ANALELE UNIVERSITĂŢII TITU MAIORESCU

TITU MAIORESCU UNIVERSITY LAW REVIEW

Drept

Serie nouă
2019
– anul XVIII –

Editura Hamangiu
2019

Editura Universităţii Titu Maiorescu
http://analedrept.utm.ro
INDEXATĂ: ***HeinOnline***

CEEOL

Editura Hamangiu SRL
Str. Mitropolit Filaret nr. 39-39A, Sector 4, Bucureşti

Editura Universităţii Titu Maiorescu
Bucureşti, România, Calea Văcăreşti nr. 187, sector 4

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ISSN: 1584-4781

TITU MAIORESCU UNIVERSITY LAW ANNALS

Drept

Law

2019

COLEGIUL DE REDACŢIE

Manuscrisele, cărţile şi revistele pentru schimb, precum şi orice corespondenţă se vor trimite Colegiului de redacţie al Analelor Universităţii Titu Maiorescu, Calea Văcăreşti nr. 187, sector 4, cod 040054, Tel. 0213302141; 0213301174; Fax: 0213302141, email: anale.drept@utm.ro, www.utm.ro/anale drept

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THE PROMOTION OF SOCIAL RIGHTS – THE NECESSARY COMPLETION OF PARADIGM OF RULE OF LAW IN EUROPEAN UNION

Nicolae VOICULESCU[*]

ABSTRACT

Rule of law is one of the fundamental values upon which the European Union is based on. It guarantees fundamental rights and values, allows the application of EU law, and supports an investment-friendly business environment. Social rights, an essential component of fundamental human rights, are thus directly related to the rule of law principle. European Pillar of Social Rights contains principles and rights essential to the existence of fair and functional labour markets and social protection systems in 21st century Europe. The author advocates for understanding the concept of rule of law at European Union and national level by raising awareness and taking social values into account.

KEYWORDS: *rule of law; European pillar of social rights; EU law.*

In the year when the structure and composition of the institutions of the European Union is renewed, it is doubtful that answers will have to be found at the level of the fundamental policies, as well as of the normative framework that will solve solutions to the most diverse and important challenges with which the European organization is currently facing.

Among these challenges, in recent years there is also an emphasis on the social character of the Union's actions, reflecting the fact that under the TEU it is a social market economy, but also an awareness of the need to convince European citizens that it really is acting in their interest, of diminishing the discrepancies of development and cohesion between the Member States and of relation with the society.

At the same time, developments in technological, demographic or economic-financial performance jeopardize the achievements registered

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or make it difficult to implement the various standards and objectives set by the European institutions.

Rule of law is one of the fundamental values upon which the EU is based on. It guarantees fundamental rights and values, allows the application of EU law, and supports an investment-friendly business environment[1]. Social rights, an essential component of fundamental human rights, are thus directly related to the rule of law principle.

As a result, in recent years it has been repeatedly emphasized (for example by the Roma[2] Declaration of March 25, 2017) the aim of Social Europe, understood as a concept built on sustainable development, economic and social progress, cohesion and convergence, the integrity of the internal market, the diversity of national systems, the equality between men and women in terms of rights and opportunities, the fight against unemployment, discrimination, social exclusion, poverty, education and training, the preservation of cultural heritage and the promotion of cultural diversity.

These objectives, in fact fundamental social principles, having a basis in European primary law, prove to be essential for the structuring and functioning of the European legal order, while their full realization is, in the same time, the premise and the result of the rule of law at organizational and state level.

Following the political consensus was adopted the **Communication from the Commission Establishing a European Pillar of Social Rights**[3] which contains principles and rights essential to the existence of fair and functional labour markets and social protection systems in 21st century Europe. It reaffirms some of the rights already existing in the acquis of the Union and adds new principles that address the challenges arising from social, technological and economic developments.

[1] *https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law_en*

[2] The Rome Declaration Declaration of the leaders of 27 member states and of the European Council, the European Parliament and the European Commission https://europa.eu/european-union/file/22759/download_ro?token=uJuS7Kb9.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions establishing a European Pillar of Social Rights COM/2017/0250 final.

From the way of drafting of the Communication establishing of the European Pillar of Social Rights, result the importance of promoting and implementing of social rights as part of the European legal order.

Thus, it is emphasized that "Building a more inclusive and fairer Union is a key priority for this European Commission".

Also, the European Pillar of Social Rights is presented with today's and tomorrow's realities in mind. It is emphasized that, in spite of recent improvements in economic and social conditions across Europe, the legacy of the crisis of the last decade is still far-reaching, from long-term unemployment and youth unemployment to poverty risks in many parts of Europe. At the same time, every Member State is facing the rapid changes taking place in European societies and the world of work.

There are as many challenges as there are opportunities. The EU is home to the most advanced welfare systems in the world and to a wealth of best practices and social innovations, but it needs to confront and adapt to unprecedented societal challenges.

The European Pillar of Social Rights is about delivering new and more effective rights for citizens. The 20 principles and rights enshrined in the Pillar are structured around three categories: equal opportunities and access to the labour market, fair working conditions and social protection and inclusion. They place the focus on how to deliver on the promise in the Treaties of a highly competitive social market economy, aiming at full employment and social progress. While the principles and rights are shared, their delivery is not assumed to take place through a "one-size-fits-all" approach: the Pillar acknowledges the diversity of situations and the varying means available to achieve these common goals.

At the same time, it was emphasized that efficient and resilient labour markets that promote a high level of employment and are able to absorb shocks without generating unemployment are essential for the smooth functioning of the Economic and Monetary Union. Over time, they contribute to the convergence of performances between Member States and to more inclusive societies. Beyond labour markets, it is also important to ensure that every citizen has access to adequate education and that an effective social protection system is in place to protect the most vulnerable in society, including a "social protection floor". Finally, the Report highlights the need to go a step further and push for a deeper integration of national labour markets by facilitating geographic and

professional mobility. This calls for a fair and enforceable level-playing field for public authorities, workers and business alike.

With these ideas, it is relevant to note that the desire to ensure high standards in the field of social rights is directly correlated with the economic and financial fundamentals of the European Union and with its specific legal order.

Therefore, we can say that by indicating and defining the fundamental social principles, the concept of rule of law has been reinforced with values that have become increasingly accentuated at the level of the European Union as it has evolved in the organization with deeper integration.

On the other hand, Member States, and for many domains the social partners, have primary or even exclusive competences in areas such as labour law, minimum wage, education, healthcare and the organisation of social protection systems. They also bear the bulk of the financing in the areas covered by the European Pillar of Social Rights. The principles and rights set by the Pillar will need to be implemented at Union and Member State level in full respect of their respective competences.

The implementation of the Pillar will be primarily the responsibility of national governments, of public authorities and of social partners at all levels.

This leads to the finding of the true complementarity between the rule of law values at the level of each Member State, as well as that of the specific legal order of the European Union, with all the implications resulting from their two-way empowerment.

Traditionally, concept of rule of law was related to aspects such as the principle of legality, the right to a good administration of justice, access to justice, guaranteeing a fair and public process and so on.

It will have to be made aware that their list also includes aspects reiterated by the European institutions. Thus, the success of a legal order characterized by rule of law also depends on, in no small measure, on the effectiveness of national labour markets and welfare systems and on the capacity of the economy to swiftly absorb and adjust to shocks and to effectively tackle their social implications. It also depends on the capacity of national economies to improve living standards and growth potential. This requires high quality education and training and well-functioning labour markets, allowing for a smooth allocation of resources, but also well-designed social protection systems to be in place

in order to provide effective automatic stabilisation, prevent and reduce poverty, and support labour market reintegration.

The success of the European initiative to establish a European Pillar of social rights would undoubtedly also mean progress in the *Romanian social space*, and thus the improvement of the rule of law quality. Thus, the education system has serious problems, being the last country in the European Union regarding the inclusion of the population in lifelong learning systems[4].

At the same time, the shortcomings of the labour market do not yet allow the full implementation of the principles in the European Pillar of social rights regarding safe and adaptable jobs or the level of wages that remain among the lowest in Europe, despite the increases in the minimum wage in last years.

The social dialogue and the participation of the workers in organizing the activity in the companies in which they operate are far from the generous objectives of the European directives. In fact, the social dialogue in society and enterprises has experienced a worrying setback, thus affecting the general democratic climate, so necessary for a society that must function on the basis of pluralistic democracy and the rule of law.

The principles on social protection and inclusion in the European Pillar of Social Rights aim at progress in aspects where Romania is at low levels. It is about the care of the children and the support given to them.

Also included here are the health care services and the inclusion of persons with disabilities, old age benefits and pensions, whose defective regulation and organization caused the departure of tens of thousands of healthcare professionals from the country, the absence of a coherent social protection system, as well as large disparities in the level of pensions.

In the social field, as in the other fields, as found in European rule of law monitoring documents, in Romania "Major legislative changes have been rushed through using urgency procedures with minimal consultation. (…) Different branches of the State have been in conflict and involved in various proceedings before the Constitutional Court. It is also

[4] Nicolae Voiculescu, Maria Beatrice Berna, *Tratat de drept social internațional și european (Treatise on international and European social law),* Universul Juridic Publishing House, Bucharest, 2019, p. 508-510).

the case that civil society, highlighted by the report as playing a key role in reform, has found itself a target for increased pressure"[5].

In any state with such social realities, it is obvious that cannot be assured to its citizens the full benefit of belonging to an institutional and normative system advanced in accordance with the contemporary imperatives of the rule of law.

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[5] Report from the Commission to the European Parliament and the Council On Progress in Romania under the Cooperation and Verification Mechanism, Strasbourg, 13.11.2018 COM(2018) 851 final, p. 2.

ROMANIAN GOVERNMENT EMERGENCY ORDINANCE 88/2018 – A SYSTEMATIC AFFECTATION OF THE INSOLVENCY PROCEDURE BY PRIORITIZING BUDGET RECEIVABLES

Ionel DIDEA[*]
Diana Maria ILIE[**]

ABSTRACT
Through this study we aim to analyse the framework for the recovery of tax receivables through the insolvency procedure filter and to identify solutions and mechanisms for rebalancing the legal construction regarding the insolvency matter that are currently facing regulations "contra legem", following the establishment by GEO no. 88/2018 of a preferential procedure for the recovery of the budgetary receivables, the interference of the tax regime in the insolvency procedure being one incompatible with the Union and international perspectives and benchmarks.

KEYWORDS: *insolvency; economy; a new EU Directive; budgetary claims; tax regime, incompatibilities.*

1. General framework. Insolvency – statistics and forecasts in the current and prospective economic environment

Nationally, the matter of insolvency has been rising upwards and seems to have revolutionized the legislation in the field, in the last few years a true insolvency law has emerged, independently[1], which aspires to the unification and consolidation of a complex and complete Insolvency Code, evoked powerfully for example at European Union level in the sense of model law regarding the incorporation of modern principles and mechanisms that bring the debtor in financial difficulty into the

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[1] See Ionel Didea, Diana Maria Ilie, *Un nou statut al instituției insolvenței raportat la viziunea monistă promovată de Noul Cod Civil. Conturarea unui drept special, particular – dreptul insolvenței – urmare abrogării Codului Comercial*, in "Curierul Judiciar" no. 8/2017, p. 425-434.

centre of interest and prioritizing the principle of second chance. However, insolvency remains an ever-evolving field and legislative changes take us by surprise most of the time. At European Union and international level, the measures and procedures for rescuing the debtor in financial difficulty and for reintegration into the economic circuit are promoted with priority, when it can contribute to the "healing" of the economy through honesty and innovation, as well as being a an instrument destined to rescue the indebted debtor, it also becomes the realm where the law intersects very strongly with the economic phenomenon. Therefore, this field involves a hybrid legal construction, based on viable and sustainable economic mechanisms so that the norms of law can have a concrete purpose, in the context in which the law and the economy remain two mirrors of the same reality. The legal doctrine invokes, moreover, a necessity of the economic aspect prevalence over the legal aspect as a way of combating the abuse of law in the tax law[2], in this regard and the constant case law of the CJEU[3]. However, the theory of the prevalence of the economic aspect over the legal aspect has lost ground in the construction and evolution of the concepts of tax law at national level, creating legislative measures for the recovery of the budgetary claims oscillating between normative imperfections and economic speculations. The recognition of these socio-juridical-economic connections is required not to fall into the irrational, the more so as we consider a series of errors that lead to economic crises, the economic dimension gaining more and more ground in this context of need of "correction" of the legislation, in the sense that the law represents a dynamic social phenomenon reconfigured and resized by the permanent and complex changes of the society.

Essentially, this introductory presentation has the role of highlighting the current economic framework, as well as a realistic perspective on the legal environment in which companies "fail", a context in which a

[2] Radu Bufan, Sever-Alexandru Sbârnă, *Prevalenţa economicului asupra juridicului - modalitate de combaterea abuzului de drept în dreptul fiscal*, in Revista Română de Drept Privat no. 1/2019 - Dreptul şi economia: două oglinzi ale aceleiaşi realităţi, p. 57-87.

[3] See the cases *Halifax* and *Newy,* through which the CJEU has ruled that *"it is the responsibility of the national court to determine the content and the real significance of the transactions in question by taking into account the economic and commercial reality",* - Radu Bufan, Sever-Alexandru Sbârnă, *op. cit.*, p. 85.

multidisciplinary analysis is required to allow an urgent legislative reform related to the compatibility conflict between the insolvency regime and the tax regime. According to statistics published by the National Trade Register Office[4], the number of companies that went into insolvency decreased by over 30% compared to last year, however, we must also refer to the spectacular increase of the number of companies cancelled, by 46%. It is worrying that over the first eight months of 2019, over 100,000 companies were suspended, liquidated and deregistered, which is a real warning signal. Beyond the statistical decrease in the number of insolvencies and bankruptcies, **the debt problem is still a very serious one.** According to experts, Romania has registered, in the last three years, the highest number of companies interrupting their activity in Europe, while also having the weakest entrepreneurship, only 26 companies/one thousand inhabitants.[5]

Stricto sensu, insolvency should not be regarded as a stigma regarding business relationships, the more so as insolvent companies have a viable reorganization plan, passed through the syndic judge's validation filter and are additionally monitored by specialists in the field, most often having a more predictable business behaviour compared to a company that is not in difficulty financial.

2. Premises. Preferential legal regime of tax receivables in insolvency proceedings

The legislative evolution regarding the insolvency experienced a steep decline at the time of the entry into force of the Emergency Ordinance no. 88/2018 for amending and supplementing certain normative acts in the field of insolvency and other normative acts[6], a legislative act that clearly aimed as a priority point the recovery of the budgetary claim vis-à-vis the insolvent companies. Moreover, the purpose stated in the preamble was "to recover debts faster, including the budgetary ones", justified by the need to stop fraudulent insolvencies and to avoid affecting the competitive environment by using these procedures

[4] *https://www.onrc.ro/index.php/ro/statistici?id=252*

[5] *https://www.1asig.ro/Insolventele-se-extind-puternic-in-sectorul-comertului-articol-3,102-62046.htm.*

[6] Published in the Official Gazette of Romania no. 840/02 October 2018.

abusively by the insolvent debtors with the purpose to avoid the payment of the amounts due to the consolidated budget of the State. Finding a balance between private sector receivables and state-owned receivables it certainly remains a delicate point in addressing insolvency.

The prerequisites from which we start in this analysis reflects the changes with the highest echo in the legal doctrine and jurisprudence that GEO no. 88/2018 brought to Insolvency Code, and which clearly emphasize the prioritization of budgetary claims to the disadvantage of the other creditors. On the one hand, we invoke art. 5, paragraph 72 which, under the effect of legislative changes, resizes the definition of the threshold value, subject to the possibility of opening the insolvency procedure at the request of the debtor by the weight of the budgetary debts out of the total of the debts declared against its assets, as follows: "*When the application for the insolvency proceedings is initiated by the debtor, the amount of the budgetary claims must be less than 50% of the declared total of the debtor's debts", and on the other hand,* art. 143 (1) which is completed in the sense that "*For debts accumulated during the insolvency proceedings that are more than 60 days old, the forced execution can be started".*

With regard to the debtor's prohibition to claim its own insolvency mainly or exclusively for budgetary claims, first of all we find a decriminalization of the offence of simple bankruptcy, provided by art. 240 Criminal Code, since we are in a situation where a debtor, although it meets the conditions of entering into insolvency, in the sense that its assets are characterized by the insufficiency of the available money funds for the payment of certain, liquid and exigible debts, it has no right to introduce the application for opening of the collective procedure as the share of the budgetary debt exceeds 50% of the total debts of the insolvent debtor.[7] At the same time, we find a non-correlation of the new definition regarding the threshold value with other provisions of the

[7] Thus, under these conditions, the problem of criminal sanctioning of the debtor - natural person or of the legal representative of the legal person cannot be raised due to the lack of submission of the request or its delayed submission more than 6 months compared to the term provided by law since the occurrence of the state of the insolvency. See Antoniu Obancia, *Infracţiunea de bancrută simplă după O.U.G. nr. 88/2018*, in Revista de insolvenţă PHOENIX no. 66/October-December 2018, p. 11-13, accessible online at the address

https://www.unpir.ro/documents/phoenix/pdf/revista-phoenix-66.pdf

Insolvency Code, respectively art. 66 (1) and (4) regarding the obligation of the debtor to file the request to open the insolvency procedure within the legal term provided, without distinguishing depending on the nature of the receivables and the creditors.[8]

The strongest impact of the amendments brought by GEO no. 88/2018, however, represents the possibility of triggering the forced execution in the insolvency procedure, in accordance with the modified provisions of art. 143 (1) of Law no. 85/2014. We mention that until this change, the just and sufficient sanction, from our point of view, of non-payment of current debts was the possibility of requesting the opening of the bankruptcy procedure by the creditors with current debts, thus respecting the case of insolvency. In other words, the access to an individual forced execution procedure against an insolvency enforcement procedure, elementary principle of insolvency in relation to the international principle, "automatic stay" represents a systematic affectation of the legal construction[9] on the matter of the insolvency whereby the creditors who approved a reorganization plan, which became an enforceable title following the confirmation by the syndic judge, are facing the decrease of the rate of "sufficiency" established by the plan.

Moreover, analysing the provisions of art. 75 (4), art. 143 (3) of the Insolvency Code, related to art. I, item 14 of GEO no. 88/2018, we find that the only current debt that can be directly foreclosed, without having to go through a filter of control of the insolvency practitioner or the syndic judge, as provided for the current debts, it is the tax debt, which

[8] It seems that in the form adopted by the Senate it is envisaged to eliminate the abusive condition regarding the amount of the budgetary claims, returning to the form previous to the modification by GEO no. 88. In the meantime, however, the effects are devastating for the economic environment, being uncertain the variant that will be adopted by the Chamber of Deputies, as a decision-making chamber. As a result, the courts have applied this law text since 2018, rejecting the entry into insolvency at the request of the debtor in case the debt of the budgetary creditor is higher than 50% or equal to 50% of the entire declared liabilities. See Civil conclusion no. 6854 of 21/11/2018 pronounced by the Bucharest Court - Civil Section VII in the file XXX/3/2018 rejecting the request to open the insolvency procedure formulated by the debtors.

[9] Simona Maria Milos, Andreea Deli Diaconescu, *Analiza aspectelor de noutate aduse de O.U.G. nt. 88/2018 la Codul insolvenţei*, in Revista Phoenix no. 66/2018 (October-December 2018), p. 5-10,

https://www.unpir.ro/documents/phoenix/pdf/revista-phoenix-66.pdf

becomes an enforceable title from the moment of issuing the notice of assessment. Although apparently the legal provision allows the forced execution of the obligation by any creditor of a current debt, in reality, of this benefit can only benefit the creditor who holds an enforceable title according to the law, especially the budget creditor. In other words, discrimination is created in favour of the budgetary creditor relative to all the other creditors participating in the procedure. Also as a discussion of the advantage granted to tax creditors, it is necessary to specify that the introduction of possible appeals against the tax administrative acts to the competent tax bodies does not suspend the execution of the act in this case, the legislator opting for such a regulation in order to prevent abusive behaviours of the taxpayer who could only follow a delay by filing the appeal. Thus, by derogation from the provisions of art. 75 of the Insolvency Code, "the tax administrative documents issued before and after the entry into insolvency are subject to the control of the specialized courts of tax administrative litigation", according to art. 351 Tax Procedure Code. We mention that the provisions in the initial form of Law no. 85/2014 established that all debt declarations should be verified in the insolvency procedure, regardless of the creditor's quality.

Passing the tax receivables through the Insolvency Code filter, we find the existence of a preferential regime and a series of advantages granted to the budgetary creditors and in particular to the tax creditor, materialized stricto sensu in: information on the filing of the application to open the insolvency procedure, the 60-day deadline for completing the tax inspection report and the submission of the supplement of the debt claim, the private creditor test, the category of distinct debt when voting on the reorganization plan, and the priority in the order of satisfaction of the claim.

3. Incompatibility of the rules of the Tax Procedure Code with the rules of the Insolvency Code. European Union and international perspectives

Despite the efforts of the courts that tried throughout this period in which it produced the effects of GEO no. 88/2018 to censure the parallel forced execution procedures, ANAF insists on evoking their own interest, by proposing to allow the single account to be opened, in accordance with art. 143 (1) and (3) of the insolvency law modified. The direction is

certainly not a good one, although we have been accustomed to saying lately that we are enjoying a law of modern insolvency, which unfortunately has taken a new turn, right from the moment when through a parallel legislative change, respectively the Tax Procedure Code, it was removed from the competence of the syndic judge the resolution of the appeals to the tax claims,[10] thus throwing into uncertainty the fate of any debtor who has significant debts to the State budget, by the objective impossibility of resolving that challenge within a reasonable time to be folded on the speed of the insolvency procedure. The point is that whenever a debtor has significant debts to the budget creditor and those debts are contested by the former, we will never be able to have a concrete liability established within a reasonable timeframe to allow the debtor to restructure or reorganize, the time lag of stabilizing the liabilities mass being a huge one. Thus, as we know, insolvency appeals at the preliminary table are solved within 3-6 months, and in a tax litigation procedure between 3 and 6 years. There is, of course, the institution of provisional registration of a contested budgetary debt, but the reality of substantiating a reorganization plan with a huge debt and which must be foreseen and paid differs from the existence or not of that budgetary debt, practically, the fate of the debtor standing in the litigation that runs in parallel, outside of insolvency proceedings. However, this is the biggest service that could be created by simply shifting the different way of solving the appeals to the preliminary table in the insolvency procedure, respectively in the tax litigation court.

The current legislative framework of insolvency, as amended by GEO no. 88/2018 and modelled by the Tax Procedure Code, is in disagreement with the Union and international legislative landmarks. As a result, both the UNCITRAL Legislative Guide[11], as well as the new Directive (EU)

[10] Through *Decision of the HCCJ no. 11/2016*, published in the Official Gazette no. 436 of June 10, 2016, it was admitted the notification regarding the unbundling of some questions of law and the interpretation of the provisions of art. 105 (1) and (2) of Law 85/2014, in the sense that the insolvency practitioner does not have the task of verifying on the background the budgetary claims found by enforceable titles, registered within the legal term before the specialized court, respectively the court of administrative tax litigation.

[11] The legislative guide can be consulted at:

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

2019/1023 on preventive restructuring frameworks, on discharge of debt, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, recommends the admissibility of the suspension of forced executions from the insolvency prevention procedures phase, for reasons related to the efficiency of the restructuring frameworks.[12] At the same time, the UNCITRAL Legislative Guide invokes in the second part the adverse effect of creating a legal privilege, in the idea that "the greater the number of creditors receiving preferential treatment, the less beneficial this treatment becomes, in itself", affecting the premises of an efficient and effective outcome of the insolvency procedure – "Core Provisions For an Effective and Efficient Insolvency Law ".

The practice of a parallelism of executions in the insolvency procedure, a scenario that has unfortunately become reality, also violates the principles set by the World Bank[13], according to which "the opening of the insolvency procedure should prohibit the right of disposition on the assets of the debtor and suspend the actions of the creditors to exploit their rights over the assets of the debtor ... the suspension of the actions should be as comprehensive as possible, extending to the assets used, held or in the possession of the debtor". Moreover, in this context, the UNCITRAL Legislative Guide emphasizes the principle of the lack of parallelisms, stating that "although the insolvency legislation forms a distinct legal regime, it will not produce results if it conflicts with other laws (...)". The reality is that, under the umbrella of the need to protect the State and the public interest, the creation of an artefact of avoidance and obstruction of the insolvency procedure is concealed, in order to allow the tax creditor to execute the debtor who is in financial difficulty in the system of the Tax Procedure Code.

[12] According to Recital (32) of the Directive: "*A debtor should be able to benefit from a temporary stay of individual enforcement actions, whether granted by a judicial or administrative authority or by operation of law, with the aim of supporting the negotiations on a restructuring plan, in order to be able to continue operating or at least to preserve the value of its estate during the negotiations. Where so provided by national law, it should also be possible for the stay to apply for the benefit of third-party security providers, including guarantors and collateral givers"*

[13] *https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights*

If we were to approach the legal regime of tax debt from the perspective of comparative law[14], relevant in terms of research and rigor in comparative analysis of the laws of the Member States, is the Report on the standardization of insolvency legislation at European level, prepared by INSOL Europe experts, under the aegis of the European Parliament, the General Directorate for Internal Policies and the Department for the Protection of Citizens' Rights.[15] We mention that, according to this report, there are Member States, such as Germany, France or Sweden, which do not grant privileged orders to the tax creditor at all. On the other hand, there are laws, such as the Italian, Spanish, Polish or United Kingdom laws, which really give a legal cause of preference to the tax creditor, but only in a certain amount or for certain types of tax claims. We find a gradual elimination at European level of the privileged treatment of budgetary debts. In fact, in the idea of increasing the efficiency of insolvency proceedings, the United Nations Commission has invoked the fact that a large part of the recently amended laws registered a significant reduction in the number of legal priorities of the debts, which surely reflects a harmonization of the public-private interests, concluding in the sense that "maintaining a high number of priorities conferred on insolvency claims is likely to complicate the basic principles of the procedure, so that the efficiency and effectiveness decisions are difficult to achieve" and "the greater the number of creditors receiving preferential treatment, the less beneficial this treatment becomes."[16].

[14] *http://www.europarl.europa.eu/document/activities/cont/201106/20110622ATT22313/20110622ATT22313EN.pdf*

[15] Simona Maria Milos, A. Deli-Diaconescu, *Tratamentul creanţei bugetare în procedurile de insolvenţă şi prevenţie a insolvenţei*, study presented at the Bursa Conference, April 2014, by Andreea Deli Diaconescu, *Creanţa fiscală în materia insolvenţei - între contestaţie şi executare silită*, published on Universul Juridic website, April 18, 2019, *https://www.universuljuridic.ro/societati-afaceri-si-insolventa/page/2/*

[16] The UNCITRAL Model Law on Cross - Border Insolveny: The Judicial Perspective, United Nations Commission on International Trade Law, New York, 2012.

4. Legal mechanisms and practical solutions to combat the abuse created by the tax regime. Ordinance no. 6/2019 regarding the establishment of tax facilities - innovative mechanism for reorganizing the debtor in financial difficulty

A valuable instrument of the insolvency procedure is the possibility of suspending the forced execution both before entering the insolvency procedure, the legislator allowing the so-called "preventive actions" by suspending the forced executions that are pending in order to grant a chance for the future insolvency procedure, as well as after the ruling the decision to open the insolvency. Thus, the debtor but also the creditors have at hand the provisional suspension ordered by the presidential decree, according to art. 66 (11) and 70 (5) from the Insolvency Code, but also the operating suspension of law *ope legis*, established by the imperative norm of art. 75 (1) of Law no. 85/2014, the latter operating from the moment of opening the procedure, effect by which the premises of conducting a bankruptcy insolvency procedure are ensured, respecting the priority order of the creditors and granting the second chance to the debtor.[17] These mechanisms were affected by GEO no. 88/2018, by triggering a parallelism of forced executions. Of course, the mechanism of *provisional suspension* of the individual forced executions started by the tax creditor can still be used by the presidential decree, in addition to the measure *appeal to execution* expressly regulated by art. 260 (1) and (4) Tax procedure code.

Specifically, in practice we may encounter different situations to which we can refer in order to identify certain solutions to combat the abusive clauses introduced by GEO no. 88/2018. Thus, in a first hypothesis we consider the debtor who has only budgetary debts and wants to enter into the insolvency procedure. In relation to the new provisions, the only option remains the dissolution of the company at the Trade Register with the appointment of a liquidator according to Law no. 31/1991, the latter requesting the opening of the bankruptcy procedure in case it is found that the value of the claims against the debtor exceeds the threshold value of Lei 40,000. The negative effect of this practice is reflected in the loss of the possibility of judicial

[17] See for development Irina Sorescu, in Gh. P Piperea (coord.), *Codul insolvenţei: Note, Corelaţii, Explicaţii*, Ed. CHBeck, Bucharest, 2017, p. 457-473.

reorganization, the only solution for the debtor's entry into the general insolvency procedure and the application of a reorganization plan being the formulation of a request to open the insolvency procedure by the budgetary creditor. However, it is difficult to imagine such actions by the tax creditor, given the possibilities of establishing insurance measures on the debtor's assets, of recovering through its own bodies based on the Tax Procedure Code, the formulation of such a request remaining among the last options of the to this credited legislative advantage.[18] In practice but also in doctrine [19] the variant of the non-payment of wages up to the accumulation of a claim equal to 6 gross average wages per economy/employee, with the request to open the insolvency procedure, can be formulated by the employee in this case. However, both this solution and the non-payment to another creditor imply a long term necessary for the accumulation of these debts.

In a second hypothesis we consider the debtor who holds besides other debts and budgetary debts in the amount of 50% or more than 50% of the total debts, which prevents him from requesting the opening of the insolvency procedure or, if he makes a request, it will not be admitted. In this case, the debtor can in practice orientate himself to two variants. In a first variant, in case the value of the other debts, of a non-fiscal nature, exceeds the threshold value of Lei 40,000, the debtor can ask the non-budgetary creditor who holds an equal or over debt to make a request to open the procedure of insolvency. Moreover, in practice such a solution is approached even by the administrator or associate as creditors, invoking their own debt from unpaid wages or loans granted to the company. At the same time, for the purpose of a speedy trial, in the sense that the debtor's request is judged urgently within a maximum of 10 days from the date of submission of the request, based on art. 66 (10) of the Insolvency Code, the debtor may submit such a request to open the insolvency procedure, although it will be rejected for failure to comply with the new legal conditions. In the meantime, however, a request for

[18] See Lotus Manuela Buză, *Creanţele bugetare în procedura insolvenţei,* article published on the website Universul Juridic on September 09, 2019 - *https://www.universuljuridic.ro/societati-afaceri-si-insolventa/* .

[19] See Nemeth Zoltan, *Dificultăţi în deschiderea procedurii insolvenţei la cererea debitorului în lumina modificărilor Legii nr. 85/2014 prin OUG nr. 88/2018*, article published on the website of Universul Juridic on August 14, 2019 - *https://www.universuljuridic.ro/societati-afaceri-si-insolventa/*

intervention or even a request to open the procedure by a creditor in the file created to resolve the debtor's request will be filed, and these requests will be resolved with the same speed. In case the value of debts of a different nature than the budgetary ones does not exceed the threshold value of Lei 40,000, the solution remains the same as in the first hypothesis, namely the dissolution of the company under Law no. 31/1990 with the appointment of a liquidator. Taking into account the text of the law which establishes the percentage of 50% of the "total declared of the debtor's debts", there would be a salvation option, namely the real non-declaration of the bankruptcy mass by the debtor at the time of the application for opening the insolvency procedure. Moreover, such a situation can be created without any intention, considering that in most cases, only the main budgetary debts, not the accessories, are entered in the accounting, the correction of the total amount of the debt occurring when the creditor has filed the declaration of tax debt. If we reflect on such a variant, we find that it would be possible, all the more so as the legislator failed to regulate a sanction to revoke the sentence of opening the procedure if after the final drawing up of the definitive mass of debts it is found that the weight of the budgetary debts is higher than 50% of the mass. However, such an alternative can only be materialized if the accounting documents annexed to the request to open the procedure do not result in a different situation of the debts than the declared one, especially since there is also the possibility that the syndic judge invested with the solution of the request will also ask for clarifications, which can be reject the request if it finds that the share of the budgetary debt is more than 50% as it results from the accounting documents of the company.

On August 8, 2019, the Government Ordinance no. 6/2019 [20] regarding the establishment of some tax facilities, which created a special mechanism for staggering the payment and debt relief regarding some interest and penalties of the outstanding tax obligations at the end of 2018, with the effect of "resuscitation"[21] of the companies on the border

[20] Published in the Official Gazette no. 648 of August 5, 2019.

[21] We consider that this tax procedure can be assimilated to the kind of "pre-packed" convention, respectively a kind of extra-judicial restructuring agreement concluded between the insolvent debtor and the tax creditor, which is not a novelty in use as a tool to rescue and avoid the insolvency procedure. See Gh. Piperea, *Proceduri de prevenție și proceduri prefabricate sau accelerate de insolvență* -

with insolvency. Having the echo of a tax amnesty, the ordinance implies, on the one hand, the cancellation of accessory tax obligations in the case of taxpayers with debts of up to one million lei on December 31, 2018, and on the other hand, the possibility of a financial restructuring for debtors with debts more than one million lei at the same time. Unfortunately, the deadline for accessing the provisions of the Ordinance was quite short, in the sense of starting the procedure by submitting the application to the fiscal year, respectively 30 September, deadline further extended until October 31, 2019. [22] However, according to Finance estimates, over 285,000 companies with private equity with debts as of December 31, 2018 would benefit from the tax amnesty, plus almost 23,000 natural persons, over one thousand taxpayers registered for VAT purposes for intra-Community acquisitions and over 1,000 public taxpayers (agencies, institutions, etc.)[23].

The ordinance seems to somewhat balance the interference of the tax regime in the insolvency procedure, instituting the possibility of restructuring the budgetary obligations precisely in the idea of "revitalizing and avoiding the opening of the insolvency procedure' and allowing the debtors, legal persons of public or private law, except the public institutions defined according to the law no. 500/2002 regarding the public finance, and of the administrative-territorial units, which are in financial difficulty and for which there is the risk of entering into insolvency, to restructure certain budgetary obligations, under the conditions of the preparation of *a restructuring plan,* filed within a maximum of 6 months from the date of entry into force of the ordinance and application of a *prudent private creditor test*, both made by an independent expert . If by 20 February 2020 the eligible debtors (2,600 companies) will not submit the restructuring plan, ANAF has 60 days to analyse and then to request the opening of the insolvency procedure. Interestingly, according to the ordinance, debt cancellation applies not only with respect to tax obligations, but also with respect to other

https://www.juridice.ro/480139/proceduri-de-preventie-si-proceduri-prefabricate-sau-accelerate-de-insolventa.html .

[22] On 26/09/2019 (1) of art 3, Chapter was amended by Point 1, Article II of GEO no. 67 of September 19, 2019, published in the OFFICIAL GAZETTE no. 784 of September 26, 2019.

[23] *https://www.contexpert.ro/ultimele-stiri/amnistia-fiscala-pentru-companii-si-persoane-fizice-cand-si-cum-va-putea-fi-aplicata*

budgetary debts, such as environmental obligations. What is important to note is that this procedure involves the cancellation of some major budgetary obligations up to 50% of their total, the payment facility being staggered for a period of maximum 7 years, with the possibility of prolongation under the law, measures that we consider effective and in accordance with the legislative proposals at the level of the European Union, in the sense that the EU Directive, recently entered into force, regarding the restructuring frameworks, establishes at art. 20 for the Member States, to ensure that insolvent entrepreneurs have access to at least one procedure that can lead to a complete debt relief, and in the case of Member States where full debt discharge is conditional on a partial debt repayment by the entrepreneur, that the related repayment obligation is based on the specific situation of the entrepreneur and, in particular, that it is commensurate with the income and assets of the entrepreneur following or available during the period prior to the debt remittance and that it takes into account the fair interest of the creditors ". **Therefore, it is advisable that all *the eligible companies, which submitted the applications in time, to take advantage of this favourable context in order to rebalance their business, all the more so as such key occasions confer the chance of a preventive reorganization, in particular through the support of the tax creditor, they do not appear all the time and surely the benefits will be felt later.***

5. Conclusions

Although the declared purpose of GEO no. 88/2018 was that of avoiding fraudulent insolvencies, creating some ,, premises for the recovery of viable businesses and the faster recovery of the debts, including the budgetary ones, in accordance with both the budgetary interest and the general economic-social interest of Romania", we find that those few beneficial changes, which contributed with a plus of material stability, were practically cancelled, shaded almost entirely by the substantial changes with systemic negative effect on the insolvency procedure, as well as those unclear changes that have triggered contradictory solutions in practice, representing rather a deep setback in this matter. The prioritization of the budgetary receivables has de-fragmented the integrated mechanisms of regulation and control and has imbalanced the system of principles based on insolvency precisely to

function independently of other areas of law. Legislative regulation that allows a single creditor to directly execute current debts, without the possibility of contesting the debt on the basis of a payment request, but only by virtue of their own certainties of certain, liquid and enforceable debt, conflicts with the reason of the normative system of insolvency. Can we admit a compatibility between the concursual forced execution and the individual forced execution in the insolvency procedure? Our arguments come to shape a negative answer and we start from the idea that insolvency was first regulated as a form of insolvency, with strict rules of applicability, so as to ensure a balance between the creditors' rights. Will there still be an economic rationale for the end of the procedure or just an "avalanche" disordered by individual forced executions? A true "contest against concursualism" will be born, in the sense that all creditors will act to protect their own interests and rights, in order to stop forced executions that will surely reduce their quota of satisfaction. On the other hand, we should also consider the provisions of the new Directive on the frameworks of preventive restructuring that we are going to implement at national level until 2021, which mentions the importance of having early warning tools of the risk of insolvency, our system being even deficient in this respect. Thus, the Directive recommends that possible early warning mechanisms involve "third parties having access to relevant information, such as tax authorities and social insurance authorities, by signalling negative developments". However, the tax authorities that should issue such signals for an early warning of an insolvency, in fact create real impediments to opening the insolvency procedure and enforce the debtor, contrary to all the principles that have governed and built the insolvency matter to date. In this context, we ask ourselves, what is the reason for the insolvency in the current socio-economic and legal environment? *„ If there is to be rule of law at all, there must be an effective insolvency system that requires all players to play by the rules!"* [24]

[24] Leif M. Clark, Judge and Member of the Judicial Committee of the International Insolvency Institute - https://www.iiiglobal.org/node/48

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HUMAN RIGHTS IN TIBET – AN INTEGRATING ANALYTICAL MODEL OF LEGAL AND CULTURAL FACTORS

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ABSTRACT
Human rights issues in Tibet cannot be segregated from the historical-cultural context of the region. The cultural factor must be perceived as both source and explanation of the breaches of human rights. Likewise, we identify the cultural factor as the main modeller of mental and behavioural patterns manifested within interactions between the members of local communities. In the same token, the cultural factor is the determiner of State action by reference to our subject-matter: pursuing the preservation of National Identity, State authorities will conceive a specific conceptualization of human rights that finds itself in dichotomous relations with the understanding of human rights developed by the People. Hence, the ineluctable clash between human rights, State Power and culture.

KEYWORDS: *human rights violations in Tibet; cultural factor; State Power; juridical framework; self-determination; territorial integrity.*

1. Peculiar conceptualizations and necessary segregations in the field of human rights

Of all the social-political tensions that characterize the relations China-Tibet, the subject of human rights reveals antagonistic aspects resulted from a certain perspective upon the individual and upon the community. In essence, China presents the issue of human rights protection as a desideratum that is closely connected to the fulfilment of the political objective of national unity unlike the autonomous region of Tibet which argues that the main dimension of human rights is the cultural dimension –the only dimension that is able to accommodate the right to self-determination within the international legal framework.

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In the field of human rights, the cleavage universalism-relativism encloses the antagonism of the perceptions advanced by China and respectively: devoted to cultural relativism, China opts in favour of the political feature of the thinking-pattern by virtue of which *every State shall prioritize within its domestic affairs issues that refer to maintaining sovereignty and independence, the common good overcoming individual needs*[1] meanwhile Tibet reclaims the respect for human rights considering the guarantee of cultural liberty and diversity thus getting close to the theory of human rights universalism. *Lato sensu*, the universalism thesis upholds the general character of human rights, regardless of the cultural context within which it manifests and without disclaiming the peculiarities of the latter unlike cultural relativism that prioritizes the features that were historically enforced in the conscience of Peoples to the detriment of universal moral standards that may grant rights in favour of the individual. We deem that both thesis accept and promote *the cultural factor* in the process of conceptualizing human rights but the real difficulty resides within the *importance attached to the cultural factor:* the promoter of the universalist theory upheld the pre-eminence of human rights upon the cultural factor so that human rights are seen as *a limit to cultural manifestations;* on the other hand, Asian relativists mention that human rights must be respected accordingly to the cultural peculiarities of each State. [2] Through the lenses of universalism cultural diversity exists and is granted by virtue of the respect for human rights and according to the language of cultural relativism human rights are recognized and applied following the spirit of community's culture as they do not exist through themselves as immutable landmarks but as the result of popular conscience. The influences exerted by Communism and Confucianism generate a negative perception with regard to individual rights within the Chinese community as the Chinese equivalent of the

[1] Kaiyu Shao, *EU, China and the concept of Human Rights : From a Cultural Relativism Perspective,* Master's Thesis, International School of Social Science, Lund University, 2013, p. 13.

[2] According to the thesis contained in the Bangkok Declaration regarding human rights of 1993, adopted as a consequence of the reunion that took place within the period 29 March-2nd of April between the representatives of Asian States organized according to the Resolution of the United Nations General Assembly no. 46/116 of 17 December 1991 within the context of the preparations for the International Conference upon Human Rights.

Western concept of individual rights *Ge Ren Zhu Yi* being the bearer of profound negative significance. The sole notion of *right* – that is clearly configured in the Western system of human rights protection – has no real equivalent when applied to the Chinese law system. The Chinese translation of the concept of *rights* is unclear as it is a twinning of two different notions: *power* and *interest*[3]. With the scope of undertaking governance all individual interests must be totalled; therefore, human rights exist and are recognized only when serving the common good and when endorsing State power.

The differences of perceiving human rights that spring from the comparison between communist China and religious Tibet can be related to the official doctrine stated in international discourse. Communism sustains the communitarist paradigm concerning human rights, underlining the importance of the economic dimension in relation to the civil and political freedoms; on the other hand, Tibet proclaims its autonomy on religious criteria, its political and religious identity being merged as one. The religious organization of Tibet represents the very form of State organization taking into consideration the fact that all the aspects of social life-education, health, military organization-are derived from Buddhism. The main thesis of Buddhism that are implemented within the Tibetan community consist in: (1) accepting the reincarnation of Buddha; (2) the regional-administrative organization in the form of convents; (3) identifying the religious leader by using the concept *lama* (symbolizing high priest) and recognizing him as the political leader of society.[4] On the contrary, communist atheism counterbalances any form of spirituality construing it as a source of disjunction that may attempt against the unity and integrity of the Chinese State.

2. Historical contextualization of the cultural dimension in the Sino-Tibetan conflict

The historical interpretation of the cultural factor represents the starting point of the Sino-Tibetan conflict: China affirms the inclusion of

[3] Zhang Y, *The introduction and application of the concept of "rights" in the late 19th and early 20th century's China*. Master, 2008, China University of Political Science and Law, Beijing.

[4] Andrew Todd, *The forbidden land: the position of Tibet in international law*, 1999, p. 5-6.

Tibet within its sovereignty sphere in light of the government exercised by the Ching Dynasty and also in light of the common ruling of Tibet and China by the Yuan Dynasty. The conflict between the ideologies sustained by China and Tibet is, in fact, a conflict of *factual data perception.* China upholds the territorial assimilation of Tibet by referring to the Yuan governance and, in opposition, Tibet identifies Chinese sovereignty as an unjust one taking into consideration the political-juridical criteria of their equal and common lineage of the Mongol Empire.[5] The period of the Mongol ruling proved to be nefarious for Tibet as it represented the deletion of the religious organization that existed within the region and the exile of Dalai Lama. The defeat of the Mongols and the establishment of the Manchu Dynasty has marked a new perspective upon the Sino-Tibetan relations - that were envisaged in a new dynamics during the 1720s: China and Tibet become new territories that are conquered by the Manchu Dynasty but, unlike Tibet-a region for which the new rulers depicted with difficulty a government paradigm, in China the Manchu Dynasty has auto-proclaimed itself as ruler thus expressly declaring China as the newest region that was obtained after the conflict with the Mongol Empire. [6]

The *sui generis* character of the Manchu-Tibet relations is characterized through the expression *cho-yon* which is *lato sensu* composed of two dimensions: (1) *cho-ne* – the object of a religious gift and (2) *yon-daq* – the one that offers religious gifts in favour of the spiritual leader. Applied to the relation between Dalai Lama and the Manchu Emperor, the *cho-yon* formula establishes the parameters of an interesting interaction, similar to the protectorate according to which the spiritual leader is involved in the act of ruling having the responsibility of *passing on the religious precepts* to the official leader of the State with the scope of attaining social good; on the other hand, the laic ruler has the obligation to protect religious symbols and, implicitly, he has the obligation to protect the spiritual leader.[7]

[5] Stephanie Schmitz, Ludwig-Maximilians-Universität München, Peter Charalambous Hochschule für Technik und Wirtschaft Berlin, *Study Guide. Human Rights Council,* p. 4.

[6] Andrew Todd, *cited work,* p. 6.

[7] *Ibidem*.

If we structure the relation Manchu-China in the classical terms of power, the Manchu rules, by exercising all attributes of sovereignty upon the new Chinese conquest, the relation Manchu-Tibet is thus of *sui generis* character and not a relation of vassalage nor a relation that allows the political-juridical expression of Tibet independence. The relations Manchu-Tibet are structured around the religious factor as State organization is achieved by applying *spirituality* and by implementing spirituality in State politics. The protection offered by the Manchu emperor to the religious leader of Tibet is translated in terms of officially embracing the precepts of Buddhism and their application within the process of formulating official State action. In reverse, the Chinese assimilation within the newly forged Empire is fulfilled as it is not applied religious derogation. In other terms, the cho-yon relation characterizes the XVIIIth century Tibet and it was initially based upon the religious factor being afterwards extended to the political field.

Under the Manchu Empire, Tibet presented all State attribute. Although the involvement of the conquerors in choosing religious leaders (*lama*) and in organizing international relations cannot be denied, Tibet preserved all State prerogatives in both domestic and international level. By referring to the requests exposed in article 1 of the Montevideo Convention on the Rights and Duties of States[8], Tibet is a State entity – a subject of international public law-, fulfilling the following qualifications: territory, permanent population, government and the ability to enter in relations with other States. Concerning the latter aspect, doctrinaire studies[9] notice the fact that, despite the political domination exercised upon Tibet during the Manchu Dynasty, the Tibetan region was autonomous, concluding peace treatises in the aftermath of Dogra and Gorkha confrontation as an independent subject of international law. Likewise, in the context of the aforementioned conflicts, Tibet re-orients its political interests in the sense of obtaining an improved *de facto* protection by Nepal, concluding in 1856 an agreement through which Tibet pursued to replace Manchu with Nepal in the *cho-yon* relation in

[8] *The Montevideo Convention on the Rights and Duties of States* was signed at 26 December 1933 the convention entered into force at 26 December 1934.

[9] Viktoria Gy Duda, *The Legal Status of Tibet*, p. 10-13.

order to benefit from an effective protection when occurring other armed confrontations.[10]

The deterioration of the protectorate relationship between the rulers of Manchu and Tibet was afflicted in the context of Lhasa's invasion in 1910 and also in the context of contesting the role of Dalai Lama as a religious leader. The *cho-yon* relation states, through its essence, the duty of the laic power to protect the moral-religious concepts that are officially proclaimed and disseminated by Dalai Lama; when the protector is oriented against the object of his protection, the *cho-yon* relation is unbalanced and conflict emerges between the two parties. In 1911 Tibet fights against imperial representatives and, as a result of the achieved victory, declares itself as independent in 1913 and signs, by virtue of its quality of international law subject, the *Agreement of Friendship and Alliance with Mongolia.*[11] The period between 1913-1949 is characterized by means of manifesting the de facto independence of Tibet on both external and domestic level. The Chinese political-juridical evolution has had the result of establishing Communism and in the field of Sino-Tibet relations, the Communist-nationalist doctrine has generated the Tibet invasion by the Communist forces at 7 October 1950. Pursuing the aim of justifying the violation of Tibet's independence –which expressed, at that moment, a real *status quo*,- China proposed to the Tibet government a juridical document whose content would solve the Tibet problem in favour of officially granting the autonomy of this region: The 17 Points Agreement for the Peaceful Liberation of Tibet.

3. Questioning the Statehood of Tibet. Dilemmas concerning the right to self-determination of the Tibetan People

The wording of The 17 Points Agreement for the Peaceful Liberation of Tibet underlines the fact that Chinese forces are in collaboration relations with the local forces the scope being that of reuniting the territories and the Peoples that share the same culture and lineage. The first points of the Agreement mention Tibet's attachment towards China being expressed the engagement of Tibet in the sense of excluding hostile forces from the territory in order to achieve the return to the main State,

[10] *Ibidem.*
[11] Viktoria Gy Duda, *cited work*, p. 13.

in return China engages to implement the measures established in the Common Programme of China's Consultative Politics Conference. The latter *ensures Tibet's right to exercise national regional autonomy under the ruling of the central government.* Points 4-7 of the Agreement resume the dispositions regarding the religious liberty of Tibet thus granting the authority of religious leaders and the autonomy of settlements of worship. According to article 8 of the Agreement, Tibetan troops will be assimilated to national defence troops and point 15 of the Agreement states the inclusion of the Tibetan personnel in the military-administrative organisation imposed by the Chinese rule, hence allowing the Tibetan population to maintain its national peculiarities. Article 11 of the Agreement stipulates the idea according to which Tibet will be the author of its own reforms subjecting to the reforms of central authorities only as long as it is reasonable, without the use of force by central authorities in the scope of submitting the indigenous population.

In light of the previously presented dispositions, the Agreement for the Peaceful Liberation of Tibet represents a juridical document by virtue of which China aimed to formally obtain control over Tibet through non-violent means, granting in exchange the religious freedom of the Tibetan region. In essence, the 1951 Agreement advanced the conciliation of both parts: China fulfilled the desideratum of its political-juridical reunification meanwhile Tibet remained religious independent protecting in this way its cultural peculiarities. The order that emerged out of the new regulation of Sino-Tibetan relations was mainly a reiteration of the *cho-yon* relation that was previously established between Tibet and the Manchu Empire: in both cases was granted the de facto independence of Tibet and its religious autonomy, the main difference consisting in the fact that in the case of *cho-yon* relation Manchu was the protector of Tibet but in the relation extracted from the Agreement for Peaceful Liberation, China engaged to recognize the religious autonomy of Tibet in the context of affirming its national identity as being an integral part of China.

China's violation of the Agreement for the Peaceful Liberation of Tibet has generated a conflictual state which, in return, was the starting point for formulating and applying the policy for breaching human rights in Tibet. In the given context, the intervention of the international community was necessary for re-defining the Sino-Chinese relations and for settling the conflict. The Resolutions of United Nations General

Assembly no. 1353/1959, no. 1723/1961 and no. 2079/1965[12] represent programmatic documents that reiterate the fundamental juridical value of *international law principles contained within the Charter of the United Nations Organisation* and in *the Universal Declaration of Human Rights*, stimulating the application of these principles in regard to the Tibetan problem with the aim of granting the fundamental rights and freedoms of the indigenous population. The three resolutions do not analyse the historical and cultural reasons of the Sino-Tibetan conflict and do not establish juridical arguments in favour of recognizing Chinese sovereignty or the Tibetan autonomy; the common content of these resolutions is oriented towards *highlighting the critical situation of violating human rights in Tibet and also the situation in the field of the limits concerning the cultural peculiarities of the region.*

As it is not clearly solved by means of the resolutions of the United Nations Organisation, the problem of Tibet remains a subject circumscribed to international law that requires a technical and rigorous approach. As we have previously mentioned, the resolutions exposed in the lines above present *juridical instruments that are destined to solve the Tibet problem,* the final solution being assigned to the international community.

The Charter of the United Nations Organisation establishes in *Chapter I-Purposes and Principles* the supreme juridical values that must guide the activity of States at the international level: peace, self-determination, cooperation between Member States by virtue of recognizing their equality and sovereignty. Likewise, according to the provisions of the Charter, the respect for human rights and fundamental freedoms is *sine qua non* and is bound to be granted in an equally and non-discriminatory manner. Following the juridical philosophy initiated through the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights guarantee in article 1 the *right to self-determination* which establishes two juridical coordinates: (1) the right of Peoples to determine their own political status and (2) the right of Peoples to determine their economic, social and cultural path.

[12] *International Resolutions and Recognition on Tibet (1959 to 2004),* Department of Information and International Relations, Central Tibetan Administration, p. 12-14.

The problem of Tibet-although it is in connection to the aforementioned juridical documents, exceeds their framework and requires the application of an intricate juridical analysis within which are merged several hybrid elements. On one hand, the arguments brought in favour of Tibet's existence as an autonomous political-juridical entity –that calls for official recognition at the international level; on the other hand, Tibet is endowed with autonomy and the right to self-determination – prerogatives that are already recognized by the international community. As we have already mentioned in the previous lines, Tibet fulfils the criteria of Statehood enounced in the Montevideo Convention as it has an autonomous territory, indigenous population, an autonomous government and the capacity to engage itself on the level of international relations (until the moment of signing the Agreement on Peaceful Liberation). Likewise, the characteristic of Statehood attached to Tibet is, in light of the Montevideo Convention, a political-juridical reality derived from the cumulative fulfilment of the aforementioned conditions, as Statehood is not a status that is subjected to recognition/validation within international community. In the wording advanced by article 3 of the Convention, *The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.* By abiding by the dispositions of article 3 of the Montevideo Convention in regard to the factual situation in Tibet, it cannot be denied that from 1913 (the moment of declaring independence) and until 1950 (the moment of the Chinese invasion) Tibet was independently organized, as it has undertaken domestic and international activity with the purpose of fulfilling the objective of affirming and protecting spiritual liberty.

The internal organization of Tibet of religious nature does not defy the Statehood characteristics and the undertaken actions during the autonomy period were not realized in the sense of damaging the characteristics of Statehood of any other subject of international law (we retain in this sense the fact that Tibet did not engage in military actions against China).

The effective application of article 3 of the Montevideo Convention will be achieved by its corroboration with the provisions of article 6 that explain the juridical consequences of the recognition and its importance in crystallizing a State entity at the international level: *The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.*

Transposed to the problematic of Tibet, the problem of international recognition exists in relation to the State that *denies Tibet's statehood* (in particular China); by reference to other States of the international community, Tibet's Statehood is not a problem *per se* as long as article 6 of the Montevideo Convention does not place in direct relation Statehood and *the problem of recognition from part of the international community.*

In the given context, the non-recognition of Tibet by China has become an international problem due to the privileged status of China at the level of international community-that is the status of Member State to the United Nations Organization and main partner at the commercial relations of cooperation with the Western World.

Equally, the adhesion of other States to the policy formulated by China with regard to the non-recognition of Tibet independence is generated by all economic interests that exist in the region. As was noted by doctrinaire studies[13] the official position presented by Great Britain in regard to the Tibet problem resides in the content of the Simla Agreement thus the representatives of Great Britain propose a compromise solution between the requests of absolute independence of Tibet and the Chinese request of recognizing Tibet as an internal part of the Chinese State, upholding the justification of the common Sino-Tibetan cultural heritage. On the occasion of signing the Simla Agreement, Great Britain has introduced the concept of *suzerainty* – thus accepting the exercise of the Chinese ruling as a form of *suzerainty* upon the Autonomous Region of Tibet (the external Tibet); upon the internal Tibet (provinces Kham and Amdo) would be exerted the Chinese *sovereignty.*

In all case, none of the two regions of Tibet were not transformed in Chinese provinces, being under the *religious authority of Dalai Lama.* The territorial identification of Tibet was connected, through history, to

[13] Background Briefing Paper No. 2 for Scottish Parliament's CrossParty Group on Tibet, *The Sino-Tibetan Dispute - Issues of Sovereignty and Legal Status,* p. 10.

the following three regions: U'Tsang, Amdo and Kham. After the Tibet invasion in 1950, Amdo and Kham were incorporated in the Chinese provinces Sichuan, Qinghai, Gansu and Yunnan and U'Tsang is the province which was recognised by the Tibetan People as the Autonomous Region of Tibet; *lato sensu, the Tibet problem comprises both the Autonomous Region and the Tibetan territories that are assimilated to Chinese provinces.*[14]

The Tibetan People right to self-determination is based on the correlated interpretation of the most relevant articles of the United Nations Charter. If articles 1 and 55 of the Charter regulate the right to self-determination as an essential juridical value that is oriented towards developing good relations between the members of the international community, articles 73 and 76 regulate concrete means of applying the right to self-determination in the sense of *ensuring self-governance according to the political aspirations of the People, by considering the peculiarities of the territory and of the People.*

Doctrinaire studies[15] postulate a comprehensive understanding in reference to the problem of self-determination thus firstly recognizing the *collective dimension of the right to self-determination as it is prescribed in favour of Peoples* and, secondly recognizing that the rights to self-determination has an ample space of action, being *exerted by the colonized and non-colonized Peoples.*

The difficulty of concretely applying the right to self-determination subsists in an implicit manner, being strongly connected to the difficulty of defining *the People* as the titular of the right to self-determination. Observing the lack of a unanimously accepted conceptualization referring to the term *People* at the level of the international community, the United Nations Organization has developed a series of objective features that together create the hypothesis of the People as a titular of the right to self-determination: *(1) a common historical tradition; (2) a racial or ethnic identity; (3) cultural homogeneity; (4) linguistic unity; (5) religious or ideological affinity; (6) territorial connection; (7) com-*

[14] Tibet Society, *The Human Rights Situation in Tibet 2013-2016,* London, Baltic Place, 2016, p. 2.

[15] *Tibet: the position in international law, with special reference to the principle of self-determination*, National Law University Jodhpur, 2013, submitted by Shashwat Dev, Advaiyot Sharma, p. 7-8.

mon economic life. [16] Nevertheless useful, the criteria formulated by the United Nations Organization are insufficient for the practical identification of *the People* because they do not reach the *subjective* and *inter-subjective* dimension relating to *the solidarity between the members of a human group that fulfils all the objective criteria previously stated*, respectively *the criteria referring to belonging to a group that, from the public international law perspective fulfils the necessary requirements in order to be considered a People.*

Being circumscribed to the subjective dimension, the feeling of belonging is a criterion that is difficult to prove by comparison to other material elements identified by the United Nations Organisation; nevertheless, a meaningful aspect in the field of scientifically demonstrating the existence of the Tibetan People from a subjective and inter-subjective perspective is given by the adoption of the *Charter of Tibetans in Exile*[17] – a document that is granted mandatory juridical force by the Tibetan government in exile and a document that circumscribes the fundamental principles and rules applicable to the Tibetan People having the aim of protecting the traditional and spiritual heritage, of promoting the consolidation of solidarity between the members of the Tibetan community and also having the aim of constituting a democratic governance system that will be compatible to the modern ideals of the Tibetan People. We observe that in Chapter I-Fundamental Principles, article 4 – The Principles of the Tibetan Administration, the Charter of Tibetans in Exile states the essential prerogatives of the regulation framework *the promotion of the moral and material well-being of the Tibetan people, the safeguarding of their social, cultural, religious and political rights, and in particular, the ultimate achievement of their common goal*. These latter values reiterate the content of *the right to self-determination* as is it presented in article 1 of the two International Covenants.

The affirmation of the rights to self-determination and, *in extenso*, the legitimacy of the Charter of Tibetans in Exile are aspects that are treated on the background of *the juridical engagements previously taken by Tibet by virtue of the Peaceful Liberation of Tibet Agreement in 17 points*. In

[16] UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: FinalReport and Recommendations (1990).

[17] Document adopted at the 11th Assembly of Tibetan Deputees on 14 June 1991 in the second day of the fifth Tibetan month of the Royal Tibetan Year 2118.

other words, the resurgence of the following dilemma in the context of international public law is justified: *the Tibetan manifestations of exercising the right to self-determination may be viable if by means of a previous international treaty (the Agreement of Peaceful Liberation) is recognized the Chinese domination?*

In regard to the previously stated problem, doctrinaire studies respond with three observations: (1) the Peaceful Liberation of Tibet agreement was signed by the Tibetan representatives under duress thus breaching the dispositions of article 2 paragraph 4 of the United Nations Organisation Charter according to which are forbidden force and threat of force against territorial integrity or political independence of States; (2) in light of the provisions of article 52 of the Vienna Convention on the Law of Treaties the coercion of a State achieved by force or threat of force is a nullity cause; in the analysed situation, the military invasion of Tibet has constituted the political-juridical circumstance of concluding the Agreement of Peaceful Liberation - the use of force being a means of coercion of Tibet representatives; (3) the nullity of a treaty concluded under duress cannot be achieved through applying it like the existence and activity of a State that is *de facto* independent cannot be denied through military occupation undertaken by another State; in the same spirit, the resolution of General Assembly no. 2625/1970 condemns the use of force that has the purpose of territorial extension, mentioning that *no territorial acquisition achieved by force or threat of force would be appreciated as legal.*[18]

China's opposition towards the validation of the right to self-determination of the Tibetan People is formulated according to the principle of territorial integrity, reclaiming the prioritization of territorial integrity when discussing the cleavage between the right to self-determination and territorial integrity. To place in opposition the argument of territorial integrity and the right to self-determination implies *the ranking of the two principles through means of international law.*

[18] Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, Emory International Law Review, Boston University School of Law, Working Paper Series, Public Law and Legal Theory, Working Paper, 2002, no. 06-44, p. 151-155.

By means of Resolution no. 2625/1970[19] of the General Assembly is approved the final text of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The Declaration consecrates the *principle of equality between Peoples and the People's right to self-determination*, establishing *in expressis* the obligation of every State to promote individually and in conjunction with other States the values of *equality* and *self-determination* of Peoples; in particular, every State has the obligation to hold back from undertaking actions that may lead to divest Peoples of their right to self-determination, liberty and independence. Thus, in the wording advanced through the resolution of the General Assembly, the right to self-determination is valued at the international level as a *principle that guides inter-state relations* - a principle whose content is bound to be fulfilled by the members of the international community by any legal means. The latter share in relation to the right to self-determination, both *in abstinendo* and *in faciendo* obligations. Regarding the manner of solving the cleavage between the right to self-determination and territorial integrity, the text of the resolution leans in favour of the right to self-determination, mentioning that, granting the principle of self-determination cannot be construed in the sense in which are violated the independence and territorial integrity of States that act according to the right to equality and self-determination. In other terms, territorial integrity cannot be abusively invoked to the detriment of the right to self-determination; territorial integrity is guaranteed as long as State acts and consolidates its position *with respect for equality and self-determination.*

Analysing the dispute between the right to self-determination reclaimed by the Tibetan People and China's territorial integrity requirement doctrinaire studies[20] reach the conclusion according to which *self-determination overrides territorial integrity as the first derives from the legitimacy of governance and territorial integrity is a consequence of*

[19] The Resolution of the General Assembly of the United Nations Organisation, adopted with regard to the report of the 6 committee within the 25 session on 24 October 1970.

[20] Tibet Justice Center (Andrew G. Dulaney and Dennis M. Cusack) And Unrepresented Nations and Peoples Organization (Dr. Michael van Walt van Praag) For The Tibetan Parliamentary and Policy Research Centre, Update added by Tibet Justice Center, 2013, p. 64.

lawful governance. In this particular case, the claim of self-determination will be satisfied *with* preeminence by comparison to other requests referring to territorial integrity if the claim of territorial integrity is formulated with the aim of serving the People. [21]

4. Some comments concerning the cultural identity of the Tibetan People

The undermining of the right to self-determination of the Tibetan People by using force and the threat of force from the part of Chinese authorities represents a reality that has generated many repercussions in the field of human rights. As there cannot be denied the connection between *collective and individual rights,* it is clear that undermining the right to self-determination has negatively influenced the sphere of individual rights, hence simultaneously producing the de-construction of the Tibetan cultural identity and the questioning of the membership community. The de-construction of the Tibetan cultural identity instrumented by China through the *three pillars politics: military occupation, colonial ruling and intimidation*[22] must be regarded in an ambivalent manner: China sustains the return of Tibet to its cultural origins and the territorial reintegration of Tibet within its motherland meanwhile, for Tibet, the denial of its cultural identity entails its reduction to *terra nullius.* At the level of international doctrine, the emergence of *terra nullius* is in strict connection to *the status quo of colonized Peoples*. The concept of *terra nullius* contains concrete indications that evoke the situation of *lack of property titles on land,* without making express references to the status of Peoples that live on that particular territory. The term was established in 1835 and it refers to the situation that existed in Australia – where territories were not in the property of any individual as they were acquired by colonizers and exploited especially in economic interests. [23]

By transposing the *terra nullius* paradigm to the situation of the Tibetan People, we observe an unaltered logic: Tibet's territory is noto-

[21] *Ibidem*.

[22] Xi Jinping's Tibet Challenge. 60 Years of Failed Policies in Tibet, International Tibet Network, 2012, p. 2.

[23] Mark Kernan, *The Displacement of Tibetan Nomads, International Law and the Loss of Global Indigenous Culture,* Global Policy Essay, University College Cork Ireland, March 2013, p. 2.

rious to the international community being reclaimed its possession by the Tibetan People; nevertheless, in exchange of its economic exploitation by the Chinese authorities, it is undertaken the cultural de-construction of its identity and the depiction of Tibet (in a formal manner within international relations) as *terra nullius* –a concept that cannot subsist in absence of the Chinese officials. The de-construction of the Tibetan cultural identity is achieved on multiple levels: from the de-construction of the religious nucleus, to the denial of the authenticity of the indigenous population - a fact that lead to its dislocation and its replacement with Chinese population, until the supreme denial of the Tibetan People's rights through the upholding of self-immolations.

In the religious field, Buddhism is the essence of the spirituality of the Tibetan People. The Decade of Cultural Revolution (1966-1976) orchestrated by Mao Zedong has undermined religious freedom by means of destroying places of worship and through politics of discouraging Buddhism. The control of Tibetan spirituality has continued through the next period of the Cultural Revolution reaching the highest form in the moment of organizing official authorities that may regulate in detail the limits of exercising religious liberty. In the year 2007, the Bureau of Religious Affairs of the Chinese State issues Order no. 5 which establishes the request of submitting the recognition of reincarnations of Buddhist religious authorities by the Chinese authorities hence sets under Chinese control the validity of Dalai Lama's reincarnations.[24]

The Chinese opposition to Tibetan religious manifestations has generated a *sui generis* violation of human rights in the Tibetan region under the form of self-immolations. Common sense describes self-immolations as victim's suicide by means of setting oneself on fire with the purpose of reaffirming Buddhist beliefs and also with the purpose of advocating in favour of Dalai Lama's return to Tibet. Acts of self-immolation – as specific protest acts undertaken in Tibet on account of the desire to preserve the religious credo of the population-were qualified by doctrinaire studies[25] as *acts of non-violent resistance.*

[24] Canada Tibet Committee, *Violations of the Human Right of Freedom of Religion in Tibet*, 6th Annual Parliamentary Forum on Religious Freedom, 2017, Ottawa, Ontario, 2017, p. 2.

[25] John Soboslai, *Violently Peaceful: Tibetan Self-Immolation and the Problem of the Non/Violence Binary*, De Gruyter Open Access, Open Technology, University of California, Santa Barbara, 2015, p. 146.

Traditionally, democratic society is connected to the *individual's rights to freely exert their religious belief and, implicitly, it is connected to the individual's right of resisting towards the government's act that are considered authoritative by the People.*

The right of the individuals of manifesting their opinions and of implicitly exercising State Power derives from the provisions of article 2 of China's Constitution[26] that stipulates that *all power in the People's Republic of China belongs to the People and is exercised through specific organs of State Power like the National People's Congress and Local People's Congresses*. The second thesis of article 2 of the Constitution allocates to the People the essential prerogatives of management in the main fields of social life: economic, cultural and social. The cited dispositions are bound to be systematically construed in corroboration to the dispositions of article 4 that establishes the principle of *equality between the lawful interests and rights of Chinese national minorities.* By consequence, the freedom of organising cultural life subsists inclusively at the level of national minorities as they are offered the constitutional guarantee of implicitly exercising self-immolations.

Self-immolations represent, in the Tibetan culture, *sui generis* protest acts because their *concrete form of manifestation does not entail violence upon order forces but it signifies aggression aimed against oneself with the purpose of affirming religious identity.* In return, violence manifested upon oneself is a particular one as it only affects the body of the victim; on the other hand, from a psychological point of view, the act of self-immolation has positive repercussions upon the *inner forum (psychological) of the victim* representing for the victim a form of reaffirming its religious credo by contrast to the repressive acts of government. Within the act of self-immolation, violence acquires a symbolic dimension - thus it evokes *the violence exercised by Chinese authorities upon the Tibetan People;* hence, violence entailed by self-immolation is, as retained by doctrinaire studies, a form of violence *of descriptive and historic nature* although it has various forms of

[26] Constitution of the People's Republic of China, adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on December 4, 1982 and revised in 1988, 1993, 1999 and 2004.

manifestation comprised within the concrete reality.[27] The external burning of the victim is a form of expressing the inner combustion generated by the denial –from the part of the Chinese authorities, - of the right to religious freedom of the Tibetan People. From the first forms of self-immolations - the moment of April 1998, India - self-immolations were attached to *pawo*[28] *(heroes)* being assimilated to the acts of *Khachem (a cultural testament)* by means of which the victim desires to ensure her contribution to the fulfilment of the common desideratum of Tibetan – that of conserving the continuity of Tibetan religion and of conserving its cultural peculiarities.

Having presented the politics of violating the cultural peculiarities of the Tibetan People, doctrinaire studies[29] have argued that there are fulfilled all the juridical premises for the existence of *cultural genocide;* corroborating the informations previously exposed, the acts of self-immolation are popular reactions to the acts of genocide.

It is worth mentioning some observations referring to the qualification of the Chinese oppression as acts of *cultural genocide.* Firstly, article 6 of the Statute of the International Court of Justice[30] defines the crime of *genocide* as *any acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.*

The aggressions committed by the Chinese government against Tibet may be circumscribed to the content of the criminal offense of *genocide*

[27] John Soboslai, *op. cit.*, p. 147.

[28] For further details concerning the manner of undertaking the self-immolation rituals please see Tsering Shakya, *Self-Immolation:the Changing Language of Protest in Tibet*, Institute of Asian Research, University of British Columbia, p. 19-39.

[29]Jaspreet K. Sandhar, *Cultural Genocide in Tibet:The Failure of Article 8 of the United Nations Declaration on the Rights of Indigenous Peoples in Protecting the Cultural Rights of Tibetans*, Santander Art and Culture Law Review, no. 2/2015, School of Law, Birkbeck College, p. 175-198.

[30] Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

in the understanding of article 6 of the Statute of the International Criminal Court nevertheless, we observe that the main limitation to circumscribing these acts of aggression to the content of crime of genocide resides, *in the absence of the condition regarding the intent to destroying the religious group that makes the object of aggression*. In our opinion, although the Chinese action of invading Tibet was achieved through *acts of violence similar to those contained within the crime of genocide*, the aim pursued by the Chinese invaders is constituted of *maintaining the Tibetan population, of its forceful assimilation and of the re-insertion of the Tibetan People in the Mother Land.*

Secondly, we retain that *the destructive aspect of the actions undertaken by Chinese representatives refer to immaterial aspects of the Tibetan People (lato sensu - the cultural aspect and stricto sensu-the religious aspect).* It is not a lesser truth the fact that the destruction pursued by China considered the Tibetan People as a religious group *in its spiritual dimension;* once the latter aspect was de-crystallized *the assimilation of the Tibetan People became effective.* Although at the international level, by means of the undertaken legal engagements China prioritizes economic, social and cultural rights[31], being a State Party to the International Covenant specialized in these matters; at the level of national legislation, civil and political rights[32] are represented in articles 35 and 36 of the Constitution.

Thirdly, the de-construction of the cultural identity of the Tibetan People is an action that implies the notion of *cultural genocide* thus generating the violation of some norms whose *prima facie configuration* at the level of international community is *qualified as jus cogens norms:* freedom of expression, freedom of the press, freedom of association, of undertaking demonstrations, religious freedom (consecrated in articles 35-36 of Chinese Constitution). The violation of the cultural rights of the Tibetan People leads to a double breach of *jus cogens* rules : (1) on one hand we take into consideration the rules approved by the international community representing the legal framework in the field of genocide crime; (2) on the other hand, the violation of the cultural autonomy of the

[31] China signs the International Convenant for Economic, Social and Cultural Rights in 1997 and ratifies it in 2001.

[32] China signs the International Convenant for Civil and Political Rights in 1998, without ratifying it up to the present.

Tibetan People is *an immaterial aggression* that contravenes to *jus cogens* norms transposed in the field of domestic legislation comprised in articles 35-36 of the Constitution.

In supporting the objective of *cultural de-construction of the Tibetan People,* China implements concrete means of action as *the displacement of indigenous population* and *the practice of inserting the Chinese population in the territory.* Both actions are justified by reference to the argument of technical-economic development of the Tibetan region; nevertheless, *in concreto* these violate the fundamental cultural rights of the population. Doctrinaire studies[33] present the economic motivation invoked by China as pretence for violating human rights in Tibet; likewise, it is acknowledged that this pretence is in strict connection to *State's right to industrial development.* The semi-nomad way of life of Tibetans contravenes to the ambitions of introducing high technology to Chinese society, thus representing a serious limitation to State development and technical progress.

5. Conclusions

Within the given logic, the expulsion of Tibetan population and the replacement of this cultural segment with Chinese population is a minimal action that is necessary for achieving Common Good. The practice of displacing Tibetan population comprises, in addition to the material dimension, an obvious cultural dimension that entails *a clear delimitation in various aspects of social life in Tibet: from the language to the manner of organizing educational programs and of exploiting terrains.* All in all, *the displacement of Tibetan population is the expression of displacing the language, education and specific manner of living.*

By acknowledging *inter alia* the real threat generated by the displacement of the Tibetan population upon the preservation of the Tibetan culture, the international community adopts the *Declaration on the Rights of Indigenous Peoples*[34] – a document that consecrates the *right of indigenous Peoples of not be subjected to forced assimilation or*

[33] Mark Kernan, *The Displacement of Tibetan Nomads, International Law and the Loss of Global Indigenous Culture*, University College Cork, Ireland, Global Policy Essay, p. 7.

[34] Resolution no. 61/295 adopted by the General Assembly United Nations Declaration on the Rights of Indigenous Peoples.

destruction of their culture (article 8, paragraph 1). The Declaration represents the legal instrument by means of which the States that have positively advised its content (including China) are bound to develop efficient mechanisms for preventing or redressing specific situations of violating the rights of indigenous Peoples some being mentioned in article 8, paragraph 2, letters *b* and *c* that refer to situation *that have the scope or the effect to deprive the indigenous People of their land, territories or resources* and circumstances *of forceful transfer of the population that have the scope or the effect the violation or undermining of the rights of the indigenous Peoples.*

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LEGAL FRAMEWORK OF THE COORDINATION OF SOCIAL SECURITY SYSTEMS BETWEEN THE EUROPEAN UNION AND THE SWISS CONFEDERATION

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ABSTRACT

The most important right of the European citizen, which is the right to free movement, necessarily determines the regulation of the adjacent aspects closely related to the freedom of movement, establishment and exercise of a gainful activity in several countries. These aspects refer primarily to the recognition of diplomas, qualification certificates and professions, the coordination of social insurance systems and the right to acquire real estate in the new country of residence. These aspects regulated at the level of the European Union for the citizens of the Union, were also addressed and regulated in the Bilateral Agreement on the free movement of persons between the Swiss Confederation on the one hand and the European Union and the Member States on the other.

KEYWORDS: *free movement; migration; coordination of social security systems.*

INTRODUCTION

The Agreement between the Swiss Confederation on the one hand and the European Union[1] and the Member States, on the other hand, regarding the Free Movement of Persons, signed in Luxembourg in the first package of Bilateral Agreements on June 21, 1999, has been applied since June 1, 2002 and has been extended to the EU countries subsequently acceded by three Additional Protocols: Protocol I signed on October 26, 2004 and entered into force on April 1, 2006 for the Member

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[1] approved on behalf of the European Community by Decision 2002/309/EC Euratom, of the Council and - concerning the Agreement on scientific and technological cooperation - of the Commission of 4 April 2002 on the conclusion of seven agreements with the Swiss Confederation, JO 2002, L 114, p. 1, Special edition, 11/vol. 27, p. 25

States of the European Union that acceded on June 1, 2004[2], Protocol II signed on May 27, 2008 and entered into force on June 1, 2009, for the Member States of the European Union that acceded on January 1, 2007[3] and Protocol III signed on March 4, 2016 and entered into force on January 1, 2017, for the newest Member State of the European Union which acceded on June 1, 2013[4].

The bilateral agreements represent the solution found by the Swiss state to benefit from the economic benefits of the union, to participate in joint research programs, professional training, cultural, cooperation in the fight against crime, access to informative and statistical databases. The bilateral are advantageous also due to the geographical location of Switzerland, which is totally surrounded by the member states of the Union, the neighbouring countries being the first with which the relations of economic, social and cultural cooperation of any state are developed.

The Court of Justice of the European Union considered the right to free movement of persons as "the greatest possible freedom"[5], as formulated in the first preliminary case, the Hoekstra case of 1964[6].

This idea was developed by some authors who consider that the free movement of persons, as a fundamental freedom in Union law, was practically conceived as the free movement of the labour force in order to achieve an internal labour market and to realize the concept of the European citizen, being at the same time a mechanism for compensating the unemployment in some states with the need for labour force in other states[7].

Other authors agree that starting with the fact that integration at European Union level is a dynamic and lasting process, as well as the fact that the prohibition of discrimination on the grounds of nationality is

[2] extended to the new Member States of the European Union, which joined on June 1, 2004, namely the Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, Hungary, (for Cyprus and Malta already applies since 2002)

[3] also extended to Bulgaria and Romania, which became members of the European Union on January 1, 2007

[4] extended to Croatia which became a member of the European Union on June 1st 2013

[5] Thomas Burri, The Greatest Possible Freedom, Interpretive formulas and their spin in free movement case law, Nomos, Baden-Baden. Germany 2015

[6] Case *Hoekstra* C-75/63

[7] Voiculescu, Nicolae, *Protectia internationala drepturilor omului (International protection of human rights)*, Hamangiu Publishing House, Bucharest, 2017, p. 167.

the basic right and principle of the Union, the concept of citizen of the Union is realized through the free movement of persons[8] and the consecration of free movement for the economic integration of the Member States[9].

However, we appreciate that for Switzerland, a non-member state of the European Union, the reason for the agreement with the EU and the Member States of the Agreement on the free movement of persons, which also involves the coordination of social security systems according to EU norms, was neither integration into the EU nor aspiration for EU citizen status, but for collaboration with EU Member States and participation in EU programs from a more advantageous position than that of a third state in relations with the EU.

The agreement between the European Union and Switzerland on the free movement of persons [10] practically re-establishes the basic rights regarding the right of entry and exit from the country, the right of establishment, the right to perform a paid or independent gainful activity, the right to family reunification and the right to study of the European citizens on the territory of Switzerland and in a reciprocal manner of the Swiss citizens on the territory of all the Member States of the Union.

In addition to these basic rights, the Agreement also provides for other adjacent rights that come in the realization of the main rights and which refer to the mutual recognition of diplomas, professional qualifications and professions, to the coordination of social insurance systems and to the rights of those who have acquired a right of residence to acquire real estate under the same conditions as the citizens of the host state.

For the purpose of the normative coordination, the Agreement provides for measures to be applied to the EU acquis and the possibility for Swiss representatives to participate, as observers, without vote, in the meetings of committees and expert groups on research topics, social

[8] Höfler, Rosemarie, *Die Unionsbürgerfreiheit*, Ed. Duncker & Humblot, Berlin, 2009, p. 209 (Freedom of Union citizens)

[9] Fischer, Peter und Köch, Heribert Franz, *Europarecht*, Linde Verlag, Wien, 1997, p. 522 (European Union law)

[10] *Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons*, OJ L 353, 31.12.2009, p. 71-90, (OJ L 114, 30.04.2002, p. 6-72, Document 22002A0430(01)

security for migrant workers, asylum, mutual recognition of diplomas of higher education and air transport[11].

Coordination of social security systems within the EU - CH Agreement on the free movement of persons

At the EU level, the concept of social security started from the idea of protection[12], later reaching the creation of different national social security systems at the level of the Member States and the conclusion of bilateral[13] and multilateral[14] agreements, in order to coordinate them.

The coordination of the social security systems provided by the Agreement of the European Union with Switzerland on the free movement of persons aims to prevent the employees from losing their social rights acquired from working in another country, respectively taking into account the time periods worked and on the territory of the other states when they come to benefit from social security benefits. To this end, by coordinating social security systems, this agreement regulates the equal treatment, the applicable law, the calculation of all periods of benefits, the payment of benefits and the cooperation between authorities and institutions in relation to the rights and obligations of social security.[15].

In the Annex II of the Agreement of the European Union with Switzerland on the free movement of persons, it is stipulated that

[11] Idem, Final declarations

[12] Vicki Paskalia, *Free Movement, Social Security and Gender in the EU*, Ed. Oxford and Portland, Oregon, 2007, p. 18, 32, 48

[13] 15.04.1904 France-Italy, 31.07.1912 Germany-Italy etc.

[14] 07.11.1949 Belgium, France, Great Britain, Luxemburg and the Netherlands etc.

[15] *Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons*, OJ L 353, 31.12.2009, p. 71-90, (OJ L 114, 30.04.2002, p. 6-72, Document 22002A0430 (01), Article 8, Coordination of social security systems: The Contracting Parties shall adopt provisions, in accordance with Annex II, for the coordination of social security systems, in particular for the purpose of: (b) to determine the applicable law; (c) to total, for the purpose of acquiring and maintaining the right to benefits, as well as to calculate these benefits, all the periods taken into account by the national law of the countries in (d) to pay benefits to persons resident in the territory of the Contracting Parties (e) to promote mutual administrative assistance and cooperation between authorities and institutions.

regarding the social security systems, three normative acts of the European Union law referred to in the Section A[16] will be applied on the territory of the Member States of the Agreement, acts in which, together with the Member States of the Union, Switzerland shall be specified, respectively (1) Regulation (EEC) no. 1408/71 on the application of social security schemes in relation to the employed workers and their families moving within the Community[17], (2) Regulation (EEC) no. 574/72 laying down the rules for its application and (3) Directive 98/49/EC on the protection of the right to supplementary pension. In addition to these three applicable acts, the EU acts provided for in Section B will be taken into account and the EU acts provided for in Section C will be taken into account, as these acts are in force at the date of signature[18].

In conclusion, the Union law regarding the social security related to the free movement of persons and the coordination of the social security systems, applies with certain amendments also to Switzerland, respectively to the nationals of the member countries in the territory of the

[16] (1) 371 R 1408 : Regulation (EEC) no. 1408/71 of the Council of 14 June 1971 on the application of social security schemes in relation to employed workers and their families moving within the Community, updated,

(2) 372 R 0574: Regulation (EEC) no. 574/72 of the Council of 21 March 1972 laying down the rules for the application of Regulation (EEC) no. 1408/71 on the application of social security schemes in relation to employees and members of their families moving within the Community,

(3) 398 L 49: Council Directive 98/49/EC of 29 June 1998 (OJ L 209, 25.07.1998, p. 46) on the protection of the supplementary pension right of employed persons and self-employed persons moving within the framework of Community.

[17] Regulation no. 1408/71 was repealed and replaced, starting May 1, 2010, by Regulation no. 883/2004 which in art. 90 (1) states that Regulation no. 1408/71 remains in force and continues to have legal effects within the meaning of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994, L 1, p. 3, Special Edition, 11/vol. 53, p. 4) and al. Agreement between the European Community and the Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons (OJ L 114, 30.04.2002, p. 6-72), and other agreements which include a reference to Regulation (EEC) no. 1408/71, as long as these agreements were not modified by the new regulation.

[18] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons, OJ L 353, 31.12.2009, p. 71-90, (OJ L 114, 30.04.2002, p. 6-72, Document 22002A0430 (01), Appendix II

signatory states, that is both in the territory of the Swiss Confederation and in the territory to the members of the EU, as they join the EU.

With regard to Romania, these provisions apply in the relations with Switzerland from June 1, 2009, once the Additional Protocol II signed on May 27, 2008[19] entered into force. This Additional Protocol II also brings an update of the provisions of the Union applicable to the coordination of the social security systems between the states of the European Union and Switzerland, namely the applicability of Regulation (EC) no. 631/2004 of the European Parliament and of the Council of 31 March 2004 on social security and relations with Switzerland[20].

These provisions were subsequently supplemented at European Union level with Regulation (EC) no. 883/2004[21] amended by the Regulation (EC) no. 988/2009[22] on the coordination of social security systems and the Regulation (EC) no. 987/2009 regarding the implementation procedure[23], acts with implication for both the European Economic Area[24] and Switzerland. For the EU Member States, these new regulations have been

[19] Which extended the provisions of the Agreement also on Bulgaria and Romania, which became members of the European Union on January 1 2007

[20] Regulation (EC) no. 631/2004 of the European Parliament and of the Council of 31 March 2004 amending Regulation (EEC) no. 1408/71 of the Council on the application of social security schemes in relation to employed workers, self-employed workers and members of their families moving within the Community and Regulation (EEC) no. 574/72 of the Council establishing the rules for the application of Regulation (EEC) no. 1408/71 on aligning rights and simplifying procedures (Text with EEA and Switzerland relevance), Document 32004R0631

[21] Regulation (EC) no. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with EEA and Switzerland relevance), OJ L 166, 30.04.2004, p. 1-123, Document 32004R0883

[22] Regulation (EC) no. 988/2009 of the European Parliament and of the Council of 16 September 2009 amending Regulation (EC) no. 883/2004 on the coordination of the social security systems and of the content of its annexes (Text with EEA and Switzerland relevance), OJ L 284, 30.10.2009, p. 43-72, Document 32009R0988

[23] Regulation (EC) no. 987/2009 of the European Parliament and of the Council of 16 September 2009 establishing the procedure for the implementation of Regulation (EC) no. 883/2004 on the coordination of social security systems (Text with EEA and Switzerland relevance), OJ L 284, 30.10.2009, p. 1-42, Document 32009R0987

[24] Norway, Iceland, Lichtenstein

the new regulatory framework since May 1, 2010[25] while for Switzerland they entered into force on April 1, 2012[26].

Regarding the bilateral Agreements concluded by Switzerland previously, directly with certain Member States, in the field of social security, the provisions regulating the same field are suspended and the other provisions apply only insofar as they do not contravene the Agreement concluded with the EU, as they will be subordinate to the provisions of this Agreement which prevail[27].

Analysing the provisions of the European Union Agreement with Switzerland on the free movement of persons, we observe in relation to the persons who effectively benefit from these provisions that the nationals of the Member States who move or establish their residence in the territory of another Contracting State that these are first and foremost the persons who move for the purpose of performing a gainful or independent gainful activity and the family members accompanying them. Depending on certain specific situations, it is possible that certain persons, for certain periods of time, may be excluded from the social security system, such as persons in search of a job[28], persons who move as a beneficiary of the service providers[29] or persons who are excluded from the payment of unemployment aid because they have not met the minimum contribution period provided by Swiss federal law[30]. As the Agreement refers to acts of Union law we can say that at present the

[25] Voiculescu, Nicolae, Maria Beatrice Berna, *Tratat de drept social international si european (Treatise of international and European social law)*, Universul Juridic Publishing House, Bucharest, 2019, p. 389.

[26] Decision no. 1/2012 of the Joint Committee established under the Agreement between the European Community and its Member States, on the one hand, and the Swiss Confederation, on the other, on the free movement of persons of 31 March 2012 (OJ 2012, L 103, p. 51), updated Annex II of the EU-Switzerland Agreement and entered into force on April 1, 2012, referring to Regulation no. 883/2004.

[27] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons, OJ L 353, 31.12.2009, p. 71-90, (OJ L 114, 30.04.2002, p. 6-72, Document 22002A0430(01), Art. 20, 22,

[28] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons, OJ L 353, 31.12.2009, p. 71-90, (OJ L 114, 30.04.2002, p. 6-72, Document 22002A0430 (01), Appendix I, Art. 2(1.2)

[29] *Idem*, Appendix I, Art. 23

[30] *Idem*, Protocol to Appendix II, Art. 1

persons to whom these provisions are addressed are those provided by Regulation (EC) no. 883/2004 which provides for the nationals of the Member States, as well as the stateless persons and refugees who are residents in a Member State, their family members and their descendants who are residents of the Member States[31]. An element of novelty is the fact that these provisions now benefit workers, all the persons insured under the social security legislation of a state, even if they are economically inactive.[32]. The provisions of Regulation (EC) no. 883/2004 were also taken over by Switzerland, with applicability from April 1, 2012[33].

At the level of Union legislation, the Regulation (EC) no. 859/2003 was adopted, extending the provisions of Regulation (EEC) no. 1408/71 and Regulation (EEC) no. 574/72 to third-country nationals who are not subject to those provisions solely on grounds of nationality, and which apply to third-country nationals, their family members and their descendants who are lawfully resident in the territory of a Member State[34]. But this Regulation is not on the list of European normative acts relevant to the Swiss Confederation[35].

The territorial area in which the provisions of the European Union Agreement with Switzerland find their applicability is restricted to the territory of the Swiss Confederation and the Member States of the European Union. For the new states joining the European Union after the conclusion of the European Union Agreement with Switzerland on the free movement of persons, the application of these provisions will be

[31] Regulation (EC) no. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with EEA and Switzerland relevance), OJ L 166, 30.04.2004, p. 1-123, Document 32004R0883, Art. 2

[32] Voiculescu, Nicolae, Maria Beatrice Berna, *op. cit*., p. 389.

[33] Pustul, Monika, Freizügigkeit der Unionsbürger und das Recht auf Sozialleistungen în der EU und unter dem Freizügigkeitsabkommen Schweiz-EU, Schulthess 2014, p. 117-120

[34] Regulation (EC) no. 859/2003 of the Council of 14 May 2003 extending the provisions of Regulation (EEC) no. 1408/71 and Regulation (EEC) no. 574/72 to nationals of third countries not covered by these provisions solely on grounds of nationality, OJ L 124, 20.05.2003, p. 1-3, Document 32003R0859, Art. 1

[35] Section A, Annex II of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons, OJ L 353, 31.12.2009, p. 71-90, (OJ L 114, 30.04.2002, p. 6-72, Document 22002A0430(01)

made with the entry into force of the Additional Protocols to this Agreement.

Regarding the benefits that come in the field of social security The European Union agreement with Switzerland does not make any direct reference, but by referring to the law of the Union we appreciate that they refer to the material scope of Regulation (EC) no. 883/2004[36] respectively to sickness allowances, maternity and paternity allowances, invalidity pensions, old age pensions, survivors' pensions, work-related injuries and occupational diseases, death benefits, unemployment benefits, pre-retirement benefits and various benefits family. Of these, the benefits of paternity and pre-retirement constitute the novelty elements [37] introduced by the new Regulations that entered into force on May 1, 2010 for EU countries and April 1, 2012 for Switzerland. Social security, medical assistance and war aid are not included in the field of social security[38].

For the implementation of the provisions regarding the coordination of social security systems, it was regulated both by the Agreement of the European Union with Switzerland on the free movement of persons and by Regulation (EC) no. 987/2009 establishing the procedure for the coordination of the social security systems, the establishment of the competent institutions to provide the social security benefits as well as of the centralized institutions or of the liaison bodies, which will ensure the exchange of data and information and the cooperation between the states in coordinating the way of granting of these benefits.

Starting from the role of the Court of Justice of the European Union to draw the attention of the states on how to comply with the international obligations assumed.[39], it is worth mentioning the reference decisions in the field of social security, with implication for Switzerland as a result of

[36] Regulation (EC) no. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with EEA and Switzerland relevance), OJ L 166, 30.04.2004, p. 1-123, Document 32004R0883, Art. 3

[37] Voiculescu, Nicolae, Maria Beatrice Berna, *op. cit.*, p. 389.

[38] Pustul, Monika, Freizügigkeit der Unionsbürger und das Recht auf Sozialleistungen în der EU und unter dem Freizügigkeitsabkommen Schweiz-EU, Schulthess 2014, p. 119-120

[39] Craig Paul, De Burca Grainne, *Dreptul Uniunii Europene (European Union law)*, Hamangiu Publishing House, Bucharest, 2017, p. 470.

the obligations assumed by the Agreement on the free movement of persons.

Thus, the CJUE was called upon to rule in Decision 189 of March 15, 2018[40] in relation to the coordination of social security systems involving Switzerland, in the subject matter of a request for a preliminary ruling made under Article 267 TFEU by the Superior Court of Justice of Castile and Leon, Spain (Tribunal Superior de Castilla y León), on May 11, 2016, in the procedure National Institute of Social Security (INSS), General Treasury of Social Security (TGSS) against José Blanco Marqués[41]. The dispute concerns the decision of the National Institute for Social Security in Spain (Instituto Nacional de la Seguridad Social) and the General Treasury for Social Security in Spain (Tesorería General de la Seguridad Social), to suspend the payment of the supplement to the pension for the permanent total incapacity of Mr. José Blanco Marqués, as a result of receiving an old-age pension in Switzerland. In his answer, the Court pointed out that the rule of Spanish national law, discussed in the main proceedings, must be considered as affecting the benefits which the person concerned benefits in another EU Member State or in the Swiss Confederation, which must be assimilated to a Member State of the European Union[42] and consequently the suspension of the supplementary pension in accordance with national law is legal.

In another case of relevance to Switzerland, the Court of Justice of the European Union was asked to rule in the judgment of November 18, 2010, in the Xhymshiti case against the National Agency for Labour - The Lörrach Family House (Bundesagentur für Arbeit - Familienkasse Lörrach)[43], in which the Finance Court (Finanzgericht) of Baden-Württemberg, Germany made a reference for a preliminary ruling on the right of Ms Xhymshiti, an Albanian national with legal residence in Germany who is married to a Kosovan national resident in Germany , but working in Switzerland, to receive as a family allowance, an amount

[40] Case C-431/16, ECLI:EU:C:2018:189, Court decision (10th chamber) of 15 March 2018.

[41] Case C‑431/16, *Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) versus José Blanco Marqués*.

[42] In order to apply the Regulation nr. 1408/71.

[43] Case C‑247/09, *Alketa Xhymshiti versus Bundesagentur für Arbeit – Familienkasse Lörrach*.

corresponding to the difference between family allowances in Switzerland and German family allowances for his two children, of German citizenship. Analysing all European normative acts on social security rules with implications for Switzerland, the Court has ruled that if a third-country national with legal residence in a Union Member State works in Switzerland, it is not subject to the Regulation no. 859/2003[44] extending the provisions on the coordination of social security systems to third-country nationals, as this regulation is not included in the acts listed in Section A of Annex II to the EU-Switzerland Agreement on the free movement of persons, which the parties to this agreement have agreed to apply. In the relations between the EU states and Switzerland, only the Regulations no. 1408/71 and no. 574/72 are applicable which, however, are irrelevant to a third-country national who is legally resident in a Member State but does not fall under Regulation no. 859/2003. Consequently, the legal conditions necessary to grant the requested family allowance are not fulfilled even if the children of third countries citizens are citizens of the Union.

CONCLUSIONS

European Union law does not restrict the competence of the Member States to organize their social security systems and to establish by national law, in accordance with European norms, the conditions for granting social security benefits, the amount and the duration of their granting.

Following the regulations on the coordination of social security systems, provided by the European Union Agreement with Switzerland on the free movement of persons, the persons benefiting from these regulations are subject to the same obligations to pay social contributions but also benefit from the same social security benefits as nationals to that Member State.

The effect of coordinating the social security systems is that the state that will grant the benefit of social security benefits will take into account

[44] Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, OJ L 124, 20.05.2003, p. 1-3.

the periods of residence, insurance, employment or self-employed activity carried out in the territory of any other Member State, as if they took place on its territory and as if they were carried out under the legislation it applies. This avoids the possibility for a person to benefit from several benefits of the same type, for the same period of compulsory insurance but at the same time benefit from the equal treatment and in the field of social security and from the benefit of the cumulating of all the periods of benefits in the territory of the EU states, EEA and Switzerland.

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13. *Regulation (EC) no. 988/2009 of the European Parliament and of the Council of 16 September 2009 amending Regulation (EC) no. 883/2004 on the coordination of the social security systems and the establishment of the content of its annexes* (Text with EEA and Switzerland relevance), OJ L 284, 30.10.2009, p. 43-72, Document 32009R0988.
14. *Regulation (EC) no. 987/2009 of the European Parliament and of the Council of 16 September 2009 establishing the procedure for the implementation of Regulation (EC) no. 883/2004 on the coordination of social security systems* (Text with EEA and Switzerland relevance), OJ L 284, 30.10.2009, p. 1-42, Document 32009R0987.
15. Case C-75/63, *Hoekstra.*
16. Case C-431/16, *Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) versus José Blanco Marqués.*
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FROM KOSOVO TO CRIMEA. RUSSIA'S SHIFTING PERSPECTIVES ON THE RIGHT OF SELF-DETERMINATION

Raisa DOBRESCU[*]

ABSTRACT

In the spring of 2014, widespread protests broke out in major Ukrainian cities demanding closer ties with the European Union. Seeing its strategic interests in being threatened by its neighbour's European ambitions, Russia invaded southeastern Ukraine to allegedly protect the Russian citizens living there and provide support for the apparent self-determination sentiments of the region. Shortly thereafter, Crimea had a controversial referendum where the majority of the people have declared independence from Ukraine and expressed their desire to join Russia, which they did the very next day. To legitimize the annexation of Crimea, Russia declared that Crimeans had a right to secession and self-determination and, since the population expressed their nationalist aspirations through a fair referendum, Russia had a moral and legal obligation to accept Crimea into the Federation. However, six years earlier when Kosovo unilaterally declared independence from Serbia, Russian officials have strongly opposed the very same arguments put forth at that time by the US. So, is there a right to secession and self-determination under international law? Did Crimea have a right to secession and self-determination? Why Russia did denied Kosovo the same rights it upheld for Crimea?

KEYWORDS: *secession; self-determination; international law; referendum; Kosovo; Crimea; consensus view; minority view.*

I. Introduction

In November 2013, Ukrainian President Victor Yanukovich decided to back out from a plan to sign a far-reaching agreement with the European Union. The plan would have established closer economic and political ties with the EU and would have marked the intention of Ukraine to join the 28-countries European bloc. This decision had a domino effect on the events that followed and was about to throw the country into one of the most significant political crises of the 21st century.

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Just hours after Yanukovich's decision, widespread pro-EU protests broke out in Kiev and in other major cities hoping that the President will reconsider his decision. Instead, he signed a $15 billion trade agreement with Russia. This threw gas on fire even more. To suppress the uprising, police and security forces were sent to the streets to disperse the demonstrators using violence and intimidation.[1] Under growing pressure from the riots that broke out all over the country – commonly known as Euromaidan protests – Yanukovich fled Kiev and shortly thereafter, the Parliament voted to oust him from government.[2]

Just days after Yanukovich's flight, professional Russian soldiers, colloquially called "little green men"[3], have appeared all over Crimea and took control of key facilities on the peninsula. Although they all carried Russian weapons, they had no identifying insignia and the Russian President initially denied any military involvement. A month later Putin admitted that they were Russian troops.[4]

By early March, the Russian troops had control of the whole peninsula and Crimean authorities swiftly organised a referendum. The poll was illegal under Ukrainian law and the options presented made it clear for any external observer that it was a complete sham. Crimeans could only choose to join Russia or to return to the 1992 Constitution, which granted significant autonomy from Kyiv. From a turnout of 83%, 97% voted in favour of joining Russia. It was a Soviet style referendum. Within a few days, Crimea was officially annexed.[5]

While Crimea was annexed by Russia so swiftly that Kyiv barely got the news, major protests were sweeping across the south-eastern part of Ukraine. This time the death toll was rising fast as supporters and

[1] "Self-Determination And the Russian People of Ukraine", *Colombo Telegraph*, 1 May 2014, accessed at https://www.colombotelegraph.com/index.php/self-determination-and-the-russian-people-of-ukraine/, on 6 October 2019.

[2] *Ibidem*

[3] A term coined by the Ukrainians.

[4] Schreck, Carl, "From 'Not Us' To 'Why Hide It?': How Russia Denied Its Crimea Invasion, Then Admitted It", *Radio Free Europe, Radio Liberty*, 26 February 2019, available at https://www.rferl.org/a/from-not-us-to-why-hide-it-how-russia-denied-its-crimea-invasion-then-admitted-it/29791806.html, accessed on 13 October 2019.

[5] Pifer, Steven, "Five years after Crimea's illegal annexation, the issue is no closer to a resolution", *Brookings*, 18 March 2019, available online at https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/ and accessed on 13 October 2019.

opponents of the Euromaidan were clashing violently for control over some of the major urban centres of southeast Ukraine: Odessa, Kharkhiv, Mariupol. Failing to secure these urban centres, as they met heavy resistance, insurgents started to focus more on the areas around Luhansk and Donetsk oblasts were they quickly gained a foothold. Due to decades of neglect by the Kyiv government and almost no reforms, these provinces were less connected to the rest of Ukraine, were much less developed and the Russians had a more prominent minority. This enabled the Russian backed separatists to secure control over the two provinces and to declare eastern Ukraine as the People's Republic of Donetsk and Luhansk. A few weeks later, on 11 May, following the Crimean pattern, they organized referendums in both regions. Although the organisers claimed to have obtained over 90% of the votes in favour of independence, the international community declared the referendum illegal under the Ukrainian Constitution and international law[6] and Ukrainian forces started mobilizing.

II. Secession and self-determination: A Legal Perspective

"*Over centuries, Russian leaders have demonstrated that they have a warped understanding of the word 'liberation'. The country has a dark history of providing 'brotherly help' in Eastern Europe*".[7] In the spirit of this warped understanding, by which one man's terrorist can be another man' self-determination fighter, Russia has (re)committed itself to restoring the "natural state of affairs"[8] in the Near Abroad.[9] Supporting ethnic, separatist movements in the former Soviet *Lebensraum* is a commitment which Russia has upholded with consistent motivation at least since Putin came to power.

[6] "Report on the human rights situation in Ukraine", *OHCHR*, 15 June 2014, accessed at https://www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf, on 13 October 2019.

[7] Foxall, Andrew and Cichowlas, Olga, "The Kremlin's Faux 'Freedom Fighters'", *Foreign Policy*, 25 April 2014, available at https://foreignpolicy.com/2014/04/25/the-kremlins-faux-freedom-fighters/, accessed on 16 October 2019.

[8] Vladimir Putin's remarks made during a meeting with young academics and history teachers at the Museum of Modern Russian History, 5 November 2014. Full transcript is available at http://en.kremlin.ru/events/president/news/46951, accessed on 16 October 2019.

[9] The Near Abroad to be construed as comprising the former Soviet republics.

Crimea and Eastern Ukraine were about to become examples of lessons learned and good practices from the Abkhazia and South Ossetia cases. This time Russia's intervention was designed to provide the international community with a 'way out', or "*a credible excuse not to act, not to enforce legal norms when an argument can be made either that there was no violation or that the situation is too complex to warrant precipitous action*."[10] Russia declared that Crimea acted by virtue of its rights to secession and self-determination when it declared its independence from Ukraine and the desire to join Russia. The same rhetoric was probably prepared for eastern Ukraine as well but, after a failed referendum and the ensuing military conflict, the rhetoric had to change.

II. 1. The consensus view: no right for self-determination?

Was this a fair use of the legal rhetoric? The short answer is no. And Russia knew that, since secession and self-determination have been subject to many debates in international legal circles. The international legal community continues to be split between Russian legal scholars and Western scholars. The former seem to have interpreted the two legal provisions as being "*gradations of view*"[11] while the latter are "*rather firmly stat[ing] that the maintenance of a people's identity does not necessarily require secession but may be achieved through other means of internal self-determination such as devolution of power, administrative and cultural autonomy, creation of local government, etc.* "[12] To make matters more complicated, the consensus view among legal scholars is that there is no right to secession under international law. According to Cristopher Borgen, "*'Secession', legally speaking, is not a synonym for 'self-determination'*".[13] How do we then interpret Article 1(2) of the UN

[10] Borgen, J. Cristopher, "Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea", article published in the U.S. Naval War College's *International Law Studies*, Vol. 91, Nr. 216, 2015, p. 255.

[11] Chernichenko, V. Stanislav and Kotliar, S. Vladimir, "Ongoing Global Debate on Self-Determination and Secession: Main Trends", in *Secession and International Law: Conflict and Avoidance - Regional Appraisals*, 2003, p. 83 *apud* Borgen, J. Cristopher, *op. cit.*, p. 231.

[12] *Idem*, p. 82.

[13] Borgen, *supra note 13*, p. 227.

Charter, which underlines the importance of "*self-determination of peoples*"? An argument can be made considering the explanation given by the drafting committee of the UN Charter, which noted, "*the principle* [of self-determination] *conformed to the purposes of the UN Charter only insofar as it implied the right of self-government of peoples and not the right of secession*".[14] Interpreting secession as a remedy that can be invoked under international law would have come in conflict with the territorial integrity of states.[15]

Although the explanations given by the drafting committee of the UN Charter might seem straightforward, no international treaty, advisory opinion or state practice has clarified what "people" means exactly. The Quebec Commission, a group of international law experts convened by the National Assembly of Quebec to advise on the legal consequences of a hypothetical secession of Quebec, has maintained that "peoples" is still a concept up for debate, its different interpretations lead to different application of the right to self-determination and secession can be recognized as a right only in case of decolonization.[16] Accordingly, there is no other situation where the right for secession can be invoked.

As long as a State allows a minority group living within its borders to enjoy a degree of autonomy which enables them to speak their own language, practice their own customs and enjoy their own culture, then they are granted, by the State, a right to *internal* self-determination. In any instance where they State encroaches on this right, the tools for dispute resolution need to be explored under human rights law, either domestically or internationally.

If this would appear to be laying to bed the controversy on secession, further exploring the legal discussion on this will lead to two new interpretations: although human rights law can provide a remedy for a 'people' who do not enjoy internal self-determination, it doesn't mean that it will. Second, although secession is not recognised as a right under

[14] Documents of The United Nations Conference on International Organizations, Vol. 6, No. 296, 1945.

[15] Borgen, *supra note 13*, p. 228.

[16] Frank, M. Thomas; Higgins, Rosalyn; Pellet, Allain; Shaw, N. Malcom and Tomuschat, Christian, "The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty" in *Self-Determination and International Law* : *Quebec and Lessons Learned*, no. 241, para 3.07 *apud* Borgen, *supra note 13*, p. 228.

international law, this does not make it illegal.[17] Having said that, international law treats secession neither as a right nor as a breach. Although modern diplomatic practice and international law discourse strongly discourages secession as it breaches territorial integrity, one of the core principles of the UN Charter, such an interpretation clearly leaves a back door open for any secessionist movement. Kosovo is a poster case in this regard.

II. 2. The minority view: remedial secession under extreme circumstances

Some legal scholars have further explored the first question we raised above: what if human rights law does not provide the appropriate remedy for a people that "*truly want their own State and not a basket of rights in someone else' country*"?[18] Answering this question leads to a minority view among legal scholars who agree that there is a case to be made in favour of remedial secession in extreme circumstances. Among these scholars the most numerous and prominent supporters are Russian international lawyers. They consider secession to be the "*ultimate expression of self-determination*"[19] and base their arguments on several legal instruments such as the "Safeguard Clause" of the 1970 Friendly Relations Declaration whose wording was adopted later in the *Vienna Declaration and Programme of Action* of 25 June 1993. Aside from the

[17] "*The United States should ... make absolutely clear that secession has not been universally recognized as an international right. It may choose, on the basis of other interests, to support the secessionist claims of a self-determination movement, but not because the group is exercising its right to secession, since no such right exists in international law. At the same time, an absolute rejection of secession in every case is unsound, because the United States should not be willing to tolerate another state's repression or genocide in the name of territorial integrity. Secession can be a legitimate aim of some self-determination movements, particularly in response to gross and systematic violations of human rights and when the entity is potentially politically and economically viable.*" 1996 U.S. State Department Policy Planning Staff Roundtable *apud* Borgen, *supra note 13*, p. 228.

[18] Borgen, *supra note 13*, p. 229.

[19] Borgen, *supra note* 13. For the broader discussion on secession and self-determination among Russian international lawyers, see also Chernichenko, V. Stanislav & Kotliar, S. Vladimir, "Ongoing Global Legal Debate on Self-Determination and Secession: Main Trends", in *Secession and International law: Conflict and Avoidance – Regional Appraisals*, No. 76.

general support for the right of self-determination, the 1970's Declaration has a so-called "Safeguard clause" formulated so ambiguously that it became the most cited source of an emerging rule of customary international law in favour of (external) self-determination.[20] This clause attaches a great importance to a representative government as a positive indicator of complying with the right of self-determination. A people not governed by a representative government would thus have the right to a remedial secession.

The issue was revisited by the Supreme Court of Canada in its Advisoy Oppinion in the issue of the *re Secession of Quebec*: "[a] *right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances…*".[21] Although it does not necessarily reiterate the representative government idea put forth by the 1970 Declaration and the Vienna Declaration, it leaves open the idea that remedial secession can be achieved through legal means.

Finally yet importantly, some of the supporters of this minority view consider ICJ's *Kosovo Advisory Opinion* as further proof in favor of remedial secession, as the Court has not found the unilateral declaration of independence of Kosovo to be illegal.[22]

Overwhelmingly, most international lawyers agree that a right to external self-determination (i.e. remedial secession) cannot exist outside of a colonial context. If such a right would exist in the post-colonial era, it would have to be established either by treaty or by customary

[20] UN General Assembly Resolution 2625 "Declaration on Principles of International Law, Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations", 24 October 1970, p. 9-10: "*Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."*

[21] *Reference re Secession of Quebec*, Supreme Court of Canada, [1998] 2 SCR 217, Case no. 25506, 20 August 1998, para. 126, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do, accessed on 22 October 2019.

[22] "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo", Advisory Opinion, ICJ, 22 July 2010, p. 38.

law. Since no treaty exists, one might look for a customary rule for remedial secession yet for such a rule to exist there would have to be clear evidence of consistent State practice over the years. However, although there had been numerous instances of secession moves, with very few exceptions (Bangladesh, Kosovo, South Sudan) which would merit a separate discussion, States have constantly positioned themselves against secessionism. Even in cases of States, which have unilaterally declared independence (Kosovo), the right to a remedial secession has never been invoked. The few legal opinions and documents to which the minority view adheres to, cannot be proof of *opinion juris* on remedial secession, as their language is mostly vague on this issue and, in the case of the 1970 Declaration, States have constantly distanced themselves through official discourse from remedial secession as a matter of right.[23]

III. Self-Determination from Kosovo to Crimea: The Evolution of Russian Rhetoric

So why does Russia's rhetoric on Crimea appeals to an international legal right, which it rebuked even during the Soviet era? To answer this, we need to revisit the Kosovo case.

The declaration of independence of Kosovo was a challenging moment for Putin. Reigning over such a diverse and divided federalist republic, Putin had all the reasons to fear that Kosvo was establishing a dangerous precedent. Moreover, shortly after its unilateral declaration of independence 64 states have expressed their recognition of the new State with the US being among the very first. The then Secretary of State Condolezza Rice underlined the fact that Kosovo is not to be seen as a "*precedent for any other situation in the world*"[24] because it is a "*special case*"[25] and the conditions for its unilateral action are not met anywhere else in the world. Many other Western States shortly after have echoed this statement. This was a significant blow for Russia, which it remembered six years later, when Crimea's annexation had drawn the

[23] Borgen, *supra note* 13.

[24] "U.S. recognizes Kosovo as an independent State", press release by the United States Department of State, Washington D.C., 18 February 2008, available at https://2001-2009.state.gov/secretary/rm/2008/02/100973.htm, accessed on 22 October 2019.

[25] *Ibidem.*

world's attention. In a speech delivered on 18 March 2014, Putin made sure to reiterate the US' stance on Kosovo:

"*I do not like to resort to quotes, but in this case, I cannot help it. Here is a quote from ... [an] official document: the Written Statement of the United States America of April 17, 2009, submitted to the same UN International Court in connection with the hearings on Kosovo. Again, I quote: "Declarations of independence may, and often do, violate domestic legislation. However, this does not make them violations of international law." End of quote. They wrote this, disseminated it all over the world, had everyone agree and now they are outraged. Over what? The actions of Crimean people completely fit in with these instructions, as it were. For some reason, things that Kosovo Albanians (and we have full respect for them) were permitted to do, Russians, Ukrainians and Crimean Tatars in Crimea are not allowed. Again, one wonders why.*"[26]

In a diplomatic mirroring, in September 2014 Russian Foreign Minister Serghey Lavrov, during an interview given for the ITAR-TASS news agency, was cataloging Crimea as "*a very special case, an unique case from all points of view.*"[27] This was a move to signal the US that every interpretative move it makes will be used by Russia to its advantage, thus limiting US' strategy at condemning Russia's actions.

Since international legal norms take shape following consistent State practice stemming from perceived, unwritten legal obligations, Russia's actions in Crimea, building on previous vague legal language and poorly justified secession cases, could become the basis of an evolving right of external self-determination. Instead of moving away from a legal rhetoric, Russia wants to show the world that it has a rather evolving understanding of international law and although it might not adhere to a consensus view, it builds its own legal framework.

What is most interesting about Russia's view on self-determination is its radically shifting perspective. Although the fall of the USSR has not put an end to Russia's imperialist ambitions and it has supported logistically, economically or militarily numerous attempts at destabilizing

[26] Address before the State Duma by the Russian President Vladimir Putin, 18 March 2014, available at http://en.kremlin.ru/events/president/news/20603, accessed on 22 October 2019.

[27] "Serghey Lavrov: Throwing Russia off balance is ultimate aim", interview given by Sergey Lavrov to ITAR-TASS news agency on 11 September 2014, available at https://tass.com/top-officials/748935, accessed on 22 October 2019.

existing States (Nagorno Karabakh, Abkhazia, Ossetia), Russia has always maintained a firm position on sovereignty and territorial integrity and never recognized any of the separatist regimes. Even during Soviet times, Russian international lawyers have never dared to interpret self-determination as an invitation to secession. Not even narrowly, in extreme circumstances.

During the ICJ's proceedings on Kosovo, Russia has maintained that 'people', as a self-determination unit in the wording of the UN Charter, entails the entire population of a State and not just of a sub-national group. Thus, in deciding whether Kosovo had a right to secede from Serbia, the entire population of Serbia had to be consulted not just Kosovo's.[28]

During the Crimean annexation, however, Russia contradicted its previous statements and considered Crimea to be representative for a 'people' with the right to exercise self-determination without consulting the population of Ukraine.[29] They consider that having a majority population of Russian ethnicity makes Crimea and eastern Ukraine valid units for self-determination. What none of them explains is why Kosovo, as a territory inhabited by a majority population of Albanian ethnicity, does not qualify as a people.

The most prominent Russian international lawyer argued that the entire south-eastern part of Ukraine was a territory inhabited by a people with a language, culture and traditions different from those of Ukraine. These differences grants them a right to demand respect and to decide their own future. While south-eastern Ukraine does indeed have a Russian-speaking minority, this does not automatically grant them the right to secede whenever they consider feasible. If that were to be true, every minority in the world would have such a right and concepts such as sovereignty and territorial integrity would have to be revisited.

[28] *Oral Statement by the Russian Federation,* "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo", Advisory Opinion, ICJ, 8 December 2009.

[29] Circular letter to the executive council of the international law association by Anatoly Kapustin, President of the Russian Association of International Law, available at https://mgimo.ru/about/news/departments/252984/, accessed on 22 October 2019.

IV. Conclusions

Most discussions on self-determination and secession have to face that the only arguments favouring or disfavouring the two ideas can only stem from politics, as international law as it currently stands is relatively quiet on such issues. Russia saw this as an opportunity to advance its own agenda while also minimizing the backlash from the international community and US's confident discourse in the virtue of a poorly shaped international legal norm has provided Putin with the perfect cover to do just that. By justifying its intervention in Crimea using US's rhetoric, Russia has made it clear that the "*legal fine points of distinguishing the cases of Kosovo and Crimea would be lost in the rough sport of political argument*"[30].

The problem with southeastern Ukraine is not the right to self-determination, or its lack thereof, but rather the fact that Russia perceives itself as being entitled to support secessionist movements in Ukraine in blunt disregard to sovereignty and territorial integrity. Crimea had a significant Russian population and the port of Sevastopol was leased by Ukraine to Russia. It would have been no surprise if the population of Crimea had decided through a *fair* referendum its desire to join Russia, eventually. However, the referendum was not fair as it was illegal under the Ukrainian Constitution and the turnout was something we would have seen only in Soviet era propaganda. A fair referendum in line with Ukraine's Constitution and transparent negotiations with Kiev would have went a long way towards ensuring some degree of international recognition for Crimea's secession if that ought to be the freely expressed wish of a population. Nevertheless, Russia had no time for negotiations as the ousting of Yanukovich and the Euromaidan protests threaten to bring a pro-EU regime in Kiev, which would have thwarted its plans of securing its foothold in Crimea. The military intervention in eastern Ukraine was more of a bargaining chip for Putin, as the Ukraine's European ambitions would have to be put on hold until the situation in Donbass will be resolved thus allowing Russia to keep Ukraine under its influence.

In closing, it is important to note that while on the surface Russia has invoked self-defense, self-determination or historical ties to justify to the

[30] Borgen, *supra note* 13.

world the annexation of Crimea, the reality is that annexing Crimea was a strategic imperative. With Ukraine's increasing European ambitions, Russia was risking to be denied access to its most important warm water, ice-free port: the Port of Sevastopol. What transpires from this move is a reality we have witnessed many times before, namely that international law is often interpreted by dominant States to justify strategic decisions thus creating dangerous precedents.

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ABUSE OF LAW EXERCISED IN THE MATTER OF THE LEGAL REGIME OF FOREIGNERS IN ROMANIA. ASPECTS REGARDING THE MARRIAGE OF CONVENIENCE, THE OBLIGATION TO MAINTAIN THE ROMANIAN CHILD BY A FOREIGN CITIZEN

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ABSTRACT

The recent jurisprudence establishes a legal instrument for the recognition of children of Romanian citizenship and the formulation of legal actions to establish a maintenance obligation used by foreigners whose residence regime in Romania is uncertain, in order to prohibit their return. Has the legislator provided sufficient legal mechanisms to protect the migration phenomenon in the field of family law or will it find topical solutions through timely legislative interventions?

KEYWORDS: *abuse of law; regime of foreigners; marriage of convenience; prohibition of return; obligation of maintenance by foreigner*.

In the judicial practice, there are more and more cases where foreigners who have not regulated a valid right of residence on the territory of Romania, in trying to obtain certain privileges regarding their regime on the national territory, are used by certain legal institutions of civil law from family law, thus distorting the purpose of family protection for the benefit of the rights obtained by a foreigner.

Also, situations were encountered in which foreigners appear as parties in civil files whose object is to pay the maintenance or recognition of paternity pension, following the legal consequences resulting on their right to stay in the national territory, in case of admitting some such actions.

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At first analysis, these aspects would not raise suspicion, but behind the appearance of legality specific activities can be carried out on illegal migration.

We can ask ourselves whether current legislative mechanisms provide enough protection against the illegal migration phenomenon.

It is noted that the Romanian legislator, in accordance with the European jurisprudence, tries to adapt to the actions taken in this regard with a view to combating illegal migration.

I. Legislative aspects of family protection in which the foreigner is a family member of a Romanian citizen

Regarding the regime of foreigners in Romania, the Government Emergency Ordinance no. 194/2002 is the legal norm that regulates the right of residence of a foreign citizen on the territory of Romania, being provided legal institutions that support the reunification of the family[1].

Thus, the foreign family members of a Romanian citizen benefit from a preferential regime in order to obtain a right of residence on the territory of Romania, access to the domestic work force and integration and social protection, compared to the other categories of foreigners.

The family reunification is defined as the entry and stay on the Romanian territory of the family members of a foreigner with legal residence on the territory of Romania or of a Romanian citizen, in order to preserve the family unity, regardless of the date of establishing this family relationship.

The foreign family member of a Romanian citizen can obtain a right of residence on the Romanian territory in order to reunite the family, access to obtain the visa to enter Romania and subsequently extend the

[1] According to art. 62 paragraph (3) of GEO no. 194/2002: To foreign family members of a Romanian citizen may be extended their right of residence, if the Romanian citizen, according to the law, has his domicile or residence in Romania, as follows: a) for foreigners married to Romanian citizens, if: (i) presents the marriage certificate, under the conditions provided by law; (ii) there is no state of bigamy or polygamy; b) for partners, if: (i) presents the birth certificate of the child; (ii) both the foreigner and the Romanian citizen prove that they are unmarried; (iii) prove the coexistence with the Romanian citizen.

right of residence, being much easier by fulfilling certain conditions regulated by the Ordinance of Government Emergency no. 194/2002[2].

At the same time, foreigners who enjoy a right of residence for the purpose of family reunification have access to the labour market on the national territory, without having to obtain an employment notice from the employers[3]. Basically, foreigners with a right of residence for family reunification have the same easy access to the labour market as any citizen of Romania.

Taking into account these benefits, foreigners with a migratory risk try to identify certain breaches in the national legislation that they exploit in their interest.

For the family protection between a Romanian citizen and a foreign citizen, legislative mechanisms were introduced aiming to prevent the moral and negative material consequences triggered by the factual separation of family members.

In this sense, at art. 82 paragraph 1 of GEO no. 194/2002, entitled Prohibition of return, stipulates that the measure of return cannot be ordered against the foreigner minor if one of his parents has the right to stay in Romania; to the foreign parent of a minor who has Romanian citizenship, if the minor is in his or her maintenance or if there is an

[2] ***art. 62 of the Government Emergency Ordinance 194/2002 - regarding the regime of foreigners on the Romanian territory***

Extension of the right of temporary stay for family reunification (1) Foreigners entering Romania in accordance with the provisions of art. 46, except for the persons provided for in art. 46 paragraph (16), the right of residence may be extended, as follows: a) for the spouse of the sponsor, if: (i) he presents documents showing the existence of the marriage; (ii) there is no state of bigamy or polygamy; (iii) the spouses live together; (iv) prove the maintenance of the means of maintenance at least at the level of the minimum gross basic salary in the country b) for the other family members of the sponsor, if: (i) presents documents showing the existence of the kinship relationship; (ii) live together with the sponsor, in the case of minors; (iii) prove the maintenance of the means of maintenance at least at the level of the minimum gross basic wage in the country guaranteed in payment.

[3] ***art. 3 of GO no. 25/2014*** *(1) Foreigners with legal residence in the territory of Romania may be employed on the basis of the employment notice obtained by the employers under the terms of this ordinance. (2) By exception from par. (1), it is not necessary to obtain the employment notice for the employment in the territory of Romania of the foreigners from the following categories (...) f) the foreigners entitled to the temporary residence right for the reunification of the family as family members of a Romanian citizen*

obligation to pay the maintenance pension, an obligation that the foreigner regularly performs; to the foreigner married to a Romanian citizen or to a foreigner who has a long-term right to stay in Romania; to a foreigner who has reached the age of 65.

Marriage, family, parental rights and obligations specific to family law have direct implications on the right of residence on the territory of Romania of a foreign citizen.

Even if the Romanian legislator sought to protect any interference of the state authorities in the family life carried out on the national territory by a foreign citizen, it also provided mechanisms to combat the exploitation of the family in order to unfairly obtain a right of residence on the territory of Romania, either by extending the right of residence, or by granting the tolerated status.

II. The marriage of convenience

The right to marriage is provided for in Article 12 of the European Convention on Human Rights and in Union law, in Article 9 of the Charter of Fundamental Rights of the EU. It refers to the right to conclude a marriage and to establish a family and is a distinct right in relation to the right to respect for family life, which refers to families applying for immigration authorization based on an existing family relationship.

European states have imposed restrictions on the right to marriage, as convenience marriages are seen as a way to circumvent immigration controls[4].

In accordance with the provisions of the European Convention on Human Rights and in accordance with the case law of the ECHR, a State may, as appropriate, impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether the proposed marriage is a convenience or force and, if necessary, to prevent it.

Returning to national law, even if the Romanian legislator wanted to protect the family interests, including in the matter of the regime of foreigners on the national territory, he adapted to the fraudulent conduct

[4] Handbook of European Law on Asylum, Borders and Immigration - 2014 edition - Agency for Fundamental Rights of the European Union, p. 127.

of the abuse of law in order to obtain a privileged status by the foreign citizen and in this sense he implemented legal protection mechanisms.

Specifically, the provisions regarding the prohibition of removal do not apply if the existence of a marriage of convenience is ascertained or that the spouses no longer have a marital relationship or an effective family relationship on the territory of Romania[5].

Given that in many cases the parties do not directly acknowledge that the marriage was concluded for other purposes, O.U.G. no. 194/2002 provides, with an exemplary character, the elements on the basis of which it can be established that a marriage is of convenience, as well as the concrete means from which these elements result.

State authorities may refuse to extend the right of residence to the foreigner if, on the date of filing the request for the extension of this right, the general conditions and the special conditions provided by law are not cumulatively fulfilled, by establishing the existence of any element that determines the qualification of the marriage as being of convenience.

The decision of refusal, as well as the reasons underlying it, are communicated to the applicant by the return decision, which can be challenged before the competent court of appeal.

The applicant for the right of residence has the opportunity to prove, by any means of proof, the effective and unequivocal character of the marriage whose existence he invoked in substantiating his request.

The question arises whether finding the marriage of convenience has legal consequences on the marriage between the parties.

The absolute nullity of the marriage can be ascertained only by a court decision and represents that civil sanction applicable to the marriage concluded with the non-observance of the provisions provided by the Civil Code, and, on the other hand, the marriage of convenience is ascertained by a specialized authority, organized under a ministry, and produces effects exclusively on the right of residence of foreigners in Romania, and not on the civil status of the persons concerned[6].

[5] Art. 63 paragraph 3 of GEO no. 194/2002. The provisions of par. (1) and (2) does not apply in the case of foreigners in the situation provided in par. (1) lit. c) if it is found the existence of a marriage of convenience or that the spouses no longer have a marital relationship or an effective family relationship on the territory of Romania

[6] Marieta Avram, *Civil law Family*, Hamangiu Publishing House 2013 , p. 81-92.

Also, regarding the marriage of convenience, a relative presumption is established which can be reversed by the contrary evidence, in the sense that the applicant of the right of residence has the possibility to prove, by any means of proof, the effective and unequivocal nature of the marriage, whose existence was invoked in substantiating his request.

The introduction of the provision regarding the marriage of convenience has the purpose of sanctioning those cases where, by the conclusion of the marriage, other purposes than the natural and legal ones were pursued[7].

Moreover, the Court observes that the Romanian legislator has adopted the same criteria for evaluating a marriage in order to establish its authentic or conventional character as those provided in the European Union legislation.

Thus, the elements listed in the content of art. 63 of the Government Emergency Ordinance no. 194/2002[8] were fully taken over in the Resolution of the Council of the European Union of 4 December 1997 on the measures that can be taken to combat the marriage of convenience (97/C-382/01), which refers to the marriages concluded between the citizens of the Member States or legal residents on their territory and persons who are third-country nationals. In addition, art. 35 of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right to free movement and residence on the territory of the Member States for citizens of the Union and members of their families, amending Regulation (EEC) no. 1.612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC allow the Member States to, in cases of abuse of law or fraud, including

[7] *CCR decision no. 350 of May 2, 2006*, published in the Official Gazette of Romania, Part I, no. 461 of May 29, 2006

[8] Art. 63 para. 2) of GEO no. 194/2002. The elements based on which it can be ascertained that a marriage is of convenience can be the following: a) matrimonial cohabitation does not exist; b) spouses did not know each other before the marriage; c) lack of an effective contribution to the fulfilment of the obligations born from marriage; d) the spouses do not speak a language understood by both; e) there are data that previously one of the spouses has concluded a marriage of convenience; f) the spouses are inconsistent or there are inconsistencies in declaring personal data, the circumstances in which they are have known or other relevant information about them g) the conclusion of the marriage was conditional on the payment of a sum of money between spouses, except for the amounts received as a dowry

convenience marriages, to take the necessary measures to refuse, cancel or withdraw any rights conferred by the above-mentioned directive.

In a case decision filed with the Bucharest Court of Appeal[9], it was held that: "*These aspects only strengthen the plaintiff's wife's statement that the parties have not concluded the marriage for the purpose of establishing a family with which the applicant can reside in Romania and that the applicant accepted the conclusion of the marriage for fear that her mother would not be fired."*

The marriage intervened either before or after obtaining a right of residence of a third-country national with a Romanian citizen[10], although legally recognized according to family law, it can be an effective way to obtain economic benefits or free movement for both the foreigner and the Romanian citizen following the conclusion of a fictional marriage.

Thus, as a result of obtaining economic benefits, Romanian citizens marry fictionally with foreigners, so that the latter obtain freedom of movement within the EU.

Currently, in Romania, the General Inspectorate for Immigration performs operative - administrative checks specific for the prevention and combating of convenience marriages. They proceed to carry out on-the-spot checks, which are corroborated with the identified aspects regarding the development of an effective family life, as well as with the conclusions obtained after conducting an interview, in front of the experts, of both married parties, can lead to the identification of the simulated behaviour in establishing family relationships, namely, marriage of convenience.

Regarding the prevention and combating of convenience marriages, the Romanian legislator provided for viable verification methods.

[9] Compilation of jurisprudence, The project "cooperation in the field of combating illegal immigration and the application of return", Sitech Publishing House, Craiova, 2015, pages 128 -129 - Civil sentence no. 2469 pronounced on September 24, 2014 by the Bucharest Court of Appeal in file no. 8/2/2014.

[10] European Union law does not distinguish between the family relationship established before and the one established after the reunion sponsor obtained a residence permit on the territory of the respective state, as interpreted in the CJUE case C-578/08 - having as its purpose a request for a ruling of a preliminary ruling under Articles 68 EC and 234 EC by Raad van State (Netherlands).

III. The recognition of the minor child by a foreign citizen, the legal consequences regarding the right of residence of the foreigner in the territory of Romania, ways to combat illegal immigration

In Romanian law, Law no. 272 of 2002 on the protection and promotion of the right of the child and the Civil Code are the most important legislative acts regarding the protection of the child, these being in accordance with the provisions of the Convention on jurisdiction, applicable law, recognition, enforcement and cooperation regarding parental responsibility and protection measures of children, adopted in The Hague on October 19, 1996 and ratified by Romania in 2007 and the Principles of European legislation on parental authority established by the Commission on European Family Law as a recommendation for all European states on family law.

The affiliation with the child outside the marriage is established by recognition or by court decision, as the case may be. If the birth has not been recorded in the marital register or the child has been recorded in the marital register as being born of unknown parents, the mother can recognize the child. The child conceived and born out of wedlock can be recognized by his father, an acknowledgment that can be made by declaration at the local community public service of records of persons, by authentic document or by will.[11]

Thus, the way of recognizing the child is easy also for foreign citizens; there are situations in the judicial practice in which the foreigners have recognized children whose affiliation has not yet been established, in order to obtain privileges.

The benefit of establishing the affiliation to a Romanian child by a foreigner on the territory of Romania is represented by the advantages established by the legislator for family reunification (*entry visa on the territory of Romania, extension of the right to stay on the territory of Romania, access to the domestic work force, prohibition of return, the possibility of travel in the European Territory).*

Although in the domestic law cases of absolute or relative nullity of the recognition of the filiation performed by foreigners as well as of challenging the recognition of the filiation are foreseen[12], the state

[11] Art. 415-416 of the Civil Code (Law no. 287/2009);
[12] Art. 417-420 of the Civil Code (Law no. 287/2009)

authorities do not react proactively in order to combat such a phenomenon, as there is no effective means to control such of cases, as provided in the case of the marriage of convenience.

The phenomenon of the recognition of children of Romanian citizenship by foreigners cannot be monitored by the authorized authorities, considering that the foreigner can proceed to recognize a child by simply declaring to the local community public service the records of persons, by authentic document or by court decision. .

It is difficult to imagine that in the absence of legal provisions for further verification of filiation recognitions by foreigners, state authorities may proceed to identify fictional filiation recognitions, distorted and for other purposes.

One way of controlling this phenomenon could be the introduction by the legislator of the obligation to carry out administrative checks in case of recognition of a child by a foreign citizen, by the public institution that regulates the right of residence in the territory of Romania, respectively the General Inspectorate for Immigration, mechanism similar to that provided for in the case of convenience marriages or carrying out these administrative checks when the foreigner who has recognized a child outside the marriage or the marriage with a Romanian citizen requests the extension of a right of residence or opposes the state authorities this recognition.

At the same time, in the actions registered before the courts regarding establishing a child's affiliation with a foreigner, the participation of the General Inspectorate for Immigration should be compulsory, so that there is no fraudulent agreement between the parties to which the courts cannot oppose.

IV. The obligation regarding the payment of the maintenance pension by the foreigner

The foreign parent of a recognized Romanian child, as in the case of the other parents, Romanian citizens, has the legal obligation to care for his minor children[13].

[13] Title IV "Parental authority" from the Civil Code.

In case the parent does not fulfil his obligations, the other party (parent, child) has the legal possibility to ask the courts to oblige them to pay a maintenance pension[14].

In most cases, the courts compel the parent to pay the maintenance pension, considering that this solution is in the child's best interest.

However, this obligation established against the foreigner may have other legal consequences in regulating the right of residence on the territory of Romania.

Thus, in the matter of prohibiting the return, an additional condition is provided for the foreigners for whom the affiliation to a child of Romanian citizenship has already been established, *respectively the minor to be in his maintenance or if there is the obligation to pay the maintenance pension, an obligation that the foreigner regularly performs*[15].

In this situation, the state authorities can carry out additional checks by carrying out specific operative activities in order to determine if the minor is in the maintenance of the foreigner or if the foreigner fulfils his obligation to pay the maintenance pension.

If it is found that the minor of Romanian nationality of a foreigner is not in the maintenance of the foreigner or the latter does not regularly fulfil the maintenance pension obligation, the state authorities, responsible for the regime of foreigners, can take against the foreign citizen measures to reject the request to extend the right of residence, as well as to remove them from the Romanian territory.

Also, it is found that foreigners who are housed in centres for public custody in order to be returned, although return decisions are issued on their names, they file legal actions or are sued by other persons asking

[14] Art. 530 of the Civil Code para. 1: „The maintenance obligation is executed in kind, by providing the necessary ones for living and, as the case may be, the expenses for education, teaching and vocational training. According para. 2, „If the maintenance obligation is not carried out voluntarily, in kind, the guardianship court orders its execution by paying a maintenance pension, established in money''.

[15] Art. 82 of the Government Emergency Ordinance no. 194/2002 – the regime of foreigners in Romania.

Prohibition of return (1) The measure of return cannot be ordered against foreigners in any of the following situations: (…) b) the foreigner is the parent of a minor who has Romanian citizenship, if the minor is in his maintenance or if there is the obligation to pay the pension of maintenance, obligation that the foreigner regularly performs.

the courts to oblige to the payment of a maintenance pension, often having an agreement between the parties, which may be fictional.

In these situations, the state authorities have the sole responsibility to prove that the maintenance pension obligation is not regularly fulfilled by the foreigner.

Without setting predetermined objective criteria for verifying the regularity of the maintenance pension payment, the state authorities are limited to obtaining evidence only from the other family member, who can point out that the foreigner does not fulfil his obligations.

However, if there is a fraudulent agreement between them, both regarding the recognition of the child and the payment of the maintenance pension, it is very difficult for the state intervention to be effective, in the absence of objective criteria for verifying alleged fraudulent agreements.

Moreover, in this matter of family law, the courts respect the principle of the best interests of the child[16], which in most cases is represented by the fact that both parents, regardless of citizenship, must contribute to the child's upbringing and education.

Moreover, in this matter of family law, the courts are obliged to respect the best interests of the child, this interest being represented by the fact that the minor must receive maintenance from both parents. However, if this maintenance obligation is not de facto fulfilled and is established only to circumvent the application of the legal provisions regarding the prohibition of return or obtaining a right of residence, this interest is not attained.

Also in this matter, specific solutions should be identified, either by modifying the current legislation, or by carrying out additional checks by the state authorities in order to avoid an abuse of law by foreigners with a migratory risk.

Conclusions

The legal norms of family law with a correspondent in the field of foreign regime (marriage, filiation with a child, parental rights and obligations), although they were provided for the respect of family life and freedom of movement on the European territory of a third-country

[16] Art. 263 of the Civil Code, art. 2 and art. 6 lit. a of Law no. 272/2002.

national family member of an EU citizen, their purpose can be distorted, if they are used only to obtain a valid residence right in Romania.

In the case of the marriage of convenience, the legislator has provided criteria for combating the abuse of law, distinct from the material norms of the marriage, by which a marriage concluded between a Romanian citizen and a foreigner who is to produce legal effects on the right of residence on the territory of Romania and the EU.

At the same time, in the situation where the existence of the marriage of convenience is established, there are no legal impediments to the removal of the foreigner from the territory of Romania.

However, as regards the activity of recognizing Romanian children by foreigners and/or obliging them to pay a maintenance pension, in order to obtain a right of residence or a privileged status in the national territory, there are no criteria for evaluating those concrete situations, the intervention of the legislator being limited to the prohibition of the removal in the situation in which the foreigner is obliged to pay a maintenance pension that he regularly performs.

As in the case of the marriage of convenience, the recognition of a child or the establishment of an obligation to pay a maintenance pension in favour of a child in a fictitious manner in order to benefit from the provisions regarding obtaining a right of residence for family reunification or forbidding removal from the territory national is *an abuse of law.*

As a legislative and administrative solution has been identified in the case of convenience marriages, the legislator could identify new legislative solutions and regarding the circumstances establishing the filiation or the obligation to maintain the children by foreigners.

We think that a way of controlling this phenomenon (fictitious recognition of children in order to obtain rights) could be the introduction by the legislator of the obligation to carry out administrative checks, in case of recognition of a child by a foreign citizen, by the public institution that regulates the right of residence on the territory of Romania, respectively the General Inspectorate for Immigration, mechanism similar to that provided in the case of convenience marriages or carrying out these administrative checks when the foreigner who has recognized a child outside the marriage or the marriage with a Romanian citizen requests extending a right of residence or opposing the state authorities this recognition.

At the same time, we consider that the legislature could require that in the actions registered in the court's role regarding the establishment of the filiation of a child to a foreigner it is obligatory and the participation of the General Inspectorate for Immigration, to combat the fraudulent agreements between the parties to which the courts it cannot be opposed.

I point out that the intervention of the state authorities in the family life of the third-country nationals must be done with caution, by creating a transparent administrative and legal procedure, so that the particular interest of the family life of any citizen is not affected by the general interest of the state for preventing and combating illegal immigration.

It is obvious that the intrusion of the state into the family life of any citizen (including a third-country national) is difficult for the community to accept, but this is necessary to remove the legal mechanisms used by foreigners abusively to obtain benefits in regarding the right of residence on the territory of Romania.

Thus, it is the responsibility of the state due diligence to closely monitor all these abuses of law apt to affect the purpose of legal rules for the protection of the family as a whole.

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PARTICULARITIES OF THE CONTRACTUAL LIABILITY OF THE AIR CARRIER UNDER REGULATION (EC) NO. 261/2004

Valentin DRAGOMIR[*]

ABSTRACT

After the entry into force of the EC Regulation no. 261/20014, the companies specialized in recovering the damages granted under this regulation started by an excessive advertisement on the Internet networks to conclude documents of assignment of debt with the passengers entitled to the compensation.

It is found that many of these specialized recovery companies do not have their headquarters in the European area and the question arises whether they can benefit from all the passenger rights of the airlines.

Lately, in Romania, more and more such specialized companies are suing in order to obtain compensation under EC Regulation no. 261/2004, and the jurisprudence is constantly changing taking into account also the decisions of the Court of Justice of the European Union in this matter.

KEYWORDS: *passenger; company specialized in recovery actions; competence to resolve compensation; proposals to revise the EC Regulation no. 261/2004.*

Introduction

Regulation 261/2004 of the European Parliament and of the Council of 11 February 2004 (hereinafter referred to as the Regulation) on the establishment of common rules regarding compensation and assistance for passengers in the event of refusal to embark and cancellation or delayed flight cancellation and repeal of Regulation (EC) no. 295/91005 aims to regulate at European level the rights of passengers on air transport.

In this respect, the Regulation establishes the minimum rights of passengers for the cases when one of the following incidents occurs: refusal to board, cancellation of flight, long delay, cancellation, non-information of passengers.

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The provisions of the Regulation apply to all passengers boarding from an airport located on the territory of a Member State and those departing from an airport located in a third country to an airport located on the territory of an EU Member State, where the operator of air transport is a Community carrier or is licensed by the competent Community authorities.

Specifically, if a passenger has been affected by the flight cancellation, the long delay, the non-information about the flight cancellation or the departure/landing time delay, he may obtain certain material compensations to be paid by *an effective operator airline*.

The definition of the effective air carrier [1]imposes two cumulative conditions so that an air carrier can be qualified as an effective one, related, on the one hand, to the flight concerned and, on the other hand, to the existence of a contract concluded with a passenger[2].

Further, according to art. 7 of the Regulation[3], passengers whose flights were canceled or refused to board for a delay of 2 hours for flights up to 1500 km or for 3 hours or moreover, in the case of all intra-Community flights of more than 1500 kilometers and of any other

[1] Pursuant to art. 2 lit. b of regulation no. 261/2004, "effective air carrier" means "an air carrier that executes or intends to execute a flight under a contract with a passenger or on behalf of another person, legal or natural, who has concluded a contract with that passenger ".

[2] Judgment of July 4, 2018, *Wirth and Others* in Case C-532/17, point 18.

[3] Article 7 of EC Regulation 261/2004 - Right to compensation (1) When referring to this Article, passengers shall receive compensation in the amount of: (a) EUR 250 for all flights of 1 500 kilometers or less; (b) EUR 400 for all intra-Community flights exceeding 1 500 kilometers and for all flights between 1 500 and 3 500 kilometers; (c) EUR 600 for all flights not covered by (a) or (b). The last destination where the passenger is to arrive after the scheduled time due to the refusal to board or cancel the flight is taken into consideration in determining the distance. (2) When, in accordance with Article 8, passengers are offered the redirection to their final destination by an alternative flight, the arrival time of which does not exceed the expected arrival time of the initially booked two-hour flight for all flights 1 500 kilometers or less or (b) three hours, for all intra-Community flights exceeding 1 500 kilometers and for all other flights between 1 500 and 3 500 kilometers, or (c) four hours for all non-Community flights falls under (a) or (b), the air carrier may reduce the compensation referred to in paragraph 1 by 50%. 3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank payment order or bank check or, with the written consent of the passenger, in travel vouchers and/or other services. 4. The distances indicated in paragraphs 1 and 2 shall be measured by the orthodromic route method.

flights between 1500 and 3500 kilometers, they are entitled to compensation.

Also, from the interpretation given in the related cases *Christopher Sturgeon and others against Condor Flugdienst GmbH* and *Stefan Böck and Cornelia Lepuschitz against Air France SA*, C 402/07 and C 432/07, the right to compensation is also granted for the delay of a flight, the CJUE showing that *the passengers of the delayed flights can be assimilated to the passengers of the flights canceled in view of the application of the right to compensation and can, thus, invoke the right of compensation provided for in Article 7 of this Regulation when they incur, as a result of a flight delay, a loss of time equal to or greater than three hours, in other words when they arrive at their final destination three hours or more after the arrival time initially provided by the air carrier. However, such delay does not give rise to a right to compensation for passengers if the air carrier can prove that the long delay is caused by exceptional circumstances that could not be avoided despite all possible measures, in other words, circumstances that fall outside the effective control of the air carrier*.

According to the principle of equal treatment, passengers whose flights are delayed and whose flights are cancelled "at the last moment" should be considered as being in comparable situations as regards the application of their entitlement to compensation, as these passengers suffer from similar disadvantages, namely a waste of time.

Most of the cases encountered in the judicial practice are represented by actions formulated in order to commit the contractual liability of the air carriers on the basis of the transport contracts for the occurrence of delays of flights of more than 2 or 3 hours.

However, it is not necessary to pay if the carrier can prove that the cancellation, delay, refusal to board is caused by extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken.

Exceptional circumstances may arise in particular in the event of political instability, weather conditions incompatible with the flight in question, safety risks, unforeseen deficiencies that may affect flight safety and other events that the airline could not foresee and combat.

Immediately after the entry into force of the regulation in 2005, certain companies specialized in recovering the compensation granted to passengers began to activate[4].

Through mass advertising on the social networks, as well as through the Internet networks, they began to contact/be contacted by suitable passengers who are entitled to the compensation under Regulation 261/2004.

These specialized companies concluded with the passengers of the airlines whose flights were cancelled or delayed various debt assignment contracts, by which the passenger transferred to the specialized company the right to compensation under Regulation 261/2004.

I. Procedure for claiming compensation under EC Regulation no. 261/2004 in Romania

In principle, a passenger who is in one of the situations of compensation provided for in the regulation (canceled flight, delayed flight) has the possibility to address the airline directly for compensation, personally, through a lawyer or through a specialized company. in recoveries compensation rights under the regulation.

In the event of a refusal, partial compensation or lack of response to the request from the airlines, the passenger has the possibility to address with a complaint/notification ANPC and/and the competent courts.

Each Member State is required to designate a body responsible for taking measures to ensure the application of the Regulation.

By the Government Decision no. 1912/2006, the National Authority for Consumer Protection (ANPC) was designated as the national body responsible for taking measures to ensure the application of the Regulation.

ANPC is competent to investigate the complaints that refer to an incident that took place in the territory of Romania, complaints that can be received, both from the passengers with Romanian citizenship, as well as from any other passengers who benefit from the provisions of the Regulation.

[4] *https://www.theguardian.com/money/2018/oct/28/fight-delay-compensation-pay-out-claims-firms.*

II. Transmission of the right of compensation under EC Regulation no. 261/2004 by the passenger in favor of specialized recovery companies

From the judicial practice it can be seen that there have appeared many specialized companies with headquarters both in the European Union and outside the European Union, to which more and more passengers entitled to recover the compensation based on the EC Regulation no. 261/2004.

The easy access of passengers to such specialized companies is achieved through online, by accessing websites that specify all their rights and obligations, as well as the costs involved in requesting compensation.

The passenger completes certain fields on the web page owned by this specialized company, transmits certain data to persons, travel documents, flight cancellation/delay information, all of these data being subsequently processed by these companies.

In the event that the passengers are eligible for compensation under EC Regulation no. 241/2006, specialized companies, in exchange for amounts of money sent to the passenger, take the right to compensation from the entitled passengers, by concluding legal documents/forms/contracts through which the right of compensation/compensation is transmitted to the specialized recovery company(Assignment of receivables).

This specialized company, acting either on behalf of the passenger or on its behalf as a result of the transfer of the right, asks the airlines/transport operators to pay damages, and in case of refusal, through law firms it files lawsuits against the airlines/to the operators for the purpose of granting compensation according to the provisions of the EC Regulation no. 261/2004.

III. Jurisdiction of the courts to settle the claims made by the specialized companies in the recovery of damages under the Regulation no. EC no. 261/2004

Regarding the international jurisdiction for the settlement of cases by the Romanian courts, the general rule is that the Romanian courts are competent if the defendant has his domicile, and in the absence of the domicile, the usual residence, respectively the main seat, and in the

absence of the main seat, a secondary office or goodwill on the territory of Romania at the time of application[5].

Considering that the right to compensation arises as a result of the conclusion of a transport contract, an alternative jurisdiction is established in the sense that the Romanian courts are competent to judge also the disputes in which the railway or road station or the port or airport of embarkation/loading or unloading/unloading of passengers or freight is in Romania.[6]

However, according to art. 1065 of the Code of Civil Procedure specifies that the provisions mentioned above apply to the processes of private law with elements of foreignity insofar as by the international treaties to which Romania is a party, by the law of the European Union or by special laws is not provided otherwise.

Regulation no. 261/2004 does not contain rules regarding the international jurisdiction of the courts of the Member States, so the question of the international jurisdiction of a court of a Member State must be examined from the perspective of Regulation no. 1215/2012 on judicial jurisdiction, recognition and enforcement of judgments in civil and commercial matters[7].

According to art. 1 of the EC Regulation no. 1215/2012, the application domain includes civil and commercial matters. In the legal reports submitted to the court in the litigation regarding the granting of damages according to the Regulation 261/2004 is civil in nature, not being part of the matters expressly excluded from the application of the regulation.

The general rule regarding competence is established by art. 4 of the Regulation, according to which, subject to the provisions of this Regulation, persons domiciled on the territory of a Member State are sued, irrespective of their nationality, before the courts of that Member State.

The norm is supplemented by art. 5 paragraph 1, according to which the persons domiciled in the territory of one Member State may be sued

[5] See in this regard art. 1066 and following of the Romanian Civil Code Procedure (Law no. 134/2010 republished).

[6] See in this regard art. 1081 paragraph 4 of the Romanian Civil Procedure Code (Law no, 134/2010)

[7] See in this respect the judgment of 9 July 2009, Rehder, C-204/08, EU: C: 2009: 439, paragraph 28

before the courts of another Member State only under the rules set out in sections 2-7 of this Regulation

In the case of the CJEU no. C-204/08 (*Peter Rehder v. Air Baltic Corporation*) established that The second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier, the court having jurisdiction to deal with a claim for compensation founded on that transport contract and on Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, is that, **at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract[8].**

In case no. C - 646/2018 (*Ryanair* (C-464/18, Publié au Recueil numérique) ECLI: EU: C: 2019: 311) pronounced on April 11, 2019 by the Court of Justice of the European Union was established that *article 7(5) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a court of a Member State does not have jurisdiction to hear a dispute concerning a claim for compensation brought under Article 7 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, and directed against an airline, established in the territory of another Member State, on the ground that that company has a branch within the territorial jurisdiction of the court seised, without that branch having been involved in the legal relationship between the airline and the passenger concerned. Article 26(1) of*

[8] See http://curia.europa.eu/juris/celex.jsf?celex=62008CJ0204&lang1=en&type=TXT&ancre

Regulation No 1215/2012 must be interpreted as not applying in a case, such as that at issue in the main proceedings, where the defendant has not submitted observations or entered an appearance.

Article 25 of Regulation no. 1215/2012 provides for the possibility of concluding conventions for choosing the competence. Paragraph 1 establishes that, if by the agreement of the parties, irrespective of their domicile, the power to settle the dispute that has arisen or may arise in relation to a given legal report rests with the court or courts concerned, unless the convention is null and void regarding the substantive conditions under the law of the respective Member State. This power is exclusive, unless otherwise agreed by the parties. The attribution agreement of competence is concluded:

a) in writing or verbally with written confirmation;

b) in a form in accordance with the customs established between the parties; or

c) in international trade, in a form consistent with the custom with which the parties are or should be aware and which, within this type of trade, is clearly known and regularly respected by the parties to the type contracts on which involves the respective commercial domain.

Article 25 para. 2, it is stipulated that "Any communication in electronic form that allows the lasting recording of the convention shall be considered as" in writing ".

We consider accomplished the condition imposed by para. 2 in art. 25, of the durable recording of the convention concluded by electronic communication, keeping in this regard that the considerations held by the Court of Justice of the European Union in the decision delivered on 21.05.2015 in case C-322/14 *Jaouad El Majdoub v. CarsOnTheWeb. Deutschland Gmbh*.[9]

[9] Article 23 (2) of Regulation (EC) no. 44/2001 of the Council of December 22, 2000 on judicial jurisdiction, the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the technique of "clicking" acceptance of the general conditions of a sales contract, such as the one in question in the main dispute, concluded by electronic means, which contains an attributive convention of competence, constitutes an electronic communication that allows the durable recording of the convention, within the meaning of this provision, when this technique ensures the possibility of printing and saving their text before the conclusion of the contract.

It is true that the decision refers to the interpretation of art. 23 paragraph 2 of the *EC Regulation no. 44/2001*, but article 23 of the EC Regulation no. 25 paragraph 2 of the EC Regulation no. 1215/2012, stipulating that "Any communication in electronic form that allows the lasting recording of the convention is considered to be" in writing ".

Therefore, we appreciate that the Court's interpretation of the decision delivered on 21.05.2015 in Case C-322/14 regarding the fulfillment of the condition of electronic communication, which allows for the durable recording of the convention, is incidental in cases where a jurisdiction clause is established through the conclusion of online transport contracts, through specialized sites or applications.

However, by this decision, the Court held that "the technique of" clicking "acceptance of the general conditions of a sales contract, concluded electronically, which contains an attributive clause of competence, constitutes an electronic communication that allows for sustainable delivery of the convention, within the meaning of this provision, when this technique ensures the possibility of printing and saving their text before the conclusion of the contract".

The Court also held in par. 33, that "In this regard, from a literal interpretation of this provision, it appears that it requires the" p**ossibility** "of providing a durable record of the attributive convention of competence, *regardless of whether the text of the general conditions has been effectively recorded in a sustainable manner by buyer* after or before ticking the box indicating that he accepts the mentioned conditions."

Article 25 paragraph 4 of the EC Regulation no. 1215/2012 stipulates "The attributive conventions of jurisdiction, as well as the similar provisions of the articles of incorporation of a trust have no legal effect if they are contrary to the provisions of articles 15, 19 or 23 or if the courts from which they derogate have exclusive jurisdiction under Article 24 ".

We believe that we are not in the presence of a dispute that falls within the provisions of art. 24 of the Regulation, art. 15 (since it is not an insurance dispute) and no art. 19, because this norm can be found in section 4 "*Competence in the matter of contracts concluded by consumers*", and by art. 17 paragraph 3 expressly excludes the applicability of the entire section 4 to transport contracts, except for those which, for a flat price, offer a combination of travel and accommodation - a situation that is not found in this case.

Thus, art. 17 paragraph 3 provides "**This section** (competence in the matter of contracts concluded by consumers, n.n.) **does not apply in the case of transport contracts** other than those which, for a flat price, offer a combination between travel and accommodation".

Regarding the competence to solve the cases in which compensation is requested based on the regulation vis-à-vis a Romanian airline or with the branch in Romania for domestic flight routes or for which either take-off or landing was carried out on the territory of Romania by a company the Romanian airline is competent the court either from the place of take-off or from the place of landing, according to the applicant's choice.

Interpretation problems arise when an element of foreignity appears, respectively the airlines are not Romanian or do not have a branch registered in Romania, but they operate flights from Romania to other countries or from other countries to Romania, or the transport contract is not concluded with a branch registered in the territory of Romania, but directly with the airline in the home state through the company's websites/applications.

In this case, the courts must verify in the analysis of the applications for the international jurisdiction of the courts, according to the EC Regulation no. 1215/2012 in accordance with the case law of the ECJ in this matter, as specified above.

Taking into account all the aforementioned considerations, in order for the Romanian courts to be competent in solving the claim according to EC Regulation no. 261/2004, with elements of extraneity, the following *cumulative conditions* must be met:

1. either take-off or landing on an airport in Romania;

2. the defendant (the airline/operator) has concluded with the passenger a transport contract (plane ticket) and has a branch on the territory of Romania;

3. when the airline/transport operator does not submit and/or does not respond to requests made before the Romanian courts, it is necessary that a branch of the airline/transport operator in the territory of Romania has been a party to the relationship between the company and the passenger in question;

4. not to establish an attribution clause of competence by concluding the transport contract outside Romania.

Considering the fact that many companies specialized in recovering the damages granted under the EC Regulation no. 261/2004 have their

headquarters outside the space of the European Union, it is legitimate to question whether by transferring the right by the passenger to a specialized company the procedural rights regarding the jurisdiction to solve the cases are transmitted.

As a rule, the assignment of a debt transfers to the assignee all the rights that the transferor has in relation to the ceded debt, as well as the guarantee rights and all other accessories of the ceded debt. The claim is ceded by the simple agreement of the transferor and the transferee, without notification of the debtor. The assignment of the debt is validly concluded by the agreement of the will of the parties, without any additional formality being required.

The European Commission has proposed a series of revisions to the regulation, following the decisions made by the CJEU, interpreting material rules of Regulation 261/2004, which have not yet been adopted in 2019[10].

[10] *https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_203*; Among the proposed changes are: The airlines will be obliged to inform the passengers about the flight delays within 30 minutes after the scheduled departure time

• The definition of "extraordinary circumstances" will be further clarified to include natural disasters or air traffic control attacks and to exclude technical problems identified during routine maintenance.

• Concerning compensation for long delays, which was never explicitly mentioned in the original regulation, but added by the European Court of Justice, a five-hour threshold for type 1 and 2 flights, 9 hours for type flights 3 to 6,000 km, and 12 hours will be set for longer flights.

• The right to refreshments and communication will become applicable after two hours, regardless of the duration of the flight.

• An explicit right to refreshments, communication, accommodation and assistance will be added for the circumstances in which passengers are late to their final destinations due to the delayed arrival of the connected flights.

• Airlines will be required to reorient passengers to another carrier if they cannot accommodate them within 12 hours after the scheduled departure time.

• Airlines will be required to provide passengers with access to toilets, drinking water, air conditioning and medical assistance after a delay of one hour or more and refreshment after two hours and allow passengers to disembark after a delay of five hours hours or more.

• Scheduling a flight within two weeks prior to departure time will give rise to the same rights as cancellation.

• Passengers will have the right to correct the letter names for free, except for 48 hours after departure.

Conclusions

So far, the Romanian courts consider that by assigning the right of debt to specialized recovery companies, all the rights and obligations of the passenger are transferred under EC Regulation no. 261/2004, including its procedural rights (*competence to resolve cases*).

National jurisprudence has shown that when the passenger acts in a personal name is exempted from the obligation to pay stamp court fees[11] being considered a consumer, instead, specialized recovery companies are obliged to pay a stamp stamp court fee depending on the amount of compensation requested.

On the other hand, the companies specialized in requesting compensations are obliged to pay a stamp court fee depending on the amount of the requested compensation, their field of activity being one specialized in recovering these compensations, and they cannot be consumers.

• Airlines will be required to provide passengers with full compensation for lost or damaged mobility equipment during a flight, provided that its value is stated at check-in. There is no charge for this.

• The forms must be provided at the airport to the clients who wish to file complaints, and these must be accepted as valid claims in accordance with the regulation.

• Airlines will be required to accept small musical instruments as cabin baggage and publish the conditions under which they will accept larger instruments.

• The airlines will be obliged to clearly inform passengers about the limited baggage and checked baggage at the time of booking and at the airports.

• The airlines will not be obliged to pay for the accommodation of travelers for more than three nights if the major interruptions escaped from their control causing delays or cancellations, except for the passengers with reduced mobility, the accompanying passengers, the unaccompanied minors, pregnant women and passengers with specific medical needs. Apart from these types of passengers, delays and cancellations on flights of less than 250 km and on aircraft with less than 80 seats will not give rise to a right of accommodation.

• Airlines and airports will be required to prepare emergency plans to treat passengers stranded in large-scale disruptions

[11] According to art. 29 paragraph (1) lit. f of the Government Emergency Ordinance no. 80 of June 26, 2013 regarding stamp court fees *" actions and applications, including those for the exercise of remedies, ordinary and extraordinary, regarding the protection of consumer rights, are exempt from the payment of the stamp court fee, when natural persons and associations for consumer protection have the status of complainant against the economic operators who have undermined the legitimate rights and interests of consumers."*

We consider that among the proposals to revise the EC Regulation no. 261/2004 should be established criteria to be met by these companies so that its purpose is not diverted.

In present, these companies specialized in claiming compensation granted under EC Regulation no. 261/2004 are the real beneficiaries of the compensations granted, transforming the benefits granted by establishing the regulation into a profitable speculative business.

Many of these specialized companies do not have their head office in the European area, and in case the rights assigned by passengers are not respected, they are not responsible.

Moreover, there may be situations where the claim for compensation is unfounded and the court expenses incurred by the air carriers in the cases registered before the courts cannot be recovered.

In order not to distort the purpose of establishing common rules regarding compensation and assistance of passengers in the event of refusal to board and the cancellation or delayed delay, I consider that it is necessary that among the proposals for revision of the EC Regulation no. 261/2004, to establish special criteria in which these specialized recovery companies can act, either by limiting the possibility of transmitting the right to compensate the entitled passengers, or by obliging them to have branches registered in the territory of the Member States in order to be obliged to observe the procedural rights and obligations of passengers.

At the same time, there should be a legal obligation for these companies to register tax on the territory of an EU Member State, under the coordination and supervision of the body responsible for taking measures to ensure the application of the Regulation.

It is noted that there are no aspects in the proposals for revision of the Regulation regarding the establishment of the competence to solve the cases regarding the commitment of the contractual liability under the EC Regulation no. 261/2004, which will not clear the jurisprudence of the EU member states in this matter.

In the absence of these punctual changes, the companies specialized in the recovery of the compensations will act freely on the European market, so that the legal norms established in order to protect the interests of the passengers will be used by them only for the purpose of running a business.

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SHORT CONSIDERATIONS REGARDING THE POSSIBILITY OF ACKNOWLEDGING THE OFFENCE OF LEAVING THE ACCIDENT'S SCENE IF THE VEHICLE CRASH WAS MADE WITH INTENTION

Bogdan Mihai DUMITRU[*]

ABSTRACT

There is a jurisprudential and doctrinal orientation which acknowledges cumulatively the offence of hitting or other violence or as the case may be, attempt of murder with leaving the accident scene. Another jurisprudential and doctrinal orientation states that the offence of leaving the accident scene cannot be considered as to be borne by the perpetrator. Through a careful analysis of Anglo-Saxon and continental legal doctrine, the relevant national law texts, as well as the international ones of the European Union, the case law of the European Court of Human Rights, this study hopes to clarify this legal issue.

KEYWORDS: *leaving the accident's scene; vehicle; intention; European Court of Human Rights.*

INTRODUCTION

This article will try to make a legal analysis of a legal issue that has created certain difficulties in judicial practice concerning the possibility of acknowledging the objective and especially subjective typicality of the offence of leaving the accident scene if the vehicle crash was done intentionally.

There will be presented the opinion of the Criminal Law Department of the National Institute of Magistracy, the opinions of the practitioners, the relevant case law of the High Court of Cassation and Justice, the classic European legal doctrine. Subsequently, the herewith study, and by means of a logical-grammatical analysis of the texts, will conclude in a point of view that hopes to be relevant in the future of the Romanian jurisprudential solutions.

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INCIDENTAL LAW TEXTS

The main legal issue to be analysed in this article is incriminated by art 338 Romanian Penal Code[1] which states as follows:

(1) Leaving the accident scene, without the approval of the police or of the prosecutor who conducts the investigation at the scene, by the driver of the vehicle or the car instructor, during the training process, or by the examiner of the competent authority, during the practical test of the exam to obtain the driving license involved in a traffic accident, is punished by imprisonment from 2 to 7 years

(2) With the same punishment is also sanctioned the act of any person to change the condition of the place or to delete the traces of the traffic accident which resulted in the killing or injury of the body integrity or health of one or more persons, without the consent of the on-scene research team.

(3) It is not an offence leaving the accident scene when:

a. after the accident only material damage occurred
b. the driver of the vehicle, in the absence of other means of transport, transports himself the injured persons to the nearest health care unit in order to provide the necessary medical assistance and where he declared his personal identity data and licence plate number or registration number of the driven vehicle, data recorded in a special register, if he returns immediately to the place of the accident.
c. the driver of the vehicle with priority traffic regime immediately announces the police, and after the completion of the mission, appears at the headquarters of the police unit in area of competence of which the accident occurred, in order to draw up the finding documents.
d. the victim leaves the scene, and the driver immediately announces the event to the nearest police station.

Also relevant and indispensable are the provisions of art. 75 of the Traffic Code[2] for the logical and systematic analysis of the possibility to

[1] Law no. 28/2009 published in the Official Gazette no. 510 of 24 July 2009 in force since 1 Feb. 2014.

[2] Emergency Ordinance no. 195/2002 regarding the circulation on public roads republished in the Official Gazette no. 670 of 3 Aug. 2006.

acknowledge the offence of leaving the accident scene if the road accident is committed intentionally, which makes the object of this article, provisions which state as follows:

The traffic accident is the event that cumulatively meets the following conditions:

a. is occurred on a road open to public traffic or originated in such a place
b. resulted the death, injury of one or more persons or damage to at least one vehicle or other material damage
c. at least one moving vehicle was involved in the event.

RELEVANT JURISPRUDENCE AND DOCTRINE.

Although the offence of leaving the accident scene was tangentially the recent subject of Dispensation of Law[34], the law issue presented in

[3] Decision no. 8/2019 of 21 March 2019. Published in the Official Gazette, Part I no. 424 of 30/05/2019. The High Court of Cassation and Justice has admitted the complaint made by the Suceava Court of Appeal - Criminal Section and for cases with minors and family, in the Case File no. 65/206/2018, by which it was requested to issue a preliminary ruling for the dispensation of principle of the following legal issue: " if the notion of injury to one or more persons provided by art. 75 paragraph (1) letter b) from O.U.G. (Government Emergency Ordinance) no. 195/2002 regarding the circulation on public roads related to art. 338 paragraph (3) from the Penal Code, article which defines the road accident as a premise of the offence of leaving the scene of the accident provided by art. 338 paragraph (1) of the Penal Code, also takes into account self-injury, when the only injured person is the driver of the only vehicle involved in the accident." It has been established that the injury of one or more persons provided by art. 75 letter b) of O.U.G. no. 195/2002, contained in the definition of the traffic accident, as a premise of the offence of leaving the accident scene provided by art. 338 paragraph (1) of the Penal Code, does not take into account self-injury, when the only injured person is the driver of the only vehicle involved in the accident.

[4] Decision no. 5 of 28 February 2018. Published in the Official Gazette, Part I no. 355 of 24/04/2018. The High Court of Cassation and Justice has admitted the complaint made by the Bacau Court of Appeal - Criminal Section and for cases with minors and family in the case file no. 8618/279/2016, by which it was requested to issue a preliminary ruling for the dispensation of principle of the following legal issue: " What is meant by the term of injury provided by art. 75 letter b) thesis II of O.U.G. no. 195/2002 regarding the circulation on public roads, in the explanation and application of the provisions of art. 338 paragraph (1) of the Penal Code regarding the offence of leaving the accident scene?". In the explanation and application of the provisions of art. 338 paragraph (1) of the Penal Code regarding the offence of leaving

this article was not approached by the High Court of Cassation and Justice within a decision of Dispensation of Law or an Appeal in the Interest of the Law.

However, a topical interest was expressed by practitioners[5], which represented a determining factor for the existence of this legal study.

Within a meeting of the practitioners it was discussed the possibility of retaining as cumulative the offence of hitting or other violence or, as the case may be, an attempt to kill with that of leaving the accident scene.

The opinion of Criminal Law Department of the National Institute of Magistracy was that, in the hypothesis of proving the typical conditions of both offences, an offence against bodily integrity or health of the person or an offence against life and leaving the place of the accident provided by art. 338 Penal Code, the actual offence cumulative aspect will be acknowledged. It was considered that the incrimination rule provided by art. 338 Penal Code does not consider committing the accident exclusively by fault, but the occurrence of a road event resulted in the killing or personal injury of a person, so that there is no basis for the opposite opinion.

It was further considered by the above-mentioned specialists that the way in which the traffic accident is defined according to the provisions of art. 75 of O.U.G. no. 195/2002 leads to the conclusion that as long as the road event was caused by a moving vehicle and resulted in personal injury or death of a person, the offence of leaving the accident scene can be acknowledged even if the accident was caused with direct or indirect intent.

As for the opinion of the other specialists present at the meeting, most of them were of the opposite view expressed by the specialists of the

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the accident scene, it was established that the term of injury provided by art. 75 letter b) thesis II of O.U.G. no. 195/2002 regarding the circulation on public roads, republished, is construed as "traumatic injury or impairment of a person's health, the severity of which is assessed by days of medical care (at least one day) or by one of the consequences provided by art. 194 paragraph (1) letters a), c), d) and e) of the Penal Code".

[5] During the meeting of the presidents of the criminal sections of the High Court of Cassation and Justice and the Courts of Appeal with the chief prosecutors of criminal prosecution section at the Prosecutor's Office by the High Court of Cassation and Justice, specialized structures DNA (National Anti-Corruption Division) and DIICOT and of the prosecutor's offices by the Courts of Appeal of May 18, 2018, Bucharest.

Criminal Law Department of the National Institute of Magistracy considering that in the aforementioned hypothesis it is not possible to acknowledge the existence of the offence stated by art. 338 Penal Code, because such an explanation would be equal to claiming the defendant to self-denounce. It was invoked that even the marginal name of the article of law, leaving the accident scene supports the thesis according to which it is incriminated exclusively the deed committed by fault.

Analysing the recent doctrine it turned out that the present issue of law aroused interest being analysed the practice of the Supreme Court[6]. The author of the doctrinal work has identified a solution of this case, however without general and compulsory application where it was considered that the hit of a person with a vehicle, with the intention to commit murder, followed by leaving the scene, constitutes attempt at the offence of murder and not the offence of leaving the place of the accident. Further it was appreciated that the latter offence does not exist if the hitting of the victim occurred as a result of the intent of the perpetrator to assault the person, because by accident is meant the unintentional occurrence of death or personal injury or health of a person.[7]

OUR ANALYSIS

The logical-grammatical analysis of the legal provisions as well as the analysis of the Romanian legal doctrine

We appreciate that although the Road Code provided a legal definition of the traffic accident, this definition is deficient in terms of the subjective side of the persons that are involved in that accident, which led to different interpretations, mentioned above in this article that is, if the traffic accident may only be committed by fault or it may be acknowledged also when it is intentionally produced.

Given this deficiency, we consider necessary to construe the texts of law in accordance with the will of the legislator, the study of definitions provided in the common language for the words accident and event.

[6] Radu, Adrian, *Road traffic offences. Comments and case law*,Hamangiu Publishing House, Bucharest, 2017, p. 326.

[7] C.S.J., s. pen., dec. no. 2878/05.06.2001 published in the Jurisprudence Buletine 2001, p. 234.

According to the Explanatory Dictionary of the Romanian Language[8], the term accident is defined as a fortuitous, unpredictable event that disrupts the normal course of things, as a random, trivial fact which brings misfortune.

Regarding the term event, this is defined as an important occurrence, a fact of great significance.

Considering the common language meaning of the two terms, the author of this study we consider that the traffic accident cannot be considered as an intentional road event.

Thus, considering these logical - grammatical arguments, the opinion according to which it cannot be retained the existence of the typical nature of the offence of leaving the scene if the accident was intentionally committed, seems to be the right one.

At the same time, another argument in support of the opinion that the offence of leaving the accident scene cannot be acknowledged if the car accident was intentionally made is also the reason for which the Romanian legislator chose to incriminate this deed. Thus according to the doctrine[9] the offence of leaving the accident scene is an offence by means of which it is prevented the establishment of an offence or contravention against the safety of the road traffic. The same author[10] showed that by incriminating this deed, the legislator although firstly he wanted to protect the circulation on public roads, secondly he also wanted to defend another social value, namely the activity of the judicial bodies against acts which prevent the immediate and complete finding of the violations committed in road traffic, identifying the perpetrators and establishing the concrete circumstances in which the respective violations were committed.

More recent doctrine[11] considers that the main legal object of the offence of leaving the accident scene is represented by social relations regarding the safety of traffic on public roads and the secondary one

[8] Romanian Academy. Institute of Linguistics "Iorgu Iordan - Al. Rosetti", *The Explanatory Dictionary of the Romanian Language*, Universul Enciclopedic Publishing House, Bucharest 2016.

[9] Corneliu Turianu, *Road traffic offences*, All Beck Publishing House, Bucharest, 2000, p. 187.

[10] *Idem*, p. 188.

[11] Radu, Adrian, *Op.cit.*, p. 318.

consists in the social relations regarding the execution of justice and those regarding life, physical integrity or health of the person.

Thus, we consider the conclusions of the doctrine as being relevant in assessing that the secondary legal object protected by these legal norms is the protection of the activity of the judicial bodies.

By leaving the car at the accident scene, the work of the criminal investigation bodies is particularly helped in order to find out who is guilty for the road accident, what was its dynamics, speed as well as other factual elements for the assessment of an exclusive or cumulative fault of those involved in the accident. These conclusions are more than important in order to individualize both a penalty that will be related to the criminal action in question and possibly to the civil one in terms of the amount of damages.

Thus it is found that the reasons for which the legislator has opted for incriminating the act of leaving the accident scene are not relevant if the car accident was intentional. It is also found, as a parallel, that if a person had used a knife or another blunt object to attempt to another person's life or bodily integrity, we would not be in the presence of an offence, the perpetrator not being obliged not to leave the place of deed. The reason for this non-incrimination is that in this case there is no need for an analysis of the criminal investigation bodies to show the existence or not of a common guilt to actually materialize as we mentioned above in the individualization of the punishment or material and moral damages.

As a consequence, we consider that neither the relevant Romanian legal doctrine does support the hypothesis of retaining the offence of leaving the accident scene if the hit was intentionally committed.

Analysis of the case law of the European Court of Human Rights

Also, in support of the above-mentioned conclusion, it is more than necessary to mention also the standard imposed by the European Court of Human Rights regarding self-incrimination in the case law of this court, taking into account the situation in which we accept that a person would cause a road event with intent to injure or kill a person and would be required by law to remain on the scene until he or she receives permission from the criminal prosecution bodies to leave.

Thus, the right of the witness or of a person accused of a criminal act not to incriminate oneself is deeply rooted in European law - *nemo debet seipsum accusare*[12].

As per the case law of the European Court of Human Rights, each person accused of a criminal offence has the right to remain silent and not to incriminate oneself.[13] [14][15] Although indeed art. 6 of the European Convention on Human Rights does not explicitly mention the right to remain silent and the right not to incriminate oneself, as explicitly protected rights, they have crystallized in the Court's case-law as generally recognized international norms that are at the heart of the concept of fair trial established in Article 6 of the Convention.

The court considers that protecting a person against abusive constraints from the part of the authorities, these immunities contribute to the avoidance of judicial errors and guarantee the result pursued by art. 6. The right not to incriminate itself applies to criminal proceedings regarding all types of offences, from the simplest to the most complex.[16]

Also, the right to remain silent is applicable since the interrogation stage before the police. In view of this general analysis of the Court's case-law, the author's opinion is that compelling the author to remain at the scene of the road accident would not pass the standard imposed by the European Court of Human Rights that protects even less important subdivisions of the right not to incriminate oneself in its case law.

Analysis of Anglo-Saxon and continental doctrine

As for the Anglo-Saxon system, the American author Leonard W. Levy in his book Seasoned Judgments. The American Constitution, Rights and History[17] performs an interesting analysis of the American

[12] Tunkel, Victor (1997) *Human Rights – Self-incrimination and the European Convention.* Amicus Curiae, 1997 (1). p. 21-22.

[13] *Funke against France*, paragraph 44

[14] Saunders against the United Kingdom paragraph. 60

[15] *O'Halloran şi Francis against the United Kingdom*, paragraph 45

[16] *Saunders against the United Kingdom*, paragraph 74

[17] Levy, Leonard W., Seasoned Judgments *The American Constitution, Rights and History*, Transaction Publishers, 1997, New Brunswick.

pre-constitutional history of the right of the person not to incriminate oneself.

Thus, it is noted as early as 1756, in the work Law of Evidence of Geoffrey Gilbert that this principle of law is analysed, the aforementioned legal adviser finding that although a confession is the best proof of guilt in a criminal trial, this must be voluntary because "our law(…) does not force anyone to self-accuse; by this we respect the laws of nature.'' At the time of the publication of the work in the XVIII century, this principle of law was so deeply rooted in Anglo-Saxon law that the author didn't even felt the need to prove the validity and necessity of its existence.

Also, almost a century before, in the work Maxims of Reasons of Edmond Wingate, published in 1658 this principle is also found in a slightly modified form *nemo debet seipsum accusare***,** being a principle recognized and applied by the courts of those times.

As for the continental law, the works of some famous legal advisers of the time like Jean Jacques Barlamaqui and Samuel von Pufendorf, works read and appreciated in the Anglo-Saxon area contained the principle of law according to which a person is not obliged to face a punishment by answering an incriminating interrogation.

Samuel von Pufendorf in his book "The Law of Nature and Nations" published in 1672, explained that no man can be compelled to accuse himself before a court or to confess to an offence, being bound by an oath.

Analysis of European Union rules

As for the European Union law, it is found that it is in accordance with the European doctrinal history of the principle, as well as with the case law of the European Court of Human Rights.

Thus, *Directive (UE) 2016/343 of the European Parliament and of the Council of March 9, 2016 regarding the consolidation of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings* contains certain provisions relevant to the present situation.

According to article 7 of this directive, entitled "the right to keep silent and the right not to incriminate oneself", states are obliged to ensure that suspected and accused persons have the right not to incriminate themselves, a right which, however, does not exclude the possibility of the competent authorities to collect evidence that can be obtained legally by using constraint measures provided by law and which exist independently of the will of suspected or accused persons.

CONCLUSIONS

Following the summary study conducted in this article, the author concludes in his opinion that it is practically impossible to retain as cumulative the offence of hitting or other violence or, as the case may be, an attempt to kill with that of leaving the accident scene. An opposite conclusion is appreciated by the author as being obviously in disagreement with the grammatical and logical analysis of the relevant legal texts, with the classical European doctrine, with the European Union legislation and the European Court of Human Rights case law.

It is more than obvious that it would be against the principles of established European law, as well as against any law of nature under the power of which we are all found, that a person who has committed an act of a criminal nature, though shameful in its essence to want to ensure his/her own escape.

An attempt of the lawmakers or practitioners to regulate or enforce the law contrary to human biology not only would not have the desired effects but rather it would lead to the fall into ridicule and inapplicability.

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PARTICIPANTS IN THE INSOLVENCY PROCEEDING FOR INDIVIDUALS – INSOLVENCY COMMITTEE

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ABSTRACT
With reference to the participants in the insolvency proceeding for individuals, we may note that Romanian Law 151/2015, as compared to Law 85/2014, brings forward a new player – the Insolvency Committee, which has a central and extremely important role from the beginning to the end of the proceeding.

KEYWORDS: *insolvency; bankruptcy; individuals; debtor; insolvency committee.*

The insolvency procedure for professionals was subject for numerous debates and, at the same time, for the practitioners' analysis from the viewpoint of the solutions ruled by the courts of law within the meaning of the law. Nevertheless, the individual's insolvency is a rather new subject, at least for the parties to the proceedings in Romania, the Insolvency Committee being an absolute novelty for the domestic law, within the insolvency procedure, based on a debt repayment plan.

The insolvency proceeding for individuals, in any of its three forms provided by the law, is initiated before the insolvency committee. This committee plays a central role in carrying out the proceeding from an organizational viewpoint as well. As an administrative structure for implementing the law, it is organized on two levels, i.e. a central level and a territorial level.

The establishment of the insolvency committees at central and territorial level provided by Law no. 151/2015 on the insolvency proceeding of individuals was regulated through Resolution no. 11 of 13.01.2016 of the Romanian Government.

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I. Insolvency Committee at Central Level

The Central Committee is defined under Art. 3 item 9 of Romanian Law no. 151/2015 as being the administrative body established according to the provisions of the law, which monitors and coordinates the activity of the territorial insolvency committees in conducting the insolvency proceedings and exercises all its other duties for which it is competent under the law.

The formation of the insolvency committee at central level comprised of one representative of each of the following institutions: National Authority for Consumer Protection; Ministry of Public Finance; Ministry of Justice; Ministry of Labour, Family, Social Protection and the Elderly; National Trade Register Office - Insolvency Proceedings Bulletin Directorate, which are nominated for 3-year mandates, is a first subject for debate, as state institutions are involved by the law in an insolvency proceeding where there are interests of debtors-individuals and creditors. In the matter of foreclosure, where the involvement of some public institutions such as courts of law and public law enforcement bodies comes as an exception, a different approach is available which demonstrated its efficiency and functionality over the years.

It may be noted than, on the other side, the law generates a new bureaucratic mechanism under the conditions in which, in the liberal economies, the future belongs to decentralization, not to the creation of mechanisms that affect the state's financial resources. Clearly, one can invoke on one side the fact that the purpose of this mechanism is of protecting the debtor against certain 'slips' which can occur during the proceeding, therefore, social protection is an aspect considered by the less liberal economies. Clearly, the debate referring to the efficiency of a system as compared to another may involve much more complex aspects, which fall outside the object of this study.

Art. 2 of GD no. 11/13.01.2016 sets eligibility conditions so that a person can fulfil the capacity of titular or substitute member of the insolvency committee. At central level, the conditions are as follows: seniority - minimum 3 years in the speciality field, professional authority and moral probity, supported through recommendation on behalf of the institution's management, expertise within the meaning of having economic, legal or other relevant higher studies for the enforcement of

the proceedings provided under Law no. 151/2015, supported by the job description.

The chair of the committee is the one who coordinates the activity of the central committee and of the technical staff, whose mandate lasts for 1 year and who is appointed by rotation among the representatives of each public institutions holding the capacity of central committee members.

The duties of the chair of the insolvency committee also include the convening and chairing the committee's sessions, issuing the decision regarding the criteria for the determination of the reasonable living conditions and ruling the annual publication of the criteria, issuing the decision for the valuation criteria on the debtors' and their families' inhabitancy needs, with the observance of the provisions of Law no. 151/2015 and of the Inhabitancy Law no. 114/1996, to represent the committee in the relationship with the central and local public administration authorities, with the national and international institutions and with the Romanian and foreign individuals and companies.

At the beginning of the mandate, the chair of the central insolvency committee proposes a plan of measures on the coordination, from a methodological viewpoint, of the insolvency committees' activity at territorial level and issues the decision regarding the type request form for the initiation of the insolvency proceeding based on a debt repayment plan, as well as other necessary forms for the enforcement of Law no. 151/2015.[1]

There are opinions according to which this position is, first of all, a honorific one, of representing the institution in its relationship with third parties, as well as a representation one, as all the decisions are issued by the chair only after having been previously approved by the committee, nevertheless, in my opinion, this is not the case, given that from all the above one may see that the president holds a central, coordinating role, thus excluding the idea of a honorific role.

The central insolvency committee has also competencies for elaborating the structure and the curricula for the professional training of the insolvency committee members and of the technical staff, for the monitoring and coordination of the proceeding administrators' and

[1] Art. 7 of the Government Decision no. 11/13.01.2016.

liquidators' activity, as well as the right to make proposals for amending or supplementing the implementing rules of the law.[2]

The technical staff operating as a department under the National Authority for Consumer Protection is the one supporting the insolvency committee at central level in its activity. The law also regulates the committee's supporting technical staff which operates as a self-standing department within the National Authority for Consumer Protection, having among its main competencies the role of ensuring the committee's technical secretariat, of supporting the committee in the fulfilment of its duties provided by the law and by the regulatory acts issued for its implementation, of conducting the documentation and analysis activity for the determination by the insolvency committee at central level of the general criteria for the determination of the reasonable living conditions and for assessing the inhabitancy needs of the debtors and their families, supporting the committee in drafting them. Thus, one may say that the technical staff is the insolvency committee's true 'brain' at central level, preparing and reasoning all the actions and endeavours for which the committee is competent.

"In the negotiations held at the political decision makers' level, during the law's drafting stage, it was pointed out that the National Authority for Consumer Protection is best qualified for assuming the technical staff's role, given its immediate organizational possibilities, holding expertise in the general consumer protection, the overly indebted consumers targeted by Law no. 151/2015 being a mere sub-category of the previously mentioned ones.[3]".

II. Insolvency Committees at Territorial Level

The decision-making, control and monitoring duties within the insolvency proceeding based on a debt repayment plan are fulfilled by the territorial insolvency committee established in each county, being supported in its activity by the proceeding's administrator. Likewise, it has surveillance competencies in conducting the simplified insolvency proceeding and, at the same time, it fulfils advisory, control and

[2] Art. 83 of the Government Decision no. 11/13.01.2016.

[3] Daniela Deteşan, *Insolventa Persoanei Fizice, Tratamentul juridic al suprain-datorarii consumatorului,* Editura Hamangiu; București, p. 162.

surveillance duties over the post-closure period of the judicial insolvency proceeding through asset liquidation, being supported by the liquidator.

The territorial Insolvency Committee is comprised of representatives of the deconcentrated structures in the territory of the National Authority for Consumer Protection; Ministry of Labour, Family, Social Protection and the Elderly; as well as a representative of the Ministry of Public Finance. The members of the territorial insolvency committee are bound to attend initial specialization courses in the insolvency for individuals, as well as in other fields which are relevant for enforcing this proceeding, within 3 months from being appointed, as well as in-service training courses.

A first observation would be that even though the Insolvency Committee at territorial level has a complex structure, it does not comprise a representative of the creditors who are thus deprived of a minimum control over the proceeding.

"*There were and still are voices that state that such an amendment of the law to this respect is necessary, as creditors are most interested in recovering the debts and, implicitly, in the way in which the insolvency proceeding chosen by the debtor is unfolded"*[4]. From the theory and practice of professionals' insolvency, it results that the initiation of the insolvency proceeding automatically determines the taking over of the control on the legal person-debtor from its shareholders and members of the management bodies to creditors. In the bankruptcy proceeding involving the trader-individual, the liquidator is the one exercising, instead of the debtor, the legal capacity of the latter, such exercise being also subjected to the creditors' control. Assigning the control or limiting the exercising capacity is already habitual for the legal reasoning in the professionals' insolvency proceedings. In exchange, from the individuals' insolvency law, it does not expressly result whether the debt repayment procedure based on a plan falls under the opportunity control of the creditors.[5]

[4] Drăghici Cristian, Ph.D. Thesis, *O altă dimensiune a Legii Insolvenței: Falimentul persoanei fizice în contextul modernizării legislației nationale*, University Titu Maiorescu, Bucharest.

[5] Gheorghe Piperea, Revista Română de Drept al Afacerilor no. 10/2015, "Câteva reflecţii şi scurte comentarii asupra Legii insolvenţei consumatorilor", p. 10.

According to the provisions of art. 8 para 2 of the law, the insolvency committee is competent for managing the insolvency proceeding for the debtor domiciled or residing for at least 6 months prior to the filing date of the insolvency proceeding request within its circumscription. This provision gives rise to a relevant question, i.e. **what happens if the debtor-individual did not have his/her domicile or residence for at least 6 months within the territorial circumscription of a territorial insolvency committee?** The law does not provide an answer to this question, even though this condition is seen as being compulsory. Moreover, the insolvency committee is bound to self-check, *ex officio,* its territorial competence[6]

Nevertheless, we cannot consider that the debtor can be refused the right to access an insolvency proceeding under these theoretical circumstances. The solution in this case is to resort to the rules of common procedure law, the access being also facilitated by art. 89 para (1) of Law no. 151/2015. Consequently, in this case, the competence shall fall on the law court under which jurisdiction the domicile or residence of the claimant, respectively, of the debtor, is found, without taking into account the restrictive rule regarding the 6-month term.[7]

The territorial committee has decision-making powers in what the insolvency proceeding stages are concerned, as follows: First of all, within 30 days from the date the debtor's request is received, the established territorial committee shall issue the decision to admit in principle the request for the initiation of the insolvency proceeding based on a debt repayment plan and, at the same time, it will also appoint an administrator of the proceeding.

If it rejects the debtor's request, the same 30-day term in the second hypothesis provided by the proceeding, the committee shall issue the Decision ascertaining that the debtor's financial situation is irremediably compromised and through which, only after obtaining the debtor's consent, it shall notify the court for the initiation of the legal insolvency procedure through asset liquidation in the event the debtor possessed goods and/or trackable revenues.[8] The debtor's consent is necessary as

[6] Art. 14 para (1) of Law no. 151/2015.

[7] Ovidiu-Sorin Nour, "Câteva reflecţii asupra noii reglementări privitoare la insolvenţa persoanelor fizice", in Revista Română de Executare Silită nr. 4/2015.

[8] Art. 14 para (1) letter b of Law no. 151/2015.

this is a voluntary proceeding, carried out exclusively at the debtor's request.

At the same time, we also have to consider the third variant of the proceeding, the one in which the committee will issue within the same 30-day term the decision to notify the court as to ascertain the fulfilment of the conditions for enforcing the simplified insolvency proceeding, in the situation in which, after analysing the debtor's request and the supporting documents submitted, it appreciates that the debtor meets the conditions provided under art. 65.

An equal attribution of the committee is the obligation to issue the decision to reject the debtor's request in case it results from the documents attached to the proceeding's initiation request that the debtor falls under one of the inadmissibility hypotheses provided by the provisions of art. 4 para 3 and 4. The analysis task, under such conditions, falls on the insolvency committee which, within 30 days from the debtor's submission of request, it has the obligation to also analyse the submitted evidence and to hear the debtor's viewpoint.

In case the debtor holds assets which may be capitalized and which value covers in full all its debts or the debt amount up to the threshold value provided by the law, the committees established at territorial level are also bound to issue the debtor's request rejection decision.

The insolvency committee also issues other documents during the various stages of the insolvency proceeding, based on a debt repayment plan. In this case, we may point out the decisions issued by the insolvency committee: the decision ascertaining the initiation of the insolvency proceeding based on a debt repayment plan, if the repayment plan has been approved; the decision through which it cancels the debtor's request to initiate the proceeding based on a debt repayment plan in case the plan was not approved, respectively, it was not confirmed; the decision of the insolvency committee to settle the complaint against the measures taken by the administrator during the proceeding based on a debt repayment plan, the decision to replace the proceeding administrator, if strong reasons exist and, respectively, to replace the liquidator; the decision to close the insolvency proceeding based on debt repayment plan.

At a first glance, from the provisions of art. 8 of the Law, one could interpret within the meaning that the decision-making attributions of the insolvency committee would only limit to the insolvency proceeding

based on a debt repayment plan and in the simplified insolvency proceeding and in the one through asset liquidation would only have a supervisory role, respectively, of guidance and control. If we take a look at the legal provisions that regulate the simplified insolvency proceeding and the one through asset liquidation, we may distinguish in these proceedings other decision-making role competencies of the insolvency committee. According to the provisions of art. 66 para 2 of the Law, the insolvency committee, after analysing the debtor's request and the supported documents submitted, if it appreciates that the debtor meets the conditions provided under art. 65, it notifies the competent court so as to ascertain the fulfilment of the conditions for the enforcement of the simplified insolvency proceeding. Likewise, within the simplified proceeding, in the case provided by the provisions of art. 69 para 2 of the Law, when the debtor's revenues or assets register a significant growth, the insolvency committee rules and tracks the payments to the creditors which hold receivables that already existed before the debtor's request for the proceeding initiation, in the priority order provided by art. 62.

In the event the debtor fails to observe its obligations within the simplified proceeding, the insolvency committee shall issue a decision stating the termination of the simplified proceeding. At the same time, the same committee shall rule the debtor's obligation to cover the receivables that existed prior to the filing date of its request, together with interest and penalties accrued since the receivables became due.

Within the asset liquidation proceeding, the insolvency committee ascertains by means of a decision the receivables' coverage rate and an assessment of the way in which the debtor observed its obligations provided by the law after the proceeding is terminated.

The competence to settle the requests regarding the proceeding administrators' and liquidators' incompatibility also falls on the territorial insolvency committee.

The insolvency committee is also entitled to enforce the administrative fine sanction upon the administrator appointed to conduct the proceeding who fails to communicate within 3 days from its appointment the refuse to take over the task determined by the committee. The committee is also entitled to rule on the re-examination request within 48 hours from the moment the sanction is notified.

We should not oversee the control attributions of the insolvency committee, both in the insolvency proceeding based on a debt repayment

plan, as well as during the period subsequent to the termination of the judicial insolvency proceeding through asset liquidation. More precise, the control materializes in the verification of the fulfilment by the proceeding administrator of its duties under the law, the biannual verification of the public registers in order to identify the possible changes of the debtor's patrimonial situation, the verification *ex officio* or when notified by the proceeding administrator or by any other creditor, if the debtor, through an action or omission endangers the plan according to art. 45 para (2) letter f) of the Law, verification of the minute drafted by the proceeding administrator which records the result of the vote on the plan, thus confirming or quashing the minute.

The committee's surveillance duties are manifested over the repayment plan's execution period, in conducting the simplified insolvency proceeding and at the same time, for the immediately following period, after the asset liquidation proceeding is terminated.

The insolvency committee endorses the proceeding initiation request form filled in by the debtor and the biannual reports on the proceeding administrator on the repayment plan's execution and, by virtue of its surveillance competencies, the commission approves loans to be contracted, when the case, it approves the request to amend the repayment plan, it monitors the repayment plan's execution, it ascertains that the plan can no longer be executed, resulting in the debtor's request being submitted to the competent court of law, under art. 43 para (1) of the Law.

Another competence of the committee is that of ascertaining the receivables' coverage rate and to assess the way in which the debtor fulfilled its obligations provided by the law after the proceeding is terminated, to track the payments to the creditors holding receivables which already existed prior to the debtor's request for the simplified insolvency proceeding, under the conditions of art. 69 para (2), if significant changes are observed in the value of the debtor's revenues or asset structure and, at the same time, to compile the file for the debtor under surveillance post-judicial insolvency proceeding. For this period after the termination of the proceeding, the committee assesses twice a year the percentage of the trackable revenues which is destined to cover the liabilities of the debtor who finalized the judicial insolvency proceeding through asset liquidation.

There are viewpoints expressed within the meaning that the competencies given by the legislator to the Insolvency Committees at territorial level would grant them a too high decision-making power. The insolvency committee is vested with decision-making, control and surveillance responsibilities over the acts of the person under insolvency or of the proceeding administrator, which may give rise to real difficulties in practice. [9]

By virtue of the role given by the legislator within the insolvency proceeding and in exercising its decision-making, surveillance and control responsibilities, the insolvency committee issues a series of documents, of administrative acts of individual character, as follows:

As decision-making body, the committee issues, as shown previously, decisions which are subject to the judicial control of the courts of law.

From the viewpoint of the control and surveillance responsibilities, the committee issues endorsements which, unfortunately are not subject to any control and they would probably remain in the practitioner's task to draft a viewpoint concerning this aspect.

The third category of administrative documents issued by the insolvency committee comprises the minutes ascertaining the offence and the minutes through which the committee enforces the administrative sanctions, among which the fine amounting from 300 to 10,000 lei.

III. Conclusions

Thus, we may note that, as the participants in the insolvency proceeding for individuals are concerned, Law 151/2015 as compared to Law 85/2014, first of all brings forward a new player - the Insolvency Committee, which holds a central and extremely important role ever since the proceeding is initiated and until its termination. In this role, it coordinates this new mechanism some would consider bureaucratic, under the conditions in which, in the liberal economies, the future belongs to decentralization, not to the creation of mechanisms which affect the state's financial resources.

Secondly, the decision-making role of the committee in all the three proceeding versions may lead to a change of the already complex

[9] *http://economie.hotnews.ro/stiri-finante_banci-20178349-plusurile-minusurile-legii-insolventei-persoanelor-fizice-analizate-reprezentantii-unei-case-insolventa.htm*

committee's structure, which might also include a new member, respectively, a representative of the creditors, given that creditors, through this law deficiency, are deprived of a minimum control over the proceeding.

Thirdly, there are viewpoints expressed within the meaning that the competencies given by the legislator to the Insolvency Committees at territorial level would grant them a too high decision-making power. The insolvency committee is vested with decision-making, control and surveillance responsibilities over the acts of the person under insolvency or of the proceeding administrator, which may give rise to real difficulties in practice. Clearly, up to the present moment, given that the number of initiated proceedings is extremely low, no conclusions can be drawn on this aspect. Once the number of initiated proceedings grows, these fears may prove to be unjustified.

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THE COMMISSION CONTRACT IN THE PUBLIC PROCUREMENT SYSTEM

Ana-Maria GASPAR[*]

ABSTRACT
This article aims at making an incursion in the field of public procurement, an area of interest in the practice of both contracting authorities and economic operators.
The entry into force of the new legislative package at both European and national levels has generated a series of contradictions in the specialized practice, and on the background of these contradictions the contracting authorities interpret a legal provision differently, which can be detrimental to the community.
By this article we have aimed to underline the importance of concluding a commission contract by the contracting authorities and to show why the law of public procurement should be modified so that such a contract could be concluded.

KEYWORDS: *commission contract; public procurement; public procurement contract.*

Introduction

In 2014 the European Parliament and the Council adopted a new legislative package on public procurement, which package includes *Directive 2014/23/EU on concession contracts*, *Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC* and *Directive 2014/25/EU regarding acquisitions made by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/CE.*

Thus, considering that Romania has the status of a European Union's member state and taking into account that starting with April 18th, 2016, all member states have the obligation to transpose into national legislation the provisions of the directives adopted by the European Union, the national legislator understood to implement these European normative acts by adopting a new legal framework, respectively by passing a legislative package consisting of: *Law no. 98/2016 on public procurement, Law no. 99/2016 on sectoral acquisitions, Law no. 100/2016 on concessions of works and concessions of services,* and

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Law no. 101/2016 on remedies regarding the award of public procurement contracts, of sectoral contracts, of works concession contracts and of services concession contracts, as well as for the organization and functioning of the National Council for Complaints' Settlement.

According to Commission's Communication of March 3rd, 2010, entitled "Europe 2020, A European Strategy for Smart, Green and Inclusive Growth", public procurement plays an important role in Europe 2020 strategy, as one of the market instruments that should be used in order to achieve smart, sustainable and inclusive growth, while ensuring the most efficient usage of public funds.[1]

Directive 2014/24/EU established a series of rules applicable to procurement procedures used by contracting authorities in relation to public procurement contracts and competitions of projects.

Also, in order to bring into discussion interpretations of the concept of public procurement, the Directive defined the notion of public procurement. Thus, by public procurement is meant the acquisition, by means of a public procurement contract, of works, products or services by one or more contracting authorities from economic operators chosen by these contracting authorities, regardless of whether the works, products or services are intended for public purpose or not.[2]

Moreover, the development of legal framework in the fields of public procurement contracts, sectoral contracts, and contracts for works and service concession is a topic of high importance, considering that this area can stimulate economic growth and, why not, social growth.

Thus, as a result of legislative changes at European level, the legislator has transposed into national law the provisions of directives, but it is necessary to focus also on the possibility of concluding by contracting authorities of a contract for provision of services (banking services), respectively: payment collecting services, consisting in collection of fines, fees and taxes due by taxpayers, be they natural persons or legal entities, through different collection channels made available by economic operators, both within the administrative-territorial area of the contracting authority and in other territorial administrative units, which

[1] Paragraph 2 of Preamble to Directive 2014/24/EU on public procurement and on repealing of Directive 2004/18/EC.

[2] Article 1 of Directive 2014/24/EU on public procurement and on repealing of Directive 2004/18/EC.

contract needs to be concluded in order to facilitate the process of collecting budget receivables.

Given the above issue and considering the new legislative provisions, it is imperative to analyse this contradiction in practice and find a solution that does not prevent contracting authorities from concluding such a contract.

Commission contract and public procurement contract

Commission contract

Until the New Civil Code entered into force, the commission contract was regulated by provisions of art. 405-412 of the Commercial Code. Thus, according to provisions of art. 405 of the Romanian Commercial Code, *"the commission's object is treatment of commercial business by the commissioner at the account of the principal"*, and according to provisions of art. 406 of the same normative act *"the commissioner is directly bound to the person with whom he contracted as if the business were of his own"*.

With the entry into force of the New Civil Code, the legislator has understood to separately regulate the commission contract within provisions of art. 2043-2053 of the Civil Code. Thus, according to provisions of the Civil Code, *"the commission contract is the mandate that has as object the purchase or sale of goods or the provision of services on account of the principal and on behalf of the commissioner, acting for professional purposes, in exchange for a remuneration called commission"*.[3]

Whether we refer to the commercial commission contract or we refer to the civil commission contract, we can say that this type of contract is a variety of the mandate contract, more than that it is included in the category of intermediation contracts.

Considering that, at present, the commission contract is regulated by provisions of the Civil Code, we will turn our attention to this type of civil contract, especially since provisions of the Commercial Code regarding the commission contract were repealed as a result of the entry into force of the New Civil Code.

[3] Art. 2043 of the Civil Code.

Also, it should be noted that this type of contract is regulated as a type of mandate without representation, which is why we can appreciate that the rules that apply to the mandate without representation and, why not, to those regarding the mandate with representation, can be applied whenever provisions governing the commission contract do not dispose in this regard.

Moreover, this type of contract differs from the mandate contract by its object, namely purchase or sale of goods or provision of services by the commissioner on behalf of the principal.

According to provisions of the Civil Code, the legislator has left to discretion of the contracting parties the form in which this type of contract is concluded, as the commission contract may be concluded in written, authentic form, or under private signature.

Another specific feature of it is that the commission contract is always concluded on an onerous basis, as opposed to a mandate, which can also be for free.

It should also be noted that the parties to the commission contract are the principal and the commissioner.

According to legal provisions, the commissioner must conclude legal acts, respectively render the services on behalf of the commissioner, but for professional purposes, meaning that the services provided should have a character of continuity.

It should also be noted that, according to the new regulations, in relation to third parties, the commissioner is no longer required to prove authorization received from the principal, taking into account that he/she acts on his own account.

If the commissioner does not comply with his duties, he/she may be obliged to pay damages, but overcoming of authorization or non-observance of the instructions received from the principal does not lead to nullity of the legal documents concluded with third parties.

As we mentioned before, the commission contract is a variety of a mandate contract, which is why this type of contract also ceases by revocation of the power of attorney, by renunciation to the authorization received, by death, interdiction, insolvency, or bankruptcy of the principal or commissioner[4], but in the provisions regarding this type of contract the legislator expressly stipulated revocation of power of

[4] *https://legeaz.net/dictionar-juridic/contract-comision-ncc*

attorney, and in this case the commissioner is entitled to a part of the commission.

The public procurement contract is regulated by provisions of Law no. 98/2016 on public procurement, with subsequent amendments and completions, with the purpose of this law on public procurement being to provide the legal framework that is necessary to purchase goods, services and works under conditions of economic and social efficiency[5].

According to provisions of article 3 paragraph 1 letter l of Law no. 98/2016 regarding public procurement, *the public procurement contract is an onerous contract, which is assimilated, according to the law, to an administrative act concluded in writing between one or more economic operators and one or more contracting authorities, whose purpose is execution of works, supply of products, or provision of services.*

At the same time, according to provisions of art. 5 of Law no. 98/2016 regarding public procurement, with subsequent amendments and completions, the legislator expressly stipulated that the law applies to public procurement contracts, framework agreements and contests of solutions.

Thus, we can assert that a public procurement contract is an administrative contract by which a natural or legal person provides products and services or performs works to a public authority.

Also, as we can see the Romanian legislator precisely transposed the definition adopted at European level regarding the public procurement contract to provisions of Law no. 98/2016.

Taking into account the provisions in this matter we can state that there are three types of public procurement contracts, respectively: contract for acquisition of public works, contract for acquisition of public services, and contract for public acquisition of goods.

Considering the purpose of this contract, we can assert that it does not differ from the sale-purchase contract under the common law, which in essence is a contract concluded by which public administration in order to meet needs of public service.

[5] Art. 1 and art. 2 of Law no. 98/2016 regarding public procurement, with subsequent amendments and completions.

It should also be mentioned that this is an administrative contract, since it represents the will contract between a public authority and another subject of public or private law (the economic operator).

Moreover, it must be taken into account that some of the contractual clauses are established by the legislator, as these clauses cannot be negotiated with the economic operator and these clauses can give to the contracting authority the right to order unilateral termination of the contract in order not to prejudice by any means the public interest.

Also, part of the clauses of this type of contract are established by the contracting authority through the specifications or by the announcements made as regards to public procurement, which distinguishes this type of contract from the contract concluded according to provisions of the common law.

At the same time, it should be mentioned that this type of contract can only be concluded after some special procedures, such as: open auction, restricted auction, competitive negotiation, competitive dialogue, partnership for innovation, negotiation without prior publication, competition for solutions, procedure of awarding which is applicable to social services and other specific services, simplified procedure.[6]

Moreover, it should be noted that disputes arising from a public procurement contract are judged by courts of administrative litigation.

Also, the public procurement contract cannot be concluded unless principles clearly stipulated by the legislator in the normative acts in force are respected.

In view of the above, we can affirm that the public procurement contract is a synallagmatic contract, onerous, solemn and commutative.

Commission contract concluded by public authorities/institutions as an exception from the rule

A problem that may arise in practice is given by the need of public authorities (especially those public authorities whose purpose is the administration of tax receivables, which administration also requires their collection) to conclude a commission contract with different economic operators that can ensure the performance of this contract.

[6] Art. 68 of Law no. 98/2016 regarding public procurement, with subsequent amendments and completions.

As mentioned above, for proper performance of the activity of collecting debts owed to the local budget or the general budget, it is urgently needed to conclude a commission contract with an economic operator that can carry out operations to collect these types of debts, and the only mention regarding conclusion of a public procurement contract that has as object banking services is made in art. 23 of Law no. 98/2016 regarding public procurement, with subsequent amendments and completions, with this one referring only to the estimated value of acquisition, which value is calculated on the basis of commissions to be paid.

Until the entry into force of GEO (Government Emergency Ordinance) no. 45/2018 for modification and completion of some normative acts with impact on the public procurement system, the bank commission contracts were regulated by Law no. 98/2016 regarding public procurement as an exception from this normative act, which aspects have not been maintained as a result of the new modifications.

In order to make more efficient the collection of receivables due to local or general budget, we consider that it is necessary to conclude a commission contract, which contract is regulated by provisions of art. 2043-2053 of the Civil Code.

According to provisions of art. 2043 of the Civil Code, *"The commission contract is the mandate whose object is to purchase or sale goods or to provide services on account of the principal and on behalf of the commissioner, who acts professionally, in exchange for a remuneration called commission."*

Thus, we specify that provisions of Civil Code are mainly applicable to commission contract and alternatively provisions of Law no. 98/2016 regarding public procurement, with subsequent amendments and completions, which is why we are in the presence of a legislative conflict, and applicability of the legal principle *specialia generalibus derogant* must be analysed.

The legal principle *specialia generalibus derogant* states that the special norm is the one that derogates from the general norm and that the special norm is of strict interpretation in the respective case.

Also, a general norm cannot remove a special rule from application, given that the general norm represents the common law situation and the special rule is the exception, so the special rule is applied whenever we are in the presence of a case falling within the scope of its provisions, but

as regards the bank commission contract, the special rule cannot be applied, respectively Law no. 98/2016 regarding public procurement, with subsequent amendments and completions, as long as this type of contract is no longer regulated by the law on public procurement.

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Conclusions

First of all, it should be mentioned that public procurement is a component of the management of public institutions and it determines economic development.

We also believe that public procurement must contribute to efficient employment of public money, but also to fulfilment of social needs, which is why this activity must be very well planned, and development of public procurement contracts must be strictly monitored so that the principle of good faith can be respected, which can occur when talking about spending public money.

This field of activity is one of the most sensitive areas at the level of public administration because, as we have previously specified, it concludes contracts by which public money is spent, which money is allocated on different sectors of activity, and the pressure to conclude a public procurement contract is very high for those persons dealing with initiation of public procurement procedures, the more so as these funds must satisfy the social need as much as possible and lead to a development of the community living environment.

Thus, those who gain from conclusion of a public procurement contract are neither the contracting authorities, nor the economic operators, but they are the people in a community whose needs are met.

It is also necessary for public authorities to know what the social needs of the community are, in order to be able to spend public money to meet those needs and to improve community's standard of living.

Whether we refer to the award of a typical public procurement contract, as it is regulated by the legislator, or we refer to the award of a commission contract, we must take into account what determined the engagement of this contract and which are the population's needs.

As regards conclusion of commission contracts that would make the debt collection mechanism more efficient, it is necessary to consider the purpose of concluding such a contract and what the contracting authority is trying to obtain from this contract.

Thus, we believe that conclusion of such a contract by a public authority is necessary because in this way the population of a certain community could benefit from a much more varied range of services when it comes to payment of taxes, no matter we refer to the local ones or to those that are paid directly to the general budget.

Also we consider that the law on public procurement should be amended as to conclusion of a commission contract and should not refer only to the method of calculating the commission due, and it should provide what the attribution method of such a contract should be, because in this case the commission is also paid from public money.

Thus, a question may arise whether this choice of a contracting authority is optimal, which diminishes its budget instead of increasing it, as a percentage of the amounts collected is distributed to the economic operator with whom such a contract has been concluded.

Yes, for a society that is in a continuous movement and development it is normal to adopt many more services that will come to citizens' support, but it also has to be analysed what is the consequence of implementation of such services.

We believe that the legislator must take into account the social needs and adapt legislation according to these needs, even if it is not wrong for a contracting authority to conclude a commission contract in compliance with provisions of the Civil Code.

It is necessary for the legislation to be amended and supplemented with provisions in this regard, taking into account that, in the field of public procurement, the legislator has also stipulated certain clauses from which the contracting authority cannot make a rebate and which the economic operator should not have negotiate.

Thus, the legislator needs to be much stricter in this area and it should implement certain rules that could facilitate conclusion of a commission contract, and also insert clauses that defend the contracting authority

against unfair competition and against application of abusive commissions because this type of contract should help the state and not diminish parts of the money that it collects.

Compared to the above, we consider that, at present, the commission contract concluded by a contracting authority (public institution) can be done only in compliance with the principles stipulated in the Civil Code, and provisions regarding the calculation method stipulated in the content of law on public procurement must be respected.

Thus, for a better performance of the activity that is specific to public procurement, it is necessary to modify the legislation in this regard and to protect contracting authorities by the legislator and why not to protect the public money spent on this activity, taking into account that the company has developed and is no longer optimal and not necessary to overcrowd the public institutions that are in charge of collecting taxes, taxes and other revenues due to the local budget or the general budget.

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PRACTICE PROBLEMS CONCERNING THE INTERPRETATION AND APPLICATION OF THE ART. 336 PARA. 1 PROVISIONS OF THE ROMANIAN PENAL CODE

Adinan HALIL[*]

ABSTRACT

The author debates some practical problemes arising from Romanian penal legislation as conditioning criminal act of pure alcohol concentration in blood at the time the vehicle has been driven on public roads and not from the time of taking biological samples, or the obligation of the retroactive calculation and the establishment of the alcoholic drink from the moment of driving the vehicle on public roads

KEYWORDS: *alcohol concentration; driving a vehicle; biological samples; traffic safety.*

I. INCIDENCE LEGISLATION

On February 1st, 2014, through art. 121 point 1 of Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal/Penal Code[1], was repealed art. 87 of the Government Emergency Ordinance no. 195/2002 regarding the circulation on public roads[2], with the subsequent modifications and completions, which at par. 1 provided the following:

"Driving on public roads of a vehicle or tram by a person who has an alcoholic excess of 0,80 g/l pure alcohol in the blood is punished with imprisonment from 1 to 5 years."

By the new Criminal/Penal Code the legislator has incriminated the act of driving a vehicle under the influence of alcohol, in the simple version, at art. 336 para. 1, the text of law unchanged so far formally

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[1] Published in Romania's Official Monitor, Part I, no. 757/12.11.2012

[2] Republished in the Official Monitor of Romania, part I, no. 670/03.08.2006.

from the date of entry into force on 01.02.2014, according to which it has the following content:

"Driving on public roads of a vehicle for which the law stipulates the compulsory possession of a driving license by a person who, at the time of taking the biological samples, has an alcoholic excess of 0,80 g/l pure alcohol in the blood is punished with imprisonment from 1 to 5 years ".

We observe as a novelty, thelegislator's opticsto change the placement of provisions regarding the social relations regarding the safety of traffic on the roads in the special legislation in the Criminal/Penal Code. Also as a novelty compared to the previous regulation state that legal texts received and marginal names.

II. EVOLUTION OF THE INCRIMINATION CONDITIONS OF THE FACT OF DRIVING A VEHICLE UNDER THE INFLUENCE OF ALCOHOL OR OTHER SUBSTANCES

1. The concept of infringements against the safety of road traffic

By incriminating the facts against traffic safety, in principle, the social value aimed at traffic safety on public roads was sought.

The interdiction of these facts under penal sanctions is intended to prevent committing of other deeds with more serious consequences.

Thus, it has been shown in the specialized literature that such offenses represent true "obstacle offenses", their sanctioning aiming precisely at preventing the occurrence of more serious consequences, consisting of the collision of vehicles, their damage or destruction, the injury or death of some persons..

2. Initial conditioning of the criminal nature of the fact by the alcohol concentration from the time of the sampling of biological samples

Interesting is the evolution suffered by the incrimination of this fact after 01.02.2014. From how the law text was drafted it follows that the legislator conditioned the criminal character of the act by the concentration of alcohol from the moment of the biological samples were taken.

This conclusion is drawn from the considerations of Decision no. 3 of May 12, 2014, of the High Court of Cassation and Justice - Complete for the unraveling of some matters of law in criminal matters, published in the Romanian Official Monitor, part I, no. 392 from 28.05.2014, according to which it was appreciated that "the conditions of incrimination regarding the moment when the existence of the alcoholic excess in the driver 's blood was necessary to ascertain the meeting of the material element of the objective side of the criminal offense, in relation to the previous regulation, as provided in art. 87 paragraph 1 of the Government Emergency Ordinance no. 195/2002 regarding the circulation on public roads, republished." "According to the previous regulation, the moment of determining the blood alcohol intake was that of driving the vehicle, and according to the new regulation, as it entered into force on 01.02.2014, the moment of determining the alcoholic excess is that of taking biological samples.

It is obvious that, as regards the drafting of the law text, no justification for the retroactive calculation of the breathalyzer used is identified, as the criminal relevance has the value of the alcohol content from the moment closest to the detection of the driving of the vehicle on the public roads where biological samples were collected.

3. The declaration as non-constitutional of the syntagma "at the time of the sampling of biological samples" from the content of the provisions art. 336 alin. 1 of the Romanian Penal Code

By Decision no. 732 of 2014 of the Constitutional Court of Romania, published in the Official Monitor of Romania no. 69 of 27.01.2015, the exception of unconstitutionality of the provisions of art. 336 para. 1 of the Criminal/Penal Code, stating that "the phrase at the time of sampling of biological samples from the provisions of art. 336 para. 1 of the Criminal/Penal Code is unconstitutional, as it infringes the provisions prejudice to the constitutional provisions of art. 1 paragraph 5 regarding the principle of compliance with the laws and art. 20 regarding the pre-eminence of international treaties on human rights over internal laws, referred to the provisions of art. 7 paragraph 1 on the legality of incrimination in the Convention for the Protection of Human Rights and Fundamental Freedoms. "

In the considerations of this decision, in paragraph 26, the Court stated that "the alcoholic excess is determined by the toxicological analysis of the biological samples collected at a time point more or less distant from the time of the crime, which is the one in the traffic detection of the driver vehicle. The condition that the alcoholic excess of more than 0,80 g/l pure alcohol in the blood to be at the time of the biological samples is taken, thus, the consumption of the crime at a later moment is committed, provided that the essence of the criminal offences is that they are consumed at the time of their completion. "

After the publication of this decision, the legislator did not proceed within 45 days upon agreeing the provision declared unconstitutional with the provisions of the Constitution, the consequence being the cessation of the legal effects of the provisions declared unconstitutional.

Publication of the Constitutional Court Decision no. 732/2014 generated problems of non-unitary practice, respectively conviction solutions, but also payment solutions, on the grounds that the act provided by art. 336 para. 1 of the Criminal/Penal Code was decriminalized as a result of this decision. Thus, when arguing the latter solutions, some courts have shown that the criminal law no longer maintains the legal configuration as the legislator edited it, in the absence of which, the court can no longer apply it, and the legal effect generated immediately is the one regulated in art. 4 of the Criminal/Penal Code, respectively the decriminalization of the act. It was also shown that the lack of constitutional character of a constituent element of the crime is equivalent to its non-provision by the law, that is, the absence of the crime, as enacted by the legislator to produce legal effects that would incur criminal liability.

4. Quasi-identical content of the provisions article 336 paragraph 1 of the Penal Code of the one retrieved in art. 87 paragraph 1 from G.E.O. no. 195/2002 republished

High Court of Cassation and Justice - Completion for the unraveling of some questions of law in criminal matters, in the recitals of the decision no. 24/2015 published in the Official Monitor of Romania, part I, no. 869 of 11.20.2015, concluded that "current form of art. 336 para. 1 of the Penal Code has a quasi-identical content to that found in art. 87 para. 1 of GEO no. 195/2002, being therefore clear enough to exclude real problems of interpretation. "Also, by publishing the Constitutional

Court Decision no. 732/2014, the High Court of Cassation and Justice found that the effects of Decision no. 3 from 12.05.2014 given in the preliminary ruling procedure cease to be lawful.

The conclusion that emerges is that the act provided by art. 336 para. 1 of the Penal Code was not discriminated against as a result of Decision no. 732/2014 of the Constitutional Court and that it has reverted to the existing conditions of incrimination.

Alcoholic impoundment is "the process of alcohol penetration into the bloodstream, with the consequence of causing a state of alcohol intoxication. The establishment of blood alcohol intoxication is done in the forensic institutions according to the methodological norms elaborated by the Ministry of Health, and of the concentration in the air exhaled by the road police with the help of a certified technical means (Etilotest.)"[3]

Relevant from a legal point of view is "The methodology for collecting, storing and transporting biological evidence for the purpose of judicial probation by establishing alcohol or drug presence or drugs with similar effects in the case of persons involved in events or circumstances, in relation to road traffic ", established by Order no. 1512 of 12.12.2013, amended and supplemented by the Order of the Minister of Health no. 277/11.03.2015, published in the Official Monitor of Romania no. 185 from March 18th, 2015.

According to the provisions of art. 7 of the mentioned order "the biological samples that can be collected from the persons involved in events or circumstances in relation to the road traffic, in order to determine the alcoholic or the presence in the body of the psychoactive substances, are represented by:

a) blood, for the determination of alcohol;

b) blood and urine samples for the presence of psychoactive substances in the body.

The biological samples mentioned in par. (1) is harvested with the standard kit, which must contain all the elements provided in the annex no. 4 to the present methodological norms, to determine the blood alcohol levels, or those provided in the annex no. 5 to the present methodological norms, to determine the presence of psychoactive substances in the body. "According to art. 9 of the same order "the collection of

[3] Alexandru Boroi, *Drept Penal Parte Specială*, Editura Universitară Danubius, Galaţi, 2014, p. 469.

biological samples in order to establish the blood alcohol or the presence in the body of the psychoactive substances will be made as soon as possible from the occurrence of the road event or the circumstance that requires their collection".

Also, art. 10^2 of the order mentioned states that "unless two blood samples have been collected, at an interval of one hour from each other, the retroactive estimation of the blood alcohol level will not be possible."

However, we appreciate that Health Minister Order no. 277/2015 has the character of an infralegal norm, with legal force inferior to the law, so that elements of typicality of an offense cannot be established.

The sanction provided by art. 10^2 of the Minister of Health Order no. 277/2015 in case of non-sampling of the two biological samples at one hour interval, consists of the impossibility of retroactive estimation of the alcoholemia.

In the considerations of the Decision no. 819 from December 12th, 2017 regarding the exception of unconstitutionality of the provisions of art. 336 para. (1) of the Penal Code, published in the Official Monitor no. 189 of March 1, 2018, the Constitutional Court held that "the criticized law text gives drivers a clear representation of the constituent elements of the crime, so that they can foresee the consequences arising from the non-observance of the norm and adapt their conduct accordingly, in meaning that at the time of driving the vehicle does not have an alcoholic content of more than 0.80 g/l pure alcohol in the blood, the determination of the blood alcohol level assuming the toxicological analysis and the retroactive calculation of the blood alcohol levels at the time of detection in traffic. "

Thus, a new problem capable of generating non-unitary practice consists in the legal classification of the deed of the detected person who agreed to submit to the first biological sample, but refused the second one, which makes the retroactive determination of the breathalyzer value practically impossible when driving the vehicle on the public roads by the driver.

In this situation we are in the presence of a probation problem.

But, in our opinion, if the driver refuses to take the second sample, it means that he implicitly accepted that the blood alcohol level established by analyzing the blood sample is the one at the time of its detection, a value that it cannot contest by requesting a retroactive calculation.

Regarding the assessment of the value of alcohol, we think that there is, from case to case, the possibility of supplementing or corroborating with other evidence, for example: recognition of the perpetrator, statement of consumption, witness statements, test alcohol results, etc. Gathering elements of typicality of the crime provided by art. 336 para. 1 of the Penal Code aims in reality to convince the court of the existence, at the time of driving, of an alcoholic drink, of more than 0,80 g/l pure alcohol in the blood, with the possibility of pronouncing a conviction solution, even in the absence of the - two biological samples, if the result of the analysis carried out at a relatively close moment from the detection in traffic indicated a concentration higher than the one provided by law.

According to art. 78 of O.U.G. no. 195/2002 regarding the circulation on public roads, republished, "the driver of the vehicle, agricultural or forestry tractor or tram, the certified car instructor who is in the process of practical training of a person for obtaining the driving license, as well as the examiner of the competent authority during conducting the practical exams for obtaining the driving license or for any of its categories, involved in a traffic accident, they are forbidden to consume alcohol or psychoactive substances after the occurrence of the event and until testing the alcohol concentration in the expired air or collecting the samples biological. "

According to par. 1 of the same article "in case the provisions of par. (1), it is considered that the results of the test or analysis of the biological samples collected reflect the condition of the driver, the car instructor or the examiner at the time of the accident. "The provision in par. 2 of the mentioned article establishes a legal presumption.

Similarly, it is deduced that the person found in traffic under the influence of alcohol is also prohibited from consuming alcohol from the moment he entered the custody of the criminal investigating body and until biological samples are collected or until he explicitly refuses to submit to this collection.[4]

In support of this argument we mention the provisions of art. 10^1 of Order no. 1512 from 12.12.2013 for the Methodological Norms approval regarding the collection, storage and transport of biological samples for

[4] Adrian Radu, *Infracţiuni rutiere, Comentarii şi jurisprudenţă*, Editura Hamangiu, Bucuresti, 2017, p. 187.

the purpose of judicial probation by establishing the alcohol or the presence in the body of psychoactive substances in the case of persons involved in events or circumstances related to road traffic, modified and completed by the Minister of Health Order no. 277/11.03.2015, which stipulate that "the supervision of the person involved in events or circumstances in relation to road traffic within the one hour interval between the two blood collections is the responsibility of the road traffic police officer."

5. Interpretation of the term "driving a vehicle"

Another problem capable of generating different interpretations was that related to the expression "driving a car".

We note the intervention of the legislator at the constitutive level content of the deed, in the sense of replacing the phrase "a car or tram" with a larger one, that of "vehicle", the only condition being that the legislation stipulates the compulsory possession of the driving license by the driver of the respective vehicle. We note that the minimum permissible limit for blood alcohol intake was maintained, namely 0, 80 g/l pure alcohol in blood.

Therefore, art. 336 of the Penal Code provides both in the marginal name and in its content the expression "driving a vehicle", without making any distinction.

According to the Explanatory Dictionary of the Romanian Language (called DEX) the vehicle represents "the means of transport with or without its own traction with which it can circulate on a terrestrial, underground, aerial or water communication path."

Also according DEX driving means "to direct the course of a vehicle, a car etc. or transitive (relating to the vehicle, particularly cars or tractors), to direct the course of the movement. "

According to art. 6 point 35 of O.U.G. no. 195/2002 regarding the circulation on public roads, republished, the vehicle represents "the mechanical system that moves on the road, with or without means of self-propulsion, commonly used for the transport of persons and/or goods or for performing services or works."

The issue has generated different opinions in practice.

Thus, in a majority opinion it was appreciated that the driving action of a vehicle, as regulated by art. 336 of the Penal Code does not require the starting of the vehicle by operating the propulsion systems and that the essence of the felony is that the vehicle moves on a public road, and the driving, its control is performed by a person under the influence of alcohol or others substances.

In another minority opinion it was that the driving action requires the starting of the vehicle by operating the propulsion systems, considering that it is sufficient only to push a vehicle or to handle the steering and braking systems, in the absence of the propulsion system functioning, in order to gather the constituent elements of the offense provided by art. 336 of the Penal Code.

The legal issue was resolved by the High Court of Cassation and Justice - Completion for the unraveling of some legal matters in criminal matters, by decision no. 6/2019 published in the Official Gazette of Romania, part I, no. 386 of 16.05.2019 which stated that "the driving action of a vehicle, as provided by art. 336 of the Penal Code does not necessarily imply the movement of the vehicle by operating the propulsion systems."

It was argued that the disapplication from the regulation of the incrimination norm stipulate in art. 336 paragraph 1 of the Penal Code of the situations in which the driving of the vehicle is carried out on a public road by a person with an alcoholic excess of 0,80 g/l pure alcohol in the blood, although the engine does not work, is equivalent to the partial decriminalization and unjustified restraint, without a legally basis, the scope of the offense of driving a vehicle under the influence of alcohol or other substances.

The duration of driving on public roads, from a spatial-temporal point of view, has no legal relevance, the deed constituting an offense.

However, we appreciate that compared to the obligation of the court to completely clarify the circumstances of the case in order to find the truth, along with the level of alcohol, the duration of the driving can be another essential criterion in the process of individualizing the sanctioning treatment.

It is also has not legally relevance that the author didn't know what was the level of pure alcohol in the blood, as long as he consciously

consumed alcoholic beverages and did not comply with the obligation to act properly to avoid the risk that the threshold provided by law would be outdated.

Given that the inhalation of alcoholic substances was made involuntary, and the perpetrator was unable to ascertain his situation and was not aware of their presence, it is obvious that the act is not provided by the criminal law because he lacks the condition of guilt.

It will be a criminal offense and there will be criminal liability if the vehicle was driven in distress caused by the death of a close relative.

III. CONCLUSIONS

Analysing and interpreting the contents of the offense of driving a vehicle under the influence of alcohol or other substances, as provided by art. 336 Penal Code, following the intervention of the Constitutional Court of Romania Decision no. 732/16.12.2014, we can draw the following conclusions:

- the deed was not at any time discriminated, the actual content of the crime being almost identical to the one provided in the previous regulation
- driving action not necessarily imply the initiation of the vehicle by operating the propulsion systems
- the vehicle must be driven on public roads

According to art. 6 point 14 of the O.U.G. no. 195/2002 regarding the circulation on public roads, republished, by public road is understood as "any terrestrial communication route, except railways, specially arranged for pedestrian or road traffic, open to public circulation; roads closed to public traffic are marked at the entrance with visible inscriptions. "

- inhaling alcoholic substances should not be done unintentionally
- the act becomes criminally unlawful at the time of driving the vehicle on public roads, if the alcoholic excess exceeds 0, 80g/l pure alcohol in the blood, and the probation problem will be solved in relation to the moment of driving-detection in traffic and not that of collecting biological samples

- the administration of the proof with the forensic expertise for the purpose of performing the retroactive calculation does not appear to be necessary, in practice there may be exceptions[5]

- the retroactive calculation of alcohol use is a mean of proof, conclusive for establishing the crime, but a conviction solution will be pronounced only in conjunction with the entire probationary unit administered in a criminal case.

From the probationary assembly interpretation and corroboration, we appreciate that it may or may not be established, as the case may be, the need to bring to criminal liability the persons suspected of having committed such crimes.

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[5] Alin-Sorin Nicolaescu, *Infracţiuni contra siguranţei circulaţiei pe drumurile publice,* Editura Hamangiu, Bucureşti 2018, p. 143.

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CONCISE COMMENTS ON THE ROMANIAN DRAFT BILL ON SEARCHING FOR MISSING PERSONS

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ABSTRACT
Considering the state of affairs in which noteworthy emphasis exists on both expanding the number of protection measures aimed at certain categories of victims, as well as increasing their effectiveness, the Ministry of Internal Affairs has drafted a bill regarding the search for missing persons. Thus, there is the distinct possibility of having a law that would be the norm for the procedure of localizing missing persons. The wide range of instruments that shall be at the command of the police could be of a genuine avail, among them we ought to mention: the analysis and seizure of objects and documents, the criminalistic investigation – that is sui generis a variation of the home search via a search warrant; entering a person's home or a company's headquarters, or running an expertise or an establishment of the facts. Considering the importance of this bill, we shall continue by analysing all of these means that would be at the command of the police, mentioning whenever necessary de lege ferenda proposals. The aim is for the bill project, that in our opinion brings bona fide utility, to ensure the swift identification of vulnerable persons that are gone missing, while preserving the fundamental individual rights and freedoms.

KEYWORDS: *bill; missing persons; rules of evidence.*

Considering the current context[1] in which there is discernible the requirement for an increase efficiency of the means designated to protect definite categories of victims, the Ministry for Internal Affaires has drafted a bill for the search of missing persons[2], thus creating a legislative support for the activity of tracking and localizing a missing person.

Understanding the need for such a bill we shall present comments and proposals to the drafted bill.

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[1] The version of the article in the Romanian language can be found at www.juridice.ro.

[2] http://webapp.mai.gov.ro/frontend/documente_transparenta/229_1564682549_proiect_Lege_persoane_disparute.pdf

I. Considering the fact that the bill works with terminology that knows no definition in the Romanian legislation, we believe there is a need for certain terminological clarifications for a better understanding of the mechanisms of this new procedure.

a. According to the reasons supporting the bill, at the base of its existence there is the situation of vulnerability, a situation in which the prompt intervention throughout a set of measures[3] is needed and the notion knows a non-exhaustive definition in article 3 of the legislative proposal.

Subsuming the missing person in the category of vulnerable persons presents great importance by way of the means that can be employed in the search that should follow, activities that are provided for in the table of contents of Chapter IV of the legislative proposal.

Thus, according to article 23 in-line (3), in the eventuality that the missing person is not considered to be in a vulnerable position, the police can proceed the search only through these means: by inserting references into the data base, activity described in article 25 of the bill, by running investigative operations in the field, in places marked in article 26[4], as well as by soliciting and using citizen support, but only with prior agreement of a family member or the prosecutor, in full compliance with art. 27 in-line (2) letter (b).

In the eventuality that the missing person is considered to be in a vulnerable position, in addition to the means already presented, the authorities have the prerogative to resort to other types of measures, specially provided for in the content of the bill, with a higher degree of intrusion into the private life of the individual. These means are connected with probationary provisions found in the Code of Penal Procedure.

[3] http://webapp.mai.gov.ro/frontend/documente_transparenta/229_1564682549_Expunere%20de%20motive_Lege_persoane_disparute.pdf

[4] According to article 26 in-line (1) of the bill, the police tasked with the missing person case has the obligation to perform the following investigative measures: a) at the domicile, residence and real estate of the missing person or at the place where this person regularly performs an activity; b) at the emergency reception units, at the compartments designed to receive urgent cases, medical establishments, centre that offer the detainment, the custody and the internment of persons or other such units, that exist in the place of the disappearance or neighbouring areas.

b. The methods used in searching for missing persons are performed exclusively to find these persons. These methods are not used to find evidence so as to prove the existence of a deed provided for by the penal law. This is the main difference between the provisions of the bill and the provisions present in the Code of Penal Procedure. Furthermore, the beginning of the criminal prosecution does not constitute a necessary premise for running the search methods provided for by the bill. The hypothesis in which the person is the victim of a deed provided for by the Penal Code represents only one out of many cases in which the bill considers the person to be in a vulnerable position. As a consequence, the provisions of article 42 in-line (3) seem legitimate. These provisions state that the data resulting out of putting into practice the authorisation of employing the methods specially designed for tracking missing persons can be used only in the search for that person. Nevertheless, the exception provided for by article 42 in-line (4) [5] is necessary and shall be applied in the eventuality of an infraction provided for by article 139 in-line (2) of the Code of Penal Procedure. The exception constitutes in the use of the data as evidence in a criminal trial. Furthermore, we consider necessary the introduction in the bill of a mention similar with that present in article 111 in-line (10) of the Code of Penal Procedure[6]. Considering the possibility for the data to be gathered before criminal proceedings were running regarding that infraction, we believe it necessary to insert the fact that the data represents evidence even when the data has been processed before an actual penal case existed.

c. According to article 4 in-line (3), the activity of searching for the missing person continues to be under the bill even when the criminal investigation regarding an infraction in nexus with the disappearance of the victim. In this case the search shall be performed under the supervision of the prosecutor that supervises the criminal investigation. As a consequence, once the criminal investigation is under way we shall be in the presence of two parallel procedures, one that is special, that shall have the aim of finding the person, and one that shall have the aim of

[5] According to this provision, as an exception from in-line (3) the data can be used in a penal case whenever there is cogent and useful information regarding the preparation or perpetration of an infraction normed by article 139 in-line (2) of the Code for Penal Procedure.

[6] M. Udroiu, *Procedură penală. Partea generală*, 3rd Edition, C.H. Beck, Bucharest, 2016, p. 307.

gathering evidence under the provisions of the Code of Penal Procedure. The content of both activities is similar. Most likely, the activities meant to lead to the finding of the missing person will have priority. Furthermore, as we have mentioned before in the article, the data gathered during the search should be able to represent evidence in a criminal trial. Thus, we need a proper legal framework to as to employ the data gathered during the search for a missing person as evidence in a criminal trial. Once the victim is found, in full accordance with the provisions of article 41 in-line (6) of the special bill, the employment of the special methods shall cease.

d. Furthermore, we consider it necessary for the bill to expressly provision for the obligation of starting a criminal investigation. This should be mandatory once there are clues for the existence of an act provisioned for by the penal law. It would be an expression of the fundamental principle of the penal trial provisioned for by article 7 of the Penal Code.

e. Although it should be a natural conclusion, the bill ought to expressly assert the fact that any request based on this law becomes a requests that would be solved by the penal court. Thus, we would respect the nature of the procedure, as well as the possible consequences of its enforcement.

II. Furthermore, we consider that a succinct presentation of the activities used for searching missing persons ought to be done, as well as the presentation of ideas that should complete the bill whenever the case may be.

a. The analysis and seizure of objects and documents represents the activity described in article 29 of the bill, augmented by the provisions of art. 170 in-line (2^1)-(2^5) and of art. 171 in-line (3)-(5) from the Code of Penal Procedure. These provisions cover the situation in which the police demands from persons and legal entities to present or hand-in any object or document whenever there are clues that these can help find a missing person. In the eventuality that the object or documents are not handed in willingly, the prosecutor or the police authority via an ordonnance based

on article 29 in-line (5) to put into motion the procedure of forced lifting of objects and documents[7].

A complaint can be filled to the prosecutor or to the head of the prosecutor's office based on article 54 of the bill. The complaint can be filled by any interested party that considers that the measure had a negative impact on legitimate and lawful rights. It is our opinion that considering the high level of interference in one's personal life the complaint should be solved by a judge, similarly with the remedy provisioned by article 171 in-line (2) in relation with article 250 from the Code of Penal Procedure.

Next, we consider the hypothesis that the objects and documents could serve as means of evidence in the eventuality that an act provisioned for by the penal law took place. In such a situation we consider that the provisions of article 29 in-line (2)[8] of the bill are to be applied. This context would motivate the refusal to return the objects and documents because they are needed in the criminal proceedings. One last question regarding this activity is in nexus with the situations in which it can be employed.

We believe that this method can be used in cases in which the person is considered vulnerable, as well as in cases in which the person is not considered vulnerable. We reached this conclusion as a result of the fact that there is no express specification in the article of the bill coupled with the fact that the law does not provision differently. The possibility exists. As a counterargument we find that article 23 in-line (2) of the bill does not include the analysis and seizure of objects and documents among the activities that can take place whenever the missing person does not fall into the vulnerable category. This legal aspect could led us to believe that this possibility is not allowed. In conclusion, we notice that there are no clear limits for the activities that can be enabled in nexus with the vulnerability of the victim. This omission ought to be clarified.

[7] N. Volonciu, A.S. Uzlău, D. Atasiei, C.M.C hiriță, T.-V. Gheorghe, C. Ghigheci, T. Manea, R. Moroșanu, G. Tudor, V. Văduva, C. Voicu, Codul de procedură penală comentat, *3rd Edition*, Hamangiu, Bucharest, 2017, p. 456.

[8] According to this norm, ruling out the case in which there are necessary for further investigation, once the objects and documents are examined and the data and information is collected, there will take place a restitution to the persons that had them in possession.

b. Article 30 of the bill provisions for the criminal investigation. This method is expressly provisioned for and it can be implemented at either the place of the disappearance, or at the domicile, residence or headquarter of a person. It can be employed only in the eventuality that it would lead to the discovery of data and information able to bring about the finding of the vulnerable missing person.

III. a. This activity presents obvious similarities with the home search, as well as particularities of the investigation at the scene of the crime. As a result, the legislator has created the possibility for it to be performed only with the written consent of the person or of the legal representative of the legal entity whenever it is necessary to be performed in the domicile, residence or headquarters. The solution of the authors of the bill is well suited as a result of the fact that once there exists written consent to perform the criminal investigation in the domicile, residence or headquarters, there is no need for authorisation. There is no need for authorisation as a result of the fact that the interference in the personal life is authorised by the owner of this fundamental right.

Nevertheless, we would like to underline the fact that in the case of the home search the law does not provision for this situation, as a result *de lege ferenda*, we propose the modification of the articles in nexus with the home search towards the inserting of the written consent of the person for the home search. This would be an exception of the law that permits a home search without a home search warrant issued by the judge[9].

Without a written consent there is need for authorisation from a judge or from a prosecutor. In this case the activity shall be included among the special methods used for searching a missing person, in full accordance with article 38 in-line (1) letter g) of the proposed bill. In this situation the activity shall take place only when the demands for proportionality and subsidiarity put forward in the provisions of article 38 in-line (3)[10].

[9] Gh. Mateuț, *Procedură penală. Partea generală*, Universul Juridic, Bucharest, 2019, p. 591.

[10] According to the provisions of this law the described activities shall be performed when: the person is in a state of vulnerability; the necessary data and information for finding the missing person can not be obtained in a another manner, or the danger that is upon the person does not allow for time to obtain them in another way; the method is proportional with the degree of interference in the fundamental rights and liberties,

b. The procedure of receiving authorisation from the court is detailed in article 39 of the bill. Although it presents similarities with the procedure for the home search, it also presents differences that are worth mentioning. Similarly with the provisions of article 159 in-line (6) of the Code of Penal Procedure, the judge has the obligation of drawing up the judgement, as well as the authorisation. The authorisation is a document similar with a home search warrant, although it bares a different name. In the case of the home search we notice an alternative competence provisioned for by article 158 in-line (1) of the Code of Penal Procedure. In the case of this method, provisioned for by article 39 in-line (1) of the bill the authorisation shall be issued by the judge named by the tribunal that has competency in the area where the disappearance has been signalled. Although, we would not expect for this issue to pose any problems, we envision drawbacks that could affect the expediency of the procedure in certain situations. At this moment it is important to note that the provisions of article 4 in-line (3) state that whenever the missing person is the victim of an infraction linked with the disappearance, as well as the existence of a penal file, the activity of searching the person shall be completed under the supervision of the prosecutor that supervisions the criminal investigation.

Thus, it exists the possibility for a criminal investigative body to start the criminal investigation although the place where the victim disappeared is outside the jurisdiction of the criminal investigative body. We believe that the possibility for delay exists as long as there is no provision to allow the request to be submitted to the court of the headquarters of the prosecutor's office where the prosecutor in charge with supervising the criminal proceedings performs his activity. We believe there is a need for an alternative competence.

c. The main critique of the criminal investigation is the omission of a provision that stipulates the time interval in which the activity can begin. This time interval would have been something similar with the time for the home search. As we have mentioned before, the criminal investigation is in essence a *bona fide* home search. The difference between the two lies not in the activity, but in the purpose it is performed. The home search is meant to gather evidence, while the criminal investigation

considering the circumstances of the cause, the importance of the data and information or the danger that hover over the missing person.

is meant to find the missing person. The level of intrusion of one's life is comparable. We bring into question the provisions of article 27 in-line (4) of the Romanian Constitution. In accordance with this article the home search can not be performed during the night. It seems that the omission of such a provision makes the bill unconstitutional, as long as the criminal investigation is not performed with written consent from the person or legal entity.

d. According to article 40 of the bill, under condition that the delayed authorisation of the judge would bring about a danger to the health, the bodily integrity or the life of a missing person, the prosecutor can authorize the activity, for a maximum period of 40 hours. Nevertheless, this authorisation would have to be followed by the intervention of the judge. This intervention would be solicited till the end of this period. We believe that these provisions are safe from constitutional critique, even though the judge does not pass judgement *ab initio* on the measure. The way in which the article is constructed is in a manner through which it has been attempted to avoid the danger of not following the provisions of the Romanian Constitution. Thus, the aim of article 27 in-line (2) letter b) of the Romanian Constitution is respected. The law manages this through two measures. One measure is represented by the fact that the provisional authorisation given by the prosecutor is confirmed by the judge. The second measure is represented by the provision under which the materials gathered through the activity would be destroyed in the eventuality the judge does not confirm the activity. Furthermore, the prosecutor can start this activity only in case of danger to the health, the bodily integrity or the life of a missing person. This is a waiver from the inviolability of the domicile, provisioned for by article 27 in-line (2) letter b).

e. Regarding article 40 of the bill we notice the lack of a name for the document through which the prosecutor gives the provisional authorisation, most likely it is still an ordonnance. Also, the provision fails to mention the content of the ordonnance, without being clear whether it would contain the same provisions as those present in the judgement of the judge.

IV. a. Another waiver from the provisions of the Constitution is represented by the permission to enter the domicile or headquarters. This activity is allowed under article 37 of the bill in order to search for the

missing person that is in a state of vulnerability. Thus, in the eventuality there are clues that the life and bodily integrity of the missing person are in danger, the entering shall be done without permission. Under these circumstances, it is obvious that the activity shall be performed without any authorisation and it could be performed for as long as it takes. The significance of the social value that is at risk is superior to the degree of interference in one's private life. It is important to discuss the other guarantees provisioned for by the bill. One is the obligation of the body that is in charge with public order to leave the place immediately after the danger is removed or, as the case may be, once the person is taken into custody in full accordance with article 37 in-line (7). Another guarantee is the presence of article 54 of the bill that provisions for the right to file a complaint against this activity.

b. In article 38 in-line (1) letter a)-f) we find other special methods that can be employed to search for a missing person. These methods have the same essence as the special surveillance and investigation methods provided for in article 138 of the Code of Penal Procedure. Through this provision the authorisation given by the prosecutor and the authorisation given by the judge share the same legal characteristics with those given in the case of the criminal investigation. The differences can be found in the written consent as an exception from the mandatory authorisation. In this case the written consent shall operate when it comes from the legal representative of the missing person. The missing person ought to be a minor or a person under court interdiction. In this case the activities shall be performed exclusively on the technical and informatical objects of the missing person.

c. Finally, it is our desire to put into scrutiny certain aspects of an expertize or establishment of facts, as activities performed in order to clarify acts or circumstances in nexus with the disappearance. We find here the same lack of clarity of the provisions of article 31. Out of these provisions it is uncertain whether or not this activity can be performed with persons that are not considered in a vulnerable situation. Likewise, taking into consideration the fact that neither the expertize, nor the establishment of facts are methods for searching a missing person, the bill fails to offer the possibility of using, at a later date, these findings as a means of evidence in criminal proceedings. We take note of the fact that the acts and circumstances investigated through an expertize or an

establishment of facts can represent valuable data in providing evidence in an eventual trial. As a result we believe it necessary for the bill to provide this nuance so as to guarantee that such evidence is not lost. Apparently, it presents a problem in terms of the parity, but it helps with the trial's expediency. We disagree that it poses a parity issue, as the suspect or the defendant, upon request, can receive a new expertize or a supplement to the expertize.

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CRIMINAL TREATMENT OF JUVENILES IN ROMANIA AND THE EUROPEAN UNION

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ABSTRACT
The transformations of the social and economic life of Romania in the last period have led to an increase in deviant behaviours among young people, a phenomenon that has generated a decrease of confidence in this age category, the deviant behaviour endangering the safety of the community and implicitly the national security.

KEYWORDS: *juveniles; deviant behaviour; danger*.

Evolution of the criminal treatment of juveniles in Romania

The problem of the responsibility of the juvenile offenders was, starting with the Roman law closely related to the evolution of the discernment in relation to the age of the one concerned *(infantia, proximitas pubertates*[1]). The provisions existing in the Romanian Countries, in the 16th-17th centuries, are beginning to advance the idea of excluding the juvenile from the enforcement of the punishment, and part of the 19th Century Codes, due to the promotion of the principle of the individualization of the punishments, have established some special criminal provisions enforceable to the juvenile offenders.

The first Romanian legislation containing references to the juvenile status *Cartea Românească de Învățătură* (1646) in Moldova, and *Îndreptarea legii* (1652) in Muntenia, provided that for certain facts, the juveniles could be subjected to cumulative punishments, both corporal ones (fair corporal punishment), as well as imprisonment or fair corporal punishment and prison and punished, as well as the majors by head cutting[2].

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[1] Ortansa Brezeanu, *Minorul și legea penală*, Ed. Ali Beck, București, 1998, p. 7.

[2] Lavinia Valeria Lefterache, *Justiția penală în cazul minorilor*, Ed. Universul Juridic, București, 2011, p. 34.

The legal manual of Andronache Donici (1814, Moldova) provided that for the crime of murder, the juveniles were not exempted from capital punishment because *the one who is willing to be a murderer, according to the law, is punished by head cutting, regardless of age*. According to the model of the European Criminal Codes, the XXth century brings a marked tendency to modernize European legislation, especially the French Criminal Code from 1810. *The criminal book* stipulated that juveniles between 8 - 15 years old could only be sentenced to imprisonment if they *had discernment*. The duration of the punishment was from 3 months to 3 years and was executed in a monastery specifically established according to the seriousness of the case. If the juveniles were found to have an impaired judgment, they were entrusted to the parents for care and supervision and under their civil responsibility.

The age issue regarding criminal liability differs from state to state. The criterion of the minimum age required by law for criminal liability is thus met by the psychic conditions of criminal liability. The quality of active subject of the crime therefore implies both the biopsychic ability of the person to understand and assume the behavioural obligations provided by the norms of the criminal law, as well as the ability to master and consciously direct the acts of conduct, in relation to those requirements[3].

The requirement to establish a minimum age from which he/she is held criminally liable, also provided in international documents, such as art. 4 of *Beijing Rules*[4], provides that, in those legal systems that recognize the concept of criminal responsibility age for juveniles, the

[3] George Antoniu, ConstantinBulai, *Practică judiciară penală*, Vol. II, Partea generală, Ed. Academiei Române, București, 1990, p. 123.

Art. 113 of the Criminal Code stipulates that, in order to be held criminally liable, the perpetrator must have realized his/her actions or inactions and he/she could have mastered them. The ability of the juvenile to understand and want, to realize the socially dangerous nature and to manifest his/her will consciously is excluded prior to the age of 14 years. The lack of judgment, prior to the age of 14, in criminal matters, constitutes an absolute presumption, *juris et de jure*. The rebuttal evidence is not allowed, even if from the concrete way of committing the deed it turns out that the juvenile is well developed physically and mentally.

[4] United Nations Resolution 40/33 of November 29, 1985, United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

beginning of that age will not be set too low, taking into account the emotional, mental and intellectual maturity.

The promotion and legal regulation of a distinct sanctioning regime, of special rules regarding the criminal prosecution and trial were made taking into account the particularities that take into account the stages of development of the human being.

Non-custodial educational measures

Non-custodial educational measures are criminal law sanctions that apply to juveniles who have committed a crime whose seriousness does not require the deprivation of liberty[5]. These are:

a. Civic learning stage;

b. Probation;

c. Confinement at the end of the week;

d. Daily attendance.

The Romanian Criminal Code leaves it up to the court to actually establish the content of the non-custodial educational measures, the content of the concrete modalities of executing the non-custodial educational measures is to be determined taking into account the age, personality, state of health, family and social situation of the juvenile.

According to the principle no. 5 of the Recommendation of the Council of Europe no. 2008/11 on European rules for juvenile offenders, the imposition and implementation of a sanction or non-custodial measure must comply with the juvenile's best interest, limited by the seriousness of the crimes committed *(the principle of proportionality)*, taking into account the age, mental and physical health, development, personal abilities and circumstances *(the principle of individualization)* and, whenever necessary, psychiatric, psychological or social reports. Likewise, principle no. 6 of the same Recommendation stipulates that in order to adapt the implementation of Community sanctions and measures to the particular circumstances of each case, the authorities responsible for their implementation must have a sufficient degree of freedom, without leading to serious treatment inequalities[6].

[5] Marcel Ioan Rusu, *Drept execuțional penal*, Ed. Hamangiu, București, 2015, p. 316.

[6] Mihail Udroiu, *Drept penal. Partea generală*, Ed. C.H. Beck, București, 2014, p. 334.

The civic learning stage was taken over from the French criminal law, respectively art. 15-1 pt. 6 of the Ordinance no. 45-174 of February 2, 1945 on juvenile delinquency. It has no correspondent in the previous Criminal Code and we think that it can be considered as a measure whose purpose is to remove some small deficiencies that have appeared in the education of the juvenile offender[7].

Art. 117 of the Criminal Code stipulates that, the civic learning stage is the non-custodial educational measure consisting of the juvenile's obligation to participate in a *program with a maximum duration of 4 months established by the court*, to help him/her understand the legal and social consequences to which he/she is exposed in the event of committing crimes and to make him/her more responsible for his/her future behaviour. The purpose of this measure is to support the juvenile in being aware of the legal and social consequences he/she exposes himself/herself in the event of crimes and make him/her more responsible for his/her behaviour.

Ordinance no. 45-174 of February 2, 1945 on juvenile delinquency of French legislation regulates the civic learning stage as an educational sanction, while the Romanian Criminal Code establishes that the civic learning stage is an educational measure that can be applied to juvenile offenders between the ages of 14 and 18 years old.

In conclusion, the provisions on civic learning stage of French legislation have enough similarities with the Romanian provisions, but they are better structured and have a higher ability to eliminate possible criminal impulses from the behaviour of the juvenile.

The probation is a new measure introduced in the Romanian criminal law, being taken over from the Spanish legislation[8], which consists in controlling and guiding the juvenile in his/her daily schedule, for a period between two and six months, under the coordination of the probation service, to ensure participation at school or vocational training courses and preventing activities or getting in touch with certain people that could affect his/her improvement process. The measure approaches the content of the probation educational measure, previously provided by art. 103 of the Criminal Code of 1969, however, having a shorter

[7] Andrei Lucian Pușcașu, *Sancțiunile aplicabile infractorilor minori*, Ed. Universul Juridic, București, 2019, p. 67.

[8] Art. 7 let. h) of the Spanish Law no. 5/2000 on criminal responsibility of juveniles.

duration, but more pronounced educational values through the involvement of the probation service.

The Spanish legislator, unlike the Romanian one, considered it necessary to regulate the criminal liability of juveniles in a different *corpus iuris*, which contains substantive criminal and procedural law rules derogating from the common law. Thus, the Spanish Criminal Code through art. 19[9] points out that holding criminal offenders who have not turned 18 years old to account is subject to the regulation of the Organic Law.

Probation is a harsher educational measure than that of civic learning stage, as it has as components the control and guidance of the juvenile in his/her daily schedule, the probation of the juvenile being thus more carefully executed.

Confinement at the end of the week, this time, the Romanian legislator was also inspired by the Spanish legislation[10]. Confinement at the end of the week, unlike the other educational measures, is considered harsher than the probation educational measure, provided by art. 103 of the Criminal Code of 1969, because it further limits the juvenile's freedom, forcing him/her not to leave home on Saturdays and Sundays. Such a severe restriction of the juvenile's freedom is not found within the probation, even if the duration of the latter (one year) is greater than the duration of the confinement at the end of the week (between 4 and 12 weeks).

Daily attendance is an educational measure "which consists of the juvenile's obligation to comply with a schedule established by the probation service, which contains the time table and conditions for carrying out the activities, as well as the prohibitions imposed on the juvenile" (art. 120 of the Criminal Code).

This educational measure, which has no equivalent in the Criminal Code of 1969, is the most severe non-custodial educational measure and is inspired by Spanish law[11].

Daily attendance is much harsher than the probation educational measure, because the latter is performed by the probation services by controlling the juvenile "within his/her daily schedule", the juvenile's

[9] *http://www .boe.es/buscar/act.php?id=BOE-A-1995-25444*

[10] Art. 7 let. g) of the Spanish Law no. 5/2000 on criminal responsibility of juveniles.

[11] Art. 7 let. f) of Law no. 5/2000 on criminal responsibility of juveniles.

daily schedule being prepared by him/her, according to his/her own options, in compliance with the obligations imposed by the court, the daily attendance, being performed with juvenile's observing a daily schedule established by the probation services, which will contain the time table and the conditions for carrying out the activities, a schedule which he/she is bound to comply with[12].

The daily schedule to be observed by the juvenile and the activities to be carried out are jointly agreed by the probation counsellor and parents, guardian or other person in whose care the juvenile is, with his or her consultation. In case of disagreement, the schedule is established by the delegated judge with the execution, by reasoned court resolution, after hearing the interested parties. The court resolution is not subject to any appeal.

Conclusions

Most juvenile delinquents are not hardened criminals, nor marginal irrecoverable elements, but simply drifting adolescents, victims of lack of education, of a hostile family environment, often violent, who, due to the failure of the socialization process in the family, have come to commit deviations from the moral, religious and legal norms. Therefore, the most important issues of the criminal justice systems are represented by the failure of the repressive sanctions and custodial sanctions, as well as by the problems of the victims of the crimes, who feel victimized twice, first time by the perpetrator of the offence and secondly by the criminal justice system that ignores them, which makes them increasingly frustrated and alienated.

Non-custodial measures have an element of novelty in the Romanian criminal law, managing to become genuine Community measures in the acceptance of European provisions. We believe that these non-custodial measures have the role of leading to the re-education of the juvenile offenders through the different educational programs carried out under the supervision of the Probation Service.

[12] Tudorel Toader, Maria-Ioana Michinici, Andra Crișu-Ciocîntă, *Noul Cod penal - comentariu pe articole*, Ed. Hamangiu, București, 2014, p. 220.

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MONEY LAUNDERING BY MEANS OF OFFSHORE COMPANIES

Dragoș-Andrei NEDELCU[*]

ABSTRACT
When a criminal activity generates significant profits, the individual or group involved must find a way to control the funds without drawing the attention on the activity concerned or on the persons involved. The criminals manage to hide these resources, changing their form or redirecting the funds to a place where it is less likely that they can draw the attention onto them.

KEYWORDS: *offshore, money laundering, criminality, financial systems, bank secret, fiscal havens.*

1. Introduction

There are more definitions about what an Offshore Financial Centre is[1] (OFC), a tax haven, a paradise of secrets, a non-cooperate fiscal jurisdiction or a country with a high risk in terms of money laundering. "Offshore" means in a direct translation "far away", meaning off the shore[2]. Offshore financial centres usually have the following features: 1. attaching the commercial activities mainly on non-residents; 2. a favourable legislative frame (low surveillance requests and minimum requests regarding the publishing of information); 3. existence of some fiscal regimes with decreased duties (not-mentioned) or inexistent.

The offshore practices fall under the techniques of fiscal avoidance currently called in Romania legal tax evasion. Amongst the countries which adopted this behaviour, there were the small islands from the East Coast area of the United States (Bahamas, the British Virgin Islands) and

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[1] An offshore company is a company registered in a country or territory depending of a country with an autonomous legislation, but which does not conduct economic activities on that territory, so it does not get a profit in the country where it was registered, but outside its borders.

[2] *Business Criminal Law*, 6th edition, Coordinator Prof. Univ. Dr. Alexandru Boroi, Conf. Univ. Dr. Mirela Gorunescu, Conf. Univ. Dr. Ionuț Andrei Barbu, Lector Univ. Dr. Bogdan Vîrjan, Publishing House C.H. Beck, Bucharest 2016, p. 192.

those from the English Channel (Jersey, Sark and Guernsey). Irrespective of how they are made (life insurance, bank deposit, shares or mutual funds units), the purpose is to avoid the taxation of incomes gained out of personal investments.

The existence of fiscal havens was determined, in some cases, by the lack of internal resources, compensated by the authorities by ensuring the fiscal facilities of the interested companies and institutions, with the purpose of attracting them in the territory[3].

Practically, the offshore mechanisms consisted of establishing and accommodating any legal person (corporation, foundation, holding and so on), by means of which business with other companies is being conducted, residing outside the specific country. These entities are generically called "offshore companies" and they offer corporate tax reliefs, capital increases, distributed dividends or interest rates and so on. The offshore frauds are especially related to fraudulent share companies, investment companies and shady banks.

2. Motivation for money laundering by means of offshore companies

The fight against money laundering has a double motivation. On one side, the motivation of fighting against organised crime and its extension to a wider scale. On the other side, is necessary to the preserve the integrity of financial markets and market economy.

The integration of world's financial systems and the removal of barriers put in the way of the free movement of the capital increased the easiness with which illegal money can be laundered and makes the money - surveillance process complicated.

The latest trends highlighted the fact that the money launderers focus more and more their efforts on the non-banking and non-financial brokerage. Thus, the fight against money laundering directs its trust in increasing the awareness of a wide range of legal persons which are not only from the banking or the financial sector.

It is normal that the money launderers try to move their funds and operations from countries with complete legislation to offshore centres

[3] A. Mănăilă, *Off shore companies or legal tax evasion*, 2nd ed., Publishing House All Beck, Bucharest, 2004, p. 1.

and countries with incipient economies. The incipient economies not only that they do not have place or they have a wicker legislation about money laundering in some sectors, such as movable assets or insurances, allowing the relatively easy placement of illegal funds, but they usually have high rates of economic increase that the money launderers can take advantage of. Moreover, these economies are making great efforts to attract foreign investments, and the money launderers can take advantage of the trust-worthy profile of the international investors and can even benefit from the economic facilities.

When the money is transformed in a form which can be transferred or smuggled, more often it will go to an offshore centre. There are some practical advantages. First of all, often, in practical terms, the funds are thus placed so that they cannot be touched by authorities from the jurisdiction where the activity from which the profit results took place. Even if the legislation is applicable also on the extra-territorial area, there are fewer laws in this end. By the involvement of another jurisdiction, the real and financial barriers appear within the path of the investigation bodies, in obtaining and protecting the evidence, which can be admitted in the justice. Some jurisdictions wish to offer their bank facilities or another kind based on the secret that they can provide. Unfortunately, there are countries which are ready to facilitate the reception of money, irrespective of their source. Once the money got to an offshore centre, they can enter either directly or indirectly in the traditional banking system. Obviously the more that this process is discreet, the better for the money launderer. Here the appeal of jurisdictions which offer the secret or a level of corruption is enough to insure an efficient cooperation with foreign agencies[4].

By its nature, the money laundering is usually a secret activity and with a very wide geographical spread.[5] Professionals use varied jurisdictions to hide the illegal product of a criminal deed, taking advantage especially of the lack of strict regulations from tax havens. Nonetheless, the multi-jurisdictional movement of money is a central

[4] *Guideline for fighting money laundering and funding terrorism*, supported by the European Union by PHARE Program-National office for Preventing and Fighting Money Laundering)

[5] R. Jurj-Tudoran, D.D. Șaguna, *Spălarea banilor, Teorie și practică judiciară (Money laundering. Theory and judiciary practice),* C.H. Beck Publishing House, Bucharest, 2018, p. 69.

element of the majority of criminal schemes because, given the bureaucratic methods of international criminal assistance, it is more difficult to trace by the investigation bodies from a certain territory.

3. Methods of money laundering

Many ways of money laundering are known, which can vary from purchasing and alienating a luxury item to the transfer of amounts of money by a complex network, at the international level, of legal businesses and by shell corporations (companies which were registered only on paper, without having economic activities or conducting business).

Initially, in most of the cases, the funds resulted from committing the crimes take the shape of cash, which must be entered, by any means, in the legal financial system. The bank operations of incorporation of deposits or transfer of amounts of money and crediting systems, offer a vital mechanism for the phenomenon of money laundering, especially upon the initial phase, of entering the cash in the financial system.

Although the methods used are varied, in the specialized publications, it is admitted that the process of money laundering is made in three phases, which can include countless transactions made by criminals, which are likely to alert the financial institutions on the criminal activities, namely placement, layering and entering the money.[6]

Starting off from obvious legal advantages, the low taxes as well as the easiness to register the companies, corroborated with the bank secrecy and with the quasi-inexistence of judiciary cooperation, the large financial groups of organised crime are focusing on offshore jurisdictions, in order to whiten the incomes gained by committing criminal deeds.

The offshore havens accept fictional implants of companies, seldom used as simple mail boxes, areas of flexible regulations on the control of exchange rates and wide freedom in terms of taxes and fees and which offer, at the same time, almost without exception, an impenetrable bank secrecy.

[6] Constantin Neacșu, *Infracțiuni de evaziune fiscală și spălare a banilor săvârșite prin intermediul companiilor offshore (Tax evasion and money laundering committed by offshore companies)* C.H. Beck Publishing House, Bucharest, 2019, p. 209-210.

When money is transformed in a way which can be transferred or can be smuggled, most often it is directed to a fiscal haven.

This system offers real practical advantages, which the ones who are defying the law sense and exploit. Firstly, the amounts of money are placed in relaxed jurisdictions in terms of tax controls.

By involving a foreign jurisdiction, there are multiple legal and financial barriers in the way of criminal investigation bodies, in terms of obtaining but also preserving or capitalizing on the evidence of committing the criminal deeds.

Second of all, a series of legislations facilitate the transfer of funds from abroad, irrespective of their source or the way to transmitting it, money that goes straight in the bank system, because the regulation is almost absent, there is no duty mentioned on payment of taxes, no proof of the share capital must be submitted, no agreement on double taxation, no duty to keep strict accounting records, no registered directors, shareholders or associates, the persons holding the decision power in the company are not known (legal beneficiaries), the identity of the beneficial owner is unknown and so on.

Usually the beneficial owners of companies do not have their residence in the countries where they registered the companies, these persons being represented by attorneys in fact or representatives (registered proprietor or registered managers), who receive orders by previously-agreed codified means.

Tax havens accept fictitious implants of groups using these theories as simple mail boxes, so that any entity using them can make that high transfer prices be paid for the branch set up in a country with a normal taxation system, making high profits in tax havens and low profits in standard taxation system[7].

The benefit brought by the havens to the persons who are committing the crimes do not come just from the absence of fees or the existence of low taxes, non-taxable advantages, offered by these jurisdictions, arriving to the point when the offshore centres represent one of the most common

[7] Dan Drosu Șaguna, *Aprecieri cu privire la măsurile specifice combaterii fraudei fiscale, Studii juridice alese, (Considerations about the specific measures to fight tax fraud, Selected legal studies),* Ad honorem Ion Dogaru, All Beck Publishing House, 2005, Bucharest, p. 404.

and used grounds of play for fraud and tax evasion at the international level.

Almost all the countries of the world impose, by their own legislation, a certain level of protection for the commercial and banking information but most of them are open to the exchange of information and disclosures, by bilateral or community agreements, data and information, in case the judicial bodies, from a foreign country, should ask for them.

In exchange, an offshore jurisdiction is opaque and shall almost always avoid to disclose sensitive data or to violate the bank secrecy, even in case it is about high social danger crimes.

Therefore, when the monetary founds originating from committing criminal deeds, look for shelter, must often they find the refuge in a tax haven or an offshore financial centre. So, the tax havens got bad image, as consequence of this frequent interaction between legal and illegal[8].

4. Characterisation of fiscal havens

The main characteristics of tax havens are decreased taxes, secrecy, bank activity and promotional advertisement.

The largest part of jurisdictions considered tax havens shall set up fees only on some categories of incomes, but they are much decreased in comparison with the countries of origin of the ones using the tax havens. The extremely low level of taxes is part of the policy to attract money from abroad, but also some strong economic and financial foreign corporations. The first 25 large banks in the world have branches in tax havens.

The tax havens ensure protection of bank and commercial information, refusing to crush the wall around the, even when it is about committing a serious breach of the laws of a country.

The bank secrecy was always considered as an element of the political freedom and private life, as essential and important as the freedom of association, of expression and the religious one.

The confidentiality degree mentioned in the fiscal legislation on the private bank account varies a great deal from one country to another. The

[8] Constantin Neacșu, *Infracțiuni de evaziune fiscală și spălare a banilor săvârșite prin intermediul companiilor offshore (Tax evasion and money laundering committed by offshore companies),* C.H. Beck Publishing House, Bucharest, 2019, p. 223-224.

tax havens promote the financial, banking and commercial secrecy, enforcing legal procedures to obstruct any request to investigate a financial or banking business.

Financial havens offer an extended area of facilities to the foreign investors who do not wish to disclose the origin of their incomes. These include registration of International Business Companies (IBC) or shell companies, as well as the services of a number of offshore banks which are not under the control of the regulating authorities. In many cases, the tax havens impose the financial secrecy very strictly, defending in an efficient way the foreign investors against investigations and judiciary enquiries in their native countries. It is estimated that at the international level, there are more than one million anonymous corporations.

When the dirty money has been moved long enough in a "washing cycle", they are considered clean and made available to the criminals and their geographical origins are hidden.

A strict bank secrecy must be regarded in tight connection with an offshore centre and often it cannot be violated or allow account holders to transfer money or develop counter-strategies before those accounts are disclosed.

Switzerland is a perfect example of a country which, voluntarily or not, facilitates the entering into banks of illicit funds by using an almost absolute professional secret, being considered a true model for illicit transactions and money laundering.

The second market of the money, the first market of gold in the world, Switzerland has an old banking system and a high performance, with branches all over the world.

Discretion, efficiency, total amorality and work seriousness made the Swiss bankers renowned.

The banking activity in the economy of financial havens is the most attractive segment for the non-resident citizens who benefit of the facilities mentioned early on symbolic taxation, lack of controls on the conducted operations and so on. The banking activity is supported by the existence of some excellent communication systems which connect these countries to others. They have performance air services and non-stop rides with the most important financial centres.

The promotional advertisement is a feature of tax havens which show off their virtues in terms of warranties which they offer to their elite clients in terms of banking activity and insurance.

5. Localisation of tax havens

From the perspective of their localisation, one can talk about internationalisation, Europeanization of tax havens which have become integrant in the state system of some European nations.

A known specialist[9] points out that in the career of magistrate and financial criminal lawyer or high-profile money laundering where the authors did not use one or multiple trade or financial companies with headquarters in a tax haven.

The offshore world is very close to the European borders, no matter if we talk about non-cooperative territories, tax, banking and judiciary havens, of small islands from the Caribbean, Pacific or Indian Ocean.

Nonetheless, the most important and sought-after territories are exactly in the heart of the European Union, every great nation producing its own tax haven, France-Monaco, England-Gibraltar and Anglo-Norman isles, Germany-Luxemburg, Spain-Andorra.

The bank secrecy practised in the tax havens represents a warranty of calmness against controls of authorities from other states. The modern bank secrecy is a Swiss invention which offered these services to French aristocrats who fled the French Revolution in 1789. In case an employee of the Swiss bank gives information about the identity of its clients, he/she is committing a crime.

London is considered the largest offshore centre of the world, being in competition with New York City. The financial services involve more than one million persons and represent 13% of the GDP of the year. The London market meets the criteria of a tax haven: simple formalities to register companies, the trust funds system which guarantees the anonymity of the beneficiaries, the lack of international cooperation[10].

Starting from the above-mentioned advantages, as well as from the easiness to incorporate a company in these financial centres[11], corroborated with the financial secret and the lack of judiciary cooperation, the

[9] See P. Bernasconi, *La criminalite transfrontaliere: sophistications financiers et faiblesses judiciairies*, CSI nr. 19, first semester 1995, p. 130.

[10] Alina-Andreia Leția, *Investigarea criminalității de afaceri (Investigating Business crimes)*, Universul Juridic Publishing House, Bucharest, 2014, p. 54-55.

[11] In relation to aspects of some offshore jurisdictions, see L. Baker, *Many jurisdictions remain vulnerable to money laundering*, in US Report, 08.03.2006 *(www.tax-news.com).*

great criminal groups are focusing on these financial centres, in order to launder their money gained form these crimes, 0which has as main consequence a pressure from the part of international bodies to implement regulations against money laundering. Stress on also emphasized by the main powers of Europe: France and Germany, unlike Great Britain, which still has interests in terms of status of offshore jurisdictions[12].

An recent analysis[13] of experts of the Organisation for Economic Development and Cooperation (OECD)[14] of 2010 observed that, in terms of transparency and exchange of information in the last two years, all financial centres have implemented OECD standards, being signed maximum 500 agreements on the exchange of information and bilateral conventions in terms of avoiding double taxation. This dramatic change on the taxation of goods can lead, in a near future, to the non-existence of "financial havens", where money and assets would"evade" taxation.

After publishing in 2010 of the first guide on the voluntary disclosure of programs, in 2014 OECD adopted "The standard for the automatic exchange of information on the financial accounts in the fiscal matters", which became effective in 2017, and in 2015 the guide on the voluntary disclosure of programs was revised.

Also, the European Commission launched an action plan[15] related to a more fair and efficient taxation of EU enterprises, and in order to launch a more open and uniform approach at the EU level on the non-cooperate tax jurisdictions, the Commission published a black list with 30 tax havens from the entire globe, promoting the non-traditional tax practises, on the account of EU states and which were mentioned as such by at least 10 member states. The list includes Andorra, Bahamas, Belize, Hong Kong, Liechtenstein, Monaco, Panama, Liberia, Brunei, Seychelles

[12] See P. Lascoumes, T. Godefroy, *Emergence du problème des places off-shore et mobilisation internationale*, Paris, 2002 (www.gip-recherche-justice.fr).

[13] *Off-shore Voluntary Disclosure: Comparative analysis, guidance and policy advice*, September 2010.

[14] Organisation for Economic Co-operation and Development (OCDE) is an international organisation of those developed nations which accepts the principles of representative democracy and free market economy.

[15] *https://europa.eu/rapid/press-release_IP-15-5188_ro.htm*

islands, British Virgin Islands[16] or Mauritius. Romania did not list any country of the ones mentioned on the EU list.

Recently, The European Parliament observed[17] that the "Panama Papers"[18] scandal has weakened the trust of the citizens in our financial and fiscal systems and underlines the urgent need to file a joint definition, at the international level, of what is an offshore financial centre (OFC), a tax haven, a non-transparent jurisdiction, a non-cooperative tax jurisdiction, and a country with a high risk in terms of money laundering. Also, it is requested to reach an international agreement in terms of these definitions, without prejudice immediate publication of the EU joint blacklist, underlining that these definitions imply the establishment of some clear criteria and objectives.

Also, the European Parliament observed that, according to the most recent data on the direct foreign investments published by OECD, Luxemburg and The Netherlands have together more investments from abroad than in the US, most of them being invested in entities with the special purpose, which do not have a significant economic activity, and Ireland[19] has investments abroad more than Germany or France. According to the researches made.

6. Conclusions

The conclusion from the studies and researches made by the specialists refer to the fact that tax havens are an important component of the organized crime, being used for laundering of the money coming

[16] The British Virgin Islands amended the legislation against the money laundering, so that on January 1st 2016, any agent who is incorporating a trade company is forced to ask, in view of establishing the real beneficiary, to request and hold the copies, the documents which establish the name, date of birth, address or residence and citizenship.

[17] Recommendation of the European Parliament of September 13th 2017 addressed to the Council and Commission following the investigation on money laundering, tax avoidance and tax evasion.

[18] *http://panamapapers.icij.org/*

[19] Conclusions of the Commission of August 2016 about state help in the sense that Ireland illegally gave 13 billion EUR as non-conventional waivers of taxes to Apple (Recommendation of European Parliaments OF December 13th 2017, para. 58).

from a high diversity of crime activities (drug traffic and gun traffic, smuggling actions, tax evasion and so on)[20].

Once the criminal funds are placed in a bank from a tax haven, they can be transferred then to any country in the world which is not cooperating with the criminal investigation authorities, in order to be put at the disposal of members of organised crime groups. The integration of such funds can be made according to the plan by selected accounts so that they can be refused in full terms of anonymity with free access to all international markets and the correspondence insured with great networks.

For these activities, one turns to financial counsellors who frequently offer their services in order to hide the origin of the money, such as the acquisition of movable assets and other investment assets in the name of their clients. Even the hedge funds which offer a certain secret of the transaction, involve large amounts and the use of offshore accounts, making them more and more attractive vehicles in order to hide their illegal wins[21].

Even if at the level of the EU there is a pretty fierce battle about the fighting of money laundering by means of offshore companies, by the attempt to introduce new regulations at the level of member states as well as at the level of offshore centres (OFC), the organised crime groups shall continue to transfer funds gained illicitly, in order to whiten their incomes, as long as there is no uniform regulation and a tight collaboration, in order to efficient prevent and fight this kind of criminal actions. The efforts must be focused on finding, freezing, seizing and confiscating the products in relation to the crimes, but nonetheless, these are operations hard to achieve, due to the differences between the legislations of the member states in this area.

For these efforts to have the expected result, the involvement of the fiscal and criminal field decision factors is needed, both at the U.E. and international level. Money resulting from illicit business should be

[20] *Criminal Business law*, 6th edition, Coordinator Prof. Univ. Dr. Alexandru Boroi, Conf. Univ. Dr. Mirela Gorunescu, Conf. Univ. Dr. Ionuț Andrei Barbu, Lector Univ. Dr. Bogdan Vîrjan, Editura C.H. Beck, București 2016, p. 196.

[21] Remus Jurj-Tudoran, Dan Drosu Șaguna, *Spălarea banilor - Judiciary theory and practise*, 3rd Edition, Ed. C.H. Beck, 2018, p. 141.

pursued from the time the crimes were committed and until they reach money laundering offshore centers.

Besides weakening of the financial-banking mechanism and the economic system, money laundering leaves its mark on the social system as well. Use and embezzlement of profits obtained by those in trouble with the law, or laundering dirty money through permissive jurisdictions, contributes at the deterioration of society, further generating corruption.

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11. *http://panamapapers.icij.org/*

THE OFFENSE OF MONEY LAUNDERING AND TERRORIST FINANCING PROVIDED BY THE ROMANIAN LAW NO. 129/2019

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ABSTRACT

The elaboration of certain financial circuits through which the money obtained from crimes is no longer related to their illicit source is a constant and permanent preoccupation within the criminal environments. The multiplication and diversification of the economic relations lead to the necessity to adopt some laws that would prevent the money laundering activities. In Romania, the law that regulates the measures in this field has been elaborated and has undergone successive modifications according to the general international requirements and interests. The purpose of this exposition is to present a strictly theoretical presentation of the crime with reference to the judicial practice in the matter. Based on knowledge as accurate as possible, it could be reached an efficient use of the aspects that impose an appropriate investigation reaction against the criminal chain that has as purpose the concealment of the illicit origin of the goods.

KEYWORDS: *money laundering; terrorism financing; sanctions.*

I. Legal framework

According to the statements[1] of Council Directive 91/308/EC of 10 June 1991 (art. 1), reiterated in Directive (EU) 2015/849 (art.1 letters a, b, c, d) and the international legislative acts unanimously recognized, "money laundering" means the following intentional activities:

- "The conversion or transfer of goods about which the person conducting such activities knows that they have been obtained through a criminal activity or by being part of such activity, in order to dissimulate

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[1] Concerning this point of view, see art. 3 of the Vienna Convention ("Each party shall adopt the necessary measures in order to grant the character of a criminal offence, according to its domestic laws") and Decision no. 418/2018 of the Constitutional Court published in the Official Gazette Part I no. 625 from July 19th 2018.

or mark the illicit origin of the so-called goods or to help any person involved in this activity to escape the legal consequences of his acts."

- "The concealment or masking of the nature, source, location, disposition, movement or real property of the goods or rights relating thereto, which the author knows to be derived from an criminal activity or from participating in such an activity."

- "The acquisition, possession or use of goods knowing, when at the reception of these goods, that they come from a criminal activity or from the participation in such an activity."[2]

- "The participation in one of the acts referred to in the three preceding points, the association to commit the respective act, the attempt to commit it, the fact of helping, inciting or advising someone to commit it or the fact of facilitating its execution."

Preventing and combating money laundering and terrorism financing was regulated internally by the provisions of the old Romanian Criminal Code (repealed) and by Law no. 21/1999, which was replaced by Law no. 656/2002. The new Romanian Criminal Code no longer contained provisions regarding the crime of money laundering.

Subsequently, for the internal transposition of Directive (EU) 2015/849 and of Directive (EU) 2016/2258, the Law no. 129/2019 was adopted (Official Gazette, Part I, No. 589 of July 18th, 2019) by which the Law 656/2002, the Government Decision no. 594/2008 (regarding the Regulation implementing the Law no. 656/2002) and the Decision no. 496/2006 of the Plenum of the National Office for Prevention and Combating Money Laundering were repealed (regarding Internal rules and standards).

In regard to the money laundering offense (in the special laws), there were no substantial changes, only certain terms of expression being transformed in order to correspond to those of the Directives and the normative act was adapted to the requirements of the Constitutional Court Decision No. 418/2018. which considered that in relation to the domestic criminal law the references to "the acquisition, possession or use of certain goods, knowing at the date of these assets that they come from a criminal activity or from the participation in such activity" (the

[2] The money laundering offence provided by art. 268 of the old Criminal Code, valid until July 24th 2009, abrogated by Law no. 286/2009 concerning the new Criminal Code.

latter being motivated by the distinct regulation of the crime of concealment in the new Criminal Code).

According to article 49 of Law no. 129/2019:

"(1) It is considered a money laundering offense and it is punished by imprisonment from 3 to 10 years:

a) the change or transfer of goods, knowing that they originate from the commitment of an offense, in order to hide or dissimulate the illicit origin of these goods or in order to help the person who committed the crime from which the goods come to evade prosecution, trial or the execution of the sentence;

b) the concealment or dissimulation of the true nature, origin, location, disposition, circulation or ownership of the goods or rights thereon, knowing that the goods resulted from committing some crimes;

c) the acquisition, possession or use of goods by a person other than the active subject of the crime from which the goods originate, knowing that the goods resulted from committing some crimes.

(2) The attempt is punished.

(3) If the deed was committed by a legal person, besides the penalty of the fine, the court shall apply, as the case may be, one or more of the complementary penalties provided for in art. 136 paragraph (3) letter a)-c) of the Law no. 286/2009 (the Criminal Code), with the subsequent amendments.

(4) The knowledge of the origin of the goods or the purpose pursued must be established/determined from the objective factual circumstances.

(5) The provisions of paragraphs (1)-(4) shall apply regardless of whether the offense from which the good originates was committed on the Romanian territory or in other Member States or third countries."

The text of the law refers to any criminal act that includes the constituent elements of a crime, committed both on the territory of Romania and in states that are members of the European Union or of the European Economic Area (they have implemented Directive 2005/60/EC) or in recognized third countries (which have anti-money laundering systems) and are not part of this Community.[3]

[3] The states Liechtenstein, Norway, Switzerland and Island are not EU members and they are part of the European Economic Area.

The list of third states is provided by H.G. no. 1437/2008, Annex, published by the Official Gazette part I no. 778 from November 20th 2008 with subsequent amendments

II. Legal object of the crime

The money laundering offense affects both the social relations through which the legal circuit of the goods is legally protected, as well as the activity of carrying out justice, because by committing such acts there are covered other (primary) offenses in order to disguise and produce some uncertainties or difficulties in establishing their criminal character.

The facts representing the components of the money laundering offense affect the economic-social system, the financial-banking system through patrimonial losses and the judicial system through which the correct and coherent application of the law is ensured. Therefore, money laundering has a complex character and is part (without being included in the Criminal Code) in the category of offenses against the patrimony and against the execution of justice.

The tangible object of the crime is represented by the goods in respect of which the changes, transfers, concealments, dissimulations of the illicit origin, the true nature of the origin, location, disposition, circulation, property or rights therein are made.

The assets to which the money laundering offense refers to were defined by art. 2 letter c) of Law no. 129/2019 under the following wording: "the term goods means assets of any kind, tangible or intangible, movable or immovable, as well as legal documents or instruments in any form, including electronic or digital ones, attesting a title or a right or interest thereon."

This definition of assets can create legal difficulties in establishing the constituent elements of the money laundering offense because the concept of asset (financial/accounting) has more acceptances, and theoretically, in general, it refers to goods that are belonging to an entity/institution/economic organization, being less close/or not/to the current criminal activity of a group or of a natural person. The text in question is completed and should be read in relation to the provisions of article 2 letter r) of the Law no. 129/2019 which specifies the notion of "client/clients" as "any natural, legal or entity without legal personality with which the reporting entities have business relations or which (not

by H.G. no. 885/2011 published by the Official Gazette part I no. 645 from September 9th 2011.

with reference to the client/clients as a natural person) carry out other permanent or occasional operations."

Regarding this situation, we consider that the "assets of any kind" referred to in art. 2 letter c) of Law no. 129/2019 must mean a set of assets held in money or in kind or the totality of the amounts invested by a natural or legal person in a commercial, financial, economic activity of any kind consisting of sale, purchase, credit, accumulation or investment.

III. The subject of the money laundering offense can be any criminally investigated person, as well as a legal person under the conditions provided by Title VI, Chapter I, art. 135-151 of the new Romanian Criminal Code.

The money laundering offense does not exclude that its active subject is the same person who was also the perpetrator of the crime from which the goods originate. In such case, the judicial practice of the supreme court was pronounced in the sense that "the money laundering offense should not be automatically considered of the perpetrator of the offense from whom the goods come, for the simple reason that in its criminal activity it was also committed one of the actions related to the material element of the money laundering offense, and this would devoid the money laundering offense of individuality. The existence of the money laundering offense has an autonomous character, and it is not conditioned by the ruling of a solution of conviction (postponement of the application of the punishment or renunciation of the application of the punishment) for the crime from which the goods come. For this purpose, it was made a reference to article 9, paragraph 5 of the Warsaw Convention stating "Each party shall ensure that an anterior/previous or simultaneous conviction for a predicate offense is not a condition for a conviction for the money laundering offense."[4]

It is noted that the offense of money laundering is distinct and cannot be committed simultaneously with the (previous) offense from which the goods on which change, transfer, concealment, concealment occur,

[4] High Court of Cassation and Justice, Panel for the settlement of some legal matters in the criminal field. Decision no. 16 from June 8th 2016 ruled for File no. 1624/1/2016, mandatory according to art. 477 paragraph (3) Criminal Procedure Code, published in the Official Gazette Part I no. 654 from August 25th 2016.

etc. Therefore, nothing prevents a distinct and concrete individualization during the criminal prosecution of the perpetrator of the deed/deeds, which may be the same or different from the one of the person who committed the crime from which the goods originate. Such situation deals with the fact that separately from the action/actions and subsequent to the commitment of the offense which lead to the origin of goods, the same person, with another criminal resolution, commits other material acts specific to those mentioned in the provisions of art. 49 paragraph (1) letter a), b), c) of Law no. 129/2019, this way the rules of the crime contest becoming incident.

Considering the above, we consider that the expression, "knowing that the goods come from the commission of a crime" does not exclude from the sphere of active subjects the persons who committed the crimes generating the goods. In another interpretation, we consider that the legal classification of the facts becomes uncertain in relation to the primary crime and leads to the conclusion that one of the facts, although regulated separately by its material elements, will not be penalized.

An indication is required under the distinction between the money laundering offense in the hypothesis provided by art. 29 paragraph (1) letter c) of the Law/repealed/no. 656/2002 and the crime of concealment, separately regulated by the Criminal Code, fact that constituted the object of the Decision no. 418 of June 19, 2018, pronounced by the Constitutional Court. As a result, art. 29 paragraph (1) letter c) of the Law no. 656/2002 was found to be unconstitutional because the incriminated facts meet the constituent elements of the concealment offense, and subsequently the text was no longer found in the same formulations of article 49 paragraph (1) letter c) of Law no. 129/2019.[5]

Strictly under theoretical considerations, the quality of active subject of the money laundering offense can be put into question, for the case provided by art. 49 paragraph (1) letter a), the final thesis of the Law no. 129/2019 that refers to "the purpose of assisting the person who committed the crime from which the goods originate to evade from the prosecution, trial or execution of the sentence." It is seen that this hypothesis is subjected to the incrimination concerning the constitutive elements of the crime of favouring the offender, provided and separately

[5] Constitutional Court, Decision no. 418 from June 19th 2018, published in the Official Gazette Part I no. 625 from July 19th 2018.

punished by art. 269 of the new Criminal Code (this topic will be analysed subsequently).

IV. The objective side of the money laundering offense is represented by its material element which consists of an action that is carried out by changing, transferring, concealing, hiding, acquiring, owning or using goods or rights over them, knowing that these come from the commission of an offense, as shown in the provisions of art. 49 paragraph (1) letter a), b) and c) of Law no. 129/2019.

By change it is understood any action by which it is executed the replacement of a good obtained by committing an offense with another that creates the appearance of lawful acquiring. The transfer "for concealing or hiding the illicit origin" is carried out by moving the good in a place or placing it within a legal context lacking any suspicion, and which would create the illusion of lawful origin. The concealment or dissimulation of the "true nature, origin, location, disposition, circulation or ownership of the goods or rights thereon" involves multiple hypotheses, specific to the criminal operations, committed for hiding the illegal/criminal origin of the goods. This multiple-effect mode is the most used method for losing the legal identity of the goods, and the identification and establishment of the real situation is held by the legal bodies that ensure the criminal prosecution, depending on each case. The acquisition, possession or use of the assets implies activities of acquisition, exercise of a seizing of the property, meaning the appropriation through employment, use or exploitation.

However, the money laundering offense is subjected to the aspect of its material side by the existence of a previous offense (known in the doctrine and by the expressions predicate offense or premised offense) by which the goods referred to in the text of incrimination are obtained. The preceding act must meet the elements constituting an offense (within the meaning of the provisions of art. 15 of the new Criminal Code), and "the term of offense is used by the generic legislator to cover the multitude of "basic offenses" from which the goods can come from."[6]

[6] Constitutional Court Decision no. 524/2006 from June 27th 2006, published in the Official Gazette Part I no. 764 from September 7th 2006.

In such conditions, it is noted that the money laundering offense has a derivative character, which presupposes the existence of an offense from which to show the goods referred to by Law no. 129/2019. The legal practice expressed that "it is necessary and sufficient to be found by the legal bodies that the constitutive elements of the predicate crime are fully fulfilled. The conclusion to be established is that the money laundering offense can exist only after the commission of the predicate crime. The money laundering offense is an act conditioned by the existence of a main offense that leads to obtaining some benefits", so that later these benefits will be subject to the actions that constitute the material element from the drafting of article 49 paragraph (1) letter a), b) and c) of Law no. 129/2019.[7]

This way, it results with certainty that the money laundering offense has its own conditions and requirements as constitutive elements that are realized by any of the hypotheses regulated by law. The causal link naturally results from the material elements of the crime and the realization of the state of danger for the protected social values.

V. Subjective side

The money laundering offense provided by art. 49 paragraph (1) of Law no. 129/2019 is committed with the guilt, as direct intention, qualified by the purpose of concealing or dissimulating the illicit character of the goods that come from committing an offense.

The author must have the representation that by his actions he hides or dissimulates the origin of the goods from a crime, consciously pursuing and accepting the achievement of this result as a final goal of his activity.

The essential requirement for qualifying the guilt form is for the author to know that the goods originate or are the result of committing a crime. Under this aspect, by the provisions of art. 49 paragraph (2) of Law no. 129/2019 a simple presumption is established by the fact that the perception (in the sense of consciously reflecting the existing reality) of the origin of the goods or the purpose pursued must be established/deter-

[7] High Court of Cassation and Justice, Criminal Court, Decision no. 411/A/November 28th 2017, Jurisprudence, *www.scj.ro*.

mined from the objective factual circumstances.[8] This results and is a transposition into the national law of the provisions of art. 6, paragraph 3 letter a) of the Strasbourg Convention according to which money laundering can be incriminated when "the perpetrator had to presume that the good constitutes a product of the crime", as well and of the provisions of art. 9 paragraph 3 of the Warsaw Convention in which it is shown that money laundering can be incriminated when "the offender had to assume that the goods represented the proceeds of the crime."

The subjective factor can be emphasized by any means of evidence or it may be the correct rational effect arising from the objective factual circumstances (thus, both positive confirmation and the existence of the circumstance that the illicit provenance of the goods could not be known).

VI. Forms of the offence

The money laundering offense is of commissive nature, being possible both as a committed crime and as an attempt, the latter being expressly provided by art. 49 paragraph (2) of Law no. 129/2019.

VII. The sanction of the offense is provided by the provisions of art. 49 paragraph (1) of the Law no. 129/2019 in which it is shown that the punishment is the imprisonment from 3 to 10 years, being, of course, applicable all the provisions of the Criminal Code and the Criminal Procedure Code regarding the individualization of the punishment, the agreement for recognizing the guilt or the procedure for recognizing the blame.

The prison sentence is applied only in the case of the crime committed by individuals.

The perpetration of the offense of money laundering by legal persons is punished in accordance with the provisions of general order contained in art. 135-151 of the new Criminal Code and by applying the derogatory provisions contained in art. 49 paragraph (3) of Law no. 129/2019. In addition to the penalty of the fine, the court applies one or more of the

[8] High Court of Cassation and Justice, Criminal Court, Decision no. 225/RC/2016, Jurisprudence, www.scj.ro (03.11.2019;19:15).

complementary penalties provided for in art. 136 paragraph (3) letter a)-c) of the new Civil Code and which consist in a) dissolution of the legal person; b) suspension of the activity or of one of the activities of the legal person for a period of 3 months to 3 years; c) closing of work points of the legal person for a period of 3 months to 3 years.

In accordance with the provisions of Article 51 paragraph (1), (2), (3), (4) and (4) of Law no. 129/2019 and by applying the provisions of Article 112 of the new Civil Code, in all cases, irrespective of the perpetrator of the crime or the form of committing it, the confiscation of the goods, their cash equivalent (if they are no longer found) or the goods acquired by substitution is obligatory. The income or other benefits are also confiscated. In the case of the impossibility of individualizing the acquired goods, the incomes or other material benefits obtained, their equivalent is confiscated.

Considering the nature of the money laundering offense, we consider that in the matter of confiscation the provisions of art. 112^1 Criminal code regarding the extended confiscation are applicable, because the provisions of art. 51 paragraph (1) of Law no. 129/2019 do not differentiate or make exceptions in this regard.

VIII. Conclusions

The money laundering offense is a transposition into the domestic law of the decisions adopted at international level and with special reference to the legislative acts of the European Union. The Romanian state has transposed into the national legislation (with some delays) the regulations regarding the money laundering to which it was obliged by international conventions. The offense is complex and necessarily involves a previous offense to which the material elements of the subsequent one are reported. Therefore, both the investigation and the subsequent settlement before a court imply some difficulties in administering a coherent probation by which to establish the causal links required by law.

We consider that in the effort to transpose into national law (under the effect of repeatedly issuing and updating some EU Directives), greater accuracy is required regarding the establishment of the constituent elements and the conditions for committing the money laundering offense. The current regulation (which according to international conventions must be adapted to national law) can be systematized to

define a clearer framework, without specific conditions that prevent the finding or sanctioning of the crime that has tendencies to amplify (in various forms) and a high degree of social danger.

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THE RIGHT TO ASSISTED REPRODUCTION UNDER ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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ABSTRACT

There is not a right to assisted reproduction regulated as such at international level. This conclusion comes from an analysis of the international legal instruments which are significant to protecting and ensuring human rights, such as the European Convention on Human Rights, the American Convention on Human Rights or the Convention on Human Rights and Biomedicine. With this consideration in mind, we attempt to demonstrate below the existence of the right to assisted reproduction and that this right is part of the category of reproductive rights.

Reproductive rights are not a new set of rights; they are rather a plurality of rights and freedoms which are already recognised in international legal instruments and which are relevant to the sexual and reproductive life and health of all individuals. By far the most relevant right in outlining a picture of the right to assisted reproduction is the right to respect for one's private and family life established by Article 8 of the European Convention on Human Rights.

The aim of this article is to analyse the right to assisted reproduction within the context of reproductive rights by highlighting the case-law of the European Court of Human Rights and the importance assigned by the Court based in Strasbourg to Article 8 of the Convention in matters of medically assisted reproduction.

KEYWORDS: *assisted reproductive technology; right to assisted reproduction; reproductive rights; right to respect for private and family life; European Court of Human Rights case-law.*

1. Reproductive rights and assisted reproductive technology

Assisted reproductive technology forms the vast field of medically assisted reproduction and includes a series of reproduction methods addressed to people for whom natural reproduction is not possible. This technology includes, *inter alia,* the assisted insemination, the in vitro

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fertilisation, medically assisted reproduction with a third donor of sperm, ova or embryos, or surrogacy.[1]

As regards the reproductive rights, the correlation between this category of rights and assisted reproductive technology is best expressed by the relation genus-species, meaning that reproductive rights are the proximal genus, and the rights in close connection with the use of assisted reproductive technology are the specific difference.

For the time being, there is no international legal instrument dedicated specifically to reproductive rights or reproductive health. Nevertheless, there have been numerous approaches to the competent entities for a worldwide recognition of reproductive rights as a component of the vast array of human rights.

A first reference to the rights of parents which later on were to be labelled reproductive rights was made on the occasion of the 1968 Proclamation of Teheran[2], in Article 16 referring to the protection of family and children. Article 16 states that "*parents have a basic human right to determine freely and responsibly the number and the spacing of their children"*. Nevertheless, more than two decades had passed before the notion of *reproductive rights* was used and defined in an official document. This is the Programme of Action adopted by the International Conference on Population and Development in Cairo, on 5-13 September 1994[3], organised by the United Nations Population Fund (UNFPA), one

[1] For more about assisted reproductive technology see: Amel Alghrani, *Regulating assisted reproductive technologies: new horizons*, Cambridge University Press, Cambridge, 2018; Charles P. Kindregan, Jr., Maureen Mc. Brien, *Assisted Reproductive Technology: A Lawyer`s Guide to Emerging Law and Science*, 2nd edition, 2011, American Bar Association, USA; Nicoleta-Ramona Predescu, *Legal aspects regarding assisted reproductive technology*, in the Volume of the International Conference "Education and creativity for a knowledge-based society", Titu Maiorescu University, Bucharest, Hamangiu, 2015, p. 284-295.

[2] **The Proclamation** of **Teheran**, Final Act of the International Conference on Human Rights, Teheran, 22 April-13 May 1968, United Nations, Doc. A/CONF. 32.41 at 3, 1968.

[3] United Nations Population Fund, *Report of the International Conference on Population and Development*, Cairo, 5-13 September 1994, 1995, A/CONF.171/13/ Rev.1; the Action Programme was established for a period of 20 years, but in 2010 a decision was made to extend the Programme beyond the limit period of 2014 until 2017. Now, the UNFPA Strategic Plan for the period 2018-2021 is under way, continuing the endeavours which began in 1994, among which there is the universal access to reproductive health for everyone or ensuring and promoting reproductive

of the agencies of the United Nations (UN) referring to sexual and reproductive health. The purpose assumed by UNFPA is to ensure the respect for and the protection of reproductive rights for all individuals, specifically by ensuring that all persons, especially women and teenagers, have access to quality reproductive and sexual health services.[4] Although the title of this agency does not include any express reference to reproductive rights or other related notions such as reproductive health, UNFPA has presented itself, on numerous occasions, as the *only UN agency concerned with health and reproductive rights*. The mission assumed by UNFPA is to "*deliver a world where every pregnancy is wanted, every child birth is safe and every young person's potential is fulfilled."* We think that this aspect can only reinforce the universality and the special importance of the definition assigned to the reproductive rights.

In the 1994 Programme of Action, reproductive rights and reproductive health occupy a whole chapter, more precisely the seventh chapter named "*Reproductive rights and reproductive health"*. Referring to this category of rights, paragraph 7.3 of the Programme of Action reveals the following definition: "*reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents*".

We also mention the Beijing Declaration and Platform of Action adopted on 27 October 1995, at the Fourth World Conference on Women[5], considered relevant legal instruments for reproductive rights.

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rights internationally. The UNFPA 2018-2021 Strategic Plan is available at *https://www.unfpa.org/strategic-plan*, last accessed on 20 September 2019.

[4] See for this *https://www.unfpa.org/frequently-asked-questions#rh*, last accessed on 20 September 2019.

[5] The United Nations (UN), *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995.

The Beijing Platform of Action addresses to Governments, in Chapter 4 named *Strategic Objectives and Actions*, section C dedicated to women and health, several references on reproductive health and reproductive rights.

In paragraph 92, the Platform of Action states that "*women's right to the enjoyment of the highest standard of health must be secured throughout the whole lifecycle in equality with men. (...) the limited power many women have over their sexual and reproductive lives and lack of influence in decision-making are social realities which have an adverse impact on their health. (...)*".

Reproductive health is defined and explained in the 94th paragraph of the Platform of Action, being considered a state of complete "*physical, mental and social*" well-being and "*not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.*" This capability of all persons, women or men, irrespective of gender or sexual orientation, implies the right of everyone to have access to assisted reproductive technology, provided that they are not prohibited nationally.[6]

It appears from the definition of *reproductive health* that governments need to act so as to ensure the access of all people to medical methods and services which are specific to the reproductive field by establishing appropriate mechanisms and by implementing reproductive technologies which might contribute to the well-being of all people with regard to their reproductive health and to the prevention and treatment of reproductive problems.

The definition of reproductive rights formulated for the first time at the UNFPA Cairo Conference in 1994 is also found in the Platform of Action (Beijing, 1995) in §95. In the exercise of reproductive rights, due consideration should be given not only people's need to have a child, but also the needs of the future child and the responsibility towards society.[7]

Besides the UNFPA activity concerned with the promotion and the international recognition of reproductive rights, we should also mention

[6] Platform of Action, Beijing, 27 October 1995, §94.
[7] *Idem,* §95.

the role of the Office of the United Nations High Commissioner for Human Rights (OHCHR)[8], the highest UN entity on human rights, and of the Danish Institute of Human Rights (DIHR)[9] in promoting reproductive rights. These three entities have united their forces and published, in 2014, a manual on reproductive rights and human rights addressed to competent national institutions, named *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions* (hereinafter the Reproductive Rights Handbook or the OHCHR Handbook of Reproductive Rights)[10], which is intended to serve as a guide for national human rights institutions in the integration of reproductive rights in their activity. Of course, every national institution is unique in its own way, and for this reason the Reproductive Rights Handbook aims to provide an introduction to the scope of reproductive rights, the significance of these rights and their practical relevance, and to emphasise the regulation history of these rights.

According to the Reproductive Rights Handbook, reproductive rights should be promoted at national level through a human rights-based approach. This approach assumes the respect for several principles developed by the United Nations as follows: the universality, inalienability and indivisibility of human rights; interdependence and inter-connection; equality and non-discrimination; participation and inclusion; and responsibility and the rule of law.[11]

As viewed by the doctrine, "*reproductive rights are defined in terms of legal notions which are generally used to express the principle saying that a woman, and also a man, is entitled to have control of their reproductive lives.*"[12] What the author intended to express with this early

[8] For more information about the Office of the United Nations High Commissioner for Human Rights (OHCHR), see the Office official web page *https://www.ohchr.org /EN/pages/home.aspx*, last accessed on 28 September 2019.

[9] See more about the Danish Institute for Human Rights at *https://www.humanrights.dk/*, last accessed on 28 September 2019.

[10] The Office of the United Nations High Commissioner for Human Rights (OHCHR), *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions Published jointly with UNFPA and the Danish Institute for Human Rights*, 2014, HR/PUB/14/6, available at *https://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf*, last accessed on 7 October 2019.

[11] *Idem*, p. 75-83.

[12] Lynn Freedman, Stephen Isaacs, *Human Rights and Reproductive Choice*, 24 Stud. Fam. Plan. 19, 1993, quoted in Fitnat Naa-Adjeley Adjetey, *Reclaiming the*

definition of reproductive rights was the women's and men's right to make choices related to sexuality and with regard to methods of procreation or of preventing pregnancy, in other words, reproductive rights correspond to the right of every person to make reproductive decisions autonomously.

We consider that reproductive rights need legislative support adopted at national level, which ensures for all individuals the guarantee and the protection of this category of rights, especially taking into consideration the personal and intimate nature specific to this category.

Reproductive rights are not a new set of rights; they are rather a plurality of rights and freedoms already recognised in the national law or in international legal instruments. Reproductive rights refer to the diversity of civil, political, economic, social and cultural rights from the perspective of the sexual and reproductive life and health of all individuals.

Moreover, in close connection with the reproductive rights, there are the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[13], whereby the signatory states recognise the protection and assistance which need to be accorded to the family, which is considered the "*natural and fundamental group unit of society*"[14] and the special protection which should be granted to women during the period before and after childbirth, including the salary related rights of mothers.[15] Additionally, there are the provisions of the International Covenant on Civil and Political Rights (ICCPR)[16], Article 23 paragraph (2), which recognise the right of men and women to marry and to found a family. We equally refer to the Convention on the Elimination of All Forms of Discrimination against Women[17], whereby the signatory states

African Woman`s Individuality: The struggle between women`s reproductive autonomy and African society and culture, American University Law Review, nr. 44, 1994, p. 1351.

[13] The UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, A/RES/2200.

[14] *Idem*, Article 10 paragraph (1).

[15] *Idem*, Article 10 paragraph (2).

[16] The UN General Assembly, *International Covenant on Civil and Political* Rights, 16 December 1966, A/RES/2200.

[17] The UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, The United Nations, Treaties Series, Vol. 1249, p. 13.

were assigned the obligation to ensure the access to health services, which includes family planning.[18] Moreover, women must be provided with appropriate services related to pregnancy, childbirth and the postnatal period, offering even free services if necessary, and appropriate food throughout pregnancy and lactation.[19]

2. The right to assisted reproduction within the context of reproductive rights

The legislative endeavours presented above served as a basis for today's recognition of reproductive rights as human rights. The question still to be answered is whether medically assisted reproduction is part of the category of reproductive rights and, implicitly, whether there is or not a right to medically assisted reproduction.

We remark the distinction between the right to reproduction and the right to medically assisted reproduction. The right to medically assisted reproduction is one of the rights to reproduction together with the right to natural reproduction, which does not require the use of any assisted reproductive technology.

Enunciating the first part of the definition of reproductive rights - "*the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so*" – we are asking the question whether these rights include the right to access reproductive medical services when natural reproduction is not possible and do single people who want to have a child or sex-same people having a relationship enjoy the prerogatives of this right?

From the explanations provided in the OHCHR Handbook of Reproductive Rights, we cannot say precisely whether medically assisted reproduction is part of the category of reproductive rights. However, we can see references to the current medical progress and the benefit brought by medical technologies in human reproduction. The merit of medical progress and new medical technologies which make it possible today to save mothers and children whose death was certain in previous years is

[18] *Idem,* Article 12 paragraph (1).
[19] *Idem,* Article 12 paragraph (2).

well recognised.[20] However, the document draws the attention to technological developments in the area of medically assisted reproduction, such as in vitro fertilisation, which have generated, throughout their history, a series of ethical and legal controversies.[21]

We consider that the category of reproductive rights should include, besides the right of access to abortion, contraception, birth specific medical procedures, both before and after childbirth, and to information specific to these medical aspects, also *the right to access reproductive medical services*. The latter category is actually an extension of the reproductive rights and it is some real scientific and technological help which should benefit both women and men. Assisted insemination or in vitro fertilisation are recognised worldwide as medical procedures intended to provide a positive response to infertility, and the right to assisted reproduction appears therefore as a way for individuals or couples to exercise their reproductive rights.

3. The application of Article 8 of the European Convention on Human Rights in cases referring to medically assisted reproduction

3.1. The European Convention on Human Rights (the Convention), in Article 8 referring to the right to respect for private and family life, provides as follows:

"*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

We can see that Article 8 of the Convention covers three rights, namely: the right to respect for private life, the right to respect for family life, and the right to respect for one's home and correspondence. This

[20] The Office of the United Nations High Commissioner for Human Rights (OHCHR), *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions Published jointly with UNFPA and the Danish Institute for Human Rights*, p. 115, paragraph 1.

[21] *Idem*, paragraph 2.

classification is taken into consideration by the Court based in Strasbourg in the application of Article 8 to actual cases brought before it. As regards the cases referring to medically assisted reproduction, they are about violations of the right to private life or to family life.

The right to respect for private and family life is by far the most relevant right in outlining a picture of the right to medically assisted reproduction because it refers directly to decisions in the private domain of every individual, among which there is the decision to ask for medical assistance for reproductive purposes, and it refers equally to the existence of family life. This aspect comes out from the case-law of the European Court of Human Rights (ECtHR), as we are about to see next.

3.2. The Court based in Strasbourg pronounced decisions in numerous cases concerning the reproductive rights and medically assisted reproduction, where the parties alleged violations of Article 8 of the European Convention on Human Rights. Here we mention the *Case of Evans v. The United Kingdom*[22], when the Court based in Strasbourg stated that the notion of "private life" includes, *inter alia*, the right to respect for the decision to become or not a parent.[23] In this case, the right to procreate was weighed against the right to not procreate. The Court tipped the balance in favour of the right to not procreate.

In other case, the *Case of Dickson v. The United Kingdom*[24], the Grand Chamber pronounced a decision in a matter referring to the access of some prisoners to assisted reproductive technology.[25] The Dicksons met in 1999 through a pen-pal network for prisoners, while they were both imprisoned. In 2001, they got married; at that time, the wife had been released from prison, but Mr. Dickson still had to serve his term, at

[22] *Case Evans v. The United Kingdom* [MC], 6339/05, 10 April 2007.

[23] *Ibid.* §71.

[24] *Dickson c. the UK* [MC], no. 44362/04, CEDO 2007-V.

[25] With regard to the right to reproduction of convicted persons who are executing a custodial sentence, see Sarah L. Dunn, *The Art of Procreation: Why Assisted Reproduction Technology Allows for the Preservation of Female Prisoners' Right to Procreate*, Fordham Law Review, Vol. 70, 2002, p. 2561-2602; Richard Jr. Guidice, *Procreation and the Prisoner: Does the Right to Procreate Survive Incarceration and Do Legitimate Penological Interests Justify Restrictions on the Exercise of the Right*, Fordham Urban Law Journal, Vol. 29, 2002, p. 2277-2342; Joseph J. Bozzuti, *Judicial Birth Control: The Ninth Circuit's Examination of the Fundamental Right to Procreate in Gerber v. Hickman*, St. John's Law Review, Vol. 77, 2003, p. 625-648.

least by 2009, when his release could have been possible. Taking into consideration the age of the Dicksons – he was born in 1972, and she in 1958 – and the date when Mr. Dickson could have been released from prison, the likelihood of the couple being able to conceive naturally was small (at the time of the earliest possible release of Mr. Dickson, in 2009, his wife would have been 51 year-old). Therefore, the spouses requested the permission to appeal to the procedure of artificial insemination. Their application was rejected by the Secretary of State. The reasons invoked focused on the absence of appropriate support which Mr. Dickson could have provided to his wife and their potential child and on the fact that Mr. Dickson would be absent for a long period of time from the life of his child. At the same time, the violent circumstances of the crime committed by Mr. Dickson were also taken into consideration.[26]

In their application to ECtHR, the Dicksons appealed to a violation of Article 8 of the European Convention on Human Rights regarding the right to respect for private and family life and of Article 12 referring to the right to marry.[27] The Court based in Strasbourg considers that Article 8 is applicable to this case and that the refusal to allow access to artificial insemination concerns one's private life and family life and that the notions of "private life" and "family life" "*incorporate the right to respect for their decision to become genetic parents.*"[28]

In determining whether there had been a fair balance between competing interests, the Court based in Strasbourg allowed for a wide margin of appreciation. The Court did not consider it necessary to decide whether it was more appropriate to analyse that case in terms of a negative obligation (the refusal by the State to allow the spouses' access to artificial insemination interfered with their right to have a child) or in terms of a positive obligation (failure by the State to grant a right which had not previously existed).[29] Referring to the interests of the two applicants, the Court acknowledged that artificial insemination was the spouses' only realistic chance to have a child, considering the age of the wife and the date when the husband could have been released.[30] The

[26] *Dickson v. the United Kingdom* [MC], no. 44362/04, EctHO 2007-V, §13.

[27] *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of that right."*

[28] *Dickson v. The United Kingdom* [MC], §66.

[29] *Idem*, §69-71.

[30] *Idem*, §72.

Court held that the obligation of the State was to ensure effective protection for the child and that the policy applied by the State in that case was aimed at the best interests of the child, but stated that the policy should not have gone so far as to prevent parents who wanted to conceive a child in circumstances like those of that case (imprisonment conditions), especially considering that the second applicant was at liberty and could have taken care of the child by herself, until such time as her husband was released.[31]

The Court set a wide margin of appreciation. However, it found that the policy failed to observe the applicants' right under Article 8. Although the Court expressed its approval for the evolution in some of the European countries with regard to the introduction of conjugal visits, it did not interpret however the provisions of the European Convention on Human Rights as a requirement for the Contracting States to facilitate such visits. Therefore, the Contracting States may enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention as regards the needs and the resources of the community and of individuals. Nevertheless, the Court considered that the policy, as structured, excluded any real balance between the interests of individuals and the public interests involved, and that it prevented the assessment of the proportionality of a restriction in any given case. In that particular case, the policy imposed an excessive burden[32] on the applicants requiring them to demonstrate, on one hand, that the deprivation of artificial insemination might prevent conception, and on the other hand, that the circumstances of their situation were "exceptional". The Court considered that the policy had set the threshold so high that any possibility to balance the existing interests was excluded, and so was also any examination of the proportionality by the Secretary of State or by the domestic courts of law. Moreover, the policy was not incorporated into the primary legislation, and therefore the competing interests had not been weighed by the Parliament. Nevertheless, the Government showed that the policy allowed granting permission in some concrete cases. Consequently, the Court found that the failures of the policy placed it outside any acceptable margin of appreciation, so that a

[31] *Idem*, §72-76.
[32] *Idem*, §82.

fair balance had not been struck between the competing public and private interests involved.[33]

The Dickson case is a clear proof of the vision of the Court based in Strasbourg on the extension of the protection under Article 8 of the European Convention on Human Rights also to aspects related to medically assisted reproduction. Equally, it illustrates the openness of the Court towards shaping a right to assisted reproduction under the protective sphere of Article 8 concerned with the right to respect for private and family life.

3.3. Furthermore, a series of cases referring to surrogacy were brought before the Court. The case of *Mennesson v. France*[34] brought up for discussion the issue referring to the recognition of children born through a surrogate mother. In fact, the French State refused to recognise the parent-child connection established legally in the United States as a result of using medically assisted reproduction through a surrogate mother between the child so born and the intended parents. The applicants claimed that their right to respect for private and family life granted by Article 8 of the European Convention on Human Rights had been breached because they could not have the recognition of their filiation with the children legally established abroad and that the best interests of the children were also affected. The Court concluded that there was no violation of Article 8 of the Convention concerning the applicants' right to respect for their family life, affirming that the applicants had not demonstrated that the impossibility to obtain legal recognition of the parent-child relation under the French law prevented them from enjoying the right to respect for their family life. However, the Court found that there was a violation of Article 8 concerning the children's right to respect for their private life, motivated by the fact that an essential aspect of an individual's identity is at stake when the parent – child legal relation is considered. The Court was concerned by the refusal of the French State to recognise the children's relation with their intended father, who was also their biological father. The legal recognition of the family relation is protected by Article 8 as part of an individual's identity; however, the established family life suffered no legal or

[33] *Idem,* §77-85.
[34] Case of *Mennesson v. France,* 65192/11, ECtHR 2014.

practical obstacles which prevented its protection as regards to the right to respect for family itself. What the Court found was that the children's identity in the French society had been affected.[35]

3.4. In another case involving surrogacy, the *Case of Paradiso and Campanelli v. Italy,*[36] the applicants appealed to ECtHR claiming a violation of Article 8 of the European Convention on Human Rights by the refusal of the Italian state to recognise the birth certificate of a child born in Russia by a surrogate mother, based on an agreement of surrogacy entered into by the couple and the surrogate mother. The refusal was followed by a removal of the child from the environment where he had grown up (with his intended parents) and given to be taken care of by another couple with a view to adoption. Initially, one of the chambers of the Court found that there was a breach of Article 8 of the Convention stating that the removal of the child from their family environment is an extreme measure which can be used only as a last option and only for the purpose of protecting a child who is in imminent danger. Notwithstanding this conclusion, the Court indicated that the child's interests always take precedence over any legal considerations referring to the child's conception and his birth and that returning the child to the intended family was not an obligation of the Italian state, taking into account the emotional ties the child had developed with his new adoptive family. The Italian State was not content with this decision, and at the request of the Government, the case was taken before the Grand Chamber. The Grand Chamber concluded that there was no violation of the provisions of Article 8 of the Convention motivating that between the child and his intended parents (the applicants) the conditions specific to family life were not met.

[35] See the *Case of Labassee v. France*, no. 65941/11, ECtHR 26 June 2014; Ramona Predescu, *Reproducerea asistată medical cu mamă surogat în jurisprudența Curții Europene a Drepturilor Omului*, Volume of the International Conference of Law, European Studies and International Relations, 7th edition, Bucharest, 2019; Bernadette Rainey, Elizabeth Wicks, Clare Ovey, *Jacobs, White, and Ovey; The European Convention on Human Rights*, 7th edition, Oxford University Press, 2017, p. 375.

[36] *Paradiso and Campanelli v. Italy* [MC], no. 25358/12, ECtHR, 24 January 2017.

3.5. In the *Case of S.H. and others v. Austria*[37], the applicants brought before the Court the very restrictive at that time Austrian legislation on medically assisted reproduction. According to the Austrian law, *Artificial Procreation Act*[38], artificial insemination and in vitro fertilisation are allowed only for married people or people in a relationship which is similar to marriage and only if ova and spermatozoids from the husband or partner are used. In exceptional situations, in case of a husband's or partner's infertility, it is possible to appeal to a third sperm donor for procreation, but only in case of artificial insemination, and not for IVF. Consequently, ovum donation is prohibited in all cases, and sperm donation is allowed only for the procedure of artificial insemination.[39] In the case under discussion, the applicants are two heterosexual married couples. In the case of the first couple, the wife suffers of infertility connected to the uterine tubes, which means that her organism produces ova, but because a blockage in the uterine tubes, the ovum cannot advance to the uterus. Therefore, natural reproduction is not possible and only an embryonic transfer could be a solution in her case. Her husband is diagnosed as being infertile. In the case of the second couple, the wife cannot produce ova, and consequently she is completely infertile, but her uterus is not affected and so she can take a pregnancy to term. Her husband is fertile.

Initially, the applicants approached the Constitutional Court of Austria showing that their only possibility, in the case of the first couple, was to resort to in vitro fertilisation using sperm from a third donor (a procedure which is not regulated in Austria), and for the second couple, in vitro fertilisation using donated ova and the husband's sperm was the only option, followed by a transfer of the embryo so created (a procedure

[37] *S.H. and others vc. Austria* [MC], no. 57813/00, EctHR, 2011.

[38] Artificial Procreation Act (*Fortpflanzungsmedizingesetz)*, Federal Law Gazette no. 275/1992. At this time, the Austrian law has been amended twice, last time in 2015, were a series of significant amendments were introduced with regard to access to medically assisted reproduction. Therefore, the access of lesbian couples to assisted insemination and in vitro fertilization with donated sperm was allowed and the access of married people or people in a similar relation to procreation was also allowed through the use of donated sperm within IVF and the possibility to use donated ova. At the same time, the possibility of access to genetic pre-implantation diagnosis was also granted. See more about this on *https://www.kinderwunschzentrum.at/en/patient-info/reproductive-medicine-act/*, last accessed on 12 October 2019.

[39] *S.H. and others v. Austria* [MC], §27-34.

which is also not regulated in Austria).[40] The Constitutional Court considered that the legal rules of the medically assisted reproduction legislation were constitutional and they did not violate the provisions of the European Convention on Human Rights.

The particulars of this case created for the Court the possibility to complete the picture of the "private and family life concept", including in this concept "*the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose"*, thus giving to this right the well-deserved protection specific to Article 8 of the Convention.[41]

Although the main purpose of Article 8 is to ensure protection against arbitrary interferences by public authorities, it does not impose any obligation on the States to refrain from such interference. The Austrian legislation in matters of medically assisted reproduction, in the Court's opinion, may be seen both as a "*a positive obligation on the State to permit certain forms of artificial procreation using either sperm or ova from a third party"* and as an "*interference by the State with the applicants' rights to respect for their family life*" as a result of prohibiting some assisted reproduction techniques which have been developed by medical science, but which the applicants cannot use because of legislative interdictions.[42] In this case, the Court decided to approach the case as involving negative obligations incumbent on the State.[43] The Grand Chamber allowed for Austria a wide margin of appreciation based on the fact that there was no consensus among the Contracting States, thus noting the dynamism of the legal field and the legislative trend towards permitting the donation of gametes for the purpose of in vitro fertilisation and stating that: "s*ince the use of in vitro fertilisation treatment gave rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the present case touch on areas where there is not yet clear common ground among the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one.*"[44]

[40] *Idem*, §11-15.
[41] *Idem*, §82.
[42] *S.H. and others v. Austria* [MC], §88.
[43] *Ibidem.*
[44] *Idem*, §97.

In such a sensitive area as medically assisted reproduction, the "concerns" based on moral or social considerations must be taken seriously. However, they are not a sufficiently serious reason for a complete ban on some specific assisted reproduction techniques as ovum donations.[45]

The Court dismissed the applications of the two couples, concluding that neither as regards the prohibition on ovum donation for the purpose of medically assisted reproduction, nor with regard to the prohibition on sperm donation for in vitro fertilisation, present in the Austrian law, the permitted appreciation margin was trespassed. Nevertheless, the Court did specify that despite the solution in this case, the legislative field of medically assisted reproduction appears to be continuously evolving and, therefore, it is the duty of the Austrian State to make sure it keeps up with the dynamic scientific and legislative developments in this area.

It is our view that this message should be considered by all Member States, especially as it conveys the idea that such restrictive laws will no longer be compatible with the provisions of Article 8 in the future. Austria did take into consideration these mentions, and, in 2015, amended for the second time the Artificial Procreation Law, making it possible for the couples to use donated sperm and ova for in vitro fertilisation, and established legislative rules on the possibility of lesbian couples to use donated sperm both for artificial insemination and for in vitro fertilisation. In our opinion, the Austrian legislative course of action in the field of medically assisted reproduction is a positive one, is the progressive example for other European countries of a country that understood the dynamism of medical reproductive technologies and the need to ensure access to such medical techniques for its citizens.

4. Conclusions

The analysis of the definition and content of reproductive rights highlights that the reproductive rights embrace some human rights which have been already recognised in international legal instruments, such as the right to private and family life, the right to marry and the right to found a family; the right to life; the right to physical integrity; the right to information; the right to health; and the right to benefit from scientific progress. In this category of rights which are specific to reproductive

[45] *Idem,* §100.

aspects of life, the right to private and family life or to the letter of Article 8 of the European Convention on Human Rights – "*the right to respect for private and family life*" – is the most important right specific to the field of medically assisted reproduction.

This assertion is reflected in the case-law of the European Court of Human Rights specifically concerned with medically assisted reproduction, which shows that the Court based in Strasbourg delivered, with regard to the provisions of Article 8, "*a dynamic and evolutional interpretation*" of these provisions, being in a constant adaptation to the "*evolution of morals and social needs.*"[46] A concrete example is the adaptation of the Court to the evolution of assisted reproduction technology and the increasing need for domestic legislation on these medical procedures, which, unfortunately, are not characterised by a regulatory consensus among the Signatory States of the European Convention on Human Rights. Moreover, as the Court asserted as early as in 1978 in the *case of Tyrer v. The United Kingdom*[47] referring to the European Convention on Human Rights, this is a "*living instrument which must be interpreted in the light of present-day conditions.*"[48] Therefore, taking into account the fast advance of medical reproductive technologies, we are not surprised to see cases brought before the Court based in Strasbourg where the Court is called upon to decide on the existence or not of a right to assisted reproduction as a component of the respect due to private and family life granted by Article 8 of the Convention.

An aspect derived from the analysis of the *Case of Dickson v. The United Kingdom* and the *Case of S.H. and others v. Austria* refers to the fact that the Court based in Strasbourg made no distinction between the *concept of private life* and the *concept of family life*, which suggests that the aspects referring to medically assisted reproduction are related both to the private life and the family life, but we note that these aspects tend to be more closely related to the private part of life.[49]

[46] C. Bîrsan, *Convenția europeană a drepturilor omului*, 2nd edition, C.H. Beck, Bucharest, 2010, p. 597.

[47] *Tyrer v. The United Kingdom*, 25 April 1978, §31, Series A no. 26.

[48] C. Bîrsan, *the cited work*, p. 597.

[49] Also see on this, Andrea Mulligan, *Reproductive rights under article 8: the right to respect for the decision to become or not to become a parent*, European Human Rights Law Review, no. 4, 2014, p. 382.

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INCURSION ON THE CONCEPT OF MALPRAXIS

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ABSTRACT
The concept of malpraxis *initially appeared in the medical field, has spread rapidly in all those occupations that involve skills and qualified behaviours, guaranteed by specific rules of professional conduct. With the universal meaning of professional error, the term* malpraxis *is fitted on the specific of each profession, thus it can be used to designate that unlawful act which consists in injuring another person by violating the rules of professional conduct.*

KEYWORDS: *malpraxis; medical malpractice; malpractice insurance; professions; professional liability; wrongful act.*

1. Origin and occurrences of the term *malpraxis*

In current language, an enigmatic word has been used lately, eloquent by its meaning which resonates harmoniously with the collective consciousness, the ***malpraxis***, universally understood as representing the wrong practice that generates civil liability, especially with reference to the medical act. From the medical vocabulary, the term of ***malpraxis*** has spread effervescently in the legal language and also in the journalistic one, replacing lately the synonymous phrases used in the spoken language such as: "*negligence in service*", "*incompetence*", "*incompetent/inappropriate practice*", "*omissio*n", "*professional error/error*", "*professional negligence/fault*", "*wrong treatment", "error/fault/medical*" (med) etc.

Moreover, this word was easily integrated into Romanian language, being widely used in the current language even before it was introduced in the relevant dictionaries of the Romanian vocabulary[1] and this

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[1] Malpraxis appears for the first time in the 2005 Doom 2 Dictionary, as a neutral noun, with the emphasis on the second a, later in the Explanatory Dictionary of the Romanian language, the edition published in 2009, as a medical term, borrowed from the French malpraxis and representing *"incorrect or negligent treatment applied by a*

phenomenon appears to be natural as ***malpraxis*** expresses more succinctly and more relevantly, but in at the same time more scientist and academic the idea of error in professional practice, and being shorter than the synonymous expressions mentioned above, it is categorically imposed to their detriment.

The term ***malpraxis*** appears in the current speech in several contemporary languages (in English more the variant *malpractice*, in Spanish the most frequent variant is *mala praxis*), but it is a linguistic anomaly because its origin is not explained according with the linguistic rules[2].

Etymologically, the word ***malpraxis*** is made up of the long-internationalized element of composition - *mal* (<lat. *malus* - "bad", adj/lat. *male* - "bad", adv.) and the Greek *praxis* - "practice" (<*prassein* - "to do, to make"). The Greek *praxis* was later taken over by the Latin language, in which it became *practicus*, and from Latin it entered Italian (*pratica*), English (*practice*), Spanish (practica), in French (*pratique*), from where it took over and Romanian word (practică)[3]. However, in French there is not used nor malpraxis, neither malepratique, but the phrase "faute professionnelle". On the other hand, *praxis* exists as an internationalized word in its own right (old loan from Greek), but it is a lively word, being rarely used in most languages, especially in philosophy (as opposed to *poiesis*, refering to actions of humans that can be evaluated if they are good or bad), in religion (meaning religious practice) or synthetically called "putting theoretical knowledge into practice"[4].

Even if it is a hybrid word, taken on an uncertain chain, the term ***malpraxis*** has been experiencing a rapid spread lately. The explanation of the propagation of this term could be the natural tendency towards the

doctor to a patient, which causes him any harm of any kind, in relation to the degree of impairment of the physical and mental capacity".

[2] http://englishromanian.ro/blog/2012/01/12/mal-de-%C2%85-praxis-malpraxis-malpractica/#more, site accessed November 5, 2019.

[3] *Idem*

[4] The *Praxis*® tests measure the academic skills and subject – specific content knowledge needed for teaching. The *Praxis* tests are taken by individuals entering the teaching profession as part of the certification process required by many states and professional licensing organizations(www.ets.org).

adoption of a unique universal language[5], in the context of the evolution of the legal responsibility, especially of the professional one, influenced by the ideology of the citizen in the current society, who seeks in the risks and injustices of life a source of income, animated by a belief of compensation.

In the English language, *malpraxis* or malpractice represents "*a dereliction from professional duty whether intentional, criminal, or merely negligent by one rendering professional services that results in injury, loss, or damage to the recipient of those services or to those entitled to rely upon them or that affects the public interest adversely the provision of professional services that results in injury*" or "*the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services or to those entitled to rely upon them*"[6].

The term malpractice is also defined as "*negligence, incompetent practice, lack of preparation or breach of professional duties, which causes the patient or client any harm of any kind. The applicant must demonstrate the failure of the specialist in his activity, according to the accepted standards in the respective professional field*"[7].

We can find in the English vocabulary a wide range of areas where the term malpractice is used, such as in medicine for medical error (*medical malpractice*), in education for unethical practices in examination (*examination malpractice*) or for plagiarism (*academic malpractice*[8]), in

[5] We refer to terms taken on the English or French chain, which are simpler and more eloquent in meaning and which have a high degree of understanding and a more pleasant resonance; for example: *ok*, taken from the English language or *merci*, from French language, with the version taken in Romanian language *mersi*.

[6] *Webster's dictionary, on line edition* Webster's Third New International Dictionary, Unabridged, s.v. "malpraxis," accessed November 05, 2019, http://unabridged.merriam-webster.com.

[7] *Britannia Universal Enciclopedia*, Litera Publishing House, 2010, vol. 9, p. 352.

[8] Academic malpractice is any activity – intentional or otherwise - that is likely to undermine the integrity essential to scholarship and research. It includes plagiarism, collusion, fabrication or falsification of results, contract cheating and anything else that could result in unearned or undeserved credit for those committing it. Academic malpractice can result from a deliberate act of cheating or may be committed unintentionally.

the legal field (*legal malpractice*), in insurance (*malpractice insurance*), in the electoral aspects (*electoral malpractices*) or even in the church affairs (*clergy malpractice*) and so on. [9]

Entered into the Romanian language - most likely - on the English track, the neologism ***malpraxis*** was comfortably established in the expressions that concern professional mistakes, especially those in the medical field, but not only.

In the Romanian vocabulary, ***malpraxis*** is seen as a scientific term, medical, being defined in DEX[10], 2009 edition, as representing an *"incorrect or negligent treatment applied by a doctor to a patient, who causes him any kind of harm, in relation to the degree of impairment of the physical and mental capacity"*, but in the Romanian legislation we find other meanings as follows.

2. The concept of *malpraxis* in the current Romanian legislation

The term of ***malpraxis*** has also gradually taken place in the Romanian legislation, mainly in the medical legislation[11]. First of all, we mention *Law no. 95/2006 regarding the reform in the field of health*[12], with the subsequent modifications, where the term of ***malpraxis*** is defined as "*the professional error committed in the exercise of the medical or medical-pharmaceutical act, generating damages on the patient, implying the civil liability of the medical personnel and the healthcare provider. medical, health and pharmaceutical products and services"* (art. 653 para. 1 letter b). "*The professional error also includes negligence, recklessness or insufficient medical knowledge in the*

[9] *https://legal-dictionary.thefreedictionary.com/malpractices*

[10] DEX - *Explanatory Dictionary of the Romanian language*, 2009 edition.

[11] Among other normative acts in the medical field where we find the term *malpraxis*, we mention as an example: *The Regulation of 2006 on the organization and functioning of the monitoring and professional competence committee for cases of malpraxis*, published in the Official Journal of Romania, Part. I, no. 970 of December 5, 2006, *Methodological norms of 2007 on health reform*, published in the Official Journal of Romania, Part. I, no. 237 of April 5, 2007, *Law 256/2015 on the exercise of the profession of dietitian, as well as the establishment, organization and functioning of the College of Dietitians in Romania*, published in the Official Journal of Romania, Part. I, no. 825 of November 5, 2015.

[12] Published in The Official Journal of Romania, Part. I, no. 652 of August 28, 2015.

exercise of the profession, by means of individual acts in the prevention, diagnosis or treatment procedures" (art. 653 (2).

Malpraxis is incident in a large category of medical professions or related to the medical act: doctors, dentists, dental technicians, pharmacists, dieticians, physiotherapists, dental technicians, etc. Practically, medical actions or those related to them present a risk of ***malpraxis***.

In the medical legislation, the legislator has not only used the word ***malpraxis*** to designate the action or inaction that constitutes the wrong medical act, but he also joined the "*medical"* term, in many provisions being found the phrase "*medical malpraxis*" or "*medical malpraxis act*"[13], thus considering in its wisdom, the possibility of existence and other forms of ***malpraxis***, either borrowed on the English-speaking branch or created indigenous.

Law 95/2006 also regulates malpractice insurance for cases of professional civil liability for damages caused by the medical act[14].

Subsequently, and for other professions for which professional liability insurance was regulated, the term *malpraxis insurance* replaced the earlier name, which was more extensive and less sound. In this way, the term of *malpractice*, used *stricto sensu* to designate the medical error was extended to other professional categories to designate the specific mistake(s) of that profession.

Thus, in the legal field, we distinguish the provisions of the *Statute of 2010 of the National Union of Judicial Officers*[15], which provide that one of the obligations of the judicial officer is to insure for malpractice (art. 54 paragraph 1 letter n), in our opinion the *malpraxis* designating, *lato sensu*, the incidental errors in the profession of judicial executor that generates professional civil liability.

At the same time, we find the same meaning in *Law 102/2014 on cemeteries, human crematoriums and funeral services*[16] according to which the funeral service provider is obliged to set up a guarantee fund for the payment of the damages due in case of non-fulfilment or of the defective performance of the funeral services, a fund that can be made

[13] Art. 668, art. 686, art. 689 etc. of Law no. 95/2006.

[14] Art. 667-678 of Law no. 95/2006

[15] Published in The Official Journal of Romania, Part. I, no. 713 of October 26, 2010.

[16] Published in The Official Journal of Romania, Part. I, no. 520 of July 11, 2014.

up, *inter alia*, of the specific malpractice insurance, concluded at the value of the guarantee fund (art. 27 paragraph 1 letter b). Thus, the term ***malpraxis*** is extended to other occupations less known to the general public[17].

Moreover, *Law 192/2006 on the mediation and organization of the profession of mediator*[18] mentions that the disputes that can be the subject of mediation are those in the area of professional liability in which professional liability can be employed, respectively the causes of ***malpraxis***, if another procedure isn't provided (art. 60^1 letter d). We note that the legislator refers to the causes of ***malpraxis***, as those causes that engage in professional liability in general, without particularizing them to a certain professional category. We could think of *legal/juridical malpraxis*, from engl. *legal malpractice* for errors in the legal professions, to the *technical malpraxis*, arising from the diversification and amplification of the occurrence of risks in the context of technological progress or the *malpraxis* of the liberal professions already recognized in the recent Romanian doctrine[19], or even the *financial-economic malpractice*, in the context of the financial losses encountered in this sector.

3. Acceptance of the term *malpraxis*

As we can deduct from the afore mentioned legal texts, we consider that ***malpraxis***, *lato sensu*, represents error, negligence, recklessness, incompetence of the practitioner, which attracts his professional responsibility.

Malpraxis implies an improperly practiced profession, so, *a priori*, it implies for its author a qualification/professional competence obtained through a specific training - because *unusquisque peritus esse debet artis*

[17] Funeral service providers may be autopsies and tanneries regulated by H.G. no. 741 of October 12, 2016 for the approval of the Technical and sanitary norms regarding the funeral services, burial, incineration, transport, burial and re-burial of human bodies, cemeteries, human crematoriums, as well as the professional criteria to be fulfilled by the funeral service providers and the fund level. guarantee, published in The Official Journal of Romania, Part. I, no. 843 of October 24, 2016.

[18] Published in The Official Journal of Romania, Part. I, no. 441 of May 22, 2006.

[19] See Năsui, Gabriel-Adrian, *Medical malpraxis. Particularities of medical civil liability. Relevant internal case law. Malpractice of Liberal Professions*, ed. II, reviewed and added, Universul Juridic Publishing House, Bucharest, 2016.

suae[20] - and recognized *erga omnes* according to the law, by its certification by the professional bodies in the field of that profession[21]. But not every profession can attract ***malpraxis***, but only those that can generate major risks with harmful effect for the others, respectively by causing human's integrity or people's patrimony damages; we consider both the malpractice in the medical field and that of other professions whose exercise presents a major risk of generating damages/injuries.

We could find forms of malpraxis in the category of liberal or independent professions, respectively in those occupations exercised on their own behalf by natural persons, according to the special normative acts that regulate the organization and exercise of the respective professions, such as those of doctor, lawyer, including other juridical professions, engineer, dentist, architect, auditor and other similar professions.

At the same time, ***malpraxis*** implies the existence of some benchmarks from which it can be seen that the professional practice has not been performed properly. These benchmarks may be certain codes of conduct, guides, standards, usages, professional ethics or the simple obligation of prudence and diligence required in a particular situation[22].

Last but not least, there is ***malpraxis*** in relation to a person who suffers a certain injury as a result of the professional practice of which he was inappropriately involved. Therefore, we will have a pre-existing legal relationship between the active subject of the ***malpraxis*** - the professional (the practitioner of that profession) and a passive subject -

[20] Latin adage meaning that everyone should be competent in his profession; see Murzea Cristinel, Șchiopu S.-D., Bianov Ana Maria, *Chrestomacy of latin legal texts*, Romprint Publishing House, 2006, p. 325.

[21] Law no. 200/2004 on the recognition of professional diplomas and qualifications for the regulated professions in Romania, which provides the List of regulated professions in Romania (Annex 2), divided into the category of those requiring at least 3 years of higher education (69 professions) and of those for which the duration of studies is less than 3 years of higher studies. In accordance with the law, the regulated profession represents the activity or the set of professional activities regulated according to the Romanian law, which compose the respective profession in Romania (art. 3 paragraph 1).

22 For example, the rule of "business judgment" enshrined in art. 144^1 a. 2 of Law no. 31/1990 regarding companies, according to which the administrator does not violate the obligation of prudence and diligence if at the time of making a business decision he is reasonably justified to consider that he acts in the interest of the company and based on appropriate information.

the client, the patient, the beneficiary injured by the act of ***malpraxis***. Therefore, certain violations of the rules of conduct enacted in the profession may not represent malpraxis, as we do not have an injured person, such as those purely disciplinary misconduct committed in the professional body: failure to attend professional meetings, failure to present certain situations, non-payment mandatory fees etc.

In the doctrine, it is appreciated that ***malpraxis*** is a distinct form of civil liability, which involves specific features and which results from the violation by certain categories of persons, generically named, professionals, the rules of conduct established by the law or the professional body from which they do part, causing harm to another person, on whom the obligation to repair it is born[23]. Another author[24] considers that the ***malpraxis*** prefigures the hypothesis of a special responsibility of the third type, which groups autonomous rules of professional responsibility, justified on considerations related to professional ethics.

With all these "merits" reputed in the doctrine, we appreciate that the acceptances of the concept of ***malpraxis*** are still pending. For now, due to its etymology and its used and accepted meanings, we consider that ***malpraxis*** subscribes to the condition of the unlawful act, an essential element of the civil liability, with the particularity that the action or inaction through which a subjective right of another person is harmed takes place by violating the rules of conduct enacted for the exercise of the respective profession.

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CONVENTIONAL REPRESENTATION OF THE LEGAL PERSON

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ABSTRACT
The author presents aspects regarding the conventional representation of the legal person before the courts, regulated by art. 84 paragraph (1) The Romanian Code for Civil Procedure (NCPC), according to which the legal persons can be represented conventionally before the courts only through a legal adviser or lawyer, according to the law. Analysing the provisions of the Constitution, regarding the free access to justice and the author finds treatment differences applied between natural and legal persons, although guaranteeing the free access to justice and of the right to defence must be granted without discrimination, equally to both natural and legal persons. In this context, an analysis is made on the possibility of the conventional representation of the legal person before the courts, by other agents, appointed by the management bodies, besides those provided by the legislation in force (legal adviser or lawyer).

KEYWORDS: *conventional representation; unconstitutional article; discrimination between legal persons and natural persons; the right to defence; free access to justice.*

Introductory aspects

The legal subjects, either natural or legal persons, usually personally conclude legal acts and thus must be present at the drawing up, signing or execution of them, but in daily life there are cases when the subject of the legal report cannot be present at the completion of these actions and therefore it is necessary to replace him with another person, thus resorting to the institution of representation.

Representation is a process of legal technique by which a person, named representative, concludes legal acts with third parties in the name and on behalf of another person (natural or legal), called represented, having as a consequence the direct production in the person represented of the effect of legal acts.

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Representation is an apparent exception from the principle of the relativity of the effects of the legal act, thus, compared to the representative the legal act produces effects exactly as if it had been directly concluded by him.

For a long time in the classical legal literature, authors such as Lurent or Pothier, expressed the idea that representation is 'a function' by which the representative 'dresses the clothes' of the represented one, replacing it, with the desire to represent him, thus considering the act completed by the representative was perfected by the representative[1].

Representation can be of several types, namely: legal, conventional or judicial[2]. In the case of conventional representation, one person (the person represented) empowers another person (the representative) to conclude legal acts on his behalf and on his account. The power of representation is demonstrated by a unilateral legal act, called a proxy, or bilateral, called a mandate contract. From the provisions of the law, it follows that, if the legal act is concluded on behalf of another person, the party with whom the representative has contracted cannot be opposed to a lack of powers if the represented party created such circumstances by virtue of which this party assumed in good-faith the existence of such mandate.

In the case of conventional representation, both the representative and the represented party must have the capacity to conclude the act for which the representation was given[3],, more than that, in the case of conventional representation of the legal person before the courts, it is necessary for both parties to have the capacity of use as well as full exercise capacity in the case of the representative.

The legal person is represented by the administrators with the right of representation or, in the absence of appointment, by any of the associates, if the right of representation for some of them has not been stipulated by contract[4]. In this respect, the legal person exercises his rights and fulfils his obligations through his administrative bodies, from the date of their constitution[5]. In the absence of the administrative bodies, until the date of

[1] C. Murzea, E. Poenaru, *Reprezentarea in dreptul privat*, Editura C.H. Beck, Bucuresti, 2007, p. 4.

[2] Art. 80 alin. (1) NCPC.

[3] Art. 1298 NCC.

[4] Art. 1919 NCC.

[5] Art. 209 alin. (1).

their establishment, the exercise of the rights and the fulfilment of the obligations regarding the legal person are done by the founders or by the natural or legal persons designated for this purpose[6].

Analysing art. 83 paragraph (1) The NCPC, which stipulates in the case of the conventional representation of the natural persons, the fact that they may be represented before the first court, in appeal, as well as in the second appeal, by the lawyer or another representative and art. 84 para. (1) The NCPC, in which the conventional representation of legal persons, regardless of the procedural stage, can be made only through a legal adviser or lawyer, there is a difference between the rights granted to the natural persons with respect to the rights granted to the legal persons, respectively an unequal treatment between the legal persons and natural persons.

Regarding the application of the fundamental rights and freedoms to the legal persons, the Constitutional Court of Romania has held, in its jurisprudence that these also apply to the legal persons, insofar as through them, the citizens exercise their constitutional right[7]. Also, by several decisions[8], the Constitutional Court has ruled that the requirements of fundamental rights or freedoms, for example free access to justice, individual freedom, private property right or economic freedom, apply both to natural persons and to legal persons. Accordingly, the requirements and guarantees resulting from the fundamental rights and freedoms regulated by the Constitution are applicable also to legal persons, to the extent that their normative content is compatible with its nature, specificity and particularities that characterize the legal regime of the legal person.

At the same time, the Constitutional Court by Decision no. 485/2015 regarding the admission of the exception of unconstitutionality of the provisions of art. 13 paragraph (2) second thesis, art. 84 paragraph (2)

[6] Art. 210 alin. (1).

[7] Decizia nr. 35 din 2 aprilie 1996, publicata in Monitorul Oficial al Romaniei, Partea I, nr. 75 din 11 aprilie 1996.

[8] Decizia nr. 40 din 29 ianuarie 2004, publicata in Monitorul Oficial al Romaniei, Partea I, nr. 229 din 16 martie 2004, Decizia nr. 1.360 din 27 octombrie 2009, publicata in Monitorul Oficial al Romaniei, Partea I, nr. 874 din 15 decembrie 2000, Decizia nr. 5 din 4 februarie 1999, publicata in Monitorul Oficial al Romaniei, Partea I, nr. 95 din 5 martie 1999, sau Decizia nr. 498 din 10 mai 2012, publicata in Monitorul Oficial al Romaniei, Partea I, nr. 428 din 28 iunie 2012.

and art. 486 para. (3) of the Code of Civil Procedure, shows that in this case, the requirements resulted from both art. 21 regarding the free access to justice, as well as from art. 24 regarding the right to defence, as a guarantee of the fair trial, provided by art. 21 paragraph (3) of the Constitution, are applicable also with regard to legal persons.

Moreover, art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrines the protection of the right to a fair trial, as regulated by the Convention and interpreted in the jurisprudence of the European Court of Human Rights, also applies to legal persons. In addition, the jurisprudence of the European Court of Human Rights is constant in applying the guarantees of the right to a fair trial both to the individual and to the collective subjects of law.

The Constitution of Romania according to which the citizens are equal before the law and the public authorities, without privileges and without discrimination[9], any person can address justice for the defence of his legitimate rights, freedoms and interests, no law can impede the exercise of this right, the parties have the right to a fair trial and to resolution of the cases within a reasonable time frame, the special administrative jurisdictions are optional and free[10], the right to defence is guaranteed and throughout the trial, the parties have the right to be assisted by a lawyer, chosen or appointed by the court[11]. It does not differentiate between natural and legal persons, but instead uses words such as 'citizens', 'any person', 'parties', which include in their sense both natural and legal persons. Moreover, if there had been differences between the rights of individuals and legal entities, they would certainly have been highlighted, especially within the framework of the Fundamental Law.

Given the fact that in the trial, the parties (both natural and legal persons) can personally exercise procedural rights or through a representative[12], being able to stand trial through an elected representative[13], not in any way restricting the quality of the representative, the representation by the lawyer not being mandatory[14], not even when the right of representation arises from the law or from a court decision, can we

[9] Art. 16 alin. (1) Romanian Constitution.
[10] Art. 21 Romanian Constitution.
[11] Art 24 Romanian Constitution.
[12] Art. 80 alin. (1), NCPC.
[13] Art. 80 alin. (3), NCPC.
[14] Art. 80 alin. (5), NCPC.

consider the fact that both the natural person and the legal person can send a lawyer/legal adviser or other representative?

In order to be able to answer this question, we must bear in mind that the right to a chosen defence, regulated as a guarantee of the right to defence, it cannot be transformed into an obligation or a condition of admissibility of exercising the right to defence.

Although the procedural means by which justice is carried out, is the exclusive competence of the legislator - instituting the rules for conducting the trial before the courts[15], he is bound to do so by orienting himself on the principle *est modus in rebus*, respectively to be concerned that the requirements established to be sufficiently reasonable not to question the very existence of the right[16]. In these conditions, any limitation of free access to justice, however insignificant it may be, must be thoroughly justified, analysing to what extent the disadvantages created by it do not somehow outweigh the possible advantages[17].

Thus, the obligation to represent the legal person before the courts only through a legal adviser or lawyer to exercise the rights and fulfill the obligations before the courts, is equivalent on the one hand, with the transformation of the content of this fundamental right into an admissibility condition, and on the other hand, with the conversion of this right into an obligation, which affects the substance of the right to defence as configured in the Constitution, the right to have a conventional representative is thus transformed into an obligation.

Moreover, we must consider aspects such as the fact that in the case of legal entities, remedies cannot be identified, such as those established by the legislator in the case of natural persons, by which they are granted a series of material advantages in order to have free access to justice in civil, commercial, administrative, labour and social insurance cases, as well as in other cases, with the exception of criminal cases, consisting of: a) payment of the fee for ensuring representation, legal assistance and, as the case may be, defence, through a lawyer appointed or elected, for the

[15] Art. 126 alin. (2) din Constitutie si Decizia nr. 1 din 8 februarie 1994, publicata in Monitorul Oficial al Romaniei, Partea I, nr. 69 din 16 martie 1994

[16] Decizia nr. 39 din 29 ianuarie 2004, publicata in Monitorul Oficial al Romaniei, Partea I, nr. 217 din 12 martie 2004, si Decizia nr. 40 din 29 ianuarie 2004, publicata in Monitorul Oficial al Romaniei, Partea I, nr. 229 din 16 martie 2004

[17] Decizia nr. 266 din 7 mai 2014, publicata in Monitorul Oficial al Romaniei, Partea I, nr. 464 din 25 iunie 2014

realization or protection of a legitimate right or interest in justice or for the prevention of a litigation, hereinafter referred to as assistance through a lawyer; b) the payment of the expert, the translator or the interpreter used during the trial, with the approval of the court or the authority with jurisdictional attributions, if this payment is, according to the law, to the one requesting the judicial public assistance; c) payment of the court executor's fee; d) exemptions, reductions, lagging or postponements from the payment of the legal fees provided by the law, including those due in the forced execution phase[18].

Thus, in the case of legal persons, the compulsory expenses of hiring a lawyer or legal adviser constitute a disproportionate task that can affect the activity of these entities. This reasoning holds its validity even in the case of public authorities, even if it is considered that they are always solvable[19].

Although the right of access to justice is not absolute and does not imply the free character of justice, it still violates the principle of proportionality when establishing exorbitant stamp duty, which exceeds the financial possibilities of the person in question. Such situations were analysed in the jurisprudence of the European Court of Human Rights, which found that they could lead to violation of art. 6 of the Convention. As a parallel to the Government Emergency Ordinance no. 51/2008 regarding the public judicial aid in civil matters, which is addressed exclusively to natural persons, there is the Government Emergency Ordinance no. 80/2013 regarding stamp court fees, through which legal persons may benefit, under certain strict conditions, only from facilities in the form of reductions, lagging or postponements for the payment of stamp judicial fees, according to art. 42 paragraph (2) - (4).

The limitation of the rights of legal persons with regard to the conventional representation, by certain conditions of form and substance imposed by the legislator, cannot be accepted if it affects the fundamental right in its substance, but these are admissible only insofar as it has a legitimate purpose and there is a proportionality ratio between the means used by the legislator and the purpose pursued by him.

[18] Art. 6 din Ordonanta de urgenta a Guvernului nr. 51/2008 privind ajutorul public judiciar in materie civila.

[19] Art. 44 alin. (1) Romanian Constitution.

The purpose pursued by the legislator by establishing the obligation of legal persons to be represented conventionally only by legal counsel or lawyer, is represented by the imposition of a rigor and procedural discipline, ensuring an adequate legal representation of the parties and ensuring the proper functioning of the courts. However, in the present case, there are no sufficient guarantees regarding the exercise of the right to defence and no reasonable ratio of proportionality between the requirements of general interest regarding the good administration of justice, the protection of the right to defence and the free access to justice. Thus, by the conditionality imposed to the realization of the mentioned general interest, the interest of the person who wishes to resort to the competition of justice in order to achieve his legitimate rights and interests is irreparably affected.

The imposition, by law, of some requirements such as the conventional representation before the courts, exclusively through legal counsel or lawyer, which implies some expenses, for the holder to exploit the right or subjective, constitutes free access to justice. Although they have a solid justification consisting in limiting the length of time of the state of uncertainty in carrying out the legal relations and in restricting the possibilities of abusive exercise of the right, such limitations can sometimes be too harsh, leading to the discouragement of the persons in the cause, making him to lower his demands to his rights and pursues the legitimate interests that have been disregarded by the other legal subjects.

In practice, the legal person is obliged to hire a legal adviser or to hire a lawyer, for the purpose of conventional representation, as a condition of access before the courts, when the administrators with rights of representation do not have the knowledge necessary to submit a request for legal representation, Calling in court or carrying out any other procedures specific to the trial, has proved to be an often insurmountable impediment, the more difficult to qualify as reasonable as, according to the law, the right to justice is open to any person harmed in his rights and legitimate interests.

Therefore, the impossibility of filing a complaint with the competent court hinders direct access to justice. We must also bear in mind that many times, in addition to the occasional expenses for the contracting of legal services of consulting, assistance and representation, the legal persons must also bear the expenses occasioned by the payment of the stamp duty. Or, in the situation of legal persons of public or private law

who are in a precarious economic situation or who cannot make payments having blocked bank accounts and who have not hired a legal adviser, conditioning the exercise of rights and obligations before the courts, by hiring or appointment of a legal adviser or the compulsory conclusion of a legal aid contract imposes excessive conditions on the legal person, so that for this, a legal framework is created that can discourage the appeal to the justice service.

Therefore, any conditioning of the free access to justice would represent a disregard of these fundamental constitutional principles and of universal international standards, in any real democracy. On a procedural level, the free access to justice is embodied in the prerogatives implied by the right to action, as a legal ability that is recognized by the legal order of any natural or legal person. Starting from the premise that the fundamental rights must be guaranteed in a concrete and real manner, and not illusory and theoretical, the concrete impossibility to refer a court by the person concerned constitutes a violation of its right of access to justice. This right imposes obligations on the legislator and the executive, and the state is obliged to grant any person all reasonable facilities in law and in fact, to access the court.

All of this considered, the legal person's condition of being conventionally represented by a lawyer or legal adviser could be accepted in some situations strictly provided by the legislator, where for example the legal person has hired a legal adviser or sufficient funds to hire a lawyer, to ensure the right to defence, otherwise if the legal person demonstrates breach of any of these two conditions, it should equally benefit from the rights granted to natural persons, both in terms of the possibility of mandating any representative and in order to receive material advantages.

Conclusions

Between the natural and legal person, we can put the equal sign regarding the rights and freedoms protected by the state. Justice is equally for any person, either natural or legal, access to justice cannot be restricted by any law. The parties in a trial have the right to a fair trial, whether they are natural or legal persons, the right to defence being guaranteed, the parties during a trial, regardless of its status, having the right to an elected or appointed lawyer. Moreover, the employment of a defender is regulated as a right (art. 24 of the Constitution), but the

provisions criticized in the Civil Procedure Code have transformed this right into an obligation in the case of the conventional representation of the legal person, which leads to the encasement of the right to defence, limiting the possibility of the appointment by another legal person of another conventional agent, other than a legal adviser or lawyer and ultimately leading to the blocking of access to justice.

In sustaining the above mentioned statements, Law no. 514/2003 regarding the organization and exercise of the profession of legal adviser, which confirms that the right to defence is not limited to the contracting of the services of a lawyer, so we can say that the term lawyer, in this context, actually refers to a defender and why not, by extrapolating, we can assume that the Supreme Law actually wanted a means to offer the possibility of defending the interests through a representative, either being by means of a lawyer, legal adviser or any other person mandated by the person in question. Any study, like the one in question is positive, because throughout controversy, progress is born and secondly, it leads to an area where the legislator is accountable and basically he must be focused on what the society wants. So, the laws are addressed to the persons, whether they are natural or legal, and the person being the measure of all things. A society that abstracts from the quality of the person is a Utopian society and then it only enters an area of arbitrariness that essentially leads to a state of anomy. The law loses its purpose, comprising that, at one point, the meaning of the law becomes a constraint to the purpose for which it was enacted.

Finally, we come with a *de lege ferenda* proposal, in which the legislator modifies the legal provisions so that legal entities can have the opportunity to be represented conventionally before the courts, in a way that does not restrict, firstly, the right to a defence and last but not least, the free access to justice. The amendment that we propose, should apply equal treatment to both natural and legal persons, in particular regarding the public judicial aid and not lastly, regarding the possibility of conventional mandate, before the courts of law by the legal persons, of both a legal adviser, a lawyer and another trustee, provided that the legal person does not employ a legal adviser or does not have sufficient funds to hire a lawyer or has the bank accounts blocked.

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GENERAL CONSIDERATIONS CONCERNING UNLAWFUL ACTS

Laura TUDURUT[*]

ABSTRACT
This study deals with the concept of unlawful act. This paper contains opinions expressed in specialized literature regarding the concept of unlawful act, as well as the indissoluble relationship between the unlawful act and being held legally liable.

KEYWORDS: *unlawful act; legal liability; immoral; legal liability conditions.*

The explanatory dictionary of the Romanian language defines "the act" as follows: "action committed, act performed by someone; fact, feat"[1]. Also, the term "unlawful" is defined as: "prohibited by law, contrary to a law or a norm." [2]

The act has been defined in the specialized literature as "any phenomenon with imposed legal consequences; the action is a legal fact with wilful legal consequences, "As noticed we can classify the acts in at least two categories: simple acts - those that do not produce important consequences for law and legal acts. "Legal acts are those that produce legal effects, that is, they are taken into account by norms, in the sense that on them depends the birth, the modification or the extinction of an obligation or faculty."

The act has been defined in the specialized literature as "any phenomenon with imposed legal consequences; the action is a legal fact with wilful legal consequences", [3] As noticed we can classify the acts in at least two categories: simple acts - those that do not produce important consequences for law and legal acts. "Legal acts are those that produce

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[1] The Romanian Academy, Institute of Linguistics, "Explanatory dictionary of the Romanian language" Univers Enciclopedic Gold Publishing House, revised and supplemented edition, Bucharest, 2012, p. 381.

[2] *Idem*, p. 490.

[3] I. Micescu, "Civil law course", Bucharest, 2000, p. 117, quoting Gheorghe Mihai, "Basics of law. Subjective law. Sources of subjective rights", volume IV, All Beck Publishing House p. 169.

legal effects, namely they are taken under consideration by norms, in the sense that the occurrence, amendment or termination of a bond or faculty depend on them."[4]

"Usually, as an element of civil liability under tort law, the unlawful act is defined as any act by which, in violation of the norms of the objective law, damages are caused to the subjective right of a person." [5]

The acts include natural events and human actions. The law is only interested in human actions, because only they are subject to legal assessment, the physical phenomena, namely those which do not arise from the subject are neither lawful nor unlawful themselves, having no importance for the law. However, in determining the lawfulness and unlawfulness, the physical phenomena can directly acquire legal importance because they can be the premise of applying the legal norms, and consequently, of the occurrence, amendment or termination of the corresponding subjective rights. "The criterion that brings the two classes of acts closer is that of the legal consequences, the legal regime is the one that distinguish them from one another."[6]

From the perspective of legal liability, any act is defined to be unlawful if it is contrary to the provisions of the law in force, entailing its author being held legally liable. The doctrine has shown that "most moral norms have a moral background"[7], as a consequence, "if such acts are contrary to public order, namely they are against the provisions of the law in force, they are unlawful; if they are also disapproved by society they are immoral. Most unlawful acts are also morally disapproved; from the subjective point of view, the unlawfulness and the moral disapproval are related to the error, to the fault, and from the objective point of view, they are correlated with the unlawful and immoral character, where appropriate, of the act. Unlawfulness as an attribute of the act contrary to the law in force takes various forms, depending on the specificity of the legal norms violated; thus we can speak in the domestic law about the civil unlawfulness, the criminal unlawfulness, the administrative

[4] Giorgio Del Vecchio, "Legal philosophy lessons", Europa Nova Publishing House p. 263.

[5] C. Stătescu, C. Bîrsan, "Civil law. General theory of obligations", All Educational Publishing House, 1998, p. 172.

[6] Ghe. Mihai, "Basic concepts of law. Subjective law. Sources of subjective rights", volume IV, All Beck Publishing House, p. 173.

[7] *Idem*, p. 192.

unlawfulness, the constitutional unlawfulness, the tax unlawfulness etc., and in the interstate law about the public international unlawfulness, the international private unlawfulness etc." [8] The unlawful acts can prejudice any subjective right, regardless of the type of good, patrimonial or non-patrimonial.

According to the definition contained in the Explanatory Dictionary of the Romanian language, the act is a concrete behaviour that has been performed, executed, committed. As a consequence the performance could be stopped by the infringer; the unlawful act committed being the result of their unlawful behaviour.

In the same sense, M. Eliescu notes the following: "By the causal report the damage leads us to a human act: to the harmful act. Someone has committed such an act, though they may not have done it, even though it is one of those that society disapproves of. In the harmful act we can therefore distinguish three elements:

1) The materiality of the act consisting of a human conduct performed in society (…)
2) The harmful act depicts a psychological, subjective element: the will of the one who chose a certain behaviour, when he could have chosen another. The will can take either the form of the intention to cause the damage, or that of negligence or recklessness. Therefore, the harmful act must be the result of a mental attitude towards potential conduct, the result of an intentional or unintentional mistake, which society disapproves of.
3) By this I approached the third element of the harmful fact, the social disapproval, which from a subjective point of view, is related to the error, and from an objective point of view it finds its legal expression in the unlawfulness of the act." [9]

Regarding the unlawfulness of the act, D. Alexandresco shows: "In order for the liability provided for in art. 988, 999 to exist, it is required, fourth of all, that the committed act be unlawful or unfair, as expressed in art. 244 and 1725 of the Calimach Code (1294 Austrian Code), that is, prohibited by the law. In fact, article 998 requires a mistake or a fault,

[8] *Idem*, p. 193

[9] M. Eliescu, "Criminal liability" Academiei Republicii Socialiste România Publishing House, Bucharest, 1972, p. 141.

either in comittenndo or in omittendo, and any mistake that can be construed as prohibited by the law; Which made me draw the reasonable conclusion that the one who causes to another a damage by the exercise of a right that belongs to them, is not under the obligation to repair it (art. 1734 Calimach Code, 1305 Austrian Code)."[10] D. Alexandresco states that the since a guilt exists makes, it can be presumed that the act is unlawful.

M. Eliescu defines the concept of civil unlawfulness as follows: "Within the civil liability, an act is unlawful when it is against the law and possibly, in its completion, the rules of social coexistence, and when it violates at the same time a subjective or at least a legal right an interest of another, an interest that is not against the law or morality" [11]

Criminal liability was regulated by article 998 of the Civil Code from 1864, and regarding one of its conditions, respectively regarding the act, the legal provisions stipulated: "any human act that causes damage to another…" [12] Both the specialized literature and the judicial practice concluded that this provision concerns only the unlawful act.

Paragraph 1 of article 1357 of the New Civil Code stipulates: "*(1) The person who causes damage to another by an unlawful act, committed with guilt, is under the obligation to repair it."*[13] It is noted that the new civil regulation restricts the sphere of acts, namely it must be an unlawful act. A similar provision regarding minor children can be found in article 1366 of the New Civil Code.

As for the identification of unlawful coordinates, the specialized literature and the judicial practice must be taken into account, as there are no current regulations which clearly define "good morals" expression.

"In the case of civil liability, an act is unlawful when it is contrary to the imperative laws and to the accepted principles of morality, having as effect the violation or the infringement of the subjective rights or at least of the legitimate interests of other people, interests that are not against the legal norms and the morality. So, first of all, the act is unlawful if the

[10] D. Alexandresco, "Theoretical and practical explanation of Romanian civil law", volume V, "Obligations (I)", anastatic edition 2017, Universul Juridic Publishing House, p. 468.

[11] M. Eliescu, "Criminal liability" Academiei Republicii Socialiste România Publishing House, Bucharest, 1972, p. 145.

[12] Civil Code from 1864, article 998.

[13] New Civil Code article 1357 paragraph 1.

conduct in question is contrary to the law in the broad sense of the word. Also, an act is unlawful if it is against the accepted principles of morality. Although, basically, the accepted principles of morality are not a source of law, the law does, however, sometimes refer to them (...). The entire behaviour of the human being, their actions must be assessed as lawful or unlawful and in report to the accepted principles of morality, insofar as they represent a continuation of the legal provisions and outline the content, the limits and the way of exercising the subjective rights recognized by the law."[14]

The development of society also leads to the amendment of the accepted principles of morality content, namely of the rules of good conduct in society, therefore the courts will be asked to assess individually whether or not a certain conduct is in conformity with these rules of conduct which are generally valid and mandatory for the members of a society.

"A similar regulation can be found in article 30 paragraph 7 of the Constitution of Romania which stipulates that the manifestations "contrary to the accepted principles of morality are prohibited."[15]

The jurisprudence has ruled that: "Public morality" and "the accepted principles of morality" are core values, enshrined by the Constitution. The fundamental rights and freedoms provided in the Constitution cannot be exercised in a manner contrary to accepted principles of morality or which would prejudice public morals...." [16]

The characteristic features of the unlawful act have been identified in the doctrine as: objectivity, namely the subjective attitude of the infringer is not of importance; the unlawful act being the result of a mental attitude, subjective towards it. The will takes the form of an intention to cause harm, or negligence, recklessness. Also, the act must be contrary to

[14] L. Pop, I.-F. Popa, S.I. Vidu, "Elementary civil law treaty. Obligations under the New Civil Code", Universul Juridic Publishing House, Bucharest, 2012, p. 425.

[15] Romanian Constitution, with related legislation and jurisprudence on the 15th of February 2019, 3rd edition, refurbished and annotated by Tudorel Toader and Marieta Safta, Hamangiu Publishing House, 2019, p. 255.

[16] Romanian Constitution, with related legislation and jurisprudence on the 15th of February 2019, 3rd edition, refurbished and annotated by Tudorel Toader and Marieta Safta, Hamangiu Publishing House, 2019, Decision no. 19 of 20th of January 2005, Official Journal no. 153 of 21st of February 2005 of the Constitutional Court of Romania, p. 255

the accepted principles of morality, of social public order, so that society does not acquiesce.

Not all unlawful acts automatically attract civil liability because it is possible for the guilt to be missing: in the case of the act committed by a person with impaired judgment or under force majeure.

The unlawful act can be committed both by action and inaction, respectively the commission or omission. The omission is a failure to act or to take measures, when this activity must be carried out by a certain person in accordance to the legal provisions.

The abuse of rights and whether or not it is a civil unlawful act was analysed in the doctrine, and the conclusion was positive namely that it is a civil unlawful act if a right recognized by law is exercised for the purpose or with the intention to harm others or wrong doing. [17]

Provisions regarding the prohibition of the abuse of rights are also found in article 17 of the European Convention on Human Rights: "No provision of this Convention can be interpreted as giving a state, a group or an individual any right to perform an activity or to commit an act that aims to destroy the rights or freedoms recognized by this Convention, or to bring limitations on these rights and freedoms, than those provided by this Convention." [18] but also in article 30 of the Universal Declaration of Human Rights: "No provision of this Declaration may be construed as implying for any state, group or person the right to indulge in any activity or to commit any act aimed at the abolition of certain rights or freedoms set out in this Declaration."

The causes that remove the unlawful nature of the act, the liability exemption causes are the causes that remove the unlawful nature of the committed act. The justifying causes recognized in criminal law, in principle, have effects in the other branches of law. For example, an act committed in legitimate self-defence does not attract any other sanctions (civil, administrative, etc.). The new Civil Code regulates the legitimate self-defence, as the state of necessity, the fulfilment of an activity imposed or allowed by law as causes that remove the unlawful nature of the harmful act. The legitimate self-defence is expressly provided for in

[17] L. Pop, I.-F. Popa, S.I. Vidu, "Elementary civil law treaty. Obligations under the New Civil Code", Universul Juridic Publishing House, Bucharest, 2012, p. 427.

[18] C. Bîrsan, "European Convention on Human Rights", 2nd editon, C.H. Beck Publishing House, Bucharest, 2010, p. 1001.

article 1360 of the New Civil Code together with the obligation of the person who is in legitimate self-defence to pay adequate and equitable compensations, if they committed an offense by exceeding the limits of the legitimate self-defence.

The New Civil Code only lists these as liability exemption causes without proceeding to define them so that in order to understand them we will have to resort to the provisions of the Criminal Code. We mention that the definitions provided in the Criminal code don't match perfectly with the ones in the law of torts. As a consequence, article 19 paragraph 2 of the Criminal Code defines the legitimate self-defence. Article 26, paragraph 1 of the New Criminal code stipulates that if the limits of legitimate self-defence are exceeded due to a disturbance or fear, the non-imputable excess establishes that it is a cause that removes the criminal liability of the accused. As far as the criminal liability is concerned, we observe that in article 1360 paragraph 2 of the New Civil Code this hypothesis does not remove the unlawful nature of the act.

We consider that the quantification of the damages in the latter case must also take into account the provisions of article 1371 of the new Civil Code as long as the material, direct, immediate and unfair attack belongs to the victim themselves.

The state of necessity is regulated by article 1361 of the New Civil Code. According to the doctrine and the jurisprudence, the state of necessity as a cause that removes the unlawful nature of the act if it fulfils the conditions stipulated in article 45 paragraph 2 of the Criminal Code. The analysis of the state of necessity was performed from the perspective of the criminal law provisions, the criminal act being treated under the same conditions with the harmful act in the sense that if this cannot attract criminal liability then it is less likely to attract civil liability(also see Article 20 paragraph 2 of the new Criminal Code).

The new Civil Code offers a new perspective on the state of necessity different from the one identified in the criminal law provisions. The act that had the consequence of harming other people if it was committed in a state of necessity does not exclude, in all cases, being held liable by paying compensation. The civil provisions stipulate that such facts are distinct causes of civil liability and the compensation of the victim is possible and even equitable in such cases.

According to article 1363 of the New Civil Code, "the trade secret disclosure" imposed under certain circumstances is a new case of

exemption from civil liability. The trade secret disclosure should not be mistaken with the "professional secret disclosure" provided for and sanctioned by criminal law. Thus, "the trade secret disclosure" consists of: "One may be exempted from liability for damage caused by trade secret disclosure by proving that disclosure was imposed by serious circumstances concerning public health or safety."[19]

"Professional secret disclosure" - offense provided for and sanctioned by article 227 of the New Penal Code: **(1)** "Disclosure, without right, of data or information regarding the private life of a person which may harm a person, by to the one who obtained them through their profession or position, and who has the obligation to maintain confidentiality regarding this data, is punishable by imprisonment from 3 months to 3 years or with a fine.

(2) Criminal proceedings shall be initiated upon the prior complaint of the injured party." [20]

From the analysis of the civil provisions we note that the priority of the lawmaker was to protect the normal relations of social coexistence, of the normal civil circuit, the general interest but excludes the civil liability in special hypotheses, namely: "... the disclosure was imposed by serious circumstances regarding the health or public safety."

Article 1354 of the New Civil Code provides for other clauses for the exemption from liability, namely the situation when it results the altruistic nature of the harmful act doer's involvement, and if damage should occur under such circumstances, it is fair for the victim to bear them. The lawmaker also included an exception, namely: the hypothesis in which the damage was caused with intent or serious fault of the one who, according to the law, would have been held liable. The victim has to prove the doer's guilt in order to claim damages. Along the same lines, also see article 16 paragraph 1 of the New Civil Code: "(1) unless otherwise provided by law, the person is liable only for their acts committed intentionally or out of guilt."

It can be deduced from article 1355 of the New Civil Code that these provisions are applicable exclusively to the material damages and not to moral damages.

[19] Article 1363 of the New Civil Code.
[20] Article 227 of the New Civil Code.

The provisions of article 1356 of the New Civil Code are new and emphasize the idea that the announcement that was previously brought to the notice of the victim could play the role of a warning about the danger. However, in the event that no precautionary and diligent action is taken to remove the risk of damage, they may be personally liable. In such situations, the rules of liability for concurrent guilt, of the doer and of the victim are applicable according to the contribution that each of them had. (In this regards, see the provisions of article 1371 paragraph 1 of the New Civil Code).

Conclusions

Given the above, we consider that unlawful acts remain a constant in determining the criminal liability and not a new valence.

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