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CONTENT

LES DROITS SUBJECTIFS DE LA VICTIME D'UNE INFRACTION

Jacques LEROY*

RÉSUME

Les droits subjectifs de la victime d'une infraction sont nombreux. Il est possible de les regrouper en deux catégories :

Ceux que nous appellerons des « droits-fins » parce qu'ils sont la raison d'être de la présence de la victime devant le juge répressif.

Ceux que nous nommerons« droits-moyens » parce qu'ils permettent techniquement, d'atteindre les buts que la partie civile s'est fixée.

MOTS-CLÉ

Droits subjectifs, le droit à réparation, le droit à la déclaration de culpabilité, le droit d'option, les droits procéduraux

Toute infraction donne naissance à deux rapports de droit : l'un de nature publique entre l'auteur de l'infraction et la société; l'autre, exclusivement privé, entre cet auteur et la victime. Afin de distinguer ces deux rapports juridiques sous l'angle de leur réalisation judiciaire, le législateur emploie les termes d'« *action publique* » et d'« *action civile* ». C'est l'action civile qui retiendra ici notre attention. Plus précisément, il s'agit de voir quelles sont les prérogatives dont dispose la victime d'une infraction pour obtenir la satisfaction qu'elle estime avoir droit.

La victime de l'infraction a toujours été associée à la répression. Le fait est indiscutable dans les civilisations ayant précédé la nôtre. A l'origine, à défaut d'un pouvoir politique apte à s'arroger le monopole du châtiment, c'est par la vengeance privée et familiale qu'était assurée la cohésion entre les communautés familiales; Puis, l'exercice de la vengeance sera limité : le pouvoir politique jouera le rôle de médiateur en imposant à la victime une composition pénale, c'est-à-dire le moyen pour l'offenseur de racheter le

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prix de la vengeance en versant à l'offensé une somme d'argent. L'offensé deviendra, ainsi, créancier. A cette époque, cette somme d'argent servait à la fois de peine et de réparation.

Pour ce qui concerne le droit français, c'est au XVIème siècle que commencent à être distinguées la partie publique et la partie civile au moyen du but poursuivi par celui qui agit, même si la victime, dénommée partie civile, joue toujours un rôle prépondérant dans le déroulement du procès. L'ordonnance criminelle de 1670 consommera la séparation des actions publique et civile. Jousse, l'un des commentateurs de l'ordonnance écrit : « *à l'égard de l'accusation, elle ne se dit que des procureurs du Roi, n'y ayant qu'eux qui soient les véritables accusateurs (…)* »[1]. Puis, à propos de la victime, dénommée partie civile, Jousse observe : *« elle est appelée de ce nom parce qu'elle ne peut poursuivre que l'intérêt civil* ».Certes, la victime conserve des prérogatives procédurales de nature pénale. Cependant, celles-ci ne s'expliquent que parce que l'institution du ministère public est loin d'être achevée et que le pouvoir judiciaire a encore besoin des particuliers pour suppléer, le cas échéant, le parquet. Après la Révolution française, le code d'instruction criminelle de 1808 et, plus récemment, le Code de procédure pénale de 1959 recueilleront l'héritage de l'ordonnance criminelle et maintiendront la présence de la victime dans le procès qui naît de l'infraction. Le droit français, à cet égard, n'a jamais voulu faire correspondre la compétence juridictionnelle et la finalité de l'action civile. Pourtant, la victime, titulaire d'un droit à réparation de nature civile, devrait ne pouvoir le faire reconnaître que devant le juge civil, le juge pénal se limitant à l'action publique. Ce n'est pas la réalité du droit positif : grâce à la tradition historique (ou à cause d'elle !), la Cour de cassation attribue à la victime beaucoup plus de prérogatives que celles qui sont nécessaires pour satisfaire ses intérêts civils.

Les droits subjectifs de la victime d'une infraction sont nombreux. Il est possible de les regrouper en deux catégories :

Ceux que nous appellerons des « *droits-fins* » parce qu'ils sont la raison d'être de la présence de la victime devant le juge répressif (I).

Ceux que nous nommerons« *droits-moyens* » parce qu'ils permettent techniquement, d'atteindre les buts que la partie civile s'est fixée (II).

[1] *Traité de justice criminelle*, 1753, Partie III, Livre II, titre IV, n°1.

I. LES DROITS-FINS

Ils sont de deux ordres : D'abord, un droit à la réparation du préjudice subi (A). Ensuite, un droit à la déclaration de culpabilité (B).

A. Le droit à réparation

Comme tout dommage, le préjudice causé par l'auteur de l'infraction donne lieu à une réparation. De ce point de vue, la victime ne se distingue pas de celle qui serait atteinte dans son corps ou ses biens par un acte qui ne serait pas constitutif d'une infraction. Dans les rapports entre l'auteur et la victime, l'infraction n'est qu'un fait générateur de responsabilité civile. Ce qui est le fondement de l'action civile ce n'est pas l'infraction, c'est le dommage issu de cette infraction. Il y a un lien étroit entre le droit substantiel, soit la créance en réparation,(1°) et le droit processuel qui donne la possibilité d'obtenir en justice le respect de cette créance, soit l'action civile (2°).

1°) Le rapport juridique qui s'instaure entre l'auteur de l'infraction dommageable et la victime est un rapport classique d'obligation : celui qui a causé le préjudice est tenu d'une dette de responsabilité s'exprimant à l'actif du patrimoine de la victime par une créance. Cette dette a pour objet la compensation du préjudice. Cette créance en réparation devrait être le seul droit subjectif de nature patrimoniale à la disposition de la partie lésée depuis que lui a été retiré le droit de punir. Lui reconnaître un droit subjectif à la vie ou à l'intégrité corporelle ne paraît pas nécessaire, la protection de la victime étant assez assurée par le devoir mis à la charge de quiconque de ne pas causer de dommage à autrui. Il suffit qu'en cas de violation de ce devoir naisse un droit à réparation au profit de la victime. La question de l'existence de ce droit originaire à l'intégrité corporelle a pu se poser à la suite d'une décision du Conseil constitutionnel rendue en 1982 qui a évoqué au-delà de la créance en réparation un droit fondamental à indemnisation : « *nul n'ayant le droit de nuire à autrui ,en principe, tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer. Sans doute, en certaines matières, le législateur a institué des régimes de réparation dérogeant partiellement à ce principe (par exemple en substituant la responsabilité d'une personne physique ou morale à la responsabilité de l'auteur du dommage). Cependant, le droit français ne comporte en aucune manière de régimes soustrayant à toute réparation les dommages résultant de fautes civiles imputables à des*

personnes physiques. Il ne peut, même pour réaliser les objectifs qui sont les siens, dénier dans son principe même le droit des victimes d'actes fautifs à l'égalité devant la loi et les charges publiques (…). [2] Les victimes n'auraient-elles donc pas un droit automatique à indemnisation ? De là à conclure qu'en amont de ce droit il y aurait un droit à la protection de la vie, le pas est vite franchi. Si l'on accepte l'analyse, il faut situer ce droit hors du champ de la responsabilité civile parce que les systèmes d'indemnisation de dommages technologiques ou collectifs se fondent, en réalité, sur la solidarité nationale. Ce n'est plus à proprement parler de la responsabilité civile.

Si nous restons dans le domaine de la responsabilité civile, la victime dispose plus classiquement d'une action en justice à l'encontre de l'auteur de son préjudice.

2°) L'action en justice se définit généralement comme la faculté d'obtenir d'un juge une décision sur le fond de la prétention qui lui est soumise[3]. Cette action est un droit pour la victime. Ce droit n'existe, dans un contentieux privé, que pour la protection de la créance en réparation C'est un droit, par hypothèse abstrait, qui a besoin d'être concrétisé. Il prendra ultérieurement la forme visible d'une demande en justice, dénommée, devant le juge pénal, citation directe ou constitution de partie civile. Il existe, donc, un lien logique et chronologique entre la créance en réparation, l'action civile et le demande en justice, ces deux dernières étant conditionnées par le droit substantiel à réparation. La demande en justice n'est que l'expression procédurale de l'action .D'où les conditions d'existence de l'action civile (ou de recevabilité de la constitution de partie civile, si l'on se maintient sur un terrain procédural) que sont l'intérêt et la qualité pour agir. Tout se tient et est dominé par la finalité du droit à dommages-intérêts invoqué par la victime.

Malheureusement, la Cour de cassation joue les trublions en ajoutant au droit à réparation, celui d'obtenir la seule déclaration de culpabilité de l'auteur de l'infraction.

B. Le droit à la déclaration de culpabilité

Voici ce qu'a jugé la chambre criminelle de la Cour de cassation, le 16 décembre 1980 : « *Ayant pour objet essentiel la mise en mouvement de l'action publique en vue d'établir la culpabilité de l'auteur présumé d'une*

[2] Cons.const. 22 oct.1982, D.1983.189, note F.Luchaire.
[3] Art.30 N.C.P.C.

infraction ayant causé un préjudice au plaignant, ce droit constitue une prérogative attachée à la personne et pouvant tendre seulement à la défense de son honneur et de sa considération indépendamment de toute réparation du dommage par la voie de l'action civile »[4]. La solution est aujourd'hui reprise par l'article 622-9 du Code de commerce dans le cas particulier du débiteur en faillite qui entend se constituer partie civile contre l'auteur d'un crime ou d'un délit. Bien entendu, ce droit ne s'exerce que dans la mesure où la victime entend saisir le juge pénal. Mais le droit français le permet et la Cour européenne des droits de l'Homme entérine cette distinction entre l'action civile et la constitution de partie civile dans un arrêt *Hamer c/France* en date du 7 août 1996 (ce qui ne veut pas dire qu'elle approuve cette audace)[5]. Depuis l'arrêt Laurent-Atthalin[6] la victime détient le droit exorbitant de déclencher les poursuites contre la volonté du procureur de la République. Cependant, jusqu'au milieu du XXème siècle, ce droit ne pouvait être utilisé qu'au service du droit à réparation. Aujourd'hui, le droit de demander réparation est distinct du droit de poursuivre. La victime devient un contre pouvoir du parquet. Conscient des abus engendrés par cette prérogative, le législateur prévoit aujourd'hui un filtrage[7]. Mais ce filtrage ne retire rien à l'existence même de ce droit. Voilà bien une prérogative étonnante : instrumentaliser le droit pénal pour le mettre au service d'un intérêt particulier de nature extra-patrimoniale ! Qu'on en juge avec cet exemple pris en matière d'accident du travail : selon le droit social français, la victime d'un accident du travail n'a aucune créance en réparation contre l'employeur. Elle bénéficie d'une indemnité forfaitaire pouvant, toutefois, être augmentée en cas de faute inexcusable de ce dernier. Pourtant, selon la Cour de cassation[8] la victime peut se constituer partie civile contre l'employeur afin de corroborer l'action publique et chercher à prouver cette fameuse faute. Mais atteindre ce but s'avère bien aléatoire : en effet, seule la juridiction sociale est habilitée à dire qu'il y a faute inexcusable ; le jugement pénal ne peut donc avoir une quelconque autorité sur le juge social. Voici une bien curieuse manière d'agir que de permettre à la victime d'espérer tirer parti de la chose *non* jugée ! En réalité, la partie civile espère qu'en raison d'un prétendu prestige de la juridiction répressive, le juge social s'inclinera devant la décision qu'elle aura rendue ; et si une

[4] Bull.crim., n°348.
[5] JCP 1997.I.4000,n°16,obs.F.Sudre.
[6] Cass.crim.8 déc.1906, DP1907.I.207, rapport Laurent-Atthalin.
[7] Cf.al.2 de l'art.85 C.proc.pén (ajouté par la loi du 5 mars 2007).
[8] Cass.crim.16 mars 1964, JCP1964.II.13744; 9mars 1994, Bull.crim.n°91.

faute pénale est retenue, la victime est persuadée que le juge social n'osera pas dire que cette faute n'est pas inexcusable. Pure conjecture que tout ceci ! Qui ne voit le détournement de la finalité de l'action civile ! En définitive, on s'aperçoit que ce droit *« hors réparation »* est un droit à la vengeance publique, c'est-à-dire un droit subjectif à la déclaration de culpabilité, c'est-à-dire un droit contre le ministère public. Nous sommes bien loin de ce qu'avaient imaginé les rédacteurs du code de procédure pénale. Que la victime soit un contre pouvoir du parquet, soit ; mais qu'elle devienne un pouvoir concurrent est regrettable dans une société démocratique où la justice pénale a quitté les mains des particuliers pour être attribuée à l'autorité étatique. Dans le droit français, c'est le parquet qui apprécie l'opportunité des poursuites. L'action civile n'est que l'accessoire de l'action publique.

II. LES DROITS-MOYENS

Pour exercer la plénitude de leurs prérogatives, la victime dispose d'un premier droit : le droit d'option entre la voie civile et la voie pénale (A). Si elle choisit la voie pénale, la victime a des droits procéduraux spécifiques (B)

A. Le droit d'option

Etant par nature une action en responsabilité civile, l'action civile peut naturellement être portée devant le juge civil. Mais elle peut aussi être portée devant le juge pénal. Ce libre choix exprime le droit d'option entre deux procédures (1°). Pour garantir l'effectivité de ce droit, il a fallu assouplir les exigences de fond qui commandent la recevabilité de la constitution de partie civile (2°)

1°) D'une manière générale, une option de procédure suppose une alternative entre deux voies dont l'usage est discrétionnaire et révocable. Nous en avons un très bon exemple avec la constitution de partie civile. Le choix de la victime est, en effet, volontaire : la constitution de partie civile ne se présume pas. [9] Ce choix est aussi unilatéral : la constitution de partie civile se suffit à elle-même ; l'acceptation de l'auteur de l'infraction est indifférente à la liaison de l'instance civile. En outre, la victime peut se désister. La constitution de partie civile exprime ainsi la volonté d'être

[9] Cass.crim.17 juin 1976, Bull.crim, n°208 : « la qualité de partie civile s'acquiert par le dépôt d'une plainte auprès du juge d'instruction compétent contenant une manifestation expresse de volonté du plaignant de se constituer partie civile ».

partie civile au procès de l'infraction et non au procès pénal comme on le lit souvent parce que le procès qui naît de l'infraction a un double objet : civil et pénal. Il y a deux instances qui correspondent au double rapports de droit nés de l'acte commis. En d'autres termes, ce n'est pas parce que le juge pénal statue sur les deux actions par un seul et même jugement que l'on doit être amené à ne voir qu'un seul rapport processuel de droit pénal. Par conséquent, les prérogatives procédurales accordées à la victime ne devraient lui servir qu'à satisfaire ses intérêts civils.

La question se complique lorsque se glisse un élément d'extranéité dans la situation juridique issue de l'infraction. Par exemple, l'infraction est commise à l'étranger par un étranger contre une victime française. Selon le droit français, le juge français et compétent et devra appliquer la loi pénale française[10]. Si la victime entend obtenir des dommages-intérêts, la question se pose de savoir quelle est la loi applicable à l'instance civile. En matière de responsabilité civile, la règle de conflit désigne la loi du lieu du dommage, soit ici la loi étrangère. Mais, le juge pénal français, nous l'avons dit, n'applique que la loi française. L'appliquera-t-il à l'action publique et à l'action civile accessoire de l'action publique ? Ou bien divisera-t-il l'application selon le type d'instance ? C'est la dernière solution qui est choisie, la victime ne devant pas disposer d'un avantage exorbitant par rapport à celle qui porterait son action devant le juge civil alors que les deux actions sont identiques.

2°) A partir du moment où c'est le déroulement du procès lui-même qui permet d'établir le bien fondé de l'accusation et de la demande en réparation, il est logique, au stade de la saisine du tribunal, c'est-à-dire de la recevabilité de l'acte de constitution, que les conditions soient appréciées avec moins de sévérité. Ainsi, lorsque la partie lésée se constitue partie civile au moyen d'une citation directe, le code de procédure pénale laisse à la victime la faculté de conclure ultérieurement à des dommages-intérêts (art.418 C.proc.pén.) ; en effet, au moment de saisir le tribunal, la victime peut ne pas connaître exactement l'ampleur de son préjudice. Lorsqu'elle se constitue partie civile devant le juge d'instruction, pour reprendre la formule de la Cour de cassation, « *il suffit pour qu'elle soit recevable que les circonstances sur lesquelles elle s'appuie permettent au juge d'admettre comme possible l'existence du préjudice allégué et la relation directe de celui-ci avec l'infraction* »[11].

[10] Art.113-7 C.pén.
[11] Cass.crim. 8juin 1999. Bull.crim. n°123.

B. Les droits procéduraux

Il y a, à cet égard, une date capitale : le 22 mars 1921 ; c'est , en effet, la date de la loi qui a étendu à la partie civile, les droits qu'une loi de 1897 avait déjà reconnu à l'inculpé et notamment le droit de bénéficier de l'assistance d'un avocat. Depuis cette date, les droits de la partie civile dans le procès se sont considérablement renforcés. Au fil des années, elle s'est vue placée sur un pied d'égalité avec l'auteur de l'infraction, le renforcement du caractère contradictoire de la procédure, notamment au niveau de l'instruction, s'accompagnant logiquement d'un accroissement des droits de toutes les parties à la procédure. Grâce à ses prérogatives la victime pourra « surveiller » l'évolution de la procédure et corroborer l'action publique. Par exemple, elle pourra demander au juge d'instruction de prononcer un renvoi ou un non lieu à l'expiration de certains délais ; et s'il ne répond pas à la requête, la victime saisira le président de la chambre de l'instruction de la Cour d'appel, juridiction hiérarchiquement supérieure[12].

Si l'auteur de l'infraction est susceptible d'être déclaré irresponsable pénalement pour cause de trouble mental, la victime a droit à une ordonnance qui, certes, déclare l'irresponsabilité mais reconnaît aussi la réalité des faits commis. La victime n'est plus laissée dans l'ignorance ; elle doit pouvoir trouver dans la tenue d'une audience juridictionnelle une réponse à son malheur.[13]

La victime peut aussi demander des expertises, interjeter appel contre l'ordonnance du juge d'instruction en cas de refus ; elle peut compléter les questions posées à l'expert, demander de lui adjoindre un second expert de son choix[14]. La victime peut aussi réclamer un transport sur les lieux ou une confrontation[15]. Elle dispose aussi, à l'évidence, du droit de faire appel des décisions pénales au regard de ses intérêts civils.[16] On voit bien avec ces quelques exemples, que la victime est véritablement associée au développement procédural, ce qui ne laisse pas d'inquiéter quand on sait qu'elle peut n'être présente que pour obtenir une condamnation pénale !

L'obsession de la protection de la victime de l'infraction a même conduit le législateur à instituer un juge délégué aux victimes *« chargé de veiller, dans le respect de l'équilibre des droits des parties à la prise en*

[12] Art.175-1 C.proc.pén.
[13] Art.706-20 C.proc.pén. (issu de la loi du 25 février 2008)
[14] Art.156 et s. C.proc.pén.
[15] Art.82-1 C.proc.pén.
[16] Art.497 C.proc.pén.

compte des droits reconnus par la loi aux victimes »[17]. Le principe d'une institution judiciaire chargée spécialement des intérêts de l'une des parties laisse perplexe surtout si le juge en question siège en même temps comme juge correctionnel. Mais, semble-t-il, la Cour de cassation n'y trouve rien à redire ![18]

Enfin, il n'est guère possible d'achever cet article sans évoquer le rapport issu des réflexions d'une commission de réforme présidée par M. Philippe LEGER, magistrat. Bien que les rédacteurs du rapport s'en défendent, certaines propositions risquent, insidieusement, de revenir sur l'un des droits fondamentaux reconnus aux victimes : celui de déclencher les poursuites par une plainte avec constitution de partie civile. En effet, il est prévu que la décision finale en revienne au juge de l'enquête et de la détention, nouveau magistrat chargé de contrôler une instruction confiée désormais au procureur de la République[19]. Il y a trois ans fut célébré le centenaire de l'arrêt Laurent-Atthalin. Il est à craindre, avec ce rapport, s'il vient à être suivi lors d'une prochaine réforme de la procédure pénale, qu'un siècle de jurisprudence soit enterré injustement. Malgré les abus révélés par quelques affaires récentes, cette réforme est dangereuse. Il vaudrait mieux redéfinir les droits procéduraux de la victime et lui interdire de se constituer partie civile à d'autres fins que celle d'obtenir une réparation réelle de son dommage. L'action civile reste l'accessoire de l'action publique. La victime doit pouvoir continuer de faire juger cette action civile par le juge pénal. Pour autant, elle ne doit pas devenir un procureur *bis*.

[17] Art. D.47-6-1 et s. C.proc.pén.

[18] C.cass, avis des 20 juin et 6 octobre 2008.

[19] On rappellera qu'en France le ministère public n'est pas indépendant du pouvoir exécutif. La Cour européenne des droits de l'Homme vient de condamner la France pour cette raison : aff. Medvedyev et autres, c/France, Cedh 10 juill.2008, D.2009.chron.600, obs.J.F.Renucci.

TENDANCES DU DROIT DU TRAVAIL FRANÇAIS AU REGARD D'ÉVÉNEMENTS RÉCENTS

Nicolas MOIZARD*

RÉSUME

Deux récentes réformes, la loi sur la modernisation du marché du travail et celle sur la rénovation de la démocratie sociale et le temps de travail, poursuivent la mutation du droit du travail, en s'intéressant notamment à la représentativité des organisations syndicales des salariés

MOTS-CLÉ

Marché du travail, normes sur l'entreprise, Code du travail, droit social, la flexicurité

Depuis les années 80, le droit du travail français connaît une profonde évolution du cadre d'organisation des relations professionnelles, qui s'est déplacé de la profession vers l'entreprise. Concernant les relations individuelles de travail, on constate la diversification des formes d'emploi et l'affirmation d'un droit de l'emploi qui se développe à la périphérie des rapports de travail.

Sans être porteurs d'un projet cohérent[1], deux récentes réformes, la loi sur la modernisation du marché du travail[2] et celle sur la rénovation de la

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[1] V. B. Teyssié qui évoque « un vent de réforme » qui « souffle avec un objectif : adapter le droit du travail français à une exigence renouvelée de compétitivité » (« Avant-propos », Dr. soc. 2008, p. 623). A comp. avec E. Dockès, « Un accord donnant, donnant, donnant, donnant… », Dr. soc. 2008, p. 280.

[2] Loi n° 2008-596 du 25 juin 2008 portant modernisation du marché du travail (JORF n°0148 du 26 juin 2008 page 10224). Cette loi a été la première illustration de la procédure de négociation « légiférante » inscrite dans le Code du travail. Elle s'inspire de l'Accord national interprofessionnel (ANI) du 11 janvier 2008 relatif à la modernisation du marché du travail.

démocratie sociale et le temps de travail[3], poursuivent la mutation du droit du travail, en s'intéressant notamment à la représentativité des organisations syndicales des salariés.

Les réformes actuelles se situent dans un contexte de questionnement sur les finalités et le positionnement du droit du travail, entendu comme *« l'ensemble des règles juridiques relatives au travail subordonné»*[4]. Depuis une vingtaine d'années, la plupart des interventions législatives en font un levier de la politique de l'emploi. Le droit du travail se voit attribuer la fonction d'aider au maintien et à la création d'emploi et est évalué sur cette base. L'Union européenne est également facteur de mutations du sens et de la place du droit du travail. Celui-ci se situe alors dans un cadre plus vaste où des objectifs liés au marché intérieur sont prioritaires. Le droit du travail risque alors d'être réduit à la dimension sociale du marché intérieur (I).

Autre tendance récente, la centralisation des normes sur l'entreprise (II), que ce soit pour la mise en place des institutions représentatives du personnel ou comme espace de négociation collective, est une réalité. Le choix de ce niveau signifie-t-il qu'il faille consacrer l'autonomie des partenaires sociaux de l'entreprise ? Les lois récentes interrogent les possibilités d'encadrement de la branche d'activité et l'ampleur de la marge laissée par le législateur.

L'individualisation du rapport d'emploi est également l'un des points marquants de cette évolution[5]. La nouvelle architecture du Code du travail en rend compte. Le titre II du Livre 1er de ce Code est consacré aux *Droits et libertés dans l'entreprise.* Il comprend les règles sur les libertés individuelles, les discriminations, l'égalité professionnelle entre les sexes et les harcèlements. Sous l'influence de l'Union européenne, le législateur est intervenu à de très nombreuses reprises sur ces thèmes depuis une vingtaine d'années. La définition légale récente de la discrimination indirecte en est

[3] Loi n° 2008-789 du 20 août 2008 portant rénovation de la démocratie sociale et réforme du temps de travail (JORF n°0194 du 21 août 2008 p. 13064). Cette loi s'est inspirée d'une Position commune du 9 avril 2008 sur la représentativité, le développement du dialogue social et le financement du syndicalisme.

[4] J. Pélissier, A. Supiot, A. Jeammaud, *Droit du travail*, Précis Dalloz, 24ème éd., n° 7.

[5] V. P. Adam, *L'individualisation du droit du travail*, Paris, LGDJ, 2005 ; A. Jeammaud, « La place du salarié individu dans le droit français du travail », in Mélanges H. Sinay, Peter Lang, 1994, p. 349 ; C . Vigneau, « Contrat et individualisation dans le relation de travail », Dr. ouvr. 2009, p. 175.

l'illustration[6]. La chambre sociale de la Cour de cassation élabore une construction subtile sur le principe d'égalité de traitement *« à travail égal, salaire égal »* depuis l'arrêt *Ponsolle*[7]. Ces nouvelles règles vont de pair avec un déplacement de la négociation sur le rapport d'emploi vers les parties au contrat de travail. Les signataires de l'ANI du 11 janvier 2008 sur la modernisation du marché du travail n'ont pas fait le choix du contrat unique. Ses mesures phares, reprises par le législateur, sont l'instauration d'un contrat de projet et la possibilité d'une rupture conventionnelle du contrat de travail. L'accord interprofessionnel encadre aussi la période d'essai. Certains thèmes évoqués par l'ANI doivent faire l'objet de futures réflexions et n'ont pas eu le même intérêt en doctrine. Ils se situent toutefois dans la droite ligne du mouvement d'individualisation du rapport d'emploi, dans la mesure où ils appellent à des éléments du contrat de travail mieux déterminés avec un salarié davantage informé. L'individualisation du rapport d'emploi s'accompagne ainsi de mécanismes de sécurisation et d'information (III).

I. UN DROIT DU TRAVAIL RÉDUIT À LA DIMENSION SOCIALE DES RÈGLES DU MARCHÉ ?

Les finalités du droit social - Dès les premières études consacrées au droit du travail, la finalité sociale de celui-ci est identifiée. Au même moment, certains auteurs mettent en lumière une finalité économique. Dans les années 50, G. Lyon-Caen relève qu' *« il y a deux exigences en sens contraire qui s'exercent dans l'élaboration du droit du travail : l'exigence sociale, celle du respect humain du travailleur, et l'exigence économique, celle de la rentabilité des entreprises »*[8]. Certains auteurs ont estimé, dans les années 80, que le droit du travail réalisait un équilibre instable[9]. Dans

[6] V. l'art. 1 de la Loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations (JORF n°0123 du 28 mai 2008 page 8801).

[7] Cass. Soc. 29 octobre 1996, Bull. V n° 359 ; Dr. soc. 1996, 1013, note A. Lyon-Caen.

[8] G. Lyon-Caen, *Manuel de droit du travail et de la sécurité sociale*, LGDJ, 1995, n° 40, p. 31. V. B. Géniaut, C. Giraudet et C. Mathieu, « Les ouvrages de droit du travail des années cinquante », Dr. ouvr. 2003, p. 367.

[9] Dans la 19ème édition du précis Dalloz de Droit du travail (1988), G. Lyon-Caen, J. Pélissier et A. Supiot observent que « le droit du travail ne « protège » pas ; il réalise un équilibre instable. En période de crise, il avantage plutôt l'entreprise, source d'emplois » (n° 31).

certains cas, il a été constaté une réversibilité de la norme[10], l'interprétation de celle-ci, *a priori* favorable aux salariés, se retournant contre leurs intérêts. L'interprétation de la norme de droit social, au regard de l'objectif de maintien ou de développement de l'emploi, suscite des doutes sur le caractère protecteur de celle-ci[11]. La finalité économique l'a-t-elle emportée sur la finalité sociale ?

Un droit social soumis aux exigences du marché - L'Union européenne montre clairement sa préférence. Lorsqu'il se produit une interférence entre les libertés économiques garanties par le marché intérieur - les libertés de circulation des marchandises, de libre prestation de services et d'établissement - et les politiques sociales, ces dernières se justifient au regard de l'intérêt général de protection des travailleurs mais les atteintes qu'elles portent aux libertés du marché intérieur ne doivent pas être disproportionnées[12].

Certes, la Cour de justice a fait échapper le droit de négociation collective aux contraintes du droit de la concurrence. Selon la Cour de justice, des accords collectifs destinés à améliorer les conditions d'emploi et de travail conclus en vue de tels objectifs, doivent être considérés *« en raison de leur nature et de leur objet »* comme ne relevant pas de l'interdiction communautaire des ententes[13]. Par ailleurs, dans ses récents arrêts *Viking* et *Laval*, la Cour de justice consacre le droit de mener une action collective, en tant que droit fondamental[14].

Mais la Cour de justice, dans ces derniers arrêts, opère bien une hiérarchie entre les droits sociaux et les libertés économiques. L'action collective ne doit pas porter une atteinte injustifiée et disproportionnée aux libertés économiques[15]. Le sens même de l'action collective est mis en cause, y compris lorsqu'elle s'exerce dans le respect des droits nationaux.

Un rééquilibrage est désormais techniquement possible depuis l'entrée en vigueur du traité de Lisbonne qui a reconnu à la Charte des droits

[10] V. G. Lyon-Caen (« Le droit virtuel : l'exemple du régime de l'emploi », D. 1995, p. 21 ; Le droit du travail, une technique réversible, Dalloz, connaissances du droit, 1995, p. 9. A rappr. de A. Supiot, « Pourquoi un droit du travail ? », Dr. soc. 1990, p. 485, spéc. p. 490.

[11] V. Cass. soc. 19 févr. 1997, Géophysique, Dr. soc. 1997, p. 432 ; Bull. civ. V n° 70.

[12] P. Rodière, *Traité de droit social de l'Union européenne*, LGDJ, 2008, n° 4-1, p. 9.

[13] CJCE 21 septembre 1999, Brentjens' Handelsonderneming BV, aff. C-115/97, Rec. p. 6025, points 56 et 57.

[14] V. CJCE 18 décembre 2007, aff. 341/05, Laval und Parteneri, points 90 et 91, Rec. p. I-11767 ; CJCE 11 décembre 2007, Viking, C 438/05, points 43 et 44, Rec. p. I-10779.

[15] CJCE 18 décembre 2007, aff. 341/05, Laval und Parteneri, préc., point 101 ; CJCE 11 décembre 2007, Viking, C 438/05, préc., point 75 ; S. Robin-Olivier et E. Pataut, « Europe sociale ou Europe économique (à propos des affaires Viking et Laval », RDT 2008, p. 80.

fondamentaux de l'Union, la même valeur juridique que les traités[16]. Celle-ci met sur un même pied d'égalité les droits économiques et les droits sociaux présents dans un chapitre consacré à la solidarité. La Charte ne créée pas de nouvelles compétences de l'Union. Mais elle invite à reconnaître des droits fondamentaux résultant des traditions constitutionnelles communes aux Etats membres[17]. Par ailleurs, l'adhésion de l'Union au Conseil de l'Europe est en cours. Il faudra ainsi prendre en compte la dernière jurisprudence de la Cour européenne des droits de l'Homme sur le droit de grève[18].

La flexicurité - Le droit de l'Union a également intégré de nouveaux types d'interventions (méthode ouverte de coordination, stratégie européenne pour l'emploi) où les partenaires sociaux sont dilués parmi d'autres organisations non gouvernementales et où le droit social est un instrument de la politique de l'emploi. Le droit du travail se situe dans la démarche de flexicurité. L'ANI du 11 janvier 2008, qui a inspiré la loi du 25 juin 2008 sur la modernisation du marché du travail, a été vu par certains comme la première manifestation française de la flexicurité[19]. Sans que cela passe par une voie unique, celle-ci suppose, selon la Commission, de combiner *« de manière délibérée, la souplesse et la sécurité des dispositions contractuelles, les stratégies globales d'apprentissage tout au long de la vie, les politiques actives du marché du travail efficaces et les systèmes de sécurité sociale modernes, adaptés et durables »*[20]. Le droit du travail n'est plus compris tel qu'il l'était jusqu'à lors si ses normes et ses acteurs doivent se plier aux exigences du marché et lorsque sa légitimité à protéger les

[16] CJUE 19 janvier 2010, C-555/07, Seda Kücükdeveci c/Swedex, point 22.

[17] V. l'art. 52 Par. 4 de la Charte. V. également les explications relatives à la Charte des droits fondamentaux : « selon cette règle, plutôt que de suivre une approche rigide de « plus petit dénominateur commun », il convient d'interpréter les droits en cause de la Charte d'une manière qui offre un niveau élevé de protection, adapté au droit de l'Union et en harmonie avec les traditions constitutionnelles communes ».

[1818] V. Cour EDH 21 avril 2009, Enerji Yapi Yol Sen c. Turquie.

[19] V. en ce sens, Sylvaine Laulom, SSL 21 janv. 2008, n° 1337, p. 7. A rappr. de G. Auzero, « L'accord du 23 janvier 2008 sur la modernisation du marché du travail : l'ébauche d'une flexicurité à la française », RDT mars 2008, p. 152; E. Dockès, Dr. soc. 2008, préc. ; A. Fabre, F. Lefresne et C. Tuchszirer, « L'accord du 11 janvier 2008 sur la modernisation du marché du travail. Une tentative d'évaluation », Revue de l'OFCE 2008/4, n° 107, p. 5 ; F. Gaudu, « L'accord sur la « modernisation du marché du travail » : érosion ou refondation du droit du travail ? », Dr. soc. 2008, p. 267 ; J.-E. Ray, « Un accord en devenir », Dr. soc. 2008, p. 272.

[20] Le processus de flexicurité intègre le dialogue social dans ses composants.

salariés est mise en cause par la nécessité d'intégrer de la *« souplesse »* au profit des entreprises.

II. LA CENTRALISATION DES NORMES SUR L'ENTREPRISE

Depuis les obligations de négocier instituées en 1982, le législateur a fait la promotion d'une *« autoréglementation de l'entreprise »*[21]. Ce développement de la négociation collective d'entreprise a été de pair avec la faculté de dérogations conventionnelles. Le thème de la durée et de l'aménagement du temps de travail en est l'illustration la plus marquante. Une convention collective peut mettre à l'écart des dispositions législatives, le législateur imposant seulement des obligations variables en terme de contreparties, d'encadrement de la branche d'activité.

L'accord d'entreprise prioritaire - C'est ce schéma connu depuis une trentaine d'années, où la loi autorise des dérogations conventionnelles sous certaines conditions, qui est en passe d'évoluer. La négociation collective d'entreprise acquiert une place centrale, les autres normes devenant subsidiaires[22]. Ce phénomène s'observe dans les rapports entre les accords de branche et les accords d'entreprise. Le doctrine évoque un mouvement de supplétivité de l'accord de branche par rapport à l'accord d'entreprise[23].

La loi du 20 août 2008, qui instaure une modalité unique de modulation du temps de travail, en est la parfaite illustration[24]. Selon l'article L 3122-2 du Code du travail, *« un accord collectif d'entreprise ou d'établissement ou, à défaut, une convention ou un accord de branche peut définir les modalités d'aménagement du temps de travail et organiser la répartition de la durée du travail sur une période supérieure à la semaine et au plus égale à l'année ».* Il résulte de cette rédaction que l'entreprise peut directement instituer une annualisation du temps de travail. Que reste-t-il alors de la branche d'activité ? Il n'est pas certain qu'elle puisse conserver un rôle d'encadrement de la négociation collective d'entreprise. Il ne lui reste plus que la possibilité de prévoir un dispositif pour les entreprises qui n'ont pas d'accord en ce sens.

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[21] V. A. Supiot, « Déréglementation des relations de travail et autoréglementation de l'entreprise », Dr. soc. 1989, p. 195 ; M.-A. Souriac, « Les réformes de la négociation collective », RDT, 2009, p. 14.

[22] V. L'article L 2253-3 du Code du travail issu de la loi Fillon du 4 mars 2004.

[23] M.-A. Souriac, RDT 2009, préc..

[24] V. F. Favennec-Hery, « Réforme du temps de travail : loi n° 2008-789 du 20 août 2008 », JCP éd. S, 2008, n° 37, p. 11.

La même remarque peut se faire avec la possibilité de négocier dans l'entreprise en l'absence de délégués syndicaux. Avant la loi du 20 août 2008, la possibilité de négocier avec des salariés élus ou mandatés était subordonnée à l'existence d'une convention collective de branche étendue. Cette condition n'existe plus depuis le 31 décembre 2009 pour les entreprises non couvertes par un accord de branche étendue sur cette question.

Loi et convention collective - Dans le cadre de cette évolution, va-t-on vers une répartition des compétences entre la loi et la convention collective ? Dans une logique poussée à son maximum, la loi se bornerait à fixer des droits fondamentaux, aux négociateurs de décliner ces droits au sein des entreprises. Il n'est plus alors besoin de rechercher dans ce cas si la norme sociale est plus favorable aux salariés[25]. Ce système conduirait à la fin des identités professionnelles et à une atomisation du droit du travail, facteur de concurrence entre les entreprises.

Cette articulation ne peut exister en l'état. L'article 34 de la Constitution impose au législateur de déterminer « *les principes fondamentaux en droit du travail* ». Le Conseil constitutionnel est là pour rappeler au législateur qu'il doit jouer son rôle. Avant de confier aux partenaires sociaux *« le soin de préciser les modalités concrètes d'application des principes fondamentaux du droit du travail »*, le législateur doit au préalable *« définir de façon précise les conditions de mise en œuvre de ces principes »*[26].

Dérogation par accord individuel - Certains schémas vont plus loin en permettant aux parties au contrat de travail de déroger directement à la loi. Il en va ainsi de la directive relative à certains aspects de l'aménagement du temps de travail[27] qui permet aux Etats membres d'autoriser une dérogation à la durée maximale de travail hebdomadaire de 48 heures par accord individuel. L'avenir de cette faculté, même davantage encadrée dans les derniers projets de réforme, n'est pas assuré en raison de l'hostilité justifiée du Parlement européen. Mais il est l'illustration d'une possibilité de négociation directe avec le salarié sur des thèmes qui relevaient de la loi et de la négociation collective.

Le droit français n'est pas étranger à ce mouvement. Ainsi, à défaut d'accord collectif, un salarié sous forfait en jours peut, en l'absence

[25] V. S. Frossard, « La supplétivité des règles en droit du travail », RDT 2009, p. 83.
[26] Conseil constitutionnel, décision n° 2008-568 DC du 7 août 2008.
[27] Directive 2003/88 du 4 novembre 2003. concernant certains aspects de l'aménagement du temps de travail.

d'accord collectif, renoncer à une partie de ses jours de repos moyennant indemnités pour atteindre 235 jours travaillés[28].

III. LA SÉCURISATION DANS LE RAPPORT INDIVIDUEL D'EMPLOI

Le glissement progressif des risques d'entreprise sur le salarié – On assiste à un glissement progressif des risques de l'entreprise sur les épaules du salarié. Les contrats de travail se gonflent de clauses de plus en plus sophistiquées qui illustrent ce phénomène[29]. Dès que l'employeur subit des pressions concurrentielles sur l'entreprise ou est sujet à une nouvelle obligation de source légale ou jurisprudentielle, la tendance est de partager cette contrainte avec le salarié. Les exemples sont nombreux. Dès lors que les risques concurrentiels sont accrus pour l'entreprise, les contrats de travail contiennent des clauses de non-concurrence, des clauses de non-sollicitation ou de confidentialité. Lorsque l'employeur forme le salarié au-delà de ses obligations légales, l'entreprise en attend un retour sur investissement de la part du salarié et, si celui-ci quitte l'entreprise avant un délai fixé, il peut être amené à rembourser une partie des frais de sa formation (clause de dédit-formation).

Le rôle majeur du contrat de travail – Même si le droit du travail n'a pas donné la priorité au contrat et à l'autonomie de la volonté, le contrat de travail n'a jamais été mineur dans les sources du droit du travail[30]. On évoque actuellement une *"centralité retrouvée du contrat de travail en droit français"*[31]. Comme nous venons de le constater, le contrat de travail est un outil de gestion, permettant notamment la fidélisation de la main-d'œuvre ou l'adéquation la plus forte entre intérêt de l'entreprise et activité du salarié.

Le contrat de travail est également présenté comme une source de résistance à la diminution de certains avantages. Depuis 1996, l'enjeu est de savoir si nous sommes en présence d'un changement des conditions de travail que l'employeur peut imposer ou d'une modification du contrat de

[28] Art. L 3121-45 du Code du travail.

[29] M.-C. Escande-Varniol, « La sophistication des clauses du contrat de travail », Droit ouvrier 1997 p.478.

[30] V. G. Lyon-Caen, « Défense et illustration du contrat de travail », Archives de philosophie du Droit, 1968, p. 59.

[31] A. Jeammaud, *Estudios juridico en homenaje al Doctor Néstor de Buen Lozano*, México, UNAM, 2003.

travail que le salarié peut refuser[32]. Certains proposent toutefois de dépasser cet obstacle devant un accord collectif majoritaire, confondant ainsi la représentation syndicale avec une représentation de droit civil, intérêts collectifs et intérêts individuels[33].

L'encadrement de la procédure sur le contrat de travail – Ce mouvement recentre la négociation sur le contrat de travail. Traditionnellement, le législateur s'est peu intéressé à la formation du contrat de travail. Le Code du travail prévoit que *« le contrat de travail est soumis aux règles du droit commun. Il peut être établi selon les formes que les parties contractantes décident d'adopter »*[34]. Le droit du travail s'est davantage consacré à régir le rapport d'emploi par des règles d'ordre public pour contrebalancer le rapport inégalitaire dans la relation de travail. Toutefois, l'individualisation accrue incite logiquement le législateur et les partenaires sociaux à s'intéresser davantage à la phase de la rencontre de la volonté des parties[35]. Depuis 1992, le Code du travail contient des dispositions relatives au recrutement, qui sont toutefois peu effectives[36].

L'information individuelle du salarié est renforcée[37]. L'ANI du 11 janvier 2008 rappelle que le salarié doit être en mesure de connaître les droits directement applicables à son contrat de travail en application d'un accord d'entreprise ou de branche.

La loi du 25 juin 2008, s'inscrivant dans les pas de l'ANI sur la modernisation du marché, encadre davantage la période d'essai qui ne peut résulter que d'un contrat de travail ou de la lettre d'engagement. Le législateur, se faisant, permet un allongement de la période d'essai. Il se

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[32] V. Cass. Soc. 10 juillet 1996, Bull. civ. V, n° 278 ; Les grands arrêts du droit du travail, Dalloz, 4ème éd., 2008, n° 50, p. 264. V. Ph. Waquet, « le renouveau du contrat de travail », RJS 1999, p. 383.

[33] V. M. Morand, « Faut-il renforcer la présence l'accord collectif face au contrat de travail ? », RDT 2007, p. 177 et la réponse d'E. Dockès, op. cit.. A rappr. de P. Morvan (« Application conventionnelle de l'article L 122-12 et accord du salarié : plaidoyer pour un revirement », JCP ed. S., n° 49, 2006 – 1964) qui estime qu'une convention collective de branche d'activité qui prévoit une application du transfert d'entreprise en dehors de l'art. L 1224-1 du Code du travail, vaut accord du salarié.

[34] V. l'article L 1221-1 du Code du travail.

[35] V. P. Lokiec, « Garantir la liberté du consentement contractuel », Dr. soc. 2009, p. 127, qui évoque un choix majeur entre l'autonomie de la volonté et la prévalence de l'ordre public et rappelle que la seule volonté des parties est insuffisante dans les rapports fondés sur la subordination. V. également la négociation lors de la rupture conventionnelle du contrat de travail.

[36] V. les art. L 1221-6 et s. du C. du trav.

[37] V. B. Lardy-Pélissier, « L'information du salarié », Mélanges Jean Pélissier, Dalloz, 2004, p. 331.

concentre sur le contrat de travail et ne permet plus que la clause d'essai résulte seulement d'une disposition conventionnelle[38].

L'ANI entend également clarifier les clauses spécifiques du contrat de travail (article 10 de l'ANI). Les contrats de travail devront préciser les conditions de mise en œuvre des clauses de non-concurrence et de mobilité ainsi que, le cas échéant, l'étendue des délégations de pouvoir.

Enfin, l'ANI énonce que le contrat de travail doit déterminer ceux de ses éléments qui ne pourront être modifiés sans l'accord du salarié (article 11 de l'ANI). On peut en déduire que *« les parties fixent dans le contrat les seuls éléments justifiant l'accord du salarié en cas de modification »*[39]. Ces dispositions révèlent une certaine méfiance à l'égard du juge. Elles ne devraient toutefois pas à elles-seules remettre en cause les éléments du contrat consacrés en jurisprudence[40]. Cette partie de l'ANI n'est pas normative puisqu'il est seulement prévu l'ouverture d'une réflexion. Cette dernière doit également porter sur *« l'application du principe selon lequel la modification des clauses contractuelles à l'initiative de l'employeur et les modalités de réponse du salarié sont encadrées dans une procédure, de manière à assurer la sécurité juridique des parties »*.

La négociation sur le contrat de travail- Le législateur estime-t-il que le salarié est en mesure de négocier le contenu de son contrat de travail[41] ? Le salarié serait-il en mesure d'évaluer lui-même et de décider les dérogations possibles ou de renoncer à certains droits collectifs ? Cet éclairage nouveau sur la formation du contrat de travail pourrait s'accompagner de la possibilité pour le salarié d'être assisté lors de la négociation portant sur le contenu du contrat de travail. Le législateur a déjà permis au salarié d'être assisté lors de l'entretien préalable de licenciement[42]. Il ne s'agit pas alors de négocier mais d'annoncer au salarié la mesure envisagée et de recueillir les explications de celui-ci[43]. Un ou plusieurs entretiens sont également prévus dans le mécanisme de la rupture

[38] V. par ex. Cass. Soc. 29 mars 1995, Dr. soc. 1995, p. 454.

[39] V. A. Mazeaud, « Un nouveau droit de la formation du contrat de travail dans la perspective de la modernisation du marché du travail ? », Dr. soc. 2008, p. 626.

[40] V. C. Radé, « Le régime du contrat de travail : la porte ouverte…mais à quelles réformes ? », Dr. soc. 2008, p. 295.

[41] A rappr. de l'information des consommateurs. V. J. Calais-Auloy et F. Steinmetz, Droit de la consommation, Précis Dalloz, 7ème éd., 2006, n° 25 : « informer les consommateurs, c'est admettre qu'ils sont capables de défendre eux-mêmes leurs intérêts : la loi se borne à leur donner les moyens de le faire ».

[42] Article L 1232-4 alinéa 2 du Code du travail.

[43] V. l'art. L 1232-3 du Code du travail.

d'un commun accord, au cours desquels *« les parties au contrat conviennent du principe d'une rupture conventionnelle »*[44] et peuvent se faire assister.

Cette possibilité d'assistance est envisagée par l'ANI du 11 janvier 2008 dans le cadre de la rupture conventionnelle, comme permettant de garantir *« la liberté de consentement des parties »*[45]. Pour assurer le même objectif au moment de la formation du contrat de travail, le salarié pourrait se faire assister lors de la négociation. Mais il est difficile d'en esquisser les modalités. Il ne s'agit à ce stade que d'un candidat à l'embauche. Il est difficile de prévoir, comme pour les entretiens précédemment évoqués, une assistance d'une personne appartenant à l'entreprise ou d'un représentant du personnel. Cette faculté serait davantage applicable lors d'une modification du contrat de travail et lors d'une possibilité de dérogation prévue par la loi. Les employeurs seront par ailleurs réticents à accepter la présence d'une personne extérieure à l'entreprise lors de cette négociation sur le contenu du contrat de travail. Le choix pourrait se porter vers une validation *a posteriori* par des instances paritaires. Mais l'on voit aussitôt la lourdeur de ce type de dispositif.

Au regard de la situation dans d'autres Etats, on peut estimer que ces évolutions sont modérées. Les véritables mutations se font discrètement. Le mouvement social, s'il a été très actif lors du Contrat première embauche, n'a pas eu de réaction face à la loi du 4 mai 2004 relative au dialogue social[46]. Cette loi a pourtant inversé la hiérarchie entre l'accord d'entreprise et l'accord de branche. Certes, les branches ont résisté mais le pas est franchi pour une priorité à l'accord d'entreprise et un rétrécissement du champ de l'ordre public social. Va-t-on pour autant vers un accord d'entreprise qui ne serait limité que par des droits fondamentaux, et qui modifierait les contrats de travail, l'accord collectif valant accord des salariés ? Cette évolution n'est pas certaine car elle supposerait pour le moins, comme condition de validité, que l'accord collectif soit effectivement majoritaire et soit signé par des syndicats représentant la majorité des suffrages des salariés. Ce pas là n'est pas encore franchi car il risque de bloquer le développement de la négociation collective dans plusieurs entreprises.

[44] V. l'art. L 1237-12 al. 1 du Code du travail.
[45] V. l'article 12 a) de l'ANI du 11 janvier 2008.
[46] Loi n° 2004-391 du 4 mai 2004 relative à la formation professionnelle tout au long de la vie et au dialogue social (JORF n°105 du 5 mai 2004 page 7983).

L'EVOLUTION DE LA PROTECTION PENALE DU PATRIMOINE EN FRANCE

Claudia LEMARCHAND-GHICA*

RÉSUME

Le droit pénal matérialise la réaction répressive de l'Etat à l'égard des infractions, qui constituent des comportements interdits, et est entièrement dédié à la protection de l'ordre public. La valeur expressive du droit pénal le rend un moyen incontournable d'établir la hiérarchie des valeurs sociales protégées et d'assurer la garantie du pacte fondateur de la société démocratique

MOTS-CLÉ

La protection du patrimoine, infractions classiques, nouvelles infractions, la protection pénale excentrique du patrimoine

L'évolution de la protection patrimoine en France est à la fois un sujet classique et d'une grande modernité. Si le sujet est limité à la sphère du droit français, j'espère, que par sa réflexion d'ensemble, il embrasse l'évolution des systèmes juridiques du monde. Le patrimoine est le fondement de la société civilisée. Jean-Jacques Rousseau expliquait que le premier homme à avoir entouré d'enclos un terrain en affirmant « Ceci est à moi » est le véritable inventeur de la société civilisée. Il accusait ceux qui l'entouraient d'avoir été faibles ou fous de ne pas s'y opposer car la terre, l'air, les fruits sont à tous et cela aurait évité tant de guerres, meurtres, famines, de malheur. Cependant, cet acte est fondateur et il a permis de changer le monde et de construire une société civilisée. Le patrimoine est une constante dans l'histoire, même s'il change de structure selon les époques et les endroits. De Robinson Crusoe, s'appropriant le nécessaire

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pour vivre, jusqu'à Bill Gates et son empire, mille visages du patrimoine s'expriment.

Historiquement, le patrimoine désigne ce qui vient « des pères », de ses aïeux, comprenant les biens de la famille hérités de ses ascendants. Mais le concept repose sur un continuum car, s'il plonge ses racines dans le passé, il trouve un prolongement naturel dans le futur. Le patrimoine reçu des ascendants est transmis aux ascendants, assurant une continuité. La définition juridique du patrimoine est restrictive et le limite à l'ensemble de biens sur lesquels la personne détient des droits. Il est une émanation de personne car toute personne a un patrimoine, mais un seul patrimoine. Le patrimoine est l'ensemble des droits appréciables en argent, constituant une universalité juridique. En effet, il est indépendant des éléments qui le composent, il n'est pas une simple addition de biens. Le patrimoine est, à la fois, une réalité composée d'un actif et d'un passif et une virtualité, une potentialité. Il n'est pas une masse figée de droits, mais un cadre apte à recueillir des biens et des obligations, indépendant de chacune de ses composantes.

Le droit pénal matérialise la réaction répressive de l'Etat à l'égard des infractions, qui constituent des comportements interdits, et est entièrement dédié à la protection de l'ordre public. La valeur expressive du droit pénal le rend un moyen incontournable d'établir la hiérarchie des valeurs sociales protégées et d'assurer la garantie du pacte fondateur de la société démocratique. Ainsi, depuis le siècle des Lumières, le droit pénal est considéré comme le meilleur moyen de mesurer le degré de civilisation d'une société, reposant sur le patrimoine et sa reconnaissance, selon les philosophes des Lumières.

Le patrimoine s'inscrit dans la sphère de répression du droit pénal. Du commandement religieux « Tu ne voleras point ! » aux articles des Codes pénaux contemporains, du « furtum » romain aux définitions de civil law ou de commom law, le droit pénal applique sa force répressive particulière aux infractions contre le patrimoine, même si leur forme ou intensité sont différentes. La protection pénale du patrimoine se détache de sa définition civile. En effet, le droit pénal ne protège pas le cadre universel global du patrimoine, mais les différents éléments le composant. Il est intéressant de savoir quel est le critère retenu par le législateur pour opérer un tri parmi les éléments patrimoniaux dignes de recevoir une protection pénale et ceux qui ne le sont pas. La première conception guidant le législateur repose sur le critère économique. L'atteinte à un droit est punie dès que ce dernier s'incorpore au patrimoine. S'y oppose le critère juridique

qui privilégie la répression en cas d'atteinte à des valeurs sociales consacrées par le droit pénal et revêtues de la sanction la plus grave, la peine. L'application de l'une ou de l'autre de cette théorie n'est pas neutre et détermine l'application de la qualification pénale. Ainsi, en application du critère économique, le créancier qui reprend sa chose au débiteur en cas de non-paiement du prix intégral protège efficacement et licitement ses droits, alors qu'en application du critère juridique, il commet un vol. Mais le choix du critère détermine la politique pénale d'un Etat et, au-delà, la philosophie pénale d'un système. Si le droit pénal privilégie le désir de protéger l'ordre public, assuré par la conception juridique du patrimoine, la répression constitue une réaction sociale à l'infraction et est déclenchée par des atteintes minimales ou virtuelles à l'ordre public. Si le droit pénal privilégie la réalité économique, il tient compte de la valeur vénale des biens protégés et du préjudice subi par la victime. Ces deux conceptions se trouvent placées chacune sur un des plateaux de la balance de la Justice et elles entraînent un mouvement de balancier qui doit assurer un équilibre parfait et une répression équitable.

En effet, si le droit pénal privilégie la conception juridique de la protection du patrimoine, elle n'est pas exclusive de toute considération économique. La conception économique conduit à une protection concentrique du patrimoine, focalisée sur ses composantes classiques. Certes, la structure du patrimoine s'est élargie grâce à la dématérialisation et a entraîné une modification des fondements du droit pénal. Ce dernier opère un retour vers ses sources et le critère juridique entraîne une protection excentrique, substance d'une nouvelle politique pénale. Cette protection élargie peut conduire à des dangers incidents, car la sphère du patrimoine doit être strictement limité aux biens et aucune extension aux personnes (dans leur unité corps-esprit) ne saurait être admise. Cette limite absolue et obligatoire est le garde-fou des sociétés démocratiques et elle ne souffre aucune exception car elle est le postulat essentiel sur lequel repose l'organisation de notre société.

LA PROTECTION PÉNALE CONCENTRIQUE DU PATRIMOINE

La protection pénale du patrimoine se détache de sa définition civile, car le droit pénal punit les atteintes aux différents droits patrimoniaux, sans punir l'atteinte au patrimoine, universalité juridique. Si à l'origine, seul le droit de propriété semblait protégé, actuellement, le droit pénal sanctionne l'inexécution de certaines obligations (abandon de famille, détournements d'objets saisis, organisation frauduleuse d'insolvabilité). L'élargissement

devient incontestable en ouvrant la protection pénale aux droits personnels et non seulement aux droits réels, englobant ainsi des droits extra-patrimoniaux (les droits de la personnalité à l'image ou à la vie privée). Le patrimoine a évolué dans le sens d'une dématérialisation, ce qui a nécessairement modifié les contours de sa protection pénale. Le droit pénal, droit tangible par essence, s'est trouvé confronté à une société hautement consommatrice d'informations, dans le cadre de la vie publique ou privée, personnelle ou professionnelle et contraint de s'adapter à la nouvelle économie de l'immatériel. Si certaines de ces incriminations ont pu ou su s'adapter à cette mutation (A), le législateur a créé un système répressif destiné à appréhender ces nouvelles atteintes (B).

L'ÉVOLUTION DES INFRACTIONS CLASSIQUES

Le Code pénal Napoléon de 1810 tenait compte de la réalité économique et sociale de son époque et centrait la répression sur les atteintes à la propriété. L'étude des « trois glorieuses », les trois incriminations issues du « furtum » romain, illustrent l'évolution globale suivie par le droit pénal. L'escroquerie, l'abus de confiance et le vol partagent une origine commune, mais leur adaptabilité aux modifications technologiques de la société n'est pas la même, ce qui explique leur évolution divergente.

Le vol est défini par le Code pénal comme « la soustraction frauduleuse de la chose d'autrui ». Le choix des termes par le législateur enferme l'incrimination dans un cadre exclusivement matériel. Ainsi, l'atteinte juridique constituée par la violation du droit de la victime se double d'une atteinte matérielle du fait du déplacement de l'objet. S'il est possible de punir le vol d'usage (le fait « d'emprunter » une voiture), le vol par photocopiage (le fait de photocopier des documents appartenant à son employeur), le vol d'énergie (expressément prévu par le législateur pour consacrer une solution traditionnelle de la jurisprudence), le vol exclusif d'informations n'est pas punissable. La question reçoit toute son importance dans une société de l'économie numérique, reposant sur l'échange de données à la vitesse de la lumière, ce qui multiplie les facilités de commission et de dissimulation des infractions. L'incrimination de vol n'est pas applicable aux biens immatériels, la qualification pénale n'étant possible que lorsque le bien s'intègre à un support matériel. Même si la Cour de cassation refuse de formuler un principe général, le vol du contenu informationnel n'est punissable que lorsqu'il est matérialisé (contenu sur un support matériel), en vertu de l'interprétation stricte de la loi pénale puisque

deux éléments constitutifs du vol ont défaut. D'une part, la chose est nécessairement un bien tangible, visible et quantifiable, car elle est limitée aux biens meubles corporels. D'autre part, la soustraction pose le postulat d'un amoindrissement du patrimoine de la victime. Or, l'information n'est pas soustraite à son possesseur, seule sa confidentialité est atteinte. Si la responsabilité pénale pour vol de données est impossible, la qualification pénale est envisageable pour vol de disquette, CD-Rom ou clé USB. Les juges utilisent un artifice juridique de qualification permettant de protéger la valeur économique des données en les incorporant à la valeur juridique protégée, le droit de propriété.

En revanche, l'escroquerie et l'abus de confiance ont connu un mouvement de dématérialisation. L'escroquerie constituée par la remise provoquée par des moyens frauduleux peut porter sur un service (le nouveau Code pénal de 1994), ou sur des fonds (la monnaie scripturale a été assimilée aux espèces), ou sur « un acte opérant obligation ou décharge » embrassant tous les actes formant un lien de droit. L'abus de confiance a connu une évolution rapide dans le cadre de la jurisprudence de la dernière décennie. Selon le C.P., l'abus de confiance constitue un détournement portant sur « des fonds, des valeurs ou un bien quelconque » qui a été préalablement remis à la personne de manière précaire. L'expression de « bien quelconque », plus large que celle de « chose » dans le cadre du vol, permet à la Cour de cassation de dématérialiser le délit en affirmant qu'il ne s'applique pas seulement à un bien corporel, dès lors que ce bien constitue une valeur patrimoniale (numéro de carte bancaire, détournement de la connexion internet professionnelle, d'un projet de création). En revanche, le détournement de la force de travail de salariés à des fins personnelles (le fait d'utiliser des salariés de l'entreprise pour effectuer des travaux d'entretien et ménagers au domicile de cadres de l'entreprise) constitue un abus de confiance uniquement sous la forme de « détournement de fonds » (les salaires devant leur être versés). Cette limite à la dématérialisation est expliquée par les juges comme une conséquence de l'interprétation stricte de la loi pénale (par un raisonnement a contrario), car, au contraire, de l'escroquerie, le nouveau Code pénal n'a pas expressément prévu l'abus de confiance de services.

La terminologie juridique traditionnelle du Code pénal, héritée du dix-huitième siècle, punit les infractions contre les biens, malgré la réforme de 1994. Cependant, le concept des incriminations déborde largement le cadre expressément désigné par le législateur et tient compte de la dématérialisation du patrimoine. En témoignent la création et le développement de nouvelles incriminations.

LA CRÉATION DES NOUVELLES INFRACTIONS

De nombreux textes répressifs modernes protègent des biens incorporels et tiennent compte de cette nouvelle dimension du patrimoine. La simple lecture du classement des plus grandes fortunes mondiales par des magazines économiques permet de suivre cette évolution. Loin de retenir encore les fortunes immobilières et des grandes propriétés terriennes, de jeunes créateurs de sociétés de service informatiques caracolent en tête du classement. Les créateurs de Google ont remplacé les Rotschild et Guggenheim. Certaines matières de droit pénal technique tiennent compte de cette évolution semblent modeler la philosophie protectrice du patrimoine en créant de nouvelles incriminations inspirées de l'économie matérialisée et virtuelle. Très nombreuses, leur étude exhaustive est difficile et se révèle inutile. Mettant en œuvre une politique pénale générale, seule leur inspiration commune est intéressante car elle révèle la nouvelle dimension de la protection pénale du patrimoine.

Le Code pénal punit les atteintes aux systèmes de traitement automatisé de données, en partant de leur source (l'introduction ou maintien dans le système) jusqu'à l'obtention du résultat (modification, altération ou entrave des données ou du fonctionnement du système). Le comportement réprimé consiste en une atteinte totalement dématérialisée à des informations.

La meilleure illustration de la dématérialisation de la protection du patrimoine est constituée par l'évolution du recel. Si sa forme traditionnelle, consistant en la détention de la chose de provenance frauduleuse, est connue depuis l'Antiquité (les pilleurs des pyramides et tombeaux royaux développent cette activité lucrative), sa forme moderne de profit connaît un grand essor dans la société contemporaine. L'article 321-1 du Code pénal réprime le fait, en connaissance de cause, de bénéficier du produit d'un crime ou d'un délit. Ainsi, tombent sous le coup de la loi pénale le passager d'une voiture volée, le mari d'une femme, policier corrompu, qui profite d'un train de vie élevé sans rapport avec les revenus normaux de la profession. Le recel est une incrimination d'une grande modernité sous sa forme « boule de neige » qui permet d'incorporer dans la répression toutes les formes et les modifications que la chose a subies (vente de la chose et investissement de l'argent dans un appartement) et toutes les personnes ayant bénéficié du produit de l'infraction d'origine (tous les comptes bancaires de personnes ayant touché des fonds suspects sont contaminés par la source frauduleuse de l'argent).

Le blanchiment se greffe sur la philosophie répressive du recel, même s'il constitue une manifestation moderne de la lutte contre l'argent sale qui engage le monde entier dans une vaste entreprise de coopération judiciaire en matière pénale. En effet, les différents systèmes de compensation financière électronique et les paradis fiscaux permettent à l'argent d'origine douteuse de circuler à la vitesse de la lumière et d'être intégré dans l'économie légale, permettant d'asseoir l'influence des réseaux criminels organisés. Le blanchiment punit le fait de faciliter, par tout moyen, la justification mensongère de l'origine des revenus de l'auteur d'un crime ou d'un délit ou le fait d'apporter un concours à une opération de placements du produit direct ou indirect d'un crime ou d'un délit. La monnaie scripturale (compte en banque) est le moyen privilégié de commission de ces infractions et le législateur l'assimile juridiquement aux espèces sonnantes et trébuchantes.

Le droit pénal français est donc soumis à une dichotomie puisque certaines incriminations, traditionnelles ou modernes, englobent les biens incorporels dans leur définition légale, alors que d'autres restent imperméables à leur intégration dans le cadre des éléments constitutifs. Les membres de la doctrine conseillent à la Cour de cassation de résoudre par anticipation ces difficultés majeures, résultant de l'économie virtuelle de l'avenir, en retenant une interprétation large englobant « tous les biens sur lesquels une personne possède des droits » et de renoncer à l'idée classique d'infractions contre les biens pour la remplacer par les « infractions contre le patrimoine ». Cette évolution est contenue en germe dans le recel et le blanchiment qui ne punissent pas exclusivement des infractions contre les biens, puisque l'infraction d'origine est indifférente à la qualification pénale (elle est constituée par une infraction contre les personnes). Cette nouvelle analyse procéderait à un renouvellement du droit pénal conforme à ses principes classiques qui permettrait un élargissement de la répression pénale et une protection excentrique du patrimoine.

LA PROTECTION PÉNALE EXCENTRIQUE DU PATRIMOINE

La protection pénale excentrique du patrimoine déborde le cadre individuel du patrimoine de la personne physique. La protection du patrimoine ne repose pas sur l'appauvrissement de la victime ou sur l'enrichissement de l'auteur de l'infraction, donc protège le patrimoine dans sa dimension juridique. Le droit pénal tient nécessairement compte du dommage (la lésion), alors que le préjudice (les conséquences de la lésion) n'est pas essentiel, sa réparation étant une question de responsabilité civile.

Cependant, le droit pénal ne peut être totalement détaché de la réalité économique. S'il continue à punir le vol de choses dépourvues de valeur (fleurs coupées, lettres missives) pour garantir l'ordre public, il ne peut se détacher de la valeur patrimoniale des concepts de l'économie moderne. Les patrimoines collectifs, bénéficiant d'une reconnaissance juridique, sont intégrés dans le périmètre de la protection pénale. Cependant, cette extension ne doit pas opérer à l'infini. Le droit pénal sauvegarde la hiérarchie des valeurs sociales protéges par la société. Certains abus de langage font sortir le patrimoine de sa dimension purement matérielle pour l'étendre aux personnes. Cette extension est dangereuse car elles justifient des atteintes aux personnes, en créant une confusion majeure dans les catégories protégées par le droit pénal.

L'ÉLARGISSEMENT DU PÉRIMÈTRE DE PROTECTION PÉNALE

La publication des résultats de l'économie, dans un contexte anxiogène de crise mondiale, démontre la mutation profonde de la notion de patrimoine. Si les personnes physiques détiennent encore des fortunes considérables, elles semblent minimes en comparaison avec le poids des entreprises dans l'économie mondiale, autant sur le plan purement pécuniaire, que sur le plan des conséquences structurelles sur l'emploi. Le droit pénal a pris en compte cette modification et a élargi son périmètre de protection pénale au patrimoine social. Si le droit pénal des affaires contient de nombreuses incriminations spécifiques, l'abus de biens sociaux constitue l'illustration parfaite de l'évolution du droit pénal. Le Code de commerce, siège de l'infraction, incrimine l'abus de biens, de crédit, de voix et de pouvoirs de la société. Le patrimoine protégé par le droit pénal est le patrimoine de la personne morale, distinct de l'addition des patrimoines individuels des différentes personnes physiques le composant. Le droit pénal punit autant les atteintes aux biens corporels (les biens) que sur les biens incorporels (crédit, voix et pouvoirs), incorporant tous les éléments de l'actif de la société. Le dirigeant ayant des parts dans la société (son patrimoine contient des actions) peut être condamné pour abus de biens sociaux en cas de détournement de biens de la société (incorporés dans le patrimoine social).

Dans la même inspiration, le délit d'initié sanctionne la communication d'une information privilégiée permettant de réaliser directement ou indirectement des opérations boursières avant que les informations soient rendues publiques. L'incrimination punit autant l'atteinte portée au patrimoine de la société que la rupture d'égalité de tous

les investisseurs en utilisant la tricherie et la dissimulation. L'incrimination repose sur l'information privilégiée, définie par le droit comme « des sons, images, documents, données ou messages de toute nature », en respectant l'origine latine étymologique de la notion, « informatio », qui vise le dessin, l'esquisse, la conception. L'information n'est pas considérée par le droit comme une idée abstraite, mais un message communicable, coulée en signes intelligibles donnant naissance à la propriété intellectuelle et artistique.

Le droit de propriété, droit réel caractérisant les biens incorporels, peut s'exercer sur une œuvre de l'esprit. La loi du 12 juin 2009, complétée par la loi du 28 octobre 2009, punit l'infraction aux droits d'auteur, consistant dans le partage des fichiers « peer to peer », par une riposte graduée et crée une nouvelle autorité administrative indépendante, la Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet (HADOPI). La loi a été censurée partiellement à deux reprises par le Conseil constitutionnel qui a considéré que la sanction maximale prévue par le texte, la suspension de la connexion internet de la personne responsable, ne pouvait être prononcé que par le juge pénal, en appréciation des critères de la gravité de l'infraction et la personnalité de l'auteur des faits. Anticipant la condamnation de la Cour européenne des droits de l'homme, les juges constitutionnels ont censuré la procédure administrative qui autorisait la HADOPI à prononcer ces mesures, qui par leur nature et gravité s'incorporent à la matière pénale et nécessitent le respect de l'article 6 de la Convention de sauvegarde des droits de l'homme et du citoyen et la mise en œuvre des garanties du procès équitable.

L'élargissement du périmètre de protection pénale du patrimoine est déterminé par la prise en compte de l'analyse économique de la valeur. A ce titre, l'évolution des concepts de droit pénal s'adapte à l'évolution de la société pour assurer une application harmonieuse et cohérente. Mais, la nature du droit pénal est d'ordre public et elle reflète la hiérarchie des valeurs sociales protégées par le droit pénal. Une mutation des concepts répressifs entraînerait le danger d'une confusion majeure dans la hiérarchie des valeurs sociales pénalement protégées et menacerait la société démocratique.

UNE MUTATION IMPOSSIBLE DES CONCEPTS PÉNAUX

Le concept de patrimoine est intrinsèquement lié à la notion de propriété. Cependant, certaines projections du patrimoine au niveau social excèdent ce cadre originel. Certaines structures collectives disposent de la reconnaissance de leur patrimoine, qu'il soit dans la dimension de

l'infiniment petit ou de l'infiniment grand. Ainsi, les juristes se penchent sur le patrimoine génétique, patrimoine commun à certaines souches de famille, de population ou de races, alors que d'autres travaillent sur le patrimoine de l'Humanité, patrimoine commun aux peuples de la Terre entière. L'UNESCO a adopté La Convention pour la sauvegarde du patrimoine culturel immatériel, alors que les sites inscrits au patrimoine commun de l'Humanité se multiplient et la lutte pour la sauvegarde de l'environnement dégage la Terre comme objet de protection commune, au titre du patrimoine partagé. Le droit pénal protège cette dimension infiniment grande ou petite de l'Humanité (création des crimes contre l'Humanité et contre l'espèce humaine), mais il ne les incorpore pas au patrimoine, tenant aux biens, mais aux personnes. Le patrimoine génétique de la personne est protégé, car le clonage, les recherches génétiques sans le consentement de la personne constituent des infractions gravement punies, mais leur qualification ne relève pas de l'atteinte aux biens, mais de l'atteinte aux personnes. De même, l'enregistrement d'images relatives à la commission d'une infraction violente sur une personne, le happy slapping, ne constitue pas un enregistrement d'informations visuelles puni sous son angle matériel, mais une forme de complicité spécifique de l'infraction commise et filmée, qui est nécessairement une atteinte violente à la personne.

La valeur suprême protégée par le droit pénal est la personne, sa vie et son intégrité, et le patrimoine constitué de biens ne vient qu'en second lieu. Le patrimoine est protégé car il appartient à la personne, devenant une de ses caractéristiques, et nullement l'inverse. La personne n'est pas protégée parce qu'elle possède des biens, preuve en est la protection générale accordée à toute victime, sans distinction portant sur ses possessions matérielles. Toutes les analyses du droit pénal sont inspirées de cette hiérarchie traditionnelle, mais toujours vivante et forte au sein du droit pénal. Ainsi, la légitime défense des personnes est plus largement admise que la légitime défense des biens, les infractions contre les biens constituent normalement des délits, mais elles deviennent des crimes, lorsqu'elles se soldent par des dommages infligées aux personnes.

L'évolution suivie par une infraction emblématique du droit pénal français, l'abus frauduleux de faiblesse, illustre cette inspiration. L'incrimination a été créée comme une infraction satellite de l'escroquerie, mais a été transférée dans le cadre des infractions contre les personnes. La personne d'une particulière vulnérabilité, en raison de son âge, de sa maladie, qui signe des actes de nature à lui causer un préjudice, sous l'influence ou la manipulation de tiers, n'est pas protégée uniquement du point de vue de son patrimoine, mais de manière plus générale, quant à son

niveau de vie et à sa dignité. Alors que la définition légale repose sur l'existence d'un préjudice grave, la jurisprudence sanctionne « un acte de nature à causer un préjudice » et qualifie le délit en présence d'un préjudice moral, ou simplement éventuel.

En conclusion, si la protection pénale du patrimoine a connu un élargissement souhaitable dû à la dématérialisation de l'économie, elle doit s'arrêter aux limites de la protection des biens. Toute extension du patrimoine dans le domaine des personnes recèle un danger majeur. La personne ne serait plus protégée dans sa dimension intrinsèque dictée par la dignité humaine, mais considérée comme constituée de composants multiples soumis à une logique économique. Le commerce des ces « biens » serait envisageable. Sans faire référence aux scènes décrites par Victor Hugo dans « Les misérables » de cette pauvre Fantine, vendant cheveux et dents, cette analyse risque de nous propulser dans « Le meilleur des mondes » décrit par Aldous Huxley. Ce n'est pas un simple voyage dans la science-fiction que je vous propose, mais certaines dérives apparaissent déjà. Dans l'affaire du sang contaminé, affaire qui a marqué la vie juridique et politique française pendant vingt ans (des produits de sang contaminés par le virus du SIDA ont été maintenus sur le marché pour des considérations purement mercantiles et ont contaminés plusieurs centaines d'hémophiles), a qualification pénale retenue a été la tromperie sur « les qualités substantielles de la marchandise ». Le sang, considéré comme une « marchandise », ouvre le chemin à la mercantilisation du corps humain qui pourrait être intégré au patrimoine. Il est important de ne pas glisser du droit pénal vers le droit vénal en suivant certaines dérives de la société contemporaine. Le droit pénal doit rester le garant de la hiérarchie de valeurs fondatrice de notre société.

LE ROLE DU *SOFT LAW* DANS L'INTERPRETATION DU DROIT INTERNATIONAL

Julien CAZALA*

RÉSUME

L'auteur fait une analyse du soft law qui est présente comme l'expression par laquelle nous désignerions « des règles dont la valeur normative serait limitée soit parce que les instruments qui les contiennent ne seraient pas juridiquement obligatoires, soit parce que les dispositions en cause, bien que figurant dans un instrument contraignant, ne créeraient pas d'obligation de droit positif, ou ne créeraient que des obligations peu contraignantes ».

MOTS-CLÉ

Soft law, la convention de Vienne, hard law, la Convention Ospar

Le dictionnaire du droit international publié sous la direction de Jean Salmon nous livre les éléments suivants de définition du *soft law*. Il s'agirait l'expression par laquelle nous désignerions « des règles dont la valeur normative serait limitée soit parce que les instruments qui les contiennent ne seraient pas juridiquement obligatoires, soit parce que les dispositions en cause, bien que figurant dans un instrument contraignant, ne créeraient pas d'obligation de droit positif, ou ne créeraient que des obligations peu contraignantes ». Les formules utilisées appellent quelques observations. Sont visées par le dictionnaire Salmon « des règles dont la valeur normative serait limitée ». Si elle est limitée, on peut se demander quel peut être l'éventail de cette normativité[1]. On serait dans un domaine étranger à la logique du 1 ou 0[2]. Toutes les subtilités et les raffinements normatifs

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[1] Serge Sur, « Quelques observations sur les normes juridiques internationales », Revue générale de droit international public, 1985, n° 4, p. 911.

[2] Alain Pellet réfute l'idée d'un seuil entre le droit et le non-droit mais évoque un « dégradé normatif » : Alain Pellet, « Le ''bon droit'' et l'ivraie – Plaidoyer pour l'ivraie (Remarques

seraient ouverts aux sujets de droit international par la voie du *soft law* que l'on désigne en français par droit mou, droit souple ou droit vert[3]. La variété des effets normatifs serait encore renforcée par la profonde hétérogénéité de la catégorie *soft law*. Entreraient dans la catégorie, des instruments aussi différents que la déclaration universelle des droits de l'homme de 1948 et l'appel d'Heidelberg lancé en 1992 par plus de 250 chercheurs de renom avant l'ouverture de la Conférence de Rio sur l'environnement et le développement[4]. Cet exemple renvoie à un élément important de classification des instruments *soft law* à raison de leur origine. Ainsi, dans un article stimulant sur la question mais excessif dans ses conclusions, Andrew T. Guzman et Timothy L. Meyer considèrent ils que tout ce qui est *law-like*, tout ce qui ressemble à du droit peut être classé dans la catégorie *soft law*[5]. Si les manifestations les plus fréquentes du *soft law* concernent des actes adoptés par les Etats au sein des organisations internationales ou lors de conférences internationales, il est également raisonnable de classer sous cet énoncé attrape tout, les codes de conduite privée. Certains de ces codes, ou lignes directrices jouent un rôle considérable en droit international. C'est notamment le cas, dans le champ du droit du commerce international des Principes Unidroit[6]. La pratique est en cette matière particulièrement volatile, rétive à toute forme de systématisation. Nous n'évoquerons pas cette forme de *soft law* qui a ses caractéristiques propres. Nous ne suivrons pas non plus les pistes ouvertes par certains auteurs considérant que l'on peut rattacher à la catégorie *soft law* les principes généraux de droit et les standards. L'argument en faveur de l'inclusion exposé avec une grande prudence par Jean-Michel Jacquet consiste à affirmer que les normes à contenu flexible, voire multiple peuvent de ce fait être classées dans la catégorie objet de l'étude[7]. Il semble dès lors que la thèse défendue consiste à affirmer que l'entrée dans la catégorie se fait par

sur quelques problèmes de méthode en droit international du développement », Le droit des peuples à disposer d'eux-mêmes – Méthodes d'analyse du droit international – Mélanges offerts à Charles Chaumont, Pedone, Paris, 1984, p. 488.

[3] La Commission spécialisée de terminologie et de néologie préconise l'usage de l'expression « droit souple » : Les Annonces de la Seine, 2008, n° 20, p. 4.

[4] Appel d'Heidelberg, 14 avril 1992 (rendu public le 1er juin 1992) reproduit dans D. Lecourt, Contre la peur, P.U.F., Paris, 1999, pp. 160-161.

[5] Andrew T. Guzman, Timothy L. Meyer, « International Soft Law », non publié, p. 4.

[6] Sur la question Stefan Vogenauer, Jan Kleinheisterkamp (ed.), *Commentary on the UNIDROIT principles of international commercial contracts (PICC)*, Oxford University Press, 2009, 1319 pages.

[7] Jean-Michel Jacquet, « L'émergence du droit souple (ou le droit ''réel'' dépassé par son double) », Etudes à la mémoire du professeur Bruno Oppetit, Litec, Paris, 2009, p. 334.

la voie de l'absence de caractère obligatoire ou de l'indétermination du contenu pour les normes formellement obligatoires. La prétention ne nous semble pas devoir être suivie, même si nous reconnaissons que tout est question de convention de langage (la définition du *soft law*) ; il est plus fréquent d'intégrer les standards dans la catégorie du droit flou ou *fuzzy law*[8]. En effet, il serait douteux de considérer qu'il est possible de remiser dans une même catégorie des notions aussi essentielles que la bonne foi, des standards comme le raisonnable et des énoncés programmatiques comme l'affirmation d'un rôle vital des femmes dans la gestion de l'environnement[9].

Si l'on donne foi à la définition du dictionnaire de droit international, nous pourrons considérer que relèvent de la catégorie, les actes des organisations internationales dépourvus de caractère obligatoire, mais aussi les préambules des traités, les dispositions conventionnelles rédigées en des termes n'entraînant pas une modification de l'ordonnancement juridique, les traités non encore en vigueur voire plus en vigueur ou encore les déclarations finales de conférences internationales ; la présente liste n'est pas exhaustive.

Si le critère d'indentification du *soft law* est l'absence de caractère obligatoire, il est nécessaire de préciser le sens de cette expression. L'effet premier de la règle de droit dur (*hard law*) est d'exprimer un commandement, une habilitation ou une interdiction pour son destinataire. Un énoncé *soft law* serait dépourvu de cette qualité. Mais est-ce à dire qu'il sera privé d'effet juridique ? Si la réponse à cette question est évidemment et universellement reconnue comme négative, il n'en demeure pas moins complexe de déterminer ce que peuvent être les effets de l'énoncé *soft law*. Or, c'est à raison de ses effets que la catégorie existe. C'est bien parce qu'il ne s'agit ni vraiment de droit ni vraiment de non-droit mais d'une catégorie frontière, mouvante et étrangère à une classification binaire rigide que l'expression *soft law* a été façonnée. Comme le relève Guy de Lacharrière, « dans les expressions de droit mou, tendre ou vert, il y a tout de même droit et c'est bien pourquoi on peut parler d'ambiguïté, ou plutôt d'une certaine ambiguïté »[10]. Dans le même sens Jean-Michel Jacquet affirme que « [s]i non obligatoire était synonyme de ''ne produisant aucun effet'', il ne serait

[8] Mireille Delmas Marty, *Le flou du droit*, PUF, Paris, 2004, 352 pages.
[9] Déclaration finale de la Conférence des Nations Unies sur l'environnement et le développement, 14 juin 1992, principe n° 20.
[10] Guy de Lacharrière, *La politique juridique extérieure*, Economica, Paris, 1983, p. 102.

pas justifié de parler de droit souple »[11]. C'est essentiellement à ces effets que l'on va s'intéresser pour essayer de comprendre quel est aujourd'hui l'impact de la multiplication des énoncés *soft law* sur la scène internationale.

Dans le processus interprétatif, le recours aux instruments *soft law* peut être pertinent dans le cadre de la prise en compte du contexte de la norme objet de l'interprétation (§ 1). La notion de contexte n'est pas clairement définie mais il est acquis qu'elle ne se limite pas à l'environnement juridiquement contraignant de la norme interprétée. Il n'est pas rare d'assister à un glissement conceptuel de la prise en compte d'une norme extérieure dans le processus interprétatif vers une tentative d'application de cette norme (§ 2).

1. LA CONTEXTUALISATION

Les dispositions relatives à l'interprétation de la convention de Vienne sur le droit des traités sont constamment considérées représentatives de l'état du droit international coutumier[12]. Celles-ci peuvent être ainsi présentées : le texte de l'instrument conventionnel doit être interprété selon le sens ordinaire de ses termes, dans son contexte et à la lumière de son objet et de son but. Si à l'issue de cette démarche le résultat de l'interprétation est clair il n'est pas nécessaire de recourir aux travaux préparatoires.

Les travaux préparatoires sont des propositions avancées et observations faites lors des négociations de l'instrument conventionnel objet de l'interprétation. L'ancrage des travaux préparatoires dans ce que l'on désigne traditionnellement sous l'appellation *soft law* n'est pas incontestable, il n'est donc pas nécessaire de développer ce point. Le rôle résiduel que l'on fait jouer à celles-ci dans le processus d'interprétation ne va pas sans présenter des difficultés. Lorsque le juge ou l'arbitre procède à l'interprétation d'une norme conventionnelle en recourant aux méthodes de l'article 31 de la Convention de Vienne, il lui sera possible de rechercher le

[11] Jean-Michel Jacquet, « L'émergence du droit souple (ou le droit ''réel'' dépassé par son double) », Etudes à la mémoire du professeur Bruno Oppetit, Litec, Paris, 2009, p. 336. Dans le même sens Georges Abi-Saab, « Cours général de droit international », Recueil des Cours de l'Académie de Droit International, 1987-VII, vol. 207, p. 208.

[12] Rosalyn Higgins y voit un lieu commun (commonplace), Affaire des plates-formes pétrolières (République islamique d'Iran c/États-Unis d'Amérique), C.I.J., arrêt 6 nov. 2003, opinion individuelle de Mme le juge Higgins, § 45.

sens ordinaire d'un terme dans des instruments conventionnels ou non conventionnels auxquels les Etats concernés sont ou non parties.

L'élément essentiel pour notre étude est la référence au contexte de la disposition interprétée. Robert Kolb indique que « [l]a fonction générale du ''contexte'' comme élément d'interprétation est d'éclairer un texte ou un ensemble normatif en permettant de le voir (et de le supposer) comme un tout cohérent »[13]. Dans l'affaire *Loizidou*, devant la Cour européenne des droits de l'homme, la Turquie affirmait l'existence d'un « principe bien établi du droit international [voulant] qu'une expression utilisée dans un traité ait le même sens lorsqu'elle figure dans un autre »[14]. Ce principe qui, s'il existe, peut être rattaché à l'article 31.1 de la Convention de Vienne (sens ordinaire des termes à la lumière de l'objet et du but du traité) est très certainement la méthode de base utilisée par l'interprète, elle permet de montrer que, domaine par domaine, la pratique conventionnelle des États est cohérente. Cela permet d'affirmer, sinon une parfaite unité, au moins des traits communs entre des instruments de droit international économique[15], de droit international des droits de l'homme[16], etc. Les arbitres ne disent pas autre chose dans la sentence rendue dans l'affaire de l'*accès à l'information en vertu de l'article 9 de la Convention Ospar* lorsque est affirmé que « [t]he primary purpose of employing the similar language is to create uniform and consistent legal standards in the field of the protection of the marine environment, and not to create a precedence of one set of legal remedies over the other »[17].

La question du rôle des instruments concertés non conventionnels ou des actes non contraignants des organisations internationales dans le processus interprétatif se pose avec une plus grande acuité. Nous pouvons prendre pour point de départ de notre réflexion un exemple tiré du droit européen. En l'absence de définition du principe de précaution dans le traité communautaire, les juges de Luxembourg ont eu recours à des instruments

[13] Robert Kolb, *Interprétation et création du droit international* - Esquisse d'une herméneutique juridique moderne pour le droit international public, Bruylant, Bruxelles, 2006, p. 474.

[14] Loizidou c. Turquie, C.E.D.H., exceptions préliminaires, 23 mars 1995, para 67.

[15] Pope and Talbot Inc. v. Government of Canada, Awards on the merits of phase 2, 10th April 2001, I.L.R., vol. 122, pp. 379-384.

[16] Islam v. Secretary of State for the Home Department, England, House of Lords, 25th March 1999, I.L.R., vol. 124, p. 505.

[17] Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v. United Kingdom of Great Britain and Northern Ireland), P.C.A., final award, 2nd July 2003, § 143.

non contraignants pour en dégager le sens. Ils ont notamment fait appel à la *Communication de la Commission sur le recours au principe de précaution* qui, n'a en principe qu'une valeur indicative. Les auteurs de ce texte indiquent en effet que « les lignes directrices qui figurent dans la présente Communication sont destinées seulement à servir de guide général et ne doivent en rien modifier ou affecter les dispositions du traité ou du droit dérivé de la Communauté »[18]. L'utilisation de ce texte par le juge communautaire montre quelles peuvent être les potentialités de ce type d'instrument. Le juge précise que l'on ne saurait contester la validité d'un règlement communautaire par rapport à une communication de la Commission, mais nuance son propos en affirmant, « par sa publication, la Commission visait à informer toutes les parties intéressées non seulement sur la manière dont la Commission entendait appliquer le principe de précaution dans sa pratique future, mais aussi sur la façon dont elle l'applique déjà à ce moment-là »[19]. Plus loin dans ces deux arrêts, le Tribunal de première instance parle au sujet de la Communication de reflet de « l'état du droit »[20] ou de « codification de l'état du droit »[21]. Ces précédents montrent que confronté à une mention au principe de précaution sans définition, une juridiction internationale a pu se référer à d'autres instruments plus précis utilisant la même notion, que ces instruments soient ou non contraignants. Mais il faut relever ici qu'il est fait référence à un ensemble contraignant par renvoi à l'état du droit ou à l'idée de codification. Cette pratique n'est pas l'exclusive du juge communautaire. On retrouve une démarche similaire devant tous les organes internationaux de règlement des différends ou au sein des organisations internationales. Ainsi, Francis

[18] Communication de la Commission sur le recours au principe de précaution, 2 février 2000, Com(2000)1final, p. 8.

[19] Pfizer Animal Health SA c. Conseil de l'Union européenne, T.P.I.C.E., arrêt 11 septembre 2002, aff. T-13/99, Rec., p. II-3374, § 137, voir également §§ 156, 158-159. Alpharma Inc. contre Conseil de l'Union européenne, T.P.I.C.E., arrêt 11 septembre 2002, aff. T-70/99, Rec., p. II-3560, § 144.

[20] Pfizer Animal Health SA c. Conseil de l'Union européenne, T.P.I.C.E., arrêt 11 septembre 2002, aff. T-13/99, Rec., p. II-3369-3370, § 123 et Alpharma Inc. contre Conseil de l'Union européenne, T.P.I.C.E., arrêt 11 septembre 2002, aff. T-70/99, Rec., p. II-3560, § 144. Le T.P.I.C.E. vise également un document de travail antérieur de la Commission (ni adopté, ni publié), Lignes directrices sur l'application du principe de précaution, 17 octobre 1998, voir § 121 de l'arrêt Pfizer et § 142 de l'arrêt.

[21] Pfizer Animal Health SA c. Conseil de l'Union européenne, T.P.I.C.E., arrêt 11 septembre 2002, aff. T-13/99, Rec., p. II-3377, § 149 et Alpharma Inc. contre Conseil de l'Union européenne, T.P.I.C.E., arrêt 11 septembre 2002, aff. T-70/99, Rec., p. II-3566, § 162.

Aimé Vallat indique-t-il dans un cours dispensé à l'Académie de droit international que « [r]esolutions [adopted within the General Assembly] may be a strong evidence of the proper interpretation of the Charter or of generally accepted principles of international law »[22].

On remarque que la nature de l'instrument *soft law* ne semble pas jouer un rôle déterminant dans sa prise en compte par le juge international. Simple acte concerté non conventionnel ou convention internationale non entrée en vigueur peuvent ainsi être traités dans un même élan. Dans l'affaire de l'*accès à l'information en vertu de l'article 9 de la Convention Ospar*, l'Irlande demandait au tribunal de prendre en compte la Convention d'Aarhus sur l'accès à l'information en matière d'environnement dans l'interprétation de certaines dispositions de la Convention pour la protection de l'environnement marin de l'Atlantique du Nord Est (OSPAR). Or, si la Convention d'Aarhus est effectivement entrée en vigueur, celle-ci n'est pas applicable entre l'Irlande et le Royaume-Uni dans la mesure où les deux États ont signé (mais pas ratifié) celle-ci[23]. Les conventions non encore entrées en vigueur sont du *hard law* en puissance. Il convient de distinguer au moins deux situations. L'absence d'entrée en vigueur objective et l'absence d'entrée en vigueur subjective. Dans le premier cas les conditions à son entrée en vigueur posées par l'instrument lui-même ne sont pas encore satisfaites. Il s'agit le plus souvent pour les traités multilatéraux de poser une exigence de dépôt d'un nombre suffisant d'instruments de ratification auprès du dépositaire du traité. Le respect d'une telle exigence permet de s'assurer ainsi que dès son entrée en vigueur le traité aura vocation à régir les relations internationales d'un nombre conséquent d'Etats intéressés. Ainsi, la Convention des Nations Unies sur le droit de la mer et le traité portant Statut de la Cour pénale internationale exigent le dépôt de soixante instruments de ratification pour entrer en vigueur. Douze ans furent nécessaires pour satisfaire cette condition dans le premier cas tandis qu'il en fallu moins de trois dans le second. Le statut de ces accords dans l'attente de leur entrée en vigueur est délicat à envisager. Ils ne sont pas *hard law* mais restent des instruments juridiques, négociés comme tels. Ils constitueront ainsi des éléments de choix pour le juge international dans le processus interprétatif, spécialement si les Etats parties à l'accord objet de

[22] Francis Aimé Vallat, « The Competence of the United Nations General Assembly », Recueil des Cours de l'Académie de Droit International, 1959, vol. 97, p. 231.

[23] Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v. United Kingdom of Great Britain and Northern Ireland), PCA, final award, 2nd July 2003, Dissenting opinion of M. Gavan Griffith, § 19.

l'interprétation sont également signataires de l'accord de ''référence'' non encore en vigueur. En outre, aux termes de l'article 18 de la Convention de Vienne sur le droit des traités, « [u]n Etat doit s'abstenir d'actes qui priveraient un traité de son objet et de son but : *a*) Lorsqu'il a signé le traité ou a échangé les instruments constituant le traité sous réserve de ratification, d'acceptation ou d'approbation, tant qu'il n'a pas manifesté son intention de ne pas devenir partie au traité ». Il est évident que cette obligation de bonne foi peut étendre ses effets dans le processus interprétatif.

2. LIEN ENTRE INTERPRÉTATION ET APPLICATION

Le lien entre deux instruments, l'un contraignant, l'autre non est parfois particulièrement significatif. Ainsi, le juge Tanaka, dans l'opinion jointe à l'arrêt rendu par la Cour internationale de Justice en 1966 dans l'affaire du *Sud ouest africain* évoque le cas de la « Déclaration universelle des droits de l'homme adoptée par l'Assemblée générale en 1948 [qui] constitue, sans avoir force obligatoire par elle-même, la preuve de l'interprétation et de l'application qu'il convient de donner aux dispositions pertinentes de la Charte »[24].

Lorsque l'Assemblée générale des Nations Unies adopte une résolution en relation avec un instrument conventionnel contraignant, l'influence de l'un sur l'autre peut présenter des difficultés. On peut évoquer un exemple tiré de la confrontation du droit international des réfugiés à la lutte internationale contre le terrorisme. La Convention de Genève de 1951 pose le principe dit de « non-refoulement ». L'article 33 de la Convention dispose :

« 1. Aucun des Etats Contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays ».

[24] Sud-ouest africain, deuxième phase (Ethiopie c. Afrique du sud ; Libéria c. Afrique du sud), C.I.J., arrêt, 18 juillet 1966, opinion dissidente de M. Tanaka, Rec., p. 293.

Bien avant la perpétration des attentats du 11 septembre 2001 sur le territoire des Etats-Unis, l'Assemblée générale des Nations Unies a multiplié son activité normative afin de renforcer la lutte contre le terrorisme international Or, la confrontation de certaines résolutions au texte de la Convention de Genève n'est pas sans poser des problèmes du point de vue de la détermination des effets normatifs des résolutions de l'Assemblée générale. Dans sa résolution 51/210 de 1997, l'Assemblée générale note « que la Convention relative au statut des réfugiés, faite à Genève le 28 juillet 1951, ne peut être invoquée pour protéger les auteurs d'actes de terrorisme, notant également dans ce contexte les articles 1, 2, 32 et 33 de la Convention, et soulignant à cet égard qu'il est nécessaire que les États parties appliquent convenablement la Convention »[25]. L'assemblée générale ajoute dans le même texte que «la présente Déclaration n'affecte pas la protection fournie aux termes de la Convention et du Protocole et en vertu d'autres dispositions du droit international »[26]. Malgré cette dernière précaution, comment peut-on penser que la résolution en question n'aura aucune influence sur la manière dont les Etats vont interpréter et appliquer la convention de Genève de 1951 ?

Le juge interne peut être confronté à ce type de situation. Il peut prendre en compte des instruments internationaux dépourvus de tout caractère contraignant dans l'examen de la contestation d'un acte de l'administration. On peut en donner deux exemples récents dans la pratique du juge administratif français. Dans l'affaire *Gagnidze*[27], le Conseil d'Etat se réfère aux critères fixés par l'Union européenne pour le financement d'un établissement pénitentiaire en Géorgie au titre de l'appréciation des risques auxquels y sont exposés les détenus. Cet élément pourra être pris en compte dans le cadre de la contestation d'un décret d'extradition sur le fondement de l'article 3 de la Convention européenne des droits de l'homme. L'instrument *soft law* joue ici un rôle important dans l'établissement d'un fait ou d'une présomption de fait. Dans l'affaire *Société TOP SA*[28], c'est une méthode d'analyse préconisée par l'Organisation des Nations Unies pour l'alimentation et l'agriculture (FAO) qui est prise en compte dans l'appréciation de la fiabilité des analyses sur lesquelles se fonde la décision de retrait de l'autorisation de mise sur le marché d'un produit.

[25] Mesures visant à éliminer le terrorisme international, A/RES/51/210, 16 janvier 1997. Principes réaffirmés dans Mesures visant à éliminer le terrorisme international, A/RES/64/118, 15 janvier 2010.
[26] Mesures visant à éliminer le terrorisme international, A/RES/51/210, 16 janvier 1997.
[27] CE, 21 décembre 2007, Gagnidze, n° 306448.
[28] CE, 27 février 2008, Société TOP SA, n° 270727.

On retrouve ici une situation proche de celle que l'on rencontre dans le cadre de l'Organisation mondiale du commerce[29]. L'accord de l'OMC sur l'application des mesures sanitaires et phytosanitaires prévoit en effet que « les mesures sanitaires ou phytosanitaires qui sont conformes aux normes, directives ou recommandations internationales seront réputées être nécessaires à la protection de la vie et de la santé des personnes et des animaux ou à la préservation des végétaux, et présumées être compatibles avec les dispositions pertinentes du présent accord et du GATT de 1994 »[30]. Le droit de l'OMC ouvre de la sorte la possibilité pour les Membres de l'organisation de justifier, *a priori*, une mesure restrictive aux échanges par sa conformité à une norme adoptée dans l'enceinte d'une autre organisation internationale telle que la FAO. L'accord sur les obstacles techniques au commerce donne de ces normes une définition extensive, il s'agit d'un « document approuvé par un organisme reconnu, qui fournit, pour des usages communs et répétés, des règles, des lignes directrices ou des caractéristiques pour des produits ou des procédés et des méthodes de production connexes, dont le respect n'est pas obligatoire. Il peut aussi traiter en partie ou en totalité de terminologie, de symboles, de prescription en matière d'emballage, de marquage ou d'étiquetage, pour un produit, un procédé ou une méthode de production donnée »[31]. La même définition est transposable dans le cadre du renvoi effectué par l'accord SPS. C'est donc par référence à une proposition dépourvue de force obligatoire qu'un Membre de l'OMC va pouvoir justifier une mesure attentatoire aux principes auxquels il a adhéré en matière d'échange international. Un Membre de l'OMC qui décide de prendre une mesure sanitaire ou phytosanitaire conforme aux standards du *Codex*, n'aura pas à justifier scientifiquement sa mesure. En revanche, le Membre désirant établir des normes plus protectrices (plus restrictives aux échanges) que les standards

[29] Sur cette question : Julien Cazala, « « Les renvois opérés par le droit de l'Organisation mondiale du commerce à des instruments extérieurs à l'organisation », Revue Belge de droit international, 2005, n° 1-2, pp. 527-558 ; Julien Cazala, « La force normative des instruments du Codex alimentarius dans le cadre de l'Organisation mondiale du commerce », in Catherine Thibierge (dir.), La force normative – Naissance d'un concept, Bruylant - LGDJ, Bruxelles - Paris, 2009, pp. 335-343.

[30] Dans le même sens, Accord sur les obstacles techniques au commerce, Marrakech, 15 avril 1994, article 2.5. Les dispositions de l'ALENA relatives aux mesures sanitaires, phytosanitaires et techniques répondent à la même logique, Accord de libre échange nord-américain, 17 décembre 1992, articles 713.2 (SPS) et 905.2 (OTC).

[31] Accord sur les obstacles techniques au commerce, annexe 1, pt. 2.

internationaux, ce qui est un droit reconnu par l'article 3.3 de l'accord SPS, devra prouver scientifiquement le bien fondé de sa mesure.

Le renvoi opéré par le droit de l'OMC à ces normes extérieures n'a aucune influence sur la nature juridique de ces normes. Ce qui n'est pas obligatoire à l'extérieur de l'organisation (sauf manifestation de volonté des Etats) ne le sera pas plus à l'intérieur[32]. Ainsi, dans l'affaire *hormones*, l'organe d'appel refuse logiquement l'idée selon laquelle l'accord SPS rend obligatoires les standards du *Codex alimentarius*[33]. Il en va de même dans l'affaire relative aux *Mesures affectant l'approbation et la commercialisation des produits biotechnologiques*[34]. Il n'en reste pas moins aisé de comprendre l'enjeu de ces normes visées par le renvoi pour les Membres de l'Organisation mondiale du commerce. Bien que dépourvues de force obligatoire, elles sont dotées d'une réelle autorité dans le champ de compétence de l'OMC. Certes, il ne s'agit que d'assurer une présomption simple de compatibilité avec le droit de l'OMC, mais les domaines dans lesquels ces normes interviennent (risque sanitaire notamment) sont si techniques que cette présomption est très délicate à renverser et ne l'a pour l'heure jamais été. Cette situation a suscité de vives protestation de la part de la Communauté européenne qui dans l'affaire *hormones* s'est heurtée à une norme adoptée à une très faible majorité dans le cadre de la Commission du *Codex alimentarius*[35]. Les conséquences sont rapidement apparues. Avant 1995, les normes *Codex* étaient adoptées par consensus au sein de la Commission sans que les difficultés ne soient très vives. En revanche, depuis que le renvoi opère, l'enjeu de ces normes est si important qu'il n'est pas rare de voir les membres de la Commission du *Codex* recourir aux voix pour adopter ce type de texte pourtant dépourvu de caractère obligatoire (sauf manifestation de la volonté des membres)[36]. Cette situation est une manifestation très

[32] Contra : David A. Wirth, « Compliance with Non-Binding Norms of Trade and Finance », Dinah Shelton (ed.), Commitment and Compliance - The Role of Non-Binding Norms in the International Legal System, Oxford, Oxford University Press, 2000, p. 339 et Mary Ellen O'Connell, « The Role of Soft Law in a Global Order », ibid., p. 112.

[33] Mesures communautaires concernant les viandes et les produits carnés (hormones), organe d'appel, rapport, 16 janvier 1998, WT/DS26/AB/R et WT/DS48/AB/R, para 165.

[34] Communautés européennes – Mesures affectant l'approbation et la commercialisation des produits biotechnologiques, WT/DS291/R Add.4 , WT/DS292/R, WT/DS293/R, groupe spécial, rapport, 29 septembre 2006, para F-66 et F-130.

[35] Mesures communautaires concernant les viandes et les produits carnés (hormones) plainte déposée par les Etats-Unis, groupe spécial, rapport, 18 août 1997, WT/DS26/R/USA, para 4.77.

[36] Commission du Codex Alimentarius, Manuel de procédure, FAO-OMS, Rome, 8ème éd., 1993. On pourra également se reporter à Mesures communautaires concernant les viandes

claire de l'hypothèse dans laquelle l'énoncé *soft law* joue un rôle « de relais ou, mieux encore [permet d']agir en synergie avec le droit positif en vigueur considéré comme inadéquat ou insuffisant »[37]. Il n'en reste pas moins que c'est par un renvoi opéré par l'énoncé *hard law* que la prise en compte pourra avoir lieu[38].

et produits carnés (hormones) – Plainte déposée par les Etats-Unis, groupe spécial, rapport, 18 août 1997, WT/DS26/R/USA, para 2.15. Sara Poli, « The European Community and the Adoption of International Food Standards within the Codex Alimentarius Commission », European Law Journal, 2004, pp. 613-630.

[37] Jean-Michel Jacquet, « L'émergence du droit souple (ou le droit ''réel'' dépassé par son double) », Etudes à la mémoire du professeur Bruno Oppetit, Litec, Paris, 2009, p. 342.

[38] Sandrine Maljean-Dubois, « Relations entre normes techniques et normes juridiques : illustrations à partir de l'exemple du commerce international des produits biotechnologiques », Estelle Brosset, Eve Truilhé-Marengo (dir.), Les enjeux de la normalisation technique internationale. Entre environnement, santé et commerce international, La documentation française, Paris, 2006, p. 211.

THE EXTINCTIVE PRESCRIPTION OR LACK OF PRESCRIPTION OF THE GROUNDED ACTION FOR RECOVERY ACCORDING TO THE PRIVATE PROPERTY RIGHT

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ABSTRACT

Since the new regulations still delays, currently, interpreted in this spirit and not its wording, Article 1890 Civil Law, is applied to any real susceptible rights of cancellation, or, according to the case by acquisition by prescription. As the property right is not cancelled by lack of use, the recovery action also cannot be cancelled by the simple fulfillment of the extinctive prescription term, but only indirectly by effect of acquisitive prescription. In this manner, only by acquisitive prescription, Article 1890 Civil Law, extends its effects on the recovery action, in the sense that the 30 year period is acquisitive for the person resorting to acquisitive prescription for the owner of the asset subject to the acquisitive prescription. As a consequence, the right to recover the property is cancelled in the case of prescription only together with the property itself, by effect of acquiring the good as a consequence of acquisitive prescription, without making a difference in its nature.

KEYWORDS

Imprescriptibility, Art. 1890 Civil law, recovery action, article 1909 paragraph 2 Civil law

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1. PRELIMINARIES REGARDING THE PRESCRIPTION REGULATION OF THE ACTION FOR PROPERTY RECOVERY

In the context of absence of a clear and precise regulation, but also based on the text of law[1], that directly or indirectly settle the imprescriptibility of the action for real estate or movable recovery based on the public property right, matter of extinctive prescription, precisely the prescriptibile or imprescriptible character of the real estate or movable assets recovery[2] based on private property, has been the object of doctrinaire controversy magnified after the Ordinance no. 167/1958 regarding extinctive prescription [3]. *De lege lata* neither the Civil Law or other special provisions contain a text of law that would represent *the foundation of extinctive prescriptibility or imprescriptibility of the recovery action in the purpose of capitalizing the private property right.*

[1] Article 136 point 4 from the Romanian Constitution in revised form, although in terminis it does not foresee the public property goods' imprescriptibility, resorting to stating: "the public property goods are inalienable...", the imprescriptible character exceeds all debates to the extent to which the imprescriptibility, acquisitive or extinctive, represents the collorary of inalienability, an asset being imprescriptibile to the extent to which it is inalienable (M. Nicolae - Prescripția extinctivă [Extinctive Prescription, , Rosetti Publishing House, Bucharest, 2004, page 381). In return, Article 1844 Civil Code, expressly foresees: "the possessions' domain, that through their own nature, or through a statement of the law, can not be prescribed, they can not be a private property object, but they are eliminated from trade" (the text consideres the goods pertaining to public domain). Law no. 213/1998, regarding public property and its legal regime (published in the Official Gazette no. 448/November 24th 1998, with the subsequent addendums), although it does not expressly regulate the imprescriptible character of the public property goods' recovery action, states under Article 11 paragraph 1: "the public domain goods' are inalienable, cannot be initiated before the court and are imprescriptible, as follows: [...] c) can not be acquired by other persons by acquisitive prescription or by effect of bona fide possession on movable assets". So, as these assets are inalienable and cannot be acquired by effect of acquisitive prescription or of the bona fide possession, they can be claimed anytime and against any persons, implicitly revealing the imprescriptible character under the extinctive aspect of such action. In the same manner, with the correspondent determinations, the Law of Public Local Administration no. 215/2001 (republished in the Official Gazette no. 123/ February 20th 2007, with the subsequent modifications) orders in Article 122 paragraph 2: "The assets part of public domain are inalienable, imprescriptible and procedures cannot be initiated before the Court to claim them".

[2] The legal regime of the claim action will be applied also for the capitalization action of real rights - dismemberment of the property right, respectively of negatory, confession actions and in limitation.

[3] Published in the Official Bulletin No. 19/21, April 1958, republished in the Official Bulleting No. 11/15 July 1960 with the subsequent modification (Article 3 and 6).

In the incomplete and unclear formulation of Article 1890, The Civil Law resorts to order: „ *all actions, both real and personal, declared imprescriptible by the law and for which no prescription term was defined, will be prescribed in 30 years, and the person calling upon this prescription will not be bound to issue a title and also mala fide can not be opposed to him/her*", and it does not distinguish between the extinctive and acquisitive prescription, or between the real estate and movable assets.

On the other hand, as soon as the prescriptibility under extinctive aspect *exceeds the regulation domain* of the Ordinance no. 167/1958, and Article 1890, the Civil Law states ***in terminis*** *the prescriptible character in 30 years of all real actions for which has not established another prescription term and also did not declare them as imprescriptible* and on the other hand, as there is no legal text expressly stating the imprescriptibility of the real estate recovery action, the legal practice[4] and the specialty literature[5] ruled, without legal basis and with an unconvincing scientific grounding: first of all that Article 1890 from the Civil Law *does not regard the real estate recovery action (as it is imprescriptible),* as the property right is not cancelled by lack of use, no matter how long the owner's passivity, the continuous character of the property right being incompatible with the limitation in time of its exercise[6] and, second of all the provisions of Article 1890 Civil Cide *justifies the prescriptibility of real estate recovery action* in a term of 30 years, as the reasons on which the real estate property's imprescriptibility is grounded, respectively the stability of the estate's legal situation, would not be found in the case of immovable[7] goods.

[4] Supreme Court, Civ. Col. no. 539/July 4th 1953, in C.D. /1954, Vol. I, page 43.

[5] C. Bârsan, *Regimul juridic al bunurilor imobile* [Legal Regime of Immovable Goods], Bucharest, Scientific and Enciclopedic Publishing House, 1983, p. 76; P. Cosmovici, in Tratat de drept civil [Civil Law Treaty] Vol. I, General Part, Academy Publishing House, 1989, page 317.

[6] It is not clear how "the perpetual character" justifies the extinctive imprescriptibility of this action, but the same character is not sufficient to justify its imprescriptibility also under acquisitive aspect: "the consequence would impose for the claim action not to be paralyzed by calling upon the acquisitive prescription". See G Boroi, *Drept civil*, partea generală [Civil Law, General Part], II Edition, Publishing House, page 273.

[7] See C. Bîrsan, M. Gaiță, M.M. Pivniceru - *Civil Law. Real rights*, European Institute, Iasi, 1997, page 132.There are opinions according to which the movable recovery action is extinctively imprescriptible, as according to the continuous aspect, no distinction can be made between the real estate property right and the movale property right (Supreme Court Civil Section, ordinance no. 1447/1982 in C.D /1982, page 13; Stătescu, C. Bîrsan, *Civil Law. Drepturile reale* [Real rights] University in Bucharest, 1988, p. 208).

Compared to the imprecise and non-differential elaboration of Article 1890 Civil Law, we wonder if its provisions regard both the extinctive and the acquisitive prescription, and if this text of law can regarded as *the legal basis of the extinctive imprescriptibiliy of the real estate recovery action* (by restrictive interpretation) but also *of the movable claim action's prescriptibility,* and if such a legal regime difference, finds its origin, at leas in the spirit of this legal document.

2. LEGISLATIVE ORIGIN OF THE CONTROVERSY REGARDING THE 30 YEAR PERIOD FORESEEN UNDER ARTICLE 1890 CIVIL LAW

The doctrinaire dispute regarding the movable claim action's prescriptibility originates from the provisions of Article 1890 Civil Law , where the acquisitive prescription (*usucapio*) is uninspired and not differentiated regulated next to the extinctive prescription, although the two legal institutions are not identical.

As a matter of fact, the controversy's roots go back to the Roman Law, that knew both the acquisitive prescription (*usucapio*) as means of acquiring the property of a movable or immovable good, based on the uninterrupted use during a period imposed by law[8], and the prescription (*prescription*), as a means of extinguishing any real action not exercised during the period foreseen by the law[9].

[8]In the old Roman Law (The Law of the 12 Tables) there was only the possibility of acquiring by acquisitive prescription of a property over a good under the provision of the uninterrupted use for a year, if it has been movable and of two years in case it was immovable. Regarding the actions in court, they were imprescriptible, perpetual (actiones perpetuae).

[9] Unlike acquisitive prescription, the extinctive prescription was harder to admit, as the duties were extinguished by using the requested forms for the symmetry principle and not by their reaching the term, according to the addendum "ad tempus deberi non potest". The consul was the one who created the magistrate actions prescriptibile within a period of one year (their prescriptibility within a year resulted from the fact the powers of the magistrates lasted only one year), referred to as actiones temporales - see E. Molcuț – *Drept roman* [Roman Law], Press Mihaela S.R.L. Publishing House, Bucharest 1999, page 204-205. Subsequently, in the Roman classic law, the real actions related to the provincial properties were subject to a 10 year prescription inter praesentes (when the plaintiff and the defendant lived in the same town) and to a 20 year prescription inter absentes (when the parties lived in separate provinces). As the term is longer than the one applied to the praetorian action, it has been named longum tempus, and thus the name longi temporis praescriptio. In the year 424 A.D. through the reform of Honorius and Teodosius the 30 year prescription was introduced. As this is the longest term it is referred to as longissimum tempus, from here

The common features of the two institutions determined their unification, first of all in the Byzantine law[10] and subsequently, in the French Law. The idea of unifying the acquisitive and extinctive prescription was not one of the most inspired ones. So, following the Byzantine tradition, the French Civil Law in 1840 unified under the same title "*De la préscription*", applicable law for acquisitive as well as for the extinctive prescription, two institutions of different nature, with different results. For the acquisitive prescription, the property right is acquired either by the 30 year possession, and the owner is not bound to justify any title, or by the 10-20 year prescription, if the owner calls upon a title and proved the bona fide (Article 2262-2265). Regarding the liberating prescription, the rule is the 30 year prescription, admitting more exceptions based on the royal decrees of local customs (Article 1304).

Adopted according to the Napoleon Code from 1804, owner Civil Law from 1864 followed the same legal regime regarding the acquisitive and extinctive prescription, regulated in the XX Title, generic called *"About Prescription"* (Article 1837-1911) ordering some contradictory provisions, with an unclear content which is difficult to determine

In 1958, the institution of extinctive prescription knew substantial modifications, new rules and principles, foreign to the Civil Law , the entire regulation in the field being subject to the Ordinance no. 167/1958 regarding extinctive prescription. Considered as a true "revolution"[11] regarding the old regulation, *the new normative document left outside the new regulation the extinctive prescription of the main real rights.* The

also longissimi temporis praescriptio. The following represented exceptions: the actions of churches and philanthropy residences - actio hipothecaria - against the debtor and its ingeritants and the actions submitted by the emperor, prescriptible within a period of 40 years; the action of repeating the debt payment resulted from prohibited games, in 50 years; praetorian actions, within one year; actio redhibitoria, in 6 months; and the royal treasury's debts remain imprescriptible.

[10] The reform initiated by Theodosius the 2nd was completed by Justinian, who in 531 A.D decided that the name usucapio is to be maintained for the movable goods' acquisitive prescription in a period of 3 years. As for the real estate field, under the name of praescriptio two acquisitive prescriptions have been adopted: longi temporis praescriptio (ordinary acqusitive prescription of 10-20 years) and longissimi temporis praescriptio (extraordinary 30 year acquisitive prescription).

[11] M. Nicolae – *op. cit.* page 25. The doctrine considered the union under the same regulation of the acquisitive and of the extinctive prescription to be wrong, even if they have common elements. Furthermore, from the educational point of view, the acquisitive prescription represents a manner to acquire property, being object of study within the subject Real Rights, and the extinctive prescription under the subject Duties, as a matter extinguishing them.

provisions of Article 21 from the Ordinance, that as we have seen, exclude its application on the action right regarding property right and its dismemberments, underlied the opinion of the complete expulsion of the incidence pertaining to the Ordinance no. 167/1958 in the real rights field, the extinctive prescription of the real rights will be subject to a new regulation[12], but also the opinion according to which the necessity of correlating this normative document with the provisions of the Civil Law [13] was necessary. *So, the prescription periods both in the field of acquisitive prescription and prescription of real actions, referred to by the Article 1890 Civil Law , continue to be the ones included in the Civil Law.*

3. BRIEF CONSIDERATION ON THE 30 YEAR PERIOD FORESEEN BY ARTICLE 1890 CIVIL LAW

In a general wording, liable to various interpretations due to these reasons, Article 1890 Civil Law, declares as prescriptible in a term of 30 years " *all actions, both real and personal that the law did not declare as non-prescriptible and for which no prescription term was established ... without that the one calling upon this prescription to be bound to issue a title and to be accused of mala fide".*

Due to the adverse elaboration, the doctrine raised the problem of the legal nature for the 30 years period in the sense of an extinctive or acquisitive prescription. The text of law referring *in terminis* to the *real and personal actions* prescribed in 30 years and taking into consideration the fact that it is not possible for a real action to be acquired by extensive possession (only the goods, rights are liable to acquisitive prescription), the 30 year term can be only of extensive prescription. A first conclusion would be that Article 1890 Civil Law *regulates a period of extinctive prescription.* But the provisions of the second thesis from the Article 1890 Civil Law, according to which *"...they will be prescribed in 30 years, and the person*

[12] D. Paşalega – *Prescripţia extinctivă* [Extinctive Prescription] from J.N. no. 1/1960, page 70.

[13] M. Nicolae – *op. cit.* page 27. The problem is treated as a simple question of legal harmonization and not of legal nature of the extinctive prescription determined but the nature of the civil subjective rights. So, the legal provisions regarding the action right having as object the property right, usufruct, use, occupancy, servitude, superficies, have remained "complete and applicable", establishing a prescription period longer than the 3 year one foreseen by the Ordinance no. 167/1958, respectively the 30 year term (Article 1890 Civil Law).

calling upon this prescription will not be bound to issue any title and without being accused of mala fide" combined with the provisions of the Article 1890 Civil Law, that regarding acquisitive prescription of 10-20 years regulates that the one calling upon acquisitive prescription must be grounded on *a just title* and to be of bona fide, lead to the conclusion that *the 30 year term is exclusively an acquisitive prescription period.* The doctrine pleaded that Article 1890 Civil Law is not the place for extinctive prescription but for the acquisitive prescription of 30 years[14].

The explanation of the apparent contradiction is one of historical nature:

• First of all, in the classical doctrine, the term of "*action"* is synonymous with the one of "*subjective right"* the action being nothing other than the 'subjective right in its dynamic state"[15].

• Second of all, if in the sense of the Code of Napoleon from 1804 and implicitly of the Romanian Civil Law from 1864, the terms of 'action' and 'subjective right' are synonymous, the notion 'all actions, both real and personal' of Article 1890 Civil Law, must be understood as 'all rights and actions, both real and personal'. The term of *action* must be used with a wide range of significance, this being the only manner *to explain the incidence of Article 1890 Civil Law in the matter of acquisitive prescription, where only the right and not the action are subject to acquisitive prescription* [16].

• Third of all, if the expression 'real and personal actions' is understood as 'real and personal rights', especially that the term 'prescription', incident in Article 1890 Civil Law must be understood with *a double significance, both by long term extinctive and acquisitive prescription (30 years acquisitive prescription)* .

• Fourth of all, the 30 year term is a general term, *with double legal nature, based on logical interpretation considerations, as the text does not make a difference and ubi lex non distinguit, nec nos distinguere debemus.*

• Also, finally, taking into consideration the provisions of Article 21 from the Decree no. 167/1958 stating that " *as the present decree does not apply to the action right regarding the property, usufruct, use, occupation,*

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[14] V. D. Zlătescu – *Considerații în legătură cu instituția prescripției* [Considerations Regarding the Prescription Institution] , in Right no. 2/1998, page 18-19.

[15] See V. and N. Em. Antonescu - *Prescripția în dreptul civil* [Prescription in Civil Law] , Bucharest, Romania Noua Publishing House, page 150, note 1 - "Article 1890 says actions; it is clear that this notion was understood by the one of law itself, the action being only the right put in motion".

[16] The acquisition of the real right by acquisitive prescription (usucapio), is established by a suit.

servitude and superficies right", as well as the lack of a special extinctive prescription period in the Civil Law, *it results that the for the real actions extinctive prescriptible the provisions of Article 1890 are applicable, resulting the general character of the 30 year period.*

In conclusion, the provisions of Article 1890 Civil Law must be interpreted in the sense that 'all rights and actions, both real as well as personal, which the law did not declare as non prescriptible and for which no prescription period was established, will be prescribed (extinguished or acquired) in 30 years, and the person calling upon this prescription will not be bound to issue any title and he/she cannot be accused of mala fide"[17].

4. ACTION OF RECOVERY AND THE 30 YEAR PERIOD FORESEEN BY ARTICLE 1890 CIVIL LAW. DOCTRINAIRE AND JURISPRUDENTIAL CONTROVERSY

The prescriptible or imprescriptible character of the recovery action has permanently been the subject of controversy within the doctrine and well as in the legal practice. Reported to the provisions of Article 1890 Civil Law, declaring as prescriptible within a 30 year period, all real actions the law did not declare as non-prescriptible, *without making a difference between their movable or immovable object* , and in the conditions of the absence *de lege lata* of a text which would expressly and differently regulate it, the 30 year extinctive prescription will be applied with certain nuances in actions of claim[18].

4.1. Action of Property Recovery. Imprescriptibility

Constantly, the doctrine[19] and jurisprudence sustained that Article 1890 Civil Law is not applied to the property recovery action grounded on the private property right. The conclusion is based on the idea of property right continuity according to which no matter the time gone by from the non-exertion, the property is not cancelled by lack of use. So, the owner cannot loose its right merely by non-exertion, no matter how long its

[17] See M. Nicolae – *op. cit*. page 384.
[18] C. Hamangiu, I. R. Bălănescu, Al. Băicoianu – *Tratat de drept civil român* [Treaty of Romanian Civil Law], vol. II, All Publishing House, 1997, page 70.
[19] Likewise, page 70-71; C. Stătescu, C. Bârsan – *Drept civil.* [Civil Law.] *Drepturi reale*. [Real rights], TUB, Bucharest, 1988, page. 99; J. Mateiaş, P. Cosmovici – *Prescripţia extinctivă* [Extinctive Prescription] Ştiinţifică Publishing House, Bucharest, 1962, page 33-34.

passivity lasts. The lack of action from the deprived owner, who did not claim the property within a period of 30 years, will not determine the cancellation of his/her right to exercise the action in the future. With all this, although imprescriptible under extinctive considerations, the action of recovery could be frozen if the current owner of the good calls upon the acquisition of property by *usucapio* or acquisitive prescription, in his/her favor [20].

In supporting the property recovery action, the specialty literature raised the problem of the legal condition of the asset, taking into consideration the fact that the recovery action would be cancelled by extinctive prescription, and that the current owner did not apply the acquisitive prescription. As the owner looses the possibility to claim it and in the absence of an acquisitive position, the asset will become *res nullis* (asset without owner), and as a consequence, according to Article 646 Civol Law, it will pass under the property of the state[21]. Furthermore, the solution of property recovery action's imprescriptibility was also imposed due to equity considerations, otherwise by fulfillment of the prescription term and penalty applied on the non-diligent owner, the usurper would continue to freely possess the asset.

Reported to the express provisions of Article 1890 Civil Law, the solution of the property recovery action's imprescriptibility was sometimes, not without reason, challenged in the sense that, in lack of an explicit text, such derogation from the rule instituted by Article 1890 cannot be possible. With all this, even the authors who have their reserves regarding the imprescriptibility theses accept that the traditional solution[22] ist the right way to follow.

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[20] In the same respect the legal practice in the field also states: Ordinance no. 539/4.07.1953 in Culegere de decizii a Tribunalului Suprem 1952-1954 [Collection of Resolutions of the Supreme Court 1952-1954] Volume I, page 143 ('... that the fact that the property cannot be cancelled by lack of use is of priciple, the owner cannot loose its right merely by not exercising it. No matter how long the owner's passivity, he/she is not declined of the right to claim the asset, even if more than 30 years have gone by. If the property does not loose the right to claim by the extinctive prescription foreseen under Article 1890 Civil Code, it looses the property if another one has acquired it by acquisitive prescription"). With the same motivation the Ordinance no. 392/5.03.1986 of the Supreme Court Civil Section, should also be regarded in RRD no. 12/1986.

[21] For further details see C. Hamangiu, I. R. Bălănescu, Al. Băicoianu - *op. cit.*, page 71.

[22] C. Bîrsan, M. Gaiță, M.M. Pivniceru – *op. cit.*, page. 123 - 'According to Article 1890 Civil Law, as real action, the action of recovery should be prescriptible within a period of 30 years. We say it should, as starting from the idea of property right continuity and that this right is not lost by lack of use, all specialty literature and legal practice in the field admit that the action of recovery is imprescriptible". In the same respect C. Oprişan –

In conclusion, the bereaved owner *may loose the property right over an immovable asset if another one acquired it by acquisitive prescription.* For a change, *he /she can not loose the asset as effect of extinctive prescription of the recovery action, as it is continuous just as the property right that is not cancelled by lack of use.*

4.2. Action of Recovery of Movable Assets

Regarding the movable asset recovery, the Civil Law dedicated a differential legal regime in Article 1909.

4.2.1. Incidence of Article 1909 paragraph 1 Civil Law

The provisions of Article 1909 paragraph 1 Civil Law foresee that "*the movable assets are prescribed by their possession and the passage of time is not required*", creates in favor of the owner an absolute property presumption - *juris et de jure* - which makes the claim of the movable asset almost impossible[23]. The mere fact of the ownership of a movable asset has the value of a property title. Article 1909 paragraph 1 can be called upon only by the third party of *bona fide* of the asset from an uncertain owner, to whom the real owner has entrusted willingly. In a possible action of recovery, initiated by the owner, the possessor of the movable asset, by proving only the fact of possession, takes advantage of the property presumption. So, the law giver, between the interest of the owner who willingly gave up his/her good and the interests of the acquirer that dealt with an uncertain possessor, believing that he/she is the owner, grants legal protection to the *bona fide* owner.

Petitory Actions, in The Right no. 9-12/1990, page 101; P. M. Cosmovici – *Drept civil* [Civil Law] *Introducere în dreptul civil* [Introduction in the Civil Law], All Publishing House, Bucharest, 1996, page 54.

[23] The text was subject to some doctrine controversies, considering initially that it institutes an instantaneous prescription, and subsequently a manner to acquire a property by effect of law, because, due to its nature, the prescription assumes the passage of a time interval (C. Hamangiu, I. R. Băl ănescu, Al. Băicoianu - *op. cit.*, page 141). For other authors, Article 1909 grants to the movable possession a special probatory force, equating the possession fact with a property title (C. Stătescu, C. Bârsan – op.cit page 206). The practice is but consequent in taking into consideration that the possession of movable goods creates in favour of the current owner an absolute presumption of property (Decree no. 1120/1.11. 1966; Ordinance no. 1477/30. 12. 1966; Ordinance no. 1938/22.11.1967 în Repertory..- op.cit., page 177).

4.2.2. Incidence of Article 1909 paragraph 2 Civil Law

In an exceptional manner, Article 1909 paragraph 2 Civil Law, admits the recovery action in case of lost or stolen goods, ordering the following: „ *the one who lost or from whom an asset was stolen, can claim it, within a period of three years, from the day in which it was stolen, from the person finding it, appealing against the one from whom it has it* " To the extent to which the goods exited the owner's possession without his/her will, by theft, robbery, piracy loss as a consequence of fortuitous case or act of God, their claim by an owner is possible, but the action is exercised according to different rules, as the asset is *under the possession of a bona fide third party* acquired from the thief or finder *or it is found even at the thief, founder or mala fide third party.*

In the case of claiming the good from the bona fide owner the provisions of Article 1909 paragraph 2 Civil Law are applied, allowing the owner to exercise the action within a period of 3 years, calculated from the date of loss or theft. According to the doctrine majority, the period foreseen under Article 1909 paragraph 2 is foreseen as degradation one, and a consequence, if during this period no claim action is submitted, the property right of the initial owner[24] is lost. On the entire duration of this period, the application of the provisions under Article 1909, paragraph 1 Civil Law is suspended, regarding the stolen or lost assets and in the bona fide possession of the third party, and upon its fulfillment, the bona fide owner becomes the owner. *We consider that, in this case also the recovery action of the bereaved owner should be imprescriptible, will the possibility to freeze it by the asset's acquirer by calling upon the bona fide protection principle.* So, he/she becomes owner not by virtue of fulfilling the declension period, but as effect of the bona fide and of the rightful appearance validity. The provisions of bona fide must exist in the moment of the asset's purchase, and if subsequently the third party becomes of mala fide, is not relevant under this aspect.

[24] See C. Stătescu, C. Bârsan , op. cit., page 212; C. Bârsan, M. Gaiță, M.M. Pivniceru, op.cit., page130; L. Pop, op.cit., page 260; I. Adam, op. cit., page 721; P. M. Cosmovici, op. cit., page 212. In an isolated opinion, the term was considered to be of extinctive prescription (D. Paşalenga, op.cit., page 68; G.Boroi – Drept Civil [Civil Law] Partea generală [General Part] Persoanele [Personas], All Beck Publishing House, 2002, page 265). The idea that the 3 year period is not an extinctive prescription period cannot be accepted, with the motivation that the extinctive prescription presupposes the cancellation of the right of action in material respect, but by fulfilling the term foreseen by Article 1909 paragraph 2 the owner looses the right of property over the asset. In order for a prescription term to exist, it should flow from the date when the asset entered in the acquirer's possession and not from the date of its theft or loss.

4.2.3. Incidence of Article 1890 Civil Law. Imprescriptibility

In the case of the movable recovery of the asset from the mala fide owner, from the thief or founder, so outside the case foreseen by Article 1909 paragraph 2 Civil Law, the prescriptibility thesis of such an action was supporting, calling upon the provisions of Article 1890 Civil Law. It was considered, that in lack of a special period, foreseen by law, the recovery action of the movable asset is prescribed in a general term of 30 year, foreseen by Article 1890 Civil Law regarding real rights, motivating that, if it was admitted that regarding movable assets, in lack of some special provisions, the recovery action would be imprescriptibile, special protection would be granted for the movable real rights, which would argue against the spirit of the Civil Law, based on the privilege granted by real estate rights, of a much higher value.

Starting from a famous case in France[25], the jurisprudence and doctrine created a second opinion based on the imprescriptibility of movable recovery action. So, beginning with 1982, the practice of the supreme court abandoned the distinction made in the field of extinctive prescription between the action of real estate recovery and the one of movable recovery. No matter if a movable or immovable asset is claimed, the action is imprescriptible as the property is not cancelled by lack of use. „ *The difference between the real estate and the movable asset's rights, under the aspect of the actions' imprescriptibility regarding the first rights and of the actions' prescriptibility in case of other rights, is in fact fallacious, as no legal provision makes this kind of differentiation with various consequences under the aspect of extinctive prescription. In fact, no matter if a movable or immovable good is claimed, the right for action is imprescriptible, because the property is not cancelled by lack of use. The action for recovery is inefficient only in the case in which the acquisition of the property right by acquisitive prescription is opposed by the plaintiff, in the cases and*

[25] In the case of the religious Congregation of Saint Viateur, it was decided that, due to the fact that this congregation had no legal entity, could not be the donor of some assets. The problem is raised if the donor's family has lost after 30 year (term foreseen by Article 2262 French Law, equivalent of the Article 1890 Civil Law), property by lack of use. By a principle decision, the Court of Cassation showed that the rules of extinctive prescription are no applicable to the action for recovery - Cas. Fr. May 5th 1879, D1880.1.143 cited by L. Harosa in Discussions Regarding Possession as Manner of Acquiring the Property Right on Movable Assets in SUBB no. 1/2001, p. 50.

provisions of the law, under this aspect existing differences according to the quality of the goods as immovable or movable assets in the litigation"[26].

The practice solution was embraced by the specialty literature, that starting from the premises that the property is not cancelled by lack of use, considered that no matter if a movable or immovable asset is claimed, the right of action is imprescriptible[27].

Also, since the recovery action protects the property right, the difference of legal regime is not justified: imprescriptible if it has as object a real estate, respectively prescriptible when referring to a movable asset. *Also, there is no reason, that aside from the exception situation regulated by Article 1909 Civil Law, for the movable property right not to be applied the same solution of imprescriptibility deduced from the absolute character and the continuous character of the property right, no matter the nature of its object.*

On the other hand, reported to the prescriptibility of the movable assets recovery action from the mala fide possesor, thief or founder and to the fact that the majority of the assets in the patrimony of a physical entity are movable, among which high value objects can also be found, it was said that it would be unfair for the thief to be able to acquire, after 30 years, an undisputable property right, resulting from an offence. [28]

Currently, the imprescriptibility thesis of the movable action of recovery gains more and more territory. [29] The option for this last point of view is based on the following arguments:

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[26] Sentence of the Supreme Court no. 144/26.01.1982 in Collection of Supreme Court Resolutions on 1982 , Ştiinţifică şi Enciclopedică Publishing House, Bucharest, page 13.

[27] L. Harosa – *op.cit.* in SUBB no. 1/2001, page 50-51; V. Stoica – *Correlation of the Provisions of Article 14 from the Penal Procedure Law with the Provisions of Article 1909 -1910 from the Civil Law* in RRD no. 10/1988, p. 29.

[28] In a recovery action having as object a number of 482 gold coins in the possession of the Romanian State by effect of executing of a complementary punishment pardoned in 1959, it was decided that the action is imprescriptible, resolution deduced from the provisions of Article 21 from the Ordinance 167/1958 and from the principle according to which the property is lost by lack of use only in the cases foreseen by law (Ordinance no. 1899/2000 of the Supreme Court of Justice, unpublished; in the sense respect the Ordinance no. 2990 of the Supreme Court of Justice, unpublished, in P. Perju - *Civil Law Matter and Civil Process Law in the Practice of the Civil Section of the Supreme Court of Justice*, in RRD no. 4/2001, page 178-179).

[29] M. Nicolae, B. Dumitrache and other – *Civil Law Institutions*, Selective Course for Licentiate's Degree, Press Mihaela S.R.L. Publishing House, Bucharest 2000, page 103-104; A. Boar, op.cit., page 14-15; I. Adam, op. cit., page723; G. Boroi, *op.cit.*, page 264; M. Nicolae, *op.cit.*, page 383; C. Jurcă, B.C. Trandafirescu, M. Cambur, F. Braşoveanu - *Real Right and the General Theory of Obligations*, Bren Publishing House, Bucharest 2007, page 103.

• Article 18902 Civil Law, refers to 'all actions both real ...', without distinguishing the movable and immovable goods and having the same reason, the movable action of recovery is imprescriptible just as the immovable one (*ubi eadem est ratio, eadem solutio esse debet*)[30];

• no legal provisions makes a difference under the aspect if extinctive prescription or *ubi lex non distinquit, nec nos distinquere debemus*.

Although *de lege lata* there is no legal text dedicating this solution as one with principle character, the supporters of the recovery action's imprescriptibility, no matter its object have cited the Article 6 Paragraph 2, from the Law no. 213/1998 regarding public property and its legal regime, ordering that: „*the goods taken over by the state without valid title, including the ones obtained by the consent vitiation, can be claimed by the former owners or by its successors, if they are not subject to some special separation laws."* As the text does not make a clear difference, the goods are understood as movable as well as immovable assets.

5. CONCLUSIONS

As for us, we share the point of view in the sense that the recovery action grounded on private property *is extensively imprescriptible, no matter its movable or immovable nature* , according to the addendum *ubi eadem est ratio, eadem solutio esse debet*. Since the property rights is continuous and is not cancelled due to lack of use, as a consequence and the action by which it is defended must be imprescriptible, *without making a difference between a movable or immovable asset. De lege ferenda,* the necessity of a regulation in this respect is needed. The modification project of the Civil Lawattempts to solve this delicate problem, stating in the principle wording of Article 1940 that " *the right of action is imprescriptible ...any time by its nature or object if the protected subjective right, its exercise can not be limited in time* ".

[30] Based on the same analogy argument, in a 'dearing' opinion it is stated: 'the fact that no distinction can be made between the movable and immovable assets is rigurous, as the law granted them the same treatment under the aspect of the prescription term. The Article 1890 Civil Law is in the sense of the 30 year prescription for both recovery cases, and the traditional solution - but not legal - presupposed by doctrine and jurisprudence, takes into consideration only the real estate property right, given the stability of the real estate situation and the certitude from the legal trade for real estate" (C. Bârsan, M. Gaiță, M.M. Pivniceru, *op.cit.*, page 131-132).

Since the new regulations still delays, currently, interpreted in this spirit and not its wording, Article 1890 Civil Law, is applied to any real susceptible rights of cancellation, or, according to the case by acquisition by prescription. As the property right is not cancelled by lack of use, the recovery action also cannot be cancelled by the simple fulfillment of the extinctive prescription term, but only indirectly by effect of acquisitive prescription. In this manner, only by acquisitive prescription, Article 1890 Civil Law, extends its effects on the recovery action, in the sense that the 30 year period is acquisitive for the person resorting to acquisitive prescription for the owner of the asset subject to the acquisitive prescription. As a consequence, the right to recover the property is cancelled in the case of prescription only together with the property itself, by effect of acquiring the good as a consequence of acquisitive prescription, without making a difference in its nature.

Regarded in itself, the recovery action must be extinctively imprescriptible no matter its object. And this, how much more so, due to the community development, the movable assets no longer play a minor role in the civil circuit, and the value criteria, used by the creators of the Civil Law in the real estate regime regulation, is no longer current.

CROSS-BORDER MERGER IN ROMANIAN LEGISLATION

Smaranda ANGHENI[*]

ABSTRACT

According to Emergency Government Ordinance no° 52/2008 for the modification and completion of Law no 31/1990 concerning trade companies and for the completion of Law no° 26/1990 concerning the Trade Register, a new type of legal institution emerges, that is the cross-border merger of trade companies, a legal alteration determined by Romania's necessity to carry out its obligations as a member of the European Union, so that it can transpose the community's directives into its own legal system, on the basis of article 249 from the European Community's Instauration Treaty.

KEYWORDS

Cross-border merger, Directive 2005/56/EC, transmission of patrimony

INTRODUCTION

According to Emergency Government Ordinance no° 52/2008[1] for the modification and completion of Law no 31/1990 concerning trade companies and for the completion of Law no° 26/1990 concerning the Trade Register, in the history of Romanian law, a new type of legal institution emerges, that is, the cross-border merger of trade companies, a legal alteration determined by Romania's necessity to carry out its obligations as a member of the European Union, so that it can transpose the community's directives into its own legal system, on the basis of article 249 from the European Community's Instauration Treaty. The Directive 2005/56/EC

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[1] M. Of. No° 333/2008.

concerning cross-border merging of stock trading companies, adopted by the European Parliament and the European Council of 26 October 2005[2], is to be found among the adopted directives whose transposition into Romanian legislation concerning trade societies is highly important, also being exercisable in other Member States, starting with their publication in the Official Journal of the European Union, its transposition's dead-line into each legislation being the 15th of December 2007.

On the one hand, it must be specified from the very beginning that Directive 2005/56/EC does not aim at every type of company settled by Law no° 31/1990, which has been re-edited, including all its subsidiary amendments and additions, although it has been achieved through the modification of trade societies' law.

On the other hand, the regulation of cross-border merger is an irrefragable novelty in Romanian legislation, even though there has always been a main wording, that is, art. 46, Law no° 105/1992, concerning international law relations[3], exercisable to all juridical entities that are of different nationalities and that decide to reorganize through merger.

Therefore, Law no° 31/1990, Chapter III. The statute of cross-border merger is different from the main enactment included in Law no° 105/1992, further exercisable for the merger of juridical entities that are of different nationalities, as well as to trade companies that have different shapes than those aimed at by the directive and its enactments, including all its subsidiary amendments and additions.

Leaving aside Romania's obligation to settle the directive of cross-border merger, which is also an obligation of all the members of the European Union, it is important to acknowledge the motives and the objectives which were taken into account by the competent authorities when creating Directive 2005/56/EC of the European Parliament and of the Council, of 26 October 2005.

THE MOTIVES AND OBJECTIVES OF DIRECTIVE 2005/56/EC

As it emerges from the exposition of motives for the directive, economically speaking, in the European Union, the adoption of enactments concerning cross-border merger is caused by the necessity of achieving a single, functioning market throughout the European Community.

[2] JOL 310, 25.11.2005, pp. 1-9.
[3] D.Al. Sitaru, *Drept internațional privat*, Tratat, Ed. Actami, Bucuresti, 2000, pp. 184-185.

This purpose is tangible only to the extent of the cooperation and consolidation between capital markets in the European Union. Where the reorganization of capital markets and cross-border merger is concerned, this clearly expressed goal is achieved either through absorption, when, most commonly, the absorbed companies cease to exist, or through merger, where each society participating in the process ceases to exist, thus becoming a new trade company.

Therefore, in the process of creating a single market, which is the main purpose of the directive, the cooperation and consolidation procedures have clear-cut dimensions.

Another point in motivating cross-border merger is represented, on the ground of generally accepted limitations, the right to settle down in any member state of the European Union, when achieving the free movement of capital, services, as well as that of labour.

Through its effects, cross-border merger must respect the rights and interests of all categories of social creditors, be they shareholders / associates, employees (labourers) of the companies involved in the process, or third parties which, during the merger, have legal differences with these trade societies.

Special consideration must be given to employees' rights, others than participation rights, that remain under the jurisdiction of a state's own legal system, and which are specified in Directive 98/95/EC of the Council, concerning mass dismissing[4], of 20 July 1998.

Thus portraying one side of economic bunching, cross-border merger must be achieved by taking into account internal legislations[5], as well the regulations concerning righteous competition throughout the European Community, on the basis of Regulation 139/2004.

TRANSPOSING DIRECTIVE 2005/56/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 26 OCTOBER 2005, CONCERNING CROSS-BORDER MERGER OF TRADE COMPANIES, INTO ROMANIAN LEGISLATION

Terminological Frame

In order to separate cross-border merger from any other means of reorganizing juridical entities of different nationalities, the legislator defines the legal institution of cross-border merger of trade companies by using the

[4] JOL 225, 12.08.1998, p. 16.
[5] JOL 24, 29.01.2004, p. 1.

following phrase: "according to the present law"[6], in art. 251 paragraph (1) from Law no° 31/1990 re-edited, with its subsidiary amendments and additions.

Key parts of the merger

Directive 2005/56/EC concerning cross border merging refers to capital markets.

However, taking into account Directive 68/151, the first directive of the Council, of 9 March 1968, for the coordination with the purpose to equate the guarantees required from companies in the Member States, according to art. 58, paragraph 2 of the Treaty, with the purpose of protecting the associates or third parties' interests, the way it was modified in Romanian legislation, capital companies stand for shareholding societies, limited shareholding companies and limited liability companies[7].

When applying the Directive, the Romanian legislator makes use of two criteria, that is, nationality and establishment for European companies.

On the one hand, the enactments in Law no° 31/1990, re-edited, with its subsidiary amendments and additions, the enactments concerning cross-border merging are applied to Romanian companies (Romanian juridical entities), shareholding companies, limited shareholding societies, limited liability companies, and according to the establishment criterion, European societies in Romania to whom EC Regulation 2157/2001, of 8 October 2001 concerning the status of European societies is applied. When it comes to European companies, it is to be specified that the enactments of Law no°

[6] A merger is the process through which: a) one or more companies, and of which at least two are under the legislative rule of two different Member States, are dissolved without going into liquidation and they transfer all of their assets to another company in exchange of the allocation to the shareholders / associates of the absorbing or the absorbed company, social parts to the first of them and maybe, to a cash payment of maximum 10% of the nominal value of the share, of the social parts thus distributed; b) several companies and of which at least two are under the legislative rule of two different member states, are dissolved without going into liquidation and then transfer all of their assets to a company which they form in exchange to the allocation to its shareholders / associates of shares and, maybe to a cash payment of maximum 10% of the nominal value of the shares/social parts thus distributed; c) a company is dissolved without going into liquidation and transfer all of its assets to a company that holds all of its shares/social parts or other titles, giving vote rights in the general assembly. The cash payment can be above the value of 10% if the legislation of at least one of the member states which the companies participating in the merger or the newly founded company belong to, allows that this percentage is topped.

[7] JOL 65, 14.03.1968, p. 8.

31/1990, Title VII, are exercisable only on the basis of their compatibility with the enactments of the Community's Regulation.

As a main point, on the other hand, these types of companies can merge with trade societies that have social premises, or accordingly, central administration or a head-office in other states of the Union or in states belonging to the European Economic Space, further named member states and that are submitted to one of the juridical shapes as they appear in art. 1, in the Council's Directive 68/151/EEC, the 9th of March, 1968, with its subsequent amendments, or European societies whose premises are elsewhere.

However, according to article 251, point 2, Law no° 31/1990, re-edited, with its subsequent amendments and additions, the types of societies described in paragraph 1 of art. 251, can merge with different types of companies as long as they have social premises or accordingly, central administration or a head-office in other member states, if they have legal representation and private patrimony is their only way to ensure social obligations. At the same time, these entities (trade companies), must be submitted to publicity formalities, similar to those appearing in Directive 68/151/EEC of the Council.

The main text concerning the types and forms of trade societies that can be the object of cross-border merger, also contains exceptions appearing in point 3 of the same article. According to this enactment, mass investment in real estates and private investment funds regulated by Law no° 297/2004 concerning capital markets with its subsidiary amendments and additions cannot be submitted to cross-border merger, this latter one is regulated in Chapter III in Law no° 31/1990, re-edited with its subsidiary amendments and additions.

At the same time, the entities that have as main activity mass investments of capital provided by the consumer and function in the system of risk allocation are not submitted to the analyzed regulations, having the possibility to buy their titles back, directly or indirectly, as requested by the issuing holder, titles which are part of the company's shares.

Characteristics of cross-border merger

Cross-border merger is a complex process where both procedural and material, substantial aspects combine.

If procedurally speaking, the steps that are followed do not imply any kind of problems, as long as legal enactments are taken into account, hereby mentioning art. 251-251 in Law no° 31/1990 re-edited; materially speaking, this complex phenomenon can lead to a number of difficulties, its

first effect, we believe, the most important, being the repercussion related to the universal transmission of the absorbed company to the one that has taken it over (where absorption merger is concerned) or to the newly-founded company (when speaking about merger through consolidation).

Speaking not only about nationally different companies that are involved in the merging process, but also about those that at the moment of the process were implicated in legal differences with those societies, the universal transmission of assets automatically generates private international legal relations.

On the one hand, those companies' patrimony is made up of movable and fixed assets, assets to which international private laws are exercisable and which are located on a different territory than that where the general transmission of goods will be enacted.

At the same time, the taking over of contracts belonging to the absorbed company by the absorbing one or by the newly generated society, either as a creditor or as proper debtor, might cause difficulties through the changing of one party's nationality or because the establishment of the assets or contract's execution are on a different territory than that of its social premises or central administration of those specific companies.

Where the transmission of patrimony is concerned, one must focus on another repercussion of the merger, that is, the special enactments, exercisable to certain contract categories, such as: license and active consolidation contracts, except the existence of a licensor's agreement or consolidation members' agreement, or that of a rental contract, where its transfer is strictly forbidden[8].

As regards French legislation, when speaking about lease contracts, one can decide in favor of legal actions, in order to ensure further guarantees from the absorbing company, even though the owner cannot stand against the contract's transmission to the latter[9].

Attention must be paid to *intuitu personae* contracts, such as: broking, distribution, consultancy contracts that cease to exist or become null and void when the trade company ends its activity. Before the adoption of Directive 2005/56/EC, French doctrine and legislation[10] have enhanced

[8] S. Angheni, M. Volonciu, C. Stoica, *Drept comercial*, ed. a 4-a, Ed. C. H. Beck, Bucuresti, 2008, pp.208-209.
[9] M. Cozian, A. Viander, F. Deboissy, *Droit des societes*, 16˚ edition, Litec, 2003, p.643.
[10] J. Beglin, *La difficile harmonization du droit des fusions transfrontalier*, Mel. Ch. Gavalda, Dalloz, 2001, p.19; J.J. Caussain, *Fusions Transfrontalieres*, J. CPE 1999, p.897, in M. Cozian, *op.cit.*, p.647.

these “legal restraints”, on the ground of national legislations’ homogeneity in the case of merger.

To conclude, cross-border merging is a novelty in the area of legal institutions that raises many theoretical and practical issues. This paper is only a mere challenge in the study of cross-border merger process, the legislation’s means to defend the rights and interests of all categories of directly or indirectly involved creditors, when it comes to cross-border merger.

DEVELOPMENTS IN THE COMMUNITY LEGISLATIVE PROTECTION OF EMPLOYEES IN THE EVENT OF EMPLOYER INSOLVENCY

Nicolae VOICULESCU*

ABSTRACT

The author presents the Directive 2008/94/EC of the European Parliament and of the Council on the protection of employees in the event of the insolvency of their employer. In context are presented the principles which the directive is based, as well as the relations between its dispositions and the dispositions of community labour law. In the same time, are analyzed the main provisions of the directive in the light of the jurisprudence of European Court of Justice.

KEYWORDS

State of insolvency, guarantee institution, compulsory contributions, the Law no. 200/2006

In order to protect employees if the employer's insolvency, was adopted on 20 October 1987 Directive 80/987CEE[1] which required the establishment of a Guarantee Fund for payment of wage claims by employers, as a transposition of the obligation to ensure its own employees against the risk of nonpayment of amounts owed to them in performing work or as a result of its cessation[2].

Directive target was employee claims arising from contracts or employment relationships that exist against employers who are in a state of insolvency[3].

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[1] Published in Official Journal of the European Union L. 283/28 X 1980.

[2] See more, Nicolae Voiculescu, *Community Labour Law*, 3-rd edition, Wolters Kluwer Publishing House, Bucharest, 2009.

[3] Managerial staff can not rely on Directive 80/987 to demand payment of wage claims of the guarantee institution established under national law for other categories of workers

By this directive are creating guarantees that when the employer becomes insolvent, the salaries paid at the time are partly paid from a guarantee fund, created in each Member State.

However, it should emphasize that in this matter, the International Labour Organisation adopted *Convention nr.173/1992 on the protection of workers' claims in case of insolvency of one who undertakes*, unratified by Romania, but that makes the distinction between the protection of these claims by a privilege (protection claims) and by an institution warranty.

Directive 80/987CEE was subsequently amended by Directive 87/164/CEE and Directive 2002/74/EC in order to protect workers which have a contract with fixed term or part-time. Also, amending directives, taking into consideration the Court of Justice caselaw have redefined the state of insolvency.

On 22 October 2008, for reasons of clarity and rationality, has been codified Directive Directive 80/987/EEC and repealed with amending directives, and replaced by *Directive 2008/94/EC of the European Parliament and of the Council on the protection of employees in the event of the insolvency of their employer*[4].

Through the new directive was aimed to ensure fair protection of employees concerned, by redefining the state of insolvency in view of legislative trends in Member States and to include in this concept and other insolvency proceedings, except in liquidation. In this context, in order to establish an obligation for payment of the guarantee institution, Member States should be able to provide that where an insolvency situation results in several insolvency proceedings, the situation must be addressed as such as about one of the insolvency proceedings.

It should be ensured that the employees referred to in Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC ,

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employed. Par.1 Article 3 of the Directive requires Member States to take necessary measures to ensure that guarantee institutions to ensure payment of unpaid claims of employees, but does not undertake to create such an institution for all categories of employees. Where the national law, even interpreted in the light of such directive, would not benefit guarantees ensuring that staff have the right to seek redress to the Member State concerned, for damages suffered as a result of non-directive in respect of (See Decision of 16 December 1993 in Case of Wagner Miret v.Fondo garantía salarial, Nr. C-334/92, Reports of cases before the Court of Justice and the Court of First Instance , p.I-6911 (cf. points 18-19, 23, disp. 2).

[4] Published in Official Journal of the European Union L 283, 28.10.2008, p. 36-42.

Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by the ETUC, UNICE and CEEP and Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship are not excluded from the scope of this Directive.

In order to make it easier to identify insolvency proceedings, in particular in situations with a cross-border dimension, the new directive establish the obligation of Member States to notify the Commission and the other Member States about the types of insolvency proceedings which give rise to intervention by the guarantee institution.

Directive 2008/94/CE shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency. Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this Directive, by virtue of the existence of other forms of guarantee if it is established that these offer the persons concerned a degree of protection equivalent to that resulting from this Directive (art.1).

Following the dispositions laid down in par.(1) of the article 2, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has:

(a) either decided to open the proceedings; or

(b) established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.

Member States may not set a minimum duration for the contract of employment or the employment relationship in order for employees to qualify for claims under this Directive.

This Directive does not prevent Member States from extending employee protection to other situations of insolvency, for example where payments have been de facto stopped on a permanent basis, established by proceedings different from those mentioned in paragraph 1 as provided for under national law.

Member States shall take the measures necessary to ensure that guarantee institutions guarantee payment of employees' outstanding claims

resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships. The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States (art.3).

As the *article 4* provides, Member States shall have the option to limit the liability of the guarantee. If they are exercising this option, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship prior to and/or after the date determined.

Member States may include this minimum period of three months in a reference period with a duration of not less than six months.

In a situation of a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks. In this case, those periods which are most favorable to the employee shall be used for the calculation of the minimum period.

Member States may set ceilings on the payments made by the guarantee institution. These ceilings must not fall below a level which is socially compatible with the social objective of this Directive. In the exercising of this option, there is necessary to inform the Commission of the methods used to set the ceiling.

The ways of organizing, financing and operation of the guarantee institutions are established, according to art. 5, in particular with respect to the following principles:

(a) the assets of the institutions must be independent of the employers' operating capital and be inaccessible to proceedings for insolvency;

(b) employers must contribute to financing, unless it is fully covered by the public authorities;

(c) the institutions' liabilities must not depend on whether or not obligations to contribute to financing have been fulfilled.

The dispositions included in Articles 3, 4 and 5 shall not apply to contributions due under national statutory social security schemes or under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes (art.6).

Likewise, Member States shall take the measures necessary to ensure that non-payment of compulsory contributions due from the employer, before the onset of his insolvency, to their insurance institutions under national statutory social security schemes does not adversely affect employees' benefit entitlement in respect of these insurance institutions in so far as the employees' contributions have been deducted at source from the remuneration paid. (art.7).

Directive 2008/94/CE includes some provisions concerning transnational situations. For example, if an undertaking with activities in the territories of at least two Member States is in a state of insolvency, the institution responsible for meeting employees' outstanding claims shall be that in the Member State in whose territory they work or habitually work (art.9).

We have also to mention the article 12 which underlines that the Directive 2008/94/CE shall not affect the option of Member States:

(a) to take the measures necessary to avoid abuses;

(b) to refuse or reduce the liability referred to in the first paragraph of Article 3 or the guarantee obligation referred to in Article 7 if it appears that fulfilment of the obligation is unjustifiable because of the existence of special links between the employee and the employer and of common interests resulting in collusion between them;

(c) to refuse or reduce the liability referred to in the first paragraph of Article 3 or the guarantee obligation referred to in Article 7 in cases where the employee, on his or her own or together with his or her close relatives, was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities.

Having regard to the obligations for transposition into national law of the European rules, was adopted the ***Law no. 200 of 22 May 2006 concerning the establishment and use of Guarantee Fund for payment of wage claims***[5] which sought Council Directive transposition. 80/987/EEC on the approximation of laws of Member States regarding the protection of employees in the event of insolvency of employer.

For the Court of Justice of the European Union, the state of insolvency of the employer within the meaning of Directive 80/987 is a concept of community law and requires a uniform interpretation in all

[5] Published in Monitorul Oficial al României, Part I, no. 453/25.V.2006. The rules for the application of Law no. 200/2006 was approved by Government Decision no. 1850/2006 (M.Of. No 1038/28.12.2006).

Member States[6]. Moreover, the new Directive 2008/94/CE on the protection of employees in the event of employer insolvency considered interpretation thereof by the Court of Justice of the provisions of Directive 80/987/EEC.

But, analyzing but Law no. 200/2006 concerning the establishment and use of Guarantee Fund for payment of wage claims, we find that the Romanian law does not define the insolvency of their employer. It is focused more on regulating the institution to ensure wage guarantee payment of claims. Thus, it provides that the Guarantee Fund will ensure payment of wage claims arising from individual employment contracts and collective bargaining agreements concluded by employers against employees who have been given final court decision opening insolvency proceedings and against which been ordered so far total or partial removal of right of administration (Article 2).

Also, article 13 of Law no. 200/2006 expressly lists the categories of wage claims that bear the resources of the Guarantee Fund, namely:

a) pay outstanding;

b) the remaining compensation money due to employees for leave to rest uneffected by employees, but only for a maximum year of employment,

c) compensatory payments outstanding in the amount specified in the collective work and / or individual employment contract, in the event of termination of employment,

d) the remaining compensation that employers are required to pay under contract collective work and / or individual employment contract, in case of accidents at work or occupational diseases,

e) outstanding allowances, which employers are required by law to pay during temporary interruption of activities.

Fund does not guarantee support social contributions payable by employers in a state of insolvency. Directive 80/987, give the national laws of inserting such provisions, which, behold, a Romanian law provides.

For the Law no. 200/2006, the employee is defined as the person which performs work for and under the authority of an employer under an individual contract of employment for full or part-time or contract work at home temporary employment or apprenticeship in the workplace, regardless of their duration.

According to Article 14 and Article 15 of Law no. 200/2006, the total amount of claims incurred in the wage guarantee fund may not exceed

[6] Decision of 15 May 2003 in Case Mau, Nr. C-160/01, Reports of cases before the Court of Justice and the Court of First Instance, p. I-4791 (cf. Points 30, 48, disp. 1).

the amount of 3 national average gross salary for each employee, and claims the support for a period of 3 calendar months.

The Romanian bill enumerates at Article 3 the lists the principles that underlie the formation, management and use of the guarantee fund. These are:

a) the principle of contribution, that the Guarantee Fund shall be constituted on the basis of contributions payable by employers;

b) the principle of compulsoriness, according to which employers have under the law, the obligation to participate in the establishment of Guarantee Fund;

c) the principle of distribution on which the fund is made to redistribute payment of wages owed by employers in the insolvency;

d) universality obligation for payment of wage claims, regardless fulfilment or unfulfilment of the contribution obligation of employers;

e) The guarantee fund is independent of resources managed by the administration;

f) The guarantee fund may not be subject to the insurers or enforcement.

As for the *Guarantee Fund establishment*, it has the following financial resources:

a) employers' contributions. According to art. 7. (1) employers are required to pay a monthly contribution to the Guarantee Fund, the rate of 0.25%, applied to the amount of revenue that the basis for calculating the individual contribution to the unemployment security budget made by workers employed by individual employment contract;

b) interest incomes representing increase in delay time for non-payment of contribution to the Guarantee Fund and other amounts from sources permitted by law;

c) recovery of amounts from flow created the Law no. 200/2006, other than from contributions to the Guarantee Fund.

Management of the Guarantee Fund is assured by the National Agency for Employment through counties and Bucharest agencies for employment.

If the case of transnational employer in insolvency, the establishing of the amount salary claims payable to employees who normally performs work in Romania and payment shall be made by the agency in whose territorial radius operating employees (art. 20).

In the situation of repealing of Directive 80/987/EEC and its replacement with *Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer (Codified version)* the

provisions of Law no. 200/2006 have to be analyzed and, of course, amended to be in consonance with the new Community legislation.

Thus, it should necessarry include the definition of a state of insolvency within the Community of the term imposed by Article 2 par. (1) of Directive 2008/94/CE. In this direction, could be taken into consideration the possibility offered by par. (4) of the same article, which offer the possibility to extend protection to workers in other situations of insolvency, such a situation de facto permanent suspension of payments.

Article 15 of Law no. 200/2006, which stipulates the supportation of the claims for a period of 3 calendar months, must be developed within the meaning of art. 4 par. (2) of the Directive which grants the possibility that the minimum period of three months to be included in a reference period which shall not be less than six months.

Concerning the establishment of the Guarantee Fund will notice that there is an essential difference between the Law 200/2006 and Directive 2008/94/CE. Thus, if the Romanian law is retained as the main source the contribution of the employers (Art. 5 letter a), the directive stipulates: „employers must contribute to financing, unless it is fully covered by the public authorities" (Article 5 letter b). The difference is important and is likely to ensure successful establishment and functioning of this important institution for the protection of employees.

An amendment to the Romanian law it should also include safeguards for the benefit of social security benefits included in Chapter III of Directive 2008/94/CE (Art. 6-8). These guarantees are missing in the existing shape. It is, first of all, necessary to adopt the neccesary measures to ensure that the failure to pay of the obligatory contributions payable by the employer to insurance institutions of the national statutory social security schemes, before its insolvency, not adversely affect the right of employees to retirement from these insurance institutions, to the extent that employee contributions were deducted at source from the remuneration paid.

ASPECTS REGARDING THE REPORT BETWEEN THE NATIONAL JURISPRUDENCE AND CEDO CREATIVITY ON THE ONE HAND AND LEGISLATIVE ACTIVITY IN THE RESTITUTION/RESTORATION OF THE REAL ESTATES ABUSIVELY TAKEN OVER BY THE ROMANIAN STATE IN THE PERIOD 6TH MARCH 1945 – 22ND DECEMBER 1989

Dumitru FLORESCU*

ABSTRACT

The author presents the reports between the internal legislation and jurisprudence and the CEDO jurisprudence in the last three years when the Law no. 10/2001 was enforced.

The Romanian legislator adopted the Law no. 10/2001 having regarded the legal and social system for about a decade in the field of restitution of the real estate's abusively taken over by the Romanian state in the period 6th March 1945 – 22nd December 1989.

The Law no. 10/2001 represents a special law in this field, which does not suppress the claiming action of the ex owner, from whom the state took over abusively, but with title, the real estate, or from his successors, but only gives him other regulation, is truth a restrictive one but in accordance with the percepts of the civil flow security. In several decisions of the courts, as well as in a part of the doctrine's opinion it was highlighted the false idea that, even if the restitution procedure, provided by the Law no. 10/2001, was wasted or cannot be used because it operates the downfall from right or the prescription, a claiming action of common law can be used, based on the comparison of property deeds, namely the property deed of the original owner, on the one hand and the property deed, the selling-purchasing contract of the under-attainder (ex tenant) on the other hand.

The legislator, respectively the Romanian Parliament, after a long delay, rejecting in totally the request for reexamination of the

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President of Romania, adopted the Law at October 7, 2008 on the amendment and completion of the Law no. 10/2001, through which it acknowledged our point of view, stating that the real estate's nationalized and sold to the tenants in accordance with the Law no. 112/1995 are not restituting in nature anymore to the ex owners who will receive compensations in money.

KEYWORDS

Restitution of the real estates, Restitution in nature, the principle „restitutio in integrum", the good faith principle

The evolution of the national post-December legislation and judicial practice regarding the repairing of the abuses committed by the ex-socialist regime in the field of private property, first through the restitution of the real estates abusively taken over by the Romanian state in the period 6th March 1945 – 22nd December 1989, and of the international legislation and CEDO jurisprudence influence over them were broadly mentioned in the first part of this study[1].

We would like to briefly analyze below the reports between the internal legislation and jurisprudence and the CEDO jurisprudence in the last three years when the Law no. 10/2001 was enforced.

The Romanian legislator adopted the Law no. 10/2001 having regarded the legal and social system for about a decade in the field of restitution of the real estates abusively taken over by the Romanian state in the period 6th March 1945 – 22nd December 1989.

As mentioned with several occasions, the Law no. 10/2001 with subsequent amendments, out of which the most important was brought by the Law no. 247/2005, has created a unitary and coherent system for

[1] DUMITRU FLORESCU – "Theoretical exam of the national judicial practice and of CEDO jurisprudence in the field of restitution of the real estates abusively taken over by the Romanian State in the period 6th March 1945 – 22nd December 1989", in "International Conference EDUCATION AND CREATIVITY FOR A SOCIETY BASED ON KNOWLEDGE" (November 22-23 2007), Titu Maiorescu University Publishing House, Bucharest 2007.

repairing the abuses committed in the field of private property by the Romanian socialist state.

Among these, the most important measure of repairing is represented by the restitution in nature of the real estate abusively taken over, if this is possible according to the law.

In the same time, the law took also into consideration the rights of the third attainders of good faith of the real estates abusively taken over by the state, complying with the universal and evergreen principles on the protection of the good faith in law and of the security of the civil circuit.

The biggest controversies were leaded in the legal literature and in the judicial practice in this field, within the conflict between the original owners or their successors and the third attainder of good faith (ex tenants) of the real estates abusively taken over by the Romanian state.

Although in our opinion and not only, expressed in written, as a professor, or in front of the courts, the Law no. 10/2001 represents a special law in this field, which does not suppress the claiming action of the ex-owner, from whom the state took over abusively, but with title, the real estate, or from his successors, but only gives him other regulation, is truth a restrictive one but in accordance with the percepts of the civil circuit security. In several decisions of the courts, as well as in a part of the doctrine's opinion, it was highlighted the false idea that, even if the restitution procedure, provided by the Law no. 10/2001, was wasted or cannot be used because it operates the downfall from right or the prescription, a claiming action of common law can be used, based on the comparison of property deeds, namely the property deed of the original owner, on the one hand, and the property deed, the selling-purchasing contract of the under-attainder (ex tenant), on the other hand.

It was motivated that this way the ex-owner is not devoid of the right for notifying the courts (the right to justice), solution which should be pronounced when the procedure provided by the Law no. 10/2001 was wasted or could not be used.

This leaded to the indirectly infringement of the Law no. 10/2001 provisions by denying the application or even its existence, despite that this law provided as a second stage, following the administrative one, a judicial control of the decision or of the disposition for rejecting the notification regarding the restitution of the real estate, granting in this way the access to justice of the person who formulates the claiming action.

This judicial practice which contradicts the existence and the application of the Law no. 10/2001 has been attenuated in particular cases by solutions which, admitting the possibility of comparison of the two titles

(deeds), have considered that the under-attainder of good faith (ex-tenant purchaser of the apartment) in accordance with the law is better characterized (defined) as the original owner or his successors deed/title.
It was a substitute solution which intended to avoid cutting "the Gordian knot" in the context of a CEDO practice of restitution, which was interpreted even beyond its limits by the justiciables, a part of judicial practice, doctrine and mass-media, who agree the application without limits and distinctions of the principle „*restitutio in integrum*". They denied the inadmissibility of principle as regards the comparison of the two types of deeds/titles, out of which one was abolished (through nationalization or through other title/deed of abusively attaining of property but considered as legal deed/title by the Law no. 10/2001) and the other title of the attainder of good faith, who, making the necessary and possible efforts, convinced himself that the seller was "*verus dominus*" (the real owner) when the selling-purchasing contract was concluded.

This judicial practice as well as its doctrinal support agreed a political conception of "*restitutio in integrum*", of ignorance the rights of the good faith purchasers, ex-tenants, who bought in order to satisfy one of their vital needs, such as a dwelling house, and not finally the infringement of the law whose text was very clear.

In a period of time, a part of the judicial practice had a creative role in a negative way, namely as regards the ignorance and even of denying the fundamental normative act in the field of repairs concerning the real estates abusively taken over by the socialist state, respectively the Law no. 10/2001.

The arguments brought by these courts are wrong because by adoption of the Law no. 10/2001 it was instituted the procedure of repairs of the abuses committed by taking over by the Romanian state of some real estates in the period 1945-1989, procedure which includes mainly the claiming action for these real estates together with its finality, the restitution in nature of the real estates, but also, when the restitution in nature is not possible, repairs through equivalent in money or in shares to the fund "Proprietatea".

Being truth that the procedure for restitution in nature is a derogatory part from the common law of the classic claiming action, the procedure is, in a first stage, an administrative procedure, and only in the second stage, a judicial one, and the request for restitution shall be done in a certain form

and within a certain term, in accordance with some conditions out of which one is represented by the prior abolishment of the under attainder (ex tenant) title/deed.

The conclusion beyond doubt and obviously highlighted is that the legislator intended to enact in this field a special regulation as regards the claiming action in order to ensure the social, economic and legal stability.

The arguments, according to which the inadmissibility of the claiming action of common law in the field of restitution of the real estates abusively taken over by the Romanian state would contravene the constitutional provisions, are completely wrong, indirectly debating on the merits the constitutionality of the Law no. 10/2001. This issue was affirmatively solved by the Constitutional Court under multiple aspects since the adoption of the Law no. 10/2001.

Through the application of the procedure provided by the Law no. 10/2001, mandatory procedure and not optional, it is not infringed the constitutional right of the person entitled and of his successors to justice but, when they are not satisfied with the solution given by the body which manages the asserted real estate, they can contest it to the civil section of the Trial Court (article 23 para. 3 of the Law no. 10/2001) whose decision is subject to the judicial control of legality and validity (art. 26 para. 2).

Thus the entitled person and his successors are not deprived by the access to justice.

Secondly, the Law no. 10/2001 is a special law, with immediate and mandatory application (*specialia generalibus derogant*) and not optional, in its field of regulation.

The Law prohibits, after entering into force, the option between using the claiming action of common law and the special claiming action regulated by the law and known with the specific name of notification of restitution in nature of the real estate.

Thirdly, the complainants, who have already used the way of notifications, meaning they used the claiming action regulated especially and exclusively by the Law no. 10/2001, so they knew and respected the special character of this Law and its exclusive application, but seeing that the solution is not favorable to them they cannot used the second way, the common law one, an inadmissible method after the entering into force of the Law no. 10/2001 and which is able to evade the provisions of this law.

Furthermore, the judicial practice, including the decision given with the occasion of the appeal in the law interest by the United Sections of the High Court of Cassation and Justice, in the field related to expropriation, shows that using of the claiming action of common law is not admissible if

the procedure provided by the Law no. 10/2001 was used because of the principle "non bis in idem" and the principle on the legal security from the CEDO jurisprudence (Brumarescu – 1997)[2].

The solution pronounced in this appeal in the law interest is valid, in our opinion, for identity reasons and when the real estate passed in the state ownership in accordance with other title considered such as by the Law no. 10/2001.

The argument that the Law no 10/2001 refers only to the retrocession from the state or from the co-operative bodies holding the real estate's abusively taken over in the period 1945-1989, and not to the contractual under-attainder (the purchaser of the apartment) and that, in consequence against him it can be used the claiming action of common law is also contradictory with the provisions of the Law no. 10/2001, which sets up the restrictive but legal modality based on which a real estate can be requested in this field from the under-attainder, meaning a special claiming action but which keeps, when there is no derogation from the law, the features of the claiming action of common law, such as the right of pursuit of the good from any under-attainder (the purchaser tenant).

It is natural, logic and legal to act this way, because the under-attainder has the same position as regards the material and procedural law, as the person from whom he attained inasmuch as the law does not provide for him additional rights (the right of the under attainder of good faith provided by the article 45 of the Law no. 10/2001).

As concerns the using of the procedure of comparison of the titles/deeds as method for solving the claiming request of common law, the pre-war and post-war legal literature as well as in the contemporaneous literature[3] highlighted that the procedure of comparison of titles/deeds

[2] (See the Decision no. 53/June 4, 2007 of the United Sections of the High Court of Cassation and Justice.

[3] The proof of the real estate ownership through title/deed is absolute if the right was originally attained and relative if the right is derivate from a convention. In the last case, the deeds which transfers the ownership or the deeds who declare the property are just facts which generate assumptions which can be removed by the contrary proof. C. BARSAN, "The real principal rights", page 211. Not less the comparison of the titles refers exclusively to the situation when the both litigant parties bring titles originating from different authors and which do not have any connection (report). The assumption of property which characterizes this kind of titles, can be combated by persuasion elements, in accordance with the article 1203 from the Civil Code – A.M. Dragomirescu "Claiming in

represents a proofing mean, a comparative reasoning of the court which can be used when the legislator does not replace it with his own general choice between the two types of property deeds, meaning when the legislator does not provide an indication generally binding in the comparison of titles field and secondly only if there are met certain conditions, namely that the two titles/deeds whose comparison is requested to be valid in the moment of their comparison; to origin from the same owner or from different owners and not to be in a close order, meaning in a succession of titles.

But in the field subject of this study it is compared a property deed/title which has been abolished through the extinctive effect of the nationalization laws or of the expropriation or in accordance with other normative acts, which through their extinctive effects abolished the property deed of the complainants authors and through their constitutive effects created the right of property of the state, with a second title/deed, namely the selling-purchasing contract through which the purchasers, ex-tenants, attained in good faith the real estates.

But it is not possible to make a comparison between an abolished title and a valid one.

Nor the other condition requested for the comparison of the titles is not met because the titles whose comparison is requested are in succession, in a close connection.

The legal process which has to be used in the case of succession of titles, of titles which alternate, does not represent their comparison but the annulment/cancelation of the title supposed to be illegally abolished, meaning the annulment of the first title of the comparison, respectively the state title.

But beyond that, the procedure of comparison of the property deeds is replaced in the field of restitution of the real estates abusively taken over by the state through a system according to which it is ensured a protection for the tenant – purchaser of good faith of the apartment where he lived, regardless if the seller's title is not valid. This is the rule regulated through the article 45 paragraph 2 of the Law no. 10/2001.

As a consequence, even if we would not take into consideration the above mentioned arguments, the property title/deed of the purchaser is protected by the good faith when the apartment is bought.

Romanian Law", Bucharest 1936, quoted passage by the Pavel Perju in Commented Civil Jurisprudence of the High Court of Cassation and Justice and of other courts, C.H. Beck, Bucharest, 2007, no. 64, page 84. In the same sense P. Perju, comment published in the magazine Dreptul no. 5/2004, page 191, 192.

In fact, as the judicial practice highlighted[4] "If the ex owner of the real estate taken over by the state, within the claiming action, did not request the ascertainment of the absolute annulment of the selling-purchasing contract concluded based on the Law no. 112/1995 and he cannot do it after the special term of prescription – 1 year regulated by the article 46 (in present article 45) of the Law no. 10/2001, the right of property of the purchaser tenants was consolidated because any action in annulment of the contract was formulated on the reason of dishonesty, and a such reason cannot be invoked within a claiming action.

While the right of property of the purchasers tenants was consolidated, it results that this right is in their patrimony, being preferable to the one of the ex-owner, as a consequence of the application of the principle regarding the protection of the good faith under attainder."

It would be excessive and absurd to pretend that the purchaser and the seller provide that in the future, after several years from the contract conclusion, the successors of the ex-owners who were nationalized will debate the state property deed.

Besides that, the debate is not concretely made, focusing on illegality of the concrete act of nationalization, meaning the application of the nationalization law, but as we generally mentioned, by asserting the abusive character of the nationalization as modality of attaining of the property in the ex socialist state.

Referring to the adoption and to the application of the nationalization law, a couple of courts spoke about "a theft, an expropriation in fact".

Without denying the totally abusive character of the nationalizations, we have to mention from the legal point of view that the nationalizations of the main production means were instituted and applied according to the Romanian Constitution from 1948, through normative acts recognized as "title" in the spirit of the Law no. 10/2001 and which can represent title for further transfers, if its application, meaning the concrete transfer, is not abolished.

These normative acts which instituted nationalizations despite being abusive represent, from the retrocession legislation's point of view, legal

[4] The Court of Appeal Bucharest, Civil Section IV, Decision no. 840/April7, 2006, no. 55, page 334.

"titles" for taking over the real estates to which the retrocession was applied and only their concrete application may be illegal.

These laws were compliant and, furthermore these were adopted in accordance with the article 8 of the Romanian Constitution from 1948, when Romania did not already access to the Universal Declaration of Human Rights and its Protocols, accession which happened in 1955, meaning 7 years later.

Consequently the courts cannot consider that the nationalization did not produce legal effects.

CEDO Jurisprudence stated that the property deed/title of the under attainder of good faith, established on the basis of the Law no. 112/1995 and validated in the internal law through a final and enforceable decision, is protected by the article 1 of the Protocol no. 1 of the European Convention of the Human Rights.

"Diminishing of the old infringements does not have to create new disproportionate prejudices (…) so that the persons who attained their goods not to be in the situation of bearing the state responsibility, state which confiscated in the past these goods (please see the case Pincova versus the Czech Republic; the case Raicu versus Romania).

Furthermore, the solution has to be the same, for identity reasons when the under attainder's title has not been contested according to the law by the ex-owner or his successors.

If a wrong reasoning is followed, like the one of the courts which ignore the existence of the Law no. 10/2001, then the Romanian Government should not privatize any immobile production mean originating from nationalization and all the privatizations performed until present should be null, because those who attained it, including the foreign investors, would be dishonest, knowing that what is privatized and bought originates in the Law 10/2001 application.

The judicial practice "*contra legem*" leads to the intervention of the General Prosecutor of Romania and of the High Court of Cassation and Justice which, in United Sections, stated with power of law, at June 9, 2008, in the case no. 60/2007, within an appeal in the law's interest, as follows "As regards the action based on the common law provisions, having as object the claiming of the real estates abusively taken over in the period 6th March 1945-22nd December 1989, formulated after the entering into force of the Law no. 10/2001 and not unitary solved by the courts, the United Sections decide:

The concurrence between the special law and the general law is solved in the favor of the special law, according to the principle *specialia*

generalibus derogant, even if this is not expressly provided by the special law.

When incongruities are observed between the special law (the Law no. 10/2001) and the European Convention of the Human Rights, the convention has priority. This priority can be given within a claiming action based on common law, if no other right of property or the legal reports security is damaged."

Furthermore, the legislator, respectively the Romanian Parliament, after a long delay, rejecting totally the request for reexamination of the President of Romania, adopted, on October 7, 2008, the Law on the amendment and completion of the Law no. 10/2001, through which it acknowledged our point of view, stating that the real estates nationalized and sold to the tenants in accordance with the Law no. 112/1995 are not restituting in nature anymore to the ex-owners who will receive compensations in money.

In this sense, the article 7 paragraph 1^1 inserted by the law, expressly and clearly provides that: "The real estates alienated based on the Law no. 112/1995 for the legal regulation of certain real estates with the destination dwelling houses passed in the state property, with subsequent amendments, cannot be restituted in nature" and the paragraph 5 of the same article provides that "The areas (grounds) related to the immobile goods alienated in accordance with the provisions of the Law no. 112/1995, with subsequent amendments cannot be restituted in nature".

In accordance with this provision, in the article 18 of the Law no. 10/2001 the letter c) was reinserted at the first paragraph, which provides that "The reparatory measures are established by equivalent when …..c) the real estate was alienated according to the provisions of the Law no. 112/1995 with prior amendments.

In pursuance of the article 20 paragraph 1 and 2 "The persons who have received compensations according to the Law no. 112/1995, with subsequent amendments, may request the restitution in nature, only if the immobile good was not sold until the date of entering into force of this law and only after the reimbursement of the amount representing the compensation received, updated with the inflation index.

When the real estate was sold in accordance with the provisions of the Law no. 112/1995 with subsequent modifications, the entitled person has only the right to receive reparatory measures by equivalent at the

appropriate market value of the entire real estate, area/ground and building, established according to the international standards of assessment.

If the entitled persons received compensations according to the Law no. 112/1995, they have the right to receive the difference between the amount cashed, updated with the inflation index and the appropriate market value of the immobile good."

The recognition of the legal effects of the good faith principle in this field, which has been subject to a not unitary judicial practice is reiterated by the article 45 paragraph 2, in the new version, text which provides that "The legal acts of attaining, including those elaborated within the privatization process, having as object immobile goods taken over without valid title, considered such as prior to entering into force of the Law no. 213/1998 on the public property and its legal regime, with subsequent amendments and completions, are declared absolutely null, excepting when the act has been concluded in good faith."

It is very important that the Law for the amendment and completion of the Law no. 10/2001 from the year 2008 solves the issue regarding the admissibility of the common law claiming procedures in this field, stating in the article 46 that "The entitled person (ex owner or his successors – o.n.) has the obligation to comply with the modality provided by this law, after its entering into force. The provisions of this law apply with priority."

We appreciate that, performing a special application of the principle *"specialia generalibus derogant"*, the legislator clarifies the issue regarding the admissibility of a claiming action based on the common law versus the special procedure of the immobile goods claiming regulated by the Law no. 10/2001, aspect that represented the main issue not unitary solved by the national courts.

In the same spirit and thinking selfsame the legislator repealed the paragraph 2 of the article 2 of the Law no. 10/2001 which provided that "The persons whose immobile goods were taken over without valid title keep the quality of owner held at the moment of taking over, quality performed after the receipt of the decision or of the court's order on the restitution, according to the present law."

Finally, the idea regarding the protection of the selling – purchasing contracts concluded in accordance with the Law no. 112/1995 results also from the provisions of the article 45 paragraph 2^1 which declare them "authentic acts and represent opposable property deed from the date of its conclusion."

It results that the Supreme Court as well as the legislator body corrected the judicial practice against the law which was developed in the

context of application of the Laws no. 112/1995 and no. 10/2001, denying the judicial creations *contra legem* and prohibiting them in the future, on the one hand and acknowledging the judicial practice compliant with the law, with pertinent CEDO decisions and with the general principles of the civil law.

In the same time, the Romanian Parliament adopted the Emergency Ordinance of the Government no. 57/2008 according to which the tenants evicted which are under eviction from the dwelling houses retro ceded to the ex owners have priority for the allotment of the social dwelling houses.

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We would like to mention that on the date of elaboration of this study, the law on the amendment of the Law no. 10/2001 has not been already promulgated by the President of Romania.

Furthermore, on October 13, 2008, within the 10 days term when the law should have been promulgated, the Democrat-Liberal Party contested to the Constitutional Court, the law on the amendment of the Law no. 10/2001, with the reasoning that it would regulate a new nationalization of the real estates and that it would infringe the private property and in consequence this law would be unconstitutional.

Instead, through Decision no. 1055 from October 9, 2008, published in the same day when the study was giving in order to be published (October 20, 2008), the Constitutional Court declared as unconstitutional the article 47 of the Law no.10/2001.

The text, which was declared unconstitutional, provided that the entitled persons whose claiming actions having as object goods abusively taken over by the state were rejected through final and irrevocable decisions , until the date of entering into force of the Law no. 10/2001, may request, regardless the decisions pronounced, repairing measures provided by this Law, firstly the restitution in nature of the good.

As reasoning, the Constitutional Court decided that "the Article 47 of the Law no. 10/2001 is unconstitutional, being contrary to the principle on granting and protecting the property, as provided by the article 44 of the Romanian Constitution, being infringed the right of property of the attainder of good faith in accordance with the provisions of the Law no. 112/1999.

The article 47 of The Law no. 10/2001 cannot represent a new legal grounding for the introduction of other restitution action regarding the same immobile good, because the legislator cannot dispose, neither through a law,

over a right gained through a final and irrevocable court decision, unless if there is an expropriation for public utility.

Even if the "*res judicata*" principle is not a constitutional principle, its infringement, by the legal text in discussion – article 47, contravenes to the principle on the State's powers separation, because the legislator cannot abolish final and irrevocable court decisions, thus intervening in the judicial activity".

AGAIN ABOUT AN EFFECTIVE INTERNATIONAL LEGAL REGIME FOR NUCLEAR WEAPONS

Dumitra POPESCU*

ABSTRACT

The study deals with the analysis of the legal regime of nuclear weapons in the light of the international law and pointing out the deficiencies of existing regime the authoress considers that in view of establishing an effective legal regime, it is necessary to take drastic measures for the prevention of the proliferation of nuclear weapons, the application of gradual and adequate sanctions, including the most severe one for the infringement of the regime of non-proliferation; the equal application of the sanction of all perpetrating states, irrespective of other considerations; by the states possessing nuclear weapons that they will not threat or use nuclear weapons against non-possessing states. It is obvious that the most secure and calm regime- although it seems a utopia- would be the regime of total and in any circumstances banning of threat or use of nuclear weapons.

KEYWORDS

Proliferation of nuclear weapons, Treaty of non-proliferation of nuclear weapons, Treaty regarding the total banning of nuclear tests, the right of the state to individual or collective self-defence

1. GENERAL REMARKS

The specific and limited regime instituted by the Treaty regarding the non-proliferation of nuclear weapons[1], after 40 years since adoption of

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[1] The Treaty regarding the non-proliferation of nuclear weapons-TNP was adopted by the UNO's General Assembly on 12 June 1968, opened for signature on 1 July 1968, in London, Moscow and Washington and came into force on 5 March 1970. Romania ratified

this treaty, continues to be questioned from time to time. Up to the present, this is the case of India in 1974 and 1998, as well as of Pakistan in 1998. What is the future direction of events in Iran? What will happen in Israel? There are questions that are currently concerning the international society.

The nuclear weapon which at present, although it is the most dangerous means of mass destruction, legally detained by five states and *de facto* by another three states[2], constitutes the only type of weapons that, after over 60 years of existence, is not subjected to a proper legal regime, the non-proliferation having limited purposes, as shown by the used term.

The settling efforts in multilateral framework were channelled towards a regime of non-proliferation of nuclear weapons[3] focused along two directions: a) horizontal non-proliferation-stopping their spreading throughout the globe; and b) vertical non-proliferation-limiting the perfecting and emerging of a new generation of nuclear weapons.

As for the horizontal non-proliferation the juridical settlement was in its turn oriented along two directions:

- the main settlement is represented by the Treaty of non-proliferation of nuclear weapons, adopted in 1968, instituing a global regime of non-proliferation;

- connex settlements under the form of treaties regarding the setting up of nuclear free zone establishing zonal regimes of total banning of nuclear weapons.

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this treaty by Decree of the State Council of R.S.Romania no. 21 of 30 January 1970 (B. Of. no. 3 of 31.01.1970). In 2006, 189 states were parties.

[2] Art. IX, par.3 of the Treaty of non-proliferation stipulates that "For the purposes of the present Treaty a state possessing nuclear weapons is the state that produced and detonated a nuclear weapon or any other nuclear explosive device before 1 January 1967"-nuclear powers recognized in the Treaty: the USA , the USSR (and since 1991 Russian Federation), Great Britain, France, China, and the de facto owners India and Pakistan, and in October 2006 North Korea. Others states may have the nuclear weapon, but they have not publicly admitted the possession of such weapons, and others admit the possession od such weapons, but their allegations have not been verified.

[3] In the doctrine, the preoccupations and goals regarding the non-proliferation of nuclear weapons are grouped in 6 stages: International control (1945-1946); Cultivation of manufacturing secret (1947-1952);The Programme ,,Atom for peace" (1953-1960); The Regime of the Treaty of Non- Proliferation (1968-1995); The period of extension for unlimited duration of the treaty after 1995 and the regime imposed by the Resolution no. 1540/2004 of the UNO's Security Council (see C. Istrate, The Law of multilateral disarmament, All Beck Publishing House, Bucharest, 2005, p.10-12 and Res. No. 1540/2004 of the UNO's Security Council).

2. THE GLOBAL LEGAL REGIME INSTITUTED BY THE NON-PROLIFERATION TREATY

The said treaty instituted a responsible monopoly over the nuclear weapons and divided states into two categories: owners and non-owners of nuclear weapons, which determined its qualification, by the disadvantaged states, as having a discriminating character. The category of owners is limited to the 5 states that have the quality of permanent members, and thus the right to veto, in the UNO's Security Council. Based on the treaty one established on the one hand the obligations for the states having nuclear weapons, and on the other hand, obligations for the states that do not possess such weapons.

The obligation of the states possessing nuclear weapons, party in the treaty, to not transfer nuclear weapons or control over such arms has a preventive character and is much more complex, containing not only the obligation not to transfer nuclear explosive weapons or devices or the control over them to anybody[4], but also not to help, encourage, or incite no state that has no nuclear weapons to manufacture or to obtain nuclear weapons or other explosive nuclear weapon (art.1).

The obligations of the states not possessing such weapons are two categories according to the goal aimed at: the obligation to not acquire nuclear weapons (art. II) and obligation to accept guarantees (control) of the IAEA (art. III).

The obligation of the states not possessing nuclear weapons has a preventive character and is also complex, including not only the obligation of the state not possessing such arms as party in the treaty to acquire or accept from nobody nuclear weapons or devices or control over such arms, but also to not manufacture them and to reject any help to manufacture them.

The obligation of the states not possessing nuclear weapons, parties in the treaty, to accept the guarantees (control) that are stipulated in an agreement to be concluded with the International Atomic Energy Agency (IAEA) aims at preventing the manufacture of fissionable materials in the quantity necessary for the manufacture of a nuclear weapon. Moreover, the treaty rules the application of guarantees so that the economic or

[4] We remark that art.I and art. II use the „to nobody' and „form nobody's part'. Gerhard von Glahn, James Larry Taulbee, *Law among Nations. An Introduction to Public International Law*, New York, San Francisco, Boston, 2007, p.648-650.

technological development of the parties should not be affected, or the international co-operation in the field of the peaceful applications of the atom (art. IV).

The signatory parties of the NPT and especially the nuclear states, are bound by the stipulations of art. IV regarding nuclear disarmament.

Since 1970, in connection with the NPT's goals and the horizontal non-proliferation, respectively, a special importance is given to the integrated system for monitoring exports and imports of nuclear devices and technologies. The goal of this mechanism is the avoidance of the export of items with double use to a state engaged in activities not subjected to the system of guarantees(control) of the IAEA.

In order to perfect the non-proliferation mechanism, the UN's Security Council adopted the Resolution no.1540 of 28 April 2004 (acting in accordance with chapter VII of the UN Chart) based on which all states-irrespective of their capacity of being or non-being party to the NPT-are obliged to provide the Council with multiple information regarding nuclear items and technologies and the regime of control and security of such, applied internally.[5]

Based on the legal instruments regarding the nuclear domain, the states assumed a number of obligations connected to the nuclear non-proliferation and security, such as: internally adopting a wide range of specific measures; creating bodies with competence in the field, as well as developing the necessary infrastructure for the nuclear sector.

2.1. The legal regime regarding the nuclear weapon – free zones

The regime instituted through the treaties regarding the nuclear-free zones constitutes an important legal barrier in the way of horizontal proliferation. As a principle, a treaty of this type institutes a multilateral legal banning of nuclear weapons on a certain territory.[6] The treaties under

[5] The Resolution no. 1540/2004 of the UNO's Security Council (and also the Resolution no. 1673/2006 of the same UNO body) refers to measures of non- proliferation of nuclear weapons, chemical and biological weapons, meant to avoid their acquiring by non-state actors-considered by the Res. 1540 as being individuals or entities that do not act under the lawful authority of any state in the development of the respective activities.

[6] All four treaties for the creation of certain nuclear weapons free zone establish the delimitation of the vised zones, which is done based on different methods, such as: enumeration of countries included in the area (Bangkok Treaty of 1995); enclosing a map (Rarotonga Treaty of 1985); generic indication of geographic co-ordinates Tlatelolco Treaty of 1967 and Pelindaba Treaty of 1996, enclosing also the map of the nuclear weapons-free African zone).

discussion have a complex nature, involving not only the participation of the states from the respective region, but also the co-operation of all states possessing nuclear weapons, even under the form of certain obligations.

The treaties regarding the creation of nuclear weapon free zone comprise similar stipulations describing the obligations of the signatory parties. Along this line, the states party assume the following categories of obligations: to not develop, acquire, possess or control nuclear weapons, to not test, use, station or transport such weapons in the area or outside it: to not allow the performance of forbidden activities by other states on their territory and to not demand or receive assistance aimed at engaging in such activities.[7]

The states under the incidence of the denuclearization regime are recognized the right to use nuclear energy for peaceful purposes, on condition they apply AIEA guarantees (control).

We underline that all four treaties[8] settle, through additional protocols, the relations with third parties meant to secure the observance of the denuclearization regime by the states possessing nuclear weapons.

In the context of the measures of horizontal non-proliferation a certain role should be applied by certain treaties setting the general legal regime of certain areas consecrating the interdiction of nuclear weapons (or other mass-destruction weapons as well) on those territories or zones: the Treaty regarding the Antarctic 1959, art. I and V; The Treaty regarding the principles governing the activity of states in the exploration and use of outerspace, including the Moon and the other celestial bodies of 1967, art.1and 4; Agreement concerning the Moon of 1979, etc.

As for the vertical non-proliferation the measures agreed in this respect aim at preventing the qualitative development of nuclear weapons. *Ab initio,* these measures were related to the nuclear states, but the settlements having intervened are of the type of multilateral treaties opened to the participation of any state.

[7] See art.1 of the Tlatelolco-Latin America Treaty; art.3,5 and 6 of the Rarotonga-South Pacific Treaty art. 3,4 and 5 of the Pelindaba-African Treaty. This last treaty stipulates both the interdiction of imports of radioactive waste and the physical protection of nuclear materials and installations(art. 6 and 10).

[8] For the text of these treaties see. A.Nastase*, Fundamental documents of international law and international relations*, Official Gazette, Bucharest, 1985, p.712-758.

2.2. The legal regime regarding the interdiction of nuclear experiments

a) The legal regime regarding the banning of nuclear weapons tests in the three media

The treaty of 1963 establishes for the first time a certain legal regime regarding the nuclear weapons, being limited only to the banning of experimental explosions with the nuclear weapon in the atmosphere, in the outerspace and under water (art. I, point 1, letter a), as well as any other nuclear explosion, and consequently irrespective of their magnitude, in the three media in any place under the jurisdiction or control of a state party in the treaty.

The 1963 Treaty leaves out of its sphere the underground tests. Nevertheless, art.I point 1, letter b of the treaty prohibits also the underground explosions, if such an explosion is accompanied by radioactive falls beyond the territorial boundaries of the state effecting it.

b) The legal regime regarding the total banning of nuclear tests

This regime is settled by the 1996 Treaty regarding the total banning of nuclear tests (C.T.B.T.), treaty that has not come into force yet. The fundamental obligations of the parties are stipulated in art.I according to which each signatory state pledges itself to not effect ,,experimental explosions with nuclear weapons or any other type of nuclear explosions", and also to prohibit and prevent any such nuclear explosion in any area under its jurisdiction or control. The dispositions of the treaty prohibit also the so-called "peaceful nucleate experiments", but they do not apply to subcritical tests, which do not cause the release of fission energy. At the same time, the treaty consecrates also the parties' obligation to not provoke, encourage or participate in any way in the effectuation of experimental explosions with the nuclear weapon.

3. FROM RETORSION TO COERCIVE MEASURES (SANCTIONS)

In principle, the examined treaties do not contain specific sanctions in case of infringement of an obligation stipulated in these treaties, the measures that may be taken are of reduced significance.[9] Thus, the Non-Proliferation Treaty does not refer to sanctions in case of non-observance of its dispositions. But IAEA, the organization in the field, according to the

[9] D.Popescu, *Nuclear Weapons- is it possible to Implement an Effective Legal Regime*, in "Caiete de drept international ", 2007, nr. (16) 3,p.43-44.

Statute, has a number of obligations in case of breach of guarantee (control) agreements concluded between the NPT parties and the Agency.

The Council of Governors can decide the interruption or suspension of the assistance provided by the Agency and to ask the guilty state the restitution of the products and equipment transmitted, or may deprive the respective state from the exercise of the rights resulted from its membership or may bring these breaches to the Security Council and the General Assembly of the UN.

Similar measures are also stipulated in the Treaties of creation of nuclear-weapons free zones-The Tlatelolco Treaty (art.20), The Bangkok Treaty (art.14), while the Pelindaba Treaty provides an own mechanism for the compliance of the parties with their undertakings under of the Treaty-The African Commission for Nuclear Energy, which co-operates with the AIEA(art.12 and 13 of the Treaty).

The inefficiency of the ”soft” measures proved, in the case of North Korea (in 2002, 2003) that refused the access of international inspectors to its nuclear installations, without being subjected to any effective sanctions, which occurred in October 2006. At this time, following the nuclear test of the same state, the Security Council, finding that this was a case of “ threat against international peace and security” took serious measures and, acting according chapter VII (art.41) of the UNO Chart applied economic and commercial sanctions. Iran was also subjected to such harsh measures in December 2006 and in March 2007 for its nuclear programme. In September 2008, The U.N. Security Council reaffirmed its former resolutions concerning sanctions against Iran, requiring the need for their implementation by this state.

4. THE SIGNIFICANCE OF THE LEGAL REGIME REGARDING NUCLEAR WEAPONS IN THE CONTEXT OF PROHIBITION OF THREAT OR USE OF FORCE

The international law, in force at present, prohibits the threat or use of force against the territorial integrity or political independence of any state or in any other way incompatible with the UNO’s purposes (art1(4) of the Chart.[10]

At the same time, the conventional international law, art.51 of the UN Chart (as well as the customary law) recognizes the right to individual or collective self-defence in the case of an armed attack against a state, and

[10] S.C.Res. no. 1718/14 october 2006; S.C.Res.no. 1737/2006 and S.C.Res. no. 1447/2007.

art.42 allows the use of force if the UNO's Security Council may appeal to certain measures with the use of armed force, according to chapter VII (art.42) of the UN Chart.

We must underline nevertheless that, by forbidding the threat by force or use of force, art.2 (4), neither art. 51 of the UN Chart, nor the developments of the principles based on the Declaration of the UN General Assembly referring to the principles of international law (1970) do not consider certain weapons, but these dispositions refer to any act of force, irrespective of the arms uses, thus they interdict the force and threat by force as principle not under the aspect of the type of arms that can be used. The UN Chart neither expressly forbids, not expressly allowed the use of certain types of weapons and especially nuclear weapons. It obviously results that a weapon that is already forbidden (illegal) per se, either based on certain treaties or the custom cannot become legal(to change the legal indictment) for the reason that it is used with the purpose of self-defence according to the Chart.[11]

Moreover, the exercise of the right to self-defence is subordinated to certain conditions, such as: necessity and proportionality, as rules inherent to the concept of self-defence, which was formed by customary way.[12] The subjecting of the exercise of the right to self-defence of necessity and proportionality are applied, irrespective of the nature or type of means of force used.[13] If the principle of proportionality may not exclude by itself the use of nuclear weapons in circumstance of self-defence, it is not enough, involving cumulatively other requirements. Besides the necessity and proportionality other principles and rules apply: the fact it produces useless suffering; it has a non- discriminatory character (it is a blank weapon) in the sense that it does not distinguish between belligerents and non- belligerents, between armymen and civilians, it produces the mass destruction of mankind and immense, lasting and serious damages to the environment and human rights in theirs entirety.[14]

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[11] See the first principle(referring to the non-recourse to force or threat by force) from Declaration (resolution no. 2625/1970) of the UNO's General Assembly, the second principle form the Helsinki Final Act (1 August 1975) referring to the non-recourse to the force.

[12] D. Popescu, *The legal fundament of the interdiction and elimination of nuclear weapons, in R.R.S.I.*, no.4, July-August, 1988, p.295-296.

[13] Gerhard von Glahn, James Larry Taulbee, *op.cit.*, 2007,p.535-536.

[14] D. Popescu, *op.cit.*, p.295; M. Dixon, R. McCorquodale, *Cases& Materials on International Law*, Oxford University Press, 2003, p.536-537.

Within the International Court of Justice, asked to express its opinion by an advisory opinion on the Legality of the threat or use of nuclear weapons[15] a less usual situation occurred as regards the paragraph in which the Court expresses a certain opinion. Thus the Court affirmed that the use or threat to use nuclear weapons is „contrary to the rules of international law applicable to armed conflicts and especially the principles and rules of humanitarian law". The Court seems to "adjust" this affirmation or even to contradict it, immediately adding that nevertheless, considering the present situation of international law and the factual elements to its disposition „The Court cannot definitively concluded if the threat or use of nuclear weapons would be legal or illegal in an extreme self-defence circumstance in which the very survival of a state would be at stake". This paragraph had 7 votes for and 7 votes against and it required the decisive vote of the Chairman of the Court to be adopted.

Under these circumstance, it is not unexpected that, in its dissident opinion, the Vice- Chairman of the International Court of Justice (Schwebel) considers the conclusion of the Court, in a matter of supreme importance-sharply controverted-as being an "astounding conclusion" and that it would have been better if the Court "would not render an opinion at all".

At the same time, in his dissident opinion have done Judge Weeramantry considers that the threat or use of nuclear weapons would not be legal in any circumstance, as it breaches the fundamental principles of the law of war which applies in case of self-defence as well as in any aspect of military operations.

5. CONCLUSIONS

The approach of the regime of nuclear weapons in the light of the international law regulations point out certain deficiencies of the regime also, and especially the fact that in the domain of non-proliferation a breach has been made, as well as the situations that escape the sphere of application of the respective treaties.

[15] In connection with the matter-brought before the International Court of Justice if the use of nuclear weapons would necessarily constitute a breach of environmental obligations, the Court affirmed that the states should consider the environmental requirements when they assess what is necessary and proportional in the following of the legitimate military objectives. The respect for the environment is one of the elements that count in the appreciation if an action is in accordance with the principles of necessity and proportionality (ICJ Reports,1996,p.226-242).

Based on certain investigations in the domain, and starting from the finding that in the international law there is no express authorization of the threat or use of nuclear weapon, but at the same time nor an express prohibition or limitation of the use of the nuclear weapon: we thus conclude that beyond such lacunas, the nuclear weapon is contrary to: the imperative norms of international law that defend the sovereignty and territorial integrity of states, their equality in rights, the protection of human rights, the right to peace and development of states; the imperative norms of humanitarian law; the norms of international environmental law; as well as morals and religious precepts.

Both the international custom and conventional law (art.51 of the UN Chart) recognize the right of the state to individual or collective self-defence in case of armed attack, but allowing the recourse to force in this case does not mean also the permission to use 'the nuclear force': nuclear weapons are contrary to the rules of war and are equally contrary to them in the case of self-defence. The right to self-defence is a right inherent of the attacked state, but it must be exercised with struggle means that do not infringe the fundamental norms of warfare.

In fact, an authority of his time in the domain, H.Lauterpacht believed that the use of such weapons should be forbidden if one proved that the effects ulterior to their use would place them in the category of "biological" war, but at the same time, did not object to their use against the strictly military objectives.[16]

That is precisely why, in view of establishing an effective legal regime, it is necessary to take drastic measures for the prevention of the proliferation of nuclear weapons, the application of gradual and adequate sanctions, including the most severe one for the infringement of the regime of non-proliferation; the equal application-in accordance with the content and degree of the infringement of international obligations-of the sanction of all perpetrating states, irrespective of other considerations; by the states possessing nuclear weapons that they will not threat or use nuclear weapons against non-possessing states. It is obvious that the most secure and calm regime- although it seems a utopia- would be the regime of total banning of threat or use of nuclear weapons.

[16] H.Lauterpacht's, Oppenheim, *International Law*, vol. II, 1948,p.348.We mention that The United States Law of Naval Warfare (present edition) declares in par. 613 that" at present there are no rules of international law that expressly forbid the states the use of nuclear weapons at war. In the absence of an express interdiction, the use of such weapons against the enemy soldier and other military objectives is allowed" (cited by Gerhard von Glahn, James Larry Taulbee, op.cit., 2007, p.648).

USING THE UNDER COVER INVESTIGATORS TO GET EVIDENCE ON THE EXISTENCE OF SOME OFFENCES AND IDENTIFICATION OF OFFENDERS

Alexandru ȚUCULEANU*

ABSTRACT

The author presents the provisions of the article 224[1] of the Criminal Proceeding Code on the conditions of using the under cover investigator. It results the exceptionality of these special preliminary investigation. Thus, when there is sound and concrete evidence that one of the offences mentioned by the law was committed, under-cover investigators meeting the conditions necessary to assure the legality of the procedure.

KEYWORDS

Article 224 of the Criminal Proceeding Code, preparation of an offence perpetration, under-cover investigators or collaborators, informers of the Judicial Police

I. GENERAL PRESENTATION ON THE PRELIMINARY INVESTIGATIONS

The preliminary investigations, as the name describes them, are previous to the initiation of the legal proceedings, and they are carried out for this initiation precisely[1].

These investigations, regulated by the art. 224 of the Criminal Proceedings Code, may be carried out only after the criminal action bodies are informed for the purpose of collecting the data necessary for the initiation of the legal proceedings, *in personam* or *in rem*.

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[1] V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. M. Stanoiu,, *Theoretical Explanations of the Romanian Criminal Proceedings*, Vol. II, Ed. Academiei, Bucureşti, 1975, p. 38.

The initial text of the article 224 of the Criminal Proceeding Code, until the amendment of the Criminal Proceedings Code by the Law no. 7/ 1973 and the Law no. 356/2006, would allow for the carrying out of the preliminary investigations also for the officially informing of the criminal action bodies. In this case, the official informing report meant also the document of legal proceedings initiation.

As regards the necessity of carrying out the preliminary investigations, the action body will pronounce a motivated resolution.

From the way the text is drawn up results that the preliminary are optional. They will not be drawn up if the information has enough data for the beginning of the legal proceedings. In case they are drawn up, the preliminary investigations are limited to reaching the purpose they are intended for. As soon as this purpose is reached, the preliminary investigations cannot be drawn up any more as the procedural guarantees ensured to the participants to the legal proceedings are shirked[2].

This activity is carried out after the criminal action bodies are informed as per the regulations provided by the Criminal Proceedings Code for the legal proceeding documents meaning any type of legal proceedings documents that can be drawn up until the legal proceedings begin[3].

During the carrying out of the preliminary investigations, no preventive, ensuring measures, security measures or other activities can be taken, measures which imply the beginning of the legal proceedings (house search, the retaining and delivering of correspondence, expert's report carrying out s.a.).

As per the article 224 last paragraph from the Criminal Proceedings Code, the preliminary investigations are registered in a report which can be a method of proof. Only this way, everything that is established by the preliminary investigation has a procedural importance, and they can be used as evidence[4]. In order to correctly understand the meaning of *can*, which is mentioned by the law, the provisions of the article. 224 last paragraph, must be referred to the provisions of the article 89 of the Criminal Proceedings Code, as regards the written means of evidence. The report duly contains the data provided by the art. 91 of the Criminal Proceedings Code.[5]

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[2] N. Volonciu, *Tratat de procedură penală* (Criminal Proceedings Treaty), Vol. II, Ed. Paideia, Bucureşti, 2001, p. 60.

[3] V. Dongoroz s.a., op. cit., p. 38.

[4] Superior Court of Appeal and Justice, criminal department, decree nr. 5826/2006. Law Magazine, nr. 10/ 2007, p. 271 and decree. nr. 13/2007. Magazine of Criminal Law nr. 4,/2007, p. 202.

[5] In the law practice, the record does not contain also the explanations of the persons they refer to and neither do they indicate other data as per article 91 of the Criminal Proceedings

As regards the above-mentioned issues, it is a matter of course that the papers completed before the beginning of the legal proceedings, such as the ones provided by the art. 91³ of the Criminal Proceedings Code, (intercepting and recording the phone calls or the communications), art 108 of the Criminal Proceedings Code (seizing of objects and documents or body search), art. 115 of the Criminal Proceedings Code, (technical-scientific or forensic certificates), art. 131 of the Criminal Proceedings Code (search on site), art 224¹ of the Criminal Proceedings Code (investigations carried out by the under-cover investigators), etc.[6] are relevant for the process and they can be used as evidence only if the outcome of these actions are registered in the report elaborated as per art. 224 last paragraph, by the body authorized by the law[7].

During the preliminary investigation, the penal action bodies can require written statements from the ones interested as regards the deed that represents the object of the investigation previous to the beginning of criminal proceedings. The doctrine and the case law admit that also, at this stage of the investigation, the right to be silent must be obeyed, the legal bodies being obliged to inform the offender about this right.[8] As part of the presumption of innocence, that is the person's right of not incriminating herself/himself by her/his declarations and the legal bodies being obliged to inform the person accused about it, they operate during the entire process and they represent international generally acknowledged norms, having as a starting point the American case law (case *Miranda /Arizona*).

For the purpose of collecting the data necessary for the beginning of the criminal proceedings, the criminal action bodies may also carry out preliminary investigation. Also the preliminary investigations may be carried out by the operative workers in the Ministry of Administration and Home Affairs as well as by the operative workers in the other State bodies working in the field of national security bodies for deeds that represent,

Code., and it is not considered to be evidence, as per article 90 of the Criminal Proceedings Code. (C. A Bucuresti, s II pen. dec. nr. 607/ 1997. Law Practice Book /1997, p. 246).

[6] If, according to the law, the relative activities are carried out after the criminal proceedings have begun (for instance, as per art. 91¹ paragraph 1 last proposition of the Criminal Code, when the call recordings are to be used because the investigation would be delayed too much) they are considered to be separate evidence.

[7] The criminal action body is under no circumstance hindered from attaching the documents drawn up as per art. 91³, art 108, art. 115, art. 131 to the record elaborate as per art 224 last paragraph from the Criminal Code, at the end of the investigations.

[8] N. Volonciu, A. Barbu, *Codul de procedură penală comentat* (Criminal Proceedings Code commented) Editura Hamangiu, 2007, pag. 30.

according to the law threats for the national security, persons specifically appointed for this purpose [9] (art 224 paragraph 2 Criminal Proceedings Code); these operative workers usually carry out preliminary investigation, after they ascertain the facts or at the request of the penal action body [10].

Under the limits and the conditions provided by special laws, other bodies can also carry out preliminary investigation [11].

In the case law, it was established that during the stage of the preliminary investigation, the offender cannot be ensured the defending and also the right to be defended cannot be exercised as the offender does not have the procedural capacity of guilty or defendant; even if the record of the preliminary investigation can be considered evidence, the persons interested have the possibility of objecting it with other evidence when the legal body admits it [12]; during the stage of the preliminary investigation, except for the record of the preliminary investigation outcome, other actions cannot be considered as evidence according to the article 64 Criminal Proceedings Code[13].

II. THE PRELIMINARY INVESTIGATION CARRIED OUT BY THE UNDER-COVER INVESTIGATORS

This proofing procedure was initially used for the investigation of crimes regarding the drugs trafficking and illegal use (Law no. 143/2000); subsequently, the under-cover investigator body was extended for the fighting of trafficking in human beings, (Law no.678/2001), for the prevention and fighting of organized crime (Law no.39/2003), etc. By Law 281/2003 the body was established and it received a minute regulation in the Criminal Proceeding Code (art.224^1-art.224^4).

From the provisions of the article 224^1 of the Criminal Proceeding Code results the exceptionality of these special preliminary investigation.

[9] See also the Law no. 218/2002 on the organization and operation of the Romanian Police, Law nr, 364/2004 on the organization and operation of the Forensic Police, Law nr. 51/ 1991 as regards the national security of Romania.

[10] Thus, according to the art. 13 paragraph 5 of the Law nr. 508/ 2004 on the organization and operation of the Organized Crime and Terrorism Investigation Department, in case preliminary investigations are to be used for crimes against the national security or for terrorism, the prosecutor will informs the competent State bodies and require support.

[11] See, for instance, the provisions of the Law 550/2004 on the organization and operation of the Romanian Police Force.

[12] Decision no. 124/ 26.04.2001 of the Constitutional court published in the Official Gazette no. 466/2001.

[13] Decision no. 113/ 16.02.2007 2001 of the Constitutional Court published in the Official Gazette no.208/2006.

Thus, when there is sound and concrete evidence that one of the offences mentioned by the law[14] was committed, under-cover investigators meeting the following conditions:
-the role of the under-cover investigators is limited to the activities of collecting the data and the information on the existence of the offences described by the article 224¹ paragraph 1 of the Criminal Proceedings Law and on the identification of the persons that are supposed to have committed the crimes;
-the evidence on the existence of these offences and the identification of the authors cannot be obtained by other means;
-the under-cover investigator collects data and information based on the authorization issued by the prosecutor, such an activity being time-limited according to the law;
-whereas the investigations mentioned by the art. 224¹ paragraph 1 of the Criminal Proceedings Code, are looked upon as preliminary investigation, and they can be carried out only after the criminal proceedings bodies as per art 221 from the same code.

In this context, the expression *preparation of an offence perpetration* found in the article 224 [1] paragraph 1 means the possibility of extending the procedures authorized as per art 224² of the Criminal Proceedings Code and aims at uncovering other offences, out of those mentioned by the art 224¹ paragraph 1 of the Criminal Proceedings Code and at identifying the offenders.

Art. 224[1] paragraph 2 of the Criminal Proceedings Code, as amended by the Law 356/ 2006 mentions that only the operative employees of the Judicial Police may be used as under-cover investigators[15]; the operative employees from the State bodies working in the field of national security cannot any more collect date and information as per art 224¹ of the

[14] As per article 224¹ paragraph 1 of the Criminal Proceedings Code, in case there is sound and serious evidence that an offence against the national security is going to happen, an offence which is provided by the Criminal Law and by special laws, as well as in case of traffic in drugs and guns , trafficking in persons, terrorism, money laundry, forgery in money and other values or an offence provided by the Law 78/2000 or in case of another serious crime that cannot be uncovered or whose authors cannot be identified by other means, can be used, for the purpose of collecting the data regarding the existence of the crime and the identification of the persons that are suspected of having committed an offence, investigators having another identity than the real one.
[15] As per Law no. 218/2002, on the organization and operation of the Romanian Police for the fighting of the organized crime and of other serious crimes, both policemen and informers can be used as under-cover investigators, according to the Criminal Code.

Criminal Proceedings Code, but they can also carry out other preliminary investigations, as per art. 224 paragraph 2 from the same Code.

The activity of the under-cover investigators is time-limited as per provisions of the art 224² and it is bound, as per art 224³ of the Criminal Code, only to the cause and the person to which the authorization given by the prosecutor refers.

As per 224¹ last paragraph of the Criminal Code, amended by the Law 356/ 2006, the under-cover investigator is obliged to give to the prosecutor all the data and information collected. In the previous regulation, it was possible that the data could also be given to the criminal action body.

If this data and information is conclusive and useful during the process of evidence, the prosecutor may also include it in the record drawn up as per art. 224 last paragraph of the Criminal Code or he/she can proceed to the examination of the under-cover investigator as witness under another identity, after the beginning of the criminal proceedings, as per art 86¹ paragraph 7 of the same Code[16].

In case of offences under the competence of the Organized Crime and Terrorism Investigation Department, when there are concrete signs that an offence which cannot be uncovered was committed or is going to be committed or whose authors cannot be identified by other means, as per art 17 of the Law 508/2004, under-cover investigators or collaborators or informers of the Judicial Police can be used. The investigations made by the Judicial Police investigators and collaborators are considered to be evidence so that there is no need for the data obtained to be found in the record drawn up as per art 224 last paragraph of the Criminal Code. Although the law does not mention it, these documents can act as records, reports, etc., depending on the case.

Also, as per art 26¹ of the Law 78/2000 for the prevention, uncovering, and sanctioning the corruption deeds, when there are concrete and serious signs that a corruption offence was committed or is going to be committed by a civil servant, offence provided by the art.254, art.256, art.257 of the Criminal Code, the prosecutor may authorize, according to the law, the use of the under-cover investigators or of the investigators with real identity for the purpose of uncovering the deeds, for the identification of the authors and for the obtaining of the evidence.

[16] The under-cover investigator's declaration can be used to find out the truth only if corroborated with facts which result from all evidence existent in this case (art 86¹paragraph 6 of the Criminal Code).

The record drawn up, on this occasion, can be considered an evidence and it can be used only for the purpose for which the authorization was given. The persons who carried out the investigations can be examined as a witness as per art 86¹ paragraph. 7 of the Criminal Code.

During the practice of our Supreme Court, one found that the under-cover investigator's declaration given to the prosecutor under the conditions of the art 86¹ paragraph 7 and which was a proof for the drawing up of the public prosecutor's charge, has the value of a proof if the person is also examined during the process[17]. Thus, the case law of the European Court of Human Right decided that the provisions of the European Conventions of Human Rights do not hinder the use of informers as sources during the investigation stage of the trial, but one cannot accept the use of the data given by the them as being proof enough to convict a person because the guarantees from the art. 6 of the Convention on the right to a fair trial is not complied with.[18]. Also, one found that the fair character of the trial is affected when a conviction was based mainly on the declarations of the under-cover agents and of another person who committed the crime, the entire activity being supervised by the Police[19].

The provisions of the art 224² paragraph 1 of the Criminal Code, contain guarantees for the avoidance of possible abuses and of the arbitrariness in the field of preliminary investigations carried out by under-cover investigators. Thus, the law mentions *which is the legal authority competent to decide the authorization of using the under-cover investigators* - the prosecutor, *the name of the procedural deed* which is drawn up on this occasion- motivated ordinance, *the ordinance content*- mainly, the prosecutor's ordinance must refer to concrete and motivated evidence that justify the measure, the activities the under-cover investigator will carry out, the identity under which he/she will carry out the authorized activities, the name of the person suspected of offence perpetration, *the authorization time-period*-60 days at the most, with the possibility of extension, each time

[17] Superior court of Appeal and Justice, criminal department, decree no. 4915/2004. N. Volonciu, Al. Ţuculeanu, *Codul de procedură penală comentat*, (the Criminal Proceedings Code commented), Editura Hamangiu, Bucuresti, 2007. p.56.

[18] The European Court of Human Rights, case Kostovski versus Olanda, decision from 20.11.1989, published in the work V. Berger Case Law of the European Court of Human Rights, Romanian Institute for Human Rights, Bucharest 2005, p.338.

[19] The European Court of Human Rights, case Vanyan/Rusiei decision from 15.12.2005. G. Antoniu, A. Vlăsceanu, A. Barbu. *Code of Criminal Proceedings* - Texts, Case Law, Decision CEDO, Editura Hamangiu, Bucureşti 2008, pag.386.

for 30 days at the most, and altogether, the authorization cannot exceed one year for the same case and for the same person[20], *the content of the authorization application*, *when the latter is drawn up by the criminal action body.*

As per art 224² last paragraph of the Criminal Code, the activities for which there is an authorization can be extended at request or automatically by the prosecutor as regards other investigations aimed at preparation and perpetration of another offence, out of those provided by the art 224[1] of the Criminal Code, as well as regards the authors identification.

From the content of the art. 224³ paragraph 1 of the Criminal Code, results the data and information obtained by the under-cover investigator can be used only for a criminal case and in connection with the persons for which the authorization was given as per art. 224² of the same code.

If the data and information obtained have the value of a proof, the prosecutor will act, depending on the case, according to the art. 224 last paragraph or the art. 86¹ paragraph 7 of the Criminal Code[21].

Given all mentioned, we consider the rules mentioned in the art 68 of the Criminal Code, representing principles of evidence, are appropriately applied, so that the prosecutor is obliged to verify their being complied with when acting as per art 224 last paragraph or as per art 86¹ paragraph 7 of the Criminal Code[22].

The data and the information obtained by the under-cover investigators as per the initial authorization, can be used for other cases or in connection with other persons, if referring to the offences mentioned by the art 224¹ of the Criminal Proceedings Code.

The texts under analysis representing derogation from the common provisions regarding the collection of the evidence necessary regarding the existence of the offences and the identification of the authors, and we must admit that the evidence got as per this special regulation, can be used only as regards the offences and the persons mentioned expressly limiting to the

[20] The cases to which the art.26[1] of the Law nr.78/2000 refers, the authorization cannot exceed 30 days, and it can be extended each time for 30 days at the most, for 4 months in a whole.

[21] In the cases mentioned by the art 17 of the Law nr 508/2004 the documents drawn up by the under-cover investigators and the collaborators of the Judicial Police are meant to be evidence.

[22] As per art 68 of the Criminal Code, it is forbidden the use of violence, threats, or any other means of coercion, as well as promises or advice for the purpose of obtaining evidence (paragraph. 1); also, it is forbidden to make a person to carry out or to continue to commit a criminal deed for the purpose of the evidence (paragraph 2).

art 224[1] paragraph 1 of the Criminal Proceedings Code. The exceptional regulation does not allow for another interpretation as this would determine the arbitrariness way or the abuse way.

The data and the information regarding other offences can be valued separately, as per common provisions on the uncovering of the offences and the identification of the authors (they can be considered as evidence notification from the office of the criminal action body).

From the proceedings carried out by the Superior Court of Appeal and Justice one emphasized that the using of an under-cover investigator for the purpose of catching the author in the act meaning in case of a drug traffic offence, does not represent a trespassing of the provisions of the art 68 of the Criminal Proceedings Code, because the offender had also previously committed deeds specific to the traffic in drugs, thus one cannot say that the under-cover investigator caused him/her to commit or to continue the committing of the offence[23].

In another case having as object the respecting of the right to a fair trial, the claimant applied to the Superior Court of Human Rights and claimed to have been provoked by two policemen dressed as civilians, to commit the offence of drug traffic for which we was convicted; the claimant declared he did not have a criminal record and that he would not have committed the offence without the intervention of the under-cover agents, who acted on their own without some proceedings being initiated against him. The European Court came to the conclusion that the provisions of the art 6 of the European Convention of the Human Rights were infringed, meaning that the activity of the two policemen transgressed the competence of the under-cover agents as they did not limit themselves to passively investigating the deed so as they make it possible to be found, but they caused the offence, and without their intervention, the deed would not have been committed; more than this, the under-cover agents did not have a previous authorization from a Magistrate[24]. The European Court considers the internal regulations do not have to allow for the using of the evidence got as a result of the State agents activity. When there are no signs that an offence had still been committed also without the under-cover agent, the

[23] The Superior Court of Appeal and Justice, criminal section, dec. nr. 5169/ 2003, in the Case Law Gazette on 2003, p. 733.

[24] The European Court of Human Rights, the Teixeira de Castro case versus Portugal, decision of 9.06.1998, published in the Criminal Law Magazine no. 4/1998, p.156.

latter's activity can be considered to be as instigation and can result in irremediably undermining the request of the fair trial.[25]

[25] Cauza Vanyan contra Rusiei - hotărârea din 15.12.2005, cauza Khudobin contra Rusiei hotărârea din 26.10.2006 în G. Antoniu şa, op.cit. pag.385-386.

FORMS OF ARBITRATION IN INTERNATIONAL TRADE

Carmen PĂLĂCEAN*

ABSTRACT

Commercial arbitration is an alternative way of solving the patrimonial disputes (which can be estimated in money) stemming from acts and deeds of trade. The disputes are assigned to be solved, according to the agreement between the parties, to arbitrators chosen by the parties, whose task is to judge the dispute and give a ruling, which the parties undertake to execute. Inserting the arbitration provision in a commercial contract entitles the interested party, in case of dispute, to request its solving by means of arbitration, there fore excluding the competence of law courts.

KEYWORDS

Rules of Arbitration, United Nations Commission for International Trade Law, international conventions on arbitrage , Ad-hoc arbitration, Institutional arbitration

Commercial arbitration is an alternative way of solving commercial disputes by which persons who have full legal capacity may solve disputes of property rights, except those concerning rights that the law does not allow any transactions upon. Under their agreement, the parties empower, according to the extent law allows them, one or more individuals to solve a dispute, thus superseding the power of the courts and the applicability of national procedures. Arbitration is a form of justice tailored specifically onto disputes between traders and mainly used within the business environment. We shall confine ourselves to enumerating two reasons for preferring such a form of justice, in comparison with state justice: the conservatism of state justice and its marked degree of immobility.

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The importance and effectiveness of arbitration in international trade relations were acknowledged through the Final Act of the Conference on Security and Cooperation in Europe signed at Helsinki on August 1, 1975 which holds that *"arbitration is an appropriate way to solve quickly and fairly disputes that may result from the commercial transactions in the area of the exchange of goods and services and from the industrial cooperation agreements"*, and recommends *"the bodies, enterprises and companies from their countries to include, if necessary, arbitration clauses in commercial contracts and in industrial cooperation agreements or in special conventions."* The United Nations General Assembly recommends, in its turn, in the introduction to Decision no. 31/98 of December 15th, 1976, by which it adopted the Rules of Arbitration established by the United Nations Commission for International Trade Law, its dissemination and application on the widest possible extent in the world, acknowledging thus the usefulness of arbitration as a method of solving the disputes that arise from international trade relations. In their turn, the regional economic commissions of the United Nations Organization developed optional regulations of ad hoc arbitration.[1]

Romania acceded to ratify during the communist regime the following international conventions having arbitrage as their object of regulation:

1. The New York Convention of 1958 on the recognition and enforcement of foreign arbitral sentences, to which Romania acceded by Decree no. 186/1961;
2. The European Convention of international commercial arbitration concluded in Geneva on April 21, 1916 and ratified by Romania by Decree no. 281/1963;
3. The 1961 Washington Convention for the regulation of the relative investment disputes between states and subjects of other states, ratified by Romania by Decree no. 62/1975;
4. The Moscow Convention of 1972 regarding the arbitration solution of the civil law disputes that occur out of scientific and economic co-operation relations, ratified by Decree no. 565/1973.[2]

[1] See in this respect: Octavian Căpățână, *Litigiul arbitral de comerț exterior*, Romanian Academy Publishing House, Bucharest, 1987, pp. 5 and the next, T. R. Popescu, Dreptul comerțului internațional, 2nd edition, E.D.P., Bucharest, 1983, pp. 352 and the next.

[2] See in this respect: Viorel Roș, *Arbitrajul comercial internațional*, Official Gazette State Publishing House, Bucharest, 2000, p. 49.

The institution of arbitration is legally consecrated in our law system in the content of Paper IV of the Code of Civil Procedure, entitled "On arbitration" (Art. 340 to 370 of the Code of Civil Procedure).

According to Art. 340, *"the persons who have full legal capacity to exercise their rights may agree to solve by arbitration the property disputes between them, except for those that concern rights that the law does not allow to make any transaction upon."*

This agreement underlies the organization and conduct of arbitration (Art. 341, paragraph 1)

The international commercial arbitration has several judicial forms. The criteria used for their classification consist in the following: organizational structure, powers of arbitrators and arbitration competence.

1. From the point of view of organizational structure, arbitration can be occasional and institutional. Occasional or ad hoc arbitration is created for a particular issue and has an ephemeral duration. Institutional arbitration has a permanent character, being organized as permanent arbitration centers. Its existence does not depend on the duration of a particular dispute.

2. According to the powers granted to arbitrators in solving the dispute, arbitration can be: arbitration in law and in equity. Arbitration in law (or *de jure*) is applied according to the law in force, the arbitrators provide, under the rules of law, incidents in the given case, rules that they are required to comply with. Arbitration in equity (or *ex aequo et bono*) is achieved according to the principles of equity, i.e. according to the mind and the judgment of the arbitrators. Arbitrators are not compelled to apply the legal rules of material law nor those of procedure.

3. According to their material competence, we can distinguish arbitrations with a general competence in matters of commercial disputes and arbitrations with a specialized competence for particular categories of disputes.

The first type represents arbitrations with a general sphere of judicial activity (e.g., the Court of Arbitration of the Chamber of Commerce in Paris, the London Court of Arbitration, the Netherlands Institute of Arbitration, etc.)

In the second category enter arbitrations specialized in solving certain disputes (for example, The Bremen Cotton Exchange Court of Arbitration).

4. According to the local jurisdiction, arbitration may be divided into three categories: bilateral arbitration, regional arbitration and international arbitration.

Bilateral arbitrations are created by international bilateral conventions and have the competence to solve only the disputes between

partners of the two contracting states (e.g., The French-German Arbitration Chamber for Soil Products, The US-Canadian Commercial Arbitration Commission).

Regional arbitrations are established by a multilateral agreement perfected between the states from a particular geographical area and solve the disputes between partners belonging to states of a given geographical area (Scandinavian Arbitration Commission for Hides, Inter-American Commercial Arbitration Commission).

Arbitration with international relevance, whose jurisdiction extends to any geographic area, settles the disputes that arise in any country. The most characteristic example is The Arbitration Court of the International Chamber of Commerce of Paris.

5. According to the national or international adherences that form the object of the dispute, there can be distinguished: national or domestic arbitration and foreign or international arbitration. National arbitration is competent in solving disputes arising between traders who are residents of the same state, whereas foreign arbitration solves the disputes between legal subjects, participants in trade relations from all over the world.

RELEVANT ASPECTS CONCERNING THE MAIN FORMS OF ARBITRATION

I. Ad-hoc (or occasional) arbitration and institutional (or institutionalized) arbitration

Ad-hoc arbitration is considered to be the original, traditional means of arbitration, being organized at the parties' initiative with a view to solving a particular dispute. Its existence ends with the pronouncement of the arbitration ruling or ends with the deadline at which the arbitration ruling should have been pronounced.

Due to its form of organization, the ad-hoc arbitration has no prior structural elements. According to Art. I, paragraph 2, letter b of the European Convention on International Commercial Arbitration perfected in Geneva on April 21, 1961, arbitration represents *"the settlement of the disputes not only by judges appointed for specific cases (ad hoc arbitration) but also the permanent arbitration institution"* (the term "arbitration" shall mean not only settlement by arbitrators appointed for each case (ad-hoc arbitration) but also by permanent arbitral institutions).

The Civil Procedure Code, in Book IV, defines neither the ad-hoc arbitration, nor the institutional one, but in its previous edition of 1865, our code only covered ad-hoc arbitration. Thus, the ad-hoc arbitration was

established by the whole of Book IV, entitled *About Arbitrators*, a regulation that has not suffered major changes by the amendments brought to the Civil Procedure Code in 1900.

The regulations of the Civil Code Procedure were completed with the Law of the Chambers of Commerce of Romania, Law no. 335/2007, published in the Official Gazette no. 836 of December 6, 2007, which repealed Decree-Law no. 139/1990 on the Chambers of Commerce and Industry of Romania. Thus, Art. 4, letter i of Law no. 335/2007 provides the express power given to the county chambers of commerce to organize the solving of civil commercial litigation by mediation and by ad-hoc and institutional arbitration.

The previous legislation also included provisions on arbitration. Article 38 of Decree no. 424 of November 2, 1972 (repealed by the provisions of art. 294 of Law no. 31/90) stipulated that *"disputes arising from joint ventures and contractual relations between Romanian legal persons can be solved, if the parties agree, also through arbitration"*. And the provisions of paragraph 2 of the same article stipulate the parties' possibility to choose, when solving the disputes, beside the courts jurisdiction, the competence of the Arbitration Commission of The Chamber of Commerce of Romania.

Subsequently, Law no. 15 of August 8, 1990, on the reorganization of the state economic units as autonomous and commercial companies provided in Art. 51, paragraph 2 the possibility of companies to resort to arbitration in order to solve the disputes between them, the law making no distinction between ad-hoc and institutional arbitration.

Based upon the elements from the above-mentioned text from the International Convention of Geneva, ad-hoc (or occasional) arbitration can be defined as *"a form of non-state jurisdiction, with special, optional and voluntary character, susceptible of being used in international trade relations, constituted by the will of litigants with a view to settling a certain dispute."*[3]

Ad-hoc or occasional arbitration represents common law in international commercial arbitration.

It has the following distinctive features:

- functions only in solving a crucial issue, but once the sentence is passed, the existence of the court of arbitration ceases;

[3] See in this respect: Mircea N. Costin, Sergiu Deleanu, *Dreptul comerţului internaţional*, vol. I, General Part, Lumina Lex Publishing House, Bucharest, 1994, p. 152.

- both the structure and the rules of procedure of the ad-hoc arbitration will be different, according to the interests of the parties in each dispute;
- by their agreement, the parties may give the dispute to a sole arbitrator or to a full collegiate; in case of disagreement between the parties, the decision of a third party or of an authority is required;
- the parties may agree that the arbitral sentence should be subject to appeal or to be final and binding;
- if the ad-hoc arbitration located in our country is governed by the provisions of international conventions (such as the Geneva Convention of 1961) a person with foreign citizenship may participate as a referee;
- an ad-hoc arbitration located in Romania may be subject, according to the will of the parties, to a foreign law when it is authorized by an international convention to exercise such an option; though, the condition must be fulfilled that the foreign law should not contradict the imperative rules and the public policy of our law;[4]
- it has an optional, essentially voluntary character.

The Romanian procedural provisions of the law characterize the ad-hoc arbitration as a voluntary institution, also subject to an marked dependence on law courts.

Thus, these courts have to perform the following tasks:
- to appoint an over-referee when disagreements arise between the arbitrators, or where the arbitrators appointed are not empowered by compromise or by arbitration clause to choose them;
- to solve any claim relating to any objection to an arbitrator;
- to review the legality and the merits of the arbitration sentence by the action for annulment;
- to invest the arbitration sentence with executive powers.

The UNCITRAL Rules of 1976 provide a viable framework for the organization and running of occasional arbitration (ad hoc). The General Assembly of The United Nations urged the application of these rules, especially in commercial disputes arising in commercial contracts.

The International Commercial Arbitration Court by the Chamber of Commerce and Industry of Romania was reorganized as a permanent arbitration institution – without legal personality – by the Chamber of Commerce and Industry of Romania, in order to manage international and domestic arbitration (Art. 29 of Law no. 335/2007). The Chamber may hold ad-hoc arbitration between the parties only if there is a written arbitration agreement. If in the arbitration agreement there is no provision for

[4] Mircea N. Costin, Sergiu Deleanu, *op. cit.*, p. 152.

arbitration regarding its organization by the Chamber, the latter can organize it at the common request of the parties or of only one of them, provided the other party accepts the request.

By the arbitration agreement, the arbitration may be entrusted to one or several persons invested by the parties, who, according to that convention, may judge the dispute under arbitration and pass a final and binding sentence on them.

The Arbitration Convention expresses the willingness of the parties to address arbitration to solve disputes between them (Art. 340, 341 of the Civil Procedure Code).

The arbitration agreement may be expressed as a *clause in the contract* (arbitration clause) or as a *separate agreement* (compromise), the written form being mandatory. The parties may also stipulate in the clause the number of arbitrators and the place of arbitration. In international arbitration, they can stipulate the language used in the debates and in the submitted documents, as well as the law applicable to the dispute.

According to Art. I, paragraph 2, letter b of the European Convention on International Commercial Arbitration, signed in Geneva on April 21, 1961, the settlement of disputes by permanent arbitration institutions, together with ad- hoc arbitration, is a form of achieving international trade arbitrage.

Institutional arbitration is a form of arbitration in international trade whose existence does not depend on the duration of a particular issue, involves the exercise of judicial functions continuously, being organized within an institutional framework by law and having the character of permanence and continuity.

Institutional arbitration has numerous and important benefits, which make it increasingly preferred over the ad-hoc arbitration.

Thus, we can exemplify by enumerating the advantages afforded by the solution of disputes by the International Commercial Arbitration Court of the Chamber of Commerce and Industry of Romania:

- accessibility – the ability to rapidly draft arbitral agreements for conflicts, either by inserting compromising clauses in commercial contracts, or through a separate compromise between the parties or in the arbitral tribunal or courts;
- simplicity – the rules of arbitration procedure are simple and clear so that the parties can very often represent themselves, without the need to hire an attorney;
- impartiality, fairness and integrity of the arbitral tribunal which is composed of independent arbitrators;

- specialized competence of arbitrators – Arbitration Court judges are highly skilled specialists in the field of law and international trade;
- confidentiality – court hearings are not public, no person has access to information regarding the activity of solving litigations;
- quickness – the arbitral procedure takes place in the course of less than 12 months in international arbitration and 6 months in the internal one (according to the provisions of Book IV of the Civil Procedure Code, the arbitral court must rule the arbitrary decision no later than 5 months from the date of issuance, unless the parties have provided otherwise; the same settlement period is stipulated in the rules of arbitral procedure of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of Romania in Art. 35);
- atmosphere of partnership – arbitration is a contractual expression of the parties' will, the sentence shall be passed by the arbitrators chosen by the parties;
low costs – the arbitration fees are expressed as percentages, regressively, in installments, according to the value of the litigation object, according to the rules on fees and arbitration costs; in domestic arbitration, the arbitration fee includes the fees of the arbitrators as well;
-sentences are final and binding for the Parties (Romania ratified the United Nations Convention on the recognition and enforcement of foreign arbitral sentences, concluded in New York in 1958).

On the other hand, it should be also pointed out that a permanent institution has some stability and a degree of certainty, which gives it multiple opportunities to contribute to the emergence of a more uniform practice.
All these advantages led to the preferred use of permanent arbitration institutions, so that most disputes arising between the participants in the trade have been attributed to be solved to such institutions.[5]

The conduct of the arbitration process begins after the setting up of the panel of referees. Basically, it follows the rules established by the rules of the arbitration center that has been addressed by the litigants.

Some of the provisions of the Regulations are binding, being regarded as implicitly accepted by the parties, and some are optional for the parties, the latter being able to make amendments agreed upon and considered by them as necessary.
Institutional arbitration is conducted by permanent arbitration institutions, which are attached to the chambers of commerce (such as the International

[5] Mircea N. Costin, Sergiu Deleanu, *op. cit.*, p. 155.

Commercial Arbitration Court of the Chamber of Commerce and Industry of Romania), or large corporate or professional associations, as specialized institutions (e.g., the Court of Arbitration attached to UCECOM, the Arbitral Chamber of the Bucharest Stock Exchange).

Permanent Arbitration may have a general or specialized material competence. Arbitral institutions with a general jurisdiction can resolve any disputes in commercial matters. They run their activity as attached to the trade markets or independently. Specialized arbitration institutions can only solve commercial disputes.

From the point of view of territorial jurisdiction, arbitration may be bilateral, regional and international. Even though most arbitration bodies are organized as national institutions, they have an international relevance.

Out of the issues briefly presented here, we can conclude that the traditional method of organizing arbitration – the ad-hoc form – is currently lacking and has entered into irreversible decline. Even though it still finds its legal expression in different texts of law, in practice, the ad-hoc arbitration does not represent any longer a requested and preferred alternative.

II. Arbitration in law (or *in jure*) and arbitration in equity (or *ex aequo et bono*)

In terms of law enforcement, arbitration can take two forms: arbitration law, which is the current form of arbitration, and arbitration in equity, a form used very little in our arbitration practice.

In the case of the arbitration in law or in jure, the arbitrators settle disputes by law, the same as law courts. They will decide on a dispute, applying the rules of the mishap.

In the arbitration in law, the arbitral sentence must include the grounds on which the solution is based. The legal grounds indicated in Art. 360, paragraph 1 of the Civil Procedure Code are as follows: the main contract, the rules of law applicable, and, where appropriate, commercial usage.

In this form of arbitration, the legal grounds are continually presented: the request for arbitration must include the legal grounds, the contestation must correspond in fact and by law to the request of arbitration, and the arbitral sentence must contain the grounds on which the solution is based.[6]

[6] See in this respect: Giorgiana Dănăilă, *Procedura arbitrală în litigiile comerciale interne*, Universul Juridic Publishing House, Bucharest, 2006, p. 38.

In the absence of a stipulation of the parties, the arbitrators' powers must conform to a strict arbitration law. This form of jurisdiction is the common law arbitration.

The rules of national or conventional law also allow for an arbitration of equity. According to Art. 360, paragraph 2 of the Civil Procedure Code, the equity arbitrage can take place only upon the express agreement of the parties.

One of the features of the equity arbitration is the abeyance of equity rules, not of the rules of law.

Equity arbitration is de facto and is characterized by the following specific features:

-the referee is not obliged to apply either the legal rules of material law or the procedure ones;

-the outcome of the arbitrator is final and it cannot be contested in front of another court of arbitration.

However, arbitration in equity remains in the area of international trade law, and is allowed in most of legislations.

The admissibility of the arbitration in equity is established by various regulatory provisions, of either national character or contained in the regulations of international commercial arbitration institutions, such as the Court of Arbitration of the Chamber of Commerce in Paris, or international conventions, such as the European Convention on international commercial arbitration signed at Geneva on April 21, 1961.

The provisions of Art. VII, paragraph 2 from the Geneva Convention of 1961 give the possibility of the parties to agree that the arbitrators should decide as *amiable mediators* or *amiable composers*, if the law governing the arbitration permits this (the role of the amiable composers or mediators is confined to finding some balanced commercial solutions without the restriction or rigour imposed by law applicable to the specific case). The condition is that the will of the litigants should coincide with the law applicable to arbitration. The arbitral practice holds that this rule should also apply to arbitrators called to decide in equity.

Reference materials point out that arbitration in equity has an intermediate position between arbitration law and arbitration entrusted to amiable mediators[7], though there are diverging opinions, that claim that arbitrage in equity and arbitrage entrusted to amiable arbitrators are equivalent, both being located within the area of law.

[7] See in this respect: Ioan Macovei, *Dreptul comerțului internațional*, vol. II, C.H. Beck Publishing House, Bucharest, 2009, p. 272.

The provisions of Art. VII, paragraph 2 of the Geneva Convention of 1961 say that *"the arbitrators will determine as amiable mediators, if this is the wish of the parties and if it is allowed by the law governing arbitration."* According to this text of the law, the arbitration entrusted to amiable mediators is integrated into law as well, as it can take place only if it is allowed by the law governing the arbitration.[8]

It can be concluded that the provisions of Art. VII, paragraph 2 of the Geneva Convention are also applicable to arbitration in equity, even if the text refers specifically only to the amiable mediators.

The specific elements of arbitration in equity are:

- the existence of a simpler procedure in solving the disputes and the application of some rules specific to international trade; in each case the judges will assess the actual circumstances, determining the content of the equity concept;
- the idea of equity is inseparably linked to the idea of justice; by avoiding the strict application of legal provisions, the rulings in equity allow for the adoption of any solutions in favor of the mutual interests of the parties;
- arbitrators can decide only within the limits of their mandate and only upon the applications they have been invested with, the failure to comply with this requirement being punished with cancellation of the arbitration decision under Art. 364, letter f of the Civil Procedure Code;
- the referee in equity is not exempted from the requirement of showing the equity grounds that justify the solution, and the failure of this requirement is punished with the cancellation of arbitration decision under Art. 364, letter g of the Civil Procedure Code;
- by the effect of admitting the action in annulment, the law court stipulated in Art. 365 (1) of the Civil Procedure Code is required to judge the dispute practically in equity as well, within the initial limits of the arbitral tribunal investment;
- the arbitral tribunal shall meet the requirements of public order, of morality and the mandatory rules of the law, whose violation would lead to the cancellation of the arbitration sentence according to Art. 364 letter i from the Civil Procedure Code.

The arbitration in equity does not mean a simple transaction or a conciliation of claims made by the parties. Arbitrators in equity judge according to rules and principles that could be applied in any similar situation, being subject to their own code of equity. The arbitration in equity

[8] Mircea N. Costin, Sergiu Deleanu, *op. cit.*, p. 161.

can only be juridical, as the will of the parties expressed in the arbitration convention is authorized by law.

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THE RIGHT TO DEFENSE DURING THE CRIMINAL INVESTIGATION

Constantin SIMA*

ABSTRACT

The right to defense is a fundamental right of the citizen, the modern criminal trial shall ensure the attainment of this right by granting compulsory legal assistance in those cases where due to the personal situation of the party or to the seriousness of the punishment that may be applied, the intervention of the assistance by a law practitioner is needed, in order to defend the rightful interests of the party.

KEYWORDS

Article 6 from the Criminal Procedure Code, The content of the right to defense, The ECHR case law, the right of the defender to participate at the performance of any criminal investigation document

The right to defense shall be secured for the defendant and for the other parties, according to article 6 from the Criminal Procedure Code, throughout the criminal trial.

The right to defense is a fundamental right of the citizen, the modern criminal trial shall ensure the attainment of this right by granting compulsory legal assistance in those cases where due to the personal situation of the party or to the seriousness of the punishment that may be applied, the intervention of the assistance by a law practitioner is needed, in order to defend the rightful interests of the party.

All modern legislations enshrine the compulsory legal assistance, unabling the criminal trial to take place without granting the legal assistance by a designated lawyer or by an ex officio appointed lawyer.

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The legal assistance shall be compulsory when the defendant is a juvenile, institutionalized in a reeducation centre or in a medical-educational facility, when the juvenile is remanded or arrested, even in a different case, when concerning the juvenile, the safety measure of medical institutionalization or compelling to medical treatment was order, even in a different case and when the criminal investigation body or the instance assesses that the defendant will not be able to defend himself, as it is set forth by the provisions of article 171, paragraph (2) of the Criminal Procedure Code.

If, during the criminal investigation, the juvenile defendant becomes an adult, the legal assistance shall cease.

During the trial, article 483 paragraphs (2) and (3) of the Criminal Procedure Code shall apply, meaning the legal assistance shall be granted, even after the defendant has become an adult, if he was a juvenile at the time when the instance was notified.

Institutionalization in a reeducation centre or in a medical-educational facility, an educational measure applied to the juveniles, who perpetrated offences, may continue after they become adults. Institutionalization, being a liberty depriving measure, it was considered necessary to grant compulsory legal assistance to juveniles who became adults, because being deprived of their liberty, they would not be able to build their own defense.[1]

THE CONTENT OF THE RIGHT TO DEFENSE

The defense of the defendant is carried out within the limits traced by the article 172 of Criminal Procedure Code.

It must be stated that due to its nature, the criminal investigation stage, having a nonpublic character, it is less opened, less transparent than the trial stage.

The defender may have contact with the defendant throughout the criminal investigation, providing him with advice regarding the content of the charges, regarding the methods by which the charges can be challenged, regarding the defenses that can be built and the evidence that can administrated.

The criminal investigation body has no right to hamper the defender while exerting his defense rights, but he must, also, act with good faith regarding the assistance granted to the defendant.

[1] Gr. Theodoru, *Criminal Procedural Law Treaty*, Hamangiu Publishing house, 2007, page 189.

The defense of the defendant shall be carried out by presenting written and oral requests, by lodging memoirs that may comprise both references to the guarantees of the right to defense and to the challenge on the merits of the charges and of the civil claims.

The defender shall assist the defendant, participating at the performance of the criminal investigation documents, advising him regarding his statements, filing requests, raising exceptions.

When assisting the defendant, beside the advice he can grant him, the defender shall also exert the procedural rights of the defendant, acting within the limits in which the defendant himself may act.

The limits, in which the defense of the defendant is performed, are stated by the national criminal procedure.

First of all, the right to defense includes the right to be informed, in the shortest term, upon the nature and the cause of the charge brought against him (article 6 paragraph (3) of the European Convention on Human Rights).

The ECHR case law ties the right to be informed, as a part of the right to defense, to the right to a fair trial and mentions that, in criminal matters, an accurate and complete information regarding the deeds imputed to the accused and their legal qualification, represent an essential requirement for a fair trial.[2]

Article 6 paragraph (1) and article 172 paragraph (1) of the Criminal Procedure Code transpose the constitutional fundamental of the right to defense into a procedural rule for the defendant and for the other parties, throughout the criminal trial.[3]

The right of the accused to be assisted by a designated defender constitutes another component of the right to defense.

The doctrine underlines the risk of the abusive or inadvertent manner, in which, in some cases, the defendants understand to exert this right of designating a defender or when they avail themselves of this right to delay the procedural activity.[4]

Within this context the following issue was referred to: whether the defendant's right to designate a defender can be precluded, the prosecutor or the court appointing, where applicable, an ex officio defender.

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[2] C. Bîrsan, *European Convention of Human Rights*, Comments upon articles, Vol. I, Freedoms and Liberties, CH Beck Publishing House, Bucharest, 2005, page 551.

[3] Constitutional Court, Decision no. 210/2000, the Official Gazette of Romania, Part I, no. 110/2001.

[4] V. Pătulea, *Fair trial*, IRDO, Bucharest, 2007, page 230.

ECHR has decided in principle that the accused cannot lose the benefit of the right to designate his lawyer by his mere absence at the debates.[5]

6. The extent of the right to legal assistance is another issue that should be studied when discussing the right to defense of the defendant.

According to article 6 paragraph (2) of the Criminal Procedure Code, during the criminal trial, the judicial bodies are compelled to ensure the parties the entire exertion of their procedural rights in the terms provided by the law and to administrate the evidence needed for the defense.

Therefore, the right to defense extends throughout the criminal trial, except during the stage of pre-trial acts.

Examining the constitutionality of these legal provisions, the Constitutional Court has considered that guaranteeing the right to defense cannot be assured outside the criminal trial, before the beginning of the criminal investigation, when the perpetrator does not have the capacity of defendant yet. The performance of some pre-trial acts by the criminal investigation bodies, before the beginning of the criminal investigation, in order to gather the necessary information to trigger the criminal trial, does not represent the moment of the beginning of the criminal trial and they are carried out in order to establish if there are grounds to begin the criminal trial.[6]

According to article 172 of the Criminal Procedure Code, the defender of the defendant may assist at the performance of any criminal investigation document and may file requests and lodge memoirs.

If his requests have not been heard, according to article 275, the defender shall have the right to complain, and the prosecutor shall be compelled to solve the complaint in 48 hours at most.

The interpretation of article 172 shows that the rights of the defender cannot exceed the frame traced by this text.

Nevertheless, a question arises regarding the conditions in which the defender has access to the file during the criminal investigation and whether he can obtain copies of some documents within the case file.

According to the Romanian Criminal Procedure Code, the defender has access to the file, on the occasion of the defendant's arrest, at the prolongation of the arrest, when judging challenging means of the rulings by

[5] ECHR, Imbriosua vs. Suisse, November 24th, 1993.

[6] Constitutional Court, Decision no. 141/1999, the Official Gazette of Romania, Part I, no. 185/1999.

which these measures were enforced and on the occasion of presenting the criminal investigation documents.

In the conditions in which the defender has the right to participate at the performance of any criminal investigation document, the issue of accessing the file should appear to remain without an object.

The European Court of Human Rights case law is hesitant in the first stage, when it pronounces that a lawyer must have access to the documents within the file, its examination is indispensable in order to challenge efficiently the lawfulness of his client's detention (*Lamy vs. Belgium*).

It should be noted that we are talking about the challenge against the preventive measures, a situation clearly regulated by our criminal procedural law and not only a simple access to the file during the criminal investigation.

Placing the file at the availability of the defendant has generated difficulties in certain states, especially in France. Under the pressure of the ECHR case law, the French lawmaker has amended the texts of the Criminal Procedure Code in order for the lawyers to be authorized to convey their clients a reproduction of the copies of the file, provided that the investigating judge does not object through a specially justified ordinance referring to the pressure risks upon the victims, upon the investigated persons, upon their lawyers, witnesses, investigators, experts or upon any other person who is involved in the procedure.

Subsequently, the Criminal Chamber has operated a change in the case law, pointing that the defendant is in the right to obtain on the grounds of article 6 paragraph (3) of the European Convention of Human Rights, not a direct communication of the procedure documents, but a release, on his expense, where applicable, through the agency of his lawyer, of a copy of the documents within the file presented before the court, where he is called to appear.[7]

Once again reference is made to the file presented before the court, leading us to the conclusion that the access to the file cannot be admissible in any moment of the criminal investigation, excepting the situations when the file is presented before the court.

Invoking the principle of equality of arms, the European case law concludes that it is important for the defendant to have access to his file and to obtain the communication of the documents included thereof. This right belongs to the defendant either assisted or not assisted by a defender. Nevertheless, in

[7] J.F. Renucci, *European Law of Human Rights Treaty*, Hamangiu Publishing House, Bucharest, 2009, page 506.

the case Foucher vs. France, the European Court has specified the reasoning through which it is not compatible with the right to defense to reserve the defendant's lawyer the access to the file, cannot operate when the interested party has chosen to represent himself, according to the law.

This statement calls in question the general nature of access to the file.

Coming back to the Romanian criminal procedure, the access to the file is guaranteed to the defendant and his defender at the presentation of the criminal investigation documents and whenever the file is presented before the court.

Concerning the release of copies of some documents within the case file, this occurs anytime important documents come up: findings and financial, technical, medical expertise etc.

Besides, enshrining within the text of article 171 of the Criminal Procedure Code the right of the defender to participate at the performance of any criminal investigation document is likely to ensure the defender direct contact with the procedure of administrating evidence, which means the strict observance of the principle of equality of arms.

PROTECTION OF COPYRIGHT BY CRIMINAL LAW MEANS

Violeta SLAVU*

ABSTRACT

The author presents the juridical framework for the protection of copyright by means of criminal law, focusing on practical issues that the criminal legislation in force fails to cover. In the context, are exposed the modifications of Law no.8/1996 on the categories of acts which are sanctioned as offences. Likewise, the author proposes some solutions de lege ferenda which in her opinion are necessary even after these new legislative evolutions.

KEYWORDS

Law no. 8/1996 amended and supplemented, acts prejudicing the author's moral rights, the author's patrimonial rights, causes for punishment exoneration and reduction

According to the criminal provisions of Law no. 8/1996 amended and supplemented, there are two categories of acts which are sanctioned as offences. On one hand, there are those acts prejudicing the author's moral rights[1] and on the other hand, there are those acts, a lot more numerous, by which the author's patrimonial rights are infringed. Practically, there are not any acts by which the author's patrimonial rights are infringed that are not incriminated as offences. Moreover, as far as the recent modifications of Law no. 8/1996 are concerned, there can be noticed an extremely exigent position adopted by the Romanian legislator concerning the acts by which

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[1] "In the previous regulation, the act of disclosing a work to the public without the author's authorization or consent was incriminated as well, an act which is no longer considered as offence in the new form of the law" – V. Roş, D. Bogdan, Octavia Spineanu-Matei, quoted works, page 538.

the author's patrimonial rights are prejudiced, a position reflected in the establishment of extremely harsh sanctions.

The protection of author's moral and patrimonial rights by criminal law means necessarily requires the following premise situations: for the work to be part of the category of those creations for which Law no. 8/1996 applies; for the intellectual creation to comply with all protection conditions; for the protection duration not to have expired in the case of author's patrimonial rights and, in the case of author's moral rights, to take into consideration the fact that their exercise, respectively their protection by heirs, after the author's death, by criminal law means, concern only the right to demand respect for the name (Article 10(b) of Law no. 8/1996 amended and supplemented); to avoid any of the exceptions related to their exercise, causing the limitation of the protection, such as: reproduction for private purposes; limitations imposed by the necessity to protect certain general interests (interests of education, art and culture, humanitarian reasons etc.) or by the objective pursued (critical or compared analysis of certain opinions), and eventually by the necessity to protect certain under-privileged categories (replacement of destroyed or lost works, normal deployment of the educational process within educational institutions etc.); reproduction for quotation purposes in compliance with the rules on the exercise of the right to quotation, as set up by Article 10 of the Bern Convention and transposed in Romanian legislation by the provisions of Article 33(1)(b) of Law no. 8/1996 amended and supplemented. Therefore, in order to have a legal character, the reproduction under the form of a quotation must be identical to the original, identifiable in the sense of pointing out the source and the name of the author, and must be short. As far as this last condition is concerned, the foreign doctrine has proposed several criteria in order to establish, from this point of view, the liceity of the quotation. A first criterion takes into account the proportion between the length of the quotation and the voluminousness of the work it belongs to, however objectionable, in the sense that such approach disregards the importance of the quotation within the context. Consequently, the quotation must not lose its quality of accessory within the work it is used, which supposes that the work in which the quotation is used does not lose its value if the quotation is suppressed. The Romanian doctrine has opted for a criterion in order to establish the liceity of a quotation, which views both quantitatively and qualitatively the correlation between the quoted passage and the personal contribution of the author who used the quotation to create his/her work. From this point of view, it is considered that the quotation is illicit if it is too ample and "used to argue a point of view which is identical

to the quoted author's point of view"[2], that the work in which it is used lacks a personal contribution and that the reference to the quoted author who elaborated the idea would have been enough. In the same sense, in the judicial practice, it has been decided that "the quotation of 13 verses of a poem which had 35 is abusive"[3].

For the offences committed in the copyright field, the generic juridical object is represented by the social relations shaping in the field of the protection of the copyright over a literary, artistic or scientific work and the material object can be, as the case may be, the work itself considered as a material creation or its copies.

The active subject can be any individual and/or legal entity, the criminal participation under all its forms being possible as well.

As far as the passive subject is concerned, in the case of an offence by which the author's moral rights are prejudiced, it can only be the author of the work (the creator) and, in the case of patrimonial rights, it can be also another person, holder of the copyright.

From an objective point of view, there are not any differences as compared to Common Law; nevertheless, in the case of offences committed in the copyright field, two conditions must cumulatively be complied with:

- for the act not to constitute a more serious offence (fraud, breach of trust, material false), in which case the special and more favourable law applies;
- for the act not to have been committed improperly, namely in the absence of a wide sense cession contract, the only way, unanimously accepted, by which authorization can be operational.

As far as the form of guilt is concerned, it can only take the form of the intention with its two modalities (direct and indirect), taking into consideration that the material element of offences committed in the copyright field can only be manifested by a commissive act. The attempt to commit such offences shall not be punishable.

As far as the causes for punishment exoneration and reduction are concerned, we mention that Law no. 8/1996 amended and supplemented regulates such situations by means of the provisions of Article 143^1, as follows:

- according to Article $143(1)^1$, no punishment shall be inflicted on the person who, before launching the criminal prosecution, denounces to the

[2] V. Roş and others, quoted works, page 316.

[3] V. Roş and others, quoted works, page 317; Paris Court of Appeal, March 17, 1970, Revue Internationale du Droit d'Auteur, January 1971, page 67.

competent authorities his/her participation in an association or arrangement with a view to commit any of the offences provided for in Article 139^6, nor on the persons having committed any of the offences provided for in Articles 139^9, 140 and 141, but only if the identified prejudice is recovered (Article $143(3)^1$ of the Law);
- according to Article $143(2)^1$ if, during the criminal prosecution, the person having committed any of the offences provided for in Article 139^6 denounces and facilitates the identification and criminal indictment of other persons having committed offences related to unauthorized goods or unauthorized access control devices, he/she shall benefit from the reduction by half of the special limitations provided for under the Law for his/her act.
The bodies with attributions in identifying the offences provided for under the Law shall be, according to Article 145(1) of the Law, the specialized structures of the General Inspectorate of Romanian Police and of the General Border Police Inspectorate.

In the case of the offences provided for in Articles $139(6)^6$, 139^8, 139^9 and 143 of the Law, their identification shall be performed, according to Article 145(2), by the General Inspectorate for Communications and Information Technology, and in the case of the offences provided for in Articles 139^6, 139^8 and 141, their identification can be also performed by the Romanian Gendarmerie, under the conditions provided for in Article 214 of the Criminal Procedure Code. Therefore, the final thesis of Article 145(2) of Law no. 8/1996 amended and supplemented establishes for certain categories of offences an alternative power concerning the finding body.

As far as the matter-related power is concerned, according to Article $27(1)(e)^1$ of the Criminal Procedure Code, the court shall try at first instance the offences under the regime of the intellectual property rights. The appeal submitted against these rulings shall fall under the competence of the Court of Appeal, according to Article $28(2)^1$ of the Criminal Procedure Code, and the appeal against the rulings of the Court of Appeal shall fall under the competence of the High Court of Cassation and Justice, according to Article 29(2)(b).

According to the provisions of Law no. 8/1996 amended and supplemented[4], the moral rights that benefit from criminal law protection are: right to authorship and right to a name.

Additionally, the new Criminal Code[5], Title IX, Chapter II, Article 437, under the expression of "Non-compliance with the rules on the

[4] Before amending the Law no. 8/1996 by Law no. 285/2004, it benefited from criminal law protection and right to disclosure.

protection of the author's non-patrimonial rights", sanctions as crime "the act of a person who improperly assumes the authorship of a work or the act of a person who discloses a work to the public under a name other than the one decided upon by the author".

The Article 141 of Law no. 8/1996 amended and supplemented incriminates as offence:

- the act of a person who improperly assumes the authorship of a work;
- as well as the act of a person who discloses a work to the public under a name other than the one decided upon by the author.

From a formal point of view, the text is identical to the one provided for in the new Criminal Code.

The special juridical object of this offence is represented by the social relations shaping in the field of the protection of the authorship of a work, known as the right to authorship and respectively, the exclusive right of the author to decide the name under which the work will be disclosed to the public (moral right to a name).

As it is an offence by which a moral right is prejudiced, it does not represent any material object.

The active subject of this offence can be any individual and/or legal entity which complies with the conditions required by the Law[6] on criminal liability.

The perpetration of the offence under the form of participation is possible in all the three cases (co-authorship, instigation and complicity).

However, some authors[7] consider that, if the act is committed by improperly assuming the authorship of a work, the criminal participation under the form of co-authorship is excluded because, under this hypothesis, the author commits the act by himself.

To support this point of view, it is also shown that, when two or more people improperly assume the co-authorship of a work, the co-authorship as a form of criminal participation is not possible because the activity of intellectual creation and the contribution to the creation of a

[5] The new Criminal Code which was adopted by Law no. 301/2004, published in the Official Gazette, Part I no. 575 from June 29, 2004 and according to Article 512 of the Final Dispositions, should have entered into force one year after the date of publication, respectively on June 29, 2005. Several postponements followed so that the new Criminal Code has not still entered into force although it was adopted.

[6] C. Mitrache, quoted works, pages 101-103.

[7] In this sense, A. Ungureanu, A. Ciopraga, *Dispoziţii penale în legi speciale române*, vol. V, Ed. Lumina Lex, Bucharest, 1996, page 110.

work, either individual, common or collective, can only be personal. The case of an individual work with one single author is not at issue here, but only a common or collective work when several people could improperly assume the co-authorship of that work. In such situation, according to the point of view under analysis, every author is personally responsible for the act committed, as there is a plurality of offences with different authors.

According to another point of view[8], the contrary is supported in the sense that, if such offence is committed, it is possible that two or more people jointly decide to assume the authorship of a work, pursuant to the same offence-related resolution[9].

The passive subject of this offence can be: the holder of the copyright; his/her heirs if the act is committed after the author's death, as it is known that the moral right to authorship of the work is transmitted by inheritance, for an unlimited period of time; or the collective management body which administered the author's rights or, as the case may be, the body having the highest number of members, of the respective field of creation, whose task is to exercise this right, if there are no heirs[10].

The material element of the objective side consists of the actions of assuming the authorship and disclosing a work to the public under a name other than the one decided upon by the author.

Assuming the authorship of a work means that a person other than the real author has appropriated this author's moral right, the real author being, according to Article 3 of Law no. 8/1996 amended and supplemented, any individual or individuals who created the work.

The proof of authorship is chargeable to the person claiming to be the author of the work.

The expression "disclosing a work to the public" represents any public communication. According to Article 15(1) of the Law, the public communication consists of any communication of a work, directly or by any technical means, which is made in a place open to the public or in any place in which a number of people gather, who are more than the normal circle of family members or acquaintances.

The communication can also take the form of a presentation on stage, recitation, or any other public form of performance or direct

[8] Ciprian Paul Romițan, *Drepturile morale de autor şi protecţia acestora prin mijloace de drept penal,* in The Intellectual Property Right Romanian Magazine, Ed. Global Lex, Bucharest, 2004, page 86.

[9] "for instance, they jointly sign a literary work although they are not its authors", idem, page 86.

[10] Article 11(2) related to Article 10(b) of Law no. 8/1996 amended and supplemented.

presentation of the work, as well as public exhibition of works of plastic art and applied art, photographic works and works of architecture, public showing of cinematographic and of other audiovisual works, including the digital art works, in a public space, by means of sound or audiovisual recordings, of a radiobroadcast work, by wire or wireless means, including by means of the Internet or other computer networks, to which the access is presumed to take place in any moment or from any place for any of the members of the public.

The Law also establishes by the provisions of Article 15(2) of Law no. 8/1996 amended and supplemented that the right to authorize or forbid the public communication or the disclosure of the works to the public is not considered exhausted by any act of public communication or disclosure to the public.

The immediate consequence consists of the change of the authorship of the work or, as the case may be, of the publication of the work under a name other than the one decided upon by the real author, situations in which a state of danger is created as far as the observance of the copyright is concerned. There must be a causality relation between the illicit act and the immediate consequence for the act to be incriminated as offence.

The form of guilt is the intention, the legislator using the expression "improperly", excluding the fault as form of the guilt. Therefore, the perpetration of this act by fault shall not result in criminal liability.

The sanction applied for this offence is alternative in the sense that, taking into account the criteria of punishment individualization, the Magistrate may choose to establish either the punishment of deprivation of liberty, respectively imprisonment for three months to five years, or a criminal fine of 2,500 lei to 50,000 lei.

The act is consumed instantaneously, either by improperly assuming the authorship, respectively even when the active subject appropriated this quality, or when the work is disclosed to the public by the active subject of the offence, if the act is committed by public disclosure.

If the same perpetrator commits one of the acts incriminated, concerning two or more works of intellectual creation, the rules guiding the real conjuncture of the offence shall be applied[11].

The criminal action shall be undertaken upon prior complaint of the injured party and the reconciliation of the parties or the withdrawal of the complaint shall remove criminal liability.

[11] For elaboration, see C. Mitrache, quoted works, pages 249-251.

The protection of author's patrimonial rights is ensured by incriminating as offences the acts by which these rights are prejudiced.

The basis of the matter is represented by Articles 139^6, 139^7, 139^8, 139^9, 140, 141^1 and 143 of Law no. 8/1996 amended and supplemented. Thus, according to:

- article $139(1)^6$, those acts consisting of the production, by any means and in any way, of unauthorized goods for distribution purposes, no matter if the pursued objective was to obtain a material benefit, shall be punishable with imprisonment for two to five years, or a fine for 2,500 lei (RON) to 25,000 lei (RON). In this case, there can be noticed that the legislator sanctions quite seriously, in the sense that it incriminates as offence with the consequences that such incrimination presumes, even the mere act of producing unauthorized goods[12]. Therefore, it is not relevant if the act was committed with the view to obtain material benefits, reason for which we consider that such act is consumed in the precise moment of its perpetration, namely when producing unauthorized goods. Nevertheless, in order to be incriminated, the legislator establishes for this act to be committed for distribution purposes. Practically, it is difficult to prove the fulfillment of such objective, in the sense that the possession of a small quantity of unauthorized goods, under the conditions where the perpetrator has not been caught at least trying to distribute them, would remove criminal liability. Taking into consideration the prejudice caused to the real author, it would impose, *de lege ferenda*, that even the mere possession of unauthorized goods be criminally sanctioned, all the more it is known the current ampleness of the piracy phenomenon, which is also alimented by the even higher efficiency technical means, allowing to obtain unauthorized goods easily and with no significant costs; to place unauthorized goods under import or export final customs regime, under suspensive customs regime or in free areas. In this case too, the legislator establishes several premise situations that concern on one hand, taking also into account the provisions of Article 1 of Law no. 344 from November 29, 2005 regarding certain measures for ensuring the observance of the intellectual property rights within the customs operations, the regime under which the unauthorized goods circulate (are declared at the customs authority with view to be placed under a final or suspensive import or export customs regime) and on the other hand, the place where they are, namely free areas. If there is no intervention request, the customs authority can suspend, according to Article

[12] The term of unauthorized goods is defined by the provisions of Article $136(8)^6$ of Law no. 8/1996 amended and supplemented.

4 of Law no. 344/2005, the operation of payment of duty and/or retain such goods for 3 working days, if there are any suspicions that these goods bring prejudice to certain intellectual property rights, having however the obligation to notify both the holder of the right and the declarer/owner, beneficiary of the goods about this measure. The 3 day-deadline shall begin on the date when the holder of the right received the notification (Article 4(3) of Law no. 344/2005). If, within this deadline, the holder of the right does not submit an intervention request, the customs authority levies the measure by which the unauthorized goods are retained and/or grants free customs passage, if the other legal conditions are fulfilled. However, if the holder of the right submits an intervention request and this request is accepted by the National Customs Authority, an intervention period of maximum one year is also established, which can be extended under the conditions of Article 7(2) of Law no. 344/2005 by one year at the most. The goods retained or for which the customs operation was suspended as a result of an accepted intervention request can be destroyed under the conditions of Article 11(a) and (b) of Law no. 344/2005. However, if the holder of the right brings a civil action or submits a criminal complaint, the customs authority shall retain the unauthorized goods until the date of pronunciation of the final and irrevocable ruling (Article 11(4) of Law no. 344/2005: any other way to introduce unauthorized goods on the internal market). The text, as elaborated, allows to sanction the introduction of unauthorized goods in the country, no matter the way in which it was performed, either by declaring them at the Customs or by attempting to illegally introduce them in the country, covering all possible situations, at least hypothetically.

- article 139(2)^6, the act consisting of the supply, distribution, possession, storage or transportation of unauthorized goods for distribution purposes, as well as their possession for use by public communication within the work points of legal entities shall be punishable with imprisonment for one to five years, or a fine for 2,000 lei (RON) to 20,000 lei (RON);
- article 139(3) and (4)^6, any of the acts provided for under paragraphs (1) and (2), if committed for commercial purpose[13], shall be punishable with imprisonment for three to twelve years. By this regulation, the legislator institutes in fact an aggravating circumstance for the typical offence regulated by Article 139(1) and (2)^6, as well as for the renting or supply for renting purposes of unauthorized goods.

[13] Commercial purpose – see definition under Article 139(9)^6 of Law no. 8/1996 amended and supplemented.

- article 139(5)[6], the promotion of unauthorized goods by any means and in any way, including the use of public adds and of electronic communication means, by exhibition or presentation to the public of the lists or catalogues of products, shall be punishable with imprisonment for six months to three years, or a fine for 2,000 lei (RON) to 20,000 lei (RON).

Therefore, we notice that this offence is committed by actions related to the advertising of unauthorized goods, in which case the legislator intervenes by sanctioning them quite seriously, taking into consideration the fact that the punishment established can be the deprivation of liberty as well. The reason for which the legislator incriminates such acts is that, on one hand, the advertisement ensures the first step in obtaining profits by exploiting unauthorized goods and, on the other hand, the perseverance in the offence-related activity that does not stop to the production of unauthorized goods, but, more seriously, it is continued by means of the advertisement to the purpose, obviously illicit, of obtaining undue profits.

- article 139(6)[6], the acts committed under the conditions of paragraphs (1)-(4), causing extremely serious consequences, in which case the punishment applied is the imprisonment for five to fifteen years, are aggravating circumstances. In order to assess the gravity of the consequences, the calculation of the material damage is performed according to the final thesis of the analyzed text, namely on the basis of the unauthorized goods identified under the conditions of paragraphs (1)-(4) and of the unitary cost of the original products, cumulated with the amounts illegally cashed by the perpetrator. When interpreting the analyzed text, it is necessary to relate to article 146 of the Criminal Code which defines "the extremely serious consequences".

- article 139(7)[6] institutes an aggravating circumstance in the case of the perpetration of the acts provided for under paragraphs (1)-(5) by on organized offence-related group, the punishment applied being the imprisonment for five to fifteen years. In this case too, the legislator institutes an aggravating circumstance, establishing a more serious punishment, the legislator's position being justified by the high degree of social danger that the act committed in such circumstances represents;

- article 139[7], the act committed by the person refusing to declare the origin of the unauthorized goods or of the unauthorized access control devices, used for services of restricted access programs, shall be punishable with imprisonment for three months to two years, or a fine. By incriminating such act, the Romanian legislator's optics extends also over the user/beneficiary/consumer of unauthorized goods or unauthorized access control devices, who refuse to disclose their origin.

- article 139^{8}, the act of disclosing to the public, including by Internet or other computer networks, without the consent of the holders of rights, the works or products bearing related rights or sui generis rights of the producers of databases or their copies, no matter the support, so that the public can individually access them in any moment, shall be punishable with imprisonment for one to four years, or a fine.
- article 139^{9}, any unauthorized reproduction of computer software in any of the following modalities: installation, storage, running or execution, display or transmission in internal network, shall be punishable with imprisonment for one to four years, or a fine.
- article 140(1), the perpetration of following acts, without the consent or authorization of the holder of the rights acknowledged by Law no. 8/1996 amended and supplemented: reproduction of works or products bearing related rights, distribution, renting or import on the internal market of works or products bearing related rights[14], other than the unauthorized goods, public communication of works or products bearing related rights, radiobroadcast by cable of works or products bearing related rights, production of derived works, establishment for commercial purpose of the artistic interpretations or performances or radio or televised programs, non-compliance with the provisions of article 134 of the Law, shall be punishable with imprisonment for one month to two years, or a fine.
- article $141(1)^{1}$, the act consisting of the illicit production, import, distribution, possession, maintenance or replacement of the access control devices (article $141(6)^{1}$), either original or unauthorized, used for services of restricted access programs, shall be punishable with imprisonment for two to five years, or a fine;
- article $141(2)^{1}$, the act committed by a person who connects himself/herself or connects another person, without having the right to services of restricted access programs, shall be punishable with imprisonment for six months to three years, or a fine;
- article $141(3)^{1}$, the act consisting of the use of public adds or electronic communication means, committed with a view to promote the unauthorized devices of access control to the services of restricted access programs, of the improper exhibition or presentation to the public in any way of the information necessary to produce devices of any kind, making possible the unauthorized access to the specified services of restricted access programs, or destined to the unauthorized access performed in any way to such

[14] As defined under article 140(2) of Law no. 8/1996 amended and supplemented.

services, shall be punishable with imprisonment for one month to three years, or a fine;
- article 141(4)[1], the act committed by a person selling or renting unauthorized access control devices, as well as the perpetration of the acts provided for under paragraphs (1) and (2) for commercial purpose, shall be punishable with imprisonment for three to ten years;
- article 143(1), the act committed by a person who improperly produces, imports, distributes or rents, supplies by any means for sale or renting purposes or possesses, for marketing purposes, devices or components which allow the neutralization of the technical protection measures or which provide services leading to the neutralization of the technical protection measures or which neutralize these technical protection measures, including the digital environment, shall be punishable with imprisonment for six months to three years, or a fine; - article 143(2), the act by a person who, without the consent of the holders of rights and who knew or should have known that thus allows, facilitates, provokes or hides an infringement of one of the rights provided for by the copyright law, commits one of the following actions: removes for commercial purpose from the works or other protected products, or modifies on them any electronic information on the applicable regime of copyright or of related rights (letter a), distributes, imports for distribution purpose, broadcasts or publicly communicates or discloses to the public, so that they can be accessed in any place and in any moment, chosen on a individual basis, improperly, by means of the digital technique, works or other protected products, for which the existing electronic information on the regime of copyright or of related rights has been removed or modified without authorization (letter b), shall be punishable with imprisonment for six months to three years, or a fine. By analyzing the legal texts in the field, we see at least hypothetically that, with the reserves formulated throughout this work, the existing legal framework satisfies the requisitions of the current ampleness of the offence-related phenomenon in the field of the copyright, ampleness which is determined also by the even higher efficiency technical means, allowing the infringement of the copyright more easily and with low costs.

CIRCUMSTANCES WHICH EXCLUDE THE WRONGFUL NATURE OF THE INTERNATIONAL ACT

Felicia MAXIM[*]

ABSTRACT

International law lists a series of causes whose intervention entails an exceptional removal of the wrongful nature of acts which violate international obligations. The legal practice of various states, the international jurisprudence and the specialized literature have helped identify the following causes which remove the wrongful nature of the international act: consent, self-defense, counter-measures, force majeure, the state of danger and the state of necessity. Establishing the causes which exclude the wrongful nature of a state's act is considered a major activity and has been imposed by the legal practice of various states and by the decisions of international courts. The manner of establishing the circumstances under which the causes analyzed herein can be invoked is rather clear, although international jurisprudence has often come across many obstacles in the process of their identification. The main objective at an international level is, in fact, to identify the limitations, circumstances and status of said causes. Consequently, we join other specialists in this field in believing that a set of limitations could be established for each cause which excludes the wrongful nature of a state's act by means of an in-depth analysis of the circumstances identified in various disputes, of the doctrinal opinions and the communications of governments. In spite of the existing circumstances, there are still some contradictory opinions, but it is safe to assume that the current achievements represent the highest standard and that it would have been impossible, or, perhaps, forbidden to achieve more while taking into account the nature of the international relations and the development level and perspectives of the general international law.

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KEYWORDS

International Law Commission, general international law norms (jus cogens), state consent, right to self-defense, countermeasures, force majeure

1. GENERAL ASPECTS

The category of circumstances which exclude the wrongful nature was instituted by the International Law Commission (ILC) during the discussions regarding the liability for damages borne by aliens, but also regarding treaty law issues. The legal significance and the practical utility of the causes have prompted the Commission to include the above-mentioned circumstances in Chapter 5 of the draft articles on state responsibility for internationally wrongful acts, thereby consecrating the following causes: consent (Article 20), self-defense (Article 21), counter-measures (Article 22), force majeure (Article 23), state of danger (Article 24), state of necessity (Article 25). Article 26 institutes a general rule which forbids the invocation of the circumstances listed above whenever peremptory general international law norms (*jus cogens*) are violated. The above-mentioned causes may be invoked when the conduct of a state contradicts the international law norms, irrespective of the source of the violated obligation, which may be the general international law regulations, a treaty, a unilateral act, etc. The invocation of the causes does not aim to cancel the obligation imposed by the international law regulations; it is merely an excuse, a justification for the wrongful conduct adopted by said state.[1] One must take into account the distinction which must be made between the effects of the circumstances which exclude the wrongful nature and the compliance with the undertaken obligations. Fitzmaurice insisted upon the fact that if a cause which removes the wrongful nature is in operation, then the failure to comply with the undertaken obligation is justified and does not prevent the state from further complying with its obligations as soon as the factors which have led to or caused the failure to comply on its part are no longer present.[2]

[1] Yearbook of the International Law Commission, vol. II, Part Two, 2001, p.169.

[2] Fitzmaurice, Fourth Report on the Law of Treaties, Yearbook of International Law Commission, 1959, vol. II, p.41.

2. CONSENT

In order to invoke a cause which excludes the wrongful nature of an act, one must first establish whether the wrongful conduct consists of the violation of an obligation which has been imposed by international law regulations and must be complied with at all costs, since there is no cause to believe that the adopted wrongful attitude were permitted. In other words, this is a test trying to establish whether the principle *volenti non fit injuria,* which states that „to a willing person, no injury is done" or that a person who consents to their being wronged has no reason to complain, can be applied to international law.[3] While analyzing this principle, international law specialists have reached the conclusion that it can be applied to the international sphere. Thus, if a state consents to another state adopting a certain conduct which opposes the latter's obligations to the former, the given consent leads to an agreement which determines the elimination of the effects of any obligations existing between the two parties or at least the suspension of said effects for a certain amount of time. The preliminary requirement is the existence of the undertaken obligation according to commitments made at an international level. Otherwise, the conduct under discussion is no longer wrongful and the state's consent is valueless. Under the circumstances, if a state clearly demands that another state should disregard the existing obligation and perform certain acts, it is clear that a perfectly valid consent has been expressed. Confusion may ensue in relation to the amount of time for which the consent is given, so clear criteria must be established.[4]

Sometimes, the validity of the consent is contested, as it was expressed in violation of the internal legal provisions. Although it is tempting to claim that only the international legal order should be taken into account, the problem of the consent's validity undoubtedly implies the observance of the internal legal provisions. From an international point of view, the existence of the consent is mandatory for an act not to be wrongful, but from the point of view of its validity, we must look to the state institutions, which were entitled to express said consent on behalf of the state according to the internal legal provisions. The authorities who have the right to express such a consent vary depending on the nature of the

[3] G.Geamanu, *op. cit.*, 1981 and 1983, p.341.

[4] Official Records of the Security Council, First Year, First Series, No.1, 6th meeting (the case regarding the British troops stationed in Greece in 1946); Official Summary Records of the Security Council, Second Year, 175th meeting (the case regarding the British troops stationed in Egypt).

problem under discussion; for example, the consent can be requested for the search of embassy premises or for placing military bases on the territory of the state. Various state officials may be addressed, depending on the context, according to the principles which govern the internal organization of the state, but also according to the principles of international law. For instance, only the head of a diplomatic mission may allow the host state to enter the premises of the diplomatic mission, according to the Vienna Convention on diplomatic relations in 1961.[5]

If the consent needs to be obtained from several states, but only one state gives its consent, the wrongful nature is not excluded if the activity for which the consent was requested is of interest to all the states involved.[6]

A different situation can be identified when the victim state expresses its consent for the adoption of a certain conduct by another state and said conduct is contrary to an obligation undertaken by the latter state based on a *jus cogens* norm. Such cases have been accepted neither by the theory of international law, nor by the international practice and jurisprudence. Once the *jus cogens* norms were accepted, their special nature was accepted along with them. Therefore, any type of conduct which disregards an obligation imposed by a *jus cogens* norm remains wrongful even when the victim has given its consent to that effect.

The consent must be given expressly and attributed to the state before the act is committed and the act must be confined to the limitations imposed by the consent.[7] As regards the fact that the consent must be expressly given, the examined cases lead to the conclusion that not only express consents are admitted, but also tacit, explicit and implicit ones, provided that they are always clearly stated. We must make it clear, though, that presumed consent is not taken into account. Presumed consent must not be mistaken for tacit consent, because, in the first case, we do not have the victim's consent. In fact, that which cannot be considered clearly stated is presumed instead, which leads to abusive use of the consent. The consent expressed by a state must not be affected by error, maliciousness, corruption or violence. The principles which apply when the validity of treaties must be established should also be applied when establishing the validity of the

[5] Art.22 paragraph 1 of the Convention establishes the fact that the premises of the missions are inviolable and the agents of the host state are not allowed to enter them unless they have the mission's consent.

[6] Villalpando S., *L' emergence de la communaute internationale dans la responsabilite des Etats*, Presses Universitaires de France, 2005, p. 260.

[7] D.Popescu, *Public International Law for Distance Learning and Reduced Frequency,* Publishing House of the „Titu Maiorescu" University, Bucharest, 2005, p.279.

consent which represents a cause excluding the wrongful nature of an act. The consent must be expressed before the act is performed. If it is requested after the wrongful act has taken place, the consent can only affect the consequences of said act and the victim state may refrain from demanding the restoration of the damages. The act must be confined to the limitations imposed by the given consent. Otherwise, the victim state risks the abusive use of its consent and the overstepping of the given approval's limits while apparently invoking humanitarian or other interests.

Article 20 of the draft articles on state responsibility for internationally wrongful acts states the following: the valid consent expressed by a state as to another state committing a certain act removes the wrongful nature of the act committed against the former state if the act remains within the limitations of the given consent.

3. SELF-DEFENSE

Article 2 (paragraph 4) of the UN Charter states that relations between states shall be based on a committment not to resort to force or to threat and use of force against a state's territorial integrity or political independence or in any other way which is incompatible with the objectives of the UN. Furthermore, Art. 51 admits that none of the provisions of the Charter shall impair the „inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.....”

Consequently, the state exercises its right to self-defense even if it thereby violates the provisions of Art. 2 (paragraph 4). The state is exonerated from its general obligation not to resort to the threat and use of force, but only in relation to the aggressor state.

The wording used for Art. 51 is clear, as it refers to the exercise of the right to individual or collective self-defense in case of an actual armed attack, while the use of force for prevention purposes is not permitted. We mention these aspects because there has been controversy in international law as to accepting the preventive use of force in self-defense or in relation to the concept of armed aggression. When interpreting and applying Art. 51 of the Charter, many references have been made to Art. 2 of the UN General Assembly Resolution 3314(XXIX) of 1974, which establishes the fact that the First use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression. In order to precisely outline the notion of aggression, the resolution provides a nonrestrictive list

of acts which may be considered acts of aggression. An analysis of the provisions of the UN General Assembly Resolution of 1974 regarding the Definition of Aggression yields the conclusion that armed attack or armed aggression need not be actually occur. International practice accepts the indirect use of force only if it has the same effect as armed attack acts and if it can be qualified as armed aggression due to its dimensions and effects. International law does not accept the theory of the preventive attack,[8] so the state which uses force cannot invoke self-defense if its use of force was based on presumptions. An armed attack performed in self-defense must be necessary, immediate and in proportion to the threat.

Self-defense cannot remove the wrongful nature of a state's act under any circumstances, except for the obligations ensuing from international humanitarian law and the norms regarding human rights. For instance, the Geneva Conventions of 1949 and the Protocols of 1977 apply to all the parties involved in an international armed conflict without exception; the same applies to customary norms of international humanitarian law, as *jus cogens* norms.

The aspects which were invoked were also taken into account by the ILC, so art. 21 of the Draft Articles establishes that the wrongful nature of a state's act is removed if the act is a legitimate measure of self-defense, which is adopted in observance of the UN Charter.

In conclusion, the right to self-defense is inherent to the sovereignty of all states, but in order to invoke the right to self-defense in a certain situation, the following conditions are prerequisite: an aggressive action, a direct, immediate and unjust material attack, which should be directed against the state, its sovereignty or its legitimate interests; the attack should cause a grave danger; the defensive action should be in proportion to the gravity of the danger and the circumstances which led to the attack.[9]

4. COUNTERMEASURES

Countermeasures represent a state's actions which do not comply with the obligations undertaken by that state; they have a legitimate character as they are taken by a state in response to another state's wrongful

[8] I.Diaconu, *Public International Law Treaty*, 3 vol., I,II,III, Lumina Lex Publishing House, Bucharest, 2002-2005, p.288.
[9] M.C.Molea, *State Responsibility in Contemporary International Law*, Scrisul Românesc Publishing House, Craiova, 1978, p.56.

conduct.[10] The existence of the wrongful act is considered a prerequisite for the exercise of countermeasures, so we must refer to the provisions of Art. 2 of the ILC Draft Articles. A wrongful act which justifies the exercise of countermeasures is a state's act which represents a violation of the international obligations and it shall be attributed to said state in light of the international law provisions. Thus, the Commission adopts a new vision, contrary to the position adopted by the traditional normativist doctrine, which considered that the victim state is the only one that can appreciate the wrongful nature of a state's act. Such a statement may be regarded as correct if we refer to the disputes caused by the attempts to establish the conditions for the states' responsibility for wrongful acts. The victim state can adopt countermeasures in order to force the state performing the act to comply with the obligations it has undertaken at an international level, to put a stop to the wrongful conduct and provide the victim state with the necessary compensation. As previously mentioned, the fundamental requirement, is the existence of the wrongful act against which the state must resort to countermeasures.[11]

If a third state is bound by an obligation to the state enforcing the countermeasures and the obligation is violated by the enforcement of the countermeasures, the wrongful nature of the measures is not excluded in relation to the third state. As such, the effects of the countermeasures viewed as causes which exclude the wrongful nature of the act are relative. The countermeasures have to do exclusively with the relationship between the victim state and the guilty state. Still, we cannot deny the possibility that the victim state's actions incidentally affect the rights of another state or of other states. For instance, the suspension of a commercial agreement with the guilty state may affect several other states and lead to collateral effects which cannot be avoided. On the other hand, the indirect effects a countermeasure may have upon third parties are possible consequences and do not raise the issue of countermeasures being accepted as legitimate on

[10] Nguyen Quoc Dinh, Daillier Patrick, Pellet Alain, *Droit international public*, 7th edition, Paris, 2002, p.785.

[11] Aspect clearly expressed by the International Court of Justice in the Gabcikovo-Nagymaros Project case, when the Court stated that in order to justify the use of countermeasures, certain conditions must be fulfilled, among which: the countermeasures should come in response to the pre-existing illicit act of another state and be directed against that state. From the analysis of the case solved by the ICJ, we can extract another essential element which stresses the obligation on the part of the guilty state to adopt countermeasures only against the author state of the wrongful act.

condition that said effects are not related to an independent failure to comply with an obligation to third parties.

Although countermeasures are normally determined by the violation of a single obligation, in certain, specific cases, the same act may simultaneously affect several obligations. This situation will not determine the victim state to use a combination of countermeasures in order to adapt them to the gravity of the acts committed; proportionality shall apply accordingly.

Countermeasures act as incentives if they are adopted in order to influence the guilty state into complying with its obligations and desisting from the wrongful act and providing the necessary compensation, which might result in the cessation of the failure to comply with the international obligation. Consequently, the countermeasures shall only be justified for the period during which the international obligation is violated; only during this period of time are they legitimate and this points out the temporary nature of the adopted measures. The main objective of the countermeasures is to ensure the cessation of the continuous wrongful act and to obtain compensation for the damages sustained. There were some situations where the guilty state desisted from its wrongful conduct but refused to grant the owed compensation, which leads us to a discussion on the efficiency of the countermeasures. States must carefully choose the appropriate countermeasures so as to ensure that their effect can be reversed. For example, the notification regarding the progress of an activity becomes worthless if the activity has already been completed.

One of the most important aspects related to countermeasures is proportionality. Proportionality has long been one of the prerequisites for the acceptance in principle of acts of ”private justice” in reaction to violations of international law regulations.[12] Proportionality is an imperative requirement when it comes to countermeasures and is recognized by the practice, the doctrine and the jurisprudence of states. As regards jurisprudence, it offers interesting, but controversial criteria for appreciating the proportionality of the countermeasures. While keeping in mind the importance of proportionality in relation to countermeasures, the ILC deemed it necessary to draft a separate article in order to regulate proportionality. To this end, Art. 51 of the Draft Articles established the following: countermeasures must be adopted in proportion to the damages

[12] R. Miga Beşteliu, *Countermeasures in Contemporary International Law*, in the Romanian International Law Magazine, A.D.I.R.I., 1-1/X-XII/2003, p.42.

incurred, while taking into account the gravity of the internationally wrongful act and the affected rights.

We notice that the ILC Draft Articles include two criteria which are recognized by international jurisprudence, which means that the appreciation will take into account both the gravity of the internationally wrongful act and the affected rights. When using the expression "affected rights", we do not only refer to the appreciation of the victim state's rights, but also to the appreciation of the guilty state's rights.

In conclusion, in order for a state to justify its adoption of countermeasures, certain requirements must be fulfilled: the existence of the wrongful act, the countermeasures should only be taken against the guilty state and should be reversible, the proportionality between the wrongful act and the countermeasures adopted, as well as the end in view, namely determining the guilty state to cease the wrongful act and to compensate for the damages it caused.

Since countermeasures are regarded as a reminiscence of private justice, the Commission deemed it necessary that certain limitations should be imposed and made it clear that countermeasures cannot affect: the obligation not to resort to force or the threat to use force, the obligations regarding the protection of the fundamental human rights, the humanitarian obligations which exclude reprisals, other obligations which ensue from the imperative norms of international law. On the other hand, the state adopting the countermeasures is not exempt from its own obligation to submit to any procedure which might lead to the peaceful resolution of the conflict between itself and the guilty state and to respect the inviolability of diplomatic and consular agents, of diplomatic and consular archives and documents.[13]

5. FORCE MAJEURE

Force majeure was frequently invoked in international relations as a cause which removes the wrongful nature of a state's act, so the Project adopted by the UN General Assembly in 2001 retained the following events as force majeure events: the illicit nature of a state's act which does not comply with an obligation undertaken at an international level is excluded if the act is committed in a force majeure state, which means the existence of an irresistible force or unpredictable event outside the state's control leading

[13] I.Diaconu, *op.cit.*, p.352.

to a material impossibility to comply with the undertaken obligation under such circumstances. We are particularly enlightened on this matter by the positions expressed by the states during the Vienna Conference on the codification of treaty law, which took into account force majeure as a cause excluding the wrongful nature of acts that do not comply with the obligations undertaken under treaties at the time when the provisions which were to become Art. 61 of the Convention were drafted.[14] During the discussions, it was stipulated that a party may invoke the impossibility to comply with a treaty as a reason to terminate it or withdraw from it if the impossibility is the result of the permanent disappearance or destruction of an object deemed indispensable for the implementation of the treaty. The decision was that force majeure can be invoked in such cases within the defense plea of the state involved, but if the impossibility is temporary, force majeure can only be invoked as a cause to suspend the application of the treaty.

In practice, force majeure as a cause which excludes the wrongful nature of an act shall only be invoked after a critical analysis of the situation aiming to establish whether the circumstances which justify the use of this cause exist. The assessors shall take into account the cases where state institutions are materially unable to act due to the existence of external causes which prevent them from acting according to international provisions.[15] Two hypotheses were taken into account: on the one hand, the absolute impossibility to act and on the other hand, the relative impossibility to act. In the first case, the conduct of the state institutions is completely involuntary, while in the second case, the desire of the state institutions to act exists in theory, but it is impossible to be translated into practice. Absolute impossibility to act is caused by the occurence of natural events, such as natural catastrophes or disasters and other such tragedies. External factors can also be traced back to human actions which might result in the loss of a state's sovereignty or the control over a part of the state's territory. The above-mentioned situations justify the impossibility to comply with international obligations, but only for the period during which the cause exists, so the impossibility is temporary. Only absolute material impossibility can be taken into acount, while relative impossibility cannot be analyzed as force majeure because the specialized literature and practice have identified it as a „state of danger". The difference between force majeure and the state of danger consists of the fact that in the latter case, the

[14]Yearbook of International Law Commission, 1966, vol. II, p. 255.
[15] J. O'Brien, *International Law*, Cavendish Publishing Limited, London, 2001, p.382.

state has a certain possibility to decide whether to commit the wrongful act or not, while this possibility is excluded in the case of force majeure.[16]

A state cannot invoke force majeure if it has caused or induced the problematic situation. This provision was mentioned during the Vienna convention on treaty law in 1969 and included in the ILC Draft Articles regarding the states' responsibility. Consequently, a party cannot invoke the impossibility to enforce the treaty if said impossibility is the result of a violation committed by the party invoking it. Force majeure cannot be invoked if the state has tried to prevent the situation or has taken the risk upon itself.

In conclusion, in order to be able to invoke force majeure as a cause which excludes the wrongful nature of a state's act, the following requirements must be met: it should be irresistible and unpredictable – an unforeseen event, outside the state's control; to make the state's compliance with its obligation impossible or to place the state in a material impossibility to realize that its action, inaction or general conduct do not comply with said obligation; the state shan't have contributed in any way to the induction of the event.[17]

6. THE STATE OF DANGER

Since it is considered similar to force majeure, but also different, the state of danger is defined as the cause which excludes the wrongful nature of a state's act if the author of the wrongful act has adopted such a conduct while being pressured by a state of danger, in order to save their own lives or the lives of other people who are in their care. In practice, the circumstances identified as a state of danger are invoked whenever a state's air space is violated or when ships enter the territorial waters of a state due to problems caused by the weather or the technical condition of the ship.[18]

The existence of a state of danger was provided for in many treaties in order to provide a possibility to justify an illicit behavior caused by exceptional circumstances. Article 14, paragraph 3 of the Convention on the Territorial Sea and the Contiguous Zone of 1958 establishes the fact that the right of innocent passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary

[16] M. Shaw, *Public International Law*, 4th Edition Cambridge, University Press, 1999, p.560.
[17] D.Popescu, A.Nastase, *op.cit.*, 1997, p.346.
[18] G.Geamănu, *op.cit.*, 1981 and 1983, p.342.

by force majeure or by distress. The rule is resumed in the Convention on the Law of the Sea, which took place in Montego Bay in 1982 and repeats the fact that innocent passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. Similar provisions are included in the international conventions on preventing marine pollution.

The classification of the protected interest is an important point when determining the special circumstances under which the state of danger can be invoked. The protection of a person's life is considered reason enough to determine the restriction of other people's rights and the protection of other interests cannot be invoked.

The state of danger may exclude the wrongful nature of an act when the adopted wrongful conduct does not lead to more serious consequences than the ones that would have occured had such a conduct not been adopted. Thus, the aim is to reach a certain degree of proportionality between the protected interest and the content of the violated obligation. For instance, a military plane loaded with explosives could cause a disaster in case of a forced landing or a nuclear submarine could cause a serious radioactive contamination in the harbor where it seeks refuge. The state of danger cannot be admitted under these circumstances, as the consequences of these events could be much more serious. Furthermore, the state of danger is not accepted when the state is found to have contributed to the event. The concept of state of danger and the circumstances under which it applies are listed in Art. 24 of the Draft Articles of the ILC.[19]

7. THE STATE OF NECESSITY

The state of necessity is only justified in situations where an essential interest must be protected against a serious and imminent threat. The interest is classified as a crucial one depending on all the existing circumstances. The interest is crucial both to the state that assumes it in

[19] This article provides the following: 1) The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care. 2) Paragraph 1 does not apply if: a.) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or b. the act in question is likely to create a comparable or greater peril.

order to justify the necessity invoked for the sake of its citizens and to the international community as a whole. Irrespective of the nature of the protected interest, the danger threatening it must be real or at least possible. I think that the existence of a possible danger could not constitute a proper reason to invoke the state of necessity, especially since such a danger can be identified with precision in certain fields of expertise, e.g. in the field of environmental protection and preservation. Furthermore, resorting to a wrongful act should be the only possible way to protect that interest. We shall not limit ourselves to unilateral actions, but also take into account forms of collective action reached by means of cooperation among states or within international organizations.

However, we must not neglect the interest of the state which was affected by the violation of the obligation under discussion. This aspect has been the focus of the specialized literature from the very beginning, with authors claiming that two subjective rights need to be taken into account, namely the right – interest – of the state invoking the state of necessity, as well as the interest of the state to which an obligation was undertaken at an international level. Under such circumstances, the existing situation must be carefully analyzed, lest the performance of an illicit act prompted by a state of necessity bring about some serious consequences for the states whose interests were affected or for the international community as a whole.

On the other hand, as in the case of countermeasures, there could be international law regulations which explicitly or implicitly exclude the possibility to invoke a state of necessity. Thus, conventions adopted in international humanitarian law which apply to armed conflicts exclude the possibility to resort to a military necessity. We must stress the fact that the state invoking a state of necessity cannot have contributed in any way to the induction of that state. In conclusion, the state of necessity cannot be invoked in any of the following three situations: if a treaty is involved which excludes the possibility to invoke necessity, if the state in question took part in the induction of the state of necessity and if any imperative norms of international law were violated.[20] In reference to the way in which the concept ”state of necessity” found its expression within the Draft Articles of the ILC, we would like to point out the fact that, based on the opinions expressed in the specialized literature and in the international practice and jurisprudence, the Commission drafted Art. 25, which stated the limits within which the state of necessity can be invoked, while adopting a restrictive approach, as follows: 1) The state of necessity may be invoked by

[20]D.Popescu, A.Nastase, *op.cit.*, 1997, p.346; R.Miga Beşteliu, *op.cit.*, 2003, p.397.

a state in order to exclude the wrongful nature of a fact only if said fact: a. is the only way to protect a crucial interest from a grave and imminent danger and b. The crucial interests of the state or states to which an obligation was undertaken or of the international community as a whole. 2) In any case, the state of necessity cannot be invoked by a state in order to exclude the illicit character if: a. the international obligation excludes the possibility to invoke the state of necessity or b. the state contributed to the induction of the exceptional situation.

CONCLUSIONS

Establishing the causes which exclude the wrongful nature of a state's act is considered a major activity and has been imposed by the legal practice of various states and by the decisions of international courts. The manner of establishing the circumstances under which the causes analyzed herein can be invoked is rather clear, although international jurisprudence has often come across many obstacles in the process of their identification. The main objective at an international level is, in fact, to identify the limitations, circumstances and status of said causes. Consequently, we join other specialists in this field in believing that a set of limitations could be established for each cause which excludes the wrongful nature of a state's act by means of an in-depth analysis of the circumstances identified in various disputes, of the doctrinal opinions and the communications of governments. In spite of the existing circumstances, there are still some contradictory opinions, but it is safe to assume that the current achievements represent the highest standard and that it would have been impossible, or, perhaps, forbidden to achieve more while taking into account the nature of the international relations and the development level and perspectives of the general international law.

SIGNIFICANCE OF COMMUNITY LAW AND LIMITATION OF STATE POWERS IN FISCAL MATTERS

Aurelia GÎGĂ*

ABSTRACT

As shown above, discrimination is presumed to be incompatible with the Treaty of European Communities; nevertheless it is accepted under special circumstances, such as losing or diminishing of budget collections, cohesion of national fiscal systems, fighting against tax evasion, a.s.o.

KEYWORDS

The community fiscal law, the principle of fiscal non-discrimination, harmonization of taxation rates, harmonization of measures related to taxation bases

The juridical system of all European Union members has two legal components that are completing each other: the community law and the internal law.

The European Community Treaty established an own legal order, which is integrated under the legal system of the member states since the above treaty came in force, and that imposes its jurisdictions.

The Community Law is applied in internal legal order as it has been adopted, and neither its reception nor its transformation in internal law is necessary. The community law norms shall be integrated in the domestic law of member states, and those states shall not have the possibility to choose between the monist and dualist concept[1], but the first one is mandatory. Through its decision dated April 3, 1968, the Court of Justice of

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[1] For details concerning the monist and dualist concept, see A.Fuerea, *Community Law of Business*, Ed.II as revised and amended, Publisher Universul Juridic, Bucharest, 2006, p.33-35.

the European Communities, usually called *the* European Court of Justice *(ECJ)*, in *Molkerei Company Case*, consecrated the monist conception, stating that "*dispositions penetrate the internal legal order, and no national measure will be necessary*".

Therefore, the community law – either original or derivative – can be applied immediately to the internal legal rules of the member states or, according to the Luxemburg Court of Justice it is part of the legal order that can be applied within the territory of each member state. That fact has the following consequences: the community law is integrated naturally into the internal legal order of the states, there is no need for a particular introduction statement; the community norms hold their place in the internal legal order, as community law; the national judges are obliged to apply the community law.[2]

The community fiscal law represents the coherent aggregate of the legal norms issued by E.U. institutions with the purpose – threefold – of providing for the community control over the national taxation of member states (including those that are candidate states), accomplishing politics of fiscal harmonisation with all community member states and implementing the contentious mechanisms related to those matters.[3]

In E.U. the fiscal independence of the member states is constrained by the obligation of non-distorting the competition within the Internal Single Market and also by the necessity of observing the convergence criteria that have been stated in Maastricht and have been included in the Stability and Growth Pact.

In fiscal matters, even when community legilsative acts have been adopted, they were under the form of Directives, and that confirms the reticence of Member States to observe some overnational regulations.

In the community fiscal law we can talk also either of the *direct applicability* or *the direct effect*, distinctive feature of the European community law that represents the right of any person to ask the judge for applying community treaties, regulations, directives and decisions. The judge has to use all those texts, regardless of the legislation of the country whose part he is.[4]

Even when no precise text exists, the states have to observe the community fiscal order. The European Community Treaty invites the

[2] See A.Fuerea, *Community Law for Business*, Ed.II as revised and amended, Publisher Universul Juridic, Bucharest, 2006, op.cit.p.36.

[3] See M.S.Minea and C.F.Costas, Taxation *in Europe at the Beginning of Millenium III*, Publisher Rosetti, Bucharest, 2006, op.cit.p.310-311.

[4] See A.Fuerea, *Community Law of Business*, Ed.II as revised and amended, Publisher Universul, Bucharest 2006, op.cit. p.36. For details see p.37-40. See also Roxana Munteanu, *European Law*, Publisher Oscar Print, Bucharest, 1996, p.342-367.

member states to take all general and particular measures intended to provide the execution of all obligations arising from the Treaty or resulting from any acts of the community institutions.

It results from the constant jurisprudence of the Court of Justice of the European Communities that the community law has a superior authority above the national laws and that its application cannot be hindered by any regulation of a member state without affecting the community bases. So, it is set forth the *principle of non-applicability of the law posterior* to the Treaty in case of incompatibility with that one. In case of litigation, the national judges have to remove systematically any internal law or regulation that is contrary to a community rule. If any doubt exists, they have the possibility to inform the Court of Justice of the European Community of that situation with prejudicial title, the Court being charged with the interpretation of the Treaty of European Communities.[5]

The prejudicial procedure provided under art.234 of the Treaty of European Communities gives to any court of a member state the possibility to ask the Court of Justice of European Communities for interpreting any rule of community law provided either under Treaties or under a derived act, when that court considers as being necessary to solve certain litigation.[6] Beginning with the decision dated October 26, 1990 (*Nicolo Case*), the Council of State of France agrees to use that procedure in fiscal matters. Thus, the Court of Justice of the European Communities is the most important source of pressure on the national fiscal systems in E.U.[7]

The authors raised some questions in the specialized literature: if the community directives are not incorporated into the domestic law, can they be considered as having direct applicability? If directives give the liberty to member states as regards the manner and means to reach the intended goal, what will happen if one state did not incorporate one directive in the domestic law?

According to the jurisprudence of the Court of Justice of European Communities, the direct effect of one directive can be invoked if the following conditions are met: the time elapsed that has been established to

[5] See D.D.Saguna, D.Sova, *Fiscal Law*, Publisher C.H.Beck, Bucharest, 2006, op.cit.p.356.
[6] For details, see also I.N.Militaru, *Community Concept of "National Jurisdiction" in the light of art.234 E.C.*, under Revista Română de Drept Comunitar, No.1/2005, p.48-58; B.Stefanescu, Prejudicial Submission to Court of Justice of European Communities, under Revista Romana de Drept Comunitar No.1/2003, p.82-96.
[7] For details, see: Claudia Radaelli, Ulrike Kroner, *Shifting Modes of Governance. The Case of International Direct Taxation*, International Workshop, International University Bremen, June 2005, p.22.

enforce the related directive; the member state did not apply it or it has been applied wrongfully.

One person may invoke the direct effect of the directive in two situations: when needed that the national judge removes the domestic law norm, which is not consistent with the dispositions of the directive invoked, and in that case it shall be asked that the domestic law disposition be disregarded when judging the case; when that person is deprived of a right due to the absence of or failing to take proper domestic measures in order to apply the related directive, and in that case he will ask the judge for recognizing the right as granted by the directive.[8]

For example for French people, the traditional answer consists in refusing any direct applicability of directives. They consider that directives, in spite of all possible mentions addressed to member states, cannot be invoked by those states for supporting any appeal related to tax litigations. However, in case of a matter of value added tax, the French Council of State pointed out the strictness of that principle, by accepting to remove one article of the Code Général d'Impôts (n.n. French Tax Code), which did not provide any exoneration established through a directive.[9]

On the other hand, the preceding principles have significant consequences as regards fiscal matters. The domestic fiscal law has to observe all rules and principles stated by the community law through its fiscal dispositions and also through extra-fiscal general rules.

One of the main principles on which the European construction is based is the *non-discrimination principle* that is provided under art.12 of the Treaty of the European Communities: "*In the field of applying the present Treaty and without affecting the particular dispositions provided herein, any discrimination is forbidden that is exercised by nationality criteria"*. We find similar provisions under art.43 of the Treaty, which states *the freedom of establishment*, it states the annulment of restrictions to freedom of establishment for the residents of one member state in the territory of other member state and it specifies that the said annulment is extended also to the restrictions regarding creation of agencies, branches and subsidiaries by residents of one member state who are established in the territory of other member state.[10] Or, art.43 represents even application of the principle of non-discrimination related to the freedom of establishment. Application

[8] See A.Fuerea, *Community Law of Business*, Ed.II as revised and amended, Publisher Universul Juridic, Bucharest, 2006, op.cit.p.39.
[9] See D.D.Saguna, D.Sova, *Fiscal Law*, Publisher C.H.Beck, Bucharest, 2006, op.cit.p.357.
[10] Ibidem.

of the principle of fiscal non-discrimination is not limited only to blaming any economic impact on the intra-community changes, as this principle reflects the spirit of so-called "economic constitution" of the European Union, *i.e.* configuration of a general economic pattern. That principle allows the appreciation of the compatibility of domestic fiscal decisions with European economic directions.[11]

In fiscal field, discrimination may occur in three circumstances: through application of different rules for comparable matters, through application of same rules for different matters and through application of different treatments for quite similar matters. As shown above, discrimination is presumed to be incompatible with the Treaty of European Communities; nevertheless it is accepted under special circumstances, such as losing or diminishing of budget collections, cohesion of national fiscal systems, fighting against tax evasion, a.s.o.

Another important aspect is represented on one hand by the harmonization of taxation rates and, on the other hand, harmonization of measures related to taxation bases, since several member states consider that entering a harmonized fiscal system at community level involves forgoing an essential component of the national sovereignty. *The fiscal harmonization* implies and involves first an assumed political will that is expressed clearly and resolutely by the community authorities, and further it shall be assimilated by all the member states through their representatives from the European Union Council.

Nowadays, the two initiatives of the Commission are debated that concern the taxation bases, namely: application of taxation following the rules of the origin country (HST – home state taxation) and the common consolidated corporate taxation base (CCCBT).[12]

Actually, the legislative fiscal harmonization has in view all kind and types of taxation existing in community states. But that ample activity cannot be achieved smoothly and evenly without recording some undesirable consequences, for several reasons: first of all, because there is not a clear idea to the Community level as regards the systematic adoption of community norms consecrated to the gradual harmonization and unification of the national fiscal legislations; no such idea was outlined distinctly as it has been considered that the differences existing between the national fiscal regulations are not significant to the extent that the respective

[11] See R.Moise, Freedom *of Establishment and Direct Fiscal System in Community Law*, Revista Română de Drept Comunitar No.3/2005, op.cit.p.65.
[12] For details see www.ier.ro/Conferinte 2008/spas/sintezele studiilor.pdf.

circumstance does not hinder further European construction nor the proper operation of the single market; secondly, the differences of legal regime existing between some of the taxes are higher, whilst between other they are almost imperceptible; that situation is not of a nature to worry – yet – too much the leaders of the European Union; finally – thirdly – while some national legal norms (such as those related to direct taxes, generally: for companies, incomes of natural persons a.s.o.) are suited harder to a change that is closer to a level considered as being optimum, reasonable in the whole community area, the regulations that are related to indirect taxes (value added tax, excises, etc.), since they are newer in all European states and based mainly on the same principles of constitution and application – are already brought together, and that situation makes possible a faster, better and more effective harmonization.[13]

A recent speech of the European Commissary for the fiscal and customs field enables to make a distinction between the two notions that constitute at the same time instruments of the community fiscal politics: *fiscal harmonization* and *fiscal cooperation.* In fiscal matter, the legislative harmonization represents an exception, only the fiscal harmonization related to indirect taxes is at the disposal of the European Union, but this is quite heavy, too. Therefore, the European Commission can but only stimulate, through various means, *the fiscal cooperation* between member states in certain fields where the lack of some minimum rules of conduct run the risk of imbalances. As underlined by the European Commissary (n.n.Laszlo Kovacs), the fiscal harmonization is but the "extreme manner" of cooperation in the fiscal field. But it is not the best solution all the time, from economic point of view. Existence of differences between the taxation rules in various member states is justified sometimes by objective elements. Moreover, the fiscal harmonization is the most difficult goal to be achieved as the unanimity is needed to adopt any decision.[14]

To draw a conclusion, we can say that the taxation of member states does not constitute an obstacle to apply the great freedoms provided under the Treaty of the European Communities: freedom of establishment, free movement of persons, free movement of services and free movement of capital.

[13] See M.S.Minea and C.F.Costas, *Taxation in Europe at the beginning of Millenium III*, Publisher Rosetti, Bucarest, 2006, op.cit.p.313-314.
[14] See M.S.Minea and C.F.Costas, *Taxation in Europe at the beginning of Millenium III*, Publisher Rosetti, Bucarest, 2006, op.cit.p.313-314.

CONSIDERATIONS ON THE SIMILARITIES AND DIFFERENCES BETWEEN THE PEOPLE`S ADVOCATE INSTITUTION AND THE TRADITIONAL LAWYER, REGULATED BY LAW NO. 51/1995, AS DEFENDERS OF THE RIGHTS AND FREEDOMS OF INDIVIDUALS FROM THE PERSPECTIVE OF GOVERNMENT EMERGENCY ORDINANCE NO. 51/2008 ON JUDICIAL PUBLIC AID IN CIVIL MATTER

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ABSTRACT

The author present some similarities and differences between the People's Advocate institution and the traditional lawyer, regulated by Law no. 51/1995 as regards the organization, their competencies and the obligations of the authorities before the two entities.

KEYWORDS

The Romanian Constitution, the Law. no 35/1997 on the organization and functioning of the People`s Advocate Institution, the Law no. 51/1995 on the organization and development of the profession of lawyer

ORIGINS AND REGULATIONS

People`s Advocate Institution has its headquarters in the Romanian law, in: the provisions of art. 58 - art. 60 of the Romanian Constitution, adopted in 1991 and reviewed in 2003, Law no. 35/1997 on the organization and functioning of the People`s Advocate Institution and the Regulation on the organization and functioning of the People`s Advocate Institution. Creating the People`a Advocate Institution in Romania by the 1991

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Constitution, had as source of inspiration, the institution of Swedish origin of the Ombudsman and the institutions established later.

The profession of lawyer, recognized in the Romanian County since the 19th century, by "Laws regarding some articles from the Organic Regulation concerning the judicial part of 1836" is currently regulated by the Law no. 51/1995 on the organization and development of the profession of lawyer and the Statute of the profession of lawyer. The latter acts have put an end to an uninterrupted string of changes in the profession of lawyer who, over time, has met various regulations, from the authority exercised by the Ministry of Justice on lawyers to the independence and autonomy that they currently enjoy.

ACTIVITY FIELD

The regulation given by the provisions of art. 58 - art. 60 of the Romanian Constitution and the Law. no 35/1997 on the organization and functioning of the People`s Advocate Institution, shows that the main function of the People`s Advocate Institution is *to protect people whose rights and freedoms have been violated by the authorities.*

As regards the role of the lawyer in Romanian society, art. 2 of Law no. 51/1995, provides that the lawyer *promotes and defends the rights, freedoms and legitimate interests of the human.*

SIMILARITIES

A first similarity of the two institutions is the autonomous and independent nature of the two forms of organization. For the lawyer, the autonomy and independence are stipulated in art. 1 of Law no. 51/1995, and for the People`s Advocate, these characters are established by art. 2 of Law no 35/1997.

A second aspect is that both institutions are defending the rights and freedoms of individuals, this aspect conferring to them the status of public service in the job of the citizens.

Another aspect that is common to the two entities is taking an oath, in the form stipulated by law. According to art. 21 of law no. 51/1995, on the entry in the bar association, the lawyer will take the official oath before the Bar Association Council. The Law no 35/1997, art. 8 and 12 provides that People`s Advocate and its deputies will take the oath in the form set by law. People`s Advocate will take the oath before the Presidents of the two

Chambers of Parliament and the deputies before the People`s Advocate and a Vice President of the Chamber of Deputies and Senate.

Lawyers are not legally responsible for the opinions expressed or for the acts which they accomplish, in compliance with the law, in exercising the powers provided by law, according to art. 30 of Law no. 51/1995. Also, art. 37 of Law no. 51/1995, provides that the lawyer will not have penal liability for the sustains made orally or in writing, in the appropriate form and in compliance with the law, before the courts, the bodies of prosecution or other administrative bodies.

According to art. 30 of Law no. 35/1997 People`s Advocate and its deputies have no legal liability for opinions expressed or acts performed, in exercising the powers provided by law, in compliance with legal provisions.

DIFFERENCES

Organization

A first difference between the two institutions is given by the liberal character of the profession of lawyer, provided by art. 1 of Law no. 51/1995. This right confers to the lawyers the possibility to exercise their profession in the forms of exercising the profession of lawyer, on their choice, according to the provisions established by art. 5 of Law no. 51/1995: individual offices, associated offices, professional civil companies or limited liability professional companies. The lawyer is conducting its activity in the forms of exercise prescribed by law, respecting the principles of legality, freedom, independence and autonomy.

In this regard, the Law no. 51/1995 for the organization and the development of the profession of lawyer, by the provisions of article 1 and Article, provides that "*The profession of lawyer is free and independent, with autonomous organization and functioning, under this law and the status of the profession. In practicing its profession, the lawyer is independent and subject only to the law, the status of the profession and ethics code.* "The position of independence and autonomy of lawyers, and is also provided by art. 1, art. 2 and art. 3 of the Statute for the profession of lawyer. Thus, under these provisions (1) "*The profession of lawyer is free and independent, having autonomous organization, functioning and management, established under the terms of Law no. 51/1995 for the organization and development of the profession of lawyer." (2) Exercise of*

the profession of lawyer is subject to the following fundamental principles: a) the principle of legality; b) the principle of freedom c) the principle of independence; d) the principle of autonomy and decentralization; e) the principle of keeping the professional secrecy. In practicing its profession, the lawyer is independent and subject only to the law, the status of the profession and ethics code.

Another aspect that distinguishes the forms of organization for the two institutions is that lawyers are enrolled in a bar association, which is composed of all lawyers in a county or the capital Bucharest. In turn, all bar associations in Romania form the National Union of Bar Associations in Romania. These entities ensure qualified exercise of the right of defense, professional competence and discipline, protection of dignity and honor of lawyer members. People`s Advocate Institution is organized and operates under the provisions of art. 58 - 60 of the Romanian Constitution, of Law no. 35/1997 and the Regulation of organization and functioning of People`s Advocate Institution.

While the profession of lawyer is a free profession, the People`s Advocate is appointed by the Chamber of Deputies and Senate in joint session, for a term of 5 years, that can be renewed only once. People`s Advocate Institution staff is composed of the People`s Advocate, as leader of the institution, deputies People`s Advocate, who have rank of secretary of state, according to recent amendments to the Law. 35/1997, counselors, experts and others with well defined powers, which perform a remunerated activity within the institution.

Addressing and the persons who may address to the lawyer on the one hand and to the People`s Advocate on the other hand

According to art. 2 alinea (4) of Law no. 51/1995 any person can choose its lawyer. In some cases, however, as the one provided by art.171 alinea (4) of the Code of Criminal Procedure, when legal assistance is required, and if the accused or the defendant has not chosen a defender, an *ex officio* defender will be appointed. During judgment, after starting the debates, when legal assistance is required, if the chosen defender is absent - without justifying- on the court term and has not ensured the substitution, the court will appoint another ex officio defender in order to replace him. The lawyer is entitled to assist and represent individuals and legal persons.

According to art. 58 of the Constitution, People`s Advocate is appointed for defending individuals` rights and freedoms. He has no right of representation and assistance of the person that has addressed to it. According to art. 1 alinea (2) of Law no. 544/2004, on administrative contentious, People`s Advocate, as a result of the control performed

according to its organic law, on the base of a complaint submitted by an individual, may address to the competent court of administrative contentious, and he complainer will get the quality of plaintiff.

The lawyer's activity and the People`s Advocate competence

Any individual or legal person who needs assistance or representation in the courts of judicial authority, other organs of jurisdiction, bodies of prosecution, public institutions and authorities and before other individuals or legal persons, can address to the lawyer.

In essence, the activity of the lawyer is performed by: a) consultation and legal applications b) assistance and legal representation before the courts, the bodies of prosecution, the judicial authorities, the notaries public and enforcement officers, the public administration bodies and institutions and other legal entities, under the law, c) drafting of legal documents, certifying the identity of the parties, the contents and the date of documents submitted for authentication, d) assistance and representation of the interested individuals or legal entities before other public authorities with the possibility of certifying the parties identity, the contents and the date of the concluded documents; e) defense and representation by legal specific means of the rights and legitimate interests of individuals and legal entities in their relations with the public authorities, institutions and any Romanian or foreign person; f) mediation activities; g) fiduciary activities consisting of depositing, in the name and on behalf of the client of financial funds and assets, resulting from recovery or execution of writs of execution, after closing the succession procedure or a liquidation, and also recovery and placing them in the name and on behalf of the client, activities of managing the funds or values in which they were placed; h) temporary establishment of the headquarters for the company at the professional headquarters of the lawyer and their registration in the name and on behalf of the client, of the parties of interest, social parts or the shares of the companies registered in this way; i) activities provided by letters g) and h) can be operated under a new contract for legal aid; j) any means and ways of exercising the right of defense under the law.

As regards the People`s Advocate, it is notable that, according to the provisions of art. 58 of the Constitution, and of art. 1 alinea (1), art. 13 letter b) and art. 14. alinea (2) of Law no. 35/1997, the People`s Advocate

examines the applications of the individuals aggrieved by infringements upon citizens` rights and freedoms, by the public authorities.

In addition to the above, we would like to show the following: a) if the People`s Advocate finds that solving the submitted complaint refers to the competence of the judiciary power, it can address, as appropriate, to the Minister of Justice, Public Ministry or the President of the court, which must communicate the measures taken, b) can bring directly before the Constitutional Court exceptions of unconstitutionality c) in case of referral to the exception of unconstitutionality of laws and ordinances which relate to the rights and freedoms of citizens, the Constitutional Court will also require the point of view of the People`s Advocate Institution; d) in exercising its powers, People`s Advocate issues recommendations that can not be subject to parliamentary or judicial control.

Through the issued recommendations, the People`s Advocate notifies the public authorities on the illegality of administrative acts or deeds; People`s Advocate has the right to perform its own inquiries, to demand from the public administration authorities any information or documents necessary for investigation, to hear and take statements from leaders of public administration authorities and from any official who can provide useful information for solving the complaint. If, following the investigations, the People`s Advocate finds that the complaint of the aggrieved person is based, may request in writing to the public administration that has violated its rights to revoke or reform the administrative act and to repair the damage and to reinstate the aggrieved person in the former situation; if the People`s Advocate finds, on the occasion of the investigations, gaps in legislation or serious cases of corruption or failure to comply with the national laws, he will submit a report on the stated facts, to the presidents of the two Chambers of Parliament or, a the case may be, to the Prime Minister. When the public administrative authority or civil servant do not eliminate the illegalities found, repair the damage and remove the causes that have led to or encouraged infringement of the rights of the aggrieved person, People`s Advocate will inform the hierarchically superior authority, that will have to communicate the measures taken. Also, if the public authority or civil servant belongs to local government, People`s Advocate will notify the Prefect or the Government about any illegal administrative act or deed of central public administration or prefect. Meanwhile, the government failure to adopt the measures on the illegality of administrative acts or deeds reported by the People`s Advocate shall be communicated to Parliament.

People`s Advocate Institution has not competences for solving the requests regarding documents issued by the Chamber of Deputies, the Senate, or Parliament, the acts and deeds of deputies and senators, of the President of Romania and the Government and of the Constitutional Court, the President of the Legislative Council and judicial authorityExpenses. Art. 28 and art. 30 of Law no. 51/1995, provide that assisting or representing an individual or a legal entity is made under a contract concluded in written form, and for his professional activity, the lawyer is entitled to fee and to covering all expenditures made in the procedural interest of the client.

The complaints submitted to the People`s Advocate, according to art. 16 of Law no. 35/1997, are exempt from stamp duty, and therefore from any expense related to these.

THE OBLIGATIONS OF THE AUTHORITIES BEFORE THE TWO ENTITIES

The authorities to which they address are obliged to allow the lawyer and to ensure him the unimpeded conduct of its activity under the law.

According to art. 6 alinea (5) of the Code of Criminal Procedure "*Judicial organs have the duty to inform the accused or defendant, before taking its first statement, about the right to be assisted by a defender, issue that will be written in the minutes of listening. Under the conditions and in the cases provided by law, judicial bodies are obliged to take steps to ensure legal assistance for the accused or the defendant, if he has no chosen defender*."

As regards the People`s Advocate, the public authorities are obliged to communicate or, as the case may be, to put on People`s Advocate disposal, according to the law, the information, documents or papers in their possession, related to the complaints submitted to People`s Advocate, and to support it in exercising its powers.

Also, the public authorities must immediately take the necessary measures in order to remove the illegalities found, to repair the damage and to remove the causes that have led or encouraged the infringement upon the rights of the aggrieved person and to inform the People`s Advocate on it.

On April 21st 2008 the Romanian Government issued Emergency Ordinance no. 51 / 2008 on public judicial aid in civil matter, which shows in the preamble that the purpose of this regulatory instrument is to

"transpose European Union Council Directive 2003/8/EC on improving access to justice in the case of cross-border disputes by establishing minimal common rules concerning legal assistance granted in these types of cases."

The Directive of which transposing must be ensured provides minimum standards for a system of legal aid to be regarded as providing an effective access to justice for the citizens of Member States of the European Union, and taking these standards in the legislative plan requires the creation of identical conditions at least domestically, in order to avoid the emergence of discrimination between its own citizens and citizens of other Member States or persons who are domiciled or resident in a Member State which would require legal aid in the courts or other Romanian authorities with judicial powers.

In these circumstances, access to justice - an expression of democratic principles in a state governed by the rule of law - must be effective, and the costs of legal proceedings should not constitute a hindrance in trying to appeal to justice for achieving or protecting a right, justifying, in certain circumstances and conditions, support from the state, from public financial resources. Starting from these principles, the Emergency Ordinance no. 51/2008, creates, regarding the assistance provided by lawyer, two types of legal assistance (art. 23) and extra judiciary (art. 35) which consists in providing consulting, drafting applications, petitions, complaints, initiating other legal steps, and also and representation before the authorities or public institutions, non-judicial or judicial powers in order to achieve some rights or legitimate interests.

Extra assistance should lead to giving information clear and accessible to the applicant, in accordance with the laws in force regarding the competent institutions, and, if possible, to the conditions, deadlines and procedures set by law for recognition, giving or achievement of the right or interest claimed by the applicant.

In this context we mention that art. 18 of Law no. 35/1997 republished, under which the People`s Advocate, without getting involved in the fund of the case, respecting the independence of the justice, can resolve the petitions on violations of art. 21 alinea (3) of the Constitution, concerning the right to a fair trial and resolving cases within a reasonable time, so, in this respect, this may be a similarity between the two institutions.

THE COOPERATIVE SOCIETIES IN COMMUNITY LAW

Mona ANGHENI*

ABSTRACT

The European Community was interested in bringing together and harmonising the legislation applicable to the company law in order to establish a common framework for the activity of companies, enterprises or of any other legal entity at Community level.

On the 22nd of July 2003, Council Regulation (EC) no. 1435/2003 on the Statute for a European Cooperative Society (SCE) [1] was adopted. It proves an incontestable attachment to the cooperative tradition as it reunites all the great cooperation principles. This statute was supplemented by Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees[2] which proved that by using the SCE instrument, fields like employment, social policy, regional development etc. may be influenced in a positive manner.

KEYWORDS

Regulation (ec) no. 1435/2003, formation and special features of the SCE, statues and procedure for registration and publication, the structure and management

DEFINITION

Regulation (EC) no. 1435/2003, defines the SCE in art. 1 and stipulates the a SCE is a society established on the territory of the Community whose social capital is divided in shares and whose principle objective is ensuring the satisfaction of its members' needs and/or the development of their economic and social activities, in particular through

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[1] JO L 207, 18.8.2003, p. 1-24.

[2] JO L 207, 18.8.2003, p. 25-36.

the conclusion of agreements with them to supply goods or services or to execute work of the kind that the SCE carries out or commissions. A SCE may also have as its object the satisfaction of its members' needs by promoting their participation in economic activities, in one or more SCEs and/or national cooperatives.

From the point of view of the *quality of the members*, there are two types of SCEs: *first degree SCEs* and *second degree SCEs*. The first degree SCEs are made up of natural and legal persons, except for cooperative societies. In the second degree SCEs, the members are cooperative societies themselves.

From the point of *view of the activities deployed by the society and of the object of activity*, the types of cooperative societies are different and are regulated by the applicable law on the territory of the registered office. Therefore, there may be cooperative societies in the field of agriculture, fishing etc.

FORMATION AND SPECIAL FEATURES OF THE SCES

Next to the general provisions of Regulation (EC) 1435/2003, the formation of the SCEs is also regulated by the law on the cooperative societies and public limited-liability company as provided by the legislation of the Member State where the SCE has its registered office.

According to art. 2 (1) of Regulation (EC) no. 1435/2003, there are three ways in which a SCE may be formed:
ab initio (direct) formation;
by merger between cooperatives formed under the law of a Member State with registered offices and head offices within the Community, provided that at least two of them are governed by the law of different Member States,
by conversion of a cooperative formed under the law of a Member State, which has its registered office and head office within the Community if for at least two years it has had an establishment or subsidiary governed by the law of another Member State.

The *minimum social capital* of a SCE, according to art. 3 (2) of EC Regulation no. 1435/2003 is *30.000 Euros*[3]. As far as the currency of the social capital is concerned, it differs according to the Member State where the SCE has its registered office. The situation is clear for the Member

[3] Javier Guillem Carrau, *La sociedad cooperativa europea*, Revista valenciana d'estudios autonomics – 1985-PERI-Generalitat Valenciana, Consel, nr. 35, 2001, p. 87.

States in the Euro zone, as the currency is Euro. For the other Member States outside the Euro zone, the capital is expressed in the national currency, without excluding the possibility of expressing it in Euro.

The *variable character of the capital* is a feature of the SCE, so that it may be modified without further formalities related to the modification of the statutes or publicity[4]. Therefore, there are no impediments in establishing, at the moment of formation and drafting of the statutes, a capital superior to 30.000 Euros. Furthermore, the regulation itself, in art. 3 (3) provides the situation of the laws of a Member State requiring a greater subscribed capital for legal bodies carrying on certain types of activity shall apply to SCEs with registered offices in that Member State.

Contribution to capital

The capital may be formed only of assets capable of economic assessment. Members' shares may not be issued for an undertaking to perform work or supply services. Therefore, any asset capable of economic assessment that is interesting for the object of activity of the cooperative may be brought in the society by the members. The regulation uses a very broad terminology, asset being liable of interpretation as any good, movable or immovable, corporal or not, as well as any sum o money.

The object of the contribution is represented by the *contribution in cash* (essential for any form of society), as well as the *contribution in kind*. On the other side, the regulation disposes that the Members' shares *may not be issued for an undertaking to perform work or supply services.* So the regulation excludes the possibility of the contribution in works, in order to ensure the completeness of the social capital. This exclusion seems harsh and restrictive, taking into account the variable character of the SCEs' capital as well as the possibility of more types of shares, and thus, of rights.
Shares and other titles with special benefits.

The regulations stipulates the possibility of more categories of shares, established in the statutes. Therefore, the statutes may stipulate that, regarding the repartition of results, the categories of shares give different rights, but the shares that give the same rights represent a single category. Evidently, the leonine clauses[5], according to which a certain category of members get all the benefits and another category supports the losses are strictly forbidden.

[4] Alessandro Graziani, *Diritto delle Societa*, Morano Editione 1962, p. 493.
[5] Pierre Nicaise, Kathy Deboeck, *Vade Mecum des sociétés coopératives*, Creadif 1995, p. 28.

The shares are held by *named persons* and their value is identical for each category of shares, as established din the statutes. The shares may not be issued at a price lower than their nominal value.

The regulation establishes the *modality of subscription* in art. 4 (3). According to this article, the shares issued for cash shall be paid for on the day of the subscription to not less than 25 % of their nominal value and the balance shall be paid within five years unless the statutes provide for a shorter period.

STATUES AND PROCEDURE FOR REGISTRATION AND PUBLICATION

In order to form a SCE, a series of formalities have to be undergone, according to art. 5 to 13 of EC Regulation 1435/2003. If the regulation does not expressly stipulate, certain formalities are required according to *the law of the member state where the SCE has its registered office*. These formalities refer to *statutes, registration and publication*.

The statues are drafted in writing and need to be signed by all founder members; the statutes, according to the regulation mean both the instrument of incorporation and, when they are the subject of a separate document, the statutes of the SCE.

The statutes of the SCE include at least, which means that if one of the following is missing, the legislation of the state where the registered office shall be established shall applied in terms of nullity:

- the name of the SCE, preceded or followed by the abbreviation "SCE" and, where appropriate, the word "limited",
- a statement of the objects,
- the names of the natural persons and the names of the entities which are founder members of the SCE, indicating their objects and registered offices in the latter case,
- the address of the SCE's registered office,
- the conditions and procedures for the admission, expulsion and resignation of members,
- the rights and obligations of members, and the different categories of member, if any, and the rights and obligations of members in each category,
- the nominal value of the subscribed shares, the amount of the subscribed capital, and an indication that the capital is variable,
- specific rules concerning the amount to be allocated from the surplus, where appropriate, to the legal reserve,
- the powers and responsibilities of the members of each of the governing organs,

- provisions governing the appointment and removal of the members of the governing organs,
- the majority and quorum requirements,
- the duration of the existence of the society, where this is of limited duration.

In terms of *registration* of a SCE [6], a SCE has to be registered in the Member State where the SCE has its registered office, in a register especially created by the respective Member State according to the law applicable to limited-liability companies in which the SCE has its registered office.

The *publication of the statues in the Member States and in the Official Journal of the European Union* is important in order to ensure that third parties around Europe are informed about the formation or any subsequent modification of the statues or situation regarding a certain SCE. The modality of the publication, as well as any other procedure related to it, are specific to the Member State where the SCE has its registered office. Again, it is applicable the legislation specific to public limited liability companies laws.

If the publicity envisages the formation of new branch, the national rules adopted pursuant to Directive 89/666/EEC shall apply to branches of an SCE opened in a Member State other than that in which it has its registered office. However, Member States may provide for derogations from the national provisions implementing that Directive to take account of the specific features of cooperatives.

Because a SCE is a type of company reuniting members from at least two Member States, the Regulation provides that obligation of publishing a notice in the Official Journal of the European Union, so that the formation of the SCE is known by every interested person around EU, not only in the Member State where the SCE has its registered office. This notice shall state the name, number, date and place of registration of the SCE, the date and place of publication and the title of publication, the registered office of the SCE and its sector of activity.

THE STRUCTURE AND MANAGEMENT OF THE SCE

The structure of organs and the systems of administration. According to Regulation (CE) no. 1435/2003, a SCE comprises a *general meeting* and, according to the *management organ* provided for in the

[6] Art. 11-13, Regulation 1435/2003.

statues, either a *supervisory organ and a management organ* (*two-tier system*) or an *administrative organ (one-tier system).*

The specific rules on the structure and management of a SCE are laid down in Chapter III of the SCE Regulation. These provisions are supplemented by the legislation applicable in the Member State where the SCE has its registered office.

ALLOCATION OF PROFITS AND DIVIDENDS

The dispositions regarding the *allocation of the surplus* for each financial year are established *according to the provisions of national laws of the Member State* where the SCE has its registered office. Where there is such a surplus, the statutes require the establishment of a *legal reserve* funded out of the surplus before any other allocation.

The statutes may provide for the *payment of a dividend to members in proportion to their business with the SCE, or the services they have performed for it.* The balance of the surplus after deduction of the allocation to the legal reserve, of any sums paid out in dividends and of any losses carried over, with the addition of any surpluses carried over and of any sums drawn from the reserves, shall constitute the profits available for distribution.

The general meeting which considers the accounts for the financial year *may allocate the surplus* in the order and proportions laid down in the statutes, and in particular carry them forward, appropriate them to any legal or statutory reserve fund, provide a return on paid-up capital and quasi-equity, payment being made in cash or shares. In any case, the statutes *may also prohibit any distribution.*

ANNUAL ACCOUNTS AND CONSOLIDATES ACCOUNTS

The provisions laying down rules regarding the annual accounts and the specific rules of this field are those adopted in the *Member State in which it has its registered office in implementation of Directives 78/660/EEC and 83/349/EEC*. However, Member States may provide for amendments to the national provisions implementing those Directives to take account of the specific features of cooperatives[7]. Where an SCE is not subject, under the law of the Member State in which the SCE has its

[7] Javier Guillem Carrau, *La sociedad cooperativa europea, Revista valenciana d'estudios autonomics* – 1985-PERI-Generalitat Valenciana, Consel, nr. 35, 2001, p. 96.

registered office, to a publication requirement such as provided for in Article 3 of Directive 68/151/EEC, the SCE must at least make the documents relating to annual accounts available to the public at its registered office. Copies of those documents must be obtainable on request. The price charged for such copies shall not exceed their administrative cost.

The statutory audit of an SCE's annual accounts and its consolidated accounts if any is carried out by one or more persons authorized to do so in the Member State in which the SCE has its registered office in accordance with the measures adopted in that State pursuant to Directives 84/253/EEC and 89/48/EEC.

WINDING-UP, INSOLVENCY AND SIMILAR PROCEDURES

As regards winding-up, liquidation, insolvency, cessation of payments and similar procedures, an SCE is governed by the legal provisions which would apply to a cooperative formed in accordance with the law of the Member State in which its registered office is situated, including provisions relating to decision-making by the general meeting.

Knowing the provisions regarding the SCE and those related to the involvement of employees is highly important from the practical point of view as well as from the theory point of view.

Form the practical point of view, the added value of this new community instrument is easy to see in the advantages for the interested parties, as well as for the economic development of the already existing companies, from the perspective of the contribution to the trans-border cooperation. Also, it is useful for the interested parties that deploy their activity in the cooperative field, to know the possibilities available for them, to adapt their activity and to place in the community framework.

DESIGNATION FEATURES OF THE TRADING COMPANY'S MANAGER

Carmen TODICĂ*

ABSTRACT

The designation of the trading company's administration bodies can be performed by incorporation document for the first managers, but also by resolution of the shareholders' general assembly for the subsequent managers, elected during the company's operation.

It must be stated that the designation of the administrators by incorporation document presents importance regarding the revoking or limitation manner of their power, as these operations logically determine the modification of the incorporation document through which they have been assigned.

KEYWORDS

The Law no. 31/1990, designation methods of the managers, clauses regarding the management bodies

1. GENERAL CONSIDERATIONS

Unlike the general assembly, 'a body without resonance in relationships with third parties, generally manifested within the closed company's circle, in internal relationships' [1], the liability of the company's management pertains to the managers, as administration bodies. In the possession of the company's current administration, the managers effectively fulfill the operational management position, both under the organizational abilities and of the possibility to capitalize human resources and materials of the trading company.

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[1] O. Căpățână – *Societățile comerciale* [Trading Companies], 2nd Edition, Lumina Lex Publishing House, Bucharest, 1996, p. 324.

The main role of the trading companies' managers, to carry out the company's object of activity, explains the exception provisions foreseen by the trading companies Law no. 31 1990, with the subsequent modifications, regarding the managers' appointment and identification, as well as the multitude of legal modifications occurred in the last two years in the field of trading companies' administration.

2. DESIGNATION METHODS OF THE TRADING COMPANY'S MANAGER

The designation methods of the managers varies according to the legal form of the trading company, but in all circumstances, their designation (appointment)[2] can be performed upon the company's incorporation, by an explicit clause in the incorporation document, as well as subsequently by decision of the general assembly of the shareholders.

Although the law regulates both modalities for designating the administration bodies, it does not foresee in an explicit manner the coerciveness of their appointment even from the company's incorporation stage. Reason from which, the doctrine[3] asserted that the notes regarding the manager is not a compulsory clause for the incorporation document, as he/she can be designated subsequently to the company's incorporation, by decision, respectively by resolution of the shareholders. Still it is hard to believe that in practice there are actually numerous cases of incorporation documents that do not identify the manager, as the law explicitly requires the registration of a such provision in the incorporation document. In case it is not registered the judge appointed from the trade registry is entitled to decline the company's registration in the trade registry.

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[2]Some authors use the ther 'managers' appointment' (I.L. Georgescu - *Drept comercial român* [Romanian Business Law] All Beck Publishing House, BuC., 2002, vol.II, p. 465 – 469) and others use the collocation 'managers' designation' (S.D. Cărpenaru – *Drept comercial român* [Romanian Business Law] ALL Beck Publishing House, p.212; O. Căpățână – *Societățile comerciale* [Trading Companies], 2nd Edition, Lumina Lex, 1996, p.324; S. Angeni, M.Volonciu, C. Stoica – *Drept comercial* [Business Law], 3rd edition, Ed. All Beck, Buc, 2004, p. 204). In comparison with the provisions of the trading companies' law, which under Article 45 differentiates 'the company's representatives appointed by incorporation document' from the 'ones elected while in operation', we consider the expression 'manager's designation' to be more adequate, implicating to a wide extend (lato-sensu) both the appointment modality for the managers signing the incorporation document and the one for appointing the subsequent managers.

[3] Gh. Piperea – *Obligațiile şi răspunderea administratorilor societăților comerciale*. [Obligations and Liability of the Trading Companies' Managers] *Noțiuni elementare* [Basic Notions], All. Beck Publishing House, 1998, p. 57-58.

So, we can not agree to the opinion according to which the designation of the first managers by incorporation document is optional.

First of all, there is the question of the person exercising the trading company's managing and representation position up to the subsequent designation of the administrator. The doctrine solved the problem in an over-simple manner [4]

In case the incorporation document does not indicate the company's managers and has no provisions regarding the company's management manner, it is supposed that each shareholder has a management mandate on behalf of the other associates, being entitled to complete all operations necessary for exercising the company's trade, the provisions of the Article 1517 Civil Code being applicable. Therefore, within persons' companies and even within limited liability companies, up to the manager's designation, this position can be held by any shareholder, and within stock companies, by the founders. [5]

Still, we believe that it is not proper for the uncertain situation to persist, in which the company lacking the managing bodies, it is managed by some of the founding members. Under such provisions, the uncertainty status would generate a lack of credibility on the market, and the company's activity would not be developed under normal parameters. Regarding the opinion according to which, if no manager is appointed by incorporation document, it is assumed that each shareholder is entitled to manage the company, we feel that such a hypothesis is difficult to encounter in practice and would be equivalent to a non-fulfillment by the trade registry office of its duties, as Article 7 letter e) from the Law no. 31/1990 explicitly requires for the company's incorporation document in collective name, in limited partnership or limited liability to designate the managers.

The dogmatic solution was also embraced by the legal practice. In such manner, the jurisprudence[6] established 'in lack of an explicit provision

[4] It was affirmed that, if in the company's contract in collective name there were no provisions regarding the company's management, the right to manage the company in collective name pertains to any shareholder, given the unlimited and solitary character of the shareholders' liability (C. Bârsan, V. Dobrinoiu and Collaborators - , vol. I, p.198).

[5] Gh. Piperea – *op.cit.*, p.58. It must be noted that the author himself criticizes the stock companies' management by the founders.

[6] Decision no. 427 from November 20th 2001 of C.A. Braşov, commercial section in INDACO. The solution is justified as being a compromise one, with a limited applicability in time, between the termination period of the former manager's mandate up to the appointment of a new administrator, so in the vacancy hypothesis of the manager position, when in lack of a habilitated person to represent the company in relationship with third

of the Law no. 31/1990 regarding the person entitled to represent the company in case there aren't any managers, are subject to the common law provisions under Article 1517 Civil Code, according to which, in lack of a special provision regarding the management manner, it is assumed that the shareholders granted each other the right to manage one another'. We cannot accept such a solution, as according to Article 7 letter e) of the Law, the incorporation document of a company must include the shareholders representing and managing the company or the non-associated managers, as well as the powers entrusted to them and their exercise manner. Furthermore, the compliance with these legal provisions is subject to the legal control exercised by the judge assigned by the trade registry office, according to Article 37 from the law, the penalty being the rejection of the application registration for the company whose incorporation document does not include the clauses expressly foreseen by law.

Second of all, the provisions of the Law no. 31/1900 are relevant under the analyzed aspect, reserving specific regulations for each company, more or less elaborated, regarding the appointment of the administration bodies.

In this manner, in case of companies in collective name and limited partnership company, Article 77 paragraph 1 from the law foresees, in a principle regulation, both modalities for manager designation: 'the shareholders ... can choose one or more managers among them, determining their powers, the appointment period and their possible remuneration'. As a consequence, from the grammatical interpretation of the text it comes out that the designation of the persons' companies managers by resolution of the shareholder's general assembly is optional.

In the same respect, Article 197 paragraph 1 from the law also contains orders regarding limited liability companies, according to which: 'the company is managed by one or more managers, appointed by incorporation document or by general assembly'. So, the text states that the manager's appointment is performed alternatively, by incorporation document or by resolution of the general assembly.

This text, as well as the previously mentioned one must be interpreted in the sense that the appointment of the first managers is performed by incorporation document (signatory managers) and the appointment of the other administrators, elected during the company's

parties, it is binding that any of the shareholders would be able to manage the company in the purpose of continuing to perform the object of activity.

operation (subsequent managers) is performed by resolution of the general assembly.[7]

Interpreted as such, the provisions of the law regarding the stock company's administration are in full compliance with the above presented opinion. So, within the unitary administration system, 'the managers are assigned by the ordinary general assembly of the shareholders with the exception of the first managers, appointed by incorporation document' (Article 137^1 par. 1). In a similar manner, within the dual management system of the stock company 'the members of the surveillance board are appointed by the general assembly of the stockholders, with the exception of the first members, appointed by incorporation document (Article 153^6 par. 1).

As a consequence, the mentioned texts explicitly exclude the possibility that the first managers, respectively the first members of the surveillance board are appointed subsequently to the company's incorporation, by decision of the stockholders' ordinary general assembly. In other words, in case of the stock companies, the law makes an explicit distinction between the first managers / members of the surveillance board appointed by incorporation document and the managers / board members although subsequently by stockholders' decision [8].

A third argument in the sense that the incorporation document must compulsory contain mentions regarding the first managers, come out of the provisions of the Law no. 31/1990 regarding the contents of the company's incorporation documents and documents attached to the registration application, necessary for the company's incorporation. In this manner, Article 7 letter e) from the law determines that the incorporation document in collective name, in limited partnership or limited liability must foresee 'the shareholders representing and administering the company or the non-

[7] See C.Cucu, M.V. Gavriş, C.G.Bădoiu, C.Haranga - *Law of the Trading Companies no. 31/1990*. Bibliographical references. Judicial Practice. Resolutions of the Constitutional Court. Annotations, Hamangiu Publishing House, 2007, p. 444. In the same respect, O. Căpățână – op. Cit, p. 328. The author also states that the manager's appointment normally occurs within the company's incorporation document. Subsequently, within the collective entity operation, the appointment is performed, for the company in collective name and limited partnership companies by the shareholders representing the majority of the joint stock, and within the other associative forms by the general assembly in compliance with the usual majority.

[8] In a diametrically opposed opinion, expressed as a matter of fact according to the previous regulation, but that is not even then justified, within the stock company and stock partnership company 'the first administrators can be appointed by the company's contract but also by a subsequent decision of the stockholders' general assembly (Gh. Piperea – *op.cit.*, p.58).

associated managers, their identification data, the powers granted to them and if they will exercise them together or separately'. In the same respect, Article 8 letter g) and i) foresees the same, that is 'the incorporation document of the stock company or stock partnership company will include:...g) the identification data of the first members of the administration board, respectively of the first members of the supervision board'; i) clauses regarding ... administration, ...number of the administration board or determination manner of this number'.

In conclusion, the clauses regarding the management bodies are compulsory within the company's incorporation document. And in the situation in which the incorporation document does not contain the elements requested by law, the judge assigned by the trade registry may decline the company's registration, in exercising the legality control foreseen by Article 46, paragraph 1 from the law[9]. That is why, in practice it is hard to picture a situation in which the incorporation document does not contain provisions regarding company administration and the appointment of the first managers is left at the appreciation of the general assembly. Furthermore, Article 36 letter f) from the law foresees the inclusion among the appendixes of the company's registration application, the notarized statement of the first managers, respectively of the first members of the supervision board that they fulfill the provisions foreseen by law [10].

[9] According to Article 46, paragraph 1 from the Law no. 31/1990: 'when the incorporation document does not include provisions of the law or contains clauses in breach of an imperative law provision or when a legal requirement for company's incorporation was not completed, the publicly assigned judge or on request of any other persons formulating an intervention request, will reject, by completion, in a motivated manner, the registration application, aside from the case in which the associates remove such irregularities. The assigned judge will acknowledge the performed regulations.'

[10] According to an isolated opinion, the lack of notes in the incorporation document regarding the managers' identity is no reason for denial, as long as the company submitted the notarized statements and the proof of the professional insurance policy existence. It was argued that the mention of the managers' identity in the incorporation document is superfluous, the data regarding them being registered at the trade registry together with the submission of the statement and professional insurance completion proof, documents without which their mandate is outside the law. So, any third party can find out data regarding the managers based on information request, as long as they have been assigned, without being nominated in the incorporation document (S.Bodu - Effects of Non-compliance with the Legal Provisions Regarding the Registration of the Trading Company in R.R.D.A no. 5/2007, p. 58). We cannot agree with this opinion based on the fact that the incorporation document represents the materialization of the shareholders' act of will and as long as the managers are not nominated in this incorporation document it means that they have not been assigned, as the shareholders did not give their consent regarding their

3. THE IMPORTANCE OF DESIGNATION METHODS OF THE TRADING COMPANY'S MANAGER

In comparison to the above mentioned, we can conclude that the designation of the trading company's administration bodies can be performed by incorporation document for the first managers, but also by resolution of the shareholders' general assembly for the subsequent managers, elected during the company's operation.

It must be stated that the designation of the administrators by incorporation document presents importance regarding the revoking or limitation manner of their power, as these operations logically determine the modification of the incorporation document through which they have been assigned. So, the cancellation or limitation of the power belonging persons and limited liability companies' managers, appointed by incorporation document can be performed only by vote of all associates, according to the *"mutuus consensus, mutuum dissensus*" principle. In change, the dismissal of managers appointed by resolution of the shareholders' general assembly will be performed with the same majority foreseen by law for their appointment, that is absolute majority of joint stock [11].

In the same line of ideas, the judicial practice itself settled down the requirement of unanimity regarding the dismissal of managers appointed by incorporation document.[12]

Also in the case of the stock company the appointment of the first administrators, respectively of the first members of the supervision board and establishment of their attributions by incorporation documents, presents

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appointment. Furthermore, the notarized statements and the proof of the professional insurance policy required by law for the managing bodies of the stock company, are operations subsequent to their appointment having another role that the one of supplying information regarding their identification data. Furthermore the provisions of Article 8^1 of the law would also be breached, that explicitly foresee the identification data of the legal entities or physical persons managers which the incorporation document must contain.

[11] According to Article 77, paragraph 2 from the Law no. 31/1990 'with the same majority, the shareholders can decide upon the dismissal of managers or upon the limits of their powers, aside from the case in which the managers were appointed by incorporation document'.

[12] Decision no. 4109/1998 of C.S.J., Business section, on no. 10/1999, p.153. ('if the managers of the company in collective name have been appointed by company contract, their dismissal from position as well as the modification of their remuneration can be decided only with the shareholders' unanimity and not the shareholders representing the absolute majority of the joint stock, as it results from the per a contrario interpretation of Article 77, par. 2, final thesis').

importance in the hypothesis of modifying these clauses. In this case the competency falls exclusively upon the extraordinary general assembly of the shareholders according to article 113 letter m) establishing in its task the passing of any resolution for modifying the incorporation document. Regarding the members of the administration board or of the subsequently assigned members of the supervision board, the competency for their dismissal belongs to the body that elected them, respectively to the ordinary general assembly, according to Article 111 letter b) from the law. In the same respect it orders the judicial practice regarding the possibility of the trial court to order as penalty the manager's dismissal. So, 'the dismissal penalty is ordered by the court for the managers appointed by the general assembly of the stockholders and is decided by the extraordinary general assembly for the managers appointed by the company's incorporation document. That is because, the dismissal of the managers appointed by the company's incorporation document determines the modification of the respective document'. [13]

[13] Decision no. 4030/2002 of C.S.J., Business section, Com., in R.R.D.A. no. 9/2003 p.112.

THE PROTECTION OF THE PROPERTY RIGHT WITHIN THE CURRENT LEGISLATIVE FRAMEWORK

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ABSTRACT

The modalities through which it may be protected the property right may be presented in most various forms, however we estimate that the action for the recovery of personal and real property, the insurance forms for the personal and real property, as well as the registrations in the Land Registry constitutes the main means available to a person in order to protect his property right against the actions of third parties. Within the context of the permanent fluctuations both of the legislative framework and of the daily reality, the insurance of goods and the registrations with the Land Registry become indispensable means of any person holding a property right.

KEYWORDS

The modalities through which it may be protected the property right, insurance contract, real estate publicity

Institution known since the period of the application of the Roman judicial norms, the property right represents a veritable guarantee of the legal approach of certain goods of different nature. Thus, the venerable *"pater familias"* exercises an absolute prerogative on the goods that constituted the content of the individual property right, being tributary to the collocation *"dominium ex jure quiritum"*. The historic evolution determined a concentration of such absolute right, which in the Middle Ages becomes an exclusivist element from which benefited only the feudal owners and some of their vassals. Finally, the current attributes of the property right

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were reacquired through the French Revolution of 1789, when the property was placed on a pedestal sustained by the fundamental human rights and freedoms.

Starting from this brief history of the concept of property, it is obvious the significance that accompanied such right ever since it birth. Above the evident abuses made by the political regimes, the attributes subsumed to such concept constitute a unitary whole with the most legal and social implications. Therefore, the necessity to protect such right obtained and reacquired through the armed and political conflicts represents an absolute condition for the existence and the enforcement of the legal norms specific to the democratic society. The French Revolution was the first step for the attention of the politics on the inviolability of the individual property. In the same unitary spirit, the Constitutions and the Civil Codes of the contemporaneousness establish, almost in their majority, the principles that delineate the existence, the exercise and the protection of the property right. For exemplification, we shall provide you the explanations of the article 17 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948: *"Everyone has the right to own property alone as well as associated with others. No one shall be arbitrarily deprived of his property."* The European Convention on Human Rights adopted in 1950 contains similar provisions. Such international acts having an absolute importance have established the respect due to the property and the possibility of any subject to protect this prerogative "de jure".

The current political, social and legal context involves the qualification of the property right, so that such right should be enframed in a larger sphere, that comprises the respect towards the society and the non abusive exercising of such right. Moreover, the legal instruments meant to protect the property right have known a natural evolution, determined by the complexity of the social relations and by the interdependence of the juridical institutions. Departing from these considerations, the analysis of the means specific to the protection of the property right justifies its utility by direct appertaining to the prejudices that may be caused to the exercising of such right.

I. General Aspects of the Modalities for the Protection of the Property Rights

The modalities through which it may be protected the property right may be presented in most various forms, however we estimate that the action for the recovery of personal and real property, the insurance forms for

the personal and real property, as well as the registrations in the Land Registry constitutes the main means available to a person in order to protect his property right against the actions of third parties.

With regards to the core theme that regulates such forms of protection, there are, on one hand, the frame-law - the Civil Code - containing (art. 909) the norms on the general and special forms and conditions regarding the goods that may constitute the object of the action initiated by the owner not possessor against the possessor not owner, on the other hand, we note the incidence of the special laws provisions on the modalities and conditions that have to be met both by the good that makes the object of the insurance contract and as well by the insured person for the valid conclusion of a contract in this regard (Law 136/1995 on insurance and reinsurance), as well as the aspects related to the drawing up of the necessary documentation and the real estate publicity forms through which the property right over a real estate may become opposable to third parties (Law 7/1996 on cadastre and real estate publicity).

We estimate that shall be useful to mention that, although within the current legislative framework, the provisions related to the action for the property recovery, the insurance contract, the entries into the Land Registry, coexist both at the level of the general law and as well as at the level of the special law, in the new Civil Code[1], both the action for the property recovery and the insurance of goods, persons and the forms of real estate publicity shall be found in the corpus of this law. A primordial aspect in this respect is related to the uncertainty raising on the Law no. 7/1996 and Law no. 136/1995 remaining in force, taking into consideration the alternative of their integration into the Civil Code, under the circumstances in which certain aspects found in the content of the current special regulation are not found in the corpus of the new law, existing even express provisions referring to the settlement of certain aspects by a special law[2].

[1] Law no. 287/2009 on the Civil Code was adopted on 25 of June 2009, based on the provisions of art. 114 paragraph (3) of the Constitution of Romania, republished, as a consequence to the Government taking responsibility before the Chamber of Deputies and of the Senate, in the common session held on 22 of June 2009, being published into the Official Gazette, Part I, no. 511, of 24 of July 2009.

[2] Art. 883 of the new normative act that decrees that ”the procedure of registering in the Land Registry shall be determined by a special law”.

II. THE INSURANCE OF GOODS – A COMPULSORY INSTRUMENT OF PROTECTION OR, AS THE CASE MAY BE, VOLUNTARILY, THE INSURANCE OF THE PROPERTY RIGHT

The importance to conclude a insurance contract rests in the fact that through its effects shall be built a veritable "anchor" laid in the way of the turbulences determined by the specific human actions or by the actions typical to the hazard.

The insurance is presented in the form of a facultative operation[3] or, as the case may be, of a compulsory operation[4], that is based on the obligation of the insured person to pay an amount of money, the contractual insurance premium, in exchange of which the insurer shall take over the risk insured and, upon the occurence of the insured event, shall pay the insured amount or the insurance indemnity.[5] In the terms of this acception, we deem that the main purpose of the insurance contract is that in which an insurance company takes over the risk of loss, damage or destruction of a good, so that, following to the occurrence of such event, the insured persons shall receive his insurance indemnity in compliance with the contract concluded, his patrimony being not subject to major modifications[6]. Therefore, the insured risk is the insured phenomenon or event that once occurred, due to its effects, binds the insurer to pay the indemnity or the insured amount to the insured person.

With regards to the classification of the insurance contracts in compulsory and facultative contracts, we deem that this distinction is important both in terms of the contractual clauses imposed to the compulsory contracts and to those negotiated, in case of the facultative contracts, and also in terms of the effects they produce. Therefore, within the compulsory insurance contract the relations between the insured person and the insurer shall take the form of an insurance contract in which the rights and obligations of each party are determined under the law. The compulsory nature of the third party liability insurance for damages caused

[3] The facultative motor third party liability insurance.

[4] On the supposition of the compulsory motor third party liability insurance, or in the future, the ompulsory dwelling insurance.

[5] In the current regulation, the facultative insurances constitute the rule, and the compulsory insurances the exception, derogatory from the rule, required by an express regulation. Thus, according to Art. 4 of Law no. 136/1995 „the third party liability insurance against damages occurred in the accidents of motorvehicles as well as tramcars, in the territorial limits of coverage".

[6] In case of insurance of goods.

by accidents involves the obligation of the persons circumstantiated by law to conclude such insurance contracts, in their capacity of insured persons, and of the insurer that performs the compulsory third party liability insurance to accept and to execute them.

The details remained to be "negotiated" by the two categories bound to conclude such insurance relation, under the conditions determined under the *art. 3 of Law no. 136/1995, shall be exclusively in the discretion of the co-contracting party*.[7]

This contract is practically a *forced contract* having the content entirely determined by law, its conclusion being compulsory, being imposed by law either to protect the interest of the contracting parties, respectively of the insured persons or the interest of third parties.

In contrast with this contract, in the voluntary insurance, regulated by Art. 2 of Law no. 136/1995, the relations between the insured and the insurer as well as the rights and the obligations of each party shall be determined by such parties in a particular way of negotiation. Considering the consensual nature of the insurance contract, its conclusion involves the simultaneous gathering, fully concordant, of the offer to contract with the acceptance of such offer also as a result of the expressing the manifestation and the meeting of minds between the insured and the insurer.

The negotiation of the insurance contract may be analysed in terms of the two stages ensuring the conclusion of the insurance contract: the *mutual information of parties and the concordant meeting of the offer with its fully acceptance by the contracting parties*. This notification shall not bind the insured person or the insurer, the parties remaining free to accept or not the conclusion of the insurance contract under the conditions provided in the notification. However, the essential element differentiating the compulsory insurance contract from the voluntary insurance contract rests exactly in this wider possibility to negotiate in case of the voluntary contact, in comparison with the compulsory contact. Therefore, the insured person may negotiate almost all the elements essential for the valid conclusion of the voluntary insurance contract, both general and technical elements, particular, with the obligation of both co-contracting parties not to breach or to remove by negotiated clauses the imperative norms of the general or

[7] A power without great advantages under the circumstances in which, on one hand, all the insurers are bound to observe the solvability margins and the reserve funds required by law, and on the other hand under the circumstances in which the contractual clauses are the same regardless the insurer, such clauses being provided by law.

special relevant law, indicated by the norms of Law 136/1995 as indispensable.

Under such conditions, we deem that the insurance of goods represents a viable alternative from the point of view of protecting the property right both in terms of hazard and as well as of the actions causing damages to third parties.

III. THE REGISTRATION IN THE LAND REGISTRY – AS A PROTECTION MODALITY OF THE PROPERTY RIGHT AGAINST THIRD PARTIES

The purpose of the real estate publicity and in an implied manner of the registrations in the Land Registry consists in the specific effects and inherent security, through which by such registrations are protected the rights of the natural or legal persons, or, as the case may be, the various legal acts or facts. Therefore, the **real estate** publicity appears as a procedure through which is made the registration into the public documents of the material and legal situation of the real property in order to protect the holders of the real rights, of the personal right, of the legal acts or facts related to status and the capacity of the natural or legal persons, of the actions brought before courts of law and of the measures of making unavailable, taken in relation with the real estates registered in the Land Registry, ensuring in this way the opposability of the registrations towards third parties.

The registrations with the Land Registry have represented and nowadays continue to appear as a form of protection for the holders of real rights, their first purpose being to provide the registrations opposability towards the third parties. Thus, in the Land Registry System regulated by the Decree - Law no. 115/1938, in the current system provided by art. 26 of Law 7/1996, as well as the Book 7th of the New Civil Code, the registrations with teh Land Registry shall keep the same printed structure of the tabulation (art.884), of the provisory registration (art.897) and of the notation (art.901-art.905) [8].

From the point of view of the Law no. 7/1996, the registration into tables/charts/registries (tabulation) represent the final registration of a real

[8] Although the Law 7/1996 regulates only the general aspects regarding the notation, the legal facts and facts that may be subject to notation, being regulated by art. 42 of the Regulation 633/13.10.2006 of the National Agency of Cadastre and Real Estate Publicity (in Romanian: ANCPI), in the Civil Code the notation as a form of registration into the Land Registry is provided in full in the Chapter III, art. 901- art. 905, entitled „The notation of certain legal rights, facts and relations".

property right into the Land Registry and takes place after the completion of the cadastral works on a administrative - territorial unit (city, commune, etc.); the registration that intermediated the transfer, the modification or extinction of a real right becoming opposable towards third parties as of the date in which has been entered the registration application, the registration made in this way having a *declarative nature.* In the vision offered by the provisions of the new Civil Code, an element that will cause interest and will open wide discussions on this subject consists in the acquirement of the *constitutive nature* of the registrations*,* constitutions and migrations of the real rights over the real estates. If by the statutory regulations provided in the Decree no.115/1938 and subsequently by Law no. 7/1996, the registration of the property right into the Land Registry had a declarative effect, the primordial purpose of this legal operation is to ensure the opposability of the registered right towards third parties, according to the new legislative perspective, the registration acquires a constitutive nature, meaning that the real rights over the real estates, according to the legal provisions subject to registration, may be acquired both between parties and towards the third parties, only by registration into the Land Registry, based on the act or fact that justifies the registration. Consequently, a sale agreement concluded under an authentic form shall remain without its natural effect, since such document is not seconded by a registration of the corresponding right into the Land Registry.

With reference to the registration of a property right into the Land Registry, a major modification consists in the requirement according to which a judgement decision, that is a ground of registration, shall be sufficient to be final and not irrevocable and final as per Law 7/1996, - this represents a positive aspect for the legislative system, because the condition according to which the judgement decision had to be irrevocable, as per Law 7/1996, was not justified since on one hand a definitive decision is enforceable, in compliance with our court system, and on the other hand because subsequently, in case of the legal status changing, taken into consideration at the date of registration, could have been requested the rectification of the Land Registry.

The second modality through which is ensured the opposability of the registered right towards third parties is the provisory registration. Therefore, according to the provisions of Law 7/1996, the necessity if such provisory registration with the Land Registry becomes incident in the circumstances in that when it is requested, the real estate right cannot be tabulated, but subsequently, when the registration shall become definitive, changing itself into tabulation, it shall have the date and the rank from the provisory registration. The primordial purpose of the provisory registration

is to grant certainty to the interested person with respect to his/its right and to protect it from a possible tabulation of the same right by a third party[9].

With respect to the third modality of registration with the Land Registry, the notation, of which object is to register the personal rights, the debt rights, the legal facts or relations related to the real estates comprised in the Land Registry in order to ensure the opposability towards third parties, being a characteristic of the debt rights, considering that the real rights may be only provisory tabulated or registered, this was regulated by the Decree no.115/1938[10], and subsequently the legal acts and facts that would make the object of notation have been provided by art.42 of the Regulation no.633/2006 of ANCPI, as well as by other special laws[11]. The new Civil Code regulates entirely the notation procedure, specifying in the art.901-art.902 the distinction between the legal acts and facts that are subject to notation and those that can be noted in the Land Registry, but without the opposability towards third parties to depend on such registration, they being opposable to third parties even in the absence of their notation into the Land Registry.

There may be various many modalities of protection of the property right, but we deemed that is useful to present the special modalities for the protection of the property, trying a deviation from the classic presentation. We think that, within the context of the permanent fluctuations both in the legislative framework and in the daily reality, the insurance of goods and the registrations with the Land Registry become indispensable means of any person holding a property right.

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[9] According to art.29, the provisory registration may be requested when: "a)the real right requested to be registered is affected by a suspensive condition; b) it is requested the tabulation of a real right based on a judgment decision which did not remain irrevocable, but only definitive; c) it is acquired a tabular right that, previously, was provisory registered; d) the debtor recorded the amounts for which the mortgage and the real estate privilege was registered".

[10] The Decree-Law no. 115/1938 is one of the normative acts that regulated the previous real estate publicity systems, ceasing its enforceability, for each county, the registrations made after the coming into force of the Law no.7/1996 on cadastre and real estate publicity, being made on principle only with due observance of the provisions of the law mentioned above, even if on temporary basis coexisted different publicity systems.

[11] As an example we mention the provisions of art.593 paragraph 3, art.597 paragraph 2, art.600 paragraph 1 of the Civil Procedure Code related to the notation into the Land Registry of the insurance measures or of Law no. 85/2006 on the insolvency procedure, related to the notation of the application for the initiation of the insolvency procedure against the debtor (art.63).

THE LEGAL CONDITION OF THE ASYLUM SEEKER IN THE EUROPEAN UNION

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ABSTRACT

The asylum represents a part of the emigrational phenomenon, which starting with the enforcing of the Treaty of Amsterdam, became without error a domain of community interest.

The states members of the European Union established at a communitary level a distinct legal system for the applicants for asylum.

The study analyses separately the situation of the applicants for asylum and the situation of the ones that obtained a form of protection from point of vu of the rights to the movement, to reside, to work, to benefit of the family reunions as well as other relevant rights and liberties.

The applicant for the asylum can not claim for the benefits to the free movement in the community space as he did not obtained the communitary protection.

KEYWORDS

Free movement in the community space, the right to leave the territory, the right of residency, the right to work to the asylum seekers, family reunification

Community members states, except those that called down the benefit of the protocol of unparticipation in adopting the minimum standards in the asylum domain at a Community level, have established a separate legal regime for asylum seekers and those who have been granted a

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form of protection ,by regulating separate Community acts ,for the first case The Directive of Procedures , and for the second case The Directive of Qualification, due to fact that for the first category of people should be granted an assistance of a limited duration, namely until is known if they need protection, otherwise he should return to his native country[1].

Therefore, as we analyze separately the situation of the asylum seekers and those who have acquired a form of protection in terms of the right to the movement, to rezide, to work , to benefit of the family reunification, and also other relevant rights and liberties

1. THE RIGHT TO CIRCULATE

First of all should be pointed out the fact that there does not exist at a Community level, a legal document which confers to asylum seekers in one of the states member the right to the free movement in the community space.

Moreover, the right to leave the territory of the state for which the applicant for a form of protection made the request for asylum can be limited by the state member in question during the asylum procedure. This shows that according to the Directive of procedures, the member states can impose to the asylum seekers the obligation to cooperate with the competent authorities insofar as those requirements are necessary for analyzing their demand, they can request to the asylum seekers to report before the competent authorities , as well as to submit all the relevant documents for analyzing their demand ,such as passport, in the context in which the Regulation for determining the Member State responsible for reviewing an application for asylum, the responsibility of the state that evaluated the application in question cease only after the applicant for asylum has been rejected and returned to his country of origin

Therefore, we consider that the members states, willing to carry out an efficient and fast evaluation of the protection need of the asylum seekers, which involves also an substantial decrease of the costs caused by from the enforcement of the proceedings for asylum, will decide to ensure the presence for those concerned on their territory, as long as their legal situation is under the incidence of the reglementations regarding the asylum. It should be pointed out that, by adopting this concept, they block the secondary movements of the asylum seekers inside the Community and they ensure the operability of the Dublin mechanism which otherwise would

[1] Octavian Manolache, *Drept comunitar*, Ed. CH Beck, 2007.

have been substantially harmed by a succession of asylum demands deposed in more members states in order to their displacement.

Regarding the implementation of the legal instrument Dublin II, it should be specified that, although the asylum seeker does not benefit from the right to the free movement within the Community, however when such a person is displaced from a state to another, he don't have to hold a visa.

However, for exceptional situations, when there are serious humanitarian reasons which require the presence of the asylum seekers in another state, the member states can issue for them a travel document and allow them the movement on its territory.

As for the right to move within the territory of the state where the demand for asylum was made, the general rule is that each member state should allow to asylum seeker freedom of movement on its territory. The detention of the applicants is allowed only to verify their identity. Each member state can limit the liberty to move of the applicants to a particular part of its territory, but only for certain motives (for example – the rapid analyze of the application). In any case, when taking such a measure, should be possible to review the decisions that determine the territorial limits for the deplacement of the applicants.

2. THE RIGHT RESIDE

As for the applicants for asylum it should be mentioned that in their case we can not speak about the right of residency in the true meaning of this concept, but, rather, about a permission of to stay on the territory of the member state as long as their claims are examined, until a decision is taken in the first instance[2]. However, this prerogative has not an absolute character, but behaves limitations, meaning that the asylum seeker will no longer be entitled to remain in the territory of the country in question when a subsequent demand of asylum was denied or in the case of the extradition from another member state, in fulfillment of a European arrest warrant or to another country other than their country of origin, in order not to prejudice the principle of non- refoulement. In the country of asylum, the solicitor for any form of protection has the possibility to choose his residency and has to bring to the attention of national authorities any changes in this regard.

Since the asylum seekers can not move freely within the Community and not enjoy a right of residence in the State of asylum, by default they are not recognized with a residence right in another Member State.

[2] The permission does not grant the right to the residence permit (art. 7 din Directiva Procedurilor).

According to the Directive of qualification, for the beneficiaries of forms of protection are to be issued a residence permit, which in the case of those who have obtained a refugee status can not have a shelf life of less than 3 years and for those who have been granted subsidiary protection can not have a shelf life of less than 1 year that may be renewed, only if there are no serious reasons related to security and public order in that State, which would cause an contrary attitude.

The fact that refugees are exempted from visa requirement confer a right to stay more than 3 months in another Member State, both in the applicability of the Schengen Agreement and the Agreement for the suppression of visas for refugees, for larger periods of time, being necessary time the holding of a residence permit. In relation to this issue should be noted that although the Council adopted a directive[3] on the status of citizens of third countries who reside on a long period, covering among other things the conditions under which such persons may relies on the territory of another Member State, however, the disposals do not apply to asylum seekers and to the beneficiaries of a form of protection (refugee status, subsidiary protection or temporary protection). The Commission is to draw up a proposal on this category of people skipped through the act said.

3. THE RIGHT TO WORK

Related to the opportunity to confer the right to work to the asylum seekers during the settlement of their demand, should be mentioned that there are views pro and versus in this sense. Hereby, on the one hand, is considered that by granting such facilities will be stimulated the abuse to the asylum procedure, but on the other hand is estimated that this would allow the employment of these individuals under state laws and relief the state of the expenses to ensure the livelihoods for them. The existing Community rules are opting for a middle solution in the sense that access to the labour market of asylum seekers occur only if in a period of 1 year from date of application for asylum has not been taken a decision about this in the first instance[4]. Certainly, as it is easy to observe, for asylum seekers is

[3] Concil Directive 2003/109/CE on the status of citizens of member countries who reside on a long period.

[4] By the Law 122/2006 on asylum in Romania was granted to the asylum applicant the right to receive access to the labour market in our country under the same conditions as the Romanian citizens,if in a year after the wording of its request he is still in the asylum.

recognized the access to the labour market in the country of asylum and not at Community level.

Those who obtained a form of protection in a Member State have the right to conduct remunerated or independent activities, subject to general rules applicable to the profession and public services[5].

The Member States are obliged to ensure that training opportunities related to the work carried out, training and practical training in the workplace are offered to beneficiaries of refugee status or subsidiary protection under the same conditions set for their citizens.

As far as it concerns the beneficiaries of subsidiary protection it should be noted that the status of the labour market of the Member State may be considered including in respect of a possible priority of their access to work for a limited period under national law. The Member States must ensure that the beneficiaries of subsidiary have access to a job for which they received, according to the dispositions of national law, a bid prioritization on the labour market.

Finally, as regards the remuneration and the access to social security for the compensated or independent activities or other forms of exercise of the profession is applicable the legislation of Member States regarding these aspects.

There does not exist a regulation at a Community level to confer the right to work to the beneficiaries of refugee status or of subsidiary protection in another Member State, to there will be applied the national law of each state regarding this issue.

4. THE RIGHT TO FAMILY REUNIFICATION

As far as it concerns the asylum seekers it should be noted that they enjoy the prerogative of family reunification under Dublin II Regulation, meaning that when an unaccompanied minor applies for asylum in a Member State and has a family member[6] with legal residence in another

[5] In this regard , according to art. 20 alin. 1, lit. C Law nr. 122/006, the beneficiary of a form of protection is entitled to be employed , to carry out unpaid activities, to exercise free professions and to make legal acts, to carry out acts and deeds of commerce , including economic activities in an independent way, in the same conditions as the Romanian.

[6] By family members is understood:the spouse of the asylum seeker or his unmarried partener, in a stabil relationship, where the legislation or the practice of the member states in question treats the unmarried couples in a way comparable to married couples trought its low on foreings; the minor children od the couple or of the applicant, on condition that they are unmarried and depandent wheather they are born in or ouside the marriage or adopted

Member State, then the latter will be responsible for processing his application if it is in his interest, to achieve the family reunification; in the situation in which the asylum seeker has a family member, whether the family was formed earlier in the country of origin, which was allowed to live as a refugee in a Member State, that Member State will be responsible for examining the application for asylum, with the condition that this is desired by the person in question ; there are given clear criteria by which is established the responsibility of a Member State, and by default is made family reunification, when several family members are applying for asylum in several Member States; finally, any Member State, even when it is not responsible under the criteria set out in the regulations, can bring together family members and other relatives, on humanitarian grounds based in particular on the cultural and family reasons, only with their agreement .

The members of the refugee' family have the right to a residence permit, whose validity should coincide with validity of the residence permit of the beneficiary of the form of protection, have access to education, to the labour market and to training, even if they are granted or not with a form of protection.

After a maximum of four years of legal residence, the spouse or the unmarried partner and the children who have reached the age of majority, have the opportunity to be granted with an individual residence permit, on condition that the family link was maintained

Finally, in the case when the request for family reunification surpass the assumptions set out so far, each Member State will apply the disposal of reference in this case existing in the legislation on the legal regime of foreigners on national territory

5. OTHER RIGHTS AND FREEDOMS

Outside the prerogatives to which we have referred so far, it must be noted that both asylum seekers and beneficiaries of forms of protection have a other rights for the first case in ensuring an efficient and fair examination of asylum applications made, to avoid the return of persons having those problems which require the granting of refugee status or of an subsidiary protection in their country of origin, and in the case of the second category of persons to facilitate the integration into the community of the persons for which is considered that they need protection. Such rights are specifically defined in the Convention, as follows: access to education, the grant to

as defined by national law; the father, the mother or the tutor when the appliant or the refugee is minor or unmarried.

social aid, medical assistance, access to accommodation and to the integration facilities, freedom of association, the right to intellectual and industrial property, free access to Justice, and the right to facilitate the acquisition of citizenship of the host State.

CONCLUSIONS

The asylum is a component of the immigration phenomenon, which starting from enforcement of the Treaty of Amsterdam has become unequivocally a matter of interest. However it should be highlighted that, in our opinion, the measures taken at a Community level in this area have been targeted in principle for solving problems that was faced by the Member States, and only as consequence had a beneficial effect on those who understood that they have to exercise their right to request a form of protection in a Member State. In support of this statement we can easily invoke the fact that the Member States have agreed very hard to adopt measures regarding the asylum, and gradually transferring limited powers in this regard towards the Community institutions, only when the phenomenon of asylum has exercised strain over national capacity management. Hereby, it's wished the creation of a common European asylum system, in which a request for international protection should be treated in similar conditions throughout the Community territory in order to prevent movements of people looking for regions that offer more and implied that will support more than the charge of new entrants chasing the higher standards of living that they offer.

Considering those exposed, it is no wonder that in the field of free movement of persons, the Member States have avoided to treat the implications of the right asylum regarding this freedom since it sought to give a territorial dimension, a limitation on the territories on which the Member States related to whom it was exercised such a prerogative are exercising their sovereignty. In this kind of situation, neither the applicant for asylum, nor the refugee can not claim the benefit of free movement in the Community since they have achieved what they wanted, to be protected, or, so far, each Member State or all the Community is committed to this and proceeds accordingly.

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PREFERRED STOCKS – OPTIONAL STOCKS FOR STOCK COMPANIES

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ABSTRACT

The presents The characteristics of the preferred stock as they are structured in The Law no. 31/1990 regarding the trade companies with the changes and additions the O.G. (government ordinance) no. 52/2008 produced in articles 95 and 96.

KEYWORDS

The right to a prior dividend, stocks and bearer stocks, the preferred stockholders

The preferred stock is brought under regulation by the Law no. 31/1990 regarding the trade companies with the changes and additions the O.G. (government ordinance) no. 52/2008 produced in articles 95 and 96.

The two characteristics of the preferred stock are mentioned in par. 1 of art. 95. These ones grant to the holder:

- the right to a prior dividend drawn over the sharing benefit of the financial exercise before any other drawing,
- the rights acknowledged to the stockholders with common stocks, including the right to participate in general meetings except the right to vote.

In this way, there can be a classification of the stocks depending on the rights the stockholder is granted, as common and preferred stocks.

Depending on the way they are transferred, the common stocks can be registered stocks and bearer stocks.

However, the preferred stocks can only be registered stocks. This rule results from par. 3 of art. 95: the administrators, the managers and the members of management and of supervision board, as well as the firm auditors cannot hold stocks with prior dividend without any right to vote.

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Par. 2 of art. 95 stipulates the stocks with prior dividend without any right to vote cannot exceed a fourth of the capital stock and will have the same nominal value as the common stocks.

Thus, although the preferred stockholder paid the same amount of money as the common stockholder, he has no right to vote in the general meetings of the stockholders. However, the preferred stockholder has priority in receiving dividends he will be paid for before any other drawing.

In case there are no sharing benefits of the firm, the preferred stocks do not have any interest.

However, the stockholder's option to give up his the preferred regime of the stocks was anticipated by the legislator by the regulation in art. 95 par. 5 and in art. 96.

Par. 5 of art.95 shows the preferred stocks and the common stocks can be converted from one category to another based on the decision of the extraordinary general meeting of the stockholders under the conditions of art. 115.

Art. 96 of the Law no. 31/1990 stipulates the holders of each stock category meet in special meetings under the conditions set by the articles of association. Any holder of stocks can participate in these meetings.

It is possible for the stock company, although it has allotted benefits, to delay the dividends payment – in this case the preferred stockholders would have a handicap over the common stockholders. For this hypothesis, par. 4 of art. 95 becomes subsistent in accordance with which, in case the dividend payment is delayed, the preferred stocks will get the right to vote starting from the due date to pay the dividends that are to be allotted the following year or if the following year the general meeting decides there will be no dividends to be allotted starting from the publishing date of the decision in question of the general meeting until the real payment of the remaining dividends.

As a result of all these, the preferred stocks grant to their holders rights that are different from the ones of the holders of common stockholders.[1] Thus, when it comes to preferred stocks, they are excepted from the rule of art. 94 par. 1 of the Law no. 31/1990 – according to which the stock grant to their holders equal rights.

The Romanian legislator has regulated so far one category of preferred stocks, the ones with prior dividend with no right to vote. A preferred regime as compared to the holder of common stocks can include

[1] S. D. Carpenaru, *Romanian Commercial Law*, Universul juridic Publishing House, Bucharest, 2007, page 330.

not only a prior dividend received before the common stockholders, but also more rights to vote for one stock.[2]

The Law no. 297/2004 regarding the capital market, with the subsequent changes and additions, classify the stocks, without mentioning their type, into the category of movable values (first type of financial instruments in the order of the legal enumeration – art. 2, par. 1, pct. 1, letter a).

As the dogma showed[3], the origin of these financial instruments which are the preferred stocks is to be found in the common-law systems. In the Anglo-American practice, these stocks are included, from their holder's point of view, in the category of the securities with fixed income. Thus, the preferred stockholders – with no right to vote – are given the right to receive dividends with fixed rate which is applied from the moment these stocks are issued but only if the issue document or the public offer brochure stipulates this thing.[4]

On the developed capital markets, there are different types of preferred stocks which can include different economic clauses such as the accumulation clause, the participation clause, the conversion clause, the repurchase clause.[5]

In conclusion, we can say the presence of the phrase preferred stock in the Law no. 31/1990 regarding the trade companies has benefits and can represent a premise for the next legislative developments, i.e. the diversification of the types of preferred stocks when our market needs it.

If we cannot imagine a stock company without stock issue, we can easily imagine a stock company that does not issue preferred stocks or whose preferred stocks have already converted into common stocks. Thus, the preferred stocks are optional for the trade company while the common stocks are obligatory.

The Romanian doctrine[6] also showed the preferred stocks would represent an intermediary stage among the common stocks – the stockholders control with their vote and securities – when the stock company has to give back their equivalent value on the due date. The main difficulty the Romanian stock companies that would like to issue preferred stocks encounter is of accounting and not judicial nature. Thus, "preferred is often categorized with corporate securities as a fixed income security, even

[2] See S. Fătu, *Inside the Romanian Capital Market*, Vox, 1998, pages 38-47.
[3] R. Țicleanu, *Judicial Regime of the Preferred Stocks*, Commercial Law Magazine no. 3/2000, page 73.
[4] S. Fătu, *op. cit*., page 39.
[5] For details on these clauses, see R. Țicleanu, *op. cit.*, pages 74-75.
[6] R. Țicleanu, *op. cit.*, page 75.

though the legal status is not the same. As mentioned above, preferred stock is more similar to securities than common stock, even though preferred stock appears in the ownership section of the firm's balance sheet."[7] The above quotation says the stocks are included in the firm's balance sheet, owners' section. The difference is one of the form and content of the text in comparison to the legally accounting system in Romania. As far as the form is concerned, the accounting balance sheet is different in the United States where it is an expression of the single-entry accountancy (which reflects the goods of the firm), while Romania applies the French system, in double-entry accountancy (which reflects the goods and the purchase sources).[8]

In this case, if a stock company issued preferred stocks is a sign of financial prosperity and good faith of the form's management.

Furthermore, the stockholder with preferred stocks puts his trust in the concerned firm which lead to the growing celebrity of the commercial operations.

In conclusion, *preferred stock* is a notion sui generis for our law with various valences and meanings.

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[8] See R. Țicleanu, *op. cit.*, page 73.

THE EVOLUTION OF THE EUROPEAN COUNCIL WITHIN THE EUROPEAN LEGAL ORDER

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ABSTRACT

In present, the European Council, composed with chiefs of states an government, does has to be mistaken with the Council of European Union or the Council of the European Communities, formed by a single representative of each member state, at the ministerial level, empowered (assignee) to engage the government of that member state (art. 203 paragraph 1 C.E.). By the Treaty of Lisbon the European council (art. 9A) achieves the status of institution of the Union; it chooses a stable president through qualified majority, for a duration of two years and a half (not like six months, how it was before the Treaty of Lisbon), with the possibility to be reelected.

KEYWORDS

The European Council, the Treaty of Maastricht, the Treaty of Lisbon

1. FROM THE EUROPEAN SOLE INSTRUMENT TO THE TREATY OF NICE

The existence of the European Council was legally consecrated through the *European Sole Instrument*, which provisioned at art. 2, that this gathers the *chiefs of state or government* from the member states, and also the President of the Commission. They are assisted by the *ministers of external* and by a *member of the commission*. It is convoked at least twice a year or anytime is necessary, under the presidency of the state or government chief of the member state who exercise the presidency of the Council. The meeting is organized with the logistical help of the General Secretary of the UE Council and of the one who serves the European Commission. In present, the reunions are developed in the state which holds

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the presidency of the UE Council but, through the Treaty of Nice was decided that, an European Council of each presidency will be kept at Brussels, and when the Union will have 28 members, all the reunion will be held at Brussels.

Through the Treaty of Maastricht, which review, in this matter almost identical the provisions of the Sole Instrument, in art. D, achieves a formal status. Its role is to give the *necessary impulses* for the Union development, and *to define its general orientations*.

The European Council *doesn't participate at the official process of taking decisions settled through communitarian treaties*. It interferes only from the political perspective, and the assignment of applying the communitarian policies vests to the communitarian institutions, especially to the UE Council.

In this field, the Treaty of Maastricht, in art. 13 paragraphs 1 and 2, stipulates the function of the European Council, and in the paragraph 3, to stipulate the modality of cooperation of it with the UE Council in applying the communitarian policies, as it follows:

defines the principles and the general orientations of the external policies and common safety, including the problems which have implications in the defense field;

settles common strategies which will be implemented at the Union level, in the fields where the member states have common relevant interests. The common strategies specify the objectives and their duration, and also the means which should be provided by the Union and the member states;

The cooperation modality of the European Council with UE Council in/and for applying the communitarian policy is realized this way:

- the *decisions* necessary for defining and implementing the external policies and common safety are *taken by the UE Council, based on the general orientations settled by the European Council*;
- the *UE Council recommends for the European Council common strategies* and apply them, especially through enacting some common actions and positions;
- the UE Council assures unity, coherence and efficiency of the Union.

Treaty of Amsterdam confirmed the status of the European Council as main source of the impulse for the Europe integration. The European Council has the highest political status. Therefore, according to art. 99 paragraph 3, the European Council, debating based on the report of UE Council, *adopts conclusions of general orientations of the economic policies of the member states and of the Community*. Based on these conclusions, the

UE council, deciding with qualified majority, enacts a recommendation which settles the general orientations.

As a result, *the European Union is not an institution of the Communities or of the Union*, being considered in the doctrine that "it exists and actions like a super-Council, in the named organization".

Through the Treaty of Nice, according to art. 4 paragraph 3 of TUE, the European Council has to *present* for the Parliament a *report* regarding each reunion and an *annual report*, concerning the progresses realized by the Union.

2. THE INSTRUMENTS OF THE EUROPEAN COUNCIL

In present, the European Council adopts principle decisions in the main problems even before it was received a proposal from the Commission or before the European Parliament would have been consulted, which would determine that some of its decisions to have a discretionary character. Its decisions are not adopted in conformity to the procedure provisioned in the communitarian treaties, because there are not the acts of institutions (communitarian). As a result, not having the legal effects of an communitarian act doesn't get in the sphere of the jurisdictional control of the Court of Justice and doesn't make the object of some prejudiciary matter in interpretation or in the validity examination (under the conditions of art. 234 CE and art. 156 Euratom). Because of this, the acts of the European council can not modify the obligations of the member states settled by the provisions of the communitarian treaties or through communitarian institutions instruments.

Though, within the European Council, from its first reunions and until now, there were taken important decisions regarding: the introduction of direct elections, the Communities development, the budgetary problems, agreements over new budgets or their correction, granting supplementary aid for those four communitarian countries considered less developed (Spain, Greece, Portugal and Ireland), the economic and monetary union, reform of the common agricultural policies, etc.

3. TREATY OF LISBON

The challenges of 21st century – the economic globalization, the demographic evolution, the climacteric changes, the supply of power and the new threads against safety – determined the states member of the European Union to acknowledge that they don't have anymore the capacity

to face alone all these problems without limits. Therefore, after two years of institutional crisis, the chiefs of states and governments form the states members of the European Union reached a common agreement over a new Treaty, which would put an end to the stalling created in 2005, after the French and the Netherlanders rejected, by referendum, the project regarding the European Constitution.

The political, economic and social evolutions lead the chiefs of states and government to propose the Treaty of Lisbon to *adapt the European institutions and their way of function, to consolidate the democratic legitimacy of the Union and of its fundamental values.*

The Treaty of Lisbon is the result of the negotiation between the member states, gathered within an inter-governmental conference, at whose works the European Commission and the European Parliament participated.

Like the Treaty of Amsterdam and respectively Nice, the Treaty of Lisbon is a treaty of amending the existent treaties – Treaty over the European Union (which will keep its name, and in the present paper TUE – new) and Treaty over the European Community (TCE) which follows to be renamed – Treaty regarding the European Union functioning (which will call in the present paper abbreviated T. f. UE). These two treaties, modified in conformity to the Treaty of Lisbon represent the fundamental treaties of the Union, have the same legal value, and will be named forward "treaties" (art. 1, paragraph 3, TUE – new). Also, the Treaty concerning the European Community of the Atomic Energy (Euratom) remains in force.

The Treaty of Lisbon has attached 13 Protocols and 65 Statements.

The elaboration of the Treaty – realized on the grounds of the precise and detailed mandate approved at the European Council from 21 – 23 June 2007 at Brussels – renew practically the substance of the provisions of the former Constitutional Treaty.

From the historical perspective, the concluding of the Treaty finalizes the process of reform initiated in 2001 at Laeken which followed to elaborate a complete treaty for Europe. The Treaty of Lisbon is the first Treaty of the Union, which Romania signed as member state.

For these two mentioned treaties – TCE and TUE – there are brought through the Treaty of Lisbon a series of modification with innovative character.

By the Treaty of Lisbon the European council (art. 9A) achieves the status of institution of the Union; it chooses a stable president through qualified majority, for a duration of two years and a half (not like six months, how it was before the Treaty of Lisbon), with the possibility to be reelected. This confers to the Union, which by this treaty achieves legal

personality, continuity in defining the orientations and priorities of the general policies, taking into consideration the high level of complexity of the European problems resulted, both from the European Union development (from 15 states to 27, only in 3 years) but also in growing the number of competency fields in UE. The new duration of the mandate will allow to the member state, in the capacity of president, to coordinate better its strategies and to supers\vise their effect.

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PETITION FOR AN INHERITANCE, A WAY TO PROTECT HEREDITARY RIGHTS

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ABSTRACT

In the new Civil Code, petitio hereditatis may be defined as the real action by means of which the heir with universal hereditary rights or by universal title – as plaintiff – asks the court to acknowledge his heir statute and to compel the defendant, who claims that he has the heir title and holds a part or all of the goods belonging to the hereditary patrimony, to give back the goods in question.

KEYWORDS

The petition for an inheritance, art. 1130 of the new Civil Code, persons entitled to have their heir quality acknowleged, juridical features evinced by the petition for an inheritance

1. Definition and Legal Regulation of the Petition for an Inheritance

Unfortunately, the current Civil Code does not regulate the petition for an inheritance, although the latter is unanimously recognized by the legal doctrine and jurisprudence. As a result of the lawmaker's lack of interest in regulating the main juridical way to protect hereditary rights, the expression "petition for an inheritance" does not benefit from a legal acknowledgement *in terminis,* even if it is frequently resorted at.

On the contrary, Law No. 287/2009 on the Civil Code[1] regulates the petition for an inheritance at its IV Title called Transmission and Division

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of the Inheritance, Chapter I – Transmission of the Inheritance, section 5 (articles 1130-1131).

Currently, in the absence of any legal regulation, the petition for an inheritance – *petitio hereditatis* in Latin – is defined by the legal doctrine as the real action by means of which the plaintiff (legal heir, universal legatee or legatee by universal title) asks the court to acknowledge his heir title and to compel the defendant - claiming that he himself is the deceased's universal heir or heir by universal title - to give back the hereditary goods that he holds[2].

According to provisions of art. 1130 of the new Civil Code, the heir with universal hereditary rights or universal title may obtain at any time the acknowledgement of his heir quality in front of any person who, by claiming that he enjoys an heir title, holds a part or all of the goods belonging to the hereditary patrimony.

Even if these legal provisions aim at large to identify the persons who can obtain the acknowledgment of their heir statute, they allow us at the same time to define the petition for an inheritance. Thus, with reference to the provisions already mentioned of the new Civil Code, *petitio hereditatis* may be defined as the real action by means of which the heir with universal hereditary rights or by universal title – as plaintiff – asks the court to acknowledge his heir statute and to compel the defendant, who claims that he has the heir title and holds a part or all of the goods belonging to the hereditary patrimony, to give back the goods in question.

Therefore, it clearly emerges that the new Civil Code makes the most of the definition given to the petition for an inheritance by specialized doctrine. It cannot be identified any distinction between the definition currently provided to *petitio hereditatis* by the legal doctrine and that provided by the new Civil Code. Practically, the advantage of the latter is undoubtedly that of giving a name and a definition to the legal action aimed

[1] Art. 2664 align. (1) states that the "Current Civil Code shall become effective at the date provided by the law for its enforcement". According to the provisions of align. (2) of the same legal text "Within 12 months from the publication of the current Civil Code, the Government shall submit for approval to the Parliament the bill for the enforcement of the Civil Code".

[2] The same definition is also provided by the entire specialized literature. See for example: Fr. Deak, *Tratat de drept succesoral*, II edition, updated and completed, Universul Juridic Publ. House, Bucharest, 2002, p. 478; Al. Bacaci, Gh. Comăniță, *Drept civil. Succesiunile*, 2nd edition, C.H. Beck Publ. House, Bucharest, 2006, p. 237; D. Chirică, *Drept civil. Succesiuni*, Lumina Lex Publ. House, Bucharest, 1996, p. 268; L. Stănciulescu, *Drept civil. Contracte şi succesiuni*, Hamangiu Publ. House, Bucharest, 2008, p. 457.

at defending hereditary rights. Moreover, we consider that the new Civil Code defines in a satisfactory and complete manner the legal action mentioned above, subject of the current analysis.

2. PERSONS ENTITLED TO HAVE THEIR HEIR QUALITY ACKNOWLEDGED

The plaintiff is the person who does not own hereditary goods, at that moment in the possession of the defendant, on the basis of an apparent heir title. When it comes to the petition for an inheritance, the plaintiff can be represented only by the deceased's legal or testamentary heir, universal or by universal title, but also by the deceased's rightful successors. The legatee by particular title may not file any *petitio hereditatis*, since he enjoys no rights to the universal character of the inheritance and can exert his hereditary rights either by means of a real action (claim or confessory pleading) or by means of a personal one, as the case may be.

In what the defendant is concerned, he may be any person pretending to be the deceased's universal heir or heir by universal title and who is in the possession of hereditary goods as a result of this quality.

Moreover, according to the new Civil Code, the acknowledgement of the heir statute may be obtained by any person enjoying universal hereditary rights or universal title at the deceased's inheritance. At art. 1130 of the new Civil Code, the lawmaker uses the expression "heir with universal hereditary rights or by universal title", which regards both the legal and the testamentary heir. As a consequence, it may be stated that the lawmaker chose to use a generic expression, after all correct, which rightfully excludes the legatee by particular title.

According to the same legal provisions of the new Civil Code, the defendant involved by the petition may be any person who, by claiming that he has an heir title, holds a part or all of the goods belonging to the hereditary patrimony. Thus, the defendant is the one who makes use of an apparent heir title.

After analyzing the provisions of art. 1130 of the new Civil Code, it can be clearly seen that the new regulations on civil matters provide for the same persons as defendant and plaintiff in regard to the petition for an inheritance.

3. SETTING ASIDE THE PETITION FOR AN INHERITANCE FROM OTHER SIMILAR CIVIL ACTIONS

The petition for an inheritance is similar to other civil actions, such as claim, personal action calling for the payment by the defendant of a debt on behalf of succession, or partition action[3].

a) Petition for an inheritance versus claim;

Both the petition for an inheritance and claim aim to obtain the recognition of property rights on the disputed goods. Yet, in what *petitio hereditatis* is concerned, there is being challenged the heir quality of the defendant, whereas when it comes to claim, there is being questioned that the goods held by the defendant would belong to succession.

At art. 1130, the new Civil Code states that the purpose of the petition for an inheritance is that of acknowledging the plaintiff's heir quality, an acknowledgement which will also trigger the restitution of hereditary goods by the defendant. Therefore, the core attribute of *petition hereditatis* is the acknowledgment of the plaintiff's heir statute.

b) Petition for an inheritance versus personal action calling for the payment by the defendant of a debt, on behalf of succession;

The petition for an inheritance, having as specific feature the challenge of the heir quality which the defendant claims to possess, is different from the personal action calling for the recovery by the plaintiff of the amounts of money inherited from the deceased person – whose creditor attribute is being questioned.

c) Petition for an inheritance versus partition action;

The exclusive role of partition action is that of determining the quota of hereditary goods to which every heir is entitled, there not being challenged the plaintiff's heir quality – previously established through the petition for an inheritance.

d) Petition for an inheritance versus action for acknowledging the heir quality.

The petition for an inheritance must not be confounded either with the action for acknowledging the heir quality, since the latter only calls for the recognition of the plaintiff's heir quality and not also for the restitution by the defendant of hereditary goods – as the former requires.

[3] For more details regarding the differences between the petition for an inheritance and other civil actions, see I. Adam, A. Rusu, *Drept civil. Succesiuni*, All Beck Publ. House, Bucharest, 2003, pp. 476-480. The new Civil Code regulates claim at art. 563.

4. JURIDICAL FEATURES EVINCED BY THE PETITION FOR AN INHERITANCE

The petition for an inheritance evinces the following juridical features:

a) the legatee by particular title cannot file the petition for an inheritance, as his hereditary rights are limited to one or several goods individually established[4];

b) is a real action, since they who resort to it aim also to dispossess the apparent heir from the hereditary goods that he holds[5];

c) is a divisible action;

Should there be more heirs-plaintiffs, they must file the petition for an inheritance on their own, in order for their heir quality to be acknowledged and get back the hereditary rights to which they are entitled as a result of that quality. On the other side, should there be more defendants (apparent heirs, holders of hereditary goods), each of them must be individually sued. At any rate, the decision pronounced by the court applies exclusively to the parties of the lawsuit.

d) is an imprescriptible action.

Currently, this feature is subject to many controversies within specialized literature[6], given the fact that it benefits from no legal

[4] Petitio hereditatis preserves this attribute also according to provisions of art. 1130 of the new Civil Code.

[5] This feature is upheld by most of specialized literature. For that purpose, see C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, 3rd volume, All Publ. House, Bucharest, 1998, p. 493; M.B. Cantacuzino, *Elementele dreptului civil*, All Educational Publ. House, Bucharest, 1998, p. 270; St. Cărpenaru, *Dreptul de moştenire*, in „Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moştenire", by Fr. Deak, St. Cărpenaru, Bucharest University, 1983, p. 513; D. Chirică, quoted woks, p. 268; D. Macovei, *Drept civil. Succesiuni*, Chemarea Publ. House, Iaşi, 1993, p. 160; V. Stoica, *Drept succesoral*, Editas Publ. House, Bucharest, 2003, p. 136; L. Stănciulescu, quoted works, p. 458; Al. Bacaci, Gh. Comăniță, quoted works, p. 238, a.s.o. However, there have been also stated opinions according to which the petition for an inheritance represents a personal combined action, whereas the type of action depends on the concrete constituency of the hereditary patrimony. For that purpose, see M. Eliescu, *Moştenirea şi devoluțiunea ei în dreptul R.S.R.*, Academiei Publ. House, Bucharest, 1966, p. 190. Specialized literature has also argued that qualifying the action in cause is not so important, since in all cases the authority entitled to settle it is the court within the territory where inheritance is opened. See: M. Eliescu, quoted works, p. 190; Fr. Deak, quoted works, p. 480. Even if we agree with the opinion most upheld within specialized literature, we still consider that establishing the juridical nature of petitio hereditatis is important in relation to the extinctive prescription.

regulation. We agree to the opinion[7] according to which the petition for an inheritance is imprescriptible, as long as its purpose is that of acknowledging the heir quality and determining the restoration of hereditary goods, and both actions (acknowledgement and restoration) are imprescriptible from an extinctive point of view. We consider, together with other authors, that the obvious similarities between the three actions justify the preservation of the imprescriptible character as one of the juridical features evinced by *petitio hereditatis*[8].

In what the new Civil Code is concerned, the latter regulates the petition for an inheritance, but contains no provisions in regard to its imprescriptibility. As a result, the latter shall continue to remain a controversial issue.

As to us, taking into account the arguments presented above and irrespective of the circumstances created by the new regulations, we consider that *petitio hereditatis* does evince an imprescriptible character.

5. PROVING THE HEIR QUALITY. THE HEIR CERTIFICATE

Even if the main issue disputed when it comes to the petition for an inheritance is the parties' heir quality, we shall not debate the aspects related to the heir certificate, from obvious reasons of space. But as a rule, both by *lege lata* and according to the new Civil Code[9], the heir quality can be proven, in principal, only by means of the heir certificate.

[6] For a complete overview of the opinions stated within specialized literature on the matter, see I. Adam, A. Rusu, quoted works, pp. 460-462.

[7] See: D. Chirică, quoted works, p. 269; Al. Bacaci, Gh. Comăniță, quoted works, pp. 239-240; I. Adam, A. Rusu, quoted works, pp. 461-462.

[8] The point of view with the most upholders within specialized literature states that the action regarding petitio hereditatis benefits from the general prescription term of 3 years, starting from the moment when the plaintiff drafts the succession documents which through their content challenge the defendant's hereditary rights. See: C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, quoted works, pp. 495-496; M. Eliescu, quoted works, pp. 191-192; St. Cărpenaru, quoted works, p. 513; D. Macovei, quoted works, p. 160; V. Stoica, quoted works, p. 136; L. Stănciulescu, quoted works, p. 458.

[9] The new Civil Code regulates the heir certificate at articles 1132-1134.

6. EFFECTS OF THE PETITION FOR AN INHERITANCE

6.1. Effects of the petition for an inheritance according to the current valid Civil Code

By *lege lata,* the admission of the petition for an inheritance by the court produces various effects upon the relations that the true heir establishes on the one hand with the apparent heir and on the other with third parties. But in all cases, the admission of *petitio hereditatis* triggers the acknowledgement, with a retroactive character, of the plaintiff's heir quality.

A) Effects of the admission upon the relation between the true and apparent heir.

The admission of the petition for an inheritance triggers the following effects upon the relation between the true and apparent heir:

a) the plaintiff is entitled to obtain the restitution of hereditary goods which have been in the possession of the apparent heir;

The apparent heir's duty to give back the hereditary goods held is governed by different rules, depending whether the apparent heir has behaved in good or bad faith. Thus:

- the heir in good faith (for instance that heir who did not know about the existence of a will in favor of the plaintiff or about the act of giving up to the inheritance signed by the plaintiff) is bound to give back hereditary goods in kind, in the condition in which they are to be found at that moment, and if he has alienated the goods in question, then is bound to give back the money received on them [art. 996 align. (2) of the Civil Code]. The apparent heir on good faith keeps the profit made by means of hereditary goods and collected until he is summoned before the court, when he becomes heir in bad faith (art. 485 of the Civil Code). At the same time, the apparent heir in good faith is not responsible for any damage caused to hereditary goods, even if it was his fault, the risk for damage or destruction of goods being the responsibility of the true heir [art. 995 align. (2) of the Civil Code].

- the apparent heir in bad faith shall give back hereditary goods in the same condition in which he took them in possession or shall reimburse their value, starting with the moment when the reimbursement request is made, if the goods in question were destroyed, alienated by onerous title (and the price obtained on them was lower) or damaged, even unpredictably, except for the case when it is proven that goods would have been destroyed anyway, even if they had been in the possession of the true heir [art. 995

align. (1), art. 996 align. (1) and art. 1156 align. (1) of the Civil Code]. At the same time, the apparent heir in bad faith is bound to give back the profit made with the aid of hereditary goods and collected, but if this profit has already been spent or is yet to be collected, then the apparent heir in bad faith must reimburse the entire value of it to the real heir.

b) the plaintiff is entitled, irrespective of the apparent heir's good or bad faith, to obtain the restitution of the promissory notes which the latter cashed but also of the interests produced by those promissory notes, ever since the day when the defendant is called before the court (art. 994 of the Civil Code);

c) the apparent heir is bound to pay any debt which he may have in relation to the succession, plus the corresponding interests starting from the moment when he is called before the court.

But on the other side, whether he behaved in good or bad faith, the apparent heir is entitled to:

- have reimbursed all the expenses made in relation to the profit which has to go to the real heir;
- have reimbursed all the expenses made in relation to hereditary debts;
- have reimbursed all the necessary and useful expenses made in relation to hereditary goods;
- take with him the goods resulted from any investment process made in relation to hereditary goods, but without damaging the goods themselves.

The apparent heir is entitled to obtain a holdback right upon the hereditary goods which are in his possession, until he obtains the reimbursement of the expenses mentioned above.

A) Effects of the admission upon the relation between the true heir and third parties.

At the admission of *petitio hereditatis*, juridical acts concluded between the apparent heir and third parties and regarding hereditary goods held by that heir, begin to be subject to different legal regimes, according to their nature. Thus, there are preserved and also apply in regard to the true owner, the following documents:

a) acts for the maintenance and administration of hereditary goods from which the true heir benefits as well[10];

[10] Per a contrario, only the maintenance and administration acts which prove to be harmful for the true heir shall be abolished.

b) acts for the alienation of movable goods, if the third owner behaved in good faith (art. 1909 of the Civil Code);

c) acts for the alienation of immovable goods[11], based on "the apparent heir theory" - derived from the Latin rule *error comunis facit jus* (the common error within a community determines the right), if they meet the following conditions[12]:

- are by particular title (and not a cession of hereditary rights);
- have onerous character
- the third possessor behaved in good faith when purchasing the hereditary good, that is he was convinced that he made a deal with the true heir. In order for the juridical act concluded in relation to hereditary goods to be preserved, the error committed by the third purchaser must be common and invincible. With the preservation of the act mentioned above, the apparent heir, as a result of making money without any legal ground, is bound to reimburse to the real heir the equivalent of the alienated hereditary good, in a different manner, depending whether he behaved on good or bad faith.

But if the act alienating the hereditary good shall be abolished according to the principle *resoluto jure dantis resolvitur jus accipientis*, then the third party shall be bound to give back the purchased good to the true heir, but will be able to make use of the eviction guarantee which the apparent heir must pay according to the common law conditions.

6.2. Effects of the petition for an inheritance according to the new Civil Code

At art. 1131, the new Civil Code regulates the effects of *petitio hereditatis*, distinguishing between the relations established between the real and apparent heir and between the real heir and third parties. Yet, in both

[11] If there were applied in a rigid way the principles nemo plus juris ad alium transfere potest and resoluto jure dantis resolvitur jus accipientis, disposing acts concluded between the apparent heir and third parties and having as object hereditary goods, should be retroactively abolished.

[12] This solution is promoted both by specialized literature and judicial practice. For that purpose, see: I. Rosetti-Bălănescu, Al. Băicoianu, quoted works, pp. 325-328; M. Eliescu, quoted works, pp. 197-200; Fr. Deak, quoted works, pp. 485-486; D. Chirică, quoted works, pp. 273-274; C. Toader, R. Popescu, *Considerații în legătură cu aplicarea principiului aparenței în drept în materia moștenirii*, in The Law magazine No. 9/1993, pp. 37-38; Court of Mediaș, civil sentence No. 1596/1992, with Note by B. Diamant, V. Luncean, in *The Law magazine* No. 3/1993, pp. 67-70.

cases, the admission of the petition by the court triggers the retroactive acknowledgement of the plaintiff's heir quality.

A) With reference to the admission of the petition involving the real and apparent heir, according to the provisions of art. 1131 align. (1) of the new Civil Code, the apparent heir is bound to give back to the real one all the goods belonging to the hereditary patrimony which he holds without any right. Moreover, become fully effective the provisions of articles 1635-1649 of the new Civil Code on the reimbursement of profits, which distinguish, by *lege lata*, between the debtor in good faith and the debtor in bad faith, such as follows:

a) When it comes to the apparent heir in good faith, he enjoys, according to the new Civil Code, the following rights and duties:

- the duty to give back hereditary goods in kind, but if they were completely destroyed or alienated (by free title, irrespective of the third beneficiary's good or bad faith, or by onerous title to a third party behaving in bad faith), the duty to reimburse the lowest value which the good had when was received, destroyed or, as the case may be, alienated [art. 1641 align. (1) of the new Civil Code]. From the analysis of these legal provisions, it clearly emerges the lawmaker's intention of sanctioning less severely the apparent heir in good faith. The latter, should the hereditary good be alienated, will have to reimburse the lowest value which the respective good had at the moment of alienation, irrespective of the price he received (which can be higher than the value).

- the duty to give up in favor of the true heir at the insurance compensations which he received or, as the case may be, at the right to receive those compensations, if the hereditary good is destroyed without the apparent heir having any fault [art. 1641 align. (2)]. In our opinion, all these provisions of the new regulations on civil matters are extremely useful, since they succeed to adequate law to the new social reality, especially nowadays when law subjects use to insure valuable goods against destruction more frequently.

- the duty to reimburse the money obtained from the use of hereditary goods, only when this use represents the main object of the activity involving goods, or when the latter, as a result of their nature, may be damaged easily [art. 1641 align. (3)];

- the duty to make amends in regard to the real heir for any situation in which hereditary goods may be partially destroyed, damaged or suffer a diminishment of their value. If the loss of value is generated by the normal use of hereditary goods, then the apparent heir is no longer bound to make any reimbursement in regard to the real heir [art. 1643 align. (1)]. At the

same time, should the partial destruction, damage or diminishment of the good's value occur out of the true heir's fault, then the apparent heir is compelled only to give back the good in the condition in which is to be found at the filing of petition, except for the case when this situation is caused out of the apparent heir's fault [art. 1643 align. (2) of the new Civil Code].

- yet, on the other side, the apparent heir in good faith is entitled to have reimbursed the expenses made for the restitution of the hereditary good, according to the legal rules regarding the apparent possessor in good faith [art. 1644 of the new Civil Code];

- the apparent heir in good faith can keep the profit obtained with the aid of the restituted hereditary good, dealing as well the expenses made for that profit [art. 1645 align. (1) of the new Civil Code];

- the expenses for the restitution are supported both by the apparent heir in good faith and by the true one, in accordance with the value which is restituted [art. 1646 align. (1) of the new Civil Code];

- the apparent heir in good faith, who is deprived of the full power of exercise, is bound to give back the goods only if he made money by using them, a fact which is established at the moment of the reimbursement request [art. 1647 align. (1) of the new Civil Code].

b) In what the apparent heir in bad faith is concerned, he enjoys, according to the new Civil Code, the following rights and duties:

- the duty to give back hereditary goods in kind, but if they were destroyed or alienated in bad faith by the apparent heir, the duty to reimburse the highest value which the good had when was received, destroyed or, as the case may be, alienated [art. 1642 align. (1) of the new Civil Code]. It can be noticed at this point the lawmaker's strictness in front of the bad faith shown by the apparent heir.

- the duty to reimburse the value of the good which was destroyed without the fault of the apparent heir's in bad faith, if the latter does not succeed to prove that the good in question would have been destroyed anyway, even if it had been in the possession of the real heir [art. 1642 align. (2) of the new Civil Code];

- the duty to reimburse to the true heir the value corresponding to the use of the good [art. 1642 align. (3) of the new Civil Code];

- as it happens with the apparent heir in good faith, the apparent heir in bad faith has as well the duty to make amends in regard to the real heir, for any situation in which hereditary goods may be partially destroyed, damaged or suffer a diminishment of their value. If the loss of value is generated by the normal use of hereditary goods, then the apparent heir is no

longer bound to make any reimbursement in regard to creditor [art. 1643 align. (1)]. At the same time, should the partial destruction, damage or diminishment of the good's value occur out of the true heir's fault, then the apparent heir is compelled only to give back the good in the condition in which is to be found at the filing of petition, except for the case when this situation is caused out of the apparent heir's fault [art. 1643 align. (2) of the new Civil Code].

- yet, on the other side, the apparent heir in bad faith is entitled to have reimbursed the expenses made for the restitution of the hereditary good, according to the legal rules regarding the possessor in bad faith [art. 1644 of the new Civil Code];

- the duty to give back the profit which he made or might be making with the aid of hereditary goods, but only after having reimbursed the expenses incurred for that [art. 1645 align. (2) of the new Civil Code];

- the duty to support all the expenses made for the restitution of hereditary goods [art. 1646 align. (2) of the new Civil Code];

- the apparent heir in bad faith (who deliberately or out of a serious fault rendered the restitution impossible), deprived of full power exercise, is bound to give back all hereditary goods [art. 1647 align. (2) of the new Civil Code].

We consider that the new Civil Code regulates in a correct manner the effects regarding the admission of *petitio hereditatis* upon the relations between the true and apparent heir, sanctioning more severely, as it ought to happen, the apparent heir in bad faith. Moreover, the new regulations within the field also bring new elements, by making references to the expenses for the insurance of hereditary goods and thus adapting law to the new social reality. At the same time, we consider that the new Civil Code regulates in a complete manner the issues regarding the petition for an inheritance, attempting to cover all the various problems which may be encountered in practice.

B) With reference to the admission of the petition involving the real heir and third parties, the new Civil Code, at its art. 1131 align. (2), states the following: "When it comes to juridical acts concluded between the illegitimate owner of hereditary goods and third parties, all the provisions of art. 960 align. (3) shall apply accordingly".

As a consequence of the admission of *petitio hereditatis* by the court, juridical acts concluded between the apparent heir and third parties and having as object hereditary goods, shall enjoy a different legal regime, according to their juridical nature. Thus, according to art. 960 align. (3) and

art. 1648-1649 of the new Civil Code, there are preserved and apply in regard to the true heir the following documents:

- acts for the maintenance and administration of hereditary goods from which the true heir benefits as well[13];

- disposing acts by onerous title, concluded between the apparent heir and third parties in good faith, there being applied for that matter the rules within the cadastral register or, as the case may be, the effect of obtaining movable goods in good faith, or the rules regarding usucapion.

Thus, maintenance and administration acts from which the true heir benefits are preserved even if they are concluded by the apparent heir with third parties in bad faith, whereas disposing acts by onerous title are preserved only if the third party is in good faith. On the contrary, there are not valid in regard to the true heir disposing acts by free title, disposed by the apparent heir in favor of a third party, whether the latter is or not in good faith, but also acts by onerous title concluded between the apparent heir with third parties in bad faith.

Practically, with provisions of art. 960 align. (3), there is being also applied the rule *error communis facit jus*, currently used, in the absence of a clear legal disposition, both by specialized literature and judicial practice.

After analyzing the regulations provided by new Civil Code to the effects of *petitio hereditatis* upon the relations between the true heir and third parties, there cannot be identified any distinction in comparison with the current orientation of the legal doctrine and jurisprudence. On the whole, the considerable advantage of the new Civil Code is that of clearly regulating this aspect in relation to the petition for an inheritance, making the most of just legal doctrine and jurisprudence.

7. CONCLUSIONS

Given the fact that, according to the current Civil Code, the petition for an inheritance does not benefit from legal regulation, it appears really useful the choice made by the new Civil Code to dedicate some of its provisions to the main method of protecting hereditary rights. Moreover, we consider that the new regulations on civil matters use in an inspired way the

[13] Contracts with successive execution, concluded between the apparent heir and third parties in good faith, with the observance of publicity formalities provided by law, shall continue to produce effects during the period stipulated by parties, but not for more than one year from the moment when is abolished the heir title of the apparent heir.

current legal doctrine and jurisprudence in relation to *petitio hereditatis*, by providing a complete and correct regulation of the civil action in question.

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NATURE AND CONTENT OF THE VOTING RIGHT ACCORDINGLY TO THE LEGISLATION OF ROMANIA

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ABSTRACT

The vote right is an exclusively political fundamental subjective right because it is used to allow the people to participate in governing through elected representatives, and second, this right belongs, pursue to the constitutional provisions, exclusively to the Romanian citizens who comply with the legal requirements. Because it is regulated by the constitutional provisions and also by certain special laws, putting together in its content constitutional elements and also elements established through normative documents with legal force lower than the Constitution, the voting right is a complex electoral right.

KEYWORDS

The fundamental human and citizen rights and liberties, the electoral rights, the right to vote, the Constitution of Romania

1ST SECTION. VOTING RIGHT – ELECTORAL, SUBJECTIVE AND HUMAN FUNDAMENTAL RIGHT

The fundamental human and citizen rights and liberties are the result of the action of the democratic human societies. Their recognition and guarantee represent an important field in the preoccupations of every state and also of the international human community.

One can tell that the fundamental rights are those subjective rights, essential for human life, liberty and dignity, indispensable for the free development of the human personality, rights established by Constitution and guaranteed by Constitution and laws.

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The regulation of the electoral rights in the Constitution of Romania is the result of the existence of the lawful, democratic and social state, that supposes that people have the prerogative to participate in government through their representatives that reflect its wishes. The legal basis and ground of this desideratum is the article 2 of the Constitution of Romania, that affirms that "The national sovereignty shall reside within the Romanian people, that shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum". Also, at the 2nd paragraph is provided that „ No group or person may exercise sovereignty in one's own name".

Regulated in the Title II of the Constitution called "Fundamental rights, liberties and duties", the electoral rights are classified in the category of the exclusively political rights. The fundamental regulation refers in the art. 36, art. 37 and art. 38 to three electoral rights, respectively: to right to vote, to right to be elected and the right to be elected to the European Parliament. These provisions are practically the general regulation in the field, it is to be integrated with those provisions contained in special laws and that refer also to other rights that can be classified by their nature into the category of the electoral rights, such as: the right to contest, the right to verify the registration on the electoral lists, etc.

Therefore, as it was natural, the Constitution regulates only the citizen's fundamental rights, the other being nominated by other laws. Having in view the restricted field of the electoral rights nominated by the Constitution of Romania and considering the upper legal force of this normative document toward the others special laws, that are enlarging this field, the three electoral rights (the right to vote, the right to be elected and the right to be elected to the European Parliament) can be considered main electoral rights.

In the specialty literature, the electoral rights are classified in the category of the exclusively political rights, these being considered citizen's fundamental rights[1]. From this perspective, the electoral rights present two large specific characteristics: allow the people's participation to governing by means of their representatives, which act in this position as „true proxies" of the people, and second, as a consequence of the first characteristic, as I have stated, these rights belong exclusively to the Romanian citizens. Although qualified as citizen's fundamental rights, the electoral rights are different from the other social- political rights and

[1] Muraru, I., Tănăsescu, E. S., *Drept constituţional şi instituţii politice*, C.H. Beck Publishing House, 2006, Edition 12, volume II, Bucharest, p. 83.

liberties that have not the same finality, but, which in a certain measure helps to the exercise inclusive of the electoral rights (for example: liberty of expression or the right of association).

The Constitution of Romania harmonises with the international treaties regarding the regulation provisions of the electoral rights, offering much more a series of guarantees necessary to the real exercise of such rights.

2ND SECTION. THE RIGHT TO VOTE – NATURE AND LEGAL CONTENT PURSUE TO THE LEGISLATION OF ROMANIA

As it has been stated, the right to vote is an exclusively political fundamental subjective right because it is used to allow the people's participation to governing by means of their representatives, and second, in compliance with the constitutional provisions, belongs exclusively to the Romanian citizens who meet the legal requirements. This distinction is imposing because the right to vote implies as the other fundamental right, a special effort from the constituent state, that, also is obliged to ensure constitutional comfort to its citizens.[2]

The right to vote is a complex electoral right, because it is regulated by the constitutional provisions and also by the ones of certain special laws, gathering in its content constitutional elements and also elements established by normative documents with legal force lower than the Constitution.

In the specialty literature, one expressed that „the right to vote is the right acknowledged to the citizens of a state, to freely, directly or indirectly express, their electoral option for a certain political party or a candidate suggested by a political group or an independent candidate, in compliance with the law conditions"[3].

From the point of view of the history of the regulation in the field, we can noticed that the right to vote has not been added to the category of the rights easily granted to the exercise of individuals, as we can speak about the other natural rights or which are imminent to the human being and everyone is born with them[4]. The recognition of the right to vote was the

[2] Vrabie, G., *Drept constituțional şi instituții politice*, Virginia Publishing House, Iaşi, 1995, p. 425.

[3] Gilia, C., *Sisteme şi proceduri electorale*, CH Beck Publishing House, 2007, p. 29.

[4] Those rights called in the French literature, the personality rights can be included in this category. The personality rights are recognised to any person, without discrimination. These rights are opposable erga omnes, being extra patrimonial rights dedicated to

result of the development and evolution of the human society and of the harsh fight of the citizens to freely express, generally, and particularly, throughout the vote bulletin.

Due to the modality of exercise and especially the purpose for which it has been regulated and the finality of this exercise, one can state that the right to vote symbolises the supremacy of the people's wish, that this way impose the personal wishes and indirectly participate to the exercise of the power in the state. In other words, the right to vote symbolises the acknowledgment of the people's power.

The Constitution of Romania regulates the right to vote as any other right acknowledged to the Romanian people, in closed corroboration with the international pacts and treaties to which the Romanian state is part of, complying with the supremacy of the international regulations and the principle from the art. 20 of the fundamental law. In such meaning, it is stated that "the constitutional provisions regarding the citizen's rights and liberties will be construed and applied pursue to the Universal Declaration of Human Rights, with the pacts and the other treaties to which Romania is part of.

If there are irregularities between the pacts and treaties related to the human fundamental rights, to which Romania is part of and the internal laws, the international regulations have priority.".

We can easily notice that the fundamental law makes direct reference to the Universal Declaration of Human Rights[5], that, in the aspects subject to analysis, prescribes at the art. 21 that „The will of the people shall be the basis of the authority of government. This will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures". Although, as all the rights regulated in its content, the recognition of the people will and of the right to vote is accordingly to the purpose specified by the Declaration in its preamble. Also, the International Covenant of civil and political rights[6] prescribes at the art. 25 that „ Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

accomplish the personality. In the category of the rights of personality, enter, for example: the right to personal image, the right to honour, the right to the personal voice, the right to dignity, the right to the protection of the private life.

[5] Adopted by the Organisation of the United Nations on December 10, 1948.

[6] Adopted on December 19, 1966.

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the voters; (c) To have access, on general terms of equality, to public service in his country".

The European Convention on Human Rights[7] prescribes in the first additional Protocol of the Convention signed at Paris, on March 20, 1952 that „ The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

In conclusion, the Constitution of Romania in compliance with the provisions of the art. 20, is accordingly to the international covenants and treaties regarding the right to vote and organisation of elections in the purpose of expression the free will of voters. The fundamental law adds also provisions regarding its concrete exercise to the recognition of this right, taking into account the labelling of the right to vote as exclusively political fundamental right. This way, starting from the premise that the public good impetuously requests to adopt certain opportune economic or legal measures, it was necessary that the election of the people's representatives by the exercise of the right to vote to be conferred only to certain categories of persons and only under certain conditions. It is reason that the Constitution of 1991 reviewed, establishes a political coming of age fulfilled, recognising the exercise of the right exclusively to the Romanian citizens. This way, the legislative body presumes that, from one hand, the legal age person has the capacity to distinguish and appreciate the meaning and importance of the act done, being able to take responsibility of his/her facts, and on the other hand, the condition of the Romanian citizenship for the exercise of the right to vote excludes the suspicion of the lack of fidelity toward the Romanian people, presuming, this way, that every Romanian citizen primordially pursues the general interest of the Romanian society.

These aspects exclude, as normally, from the category of the persons with the right to vote all those mentally deficient or alienated persons, laid under interdiction, as well as the persons disenfranchised by a final decision of the court , accordingly to the law.

Therefore, every citizen having turned eighteen and having Romanian citizenship, wherever the place where they are may be shall have

[7] The European Convention on Human Rights, known also as Convention for the Protection of Human Rights and Fundamental Freedoms is ratified by Romania on June 20, 1994.

the right to vote, pursue to the art. 36[8]. It has be specified that, during the years, this electoral right varied based on the age and the country where it has been regulated. It is to notice that, regarding the Romanian citizens, who for a certain period of time establish their residence on the territory of other state, being considered residents, the fundamental law has nothing regarding the recognition or the non-recognition of the right to vote of such persons. In this meaning, see the Decision pronounced by the European Court of Human Rights, that, in the case of Hilbe against Liechtenstein nr. 31981/96, by which the plaintiff brings in discussions the failure of his registration on the electoral lists in occasion of a referendum, for the reason that for many years he had the residence abroad, he got as response the fact that „only the persons with common residence on the respective territory have the right to vote". The Court has established, that pursue to the Protocol n. 1 „only the legislative elections are under the rule of this legal provisions that is not applicable to referendums, so this has no material competence to pronounce on the complaint. Much more, the Court considers that to impose a condition related to residence in case of the exercise of the right to vote is not compatible with the provisions of the Convention. Therefore, there were legal considerations for the incident legislation, as the citizens having the residence in other state lose the contact with the public affairs and they are not directly subjects of the documents adopted by means of a referendum"[9].

In conclusion, in Romania, the right to vote, including the right to consultation by means of referendum, belongs, not only to the Romanian citizens, having the domicile in Romania, but also to the Romanian citizen, with the domicile abroad. It results from the provisions of the art. 18 paragraph 8 of the Law nr. 35/2008 that prescribes „within the diplomatic missions and consular offices of Romania, one or many voting sections are being organised for the voters with the domicile abroad. Having the approval of the government of the respective country, besides the polling stations, polling stations may be organised also in other localities than the ones in which the diplomatic missions or the consular offices reside. The voters having the domicile or residence in other state than Romania exercise their right to vote in one of the polling stations of the respective country where they have the domicile or residence. The residence abroad is proved

[8] Art. 36 of the Constitution of Romania: „(1) Every citizen having turned eighteen up to or on the election day shall have the right to vote. (2) The mentally deficient or alienated persons, laid under interdiction, as well as the persons disenfranchised by a final decision of the court cannot vote".

[9] Chiriță, R., *Curtea Europeană a Drepturilor Omului*, C.H. Beck Publishing House, Bucharest, 2006, p. 323.

with any document issued by the foreign authorities". In the same meaning, the law on the organisation and development of referenderum is being pronounced.

From the terminology point of view, it is necessary to distinguish between the right to vote and the right to chose. Although, at the first sight, the two rights seem to have the same content, we are speaking about two different notions. This way, the right to vote makes reference to the possibility of citizens, as we have previously shown, to participate in governing, in other words, in the social life of the collectivity, by means of their chosen representatives or directly, by means of referendum. The right to choose refers to the possibility of the citizen to choose between two or many persons or political parties in competition.

In other words, to vote means to participate in the exercise of the state power, meantime to choose means to manifest a preference for one of many variants, or is about persons, parties or decisions.

As any fundamental right, the right to vote presents certain specific characteristics. These result from the provisions of the Constitution and also from the ones of the special laws in the field. Therefore, the characteristics of the vote in Romania are the following:

A) **Universality of the vote.** This does not directly implies the recognition of the right to vote to all the Romanian citizens since birth, because, this right, as I have already stated, does not belong to the category of the natural rights. Regarding this right, it is universal when it belongs to all the citizens, beyond the legal regulation of certain minimal objective and justified conditions, that can be related to age, citizenship, nationality or the exercise of the civil and citizen rights. In this meaning, the Constitution of Romania excludes from the exercise of this right the stateless persons, the under aged children, the incapable persons and also the persons who have no moral capacity to vote, being disenfranchised by a final decision of the court.

B) **Equality of the vote.** Consecrating in the art. 4 and art. 16, accordingly to the international regulations, the principle of the equality of citizens, irrespective of race, nationality, ethnic origin, language, religion, sex, opinion, political appurtenance, fortune or social origin, the Constitution establishes the second characteristic of the right to vote, respectively the vote equality. The vote equality presents two important sides: on one side the fact that a citizen can not have more than a vote to choose the same state authority, and on the other side the fact that the vote circumscriptions are divided proportionally to the number of habitants. In order for the electoral circumscriptions to be distributed as number of

population and to reflect the demographic evolution of a society, it is necessary a deep analysis in this meaning and to perform a correct census. The equality of vote supposes the elimination of certain procedures able to alter its equality, such as: electoral geography[10], multiple vote[11], electoral premium. The vote equality supposes, that a citizen is forbidden to vote several times to appoint the same state authority and also, he/she is forbidden to put in the ballot pox more than a ballot for each public authority. These actions are also considered infringements of the law and they are punished accordingly.

C) **The direct character of the vote** refers to the fact the Romanian citizens choose directly and personally, not by means of proxies or representatives. As the vote reflects the opinion and thinking of a certain person, achieving this way a personal character, it can not be exercised by means of a proxy. There is also the indirect vote, it implies several voters appointing more representatives, who, on their turn will elect a public authority. For example, the Law nr. 215/2001[12] regarding the local public administration prescribes „the vice-mayor is elected with the vote of the majority of the local counsellors in charge, from their members". Also, the art. 113 paragraph 2 from the same law prescribes that the „the president and vice-presidents are elected by the secret ballot of the majority of the counsellors in charge." The vote cannot be exercised by power of attorney not even for the election of the President of Romania, even if in such case, the expression of the vote is not conditioned by a certain electoral circumscription. The citizens can come to vote, directly, voting on special electoral lists, if they are on the place of their domicile. In the same way, the hospitalised persons or arrested persons executing a penalty which does not imply an electoral incapacity will do.

D) **The secret ballot** represents an important guarantee of the correctness for the appointment of the representatives, but also a fundamental aspect of a democratic and social state. The secret ballot is an incontestable guarantee of the freedom of expression of the will on the appointment and election of a person in a public position or a public

[10] The electoral geography is the procedure of establishing electoral unequal as number of habitans to choose the same state body. It is a procedure used to disadvantage the cities where there are adversars of the governing party or parties. In this meaning, Ioan Muraru, Elena Simina Tănăsescu, quoted opera., p. 91.

[11] It has been used also in our country, when, pursue to the Constitution of 1923, an academic professor was granted up to 4-5 ballots.

[12] Published in the Official Gazette of Romania nr. 204 of April 23, 2001, republished.

dignity[13]. In order to ensure the secret ballot, the electoral law prescribes a series of guarantees, such as: lack of distinctive signs, reason for which the ballots shall not have signs other that the ones absolutely necessary; the endowment of the polling stations with cabins allowing the confidentiality of the vote expressed and where only one person is allowed to enter. This way, the Law nr. 35/2008 prescribes that „the presence of any person, in the voting cabins, besides the one voting is forbidden". Opposite to the secret ballot is the public ballot presenting the advantage of the fact that the voters can be easily influenced to vote in a certain way by the candidates wanting to have a certain place.

E) **Freely expressed vote** supposes, on one side, the faculty of every citizen to directly participate or to not participate in voting, and on the other side, that his/her assent is not vitiated, so as he/she votes otherwise that she/he would want to do. Currently, in Romania, to participate in voting is not compulsory, so, any constraint of any citizen to force him/her participate in the exercise of voting, is an infringement of his/her assent. The electoral law prescribes as guarantee of the prevention of constraints that may be exercised on a voter's assent the fact that „besides the members of the electoral office of the voting section, candidates and delegates and accredited observers, no other person can stay in the public places from the voting are or in the voting place, more than the time needed to vote. The electoral law provides that „the voter who, due to solid grounds, ascertained by he president of the electoral office of the voting section, can not vote alone, has the right to call in the voting cabin, an attendant she/he chosen in order to help her/him. Such attendant can not be from the observers or members of the electoral office of the voting section." It is a guarantee justified by the fact the member of polling stations are representatives of a political party, this way such attendant may influence the voter's choice.

There are also states in Europe where the participation in voting is compulsory, thing determined by the introduction of this citizen's action in the category of the legal obligations. Although a compulsory vote increases the citizen's responsibility, it still would not comply with the principles of a democratic state. In most of the European states, the exercise of the right to

[13] Between the public position and dignity, there are differences, the two notions are not sinonims. This way, the public position supposes a technical –administrative activity carried out at the level of a public institution or authoriy, meanwhile the public dignity supposes the exercise of the state authority at a higher level than the public position, conferring the bearer power of decision bigger than the one of the public official .

vote is considered a civic duty, the law non-regulating penalties for its failure of execution.

3RD SECTION. SHORT CONSIDERATIONS REGARDING THE ELECTRONIC VOTE

One of the alternatives that may be promoted to fight against the electoral absence is the e-voting (electronic vote), namely, the vote sent at distance. An alternative is the postal voting. The two modalities are different by the action by which they are exercised. The first implies the utilisation of the electronic technology, meanwhile, the second supposes the utilisation of the postal services.

E-voting first appeared in discussion in occasion with the adoption by the Council of Ministers of the Council of Europe of Recommendation Rec (2004) 11 that establishes the legal and technical standards related to this system. It has to be specified, that, although, it is regulated for a short time, this vote is already used in several states, such as: the United States of America, Australia, Great Britain, Netherlands etc[14]. In the European Union, a project has been promoted in such purpose, willing to demonstrate the fact that the on-line elections fulfil the same characteristics as of the vote reported to the polls, in the voting cabins. Although, the opponents of this system consider that the electronic vote is not safe.

In Romania, there is no legal regulation regarding the electronic vote and the postal. Internationally, there is no international legal instrument adopted in the field of postal voting.

In the speciality literature[15] the main effects of the electronic vote have been marked:

- enabling voters to cast their votes from a place other than the polling station in their voting district;
- facilitating the expression of the vote by the voters;
- facilitating the participation in elections of citizens residing or staying abroad;
- widening access to the voting process for voters with disabilities or those having other difficulties in being physically present at a polling station;

[14] In this meaning, Iancu, G., *Drept constituţional şi instituţii politice*, Lumina Lex Publishing House, Bucharest, 2008, p. 331-333.

[15] Iancu, G., *Drept constituţional şi instituţii politice*, Lumina Lex, Publishing House, Bucharest, 2008, quoted opera, p. 336-337.

- reduction of the electoral absence by the regulation of additional voting channels;

- bringing voting in line with new developments in society modernisation and the increasing use of new technologies as a medium for communication and civic engagement in pursuit of democracy;

- reducing, over time, the overall cost to the electoral authorities of conducting an election or referendum

- delivering voting results of elections and referendums reliably and more quickly;

- providing the electorate with a better service, by offering a variety of voting channels to express the political options.

Till some years ago, the possibility to vote at distance, seemed generally a hard thing to do. Globally, the figures of the participation in the voting process are dramatically decreasing, and due to such reason, modalities to increase the civic engagement are looking to be found.

The solution of transformation of the voting process in a more covenant one, giving the voters the possibility to send their votes by means of internet, from home or from their work place, presents more advantages than disadvantages, being a measure that has to be imposed also in Romania in the near future, considering the fact that, in deed, for a short time, it is successfully used already in several states, as I have already mentioned.

The implementation of the voting process also in Romania, using the method of the electronic vote would considerable increase the attendance to vote, that as one can easily notice, is continuously decreasing. Also, the utilisation of the electronic voting method would decrease the cases of multiple vote in Romania, that represents a better issued than the absence to vote.

Therefore, the advantages of the electronic vote at distance are: safeguard and transparency of the suffrage; rapidity of verifiability and accountability of the results registered following any type of elections or referendum; widening access to the voting process for voters with disabilities or those having other difficulties in being physically present at a polling station; flexibility of such voting method with regard to the classical procedure, of reporting to polls, to express a political option; widening access to the voting process for young people, a very important fact considering a huge absence within such social category; decentralisation of election and referendum conduction; a very serious decrease of the electoral absence; reducing, over time, the overall cost to the electoral authorities of conducting an election and not at last, it will lead to the elimination of the cases of multiple vote.

CONCLUSIONS AND SUGGESTIONS

Regulated by the Constitution of Romania, the electoral rights are qualified as fundamental rights, due to the facts they are comply with all their essential characteristics. So, the electoral rights are therefore subjective rights due to the fact that these are prerogatives of faculties recognised to a subject, giving this subject the possibility to have a certain conduct, and in the same time, enjoying the state support in their exercise. Still as a consequence of the fact that these rights are citizen's fundamental rights, they present an essential importance for the citizens. Their role and importance is marked by the fact that they have as object the participation of the citizens in governing. It is the most important characteristic that explains why from the frame of the subjective rights, only a certain number of rights are fundamental, registered as such in the Constitution. Due to their importance, the fundamental rights are registered in special normative documents such as declarations of rights or fundamental laws. The notation in the Constitution of the electoral rights is the result of their main characteristic of being essential rights.

Regarding the right to vote, this is an exclusively political fundamental right because it is used to allow the people to participate in governing by means of their elected representatives, and second, this right belongs exclusively to the Romanian citizens complying with the legal requirements, pursue to the constitutional provisions. The right to vote is a complex electoral right, because it is regulated by the constitutional provisions and also by the provisions of certain special laws, consisting of constitutional elements and also elements established by normative documents with legal power lower than the Constitution.

SUGGESTIONS OF LEX FERENDA

In the context of the modernisation of the Romanian social life is necessary to take several steps also in the evolution of the electoral system, in view of achieving the electronic vote and its on-line mechanisms. In a first stage, the option of e-voting should be introduced for the Romanian citizens from Diaspora because the e-voting method would be more than welcome , this issue being already a reality for other nations, by no means a future issue. Among the main arguments, supporting this type of voting, can me mentioned: rapidity of verifiability and accountability of the results registered following any type of elections or referendum; widening access to

the voting process for voters with disabilities or those having other difficulties in being physically present at a polling station; flexibility of such voting method with regard to the classical procedure, by ballot, to express a political option; widening access to the voting process for young people, a very important fact considering a huge absence within such social category; decentralisation of election and referendum conduction, and not at last, a very serious decrease of the electoral absence.

As a consequence, I suggest a legislative debate on such issue, debate that shall essentially contain, rules regarding: the alternative character of the e-voting utilisation in relation to the classic procedure of reporting to polls (namely, the possibility recognised to citizens of choosing the voting variants); the principles of e-voting; attributions of the Permanent Electoral Authority regarding e-voting, in the hypothesis that the debates on the electronic voting should be carried out; the procedure accordingly to which the voters can exercise the electronic voting; the necessity of experiencing and testing the electronic voting system, especially related to the technical solutions provided for the safeguard and audit of the electronic voting system; the costs of organising and conducting the e-voting. Through these measures, electoral frauds can be avoided, frauds that are often denounced due to the conducting of the electoral or referendum process.

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THE PROPERTY RIGHT'S JURIDICAL MEANS OF DEFENCE AND ITS IMPLICATIONS IN CEDO'S JURISPRUDENCE

Alexandra Mirela STOIAN*

ABSTRACT

Defense of property is made directly through legal means governed by civil law and civil procedural law but also indirectly, through a variety of institutions and legal rules of criminal law, criminal procedure law, administrative, commercial or labor law.

The means of civil law which protect the right of ownership or other real right principally engaged in all legal actions by the holder the right to require courts make decisions in order to remove any or its infringement.

In legal literature, legal means of defending the property were classified into two categories, namely: indirect or nonspecific means, such as legal proceedings and claim rights based on direct or specific means, represented by real actions.

KEYWORDS

The notion of property, the Constitutional provisions, claiming action, the new Civil Code

GENERAL CONSIDERATIONS

In legal literature devoted to real rights, the property is approached as a complex legal concept with multiple meanings, historical, sociological and legal persons in constant evolution.

The institution of property has undergone qualitative changes in the transition from one social formation to another, and the legal concept of property beyond the boundary of civil law, entering in all branches of law.

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The concept of property and ownership are synonymous and represent the expression of the same legal institution. Before being a right, property is a social and economic reality.

Property, the economic and social reality, was born assumption of ownership, it became such a right once came to the attention of state and was subject to regulations that edict [1].

Regulation and transformation in property ownership created the possibility for the state to lay down rules for the exercise of specific property, but also by creating a legal framework necessary to the defence from its potential harm that could be made to property.

The term property has several meanings, which stem from the very laws.

More broadly, the concept of 'property' is applicable to all rights, the ownership and other real rights[2] in this regard to be the owner is to have something exclusively for the use by destination, or after their interest was. In this sense the term may refer property real estate, movable property, ownership of a usufruct, ownership of a claim or intangible property.

In the narrow term property refers to its meaning, as a property that only real, absolute and perpetual, may carry tangible movable and immovable property[3].

Ownership can be defined as that which expresses the subjective right of ownership of a thing, allowing the owner to exercise possession, use and have that thing in his own power and their own interest and in compliance with the laws.[4]

CONSECRATION LEGAL

Ownership is the prototype "real rights and its importance to individuals and society has led to legal regulation of the legal institution of property.

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[1] E. Chelaru, *Civil Law, Human major real*, Issue 2, Publishing House CH Beck, Bucharest 2000, p. 21.

[2] G.N. Luțescu, *General Theory of real rights. Theory heritage. Classification of goods. Main real rights*, Bucharest, 1947, p. 237.

[3] I.P. Filipescu, *Civil law, property and other real rights*, revised edition, Publishing House Actami, Bucharest 1996, p. 74.

[4] G. Boroi, L. Stănciulescu, A. Almășan, I. Padurariu, *Civil Law, Course selectively license, multiple choice*, 4th edition, revised and updated, Publishing House Hamangiu, Bucharest, 2009, p. 200.

Romanian Civil Code, the current regulations in Article 480 defines the property, definition of who can see private property belonging to the category of real rights, but also the specific difference between this law and real. Specificity is given ownership of content that is legal powers of ownership, the characters of this law and its performance specification limits.[5]

Constitution of 1991[6], governing the rights and fundamental freedoms in article no. 44 stipulating that the right property, and claims the state is guaranteed. Content and limits asceto rights are established by law ".

By the Constitution[7], article no. 41 paragraph 2, has changed (from republicării becoming Article no. 44 item 2), in that 'private property is guaranteed and protected equally by law, regardless of its owner.

It should be stressed that constitutional provisions in current legislation expressly prohibits the nationalization or other measures of forcible transfer of public ownership of assets based on the owners' social, ethnic, religious, political or other discriminatory features of the goods. Also, Article no. 136 paragraph 5 of the Constitution provides that 'private property is inviolable in the organic law.

The importance of ownership for individuals and society resulted in the content of international regulations, to be entered rules to protect private property. In this regard, it cited the Universal Declaration of Human Rights of December 10, 1948, which in article no. 17 stipulates that any person, both alone and in the community has the right of property. Nobody can be deprived of his property in an arbitrary way.

Finds its ownership rules in the First Additional Protocol[8] to the Convention on Human Rights and fundamental freedoms, ratified by Romania by Law no.30/18.05.1994[9], established in Article no. 1 that any natural or legal person is entitled to respect his property and nobody can be deprived of his possessions except in the public interest, as provided by law and general principles of international law.

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[5] V. Stoica*, Civil Law, the main real rights*, Humanitas, Bucharest, 2004, p. 224.

[6] Romanian Constitution adopted in 1991 was revised by Law 429/2003, approved by national referendum of 18-19 October 2003, confirmed by the Constitutional Court Case No.3 of October 22, 2003.

[7] Law revision of the Constitution of Romania no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003.

[8] First Additional Protocol of the European Convention on human rights and fundamental freedoms of Paris was signed on 29.03.1952 and entered into force on 18.05.1954.

[9] No.30/18.05.1994 Law was published in the Official Gazette of Romania, Part I, no.135/31.05.1994.

The Court of Justice in Luxembourg, which has the power to ensure the correct application of the rules of the European Union. This body decided that judicial activity 'basic rights, especially property rights, do not appear as absolute powers, but should be considered in relation to their position in society.

LEGAL MEANS TO DEFEND PROPERTY RIGHT

Defense of property is made directly through legal means governed by civil law and civil procedural law but also indirectly, through a variety of institutions and legal rules of criminal law, criminal procedure law, administrative, commercial or labor law.

The means of civil law which protect the right of ownership or other real right principally engaged in all legal actions by the holder the right to require courts make decisions in order to remove any or its infringement[10].

In legal literature, legal means of defending the property were classified into two categories, namely: indirect or nonspecific means, such as legal proceedings and claim rights based on direct or specific means, represented by real actions.

Action claim is the most important means of defense of property, but with the owner of the property depending on the circumstances of the case may turn to other means to defend its rights, such as action and denying action confessor.

If the dening action, conflict arises between the owner of the property on immovable and claiming to be entitled to exercise powers related to a party of the property on the same property.[11]

Confessor action resembles the action claim in that and it seeks recognition of a subjective right, but not ownership and one of its parties.

Next we detail the most important means of defense of property, that claims, because of the denying action and confessor, on the one hand, judicial practice has seen a casuistry not complex, and secondly so far the Strasbourg Court has sentenced the Romanian state in any case by case, in which the law is invoked dening action or the confessor.

[10] L. Pop, L-M. Harosa, *Civil Law*, *Real Rights main*, Publishing House Universe Legal, Bucharest 2006, p. 305.

[11] C. Bîrsan*, Civil Law. Main real rights*, Third Edition, revised and enlarged, Publishing House Hamangiu, Bucharest 2008, p. 236.

CLAIMMING ACTION

Claimming action is the most vigorous defense of property, because it appears that legal possibility that allows the holder to protect the property and real right to claim reimbursement from that which mastered him without reason.[12]

Action claim may be exercised only by the owner of the property, excluding the work claimed. In this respect, the practice court stated that the claimant must be the exclusive owner of the property claimed, issue hence the claim that the action could be brought by an owner in the state of individuals with other co-owners.

It also, held that if the law of the claimed property is owned jointly by the shares of several owners, claims made only one of them is inadmissible because codivider applicant has only a limited right of property. In such a situation, he may recognize to the codivider (single plaintiff in an action claiming, without the consent of all codividers) only its right to require individuals and not the one to get good teaching by the third party owner.[13] Obviously, if there is express consent of all codividers, one of them can claim the property as individuals even if given only one applicant.

Referring to rule inadmissible exercise action or claim by one party of a joint owner, who, without a legislative consecration, unsupported by the text of the law, was recognized by the legal doctrine and embraced by judicial practice, to the European Court of Human Rights ruled in a case against Romania, respectively in *Case Lupas*[14] and others against Romania, which held that strict application of the unanimity rule required applicants to take a disproportionate private any possibility that the courts to clear and concrete decide on applications for refund of the disputed land, thereby adversely affecting the very substance of their right of access to a court.

The case originated three requests are directed against Romania, in which 19 plaintiffs, citizens of this state before the Court on September 18, 2001, August 5, 2002 and December 13, 2002, pursuant to Art. 34 of the Convention on Human Rights and Fundamental Freedoms.

In fact, the 19 claimants are descendants of part of the joint owners of land of about 15 hectares, situated in Constanta on the Black Sea coast.

[12] C. Bîrsan, mentioned work., p. 200.
[13] Maramures Court decision civil nr.606/1988 in RR D 10/1988.
[14] CEDO Decision of 14.12.2006.

The national court was a request for partition of immovable property, consisting of a ground area of about 15 hectares on the Black Sea coast and the building - which belonged to the late Alexander N. Steflea. After attending regular review procedures before national courts, the Supreme Court, by decision rendered on the April 24, 2001, dismissed the appeal, ruling that plaintiffs could not claim the expense of a good individual rights violations and other co-owners heirs. Ruling that a claim for a good action not only target individuals defending the right of ownership of a share of good, but also been recognized on the entire property, and reimbursement to the one you claim, all courts have concluded that, without the agreement of all heirs of former co-owners, the applicants could not claim the parcel in question because under the unanimity rule, an owner can not do any act of management or disposal on the property without the other joint owner individuals.

The applicants have found that their actions prevented rejection to enjoy their inheritance rights and therefore they denounce a violation of their right to respect for property, as guaranteed him by Article no.1 of Protocol no.1. They admit that the unanimity rule is applied by most national jurisprudence, but they dispute the merits of it and show that their situation, the heir to one of the co-owners refused to join their actions and the heirs of another owner could not be identified application of this rule has deprived of any means to demonstrate inheritance rights.

On alleged violations of Article no. 6 item 1 of the Convention the applicants complain of infringements of access to justice because of the rejection of their actions under the unanimity rule required to claim individual property.

In Case Lupas and Others v. Romania (Application no. 1.434/02, 1.385/03 and 35.370/02) of December 14, 2006, the Court held that Article no. 6 item 1 of the Convention was violated because the unanimity rule applied in this case by the court, on the one hand has prevented analysis of the merits of the plaintiffs, and on the other hand - having regard to the circumstances of the case, and in particular the date of nationalization and difficulties arising therefrom in the identification of heirs of a former owner and was part owner of another heir refusal to join the plaintiffs in actions brought - this rule is an insurmountable obstacle to any future attempt by plaintiffs claim individual property.

In light of the foregoing, the Court considers that the strict application of the unanimity rule has imposed a disproportionate burden on applicants as private take any opportunity to get clear and concrete

examination by the courts to surrender their claims to disputed land, bringing as the very substance of their right to access to a court.

In terms of Article 1 of the First Additional Protocol to the Convention, the Court held on the one hand, it is not competent *ratione temporis* to decide on the circumstances of the nationalization of the property, and, secondly, that the plaintiffs had a "good" within the meaning Convention, because no court or administrative authority is not definitively recognized the plaintiffs are entitled to return the disputed land so that there was a breach of Article no.1 of the first Additional Protocol to the Convention.

So regarding alleged infringement of their right to respect for property, as guaranteed him by Article no. 1 of Protocol no. 1, the Court held that plaintiffs can not complain about a breach of art. 1 of Protocol. 1 only if the procedures in question refers to "goods" whose owners are, for the purposes of this provision.

CONCLUSIONS

In doctrine and practice of national courts have the idea that action claim is an act of disposal and acts contrary to the conservation of the property, the consent of all joint owners required to claim such a good, so, action must be promoted by all joint owners. The Strasbourg Court found first that the rule in question is a construction case-law that does not follow a specific procedure available, but is inspired from the particular action claim.

Case Lupas and others against Romania brings elements to revolutionize the applicability of the unanimity rule in civil law so that legal practice, after delivery by the Strasbourg Court that the decision in this case has shifted, meaning that no Plano was rejected as inadmissible claims, where the unanimity rule is not met.

National courts are obliged to apply when resolving cases that are invested in European contentious court case, especially with national law and there are laws permitting it, according to article no. 11 with reference to article no.20 from the Romanian Constitution, which stipulates that treaties ratified by Parliament, by law, are part of the law, and if there are differences between the covenants and treaties on fundamental human rights to which Romania is party, and laws , priority international regulations, unless the Constitution or national laws contain provisions more favorable.

Legislature, the provisions contained in the new Civil Code[15] came in support of the courts, meaning that, as they are covered in the new civil code legal institutions tend to be consistent with the CEDO case law, a matter which was due to the large number of convictions incurred by Romanian state in matters of property to the Strasbourg Court.

Thus according to gauges. Article no. 643 paragraph 1 ,,each owner can stand alone in court, regardless of legal standing in any action relating to joint ownership, including the claim for action".

Regarding the effects of judgments in matter of co property in paragraph 2 of that article states that the judgments in co property benefit and the benefit of all joint owners hostile one joint owners are not applicable to other joint owners. The provisions included in the new Civil Code seek to eliminate existing controversies in the specialized legal action on the claim qualified as a legal act of preservation or disposal.

The new approach of the new Civil Code co property made solutions arising in practice are solved on the passivity of one or some of the co-owners, passivity may lead to imminent loss of a real right by the other joint owner.

Pending the entry into force of the new Civil Code, the courts invested with an action claim brought by one or only a part of the joint owners, will consider whether to report the actual situation in this case pursued if the refusal of other joint owners of the sit in court as plaintiffs determined that they not be identified, or the contrary, to determine whether it is an abuse of rights of joint owners who refuse to bring action claim.

In the situation that the court finds that the refusal of the joint owners or joint proprietor of the formula and claim support action takes the form of an abuse of law, then it no longer enjoys legal protection and shareowner consent opposed to promoting action claim is supplied by the court.

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CONSIDERATIONS ON CEASING OF THE EMPLOYMENT CONTRACT WHEN THE ENTERPRISE OR THE UNIT OR OF ONE PART OF THE ENTERPRISE OR UNIT ARE TRANSFERRED

Ion PĂDUCEL*

ABSTRACT

The author presents , the 2001/23/CE Directive of the Council which deals with the levelling of the legislations of the member states regarding the rights of the employees in case of the transfer of the enterprise or of the unit or of some parts of the enterprises or the units. Compared to the EU standards, the norms from the Labour Code and from the 67//2006 Law are applicable to the transfer of the enterprises or of the units or of the parts of them regardless of the nature of the registered/authorized capital if they are situated on the Romanian territory.

KEYWORDS

The 2001/23/CE Directive, the 67/2006 Law regarding the protection of the employees rights in case of the transfer of the enterprise, individual or the collective dismissal

The economic evolution of the E.U. states has required changes in the structure of the enterprises, changes that operate through the transfers of the enterprises, or of the units or of the parts of them, resulting, in terms of Law, from cessions and mergers.

In order to maintain the rights of the employees, in case of such transfers, the 2001/23/CE Directive of the Council[1] which deals with the levelling of the legislations of the member states regarding the rights of the

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employees in case of the transfer of the enterprise or of the unit or of some parts of the enterprises or the units.

The 2001/23/CE Directive stipulates that the transfer operates as regards to the enterprise, to a part of it, or, to some parts of the enterprise or to some parts of the composing/composing units as a result of a conventional cession or merger.

The Directive considers to be a transfer, the act through which the economic entity maintains its identity as an organized aggregate of means with respect to carrying on an economic activity which can be essential or accessory.

The provisions of the 2001/23/CE Directive are applicable to both state enterprises and private enterprises which have an economic activity irrespective of then having a lucrative aim/goal or not.

In accord with the E.U. Directive the maintaining of the rights of the employees is regulated/stipulated by the 67/2006 Law regarding the protection of the employees rights in case of the transfer of the enterprise or, of the unit, or in case of the transfer of some parts of them[2], and of the provisions of the Articles 169-170 from the Labour Code.

In accordance with the Article 4, letter d) from the 67/2006 Law a transfer is considered to be the passing from the assignor's property (the person who loses his quality of being the employer of the employees of the enterprise or of the parts of it that transfers/are transferred), to the property of the assignee(the person who gets gets the quality of being the employer referring to the same employees, that is the new employer) of an enterprise or of a unit or of some parts of them having as a goal the carrying on of the main or of the secondary activity regardless of following/pursuing a profit or not.

At the EU level the French jurisprudence (doctrine) analysing the decisions ratified / promulgated / adopted in the course of time by the EU Court of Justice considered that the provisions of the 2001/23/CE Directive are applicable in all the hypothesis of the changing within some contractual relationships of the natural person or of the legal person and which is responsible/answerable for the exploitation/ruling of the economic entity and who takes upon himself the legal obligations of the employer related/referred to the employees in question.

According to this Doctrine the decisive criterion for the establishing of the real existence of a transfer (in the Directive's logic) is that of knowing

[2] Published in "Monitorul Oficial" of Romania, Part I, no 276, 28 March 2006.

if the transferred economic entity has preserved its identity which usually results in the carrying on of the activity or in the taking over of the activity in question.

Compared to the EU standards ,the norms from the Labour Code and from the 67//2006 Law are applicable: to the transfer of the enterprises or of the units or of the parts of them regardless of the nature of the registered/authorized capital if they are situated on the Romanian territory[3]; in all the situations in which the transfer of the enterprise or of the unit (or of the parts of them) results from a cession (realized/achieved through a deed of conveyance or through a donation document)or from an amalgamation or from a taking over realized on the Law basis[4]; to all the employment contracts irrespective of their kinds (with definite or indefinite duration).

With reference to the rights and of the obligations of the employees in case of such transfers the Article 169 paragraph (2) from the Labour Code and the Article 5 , paragraph(1) from the Law 67/2006 indicate the rights and the obligations of the assignor which result from the employment contract and from the Collective Labour Agreement that are in force when the transfer occurs are "*ope legis*" totally transferred to the assignee.

But before the transfer occurs the assignor (the old owner) has the obligation to notify the assignee (the new owner) about all the information and the data regarding the rights and the obligations that are to be transferred.

We consider that this obligation is one that involves diligence as the inobservance of it does not affect the transfer of all rights and the obligations in question to the assignee and as an essential aspect the rights of the employees are not affected either.

As for these reasons it results that the assignee takes over the employment contracts under the circumstances that they were negotiated and signed by the assignor (the old owner) with his employees.

In fact Article 169, paragraph (3) from the Labour Code states precisely that "the transfer of the enterprise, or of the unit or of part of it cannot be considered a cause for the individual or collective dismissal by the assignor or by the assignee".

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[3] For more details, see: I.T.Ștefănescu, *The labour protection of the employees in case of the transfer of the enterprise, of the unit or of some parts of them based on the Law* 67/2006, in "Dreptul" no 9/2006, pages 9-21.

[4] For more details, see: N.Voiculescu, *EU legislation, national and jurisprudence regarding the labour protection of the employees in case of the transfer of the enterprise, of the unit or of some parts of them*, in "Romanian revue of labour legislation", no 1/2006, pages 22-27.

In this aspect the 2001/23 Directive also decides by a strict order that the transfer of the economic entity cannot be considered as a reason for the dismissal of the employees that the assignor or the assignee could claim. Thus the assignor or the assignee cannot use the transfer to justify or ground the individual or the collective dismissal. But this these dismissals can occur according to Article 4, section 1, thesis(2)of the Directive for economical, technical or organizing reasons implying changes in the structure of the labour power. These EU provisions were not taken over neither by the norms of the Labour Code nor by the 67/2006 Law.

Irrespective of the intention/option of the Legislator we consider that the dismissal of some employees on the basis of Article 65 from the Labour Code is possible.

In this specific case of a transfer before or after the carrying out of it the assignor or the assignee can adopt measures of dismissing the employees based on any reasons which are connected or not with the natural person or the employee.

In this way the assignor or the assignee have the possibility to decide the dismissal of the employees on the grounds based on the Article 61 from the Labour code(a-the disciplinary dismissal; b-the dismissal in case of the preventive custody of the employee for more than 30 days; c-the dismissal in case of the physical and/or mental incapacity of the employee; d-the dismissal in case of the professional incompetence; e-the dismissal in case of the fulfilment of the standard age and of the legal length of service(seniority).

On the other hand the assignor or as the case may be the assignee can decide the dismissal for the grounds based on Article 65, paragraph (1) and on the Article 66 from the Labour Code because of the abolition of the place of work held by the employee for one or more reasons that are not because of the his fault. For example: new technologies are implemented that necessarily impose the reduction of the number of the employees; two positions are grouped in only one; the employer (the assignor or the assignee) has bank debts and has suffered a reduction in the turnover of his enterprise.

The dismissal in the case of the transfer before and after its carrying out can be a collective one as well based on provisions of the Article 68 from the Labour Code.

Therefore the norms of the Labour legislation of the common right are applicable regarding the reasons and the conditions of the dismissal of the employees in case of the transfer before or after the implementation of it.

The only condition of legality from the legal point of view is that of a real and serious cause, that of the legitimacy or illegitimacy of the dismissal namely if the assignor or the assignee did not commit any over-indulgence.

As the French jurisprudence mentioned above considers the assignor as well as the assignee can dismiss for economical, technical or organizing reasons, but the illegal dismissed employees by the assignor some time before the transfer and that they not taken over by the assignee yet can take advantage of the lawfulness of their dismissal regarding their new relationships with the assignee.

We must state precisely that the assignee is only responsible for the employment contracts in which the assignor was a side as the employer when the transfer occurred.

Therefore he has to take into account the situation at the precise moment of the transfer even if an employee was moved from his place of work to another unit only a short time before the transfer, but observing the norms from the labour Code.

The carrying on of the employment contracts is a task imposed both to the employee and to the assignee without even notifying the employees in question about it.

On the other hand the tacking over of the employees by the assignee must be recorded in the registry book kept by the new employer and notified to the agency of the Labour Control and Regulation of the County in question.

The employment contracts are and remain the same in their substance.

In fact is a legal definitive cession of the employment contracts by changing the employer or a legal novation substitution of the labour as is defined by the French jurisprudence. The new employer (the assignee) and the employee are in a legal relationship that connects one to the other as was the previous connection legal relationship between the old employer (the assignor) and the employee in question. The employee can claim to exercise all his rights which he has according to his employment contract. But, the employee is held of all previous transfer obligations as well, including some specified provisions in his employment contract as is the case with the mobility provision, the confidentiality provision, etc.

The fact that the transfer of an economic entity from the assignor to the assignee may imply a certain change even an important negative one of the walking conditions to the prejudice of the employees is an issue problem which must be solved.

According to the Article 4, paragraph (2) from the Directive 2001 / 23 when the employment contract (or the work relationship) is terminated because the transfer brings about an important change of the working conditions to the prejudice of the employee, the termination the employment contract (or of the work relationship) is considered to be because of the employer's action. The Article 8 from the 67 / 2006 Law taking over the EU Jurisprudence text show that, if the transfer causes an important change of the working conditions to the detriment of the employees, the employer is responsible for the termination of the employment contract.

In this context the enforcement of the national law prescribes a specification. The employer is free to oppose to the transfer office employment contract to the assignee if his working conditions are substantially changed. In this situation if there is an important change of the working conditions to the employee's detriment, the EU Directive does not enforce the member's states to regulate the maintaining of the employment contract of the employee whit the assignor. But the national norm, namely the 67/2006 Law makes no provision for such a case although according to the directive the maintaining "ex lege" of the employment contract whit the assignor is not out of the question. If a members state wants it.

Therefore, in our opinion when the working condition did not suffer an important change and the employee has freely decided not to accept the transfer of his employment contract to his new employer he has the possibility either to suggest the termination of his employment contract by mutual agreement or to resign. If the employee who does not accept the transfer neither suggests the termination of his employment contract by a mutual agreement, nor he resigns coming to his new job fulfilling his work obligations the previous employer (the assignor) has to take in to account this fact and carry on his attempts in taking the necessary steps finally achieving the effective transfer to the new employer (the assignee). Thus ceasing the quality of the old employer as the assignor the situation of the discontented employee will be possible to be solved only by his new employer (the assignee).

We also think that the assignor, in his turn can dismiss the discontented employee for any of the reasons stipulated by the Article 61 [letters a)...e)] and the Article 65 paragraph (1) from the Labour Code, but not for the fact that the employee in question does not agree whit the fact of being transferred. The consequences of the termination of the employment contract in such cases are those stipulated for any particular case by the employment legislation.

There are cases when the employee being discontented because of his transfer refuses to be transferred to the assignee and his entitled to remain to the assignor. Thus: there is a clear provision in his employment contract in which it was stipulated that in cases of the transfers of this kind (of the enterprise, of the unit or of some parts of them), the employee in question will remain to the previous employer carrying on his work for him; there is in his employment contract a clause of conscience and because of that the employee could not work for the assignee (the new employer), etc. In such cases the employment contract of the employee cannot cease without assignor's initiative in the condition stipulated by the norms from the Labour Code.

In conclusions we can considered that it is forbidden both by the EU norms and the national ones only the dismissal which would be based on the transfer in itself, as a juridical action. In other words the cause or the reason of the dismissal cannot consist in the transfer of the enterprise, of the unit, or some part of them. Hence we also considered that in the case of the transfer before or after the implementation of it, the assignor or, as the case may be, the assignee, can decide the termination of the employment contract for any reasons which are prescribe by the Article 61 and the Article 65 from the Labour Code, as they were dealt with in this work.