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THEME: PERSPECTIVES OF NATIONAL AND EUROPEAN LAW IN THE CONTEXT OF THE COMPLEX CHALLENGES OF CONTEMPORARY SOCIETY

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CONTENT

1.Considerations concerning the evolution of the property law

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Abstract

In so far as we know the history of the property law, we will be able to understand the current property law.

E. Lerminier said that „law must be studied historically: without knowing the history, what was and lasted before our time, we would remain forever incomplete, ignorant and unjust; if we tried to despise the past, we would miss to understand the present and our own laws."

In this work, we are attempting to analyze the evolution of property and of the property law since the ancient ages until present days. We are going to analyze the transformations and the part played by the property in time.

Key words: property, property law, evolution, legal deed, inheritance.

Due to the importance of the property law, it has been included in the category of fundamental rights. The property knows two different definitions both in economic, and in legal terms.

From the economic point of view, the *property* represents a social relationship of appropriation (assimilation) of things, by people, in an immediate and direct way.

From the legal point of view, *property* is considered to be the same as the property law [1]. The property law represents the totality of legally protected attributes, based on which the holder of the right may directly and immediately satisfy the interests related to the appropriation of a certain object.

Property has been well defined in time. It has constituted a fundamental element of the feudal and modern society. In time, property has taken various forms, which we are to analyze as follows.

1. Roman property

1.1. Roman Property in the Ancient Ages

The Roman Law knew the private property during a long and complex process of evolution, on the background of economic, political and social transformations, that occurred in the ancient times. [2] The property was two forms: the collective property of the kind, and the family property.

If initially the property law expressed the idea of power and was conceived as a material relation, in time, by using procedural means and by adapting the mechanisms of the law to the requirements of good faith, it turned into a legal concept with abstract contents. [3]

The model of the private property could thus be accessible to all the persons by applying it over all the works, and the property could be transferred by the mere agreement of will [4].

In the ancient ages, the two forms of property originated in the war conquests [5]. The conquered lands entered the property of the State, but part of them were given to be used for free or against payment of a certain amount of money, to the Roman citizens [6], thus creating the *latifundia*, to the advantage of the patricians. Such use could be considered a real right, as the land could be left as inheritance, could be charged with encumbrances, could be alienated and could be pursued in justice in a real action.

The lands given to the Roman citizens from the *ager publicus* were called *dominium ex iure quiritium* [7].

Having an exclusive character, the quiritare property was accessible only to Roman citizens, was related only to Roman objects, was transferred only by deeds of civil law, and could be claimed in justice only by civil actions. [8]

The birth of the quiritare property, as well as its transfer and punishment, were performed in a solemn manner. The quiritare property had three characters – absolute, exclusive and perpetual.

In the ancient times, the quiritare property was of four forms:

- quiritare property over the land,
- quiritare property over the slaves,
- quiritare property over large cattle,
- quiritare property over the small cattle.

The first two forms of quiritare property, respectively on the slaves and cattle, were the oldest forms of quiritare property.

The quiritare property over the land occurred later, and the forms of *mancipatio* [9] and *sacramentum in rem* [10], [11], [12], seen as a bet, bear witness; the sentence would not touch the claimed object.

At the time of the Law of the XII Tables, the property was a component of power, which *pater familias* had over persons and objects, and was designated by the word *manus* [13]; later, the property would be taken out from the manus scope and would become *dominium.*

Towards the end of the ancient era, the property law acquired an abstract content, meaning that its existence was no longer conditioned by material possession [14].

By rendering the property law more abstract, new legal titles appeared, which we are going to analyze as follows.

1.2. Roman property in the classical era

In time, due to the economic, social and political evolution, other forms of property appeared, beside the quiritare property.

These property forms were: praetorian or bonitary property, provincial property and peregrine property.[15]

In the classical era, the ancient property, the quiritare one, preserved some of its features, but acquired new ones as well. The extension of the territory, as well as the commercial relations with the peregrines determined the Romans to recognize a property right to foreigners as well.

Since the peregrines could not use the civil manners of transfer of property, they used the *traditio*.[16] The quiritare owner that transferred the property by *traditio* continued to be the owner, according to the civil law.

The praetorian property was temporary, the praetorian owner would become a quiritare owner after the moveable or immoveable asset was subject to usucapion. Thus, the praetorian owner enjoyed all the advantages of possession [17].

The provincial property and the peregrine property were forms of property inferior to the quiritare one. The provincial property [18] supposed the property over the lands to be used by the inhabitants of the provinces, by the Roman State.

As regards the peregrine property, due to the development of trade and due to the increased exchange of goods, the Romans were forced to recognize a different property law for peregrines. Separate legal procedures were created, by the model of those applied to civil property. The peregrine property disappeared after the adoption, in 212 a.D., of Caracalla's Constitution, when citizenship was granted to all tee inhabitants of the Roman State.

In the post-classical era, we notice a similarity between the quiritare property and the provincial one. The four forms of property have been gradually reduced to one single form of property called *dominium* – Justinian being the emperor who made this unification.

2. Evolution of property in the Romanian past

2.1. Property in the Romanian ancient law

The interest for the evolution of property in the Romanian past is explained by the fact that the property constituted the fundamental element of the feudal and modern society.

The property has evolved in time, from the joint property over the goods to the individual property [19]. The private property appeared at the time when the Geto-Dacians mastered animal herds and tools. The

individual property was not formed immediately after the patriarchal families became village communities, and the land, meadows and forests still continued to belong to the community.

In the 6th century, the community had a law of random possession of the land, but because the members of the community possessed a household and the related land, there was a law of individual property as well.

In feudalism, the great land properties were constituted upon the joint property of the former communities, completed by the government benefits, granted by the governor by charters or books [20].

In Wallachia and Moldova, the right of property over the land belonged to the governor, who was sovereign over the province. In the developed feudalism, in Wallachia and Moldova, several forms of property existed in parallel: the feudal property – of the governor, of the boyars or of the monasteries [21].

In the plain, the individual property predominated, while in the mountains, there were collective private properties possessed by landlords [22].

The property of the freeholders was the property resulting from a common author, which could be alienated and transferred infinitely to the descendants. Many times, this property appeared as co-property, but it preserved the individual and exclusive character, and it could be alienated.

The most common forms to constitute a property were the benefits given by the governor or by the boyars, specific to the feudal ruling. The deeds by which the property was transferred were the governing charter or the zapis, as well as the institution of the *offering of the horse* [21, p. 235-237].

In 1746, through the reform of Constantin Mavrocordat, the peasants could use the land based on a contract, but this possibility was not considered to be a right.

Provisions related to the property were also included in: The Chronicle of Al. Ipsilani of 1780, Caragea 's Code of 1818 and Calimach's Code of 1817. In art. 465-466, Calimach's Code stipulates that the attributes of the property, the right over the good and the right of use may belong to one single person, the property right being final, or they may be divided between two persons [23].

The property was also debated in 1831-1832, when the Organic Regulations were adopted. After this period of time, the revision committees of the agrarian regulations were constituted, by the rulers Grigore Ghica and Barbu Știrbei (1851).

In 1864, the Law for the agrarian reform was adopted, a genuine reforming of the land property. The habits related to the property over the lands operated either when they referred to a deed of alienation, or when a division was demanded upon inheritance.

An important moment that reconsidered the property law and the property right was represented by the Civil Code of 1864. When the Civil Code of 1865 entered in force, the individual property was defined by art. 480 as the *right owned by someone to enjoy and dispose of an object, exclusively and absolutely, but in the limits set by the law.*

2.2. Manners to acquire a property in the ancient Romanian law

The manners to acquire a property in the Romanian Principalities were: *legal inheritance, benefit granted by the ruler in Wallachia and Moldova, respectively by the king or by the prince in Transylvania, The different legal deeds signed between the living - inter vivos (sale-purchase, exchange, private donations etc.) and wills, breaking up of the unharvested lands.*

The legal inheritance of the property was a way to acquire a property originating in the era previous to the constitution of medieval States. The wealthy persons of a community permanently sought to acquire a greater land area, thus constituting the *family property*, which would be transferred from one generation to the next.

The constituted property took the family name of the founder of the village, a name taken over by his heirs.

The property form of the heirs was, most of the time, in joint tenancy, each possessing an arithmetic share of that land, depending on the degree of relation with the joint ancestor. They could ask to be removed from the joint tenancy at any time, or make transactions with the share they were entitled to. The joint tenancy property was called common indivisible property, and it could last differently from one owner to the next.

In XVII-XIX centuries, the legal inheritance constituted a means to acquire a property, and it would take place after the death of the person that the purchaser was related to by blood.

The benefit granted by the ruler or by the king was another way to purchase a property. This property was a donative property, because it was given for certain duties that had been or would be accomplished. These duties were military duties, provided to the king or to the ruler on the battlefield, or duties performed in the field of diplomacy, other public or personal services. Such benefits were enjoyed by boyars, noblemen and the church in the country or abroad.

As the king or the ruler had the supreme right of property, they could offer estates or countries. In time, such offerings became more and more rare, and the alienation could happen upon the king receiving a certain amount of money in exchange of the granted benefit.

The donative or conditioned property became the most spread way to transfer a property in the feudal society, due to the repeated offerings by the kings or rulers.

The property acquired by legal deeds derives both from legal documents signed between the living, and from legal deeds *mortis causa*. The legal deeds signed between the living were sale-purchase documents (zapis), donations, exchange, and mortis causa deeds were wills or *diata,* either verbal, or written.

The sale would be performed as it was customary, and the sold lands were frequently in common indivisible ownership. The Charter of 1785 (*Sobornicescul hrisov)* demanded that the removal from the joint tenancy should precede the sale.

As regards the seller's capacity and consent, the standards were specific to the feudal society.

Beside the sale, another way to purchase a property was the *offering* (the boyar offering in Moldova, the private offering in Transylvania).

While the private property became more and more consolidated, the offerings gained more and more ground. The church supported this practice, in the hope that it could acquire goods form the believers.

The transfer of property by will or by *diată* was a new way to purchase a property, in the feudal society, because the inheritance of the use of the lands, which were joint assets, was done according to the standards set by the family.

A primary way to acquire a property consisted in *working the land,* more precisely in *breaking up* the lands that no one worked or possessed.

Acquiring property by work played an important part in the constant extension of crop areas. The breaking up of the land as a manner to acquire a property is registered in Moldova since 1439, when the heirs of Alexander the Good sent to Ivan Stângaciul a village, called Racova. Such lands, broken up and cleaned, were private goods, that could constitute the object of various legal documents, such as sale, inheritance, lease, offering, etc.

3. Property in the old and the new Civil Code

The social relation of assimilation by customs, rules and standards set by the government turned into a legal report, which has become the property law [24].

The right of property is defined in art. 555 para. 1 as: *the holder's right to possess, use and dispose of an asset in an exclusive, absolute and perpetual way, in the limits set by the law.*

The new regulation on the property law stipulated in the Civil Code defines this law by its contents, namely by the attributes given by the property right: *possession, use and disposal.*

The legal contents of the right of property [25] did not change when the new Civil Code was enforced. Thus, the attributes of the property right still continue to be: possession (relationship between the owner and its asset), use (the owner's use to personally dispose of his good according to its nature. According to art. 15 Civil Code, this prerogative must not be applied in an abusive way), and disposal (material and legal disposal).

As regards the features of the right of property, the new Civil Code adds a third feature standardized by the doctrine, namely *perpetuity.*

As provided by art. 555 para. 1, the right of property is *absolute* [26], *exclusive* [27] *and perpetual.*

The Older Civil Code (1864) stipulated that the property right could be acquired by inheritance, by will, by covenant, by hand-over, by accession or incorporation, by prescription, by law and by occupation.

The Civil Code in force stipulates in art. 557 that: *the property right may be acquired according to the law, by covenant, by legal inheritance or by will, by accession, usucapion, as an effect of the possession by good faith, as regards moveable assets and benefits, by occupation, tradition, as well as by ruling, when it transfers the property by itself. In the cases stipulated by law, the property may be acquired upon an administrative deed. By law, other manners to acquire the property law may be regulated. Except those cases stipulated by the law, as regards immoveable assets, the property right is acquired by registration in the Land Register, in compliance with the provisions stipulated in art. 888.*

The attributes and contents of the property right are exercised only in the limits set by the law. Thus, in art. 556 para. 1, the material limits of the application of the property right are stipulated, and in para. 2, the legal limits of the property right are described, which take into account the legal contents of the property right. Para. 3 of the same article mentions the conventional limits.

We must specify that, regardless of the type of limits, the holder cannot be deprived of his right. The exceptions when the holder may be deprived of his right are expressly stipulated in the Constitution, and they are: *expropriation for public utility and seizure.*

The registration in the Land Register, in compliance with the legal provisions of the immoveable assets, corresponds to the constitutive effect of registrations – new regulation (art. 557 para. 4).

A new regulation was set for real estate usucapion, which had two forms – *extra-tabular usucapion (art. 930) and tabular usucapion (art. 931).*

The property over land was stipulated in art. 489 in the old code, and it included *the property over the area, and over the underground.* Art. 559 para. 1 of the Civil Code in force specifies that *the property of the land taken as a given object spreads over the underground and over the area above the ground, in compliance with the legal limits.*

The extinguishing of the property right enjoys at the moment a specific regulation, with clear reference to the private property (art. 562). Thus, the property law is extinguished by *loss of the good, by abandoning a moveable asset by its owner, by expropriation (art. 562 para. 3) and seizure*, which is an exceptional punishment defeating the inviolability of the private property law; therefore, it could only be standardized in the constitutional regulations.

This manner by which the property law may be extinguished is regulated in the Civil Code in para. 4 of art. 562 by *negation*, thus ignoring the rules of legislative technique.

By the new Civil Code, enforced on October 1, 2011, the lawmaker included, apart from the institutions of the old Civil Code, new institutions as well (*Fiducia* –art. 773-791 Civil Code, *Administration of another person's assets*–art. 792-857 Civil Code, *Periodical Property* – art. 687-692 Civil Code).

A new institution introduced to the Code of Civil Procedure is enforcement (art. 622-913). Enforcement as a legal institution first appeared in Roman tims. In our country, enforcement was regarded as an exceptional procedure that could appeal only upon prior authorization.

Enforcement has emerged with the advent of the Civil Procedure Code of 1865. Enforcement was defined *as a rules governing the ways and means by which, with the enforcement bodies steadfast creditor realizes the rights enforceable title obtained trough coercion of the debtor's patrimony [28].*

New Code of Civil Procedure, in matters of enforcement brings news and also expand bailiff duties.

4. Conclusions

People have always tried to protect the goods they possessed and used in their daily activities, to work the land, etc. Once the society started developing, institutions of law were created, settling the manner to establish legal relations concerning the private property.

Thus, as we could notice, the institutions of civil law had a significant part, as they had been standardized since the time of the Roman Empire; these are institutions that we continue to find in the modern law.

Internally, the property law started developing together with the French doctrine, but also with the normative development. The importance of the property law for the society determined that, in the contents of the international regulations, standards should be registered concerning the protection of the private property law.

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2.A few aspects regarding successor indignity

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Abstract

In order to inherit, a person must fulfill two positive conditions, to have successor capacity and successor vocation and also a negative condition, that the heir is not undignified. Successor indignity is a civil law sanction by which the heir is removed from the inheritance of his author as a result of committing one of deeds regulated by the Civil Code. Thus, this represents the negative general condition stated by law in order to inherit, as well as a sanction which affects the quality of legal heir and that of legatee.

The new Civil Code states two categories of indignity: lawful indignity and judicial indignity, each having its own legal regime.

Keywords: inheritance, conditions, indignity.

1 The motivation of this institution

Successors who manifested an undignified behavior in regard to the defunct can lose the right to inherit. At first sight, we could easily state that, in case they were guilty of serious deeds against the author of the inheritance, he would have the possibility to disown them. However, what would happen in case of reserve heirs who, even if disowned, would have the legal possibility to claim their reserved part of the inheritance? Even more, what would happen to the inheritance in case the undignified deed would lead to the death of the testator and he can no longer express his will in regard to the disownment? This is why the necessity of finding a legal remedy to apply to this situation was needed, to regulate the situations in which the heirs commit certain deeds, regardless of the specific possibility and the limits of the author's rights. This remedy is the institution of indignity.

2 Notion and legal traits

Indignity entails the loss of the right to inherit, whether legal or by will, of the heirs who committed certain deeds with guilt, deeds which are expressly regulated by law. The unworthy heir loses the right to inherit not as a result of the will, but through the power of law, as indignity is a civil sanction[1].

From the previously phrased definition of indignity, we state the following characteristics:

- it operates in case of testamentary inheritance as well as in the case of legal inheritance[2];
- it operates through the power of law or it can be declared by legal means;
- it only causes effect in regard to the undignified heir, not in regard to his successors[3];
- indignity can be expanded to other inheritances
- in order for it to operate, the perpetrator had to have been acting with guilt, thus his judgment must be unaltered at the time of committing the deed;
- the effects of indignity can be expressly removed by will or by authentic notary act

3 Indignity cases

Unlike the old regulation, the new Civil Code states two types of indignity, the lawful indignity and the judicial indignity.

3.1 Lawful indignity

According to article 958 of the new Civil Code, the following are lawfully declared as undignified to inherit:

a. The person who was criminally sentenced for committing crimes with the intent of murdering the author of the inheritance.

In regard to this first case of indignity, the lawmaker is rather explicit in regard to the conditions which must be met in order to apply this sanction, namely:

- the existence of a definitive conviction. In case the conviction is prevented by the death of the author of the deed, by amnesty[4] or by the statute of limitation, indignity operates if the deeds were stated as such by a definitive civil decision, as stated by the provisions of article 985 second alignment of the Civil Code;

- the sanction must be given for a deed committed against the life of the author of the inheritance, regardless of whether it is a consumed crime or just an attempt. The quality of the heir in committing the deed is irrelevant, as he can be either the author or the coauthor or an accomplice. In case he was an accomplice or an instigator, it is necessary to prove that he had the will to end the victim's life. In order for indignity to operate, the deed must be directed against the life of the author of the will and not against his bodily integrity or his patrimony. We believe this sanction is not to be applied in case of *error in personam* or *aberatio ictus,* as the lawmaker aims to sanction the reprehensible attitude of the author in regard to the person whose inheritance is discussed[5]. We can't mistake civil law and the enforcement of civil law sanctions with the enforcement of criminal law. Indeed, criminal law protects a person and its life, regardless of the holder, but the sanction of indignity is not a punishment and it is not a criminal law sanction, but rather a civil law one which sanctions a specific type of behavior in regard to certain people.

Furthermore, we must not forget that indignity is an institution which belongs to successor law and legal inheritance, thus entailing family relations exclusively. In order to apply this sanction, the deed of the successor must be regulated as a crime, as stated by article 15 of the Criminal Code. This statement is necessary, as in the case of other institutions which also represent civil sanctions, such as the judicial revoking of a legate for ingratitude, starting from the fact that the lawmaker does not mention crimes against life, but an attempt to end the testator's life, we conclude that in order for this sanction to be applied, the deed of the legatee doesn't have to be a crime in the meaning of article 15 of the Criminal Code;

- the definitive conviction sentence must be given for a crime committed with guilt, as intent regardless of whether it is direct or indirect[6]. Obsolete intention as a form of guilt is not likely to cause the enforcement of such a sanction. We feel the lawmaker's statement of clearly regulating the cases in which successor indignity operates is much needed, as it only operates in regard to the heir who committed the deed or accepted to possibility of a dangerous result, namely the death of the victim, as the final purpose was an illegal one.

The author of a murder can't claim the same legal status as the other citizens, as he excluded himself from their category be committing a crime[7]. As lack of judgment is not a cause which removes guilt, in order for indignity to operate it is necessary that the author did not have his judgment impaired at the time of committing the deed[8].

b. *The person who is criminally sentenced for committing, before the inheritance procedures begin, a crime with the specific intention of killing another heir who, had the inheritance procedures began at the time of committing the deed, would have removed or limited the inheritance vocation of the perpetrator.*

In order for this case of indignity to operate, the following conditions must be met simultaneously:

- the existence of a definitive conviction. In case the conviction is prevented by the death of the author, by amnesty or by the statute of limitation, indignity operates if those deeds were stated as such by a definitive civil court decision as stated by the provisions of article 958 second alignment of the Civil Code;

- the conviction must be given for a crime directed against the life of another heir who, had the inheritance procures began at the time the crime was committed, would have removed or limited the successor vocation of the perpetrator;

- the definitive conviction must be given for a deed committed with guilt, regardless of whether it is direct or indirect;

- the crime must have been committed before the time of death of the author of the inheritance;

- the successor whose life was endangered was one of those heirs who, had the inheritance procedures began at the time of committing the deed, would have removed or limited the successor vocation of the perpetrator, thus he must have been capable to inherit.

3.2 Judicial indignity

According to article 959 first alignment of the Civil Code, the following can be declared as unworthy to inherit:

a) the person who is criminally convicted for committing a crime with intent against the author of the inheritance, a crime of serious physical or moral violence, or crimes which result in the victim's death.

This case of indignity entails the following:

- the existence of a definitive sanction. In case the conviction is prevented by the death of the author, by amnesty or by the statute of limitation, indignity operates if those deeds were stated as such by a definitive civil court decision

- the conviction must be given for committing serious crimes of violence, physical or moral, or deeds which resulted in the victim's death; in this case, attempt is no longer a case of indignity;

- the definitive conviction must be given for a crime committed with guilt or obsolete intention[9]. We believe that indignity can't operate in case of deeds committed without intent for the mere reason that indignity is the sanction of a reprehensible behavior, not a negligent behavior as is the case with deeds committed without intent.

b) *the person who, in ill faith, hid, altered, destroyed or falsified the will of the defunct.*

The sanction of indignity is also to be applied in case one of the deeds alternatively regulated by the lawmaker is committed. Any of the alternative ways is possible just in case of a handwritten will, as the authentic one is also kept at the archive of the notary office.

Hiding a will entails concealing it from the other heirs, so they are not aware of its existence or its content. The concealing can involve an entire will or just certain parts of it.

Altering a will entails its distortion. The alteration can be material, when it involves the material support of the will or legal, when in involves the content of the will.

We believe the lawmaker only regulated the material alteration of the handwritten act, as the legal alteration is a form of forgery and such a crime is distinctly regulated as means of altering a will.

Destroying a will means it is materially abolished, as it no longer physically exists.

Falsifying a will can be achieved by two alternative means: either by counterfeiting of by alteration. Counterfeiting means the creation, imitation or replacing of the handwritten will with a fake one, created by the perpetrator.

Alteration entails the change of the content of the will. Writing the will entirely by hand by the testator is seen as a guarantee of the freedom to express a person's final will. The validity of the handwritten will is not affected in case the will has changed or certain parts are erased by the testator, regardless of whether these changes are signed or dated by the author.

Different writing in the will, in regard to the provisions of the will of which the testator had knowledge of, entails the sanction of annulment of the entire will. In case the testator had no knowledge about the different writing, the will shall be valid and the different writing will be ignored. Thus, by altering the content of the will, the successor commits a reprehensible deed, by purposely violating the final will of the testator.

In order for this sanction to operate, any of these deeds must be committed in ill faith, regardless of whether previous or subsequent to the time when the inheritance procedures began.

We believe that, in regard to the provisions of article 260 of the Civil Code, the area of enforcement of indignity can't be debated, as it obviously refers to both legal and testamentary inheritance, even if the action of the perpetrator refers only to *de cuius*'s will[10].

c**)** *the person who, by fraud or violence prevented the author of the inheritance to draft, modify or revoke the will*

This case of indignity refers to these three hypotheses, namely: preventing the author of the will to draw up the will, preventing the author from changing a will and preventing the author from modifying a will.

In order for indignity to operate, the consent of the author of the will must altered, namely his judgment must be impaired. Consent or judgment vices are "those situations in which the will of the author exists, but it is not freely expressed. Technically, consent vices regard certain deficiencies of the internal will and are sanctioned

by law with relative annulment. These deficiencies represent diseases of the legal will and the remedy is the annulment of the legal act in order to preserve the freely expressed character of the legal will"[11].

According to article 1206 of the Civil Code "consent is affected by vices when it is provided in error or by fraud or violence". Thus, the vices which affect the free expression of consent are error, fraud or violence. Those which cause indignity are fraud and violence.

Fraud is the use to deceitful means with the purpose of determining the testator to act in a certain way which he would not have acted in, had his will been unaltered and free.

In order to be in the presence of fraud, the use of fraudulent maneuvers is needed, as the mere insinuation in order to deceit the testator[12] and result in the alteration of his will are not enough. It must be proven that without these maneuvers, the testator would not have acted as he did[13].

The actions he performs can be seen as forms of fraud "only if their power of convincing is clear, based on a weak mental state, as well as the testator capacity to manifest its will, the reprehensible maneuvers which are used, the relations between the testator and the person who performs these maneuvers".[14]

Violence, as a vice of consent entails the threat of a person with imminent harm, which causes justified fear for his life, honor or his goods thus determining the person to act in a manner which he would not have acted in had the threat not been present[15].

In order for violence to be a vice which affects consent, the violent actions must be performed continuously until the end of the testator's life. Violence can be mental or physical, legitimate or illegitimate, directed against the testator or a person who is close to him, such as the husband, his ascendants or descendents (article 1216 third alignment of the Civil Code)[16].

Whereas the Civil Code makes no mention of the possibility to annul the will in case violence comes from a third party who is not the beneficiary or the will and who acts independently without the legatee's knowledge, doctrine expressed the opinion, which we embrace, according to which the provisions of the will no longer represent the final will of the testator and they don't reflect his internal will, thus the sanction must be the relative annulment of the act. "Performing violent acts in order to manipulate the consent of the testator determine the change of the reason for which the will was drawn up, as consent is no longer freely expressed but it represents the need to avoid imminent harm"[17].

In regard to liberalities, consent vices attract the sanction of relative annulment[18] of the legal act, the statute of limitation for this act being that of 3 years. As the will represents a complex legal act which contains several legal acts in its structure, annulment can involve the entire will or just those provisions which are affected by vices; in this case, the court is obliged to research not only their existence, but their influence over the content of the will.

In this context, the natural question arises: the sanction of indignity is not doubled by that of relative annulment of the as it no longer expresses the final will and the real will of the testator because the will can't be changed or revoked due of fraud or violence performed by the unworthy successor? As, in the Romanian legal system, unlike the German one or the Austrian one "the real will shall overpower the declared will. The spirit beats the letter. This is the rule of the autonomous will"[19]. The principle of the autonomous will or that of contractual freedom [20] entails the fact that individual will creates a testament, as it is nothing but a synonym of human liberty[21]. This is not a will guided by impulse; it is a rational and conscious will[22].

We can observe that determining the testator to draft a certain will as suggested by the successor is not cause of indignity. This is owed to the fact that the will which is drafted in this manner is annulled, thus is it will not cause the desired effects.

4. The legal regime of indignity

Lawful indignity can be stated (not declared) according to the provisions of article 958 third alignment of the Civil Code at any time, by request of the interested party, by the court or the public notary, based on the court decision which acknowledges indignity.

The interested parties can be: the coheirs of the unworthy, the subsequent heirs, the universal legatees and the particular legatees. We believe that the creditor of these people can't file a complaint for indignity as, according to the provisions of article 1560 second alignment of the Civil Code "they can't exercise the rights and actions which are closely connected to the person of the debtor, namely those rights which involve a personal appreciations of familial or moral nature[23], even if the action would have a purely patrimonial character.

As it operated by the power of law, the court is only called to acknowledge the indignity; such a complaint can be filed even by the unworthy person.

In all cases, a complaint for indignity can be filed only after the inheritance procedures begin[24]. The reason for this is that the lawmaker allows *de cuius* to remove the effects of this sanction[25].

The complaint for acknowledging indignity can be filed in court by[26]:

- any successor in case they can prove they have interest in the matter, as interest is one of the required conditions in order to pursue civil actions. In this case, the option of the lawmaker is to allow successors to file a complaint for judicial indignity, as opposed to lawful indignity which can be requested by any interest person.

This option is explained by the fact that, in case of lawful indignity, the court is only called to acknowledge the existence of an indignity case, whereas, in case of judicial indignity, the court will have to declare the successor as unworthy, thus ruling on whether indignity is justified in that specific matter;

- the village, town, county on whose territory the goods were at the time inheritance procedure began if, except for the author of the deed, there are no more heirs.

The action of declaring judicial indignity can only be filed within a year, calculated from the time inheritance procedures begin.

However, as an exception, this term can be calculated from a different time in the following cases:

- if the conviction for the deed regulated by the Civil Code in article 959 first alignment letter a - acts of serious mental or physical violence or actions which result in the death of the victim, if the conviction is pronounced subsequently to the start of the inheritance procedures, the one year term is calculated from the time the conviction becomes definitive;

- in case the conviction of the perpetrator is no longer possible because of amnesty or the statute of limitation even if he committed serious acts of moral of physical violence against the testator which resulted in his death and indignity is acknowledged by definitive civil court decision, the one year term is calculated form the time of the cause which prevented conviction, if it occurred after the inheritance procedures began (article 959 fourth alignment of the Civil Code);

- in cases stated at the first alignment letter b article 959 of the Civil Code - hiding, altering, destroying or falsifying a will and those stated in letter c – preventing the testator, by fraud or violence, to draw up a will, to change or revoke it, the one year term is calculated from the time the successor was aware of the indignity cause, if is occurs after the inheritance procedures began.

Filing a complaint for judicial indignity is, according to the provisions of article 959 second alignment second thesis of the Civil Code, an act of tacit acceptance of the inheritance.

5 Conclusions

Indignity is a civil law sanction by which the successor is removed from the inheritance of his author as a result of committing one of the deeds stated by the Civil Code. Thus, it represents a remedy which will be applied in case certain deeds are committed by the successors, regardless of the specific possibility and the limits of the author's rights.

In order for it to operate, specific conditions must be met, conditions which can't be extended to other situations. Also, it is necessary that indignity be stated or declared by the court of law in all cases, as it can't operate by the power of law.

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[2] Unlike French law where it operates only in regard to the ab intestat inheritance.

[3] The personal effect of indignity comes from its character of civil sanction.

[4] We observe that the lawmaker is not very thorough, thus leaving out amnesty which occurs prior to conviction and can prevent definitive conviction.

[5] Similarly, Chrică D.(2014). Treaty of civil law. Succession and liberalities, C. H. Beck Publishing House, Bucharest, pp 26; for contrary opinion, see Dunca D, Negrilă D.(2014). Civil law. Inheritance and liberalities, volume I , Notarom Publishing House, Bucharest, pp 59.

[6] For the opinion according to which guilt can only be expressed under the form of direct intention, see D. Chirică, *op cit.,* page 24. However, we can't see the reason for limiting the area of enforcement of indignity for the following reasons: the lawmaker does not expressly state this limitation; the Criminal Code sanctions all crimes against the life of person committed with intent with the same punishment regardless of whether intention was direct or indirect; attempt is possible both in case of direct intention and in the case of indirect intention.

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[17] Negrilă D.(2013). The will in the new Civil Code. Theoretical and practical studies, Universul Juridic Publishing House, Bucharest, pp 85.
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[20] The Constitutional Court, by decision no 365 of July 5th, 2005, published in the Official Bulletin no 825 of September 13th, 2005 regarding the unconstitutional exception of the provisions of article 38 of Law no 53 of 2003 regarding the Work Code, offers a definition of contractual freedom as follows: "contractual freedom is the possibility of concluding a contract as *mutuus conssensus* and as the product of the person's will in agreement with the will of the other parties, thus assuming rights and obligations which must be respected" (http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=66568, accessed on December 21st e 2014).
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[25] According to the provisions of article 961 of the Civil Code, *de cuius* can forgive the unworthy by will or by authentic notary act. With express statement, the effects of indignity can't be removed even be legate given to the unworthy after the deed is committed.
[26] There are authors who claim that judicial indignity can be invoked by the undignified himself if he can prove legitimate interest – see Dunca D., Negrilă D., *op cit.,* pp 62. We believe the undignified

can’t invoke his own judicial indignity as, in this case, the court would no longer acknowledge the indignity case, but it would have to declare it, thus the principle *nemo auditur propriam turpitudinem* would be incident.

3.Procedural incidents on the structure of the arbitral tribunal

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Abstract

The incidents related to the arbitration are in the jurisdiction of the courts, namely the court in which district the arbitration takes place. The attributions of the courts in the private arbitration consist in removing the obstacles that may arise in organizing and conducting the arbitration, particularly relating to the establishment of the arbitration board (the arbitrator’s appointment, his replacement and recusation.

In the case of the institutional arbitration its autonomy towards the courts is by removing potential obstacles of appointing the arbitrators or establishing the arbitral tribunal, whereas, the competent appointing authority is provided in the respective institution’s rules.

Code of Civil Procedure provides that all powers conferred to the court regarding any possible incidents relating to the arbitrators shall be exercised by the institution of arbitration in compliance with its rules, unless it states otherwise.

Key words: arbitrator,arbitral tribunal, incidents, arbitral procedure.

1.Arbitrators

In compliance with art.555 of the Civil Procedure Code the arbitrator can be any individual who has full legal capacity. By the arbitration agreement may also include certain qualifying conditions relating to arbitrators as the permanent arbitration institution may establish certain criteria for selecting the arbitrators whom he register on his list of arbitrators. The regulations related to the organization and functioning of the Court of the International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania adds some special requirements to achieve the quality of an arbitrator "an intact reputation, a high qualification , experience in the field of private law, of national and international economic relations and commercial arbitration" (Article 4, paragraph 4).

Limitations imposed by the procedural law for the appointment of the arbitrators cannot be ignored, as it is expressly stated; therefore, only a physical entity can be an arbitrator. The law does not require the person who is appointed as an arbitrator to have legal knowledge, the parties being free, based on the free will, to choose the arbitrators according to their own criteria and if they consider it necessary, to even employ specialists in the field of activity related to the dispute. [1]

2.The arbitral tribunal and the courts

The arbitral tribunal may consist of a sole arbitrator or more arbitrators (a panel of three arbitrators), appointed by the parties, in accordance with the rules of the arbitration clause or arbitration institution that organizes the institutionalized arbitration. In case of a three arbitrator’s tribunal, each party appoints one, and the third-presiding arbitrator-is appointed by the two arbitrators (art.556 Civil Procedure Code).

The incidents related to the ad-hoc arbitration are in the jurisdiction of the courts, namely the court in which district the arbitration takes place. The attributions of the courts in the private arbitration consist in removing the obstacles that may arise in organizing and conducting the arbitration, particularly relating to the establishment of the arbitration board (the arbitrator’s appointment, his replacement and recusation. [2]

In ad hoc arbitration, settling the request of recusation submits to the jurisdiction of the court of common law, which will apply the same procedure as for the recusal of the judges; in the institutional arbitration it is the task of the respective institution.

3.The appointment of arbitrators.

The doctrine [3] sometimes makes a distinction between the designation and the appointment of the arbitrators. The term of "designation" is used when assuming that the nomination of arbitrators is made by the parties and the term of 'appointment' is used in case the operation is done by a third party which may be: arbitrators for a presiding-arbitrator, an authority which appoints the arbitrators that can be the permanent institution of arbitration, if the parties address to such an institution.

The arbitrators are appointed, dismissed or replaced in accordance with the arbitration agreement; if however their appointment was not made by the convention nor was foreseen the manner of appointment, the party wishing to appeal to arbitration invite the other party in writing to proceed to their appointment, specifying the name, address and if possible the personal and professional details of the proposed sole arbitrator or the one appointed by it, brief waiver of the claims and their ground. The law sanctions by invalidity the arbitration clause in the contract whereby one party would be entitled to appoint an arbitrator on behalf of the other party or to have more arbitrators than the other party.

If the parties do not agree on the person to be the sole arbitrator, or if a party fails to appoint its arbitrator or the two arbitrators appointed by the parties fail to agree on the person to be presiding-arbitrator, the party concerned may request the competent court to appoint an arbitrator or where appropriate, the presiding-arbitrator. [4] In the case of the institutional arbitration its autonomy towards the courts is by removing potential obstacles of appointing the arbitrators or establishing the arbitral tribunal, whereas, the competent appointing authority is provided in the respective institution's rules.

Code of Civil Procedure provides that all powers conferred to the court regarding any possible incidents relating to the arbitrators shall be exercised by the institution of arbitration in compliance with its rules, unless it states otherwise.

4.Establishing the arbitral tribunal.

The arbitration board shall be deemed constituted in compliance with art.55 of the Civil Procedure Code on the last acceptance date of arbitrator's assignment, or, where appropriate, of sole arbitrator, the date of acceptance being that of postage of the notice required by law. If the parties do not agree on the appointment of the sole arbitrator or a party is called arbitrator or the two arbitrators fail to agree on the person to be presiding-arbitrator, the party wishing to appeal to arbitration may request the court to proceed, as appropriate, to the appointing of an arbitrator or a presiding-arbitrator. The court must rule within 10 days from the notification, summoning the parties and the decision on appointment is not subject to appeal (art. 558-559 Civil Procedure Code)

Once appointed, the judges must decide whether to accept the task which they were given. The approval must be confirmed in writing and communicated to the parties within 5 days from the proposal's receipt. After accepting the position, the two arbitrators appointed will proceed within 10 days to appoint a presiding-arbitrator. In case there are any disagreements between the parties regarding the appointment of the arbitrators, they shall be settled mandatory by the court. The designated person may refuse assignment without stating his reasons for such a gesture. The refusal can be tacit. Once this mission was accepted it becomes irrevocable. The arbitration board is considered constituted on the date of the last acceptance of arbitrator's entrusting. The acceptance date is the mailing date of the acceptance notification.

The quality of the arbitrator appointed in the arbitral proceedings may be terminated in one of following cases: recusation, revocation, replacement, abstention, renunciation, preventing the exercise of duties, death. The reasons for which the quality and the arbitrator stops in the cases of recusation, revocation, abstention, renunciation are similar for both for the ad hoc arbitration (and referred to in this Code of civil procedure) and for the institutional arbitration organized by the Court of the International Commercial Arbitration of Romania (CACIR). It may require the replacement of an arbitrator appointed as such, regardless of the form in which this replacement is required, for reasons of independence and impartiality. The rules of the arbitration provided both in the Civil Procedure Code and the CACIR promote and protect the independence and impartiality of the arbitrators specialists, this being one of the advantages of arbitration and one of the reasons why increasingly more people are using this method of settlement the disputes in the contractual relations. The rules and procedural reasons relating to the replacement of the arbitrators are similar both for ad hoc arbitration, and for the institutionalized arbitration organized by CACIR.

5. Incidents

5.1.*The abstention of the arbitrators*

In order to prevent the causes that could lead to alteration of the independence and impartiality of the arbitrator, in Book IV of the Civil Procedure Code there were submitted provisions concerning the abstention and recusation of the arbitrators. In the arbitration the abstention has a much wider field than in the courts where the cases of abstention coincide with the ones of recusation. Thus, the judge can abstain when he knows that there is a reason for his recusal (Article 42 Civil Procedure Code.), not for other reasons. The abstention can be considered as a "self-recusation" which does not prevent, however, the participation of the arbitrator found in such a situation, to the settlement of the dispute, if the parties make a written declaration in the sense that they understand not to seek recusal. Unlike the judge, referee has wider possibilities in the sense that he can abstain not only when there are reasons for his recusal, but also for any other reasons that would question his independence and impartiality. Therefore, an arbitrator can also abstain himself when he has become associate in a law firm that called one of the parties, or when, being the shareholder of a company, it is designated as the arbitrator of that company as part of the trial. The widening of the reasons for abstention is explained by the fact that the arbitrator may be part of the business environment or may be a lawyer, thus, he may be integrated into a network of interests which may be likely to affect the independence and impartiality of the arbitrator.

The reasons that may determine a judge to abstain from the proceedings is based on a wide range of considerations much more than those under which it may require recusation or revocation of the arbitrator; in the arbitration, the recusation and the abstention is based predominantly on the subjective element, of the confidence of the parties or of assessing the arbitrators. The arbitrator has the discretion to accept or refuse the assignment without being forced to motivate his option, while the judge does not have this possibility, the limits of his acceptance being stipulated by the law. The abstain should not be abusive, does not have to require giving up unduly the assignment of the arbitrator, a situation comparable to denials of justice.

For reasons of celerity, the abstain of the arbitrators may not be subject to judgment, being a unilateral act of will. The arbitrator is obliged to inform the parties and the other arbitrators, about the existing causes of recusation on him, but he will continue to participate in the arbitral proceedings if the parties shall notify in writing that they do not intend to request the withdrawal, an alternative that has no equivalent in the common law [5].

5.2.*The recusation*

The parties in the arbitration have the right to ask, in cases determined by the law, the arbitrator to withdraw from the arbitration board. Basically, the referees may be removed for the same reasons as the judges. If, for the judges the cases of challenge are stipulated in the law, expressly and exhaustively, in the matter of recusal of arbitrators there are also conventional causes, the parties having the freedom that, by the arbitral convention, to indicate a range of conditions to be met as regards the appointment of arbitrators, their failure entitling the interested party to request the recusal.

The arbitrator may be recused under certain conditions and when there is reasonable doubt about the impartiality or his ability to understand the case, the particular demands on the area of expertise of the arbitrators and the specialization of the judges.

With respect to the arbitrators' recusal, the rules of the Civil Procedure Code add as grounds for recusal, in addition to the cases of incompatibility provided for the judges and the reasons for questioning their independence and impartiality.

According to art.562 paragraph (1) of Civil Procedure Code, with the exception of the incompatibility cases of the judges, the arbitrator may be recused for the following reasons, which question his independence and impartiality: a) the conditions of qualification or other requirements regarding arbitrator position, provided in the arbitration agreement; b) where a legal entity whose associate is or whose governing bodies are the arbitrator, has an interest in the case; c) in case the arbitrator has work relations or commercial connections with one of the parties, with a company controlled by one of the parties or under joint control; d) if the arbitrator has provided consulting services to either party, has witnessed, or has represented one of the parties or has testified in any of the previous stages of the dispute.

A party cannot challenge the arbitrator appointed unless it has reasons that occurred after the appointment. The person, who knows that there is an issue with respect to his recusal, is required to notify the other parties and arbitrators before accepting the appointment as arbitrator and in cases in which the causes occurred after the acceptance, as soon as they have been acknowledged. Such a person cannot participate in the arbitral proceedings unless the respective parties notify in writing that they understand not to ask recusation. Even in this case he has the right to refrain from judging the dispute, without the abstention to amount to a recognition of the recusal case. The refraining becomes effective on the date of its conclusion, without any further formality.

The powers of the court in relation to the arbitrators' recusal are assigned to a permanent arbitral institution, if the arbitration is organized by such an institution, according to the regulation or, unless that regulation provides otherwise. Regarding the judges, the lawmaker takes into account the presumption that the party who appointed them was aware of the causes of recusal and took the risk of the designation.

5.3.*The revocation of the arbitrator*

As an effect of the contractual character of the arbitral convention, the revocation of the arbitrator is expressly regulated in art.558 paragraph. (1) of Civil Procedure Code according to which "the arbitrators are appointed, dismissed or replaced according to the arbitral convention"

The revocation of the arbitrators is the sanction which intervenes if the arbitrator does not fulfil his duties according to the mission entrusted by the parties. The cases of dismissal are found indirectly in the provisions of art.565 letter b) governing the liability of arbitrators providing that they are liable for damages under the law and if without good reason, he does not attend the trial. The dismissal occurs upon concluding a transaction by the parties in dispute, upon the renunciation of the parties to the arbitration proceedings or upon the parties' loss of trust in the arbitrators.

In most legal systems, the parties are free to specify under what circumstances the appointment of an arbitrator may be revoked. Automatically, most of the legal systems provide that the parties to the dispute to act jointly to remove an arbitrator or the other members of the arbitration board must act to remove the arbitrator and / or the court must act to remove an arbitrator.

The revocation is different from the recusal, both in terms of source from which it emanates (revocation has in this respect ambivalent character, the result of a joint initiative of all the parties to the dispute being mutual, while the recusal is non univalent being requested only by the part that has an interest in this regard) as well as regarding the reasons on which it is based.

5.4.*The refusal of the defendant to appoint the arbitrator; the lack of the arbitrators' agreement with respect to the appointment of the arbitrator*

The hypothesis of one party's refusal to appoint its arbitrator or the refusal of a designated arbitrator to appoint the presiding-arbitrator are the most frequent attempts of obstructing the performance of the arbitration proceedings, found in practice. Within the institutional arbitration these obstructing manoeuvres are eliminated by the existence of procedural provisions contained in the rules of arbitration of own permanent arbitration institutions that compensate the effects of the party's or arbitrator's inaction of bad faith. In ad hoc arbitration, these difficulties are arise in three distinct situations: a) when the appointing authority refuses to designate the arbitrator; b) when there is an immediate opportunity to challenge the appointment made by the appointing authority; c) when the arbitral convention is poor.

In case of disagreement between the parties on the appointment of a sole arbitrator or if a party does not appoint the arbitrator or if the two arbitrators fail to agree on the appointment of a presiding arbitrator, the solution might be that the party who wants to resort to arbitration to be able to ask the court to appoint an arbitrator or, if applicable, a presiding-arbitrator. In addition to the reasons set out in the civil procedure code, the judges can be dismissed for not fulfilling the special conditions set by the parties in the arbitration agreement, which is an additional opportunity verification and control of objectivity, probity, professionalism of the individuals to whom the dispute is submitted to, in relation to the particular circumstances of litigation. In order to ensure a balanced performance achieved in the act of judgment, the parties have the right to decide exigencies which justify the revocation of the arbitrations.

In the institutionalized arbitration, the procedure to solve the application for recusal is done by the arbitration board, without the participation of the challenged arbitrator, this one being replaced by the President of the Court of Arbitration or by an arbitrator appointed by him (art. 18 par. 6 of the Rules of Procedure of CAB-Court of Appeal Bucharest); in case the arbitration board shall consist of a sole arbitrator, the request for recusal shall be settled by the President of the Court of Arbitration or by an arbitrator appointed by him (art. 18 par. 7 of the Rules of Procedure of CACIR).

5.5.*The renunciation of the mission entrusted*

The arbitrators may give up the mission entrusted by the parties for valid reasons that prevent them exercise: health reasons, temporary incapacity arose during the arbitration, etc. The arbitrator's giving up of the mandate he was invested with, represent a reason for replacement as provided by art. 564 of the Civil Procedure Code. The renunciation should be justified, otherwise it entitles the prejudiced party to claim damages.

5.6.*Incompatibility*

In civil procedural law, according to article 41 paragraph (1) Civil Procedure Code, the incompatibility is when there is a judge has to judge in appeal or after the retrial on the merits, asset retirement, with reference to a cause that he has already sentenced once. The cases of incompatibility related to the judges are to be interpreted strictly and the rules governing them are mandatory.

The provisions of Book IV of the Code of Civil Procedure generously give of the access to arbitrator quality, art.555 stipulating that any person, of Romanian citizenship, who has the full capacity to exercise rights, can be an arbitrator. So, it could be said that the failure to meet these requirements would lead to a general incompatibility of individuals who would like to be an arbitrator. On the other hand, as we showed in institutionalized arbitration the procedural rules of the arbitration bodies may provide additional conditions, likely to enhance the credibility of those institutions. In cases in which an individual does not meet this requirement, he is not compatible with the quality of the arbitrator. Also, Law no.303 of 28 June 2004 on the statute of judges and prosecutors set up in art. 8 (1) letter b) the incompatibility between the arbitrator and the quality of magistrate.

5.7.*The replacement of the arbitrators*

In case of the arbitral tribunal component's vacancy, in order not to interfere in the course of the judgment, when the quality of arbitrator of a person ceased for cases of recusal, revocation, abstention, renunciation, obstruction, death and if an alternate member was not designated or this one is prevented from exercising his assignment, the replacement of the arbitrator will take place, according to the provisions laid down for his appointment of art.564 of the Civil Procedure Code; in this respect it is advisable that as the party appoints a titular arbitrator it should also appoint a substitute arbitrator.

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4.Contractual representation in Roman law. The evolution of the mandate contract

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Abstract

Romans accepted with great difficulty the idea of representation in contracts matter, taking into account that this would be a violation of the principle res inter alios acta aliis neque nocere neque prodesse potest. If in very old age it was not imposed because there were very few legal relationships with the development of economy of exchange, the contractual representation becomes a concrete necessity. Acceleration of trade relations with pilgrims has made that the principle of non-representation in the contracts to be regarded as a hindrance to the path of economic boom. The development process of a system of representation has not proved to be an easy one but, in the context of formal and conservative civil law, being necessary procedural interventions from the side of the praetors as well as the solutions coming from the field of jurisprudence. The road to the institution of representation has been opened by actions with adjacent character. These actions arise from the honorary actions of praetors who through their creative activity have sanctioned the new subjective rights by procedural way. A first problem to which they have been confronted have been manifested on the level of the effects of institution of representation, namely the acquisition of ownership of rights and obligations arising from the respective contract by representative, subsequently being necessary other legal transactions by which to be realized the transmission of these effects upon the person of representative. This mechanism was obviously inefficient and inconvenient to the Romans eager to escape from a formalist and rigid legal system. For this reason, starting from the difficulties that the imperfect representation entailed, Romans create the perfect representation, by which the effects of obligation affect directly to the representative. Although the Romans have created and adapted a system of representation to the requirements imposed by the economic dynamics in reality it has never become a general rule. In the modern law system upheld by the Romans only for certain cases has been generalized so that the proxy appears as a representative and the effects of the documents concluded by him are produced directly on the principal, who becomes either debtor or creditor, trustee person disappearing.

Key words: imperfect representation, actions with adjacent character, perfect representation, contract of mandate.

1. Evolution of representation in the contract. Actions with adjacent character.

Romans accepted with great difficulty the idea of representation in contracts matter, taking into account that this would be a violation of the principle *res inter alios acta aliis neque nocere neque prodesse potest*[1]. If in very old age it was not imposed because there were very few legal relationships with the development of economy of exchange, the contractual representation becomes a concrete necessity. Acceleration of trade relations with pilgrims has made that the principle of non-representation in the contracts to be regarded as a hindrance to the path of economic boom. The development process of a system of representation has not proved to be an easy one but, in the context of formal and conservative civil law, being necessary procedural interventions from the side of the praetors as well as the solutions coming from the field of jurisprudence.

A first problem to which they have been confronted have been manifested on the level of the effects of institution of representation, namely the acquisition of ownership of rights and obligations arising from the respective contract by representative, subsequently being necessary other legal transactions by which to be realized the transmission of these effects upon the person of representative. This mechanism was obviously inefficient and inconvenient to the Romans eager to escape from a formalist and rigid legal system. This mechanism was obviously inefficient and inconvenient to the Romans eager to escape from a formalist and rigid legal system. For this reason, starting from the difficulties that the imperfect representation entailed, Romans create the perfect representation, by which the effects of obligation affect directly to the representative. Although the Romans have created and adapted a system of representation to the requirements imposed by the economic dynamics in reality it has never become a general rule [2].

The road to the institution of representation has been opened by actions with adjacent character. These actions arise from the honorary actions of praetors, who through their creative activity have sanctioned the new subjective rights by procedural way. Thus, through actions with the formula with transposition has been outlined imperfect representation (in the court) and has been ordered a pater familias by the son [3].

Whether in the delictual matter even *alieni iuris* persons have the ability to respond in their own names, in the contractual matter the rule has been that they benefit much more limited capacity to compel than *pater familias.* But, through *the actions with adjacent character*, the son of the family and the slave, in the position as persons under the rule of *pater familias*, acquire the ability to compel in their own name, and in the same time forcing this one [4]. Concretely, the praetor admits that in case of such an action, in *intentio* of the formula to be written son's name (or slave's name), in the position as party of the legal concluded document, and in the last part of the formula *condemnatio*, the name of pater familias, as he will bear the effects of the sentence, and he will pay *damages - interests* in the event of a conviction. Initially, the son of the family may conclude, lending the personality of *pater familias*, only those acts by which the latter had to be rich, not being admitted situations

in which by the document concluded by the son, the head of the family to be situated in the position of debtor. The appearance, towards the end of the republic, of the documents with bilateral character make impossible to continue those operations by which *pater familias* to have exclusively the position as creditor. In this context, the praetor's intervention ensures the harmonization of the effects of commutative character of the contract with legal situation of *alieni iuris* persons (the son of the family and the slave).

Praetor's reform in the realm of contractual representation has been in the creation of those five actions with adjacent character (*actio quod iussu, actio exercitoria, actio institoria, actio de peculio et de in rem verso, actio tributoria*) by which the son is undertaken according to the civil law, the slave is undertaken by virtue of natural law, both can, at the same time, to oblige the *pater familias* or *dominus*, in the realm of the praetorian law [5]. From the moment of the conclusion of document in this manner, the creditor with two debtors will have, in the case of default by the son with whom he contracted, two variants: either he will be directed against the son through a direct action or against the father he will be directed by an action with adjacent character. Taking into account the extinctive effect of *litis contestatio* (real right deducted in the court is inferred in the moment of copy issue of the formula by the magistrate, instead being born a right of claim), which does not allow the creditor to open both actions for his right capitalization, most often he will be directed against *pater familias*, because the son of the family not having his own patrimony (with the exception of soldier son, who is benefiting by *peculium castrense*), the creditor would face real difficulties in execution of this one.

Actio quod iussu has been the action by which the creditor could act against the head of the family who has empowered expressly the son / slave to conclude that document from which are arising the plaintiff 's complaints.

Actio exercitoria și *actio institoria* have designated those actions handy to the creditor, against the head of the family who has empowered the son / slave to conclude documents of maritime trade (in the position as commander of the boats) and trade documents on land.

Actio de peculio et de in rem verso has been opened against pater familias which in the son, without the first one to know, conclude the trade document using his own privilege and in the situation which in the father knows though he does not authorize such documents, the creditor disposed by *actio tributoria* [6].

The actions with adjacent character, although they have meant an important first step in establishing representation in the contracts matter, they have had a limited applicability to the relationship between a *sui iuri*s person and an *alieni iuris* person, not addressing to the relations between the two *sui iuris* [7].

The next step in building the system of representation has been the adaptation of operations between a *sui iuris* and an *alieni iuris* to the relationships between two *patres familias*, by sphere extension of *exercitoria* and *institoria* action handy to the creditor even in situations in which the documents of trade (maritime/ on the land) are realized between two *sui iuris* persons [8].

Partial adaptation (on the procedural way) of these actions with adjacent character to the relationships two *sui iuris* has been supplemented by jurisprudence, the creditor acquiring the opportunity to act against representative by a new action *(actio quasi institoria)* even in the situation which in the power of attorney has not covered the maritime / on the land trade documents. Even after these progresses towards representation, still we can not talk about a system of perfect representation, because the admitted actions have vise exclusively situations by which the representative has r acquired the position as debtor, otherwise the right to claim being acquired by the representative [9].

The perfect contractual representation appeared later, allowing that in some cases (unfortunately it was never generalized), the effects of the obligation to pass directly on the represented person. Such cases mainly concern the loan in of consuming, the situation of insolvent representative or legal guardian (but only after obtaining legal capacity in fact of the ward).

2. The mandate in Roman law

In Roman law, the convention whereby a person called proxy is undertaken to perform a free of charge service for the benefit of another person, called the principal, has been called the *mandate* [10]. Although the form of a consensual convention is the result of exchange economy development, in fact, there have been certain acts prior to this phenomenon by which certain rights have been capitalized / some goods have been administrate by other persons. An example in this respect is represented by *adstipulatio* whereby a main creditor has capitalized a claim by an accessory creditor, the situation which in the *adstipulato*r was equivalent of a proxy. One of the characters of the mandate contract was that one of gratuity, which from was arising the possibility of principal to revoke it. However, in time, the Romans have admitted, exceptionally (in situations where it was necessary to distinguish between the position as craftsman / professional of the principal), the existence of the remunerated mandate [11].

The object of the mandate contract consists of either a legal document or a material fact and the execution of a determined work may be included in the sphere of mandate settlement, depending on the social situation of the proxy. Regardless of the mandate, it necessarily had to be lawfully and moral. Last but not least, in order to be valid, it must be concluded in the interest of the principal. Much later, the Romans have allowed through *in rem suam* mandate, the mandate to be performed in the interest of the proxy, for the realization of the transfer of receivables [12]. Moreover, they have admitted as being valid the mandate by which pursued concurrently have been pursued the interest of principal and interest of a third party (nearby whom the principal answered in the position as guarantor).

Effects mandate without exception involve the creation of obligations owed by the representative (sanctioned by *actio mandati directa*), the principal can only be exceptionally bound by mandate. Whereas in the beginning Romans have rejected the idea of representation, arguing that it would violate the principle of contracts effects relativity, the mandate included several complicated legal transaction by which the effects of the obligation to be transferred from the proxy to the principal. As we have shown in the previous section, just by the perfect representation is reached to the direct transmission of the effects on the principal, but without being a generalized system. The obligation of the authorized representative is to execute in good faith, being responsible for the good disappearance (initially he responds only in case of the consent vice, and later for *culpa levis in abstracto*, by which the judge compares the attitude of this one towards the due good to what should be the behavior a good administrator).

The modalities to turn off the mandate were: reaching maturity, the common will of the parties (or just of one party, the situation which in there are no grounds for mutual trust, either by revocation or by waiver), the death of one party. In case that one of the parties died, the obligation ceased, but may be executed by the heirs of the deceased, because mandate contract of mandate was concluded *intuitu personae*, based on mutual trust between the parties.

3. The mandate. Elements of novelty.

In modern law, the system admitted by the Romans only for certain cases has been generalized, so that the proxy appears as a representative and the effects of the documents concluded by him are produce directly on the principal, who becomes either debtor or creditor, disappearing the person of proxy [13].

Article 2009 from the Civil Code is defining the mandate as contract whereby one party called authorized representative is obliged to conclude one or more legal documents on behalf of the other party, called the principal [14]. From the very definition of the mandate contract can be seen the novelty in terms of its subject, which unlike the mandate object in Roman law, and even its object as it was previously stipulated in the Civil Code, it is now limited to conclusion of legal documents. Regulation in the Civil Code from 1864 (art.1532), according to which the mandate was "a contract in power of which a person is undertaking, free of charge, *to do something* on behalf of another person from whom received the commission" was approaching more to than sense used by the Romans, admitting in both conception, execution of a determined work / a material fact as an object of the mandate. So in the current regulation, the mandate consisting in concluding any legal documents, less of those having purely personal character, such as: the marriage, adoption, recognition of parentage, will or contract of labour [15]. We are mentioning that while the marriage can not, for obvious reasons, done by the proxy, t he mandate can be easily used in concluding an matrimonial convention between spouses (Art. 330 par. (1) Civil Code is providing that "under the sanction of absolute nullity, the matrimonial convention is concluded by written document authenticated by a public notary, with the consent of all parties, expressed in person or by proxy with genuine power of attorney, special one and having a predetermined content"). The question to the provisions of Article 330 of the Civil Code, referring to the matrimonial convention concluded during the marriage, is whether two future spouses may conclude a matrimonial convention previously to the marriage, by which they can set a term to be fulfilled during the marriage, which from to run the effects of convention. The doctrine is admitting such possibility, with the amendment that the parties "should consider a period of at least one year of marriage, because in such a case, the matrimonial convention has the effect of a modification or, where appropriate, a change of matrimonial regime of legal community that is directly applicable since the date of marriage conclusion" [16].

A constant adjustment of legal provisions to social dynamics is requiring innovations in terms of mandate contract competences. Thus, one can see normative harmonization and it may be surprising in the divorce matters, which now can be done outside the courts, through administrative or notary procedure. As far as we are concerned, we must point out a new competence of the mandate in the matter, namely that the divorce petition can be submitted to a notary public by the proxy, through an authentic power of attorney [Art.376, par.(2) Civil Code]. However, the divorce certificate raising can not be done by the proxy, because after the

reflection term expiration of 30 days, the parties will need to express their perseverance in divorce by giving free and uncorrupted consent.

We are observing, in addition to innovative elements, the commonalities between current regulations and those ones specific to the Roman law, such as the existence of mandate with onerous title [Art. 2010, parn.(1) Civil Code –"... the mandate given for the acts of exercising professional activities is presumed to be with onerous title"].

Another element of novelty is targeting the form and extent of the mandate, Article 2015 Civil Code setting a 3-year term of validity of the mandate in cases where the parties are not establishing in common a term.

The Civil Code also provides with title of novelty the mandate without representation, by which the proxy is concluding legal documents on behalf of the principal, but not in his name (Art.2011 Civil Code – "the mandate is with or without representation", Art. 2039 Civil Code -" the mandate without representation is the contract under which one party called proxy, is concluding legal documents in own name, but on behalf of the other party, called the principal, and he is assuming to third parties obligations arising from these documents, even the third parties had knowledge about the mandate").

Last but not least, we are observing both similarities and differences in the sphere of causes of mandate contract termination. Therefore, the 3 ways that a mandate is turned off are: its revocation by the principal, renunciation of the authorized representative, death, incapacity or bankruptcy of the principal or authorized representative. In the cases stipulated to in paragraph 3 of Article 2030 of the Civil Code, the heirs / representatives of the respective party have the obligation to inform without delay the other party, and the authorized representative or heirs / representatives may be forced to continue the mandate execution if the delay of it would could jeopardize the interests of the principal / his successors (Article 2035 Civil Code).

3. Conclusions

In the matter of the law, the theoretical reluctances will always overcome by practice requirements. Through this article we are not intending to analyze in detail the current regulation of the mandate contract as its competences are extremely numerous, but to pursue the possible influences of Roman law in the domain of contractual representation. Although the means are different, for objective reasons the results are depicting common incontrovertible points. The difference of instruments chosen for the adaptation of the system of law to the demands of society is coming from the hierarchy of law springs from the two systems. Thus, the Romans have perfected the system of representation in contracts on the procedural way and by legal expert interpretations, praetors sanctioning the new subjective rights on procedural way, by putting a honorary cause to the plaintiff's disposal who has had some legitimate claims. The solutions found by praetors and legal consultants not only have given the identity to Roman law, but they also have generated a paradoxical effect: the fact that their system of law could be successfully as a foundation for the two major current systems of law - Anglo-Saxon legal system, which has taken over the spirit of Roman law and the continental system, and this has taken over the Roman legislative technique. By the creation of a system of representation in contracts, the Romans have recognized the importance of removal of formalism, in order to develop the trade, encouraging and protecting the creditors. Although the current dimension of legal relationships are not supporting comparison, the improvement of normativity in the matter of representation in contracts is coming as a stimulant of economic operations (and not only),which in the subjects (but even the public notary public) are feeling increasingly legally protected.

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PUBLIC LAW SECTION

1.Lobby versus influence peddling in public procurement

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Abstract

Conducting lobbying may have as purpose the exercise of legislative initiatives directed to the Chamber of Deputies or the Senate in order for withdrawal, amendment, adoption or repeal of a law, decision or ordinances issued by the government or of an administrative action issued by public or local administration authorities. Although there have been numerous discussions on the adoption of legal rules to govern the conduct of lobbying in Romania, not far not found in Romanian regulatory landscape such provisions.

Keywords: lobby, influence peddling, pressure groups, public procurement, embezzlement of public tenders

1. General considerations on lobbying

Some practical considerations to regulate lobbying have been exposed on several occasions by NGOs, but these initiatives were hit systematic by motivations as unrealistic as could be, which proves that the Romanian society as a whole is not yet ready to adopt rules to regulate and also put into practice some legislative initiatives.

We are thus entitled to believe that although there is political will to materialize the need to adopt such rules, however, we witness a refusal by most people that should be actively involved in creating a modern legislative framework aligned to standards of democracy and normality otherwise we encounter in most European countries, but in the United States, Canada etc.

Although we do not propose a historically presentation, however, it is important to note that in the U.S. there were rules set out in "Federal regulations" since 1946 which established the obligation to register all persons who requested, collected or received money in order to pass or reject the legislation in the American Congress, the shortcomings of this legislation was later modified substantially by adopting the Regulation of Lobbying (New York State Lobbying Act) [1].

In Canada, with the entry into force of the Law of registration of Lobbyists (Federal Lobbyists Registration Act [2]) in 1989, it was wanted that information on lobbying to dispel the atmosphere of conjecture and innuendo which was accompanying such activities, the law calling for paid lobbyists to register and disclose certain information through a public registry, instituting such obligation to disclose the name of the entity or group that has used the services of lobbyists, as well as the obligation not to represent the interests of competition , unless approved by customers.

From 1991, in the European Parliament were also registered proposals for a code of conduct and a system of public registration of lobbyists accredited by the Parliament, a proposal that did not had support due to the fact that there was no consensus on what the definition of lobbying [3], but later, after 1995 their registrations were made by the College of Quaestors and were made public through the Internet, so that on October 14th 2009 there were registered 2.066 of lobbyists, of which 119 consulting firms and law firms, 1,148 professional associations, and commercial companies, 578 NGOs and 221 organizations representing various interests (religious associations, educational and academic organizations).

On the other hand, the European Commission also opened on June 23rd 2008 a voluntary Registry entitled "Registry of Interest Representatives" [4] for online registration of lobbyists, assuming also the elements of a code of conduct [5].

In Austria, economic interest groups, professional associations or trade unions are not officially registered, although they carry significant activity in the legislative process, sense in which the social – democrats support lobbying transparency [6].

Neither the Belgian parliamentary system, there are no rules and procedures governing lobbying, instead there is a Code of Conduct for those who conduct lobbying.

But the German system has specific regulations for lobbying activities, and there is a register of lobbyists that is updated annually. [7]

In France, in 2008, the French National Assembly approved a proposal to regulate lobbying [8] proposal which came into force in 2009, initiated by deputies, initiative that involves a register of lobbyists and a code of conduct with the supervision of a special committee of the National Assembly, invested with the authority to withdraw the lobby license.

2. Definition of lobbying

Naturally we can not talk about lobbying, without defining the term to explain the need for its inclusion in Romanian legal language. If we had to refer to the explanation given in the Explanatory Dictionary of the Romanian language, "lobby" is the work of a group of people who influence from outside the decisions of Parliament or the activity of a pressure group, of influence [9]. We are thus in the presence of a definition in a Romanian dictionary, but let's not forget the explanation for an activity unregulated in the Romanian legislation. Of course, the Oxford Dictionaries also explains that the lobby is the work of a group of people trying to influence the legislators in a certain way about a certain issue [10]. La Rousse dictionary also [11] gives an explanation of the term "lobby" as work carried out by individuals or legal persons or by pressure groups.

So it is natural to ask the question why are these pressure groups, because declaring a single or group of street manifestations, demonstration, etc. as a pressure group is wrong, because a pressure group must have a minimum internal organization, starting from the structure of its leaders and the masses of adherents, with continuity in achieving its purpose [12] their characteristics being the organization and existence of some interests to protect [13].

Also, if we cleared the lobbying by various explanations, however it requires a separation of these activities with others that are called "advocacy", although internationally accepted "lobby" implies an attempt to influence legislation, while "advocacy" covers a wider range of activities, which may include at a time also lobbying, defining the two concepts from general (advocacy) to particular (lobby) [14].

From a theoretical standpoint, lobbying is acceding to a democratic mechanism for making and implementing policy decisions that affect the lives of citizens and that involves building confidence in democratic institutions which should clarify the "rules of the game" for decision-making, including the principles of good governance.

Moreover, the principles underlying lobbying in Romania relate to the criterion of the content of fundamental rights and freedoms provided by the Constitution, which has in the content of each criterion a right which is closely related to lobbying, according to the classification [15], so: inviolability, social – economic and cultural rights and freedoms, exclusively political rights, social – political rights and freedoms (freedom of expression provided by article 30 and the right to information provided by article 31) and guarantees rights (right of petition provided for in article 51 of the Constitution).

3. Regulation at the domestic level of lobbying

Regarding the need for regulation of lobbying in Romania, we can say that there are three different reasons for the need to regulate this activity, namely [16]: some that support distinct and detailed regulation; others that reject it invoking the existing legislative framework, which allows interaction with policy makers lobbyists and others who see better a self-regulation (codes of conduct and voluntary registers) than a law.

In Romania, although since 2000 there have been legislative proposals on lobbying organization, being formulated five legislative proposals in this regard, one being ranked (Pl 323/June 27th 2000 [17]), two being rejected (PI 211/March 26th 2001, Pl-x 638/October 26th 2004 [17]) and two being still in legislative procedure at parliamentary committees (Pl-x 581/October 18th 2010, PL-x 739/December 05th 2011 [17]) two legislative proposals were registered at the Senate, one being ranked (PL184/June 08th 2000 [17]) and the other rejected by both chambers (L482/June 17th 2004 [17]), now we find yet the accession to the self-regulation model of lobbying by a code of conduct and a register, as actually represented the Romanian Lobby Registry Association (RLRA) in June 2010, in order to contribute to the popularization and promotion of lobbying, RLRA operating as Romanian legal entity of private law, with non-profit character, non-governmental, autonomous and apolitical, which operates under the Code of ethics governing lobbying which it carries [18].

Even if lobbying was not effectively regulated by a law, however, we find a number of normative acts with implications for the conduct of lobbying, but in some areas. We mention this: Lobbying and transparency of the decision to draft normative acts represented by the Constitution provisions, of Law no. 24/2000 on legislative technique for drafting normative acts [19], the Government Decision no. 561/2009 approving the Regulation on procedures, at government level, for the development, approval and submission of public policies documents projects, of normative acts projects and other documents for adoption or approval [20]); lobbying and overall transparency of public administration represented by Law no. 52/2003 on decisional transparency in public administration [21], Law no. 544/2001 on free access to information of public interest [22]; lobbying and legal advice purchase represented by the Government Ordinance no. 26/2012 amending the Government Ordinance no. 9 / 1996 on improving the financing of public cultural institutions financed from extra-budgetary funds and allowances from the state budget or local budgets, the payment system of the staff in these institutions, and improving wages in the institutions and activities with cultural profile [23]; Lobbying and transparency of decision-making in public policy represented by the Government Decision no. 775/2005 approving the Regulation on procedures for developing, monitoring and evaluation of public policies at the central level [24]; lobbying and agreements, acquisitions and public investment represented by the Government Emergency Ordinance no. 34/2006 on the award of public procurement agreements, public works concession agreement and service concession agreements [25].

4. Involvement of lobbying in public procurement

Regarding lobbying and public procurement, we mention as representative the Government Emergency Ordinance no. 34/2006 on the award of public procurement agreements, public works concession agreements and service concession agreements.

Corroborating the provisions of article 1 and 2, we conclude that the Government Emergency Ordinance no. 34/2006 regulates the legal regime of the public procurement agreement, public works concession agreements and services concession agreements, the awarding procedures of these agreements and also the ways of solving the appeals submitted against documents issued in connection with these proceedings in order to promote competition between economic operators; ensuring equal treatment and non-discrimination of economic operators; ensuring transparency and integrity of the public procurement process; ensuring efficient use of public funds through the application of procedures for the award by the contracting authorities.

At the same time, the provisions of article 66-70 of this Ordinance shall establish rules for avoiding conflicts of interests during the award procedure, the contracting authority having the obligation to take all necessary measures to avoid situations likely to cause a conflict of interest or unfair competition, the normative act establishing categories of people who may not be involved in the process of verification or evaluation of applications or tenders, so be eliminated the suspicion of favoring one or other of competitors participating in the procedure for awarding public agreements, being regulated the open access of citizens to the content of the agreement, in accordance with article 111 of Law no. 544/2001 on free access to information of public interest [26].

Under this legislation, any contracting authority, as defined by law, is obliged to provide legal or natural person concerned, within the time, the format and with the motivation provided by law, the public procurement agreements.

It is noted that in this situation, citizens who have access to information, after taking the decision at administrative level by public authorities, with the possibility for citizens to check how the public authority has fulfilled its legal duties. In this way, we mention the transparency in business decision-making so that the public consultation process in this situation to be interpreted as starting a procurement procedure, in which case the interest groups could have an influence justified, besides the competent authority to decide, in the sense of presenting studies, analyzing the effects of certain decisions, analyzing trends in the field and arguing in favor of a solution or the other [27].

In this regard, it will be decisive the implementation of article 40 of Directive 2014/24/UE110 on public procurement and repealing the Directive 2004/18/EC [28], so that "contracting authorities may have a specific theme in public procurement to achieve preliminary market consultations in order to prepare a public procurement and to inform the economic operators of the projects and their procurement requirements". Also, "before launching a procurement procedure, contracting authorities may conduct market consultations in order to prepare the procurement and to inform the economic operators of their projects and requirements in public procurement", importance in this respect having, of course, the lobbying.

We are thus in the presence of two activities taking place with a different purpose. On the one hand lobbying - legitimate activity to advocate for its own values and interests, contributing actively in the democratic exercise of a state, but that is carried out without being governed by laws, and on the other hand, influence peddling offense, in which the active subject may be any "person who has influence or makes it believe that has influence

over a public official" and which "promises" that will try to influence the public or private official, conduct adopted by the dealer being the one to undertake to intervene with the official to induce him to meet, not meet, to expedite or delay the performance of an act which enters in the duties of his job, in accordance with the provisions of article 291 paragraph 1 of Law no. 286/2009 on the Criminal Code [28]. In this case, the quality of passive subject of the offense of influence peddling is represented by any of the unit referred to in article 176 of the Criminal Code or by a private legal person in whose service operates for the public official or official for whose influence the active subject is receiving or claims money or other benefits.

Also, the purpose of the whole objective side of this offense is necessary to be met also some essential requirements. Thus, it is necessary for the perpetrator to have influence or leave the impression that has influence on an official (by relationship or friendship), also is required that the perpetrator to promise his intervention to a public official, and the action constituting the material element of the crime to be carried out before the official whom was promised to intervene have had performed the act that interests the buyer of influence or at the latest during its execution otherwise, otherwise, it will be retained the offense of cheating, if the perpetrator knew when was taken advantage of influence that the official fulfilled that act.

I have made this detailed analysis of the constitutive content of the offense of influence peddling, from the necessity to delimit the material acts which constitute the material element of the crime of influence peddling by the action of lobbyists that can be successful or not before the representatives of establishments referred to in article 176 of the Criminal Code. or any other legal entity, but not based on criteria and illegal actions, but based on efforts in good faith and justified in order to eliminate shortcomings in the laws and for making effective decisions for different segments of the population, economy, culture, health, etc., while the offense of influence peddling affects the social relationships referred to the normal activity of public or private institutions and creating a state of disbelief about the integrity of the officer in the exercise of his duties. For argument's sake of the above, we also mention the criminalization by the provisions of article 246 of the Criminal Code of the act of removing, by coercion or corruption, an attendant to a public auction or understanding between the participants to distort the sale price of constituting the crime of misappropriation of public auctions. This should be done either by coercion of the attendant (violence acts or threats) or by its corruption (offering money or other benefits) [29].

5. Conclusions

We believe that for the regulation of lobbying in our country is the transparency of decision-making within the public authorities and correlatively, full involvement of the competent bodies by monitoring this activity, achieved by implementing an efficient control system of lobbying agreement. Meanwhile, special attention should be paid to specific procurement activities, so any contracting authority to provide the natural or legal person interested in timing, the format and motivation provided by law, public procurement agreements, thereby promoting transparency of decision-making, but also including specific activities carried out by interest groups that could have a benefic influence to the competent authorities through specialized studies and argumentation of some beneficial solutions to citizens.

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2.On Replacement of Prison Sentence with Fines in the Case of Art. 6 Para. 3 Criminal Code

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Abstract

The institution of applying the most favorable penal law after the final judgment of the case has been subject to several changes in the new Criminal Code, which removed, first of all, the issues raised earlier in the practice in the field.

However, other problems are also discussed in the legal doctrine, one of which concerning how to replace the prison sentence with another type of punishment, such as fines, in the case of art. 6 para. 3 Criminal Code. Many opinions have been expressed in this regard and the current article offers arguments in favor of one of them.

Keywords: prison, replacement, fine, customization.

1. Introduction

During the execution of imprisonment either in detention or at liberty, it is possible that the law in force at the time of the offence and under which it was established and applied the punishment could suffer changes that have legal effect on the enforced sentence.

Such a situation is addressed by art. 6 para. 3 Penal Code, according to which: "if the new law stipulates only a fine instead of imprisonment, the applied sentence is replaced by the fine, without exceeding the special maximum, prescribed by the new law."

In this case, the court *is obliged to replace* the applied prison sentence with the stipulated punishment under the form of the fine without exceeding the maximum stipulated by the most favorable criminal law.

However, the court *can remove* all or part of the fine execution, taking into account the executed part of the imprisonment.

The above mentioned legal provisions will be applied when the following conditions are met cumulatively:

►a final prison sentence should have been made regardless of its duration, in compliance with the law in force at the time of committing the offence and of the trial;

►a new law should have come into force in the time period between the final sentence and the full execution of imprisonment or until its execution is extinguished by any means of extinguishment;

►the new law should be more favorable as regards the type of the main punishment compared to the main applied punishment, i.e. it should stipulate for the same offence only the fine instead of a single punishment under the form imprisonment or a sentence prison alternative with the fine;

►the newer and more favorable law should occur during the execution of the imprisonment. Given that imprisonment means, as a rule, deprivation of liberty, but can also be done at liberty, the newer and more favorable law can enter into force when the convicted person is executing the prison sentence either in detention or at liberty as a result of conditional suspension of sentence, of suspended execution of the sentence under probation or parole;

►the applied prison sentence presents no interest as regards its duration and is not derived from a punishment stipulated by the law-maker as single or alternative with the fine, out of which the court chose the imprisonment according to art. 72 para. 2 of the previous Criminal Code;

►the offence for which the prison sentence was applied can be committed as consumed or in the form of attempt, or can have any form of the natural or legal unity of the offence;

►the prison sentence can be enforced by a final sentence pronounced abroad for an offence stipulated as a crime also by the Romanian criminal law, and which has been acknowledged by law (Law no. 302/2004 on international judicial cooperation in criminal matters[1].

2.The mechanism of replacing the prison sentence with fines

As regards the determination of the amount of the fine that will replace the imprisonment, the law-maker does not establish a specific process, but is limited to indicate a benchmark limit, namely, "not to exceed the specific maximum stipulated by the new law."

The law-maker's formulation has stirred various opinions in the doctrine, different as regards either determining the amount of the fine to the special maximum set by the law – with the argument that in this case the customization of the sentence cannot work to determine the amount of the fine within the specific legal limits – or establishing, on the basis of (re)customization, an amount between the special limits set by the new law for the fine.

We present in the following the views expressed in the doctrine:

"The newest and most favorable criminal law enforcement is mandatory for the court, which will replace imprisonment with a fine, and the latter cannot be greater – art. 6 para. 3 Criminal Code stipulates – than the special maximum foreseen in the new law. This clarification that the fine which replaces the final prison sentence should not exceed the special maximum stipulated in the new law could be interpreted as a possibility for the court to decide on the amount of the fine, which can be its special maximum or a lower sum. When a lower amount than the special maximum is set, it means that a judicial customization is done, which was not stipulated by law at this stage. The punishment represented by a fine can be applied at this stage at the special maximum stipulated by the new law, and the court will be able to remove its execution in whole or in part, depending on the part of the prison sentence that had been executed until its replacement with the fine (art. 6 para. 3 second thesis of the Criminal Code)."[2].

"We do not share the opinion, already expressed in the doctrine, that the court is obliged to replace imprisonment with the special maximum of the fine stipulated by the new law, because it cannot be established a lower amount of the fine, as the judge at this stage does not make a recustomization of the punishment, which he might apply in the next stage, when he decides the execution of the fine, considering how much of the imprisonment was executed, can remove the execution of the fine entirely or partially"[3].

"So this time the substitution of the maximum of the punishment stipulated by the new law is not mandatory, as happened in the previous case, and the court can impose a punishment with a fine between the minimum and special maximum".[4].

"However, for the situation at para. (3), the court would recustomize the punishment, being able to set any value for the fine between the minimum and the special maximum especially in the new law, but only if the new law stipulates exclusively the fine as a unique punishment for the committed crime. Certainly, the court cannot exceed – in the case of normal situations – the maximum of the fine. In establishing the fine will not be taken into account that part of the prison sentence which has already been executed, but this aspect will be considered in the later step, an optional element for determining the amount of the executable part of the punishment set this way."[5].

"Since the fine stipulated in the new law has a minimum and a special maximum, it was asked the question which should be the starting point taking into account by the judge for calculating the replacement of the imprisonment with the fine: the minimum or the special maximum set by the new law. In the doctrine it was expressed the opinion that "the court, will replace the prison sentence with a fine and this cannot be higher – as stipulated in art. 6 para. 3 Criminal Code – than special maximum set by the new law."[6].

"In this case it will be applied a fine customized within the special limits set by the new law, without replacing the prison sentence applied on the basis of the old law with the special maximum of the fine set by the new law."[7].

"As regards the amount of the fine to be applied as a replacement of the prison sentence, the law-maker has made only one important specification: this should not be higher than the special maximum set by the new law. This hypothesis would be valid in the situation when the person sentenced to prison did not execute any day of imprisonment and, benefitting from the new law, the court could establish a fine taking into account the criteria of art. 61 Criminal Code, which should not exceed the special maximum stipulated by the new law.

In the case when the new law, which stipulates the fine, is enforced after the criminal has already executed a part of the prison sentence, the replacement of the other unexecuted days with the fine will be made in compliance with art. 61 Criminal Code. Thus, the fine that the convicted person has to pay for the unexecuted days of prison will be calculated according to the system fine per day".[8].

Other authors (Siegfried Kahane[9], Ion Oancea[10], Costică Bulai[11], Matei Basarab[12], Florean Ivan[13], Mihai Adrian Hotca[14], Vasile Păvăleanu[15], Narcis Giurgiu[16], Iancu Tănăsescu[17], Viorel Paşca[18] did not express a point of view ragrding the way the court should establish the amount of the fine replacing the prison sentence, but only mentioned the legal provision – "of not exceeding the special maximum set by the new law".

In comparison with the above mentioned opinions, I consider that the applied prison sentence is replaced with the fine in an amount situated between the special limits stipulated by the law, which can also be the special maximum.

The opinion is supported by the following arguments:

1. As regards the amount of the fine, the law-maker imposes only one condition: that the special maximum set by the new law should not be exceeded. From this it results undoubtedly that the court has the freedom to establish the amount, either to the special maximum, or between the special minimum and the special maximum, without imposing the special maximum as an amount of the fine that will replace the enforced prison sentence;

2. The court has the freedom to establish the amount of the fine, because the operation of replacement does not equal the fulfillment of a procedural condition, but involves the application of a new criminal sanction, a fact that requires the customization of the new punishment;

3. The replacement of the prison sentence with the fine involves the fact that, preliminarily, the amount of the fine should be established, otherwise the replacement is not possible. Setting the amount of the fine would not mean a recustomization of the fine, but a customization, as the court establishes for the first time on the base of the new law the punishment under the form of the fine for the committed offence;

4. Imposing the court the replacement of the prison sentence with the special maximum of the fine means not to take into account at least two elements that can ground the customization of the amount of the fine: the small duration of the prison sentence for an attempt of offence and the execution of the sentence at liberty.

Such elements can justify establishing the amount of the fine under the special maximum and in the case in which the criminal law in force at the time of the commitment of the offence stipulated the fine as punishment;

5. If the old law stipulated for the committed offence the prison sentence alternatively with the punishment under the form of the fine, the amount of the fine established according to the old law can represent a landmark for establishing the amount of the fine according to the new law under the special maximum;

6. As the punishment under the form of the fine was not previously established by the court for the committed offence, it is necessary and natural that this should be customized to replace later the prison sentence;

7. Replacing the prison sentence with the special maximum of the fine means applying the new system of establishing the fine on the basis of fine per day system. As regards the special limit of the number of days-fine, i.e.180 days-fine, the decision is made on the basis of the same general criteria of customization, which grounded the establishment of the duration of the prison sentence. As regards the sum corresponding to a day-fine, it cannot be used automatically the general limit of the value of a day-fine, i.e. the sum of 500 RON, because the sum corresponding to a day-fine is set according to the material situation of the convicted person and to his legal obligations towards the dependents;

8. The replacement is not a mechanical operation, as the reduction in the case of art. 6 para. 1 Criminal Code, for which the court just compares the punishment applied on the basis of old laws with the special maximum of the punishment, stipulated by the new law, but involves the return to the substantive issues of the trial in the view of establishing the amount of the fine without exceeding the special maximum – the amount should be established by the court;

9. The aim of the law-maker when he created art. 6 Criminal Code was to apply mandatorily to the convicted person, in the case of the change of the criminal law, the most favorable provisions. The compliance with his will does not remove, but includes the possibility that the replacement of the prison sentence should be made with an amount of the fine established under its special maximum.

Such a solution is suggested also by the next stage of the application of the most favorable criminal law, i.e. the possibility of completely or partially removing the execution of the fine, according to the number of prison days that have already been executed;

10. I consider that the above mentioned solution and the arguments remain valid also in the case in which, for the committed offence, and not simply generally, the law-maker stipulated the special limits of the punishment under the form of the fine, so that the prison sentence should be replaced with the fine in an amount equal to the special maximum or situated under this maximum.

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1.The Critical Analysis of the Martens Clause or Some Meditations Upon the Humanization Process of Public International Law

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Abstract

This paper aims to analyze a peculiar disposition of international law- which is extracted from the preamble of the Hague conventions of 1899 and 1907 that regulate the law of war. In analysing the Martens clause, we will approach an interpretative perspective, thus the reserach method that we will use is mainly *hermeneutical.* The scientific objective advanced through the present paper does not reside in undertaking an exhaustive approach of the content of the clause, thus, we will mainly pursue the conceptualization of the main concepts enshrined within the content of the clause and the highlighting of the effects that it determines în practice. The main problems that we recognize as deriving from the Martens clause mainly reside in the following : (1) identifying the connection between natural law and positive law by refering to the content of the clause, (2) identifying the Martens clause within the content of the Geneva Conventions of 1949 and therefore reaffirming the modernity of the Martens clause, (3) establishing the manner of construing and applying of the clause by taking into consideration the clevage between the Western thesis of human rights universalism and the thesis of cultural relativism.

Key words : natural law, positive law, Martens clause, Hague Conventions, Geneva Conventions.

1.Preliminaries

Through the Martens clause, the peculiar features of the war field is mitigated, being subjected to the rules of natural law. Although it does not excel in matters of standardized wording, the Martens clause has the merit of complementing the rigours of positive law with the rigours of natural law and of simultaneously applying both types of provisions in the context of armed conflicts. [1] First formulated in the conciliation process undertaken during the second Hague Commission of 1899 [2], the Martens clause expresses in an extended version, the necessity of establishing a connection between the aspects derived from morality and the pure legal aspects with the purpose of ensuring a higher degree of protection to individuals that are found in war circumstances. The Martens clause was repeted and inserted into the preamble of the *Hague Convention related to Respecting the Laws and Customs of War on Land* of 1907 in the following phrasing : *Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.* At a first glance, the clause establishes exclusively the humanity principle as a rule that is able to regulate the matters of war and to ensure protection to individuals that are found in a conflict situation. We deem that the *in extenso* interpretation of the content of the clause determine some consequences that must be appraised on multiple dimensions : (1) there are no situations derived from the state of war that cannot be solved by means of the Martens clause because where there is no specialized rule of law, there may be applied the principles of international law extracted from the customs of civilised nations, from the laws of humanity and from the dictates of public conscience; (2) the laws of humanity and the requirements of public conscience are a source of international law

principles; (3) similar to the customs applied to civilised nations, the laws of humanity and the dictates of public conscience are elevated to the status of unwritten law, of customary nature, thus being consequently applied; (4) the expression *the laws of humanity and the dictates of public conscience* are not reaffirmed nor explained through the content of the Hague Convention, thus being submitted to multiple possibilities of interpretation.

The association of the two expressions with the doctrine of natural law is not arbitrary. On the contrary, in the subsequent lines we will agrue the idea according to which through the content of the Martens clause, the laws of humanity and of public conscience are elevated to the status of customary law and, at the same time, they establish the premises of natural law. The recognition of applying the laws of humanity and of public conscience under the guise of the principles of international law with the purpose of covering the legal gaps concerning the situation of the population and of belligerant determine, in their favour, the status of international customary law. The thought of the international community according to which the laws of humanity and public conscience are a practice unanomously allowed that has a binding force translate into the concept of *opinio juris (the psychological feature of the process of establishing customs).* [3] In another token, the interpretation of the expression *laws of humanity* is opened as the Hague Conventions do not cleary set its signification. The doctrine has identified this juridical shortcoming and has advanced two ways of construing the concept of *humanity* : (1) at the individual level- as a feeling of goodwill, solidarity and fraternity between individuals and (2) in a collective sense – as an assembly of individuals. [4] From the significations imposed by doctrinaire means we deem that the most adequate to the context of the Hague Conevntions is the signification of humanity as a feeling. In all cases, both interpretations validate the thesis of natural law according to which there are some moral principals which allow people to enjoy the highest accomplishment in their rights. The doctrinaire explanation of the theory of natural law establishes the idea according to which humanity must be regarded as a pool of individual experiences and feelings in the absence of which human rights cannot be fulfiled. In other words, by virtue of their humanity, individuals become beneficiaries of rights and States become the bails of those particular rights.[5]

2.Patterns of conceptualization and applications of the Martens clause

The specifics of the Martens clause are three folded : (1) on one hand, the Martens clause brings the laws of humanity to the same status as intermational customary law; (2) on the other hand, the Martens clause ensures the possibility of construing the laws of humanity as a component of natural law and finally (3) the Martens clause ensures the link between positive and natural law. From the wording used in the content of the Martens clause we understand that the laws of humanity are not enshrined within the sphere of practical law sustained by the positive trend; *per a contrario*, they can be included in the metaphysical sphere-thus there is a real difficulty that the laws of humanity are known by means of the codified norms of law. Pursuing to establish a possibility of scientifical clarification of *moral norms,* Kant undertakes a discrimination between *natural law* and *positive law,* hence underlining that the first one comprizes norms that have *a priori* recognition by virtue of human reason and even in the absence of an autonomous regulation while positive law includes rules with inner binding character whose existence is related to formal norms, norms of positive law. [6] In other words, the enforcement of natural law obviously derives from human morals meanwhile the norms of positive law are binding by means of law enforcement. In other words, the enforcement of natural law logically derives from human morals meanwhile the rules of positive law are respected by virtue of the compulsory force of the law. The laws of humanity are the product of human morals –they represent the common ground of humanity and have their origin in human dignity- so that their uphelding is in compliance with the inner moral law of the individual. As an expression of natural law, the laws of humanity merge the objective dimension (their enforcement is required *per se*) with the subjective dimension (the enforcement of the laws of humanity derive from the common belief that humanity law is immutable). In this token, the public conscience seems to be the subjective dimension of the rationale of including humanity law in the sphere of natural law. The common belief that the laws of humanity are immutable and are ought to be respected as an external source of law describes the notion of *public belief.*

Public conscience was conceptualized in doctrinaire studies [7] in two ways : (1) the opinion of the population- respectively the public opinion that expresses the collective mentality and (2) the subjective element of the process of establishing customary norms (the belief of the States according to which a certain practice becomes binding). We feel that although both senses of defining *public faith* are validated in practice, we must give preference to the first definition concerning the opinion of the population. The opinion of individuals is the element that influences and may determine the official position of States regarding the expression of *opinio juris* vis-a-vis a certain practice. To this argument we add the idea according to which the doctrine of natural law establishes that there is a moral law that preceeds positive law because it is derived from the collective mentality of humanity. In the given context, public conscience expresses the inner forum of each individual and also the collective inner forum of all individuals who are members of the humanity family that grounds what is right and what is wrong. If we look through the kantian lenses we observe that public conscience resumes a *moral law*

applied to humankind; by applying the universal moral law, each individual must behave so that his acts represent, in their turn, the universal acts in which can be found the morality of each individual.

Through its content, the Martens clause ensures the connection between positive law and natural law mentioning *in expresis* that the rules of positive law may not be enough in the field of human rights protection in conflict situations. As doctrinaire studies remark [8], by virtue of the Martens clause, the public conscience, the humanity laws and the customs used between civilized nations are norms of natural law that complete international positive law, conducing to the conclusion according to which *not always what is not expressly prohibited in international law is thus allowed.* Being an extension to the juridical norms codified at the international level, the applications of natural law evoked by the Martens clause establish *extended guarantees* in matters of human rights protection in conflict situations, enshrining every act that is opposed to the concept of human dignity *lato sensu.*

The relation established through the content of the Martens clause between positive and natural law is leaning in favour of the first one. The protection offered by the rules of natural law becomes effective in the hypothesis of non-application of the rules of international law or in the hypothesis of the absence of a specialized positive regulation. We feel that at this point there is a contradiction. From the two categories of norms – the norms of natural law and the norms of positive law- only the first ones are immutable and are imposed *de plano* by virtue of the inner morals of humans, disregarding its legal recognition. On the other hand, the rules of natural law are perfect due to the fact that they derive from the unaltered human morals and they constitue a pattern for the formulation and application of positive laws – the latter are the product of human thought and they need legal sanction in order to be understood. In order to achieve the efectiveness of the Martens clause, we deem that the seized contradiction must be construed in the sense that the *apparent preeminence of positive law upon natural law is given by the impossiblity of regulating some aspects of metaphysical order that are enshrined in the content of natural law.*

The Martens clause ensures the connection between natural law and positive law and also the connection between the law of war (identified within the Hague Conventions from 1899 and 1907) and international humanitariam law (represented by means of the Geneva Conventions and its Additional Protocols). The references regarding the laws of humanity and the dictates of public conscience are reiterated in all 4 Geneva Conventions that have the purpose of regulating the possibility of denunciation of the Conventions. [9] The Martens clause establishes that, in the hypothesis of denouncing the Geneva Conventions, the effect of denunciation will be exclusively reflected upon the denouncing Power, without affecting the obligations that other Powers have undertaken. The Powers that are still Parties to the provisions of the Geneva Conventions must comply with the obligations enshrined in these international instruments by virtue of the principles of international law as they derive from customs, humanity laws and the dictates of public conscience. In both the Additional Protocols, the Martens clause is mentioned as an autonomous provision in article 1, paragraph 2 of the Additional Protocol to the Geneva Conventions of 12 August 1949 concerning the protection of the victimes of international armed conflicts and as a provision included in the preamble of the Additional Protocol to the Geneva Conventions of 12 August 1949 regarding the protection of victims of international armed conflicts without international character.

From our pint of view, the applications of the Martens clause can be identified also in article 3- that is common for all 4 Geneva Conventions. The official interpretation of the provisions of article 3 developed under the auspices of the International Committee of the Red Cross [10] underlines the humanism principle promoted within these provisions. The latter are relevant because it do not resume exclusively to establish as a principle the application of human treatment in favour of the persons who do not directly take part to the conflict, in favour of the members of the armed forces who were removed from the battle or who surrendered their arms; the signification of article 3 lies in imposing the *non-derogatory value* of humane treatment in situations of armed conflict. The article presents the rule of *humane treatment* in connection to *non-derogatory treatment* and within the concrete applications of humane treatment we underline the prohibitions regarding *the acts against life and psysical integrity, the taking of hostages, the outrages againts personal dignity, the passing of sentences and the carrying out of executions without previous judgement.*Thus, we identify two aspects through which we can observe the humane treatment : (1) by means of granting equality between the persons that are non-belligerantes; (2) by granting human dignity. From the three coordinates of the Martens clause (customs agreed upon by civilized nations, humanity law, dictates of public conscience), the principle of humanism established in article 3 of the Geneva Conventions approaches *the laws of humanity* by ascertain the rule of humane treatment and *the customs accepted by civilized nations.* The latter are present within the content of article 3 in the case of expressly prohibiting *the passing of sentences and the carring out of executions without previous judgement (...) that would be accompanied by juridical guarantees that are recognized as indispensable by the civilized Peoples.* We deem that the juridical guarantees that are recognized by civilized Peoples evoke the right to an equitable process- that includes the guarantees of developing a just judgement and the pronouncement of a just decision. The official comments achieved under the auspices of the International Committee of the Red Cross concerning the clarification of the signification of *judicial guarantees recognized as necessary by civilized*

Peoples attests that the guarantees in question offer protection to the persons that are not directly involved in hostilities from the *summary judgements and executions.* Summary judgements- in conjunction with the violation of the requirements of the right to fair trial – breach the presumtion of innocence and lead to some results that may constitute judicial errors.

In the lines above we have highlighted the texts of the international instruments that either have re-affirmed or upgraded the provisions of the Martens clause with the purpose of underlining the following idea : the protection established by the Martens clause in favour of individuals that are found in conflict situations does not essentialy and exclusively target the protection of the right to life; rather, it targets the protection of the individual by virtue of protecting the fundamental rights and freedoms and their basis that is gorunded within human dignity. Furthermore, in the various juridical forms in which it is presented, the Martens clause does not refer only to protecting individuals in conflict situations but it extends its application inclusively to *the establishment of fair conditions within which confuntations are carried out.* Transposing the exigences of natural law in situations of armed conflict must be construed in the sense that the juridical protection offered to human beings must be manifested also through *the ethical development of confruntations, so that none of the belligerents parties benefit the injust advantages or to determine injust disadvantages to other parties (party) involved in conflict.* În the following lines we will analyse the *degree in which the Martens clause prevents the provocations derived from the injust armed confruntations in which one of the parties has the advantage of superior weapons.*

Taking into consideration that natural law represents the source of the Martens clause some clarifications are needed concerning the application of the Martens clause to the modern means of fighting. As we have previosuly mentioned in our paper, the Martens clause is applied as a rule of customary law, in completing the gaps that exist within the international written norm. To the principle *not everything that is not forbidden in war is also allowed* we add in correlation the principle identified in doctrinaire studies [11] according to which *the methods and the means of war employed by the belligerents are not unlimited.* Taking into consideration the humanitarian vocation of the Martens clause, by relating to the means and methods of fighting, the principle of humanity in armed conflicts will have as analogous the rule of ethical fighting, without resorting to weapons that are *mala in se.* [12]

A separate discussion is represented by *the equity of utilising the robotics instruments in armed conflict.* The essential problem of this particular hypothesis consists in the following : is it ethical and fair the confrontation between robotic entities and human beings in armed conflicts? Is this kind of confrontation in compliance with the laws of humanity, the dictates of public conscience and the customs accepted by civilized nations promoted by the Martens clause? Doctrinaire studies offers a disputed response in approaching this problem in relation to the *degree of autonomy of the automatic devices used.* [13] If the fighting device is guided in undertaking its actions by a human mind then the conforntation is fair given the fact that, in essence, it takes place between two human beings. On the other hand, if the robot is entirely autonomous, being scheduled to destroy the opponents who are human beings, the confrontation ceases to be fair and ethical, being created advantages that are obvious in favour of the party that emplys autonomous robotic devices. We feel that this distinction is superfluu and unfounded. The relative or total degree of autonomy of a robot cannot be *per se* utilised as a criterion for evaluating the degree of fairness of a confrontation as long as the opponent is represented by a human being. The advantages that are held by a robotic entity obviously surpasses the physical and psychological resources that are used in war by a human being, independently of the total or relative autonomy of the robot devices. The difference between the robot entity that responds to the orders given by a human being and the devices that benefit of total autonomy of action resides in *the moment of the intervention of the indications of the author of the robotic devices* : if the robotic devices employed in war have full autonomy of action that means that the intervention of the author of the device was ante-factum and was manifested by means of *programming the robot to perform a destructive action within the armed conflict*. If the device engaged in battle has relative autonomy, the indications of the author determine directly and in real time the action of the robot engaged in the fight. In both cases, the utilisation of autonomous devices represents both a breach of the fairness principle given the fact that in this manner are created advantages for a single part and also a breach of the priciple of human dignity –the basis of human rights and freedoms. The breach of the principle of equality in war and of the ethics and fairness of the procedures determines, *in extenso,* the breach of human dignity. In the sphere of international humanitarian law, the correspondent of the breaching of human rights and freedoms is represented by the violation of the precepts of natural law that are inserted in the content of the Martens clause under the guise of the respect for the customs accepted in the relations between civilized nations, within the laws of humanity and the dictates of public conscience.

3.Possible dilemmas in the interpretation of the clause

The humanist character of the Martens clause determines that its dispositions regarding the *laws of humanity* and *the dictates of public conscience* be subjected to the dillema of choosing the interpretation. In a

similar manner with the content of human rights, the humanist precepts of the Martens clause will oscillate between the signification established by means of the thesis of the universality of human rights (developed by the Western doctrine) and the thesis of the relativism of human rights (that is specific to those cultures that value the communitarian spirit). The essential problem that results from these ideas refer to the *correct manner of clarification of the significations attached to the laws of humanity and the precepts of public conscience.* Embracing the thesis developed under the Western doctrine, the allegations made at the commencement of our paper become valid and the laws of humanity are construed accordingly with the doctrine of natural law. Resorting to the thesis of cultural relativism leads us to a different solution according to which realities fade and the notions of *humanity laws* and *public conscience* are understood differently according to the cutural context to which we relate. *Exempli gratia,* presenting public conscience as the voice of the public opinion (understood as the voice of every individual) is invalidated by the thesis of cultural relativism. In this sense, the States that adhere to communitarian cultures (Asian or African) value community against the individual so that the voice of the public opinion is not a natural result for society but a falsification of the voice of the community/society/State authority that influences the opinion of individuals until the complete transformation of the latter. In the same token, the expression *laws of humanity* has other senses by virtue of cultural relativism. If according to the doctrine of natural law *laws of humanity* represent norms that are unanimously admitted with the scope of garanting in favour of individuals some prerogatives that are inherent to their quality as human beings, the doctrine of cultural relativisme reconfigures this sense because *human rights* do not represent in this perspective an absolute concept but *circumstances that are not granted to individual by virtue of being human but by virtue of the State and within the existent cultural limits.*

By accepting the hypothesis established by means of cultural relativism are produced concrete essential consequences in construing the Martens clause. First, by denying the doctrine of natural law and by contextualizing *the laws of humanity* and *the requirements of public conscience* the result consists of eliminating the problem of *the fairness of war.* If the laws of humanity are liable of multiple interpretations – which derive from the spirit of community culture- than the problems connected to *the possible violations of human dignity that are connected to the employment in the battle of robots* loose all relevancy. The aspects linked to dignity and human rights loose their immutable charatcter and are perceived differently according to the State culture to which we relate.

The relativity of the laws of humanity would lead to opposite juridical results because in these conditions the prohibition of *crimes against humanity* would be deemed a superfluu element. Likewise, the relativity of the laws of humanity by refering to the cultural factor would lead to invalidating the initiative developed by the United Nations Organization in 2014 of transfering the issue of crimes against humanity on its active agenda and of achieving a codification of crimes against humanity by adopting a treaty in this sense. [14] Another argument by virtue of which the precepts of the Martens clause cannot be subjected to the interpretations derived from the thesis of cultural relativism resides in the idea according to which the respective principles are applied exclusively to *civilized nations.*The expression *civilized nations* was associated in doctrinaire studies with Western States hence being excluded from the aplication of the clause Asian States and/or African States as Muslim States, Turkey, China, Japan. [15] African and Asian States are supporters of the cultural relativism thesis, promoting comunitarianism – which is understood as a form of attachment of the individual towards the community – in interpreting human rights. In other words, African and Asian States, excluded from the application of the precepts that are contained in the clause, do not share the doctrine of natural law but they employ customs in order to relativize and construe the precepts of natural law. By accepting the appliaction of the Martens cluase exclusively to civilized nations we implicitly accept the elimination of the interpretations of the precepts contained within the Martens clause by virtue of cultural relativism and the employment of interpretation intruments that are derived from the thesis of Western universalism.

Conclusions

The Martens clause is highlighted, amongst other international law provisions, by means of its humanist vocation. It is a fact that its metaphorical wording determines, in a concrete dimension, some issues of interpretation or some dilemmas in its practical application. Despite those peculiarities- which, in certain circumstances may prove to be factors of confining the application of the Martens clause,- the latter has the merits of mitigating the rigours of the law of war by implementing the *pro homine* principle. The Martens clause affirms its utility not only by means of introducing the humanism principle within positive law (mainly within war regulations) but also by generating some authentical juridical problems as *the fairness of war, the protection of fundamental human rights in situations of armed conflict, the protection of human values of socio-juridical nature by employing the clause as a legal premise in the codification process of crimes against humanity.* The reiteration of the three precepts of the Martens clause (customs applied within the relations between civilized nations, the laws of humanity and public conscience) in the Geneva Convention of 1949 reaffirms the binding

character of the clause and its real application to cases of international humanitarian law and, by default, in situations of armed conflict.

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2.Derogatory clauses in legislative procedures laid down in the Treaties on which the European Union is founded

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Abstract

With the entry into force of the Lisbon Treaty has been reformed the EU's decision-making process, being implemented an ordinary legislative and certain special legislative procedures. Even if through this reform has been expanded the scope of the ordinary legislative procedure in a number of new areas and, therefore, qualified majority replaces unanimity, some areas are still considered "sensitive" by Member States, reason for that sought to preserve their right of veto in certain policy areas. Therefore, in order to apply the ordinary legislative procedure to areas for which the Treaties had laid down a special legislative procedure, were introduced some derogatory clauses, such as: "passerelle" clauses, "brake" clauses and "accelerator" clauses. Considering the importance of derogatory clauses in facilitating of decision-making process, the aim of this study is to identify the areas of clauses application and, also, to highlight the way in which contributes to strengthening the Union's capacity to act and take decisions.

Keywords: ordinary legislative procedure, special legislative procedures, derogatory clauses, reform of decision-making process, Lisbon Treaty.

1. General considerations on the European Union's decision-making process

1.1. Applicable principles

In comparison with national systems where the Parliament is the legislative body, the EU's decision-making process involves several institutions and bodies of the Union, which have the obligation to practice "mutual sincere cooperation" and also to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them [1].

Thus, the process of adopting EU legislation is based on several principles, including: the principle of conferral (or attribution) of powers, the principle of institutional balance and the principle of institutional cooperation.

In accordance with the principle of conferral of powers, the institutions of the European Union shall exercise only the powers with which were invested, powers having a limited character.

Under the principle of institutional balance, each of the institutions exercises its powers in compliance with those of the others, without hinder in any way the exercise of their competences. This means that the institutional balance established by the Treaties can not be modified by a transfer of powers from one institution to another, reason for that institutions can not give up their powers by transferring or delegating to another institution or body of the European Union. It can be said therefore that in addition to the limited character, the exercise of powers by the European Union institutions has an exclusive character.

The principle of institutional cooperation, also called the principle of loyal cooperation, reflects the fact that in addition to the exercising of invested powers, the institution have obligation to cooperate for the attainment of the Union's objectives.[2]

1.2. Institutions and bodies of the European Union involved in decision-making process

The institutions and bodies of the European Union which interact in decision-making process are as follows: European Council, European Parliament, Council, European Commission and, also, Economic and Social Committee and Committee of the Regions which acting in an advisory capacity.

In addition to the general competence on providing necessary impulses for the development of the Union and defining its priorities and general political directions, the European Council has also an important mediating role in the remaining suspended issues between Member States. Thus, the European Council shall endeavour to facilitate cohesion and consensus where there are differences of views, in order to finding suitable solutions for all Member States.

Regarding the European Parliament, although initially was only a consultative forum with an advisory role in the legislative process, during the evolution of European Communities/European Union its legislative powers have grown significantly. Thus, with the entry into force of the Lisbon Treaty, the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions and also shall exercise functions of political control and consultation as laid down in the Treaties [3].

The main legislative body of the European Union is the Council, institution which exercise its competences jointly with the European Parliament (the EU's standard decision-making procedure), or individually (in certain cases legal acts may be adopted by the Council alone, but after consulting the European Parliament).[4]

In accordance with Article 17 (2) TEU, Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Although it seems that European Commission has a near monopoly on legislative initiative, the Treaties provide other situations when the legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank (Article 289 (4) TFEU) [5]. At their turn, the European Parliament and the Council may request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties (Articles 225 and 241 TFEU). Also, in order to increase citizens' involvement in the democratic life of the European Union, Article 11 TEU establishes a citizens' initiative right, right under which one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The institutions involved in adopting EU legislation are assisted by an Economic and Social Committee and a Committee of the Regions, two bodies which acting in an advisory capacity [6]. According to TFEU provisions, the Economic and Social Committee shall be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide, as well as in all cases in which these institutions consider it appropriate. Also, this body may issue an opinion on its own initiative in cases in which it considers such action appropriate [7]. On its turn, the Committee of the Regions shall be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide and in all other cases (in particular those which concern cross-border cooperation) in which one of these institutions considers it appropriate [8].

Under reform realised by Lisbon Treaty, the national parliaments were given a number of new rights and powers within the European Union's decision-making process. Thus, the national parliaments contribute actively to the good functioning of the Union through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union and Protocol on the application of the principles of subsidiarity and proportionality (annexed to the Treaties) [9]. According to the before mentioned protocols, within eight weeks from the date of transmission of a draft legislative act [10], each national parliament may express a reasoned opinion stating why it considers that the draft legislative act in question does not comply with the principle of subsidiarity

2. Legislative procedures laid down in the Treaties on which the European Union is founded

In light of the TFEU provisions can be identified an ordinary legislative procedure (formerly the co-decision procedure) and certain special legislative procedures (which replaced the former consultative, cooperation and assent procedures).

Given that this study is dedicated to analysis of derogatory clauses in legislative procedures, for their full understanding I consider that, as a first step, is necessary to briefly highlight the ordinary legislative procedure and the special legislative procedures, but without going into technical details.

2.1. Ordinary legislative procedure

The ordinary legislative procedure replaces the former codecision procedure and, as noted before, imply the participation of the European Parliament as a colegislator at the Council's side. Under the reform made by the Lisbon Treaty it has been extended the application area of ordinary legislative procedure to a significant number of key activity areas, such as: services of general economic interest (Article 316 TFEU); citizens' initiative (Article 24 TFEU); legislation concerning the common agricultural policy (Article 43 TFEU); exclusion in a Member State of certain activities from the application of provisions on the right of establishment (Article 51 TFEU); extending provisions on freedom to provide services to service providers who are nationals of a third State and who are established within the Union (Article 56 TFEU); adoption of other measures on the movement of capital to and from third countries (Article 64 TFEU); administrative measures relating to capital movements in connection with preventing and combating crime and terrorism (Article 75 TFEU); visas, border checks, free movement of nationals of non-member countries, management of external frontiers, absence of controls at internal frontiers (Article 77 TFEU); asylum, temporary protection or subsidiary protection for nationals of third countries (Article 78 TFEU); judicial cooperation in criminal matters – procedures, cooperation, training, settlement of conflicts, minimum rules for recognition of judgments (Article 82 TFEU); etc. [11]

The ordinary legislative procedure is regulated in Article 294 TFEU and consists of up to three stages (readings), existing the possibility that European Parliament and Council to conclude at any reading, if they reach an overall agreement in the form of a joint text [12].

If it becomes clear that the two co-legislators cannot reach an agreement between them, it is convened a Conciliation Committee which brings together members of the Council or their representatives and an equal number of representatives of the European Parliament, its mission being to reach an agreement on a joint text within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading [13].

The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council, in order to facilitate the adoption of the legislative act.

If, within six weeks (or eight weeks if it was decided an extension) the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted [14]. If, within that period, the Conciliation Committee approves a joint text, the European Parliament and the Council shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. The two institutions vote separately on the joint text as it stands, without any possibility of further amending it. Regarding the European Parliament procedure, the vote in plenary on the joint text is preceded by a debate and only after that the plenary votes on the joint text. A simple majority of the votes cast is required for approval, otherwise the joint text is rejected. On its turn, the Council shall approve the joint text by qualified majority, which generally votes after Parliament's third reading. In conclusion, the joint text must be approved by both Parliament and Council before it can become law. If either institution fails to approve the joint text, the legislative procedure comes to an end: it can only be re-started by a new proposal from the Commission [15].

2.2. Special legislative procedures

The special legislative procedures derogate from the ordinary legislative procedure and therefore constitutes some exceptions. As opposed to ordinary legislative procedure, special legislative procedures are not described precisely by the European Treaties, which just provides their application in specific cases.

In the case of special legislative procedures the decision belongs to the Council, the European Parliament's role being limited to consultation or approval, as applicable.

Obligation for consultation resulting from specific provisions of European Treaties and, according to them, before taking a decision, the Council must take note of the opinion of Parliament, of Commission, of Court of Justice and, if necessary, of the European Economic and Social Committee and the Committee of the Regions. Imperative obligation of consultation it is laid down by TFEU, under which the European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation [16].

In this procedure the European Parliament may approve or reject a legislative proposal, or propose amendments to it. The Council is not legally obliged to take account of Parliament's opinion but in line with the case-law of the Court of Justice, it must not take a decision without having received it. Thus, adoption of a legislative act by violating the obligation of consultation represents an infringement of an essential procedural requirement, situation in which can be brought an action before the Court of Justice of the European Union for annulment of the act (Article 263 TFEU). Example in this regard are judgments of the Court of Justice of 29 October 1980 in Case138/79 [17] and Case139/79 [18], cases in which the Court declared a Council regulation invalid because the Council was in breach of its obligation to consult Parliament, arguing that "the consultation is the means which allows the Parliament to play an actual part in the legislative process, such power represents an essential factor in the institutional balance intended by the treaty".

Pursuant to the provisions European Treaties, the consultation is now applicable in a limited number of legislative areas, such as:

- adoption of directives establishing the coordination and cooperation measures necessary to facilitate protection of European citizens in the territory of a third country in which the Member State of which he is a national is not represented, by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State [19];
- application of the TFEU provisions on aids granted by Member States [20];
- adoption of provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition [21];
- establishing an Employment Committee with advisory status to promote coordination between Member States on employment and labour market policies [22].

Also, another situation when is required consultation refers to the obligation of the High Representative of the Union for Foreign Affairs and Security Policy to regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence

policy and inform it of how those policies evolve. Moreover, the Treaty provides that he shall ensure that the views of the European Parliament are duly taken into consideration [23].

In the case of approval procedure, the Council may adopt decisions after obtaining the approval of the European Parliament. Therefore, the Parliament has the power to accept or to reject a legislative proposal by an absolute majority, without amendment. As legislative procedure, approval is provided for in Article 352 TFEU and is necessary:

- when the Council take an appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation [24];
- when the Council make a determination that there is a clear risk of a serious breach by a Member State of the values on which the Union is founded or in the case when the European Council determine the existence of a serious and persistent breach by a Member State of the Union's values [25];
- for the adoption of the decisions by the European Council on the proposals for the amendment of the Treaties [26];
- when the Council shall act on the request of an European State to become a member of the Union [27] as well as when is concluded an agreement with a Member State which decides to withdraw from the Union [28];
- when the Council, acting by means of regulations, shall lay down implementing measures for the Union's own resources system [29] and also when adopt a regulation laying down the multiannual financial framework which ensuring that Union expenditure develops in an orderly manner and within the limits of its own resources[30].

3. Derogatory clauses in legislative procedures laid down in the Treaties

3.1. General Aspects

Despite the fact that through reform made by Lisbon Treaty has been expanded the scope of the ordinary legislative procedure in a number of new areas and, therefore, qualified majority replaces unanimity, some areas are still considered "sensitive", reason for that Member States are little inclined to relinquish part of their power of opposition in certain policy areas.

As shown above in the section about special legislative procedures, certain areas remain subject to unanimity in whole or in part, as they are particularly important: adoption of the Union's multiannual financial framework; harmonisation of national legislation on indirect taxation; harmonisation of national legislation in the field of social security and social protection; certain provisions in the field of justice and home affairs; common foreign and security policy. Given the difficulty of reaching agreements in these areas, by the Lisbon Treaty were introduced several types of clauses aimed to simplify the EU’s decision-making process by to applying the ordinary legislative procedure to areas for which the Treaties had laid down a special legislative procedure. Thus, the derogatory clauses are classified into three categories, namely: passerelle clauses, brake clauses and accelerator clauses [31].

3.2. Passerelle clauses

Passerelle clauses allow derogation from the legislative procedures laid down in the Treaties, making it possible to apply the ordinary legislative procedure to areas for which was necessary a special legislative procedure, thus the vote with qualified majority replaces unanimity. However, activation of a passerelle clause depends on the consensus of Member States, in all cases being necessary a unanimous decision by the European Council or the Council of the European Union.

There is a general passerelle clause applicable to all policies and actions of the European Union and, also, a number of other specific passerelle clauses to certain European policies.

The general passerelle clause is applicable when the European Treaties provides for the Council to act by unanimity in a given area or case, situation in which the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. Also, where the European Treaties provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure. In both cases, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members. It should be noted that any initiative taken by the European Council shall be notified to the national Parliaments which have the opportunity to make known their opposition, thus hindering the clause application [32].

The specific passerelle clauses have a series of particularities and their implementation may vary from case to case. Thus, according to the European Treaties provisions, can be identified six specific passerelle clauses which are applicable to:

- Common Foreign and Security Policy (except decisions having military or defence implications) [33];
- multiannual financial framework of the Union [34];
- achieve the objectives of the Union policy on the environment [35];
- social policy of the Union [36];
- adopt measures concerning family law with cross-border implications [37];
- where a provision of the Treaties which may be applied in the context of enhanced cooperation (in this case all members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote) [38].

3.3. Brake clauses

So-called brake clauses have been created in order to enable a Member State to temper the ordinary legislative procedure by a braking mechanism, if it considers that the fundamental principles of its social security system or its criminal justice system are threatened by the draft legislation in the course of being adopted.

Thus, where a member of the Council declares that a draft legislative act would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After debates, the European Council shall refer the draft back to the Council (in that case which shall terminate the suspension of the ordinary legislative procedure) or take no action or request the Commission to submit a new proposal (situation in which it is considered that the draft legislative act was not adopted) [39].

In the cases of adoption the necessary measures to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension (measures adopted in accordance with the ordinary legislative procedure), if a member of the Council considers that a draft legislative act would affect fundamental aspects of its criminal justice system, it may request that the draft be referred to the European Council. After the necessary debates, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. In case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft legislative act concerned, they may turn to the accelerator clause [40].

3.4. Accelerator clauses

Accelerator clauses facilitates collaboration among certain Member States as they allow derogation from the engagement procedure for enhanced cooperation in some areas provided by the Treaties, particularly those concerning criminal offences, cooperation in criminal matters and police cooperation.

In cases where a Member State has used the brake clause to oppose the adoption of a legislative act relating judicial cooperation in criminal matters or establishment of common rules for criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, the other States who wish may turn to the accelerator clause and thus continue and conclude the legislative procedure between them, under the framework of enhanced cooperation. According to the TFEU provisions, where at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) TEU and Article 329(1) TFEU shall be deemed to be granted and the provisions on enhanced cooperation shall apply [41].

An accelerator clause can be applied in the case in which the Council decides by means of regulation to establish a European Public Prosecutor's Office. Given that such a decision must be adopted unanimously by the Council, in the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After debates, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation shall be deemed to be granted and the Treaties provisions on enhanced cooperation shall apply [42].

Also, an accelerator clause can be applied in the police cooperation, field in which are involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences. The Council must act unanimously

and, if it is otherwise, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In this case also, the procedure in the Council shall be suspended. After debates, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation shall be deemed to be granted and the Treaties provisions on enhanced cooperation shall apply [43].

4. Conclusions

The European Union's decision-making process has ushered in a new era with the entry into force of the Lisbon Treaty, codecision officially became the 'ordinary legislative procedure' and the general rule for passing legislation at European Union level. This legislative procedure involves adoption of legislation jointly and on an equal footing by Parliament (which is composed of representatives of the Union's citizens, elected by direct universal suffrage in a free and secret ballot) and the Council (which is consisted of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote).

Despite the growing importance of the ordinary legislative procedure, and thereby the extension of qualified majority voting method in the Council, a limited number of policy areas are still considered as "sensitive" by Member States and, therefore, they remained subject to unanimity voting, which makes that decisions taking process to be quite difficult.

In conclusion, it should be noted that in order to avoid blockages and to eliminate the risk of tense situations similar to those resolved by compromises from Luxembourg (1966) and Ioannina (1994), where certain Member States have expressed their intention to oppose a decision, within the Council there is tendency to do everything possible, in a reasonable timeframe, to reach a solution acceptable to a large majority of States. Thus, even if the European Treaties establishes a series of derogatory clauses which creates the premises for a flexible decision-making process, their implementation is not possible without consent of all Member States, especially that activation of a derogatory clause is always dependent on a unanimous decision of the Council or the European Council.

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[8] Article 307 TFEU
[9] Article 12 TEU
[10] For the purposes of two Protocols annexed to the Treaties, "draft legislative acts" shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank, for the adoption of a legislative act.
[11] A full list of the 85 legal bases subject to the ordinary legislative procedure can be found in Report of European Parliament on the Treaty of Lisbon 2007/2286 (INI) - http://www.europarl.europa.eu/
[12] Codecision and conciliation. A Guide to how the Parliament co-legislates under the Lisbon Treaty, November 2009 - http://www.europarl.europa.eu/
[13] According to Article 294 (14) TFEU, the periods of six weeks shall be extended by a maximum of two weeks at the initiative of the European Parliament or the Council.
[14] Such cases are very rare, over time there have been two cases where the delegations of Parliament and Council did not succeed to reach an agreement on a joint text in the Conciliation Committee ('Working Time Directive' and 'Novel Food Regulation') - Codecision and conciliation. A

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3.Legal Personality of UN and NATO

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Abstract

The evolution of international relations among various countries of the world from the political and socioeconomic point of view has led to the formation of the international organizations which have become subjects of international law. In general, up to the Second World War only the states had been considered subjects of international law.

The historical reality has shown that since the nineteenth century in Europe and America new sovereign states have emerged – a situation which "forced" and determined new interstate cooperation mechanisms.

Keywords: international law, sovereign states, subjects of international law.

Introduction

The historical reality has shown that since the nineteenth century in Europe and America new sovereign states have emerged – a situation which "forced" and determined new interstate cooperation mechanisms.

As it was specified,[1] "the development of the means of communications and transport over long distances has enabled broader and more complex connections between states and peoples of different continents and has favoured the creation of international mechanisms of permanent coordination of the cooperation efforts of the states."

International cooperation[2], based on international relations, has given rise to an international community that respects the principle of independence and sovereignty of the involved states. The attitude of the states as regards cooperation is manifested through the conclusion of conventions, treaties, bilateral or multilateral agreements. These may have regional or universal character, depending on the relationship that forms the object of cooperation.[3]

The evolution of international relations among various countries of the world from the political and socioeconomic point of view has led to the formation of the international organizations which have become subjects of international law. In general, up to the Second World War only the states had been considered subjects of international law.

The quality of subject of international law of the international organizations is currently recognized. ***They can be defined*** as an association of states based on the freely expressed will in an agreement, having legal personality – different from that of the member states –, common bodies, and functional autonomy. Their aim is to achieve the objectives set by the founding document, usually an international treaty.

The recent doctrine has specified that the term of international organization has been widely used in the diplomatic and political language since the first half of the twentieth century. Over the previous century concepts such as international public union, international office, and international committeewere used. For the first time, the above-mentioned phrase was used by James Lorimer in the eight decade of the nineteenth century and taken over by the Germans Constantin Frantz towards the end of the century.[4]

In ancient times there were the first manifestations of this kind of relationship between states and they have developed until today.[5] As the reputed specialists A. Bolintineanu and M. Malița show, the idea of international organization arose in ancient times in many projects formulated by philosophers and political thinkers. The same authors evoke the idea of Confucius (first c. BC) – who imagined an international association international, the "Grand Union" – and the work of Pierre Duboios – "De recuperatione terrae sanctae" (written between 1303 and 1307, during a period of uninterrupted wars), where the author pleaded for a general council with the role of arbitration to resolve disputes between sovereign princes. A. Bolintineanu remember and M. Malița evoke the plans of George of Podiebrad, King of Bohemia, who in 1462 AD wanted to establish a *Christian League*, "based on equality in rights of states" and the fact that in 1603, the minister of the French King Henry IV formulated the draft of an *always peaceful European Christian Republic*.[*6*]

The first forms of interstate cooperation were based on international conferences and congresses. The Congress of Vienna in 1815 can be considered as the starting point of the international relations carried out through international conferences and treaties.

As the literature shows, "theinternational river commissions created in the nineteenth century – the Central Commission for the Navigation on the Rhine, stipulated in the final act of the Congress of Vienna in 1815, and the Danube Commission founded by the Treaty of Paris in 1856 –, with the special and semipermanent restricted object, can be considered embryonic forms that prefigured the future international organizations."[7]

Historical reality shows that since the nineteenth century the international relations and the cooperation between countries have started to tighten up so that international conferences and congresses began to gain more prominence and became rhythmic, following a permanent trend.

The first international organizations which correspond to the current requirements date from the mid-nineteenth century, when, as the experts show, "the so-called administrative unionswere created: international organizations having the aim to ensure the cooperation between states in limited specialty areas, according to general rules stipulated in their charters."[8]

The subjects of the international public law

From the perspective of the international law, lato sensu, the subject of the international law represents a legal entity, with rights and obligations, and right to file action in international courts. Quoting the reputed specialist I. Brownlie, professors B. Selejan-Guțan and L.M. Crăciunean highlight the following elements of the legal entity in the international public law:

- capacity to conclude international treaties;
- capacity to file action in international courts;
- benefit of privileges and immunities in national courts.[9]

According to the classical view, only the states can be subject of international law. This view is contradicted by the evolving concept of international law, which, observing the dynamic nature of the international law, affirms that not only the states have now legal personality, but also other entities, such as the international intergovernmental organizations. Some authors consider that the nations, or the national liberation movements, the individual, or the Vatican can be considered under certain conditions as subjects of international law. This opinion is questionable given the fact that those entities do not have full legal capacity at the international level.

The international law considers as its subjects the entities which, on the one hand, participate to drawing up the rules of international law and, on the other hand, to the pursuit of the legal relations governed by these rules, thus acquiring direct rights and assuming obligations within the international legal order.[10]

The typical, primary and primordial subject of international law is the state. The ground for the acquisition of this capacity is the sovereignty. Any state is subject of international law, hence having a series of rights and obligations.

Regarding the international organization, the literature states that this is a subject of international law insofar the member states grant it such capacity, through attributes that allow it to enter into relations of international law with the states or other international organizations, exercising rights and assuming international obligations.[11]

International intergovernmental organizations are considered "derived subjects" of the international law, because they emerge through the agreement of the states, but gain after that moment a legal personality different from those of the states.[12]

The international legal personality of the international organizations and their capacities

Any international organization gains legal personality if it meets the following conditions:

a. the existence of a bilateral or multilateral constitutive act, ratified by all the member states;
b. the existence of an own structure composed of bodies acting permanently or periodically;
c. it should act in the letter and spirit of the general normative framework of international law.

The legal personality of the international organizations is much more restricted than that of the states and it is subject to the limits and competences established in the constitutive act. As it is known, the international organizations often have a technical character, limited and specialized in a particular field. Consequently, the capacities of the international organizations are also limited.

Thus, the international organizations, to the extent that the constitutive act does not forbid it, may conclude international pacts, treaties, etc., among themselves and with other subjects of international law. The limits of the treaties that can be concluded by the international organizations are stipulated in the constitutive act, having also the right to legation. Thus, the international organizations can have permanent missions like other subjects of international law. These missions are led by diplomatic representatives.

As a proof of the own legal personality, the international organizations can participate to dispute settlement and can assume obligations in their own name. At the same time, the international organizations can form their own armed forces to undertake peacekeeping missions. For example, the UN participated with own armed forces in international missions such as those in Somalia and Bosnia-Herzegovina.

Literature shows that international personality does not represent an essential feature, inherent to any international organization through the very act of its existence. It depends on the will of the member states that an international organization has or not such a quality.[13]

UN and NATO – subjects of international law

The United Nations Organization

UN is an organization of international association and cooperation, in which all the member states are sovereign entities, equal, and independent. Largely, this organization of worldwide interest provides a basis for negotiating international problems and issues under dispute. However, the UN mechanisms facilitate cooperation between all the subjects of international law.

Within this organization with universal vocation, communication and cooperation are the main means that provide its functionality. The application of the principles that lie at the base of the existence and functioning of the organization makes the states have a certain behaviour which, in the following stage, will become a universally accepted norm.[14]

As shown, UN is also an institution of international law, a set of principles and rules of law created by states to regulate the relations between them on all the aspects regarding the organization and functioning of the

organization. From this point of view, one can speak of a new moment of particular importance in the postwar period in the development of the international law, in the diversification and increase of its efficacy.[15]

UN has played, is playing and will play an essential role in the actions of peacekeeping. The specialists in the international law, A Bolintineanu and M. Malița, referring to the Charter of the UN show that it stipulates as the first obligation of the parties, in a dispute which could endanger the peace and international security, to seek its resolution by negotiation, discussions, investigation, mediation, conciliation, arbitration, at the judicial level by recourse to organizations or regional arrangements, or by any other peaceful means of their own choice.[16]

In the 21st century we should witness the transformation of the UN into an efficient institution of fight against terrorism, against the proliferation of nuclear, chemical and biological weapons, which should contribute to reducing the risk of war.

NATO

Since the date of its foundation, NATO has been aiming at the respect for human rights, and for the consolidation of the rule of law. In this regard, during the summit in Prague, NATO declares that this organization will remain open to European democracies willing to assume the responsibilities and obligations of the membership in accordance with Article 10 of the founding treaty.

NATO is a dynamic and expanding organization. If initially it aimed at preserving the freedom and safety of the members, and after the end of the Cold War the gates opened for new European democracies, in 1999 NATO decided to turn from a defender of its members into an administrator of the conflicts in the Euro-Atlantic zone. We have to mention that through the new strategic concept adopted in Rome in 1991, NATO already launched the global strategy of ensuring safety due to the new threats of terrorist attacks and because of various regional crises.

NATO Treaty is a simple document, drafted in the letter and spirit of the Charter of the UN. This organization aims mainly to ensure the safety of the member states by providing an atmosphere of peace. In the same way, this aim is a universal goal of NATO.

The recent doctrine specifies that according to the capacities are projected as guidelines: - the need for agility and flexibility to eliminate complex and unpredictable dangers that can occur far from the borders of the member states and after a short notice;- efficient arrangements for sharing the information sources Comprehensive Political Guidance, a document which is expected – according to the reasons for the decision to initiate it, at the NATO Summit in Istanbul on 23 June 2004 –to "support the strategic concept for the overall capacity problems, discipline of planning and educational activities of the Alliance, which answer the needs of Alliance in interoperable and deployable forces, able to lead major operations as well as operations of smaller scale, simultaneously if necessary, and operate in a complex security environment, capacity to launch and carry out simultaneously inter-army large-scale operations, and small-scale operations for collective defense and crisis response, on its territory, at the periphery, and at strategic distance; - preserved capacity to lead large-scale and high intensity operations withcommand and control structure allowing for the planning and execution of a campaign to achieve a strategic or operational objective by combining appropriately the air, land and sea elements; - structured forces, equipped, and trained for expeditionary operations; - the need to have sufficient fully deployable and sustainable ground forces, as well as suitable air and sea elements, and an efficient use of resources with increased investment in essential.[17]

Conclusions

The international organizations have emerged as a necessity in the development of the international relationships and exchanges. The nineteenth century marks the starting point of the embryonic forms of these subjects of international law. The turning points represented by world wars strengthened the position and the role of the international organizations in the field of global cooperation and security. It is obvious that UN and NATO have demonstrated and consolidated the leader position within the international organizations, starting with mid-twentieth century. These two important subjects of international law have proved to be two essential vectors in peacekeeping in the world, due to the force of their own legal personality.

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