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# ANALELE UNIVERSITĂȚII TITU MAIORESCU

## Drept

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# CONTENT

# LOBBY OR INFLUENCE PEDDLING?

**Alexandru BOROI**[*]

**ABSTRACT**
*Lobbying has the role to inform the officials on the putting into practice of certain decisions regarding a segment of the society. The principles of this activity in our country have to fall under the constitutional rights and the dispositions included in special laws. The lobbying should be proformed with the aim to support some legitimate rights and interests by promoting, adopting, annotating or abolishing normative or administrative acts.*

**KEYWORDS:** *pressure groups, lobby, corruption, influence peddling, decisional transparency*

## 1. Introductory reflections

Lobbying is currently carried out in all countries and in all fields, but not everywhere this activity is regulated. If we were to make a brief historical retrospect, we see that this term used to define the activity conducted at the meetings of the members of the British Parliament in the halls of the Parliament House, also in the United States the term is used to define the policies or practices of political dealers or persons interested in addressing the president in an informal manner, on matters of general interest, currently the term referring to the work done by the European Parliament to influence policy and decision making processes of the European institutions.

Although in some countries the term, "lobby" is accompanied by a negative illegal connotation, in fact, lobbying is one way of expressing verbally, in writing, in pictures, by sounds or other means of public communication of thoughts, opinions, religious beliefs and spiritual creations of any kind which cannot be restricted because it would violate a right or a constitutional freedom[1]. Moreover, in the European Commission's Communication[2] "lobby" means "activities carried out to

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[1] Liviu Mihăileanu, Aurelian Horja, *Reglementarea activității de lobby în anticamera influenței,* C.H.Beck Publishing House, Bucharest, 2009, p. 10.

[2] Communication from the Commission *„Actions for the implementation of the green card- European Initiative for Transparency",* Bruxelles, 21 March 2007, COM (2007) 127 final, available on www.europa.eu.

influence policy making and decision making processes of the European institutions".

## 2. Defining the activity of lobby

To define the term "lobbying" the dictionaries abound in definitions.

In the explanatory dictionary of the Romanian language "lobby" is the work of a group of people who influence from the outside the decisions of the Parliament or the activity of a pressure group[3]. In the Oxford Dictionary, lobby is the work of a group of people trying to influence legislators in some sense related to a specific problem[4]. In Merriam Webster Dictionary, lobbying is defined as the work of an organized group of people working together to influence government decisions that relate to a particular economic, social or political activity[5]. La Rousse[6], gives an explanatory definition for "lobby" as the work of individuals or legal or pressure groups. The question is who are these pressure groups because declaring a group who is demonstrating in the street as a pressure group is wrong, because a pressure group must have a minimum internal organization structure starting from its leaders and adherents with continuity in achieving its purpose[7], the characteristics of the organization being the existence of interests to defend[8]. Moreover, an interest group can become a pressure group anytime, practically there are no interest groups that have not put pressure on the public authorities, the expression group of interest and group pressure becoming synonymous in this case[9]. Also out of the need of delimitation of those specific activities, we find that often "lobbying" and "advocacy" are confused, although internationally accepted lobbying involves attempting to influence legislation, while advocacy covers a wider range of activities that may

[3] *Dicţionarul explicativ al limbii române*, 2nd edition, Univers enciclopedic Publishing House, Bucharest, 1998, p. 578.
[4] www.oxforddictionaries.com.
[5] www.merriam-webster.com.
[6] www.larousse.fr.
[7] Jean-Marie Denquin, Introduction a la science politique, Hachette, Paris, 1992, p. 125-126.
[8] Roger-Gérard Schwatzenberg, Sociologie politique, Editeur Monchrestien, ed. 5-a, Paris, 1998, p. 540-541.
[9] *Idem*, p. 542.

include at some point lobbying activities, the definition of the two concepts starting from general (advocacy) to particular (lobby)[10].

In conclusion, the lobby activity may be performed by any citizen, legal or physical body or organization if they are affected or threaten by a stipulation of the law, having the right to ask for a change[11]. This activity is characterized by transparency either it is carried out in the U.S. or the European parliamentary systems.

### 3. International regulation of the lobby activity

In the U.S. there is a remarkable history regarding lobby, the Federal Regulations since 1946 requiring the compulsoriness of all persons asking, collecting or receiving money for passing or rejecting a piece of legislation within the Congress to be registered. The shortcomings of this regulation were modified by the New York State Lobbying Act[12], which defines lobby in Section 1, paragraph§ 1-c as any activity to influence some normative acts, by adoption, rejection, modification of terms or adoption or rejection of orders or the outcome of a of a procedure for adopting normative acts and the persons who cannot perform lobbying, such as: persons engaged in drafting, advising clients on or rendering opinions on proposed legislation, rules, regulations or rates, municipal ordinances and resolutions, procurement contracts. At the same time, paragraph 1-e, pct. 4, lit. c states that it is compulsory that the lobbyists be registered at the Senate Secretariat within 45 days from their employment or from the first lobby contract and paragraph § 1-j states that they are obliged to write biannual reports related to their activity as well as the list of the institutions they contacted. All of these requirements are meant to ensure transparency and professionalism in the governmental area.

In Canada, once the Federal Lobbyists Registration Act[13] entered into force in 1989, all information regarding lobbying was meant to ensure transparency as the law stipulated that the groups of interests be

[10] Alina-Costina Bărbulescu, *Lobby versus trafic de influență*, Eftimie Murgu Publishing House, Reşița, 2012, p. 25; Liviu Mihăileanu, Aurelian Horja, *op. cit.*, p. 13.
[11] Liviu Mihăileanu, Aurelian Horja, *op. cit.*, p. 10.
[12] New York State Lobbying Act, created by article 2 from the legislation of 1999, annotated by Chapter 62 of the legislation from 2003 and chapter 1 of the legislation from 2005, recently annotated by chapter 14 of the legislation from 2007. Available at www.jcope.ny.gov.
[13] http://www.parl.gc.ca/Content/LOP/researchpublications/prb0574-e.htm.

registered and give information in a public record. The name of the group that requested lobbying was compulsory to be public.

Since 1991 the European Parliament initiated proposals to develop a code of conduct and a public registration system for lobbyists accredited by the Parliament. This proposal had no support due to the fact that no consensus has been achieved regarding definition of lobbying[14]. Then after 1995 the records of the lobbyists were made by the College of Questers and were made public via the Internet. In order to correctly know the number of interest groups in the European Parliament, we mention that on 14 October 2009, 2,066 interest groups were registered, out of which 119 companies and advocacy firms, 1,148 professional associations, trade companies, 578 NGOs and 221 organizations representing various interests (religious organizations, academic and educational organizations). Out of the twenty biggest lobbying organizations we mention: Chemical Industry Council, The professional organizations of farmers (COPA - COGECA), European Trade Union Confederation (ETUC), the Union of Industrialists (BUSINESSEUROPE), European Federation of Pharmaceutical Industries Associations (EFPIA) European Federation of aerospace and defence (ASD) and others[15].

On the other hand, the European Commission, highlighting explicitly the legitimate and useful role of lobbying in a democratic system in the context of the European Transparency Initiative, opened in June 23, 2008 a voluntary registry called "Register of Interest Representatives" for

[14] The main steps to carry out an effective lobby in the legislative process of the European Parliament, according to Burson – Marsteller, an international counselling and public relations group are: "think politically, be transparent, creative, respect cultural and linguistic diversity and try to have allies and built coalitions". www.burso-marsteller.co.uk.

[15] To give an example for the activity of lobbyists at the European Parliament we mention Reach Regulation (Registration, Evaluation, Authorisation of Chemicals)-(CE) Regulation no. 1907/2006 of the European Parliament and European Council regarding registration, evaluation, authorization and restrictioning of chemical substances, for setting up the European Agency for Chemical Products, annotating Directive 1999/45/CE and abolishing Regulation (CEE) no. 793/93 of the Council and Regulation (CE) no. 1488/94 of the Commission, and Directive 76/769/CEE of the Council and Directives 91/155/CEE, 93/67/CEE, 93/105/CE and 2000/21/CE of the Commission. All these by a single normative text that substituted 40 community legislative acts regarding chemical substances. www.europa.eu.

online registration of lobbyists, assuming also the elements of a code of conduct[16].

As regarding the EU Member States, in some of them the lobbying is regulated, but there are others which do not have any regulations in the field.

Thus, in Austria, the economic interest groups, professional associations or unions are not officially registered although they carry out an important activity in the legislative process, therefore the social-democrats support the transparency of lobbying[17].

The Belgium Parliament does not have rules and procedures for lobbying but they have a Code of conduct for the lobbyists.

The German system has specific regulations for lobbying and a register for the groups of interest which is updated annually[18].

In Poland lobbying is regulated by the Lobbying Activity in the Lawmaking Process Law adopted on 7 July[19] which establishes the principles of transparency and the forms of control.

In France, in 2008, the National French Assembly approved a proposal to regulate lobbying[20] which entered into force in 2009. The initiative was to set up a register for lobbyists and a code of conduct which are to be supervised by a special commission of the National Assembly.

[16] The Code of Conduct for lobbying of the European Commission comprises rules for the representatives of the groups of interest: 1. To declare the name and the organization they represent; 2. To declare the clients or the members they represent; 3. They do not obtain or try to obtain information using unfair methods; 4. Do not coerce the personnel to break rules or standards. www.europa.eu.

[17] „Licht ins Dunkel des Lobbystendschungels" www.ots.at.

[18] www.linksnet.de.

[19] www.europeum.org.

[20] See „Lobby for lobby", Association for civic initiative, p. 4 „ C.P.E.M. is made of the representatives of corn producers in France fighting to counter the unloial activity of American companies on the French market. In order to solve the complaint filed by C.P.E.M. at the European Commission a professional lobbying agency from U.S. was hired which managed to make a legal framework for the interests of C.P.E.M. In 1989 they started a communication campaign in 12 states of the European Community. The result was a flexibility of the decision acts so that the conflict was solved and the French association became leader on the European market. www.apd.ro.

## 4. Internal regulations of lobbying

In Romania, although since 2000 there have been proposals on regulating lobbying[21], currently it operates only a small number of companies specialized in these activities, basically lobbying being carried out through the support of professional intermediaries, physical or legal persons who have legal representatives in Romania. They represent the rights, opinions and collective interests of interest groups which consist of individuals or legal entities in order to promote a program or policy, to initiate, adopt, amend or repeal legislative acts by public authorities[22]. Among the entities that come into contact with Romanian lawmakers to persuade them to adopt, modify or reject some bills include pharmaceutical companies, tobacco, energy, construction, transport, health systems and chambers of commerce, NGOs, trade unions, including the Romanian Orthodox Church.

We can say that lobbying is not new, but there are consistently avoided discussions about politicians meetings with representatives of organizations interested in influencing public policy, often, any reference to the regulation of this activity gaining negative connotations due to the coverage of cases of trafficking of influence, because the influence of illicit activities are mislabelled or biased as lobbying[23].

Moreover, there are two activities which are currently taking place with a different purpose. On the one hand lobbying - legitimate activity to advocate for their own values and interests, actively contributing to the democratic exercise of a state, but which is carried out without being governed by laws, and on the other hand the offense influence peddling where the active subject can be any "person who has influence or makes someone to believe that he has influence on a public official"[24] and who promises "that he will try to influence public or private officials". The

[21] See Bill no. 184/2000 registered in the Senate, initiated by U. Spineanu between 1996-2000, which received negative answer from the Commission for human rights and minorities on 13 September 2000. Bill 323/2000 initiated by P. Naidin şi S. Constantin between 1996-2000 and Bill 211/2001 initiated by P. Naidin between 2000-2004.

[22] http://advocacy.ro/node/5350/depozant-verbal/5677.

[23] *Idem*.

[24] Many times the persons who states that has influence upon a public official may be a friend or a relative and in some cases he does not even know the public official or has no relation with him. For this motive some authors agree to include this act unde influence peddling and other as fraud. See Alexandru Boroi, Drept penal. Partea specială. Conform Noului Cod penal, C.H. Beck Publishing House, Bucharest, 2011, p. 384.

conduct adopted by such individuals is to take the obligation to intervene with a public official to induce him to perform, not to perform, to expedite or to delay the performance of an act which falls within his duties, in accordance with art. 291 par. 1[25] of Law no. 286/2009 on the Criminal Code[26], a situation which was not foreseen by the legislator in criminalizing influence peddling in art. 257 of Law no. 15/1968 on the Criminal Code, as amended[27].

The quality of the passive subject of the crime of influence peddling is represented in terms of the Criminal Code, any unity stipulated in art. 176 new Criminal Code or a private legal body in whose service operates the public official or the official who influences the active subject who receives money or other benefits.

The Law no. 15/1968 on Criminal Code, annotated, does not stipulate influence peddling regarding foreign officials. This act was incriminated by art. 8[1] from Law no. 78/2000. These stipulations were included in art. 294 Criminal Code and state that public officials or individuals who carry out their activity on the basis of a contract or other persons who have similar competencies within a public international organization to which Romania is a party. This also refers to members of parliamentary assembly or international organizations Romania is party; public officials who work under contract within the European Community; persons with legal functions in international courts whose competence is accepted by Romania; officials of a foreign state; members of parliamentary assembly or administrative staff of a foreign state may be the passive subjects of influence peddling.

Regarding there persons stipulated in art. 294, for those stipulated at lit. c din Criminal Code, the dispositions of pct. 27 of Law no. 187/2012

[25] Art. 291 par. 1 Criminal Code „asking, receiving or accepting the promise for money or other benefits, directly or indirectly, for the self or other person, committed by a person who is influential or claims to be influential upon a public servant and who promises to make the public servant act or nor, speed or delay and act that falls under his duties or to perform an act contrary to these duties".

[26] The articles which incriminate influence peddling are included in Law no. 286/2009 on the Criminal Code, published in the Official Gazette no. 510 of 24 July 2009, and Law no. 78/2000 for preventing and punishing corruption acts, published in the Official Gazette no. 219 of 18 May 2000.

[27] The Criminal law of 1968 was adopted by Law no. 15/1968, published in the Official Bulletin no. 79-79 bis/21 June 1969, republished in the Official Bulletin no. 55-56/ 23 April 1973 and according to the Law no. 140/1996, in the Official Gazette no. 65 of 16 May 1997.

for enforcing Law no. 286/2009 on the Criminal Code[28], there are some changes so that the dispositions apply to public officials who are under contract or other person with similar competencies within the EU. At the same time the provisions under 28 of Law no. 187/2012, are completed by the provisions of art. 294, lit. g, according to which the provisions apply for "members of the jury within a foreign court".

Also, by the provisions of art. 293 Criminal Code, the law maker also extends the quality passive subject of the crime of influence peddling on people who on the basis of an arbitration agreement, are called upon to take a decision on a dispute that is given to the settlement by the parties to this agreement whether the arbitration procedure shall be conducted under Romanian law or under any other law.

We note that also a civil servant is the person who exercises a public service and who was invested by public authorities or who is subject to control or supervision for the fulfillment of their respective public service and persons working permanently or temporarily, with or without remuneration, a duty of any kind in the service of individuals as stipulated in art. 175, par. 2 of the Criminal Code or within a legal body (in accordance with art. 308, par. 1 of the Criminal Code).

On the other hand, the activities constituting material element of the offense of influence peddling is to receive, demand or accept promises of money or other benefits, directly or indirectly, to determine an official to perform, speed or delay something that falls within the scope of his employment or to perform an act contrary to these duties.

From the point of view of the objective side of the crime, it will include two cumulative actions, i.e. the actions of claiming, solicitation or acceptance and the second of promising. Also, in art. 291 of the Criminal Code, in order to complete *the actus reus* of the crime of influence peddling there are introduced two alternatives, namely, "delay" of an act falling within the scope of his employment or an act contrary to these duties. Also, these measures, according to the Criminal Code will be made to expedite the fulfillment by the official of an act falling within the exercise of his duties, a provision that is in the text of the new Criminal Code[29]. The "receiving" consists of taking a sum of money or property, directly or through another person. "Solicitation" consists of a request by the active subject of this crime, tacitly or explicitly, to give an

[28] Published in the Official Gazette no. 757 of 11 December 2012.
[29] www.cdep.ro.

amount of money or property, and "acceptance" involves agreement for the promises or gifts.

Also, the purpose of completing the *actus reus* of the crime must meet and some essential requirements. Thus, it is necessary for the offender to have influence or to let to believe that an official has influence (by friendship), also it is necessary that the perpetrator promises the intervention to a public official, and the action that constitutes the material element of the crime to be carried out before the official have performed the act.

We have made this detailed analysis of the constitutive content of influence peddling to delimitate the material acts from the action of the lobbyists which may have or not success but which is not illegal and is meant to eliminate some deficiencies of the laws in different fields like economy, health, culture[30]. The crime of influence peddling affects social relations regarding the normal carrying out of public or private institutions and induces a lack of trust regarding the public servants[31].

Thus, the bill[32] defines lobby as all the legal actions performed to influence the activity of the legislature or the executive power, either public central or local institutions, actions performed for third parties in exchange of material benefits stipulated in the lobby contract.

This bill also regulates the conduct of actions to influence the work of the legislative and executive in favour of a third party under a contract of lobbying. This category includes: information on beneficiaries who have taken steps to achieve the objective pursued; research and gather information necessary to fulfil the purpose; inform beneficiaries of the actions undertaken and the monitoring of results; analysis of activity of the central and local public authorities; participation in debates organized by central and local public authorities; developing and attracting public support through any means of advertising, media conferences and public debates; contributions to political strategies and/or economic and attracting the support of political parties to achieve the objective pursued; contacts with representatives of legislative and executive power, be it public or local authorities and other related activities of lobbying.

Article 2 defines the scope of as one of the following activities, except activities that are contrary to the country's defence and national security or prejudice the rights and fundamental freedoms: the exercise of legislative initiative: the withdrawal, modification, adoption or repeal, as

[30] See Liviu Mihăileanu, Aurelian Horja, *op. cit.*, p. 30.
[31] Ilie Pascu, Mirela Gorunescu, *Drept penal. Partea specială*, *op. cit.,* p. 402.
[32] Arguments for the bill regarding lobbying. www.cdep.ro.

appropriate, of laws, decisions or motions by the Chamber of Deputies and the Senate, a decree issued by the President, an order issued by the Government, or other administrative act issued by the public authorities, central or local; exercising the function of strategy by the government, implementation of the country's economic development programs, achieving social policy and the function of state property management and developing and implementing policies and strategies on specific areas of activity by the ministries; nomination, hearing or confirmation of a person in public office that is elected by the Chamber of Deputies and the Senate, by local authorities, including whether it is called by the authorities of central public administration.

Lobbying can be performed by any physical or legal body after having been registered.

This bill seeks to legitimize the efforts made by the business sector to legalize the activity of influencing the decisional sector according to everybody's own interests as well as enhancing the quality of the decision making process by delivering professional information to the law makers[33].

However the need to regulate lobbying has generated different opinions. On the one hand, it is considered that a law on lobbying would provide legal cover for influence peddling, and on the other hand it is believed that pressure groups do not want legislation to bring transparency of their work in order not to jeopardize their interests. Moreover, regarding the need to adopt a law on lobbying the Government[34] considers that the regulation of lobbying in the European Union does not have as an objective the harmonization of laws and practices of the Member States, only enhancing the transparency of the decision- making process so we cannot speak about the Romanian state obligation to regulate this area, and a decision on whether such a law is needed belongs to the Romanian legislator. Under these circumstances, if the legislature will be sufficiently motivated it shall adopt a law regulation on lobbying.

## 5. Conclusions

We believe that the purpose of lobbying regulation in our country is the transparency of decision-making process within the public authorities

[33] Expunere de motive la Proiectul Legii privind organizarea activității de lobby. Document disponibil online în www.cdep.ro.
[34] Document disponibil online în www.cdep.ro.

and accordingly, the involvement of competent bodies by monitoring the activities, carried out by implementing an efficient system of lobbying contracts. Although the topic has generated different opinions we believe that this activity must be regulated, since it takes place, leading eventually to the creation of a more institutional transparency otherwise, this activity could escalate at any time into corruption.

## References

**1.** Alina-Costina Bărbulescu, *Lobby versus trafic de influență*, Eftimie Murgu Publishing House, Reșița, 2012.

**2.** Alexandru Boroi, *Drept penal. Partea specială. Conform Noului Cod penal*, C.H. Beck Publishing House, Bucharest, 2011.

**3.** Jean-Marie Denquin, *Introduction a la science politique*, Hachette, Paris, 1992.

**4.** Liviu Mihăileanu, Aurelian Horja, *Reglementarea activității de lobby în anticamera influenței*, C.H.Beck Publishing House, Bucharest, 2009.

**5.** Ilie Pascu, Mirela Gorunescu, *Drept penal. Partea specială*, Hamangiu Publishing House, Bucharest, 2008.

**6.** Roger-Gérard Schwatzenberg, *Sociologie politique*, Editeur Monchrestien, ed. 5-a, Paris, 1998.

# ON THE POSITIONING OF THE OFFENCE OF INFANTICIDE IN THE NEW CRIMINAL CODE

**Rodica BURDUŞEL**[*]

**ABSTRACT**
*The new Criminal Code has introduced amendments on the offence of infanticide. Some of them, such as positioning, denomination, and special legal object are approached mainly from a critical and well-argued point of view, including debate-worthy proposals.*

**KEYWORDS:** *family member, infanticide, family, new Criminal Code*

Until its enforcement on Feb 1, 2014, the new Criminal Code was subject to numerous comments regarding both the regulation of institutions, in its general part, and the incrimination of deeds as offences, in its special part.

The *Criminal Law Journal* published in issue 1/2009 an article[1] presenting critical thoughts on the amendments brought to the offence of infanticide by Law no. 286/2009 (the new Criminal Code), regarding the new denomination of the offence, its positioning in the special part of the Criminal Code, and the special legal object, among brief presentations of legislative landmarks and suggestive references from comparative law.

By making some personal observations, we hereby set out to further nuance some of the topics approached, following how the introduced changes fall within the legislator's new conception of the special part of the Criminal Code.

**1.** The author of the above-mentioned article noted, by taking a critical stance, the legislator's new vision on this offence, rendered through the following changes:

a) Positioning the offence of infanticide under Title I – *Offences against the person*, Chapter III entitled – *Offences committed against a family member*, instead of Chapter I – *Offences against life*;
b) Changing the denomination for the offence of infanticide: *Murder or harm of the newborn committed by the mother*;

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[1] Petre Dungan, *Pruncucidere. Reflecţii*, RDP, no. 1/2009, p. 48-50.

c) Changing the special legal object as a logical consequence of the previous amendments.

We consider that the legislator's interventions – correctly noticed and pertinently argued – should be seen not only as actual amendments, but as changes with special purposes intended to solve certain issues.

Regarding the new positioning of the offence of infanticide, whose denomination was changed into *murder or harm of the newborn committed by the mother*, we note that the legislator maintained the position of the deed of murdering newborn children under Title I, but placed it in a new chapter within this title, which it entitled *Offences committed against a family member*.

We consider that this is a change of substance, in two ways: on one hand, this incriminates as freestanding offences, more precisely offences against life, against bodily integrity or health, depending on the immediately occurred consequence, violent manifestations whose victims are family members; on the other hand, this incriminates the deed of a mother murdering her newborn child through an approach that is different from the previous, as it is centred on new definitive, essential elements, such as *the capacity of family member* of the passive subject, *the state of mental disorder* of the active subject – the mother – at the time of committing the action or the inaction, the commission of the deed of murdering a newborn child immediately after birth, *but no later than 24 hours*.

The legislator has accustomed us to indicating through the names of the titles, chapters or sections the social value protected by the law from the offences directed against it. This indicates that there should always be a link between the name of the titles, chapters, sections and the offences stipulated under them, as a relationship between what we protect and whom we protect it from: life is protected from the offence of murder; patrimony is protected from the offence of theft; state security is protected from the offence of treason.

The correspondence between the name of Chapter III and its contents, verified in this case, leads us to the conclusion that the intention was to protect the family member from the offences against life, bodily integrity or health, incriminating as offence the deed named *family violence*, under which the legislator placed infanticide – an offence we were used to find within the group of offences against life.

Thus, in the Criminal Code of 1864, the offence of infanticide was positioned under Title IV – *Crimes and offences against private persons*, Chapter I – *Crimes and offences against persons*, Section I – *For murder*

*and other big crimes. Murder threats against persons*, in Articles 230 and 232.

In the Criminal Code of 1936, the offence of infanticide was stipulated under Title XIII – *Crimes and offences against persons*, Chapter I – *Crimes and offences against life and bodily integrity*, section I – *Murder*, Article 465.

In the Criminal Code of 1968, the offence of infanticide was regulated under Title II – *Offences against the person*, Chapter III – *Offences regarding sex life*, Article 197.

We notice that the new positioning of the offence of infanticide has no legislative precedent in the previous criminal codes, as it is explained through the newly introduced social value: the family member.

By doing so, the legislator intended to strengthen the legal and criminal protection of the family, which it safeguards under Title VIII – *Offences that touch on relationships regarding social cohabitation*, Chapter II – *Offences against the family*, Articles 376-380, by paying special attention to the family members, as the legislator could have protected the family in the broad sense of the word in only one place, in the special part, instead of fragmenting it and distinctly protecting the family members.

However, by making this change, the legislator clearly indicates it wanted to separately protect the member within the family, making it a value on its own, separate from family, because the social and legal reality frequently shows that family members are victims of offences, that family violence has developed to such an extent that it was required to safeguard the family member through special norms.

Thus the legislator aimed at underlying in the new Criminal Code the presence of a new group of offences also known as domestic offences, characterized by diverse violence starting from physical, psychological, verbal, and sexual up to economic violence[2].

If this was the intended result, then it would have been more appropriate that the family member were protected from all the violent manifestations directed against him, by grouping all offences in one single place. As such, some of the offences against sexual freedom and integrity (rape, sexual assault, sexual intercourse with a minor, sexual

[2] Sorin M. Rădulescu, *Sociologia violenţei (intra)familiale: victime şi agresori în familie*, Ed. Lumina Lex, Bucureşti, 2001, p. 19.

corruption of a minor)[3] that are stipulated in Chapter VIII could have been added to the deeds under Chapter III, which protects the family member.

It is worthy to note that in the case of offences regarding sexual freedom the legislator no longer uses the phrase *family member*, like in the previous Criminal Code, in order to create an aggravated version, but instead resorts to the criterion of kin, which is found in the notion of *family member* defined in Article 177 of the new Criminal Code[4].

Concretely, for the purpose of exemplification, through the aggravated version of the offence of rape provided in Article 218, para. 3, letter b), the following are protected as family members: 1. victim – brother in relation with author brother or sister; 2. victim – sister in relation with the author brother or sister; 3. victim – father/mother in relation with the author son or daughter; 4. victim – grandmother/grandfather in relation with author grandson or granddaughter.[5]

It is clear that the legislator intended to protect the family member, but did not provide to all family members this protection in respect of sexual violence, because the contents of Article 218, para. 3 letter b) of the new Criminal Code refer only to brothers, sisters and next-of-kin of the author of the offence, mentioned as family members in Article 177 para. 1, letter a) and para. 2 of the new Criminal Code, but not to other family members like the spouse (Article 177 para. 1, letter b) of the new Criminal Code) or persons that established relationships similar to those between spouses

[3] Art. 218.Rape – para. 3 letter b) new Criminal Code – the victim is next-of-kin, brother or sister.
Art. 219. Sexual assault – para. 2 letter b) new Criminal Code – the victim is next-of-kin, brother or sister.
Art. 220. Sexual intercourse with a minor – para. 4 letter a) new Criminal Code – the victim is next-of-kin, brother or sister.
Art. 221. Sexual corruption of a minor – para. 2 letter a) new Criminal Code – the victim is next-of-kin, brother or sister.

[4] Art. 177. Family member – (1) By *family member*, the following is understood:
a) ascendants and descendants, brothers and sisters, their children, as well as the persons that became relatives by adoption, pursuant to the law;
b) the spouse;
c) persons that established relationships similar to those between spouses or between parents and children, in the event they cohabitate.
(2) The dispositions in criminal law regarding family members, within the limits provided in paragraph (1) letter a) also apply, in case of adoption, to the adopted person or to his descendants in relation with the natural relatives.

[5] Constantin Duvac, in *Explicaţii preliminare ale noului Cod penal*, vol. II, articles 53-187, Ed. Universul Juridic, Bucureşti, 2011, p. 540-542.

or between parents and children, in the event they cohabitate (Article 177, para. 1, letter c) of the new Criminal Code).

This entails that rape between spouses is incriminated only in the simple version of the offence, the same as rape between live-in partners and the rest of the family members, though these two categories of persons are part of the "family member" notion and, therefore, they should have been mentioned alongside the relatives in the aggravated version.

This situation can be rectified by returning to the wording used in the previous Criminal Code: *rape committed against a family member*, in the meaning of this phrase in Article 177 of the new Criminal Code.

Consequently, in Chapter VIII of the new Criminal Code, the family member is also protected against sexual violence, therefore the provisions regarding family members concerning these offences should have been placed under Chapter III, which would be positioned after offences against sexual freedom and integrity, as to first become aware of the latter.

Though the legislator intended to protect under Chapter III only the family member, separated from the institution of the family, it only succeeded to provide limited and incomplete protection by not including in this chapter all the norms regarding the family member.

To this effect, we consider that the following solution would have been more appropriate, being that it is formed of a complex group of protective norms for the institution of the family through the means of criminal law: following Title I, create Title II named – *Offences against the family*, which should be divided into several chapters: Chapter I – *Offences committed against a family member*; Chapter II – *Offences regarding alimony obligations*; Chapter III – *Offences regarding marriage*.

In conclusion, if the purpose of creating Chapter III is to prevent and sanction family violence, we think it should both address the family member and the institution of the family.

**2.** The critical and nuanced approach of Chapter III allows us to comment on the positioning of this chapter of the offence of infanticide, whose denomination was changed into *murder or harm of the newborn committed by the mother*.

This chapter of the offence was positioned by the legislator according to the capacity of the passive subject – the newborn child – as a family member. Consequently, the violent acts directed against life, bodily integrity or health of the newborn were grouped under Chapter III.

By doing so, the legislator indicates it chose for the positioning of the offence of infanticide in the new Criminal Code the status of family member of the newborn child and not the latter's right to life, without presenting a reason for which the right to life could be compared to the status of family member and replaced by the latter.

The right to life has always been the first protected right for persons, irrespective of age, health, gender, capacity or relation between author and victim. The right to life was sufficient to itself. The only condition was that the person was alive at the time of commission of the offence. Any particular aspects regarding the victim – such as the capacity of being a spouse or close relative to the author, or the pregnancy of the victim – were solved within the group of offences regarding life.

In order to erase our legislative tradition indicating that infanticide has always been included among offences against life, irrespective of the organization of the criminal code at that time, the family member capacity should be a very solid justifying reason.

The comparative criminal law argument to which the author of the above-mentioned article also refers – that four criminal codes (the German, Hungarian, Swedish and Portuguese criminal codes) position infanticide among offences against life – could have been a convincing reason for the Romanian legislator – that often invokes the example of foreign legislation – in order to maintain this offence among the other offences against life.

The deeds of men are mostly heterogeneous and it's difficult to include them all in a single category. But among all the ensuing interferences, we ought to choose the one that serves the intended purpose best. It is true that in our case the purpose of the legislator was special – protecting the family member, but when we want to see what exactly we protect concretely, we realize that life is the *erga omnes* opposable value that we safeguard.

The protection of the family member isn't actually done against an offence named *family violence*, but still against the traditional offences of murder, bodily harm, rape, where the family member is victim.

As a matter of fact, the deed from Article 199 of the new Criminal Code, named *family violence*, references to Article 188 (offence of murder), Article 189 (aggravated murder), Article 193 (beating or other violent acts), Article 194 (bodily harm) and Article 195 (death-inducing beating or harm).

Our legislator tried to choose between life and family member, selecting the latter, but it could have just as well taken into consideration

the family to which the family members belongs and position infanticide among offences against family.

**3.** Positioning the offence of infanticide in the chapter regarding the offences committed against the family member is a change that entails other amendments.

Thus, the denomination of the offence of infanticide, which referenced only the murder of a newborn child by its mother, was replaced with another denomination that resulted in a *nomeni iuris*, that is *murder or harm of the newborn committed by the mother*.

The new denomination is widely descriptive, as it explicitly reveals the content of the offence by indicating the essential components of the legal structure (the material component – *murder or harm*, the passive subject – *the newborn*, and the active subject – *the mother*) and, implicitly, the targeted social values – *life, bodily integrity, health*.

The fact of retaining two fundamental attributes of the person in the incrimination norm of the deed of murdering a newborn child is a novelty in legislation, as it has never been used before to regulate the offence of infanticide. It can receive both appreciation and criticism.

The reasons for which this incrimination was chosen could be the following:

The legislator distinctly regulated in Article 200, para. 2 of the new Criminal Code the deed of *causing harm to the newborn* immediately after birth by the mother that is in a state of mental disorder, along with the deed of *murdering the newborn*. The latter is stipulated in para. 1 of Article 200.

We believe that this choice can be explained by the absence in the previous Criminal Code of the incrimination of the deeds that harm the bodily integrity or health of the newborn, committed immediately after birth by the mother that is in a state of postpartum disorder.

When the act of murder remained in the state of attempt because the life of the newborn was saved, the attempt was not punished, but for harming the bodily integrity or health of the newborn the mother was held liable for one of the offences directed against these values (beating or other violent acts, bodily harm or serious bodily harm), in relation with the required number of days for medical treatment. The Criminal Code did not contain any body of text incriminating separately the act of murder and the act of causing harm to the newborn child.

This situation caused sanction-related problems to the mother, who was always considered an active subject protected due to her state of

postpartum disorder that led her to murdering her newborn child and received milder sentences than any other author of the offence of murder. However, as author of the offence of causing harm, the mother was sanctioned using the penalty stipulated for offences against bodily integrity or health, without benefiting from the legally reduced limits.

Through the new regulation of the offence of infanticide, the legislator eliminated these situations, thus creating a special incriminating text that protects the life, bodily integrity and health of the newborn, and sanctions the mother by using the penalty of imprisonment established within special limits.

Nevertheless, the positioning of two deeds that represent separate offences under the same article can be considered an economic option, but not a legislative option, as it does not prevent us from seeing in Article 200 the incrimination of two criminal deeds – one directed against life and another one against the bodily integrity and health of the newborn child immediately after birth, but no later than 24 hours, both deeds committed by the mother that is in a state of mental disorder.

In a critical approach, the legislative novelty is an obvious deviation from the traditional line of incrimination which, when used, did not pass without criticism.

Thus, the procedure of grouping in the same body of text several offences was used before in the previous Criminal Code, regarding the offence stipulated in Article 266 of the Criminal Code – *Illegal arrest and abusive search*, and was criticized with good reason[6], as no justification was found for the legislator other than making an insufficiently examined choice.

Whilst in the case of Article 266 of the Criminal Code we could find a link between the paragraphs, consisting in the protected social value –

[6] Avram Filipaş, *Drept penal, partea specială*, Ed. Universul Juridic, Bucureşti, 2008, p. 500 („În cazul acestei fapte avem mai multe infracţiuni adunate de legiuitor în acelaşi text de lege. Şi în alin. 1 şi în alin. 2 sunt infracţiuni care nu au ce căuta împreună. Nu pot apărea ca formă a alin. 1. Există în teorie un obicei, şi anume că totdeauna când analizăm un text penal, alin. 1 dă tonul, de la care avem alineatele în continuare.... Această legătură care există între alineate în structura unei fapte penale larg descrise în textul de lege nu funcţionează aici").
„In the case of this deed, we have several offences that the legislator convened in the same body of law. Paragraphs 1 and 2 mention offences that shouldn't appear together. They cannot appear as form of paragraph 1. In theory, it's custom that paragraph 1 sets the tone of the analysis of the criminal text, as the following paragraphs ensue from it....This connection between the paragraphs in the structure of the criminal deed that is amply described in the body of law does not work here").

*justice*, which perhaps led the legislator to this union, in the case of Article 200 of the new Criminal Code, this reason no longer subsists on the offence of infanticide, even though both fundamental attributes concern the *person*, which is protected as common social value for all offences under Title I.

The fact that they are attributes of the person does not represent a sufficiently solid argument as to accept the inclusion of two deeds (murder and causing harm) in one body of text, because each attribute of the person must be valued and protected separately, as life takes priority over bodily integrity or health, by creating distinct chapters or sections where the respective attribute is the only safeguarded value.

**4.** The presence in the text of Article 200 of two main social values reveals more incongruities:

a) By including the two attributes in the incrimination norm of the same deed, it is no longer possible to ascertain that life is the mainly protected social value and bodily integrity and health are secondarily protected social values, as it is usually assessed when the legislator places several social values in the same incriminating text, because the two attributes are positioned in two different offences and are main social values for each of these offences, which strengthens our belief that the changes to the offence of infanticide were not closely examined.

b) The two fundamental attributes of the person are affected by two different material elements – murder and causing harm, which makes their legal approach as a single group of social values impossible. They can be approached only as different social values, as they actually are, which are affected in turn, as the mother cannot be charged with both the deed in para. 2 and the deed in para. 1. It is obvious that the legislator placed in the same text two distinct offences, with much more differentiating elements (the protected social value, the material element, the result) than similar elements (the active subject, the passive subject).

Under these circumstances, we can say that the text raises a technical legal issue that deviates from the rule, as the first paragraph incriminating the simple version of the offence is not followed in the other paragraphs by aggravated or attenuated versions, procedure dispositions or references to the penalty, as the case maybe, but – instead – by another offence.

c) The indication in the title of the individualized author – *the mother* – is also incompliant with our tradition, as the legislator mentioned it exclusively in the norm. Until now, no pertinent argument was presented for indicating the author of the offence in the actual denomination thereof, except when intended to draw attention to the author.

If this change is founded and not just conjectural, perhaps a constant attitude should be adopted and the author of the offence should be included in the denomination of all offences where the legislator details him. Or perhaps the legislator intended to repeatedly point out that the natural mother alone is the author of this offence.

This could entail that the new Criminal Code is, to a certain extent that is yet undetermined, centred on the offender rather than the protected, which could mean that the central element of the Criminal Code is no longer the protected value but the offender.

***In conclusion*,** we consider that if the legislator chose to maintain the distinct incrimination of the offence of infanticide in the new Criminal Code instead of attenuated version of the offence of murder – as the doctrine repeatedly recommended, the incrimination thereof should be made by including it in separate chapters regarding the offences against the person, more precisely against bodily integrity or health.

# JURISPRUDENCE IN THE ROMANIAN LEGAL SYSTEM

**Mihail NIEMESCH** *

**ABSTRACT**
*It should be noted that throughout the history the place, role and functions of jurisprudence within law sources varied from one era to another, from one legal system to another.*
*In common law, the place and role of jurisprudence in the realm of law sources is well known and it does not make sense to go into detail.*
*In Romania, the judge is subject to the law and in his work he applies the rules of law. Interpretation of the law, as does the magistrate must be adapted to reality and must be an inspiration to the legislature, which confirms personal opinion on the nature of jurisprudence as "a helping law source" in our legal system.*
*We note that importance of jurisprudence will increase within European law system.*

**KEYWORDS:** *jurisprudence, sources of law, European law*

Romanian legal system has begun to face a problem of increasing importance: to know whether today jurisprudence is a genuine source of law or not, especially because now in the European Union, there cohabitate many legal systems. It is however noted that historically the place, role and functions of jurisprudence within the sources of law, has varied from one era to another, from one legal system to another. The interpretation of the law given by Roman legal consultants generated laws and prosecutor decisions were considered a source of law. In continental Europe since the 18th century, with the advent of the Enlightenment, which desired to create a rational society and with the advent of legal codes, role and powers of jurisprudence fell sharply, that only the decisions of higher courts were valued as a source of law.

In *common law*, the place and role of sources of law in the realm of jurisprudence is well known and does not make sense to go into detail. But, unlike the *common law*, in European law the obligation to comply with earlier decisions did not exist; judges could return and change jurisprudence by a new interpretation of the legal provisions.[1] In a recent

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[1] Sorin Popescu, L.Manea, *Court of Justice of the European Union between the Anglo-Saxon legal system, and the Roman-Germanic one. Legal value* in the Legislative Information Bulletin no. 2/2012, Internet source, www.clr.ro.

article it is stated very categorically that the system of civil law, as in the Romanian legal system does not recognize that judicial precedent is a source of law, invoking the principle of powers separation.[2]

At present[3] judicial practice is not a source of law in Romania

However, the instructions given by the superior courts in resolving appeals, provisions relating to certain legal issues and the need for administration of evidence and so on, are binding on lower courts in the case of cassation referring back to judgment. Broadly speaking, we can say that the higher court ruling has the value of a law source for the activity of the lower court that will proceed to a retrial; it is true that in this case there is a strict limitation at the lower court that will proceed to retrial and on certain issues fixed by the higher court.

In the past, the Supreme Court or the Supreme Court of Justice and now the High Court of Cassation and Justice issued and still issue guidance decisions that have the importance of sources of law with limited applicability. Basically, the main courts regularly develop collections of jurisprudence with related solutions. The goal would be to guide individuals in the right direction, the collection is serving practitioners, alike.

Likewise, we evoke the regulations of the old and the new Code of Civil Procedure, the appeal in the interest of civil law. Thus according to art. no. 329, 330 of the former Code of Civil Procedure, it is provided that, in so far as, in the courts of law if there arise issues solved differently by those, the General Prosecutor, *ex officio* or at the request of the Minister of Justice and the management boards of appeal courts, are entitled to ask the High Court of Cassation and Justice to rule on questions of law that were differently resolved by the courts. Decisions which resolve this outstanding question, shall be decided by the sections of the High Court of Cassation and Justice and published in the Official Gazette of Romania, Part I.

[2] M. Agheniței, I. Flămânzeanu, *Jurisprudence as source of law* in the Criminal Law Review nr.1/2013 Legal Universe, Bucharest, 2013, p. 115.

[3] Although it is exceptionally recognized the possibility of a legal vacuum or a judicial loopholes, it was not allowed to call the law, in such circumstances the judge could not apply judicial precedent but he guided himself by his own legal socialist conscience, by policy and legislation on the principles of the socialist state. He admitted, however, a legal advisory practice, given the hierarchy of courts; superior court practice could be a guide for lower level instances without binding. See L. Barac, Elements of the theory of law, All Beck Publishing House, Bucharest, 2001, p. 148.

Solutions are pronounced only on points of law and have no effect on judgments examined or on the situation of the parties in those proceedings. Absolution given to problems as judged is obligatory for the courts. The situation is regulated in the same manner as provisioned in art. No. 514-518 of the New Code of Civil Procedure.

Examples of appeal in the interest of the law:

- Decision of HCCJ no. 41/22 September, which allowed the appeal in the interest of law filed by the General Prosecutor appointed to the High Court of Cassation and Justice establishes that in litigations between medical personnel and medical units, concerning the payment of certain amount of money representing labour rights, social health insurance funds do not have passive proceeding quality.
- Decision of HCCJ no. 4/19 January 2009, allowed the appeal in the interest of law filed by the General Prosecutor appointed to the High Court of Cassation and Justice, and it is determined that the provisions of art. 374[1] of the Code of Civil Procedure, in relation to art. 61 of Law no. 58/1934 and that of art. 53 of Law no. 59/1934, shall be construed as meaning that, promissory notes, bills of exchange and check should include executory form in order to be enforced.
- Decision of HCCJ no. 15/6 April 2009, the United Sections, interpreting the provisions of art. 278 para. 3 and art. 2781 par. 2 of the Code of Criminal Procedure, as regards the legal nature of the terms, states that they are limitation periods.

Whether a judge may or may not create law is one that, in relation to the constitutional provisions, should receive a reply that, basically, he cannot do this, but reality shows that, however, certain judgments, such as, for example, those given in the matter of appeals on points of law or the Constitutional Court declare unconstitutional certain legal rules, have a "creative role" because they create binding rules for all judges[4].

There are legal opinions in Romania, which qualifies jurisprudence as a true formal source in our legal system.[5] The author Betinio Diamond

[4] M.A. Hotca, *Criminal Law. General part. Criminal law and crime*, PH. CH. Beck, Bucureşti, 2012.

[5] B. Diamant, *Jurisprudence as a source of law in the legal system* in Romanian law studies, year 11 (44), no. 1-2/1999, p 197 et seq. See also C. A. Dumitrescu, Introduction to the theory of sources of la, Paideia P.H. Bucharest, 1999, p. 79 et seq., 87. The author shows that, necessarily, when we speak of a source of law we mean any legal norm, regardless of the area that it covers. It must be considered, along with jurisprudence, as an important formal source, the administrative and notary activity.

shows that jurisprudence is a legal provision, case law or legal doctrine, which is required to be considered by the court in resolving a dispute.

Among the arguments made by the author in support of his opinion are:

1. Law no. 105/1992 on the regulation of private international law is silent on the law applicable to foreigners in Romania on marital status and their capacity. Courts have recognized the same legal situation on their personal status as well the situation of Romanians abroad without the existence of a written text in this regard. So in this issue, the case was a source of law leading to what private international law doctrine called "reciprocity" of a one-sided text.
2. guiding decisions of the former Supreme Court of Justice are binding on courts and "interpret" the law.
3. provisions of art. 315 para. 1 of the former Code of Civil Procedure, whether through these instructions it is even given an interpretation that is called "creative" of a statutory provision, it is mandatory for the court where the case is retried. Jurisprudence becomes a source of law indirectly.
4. art. 144 let. c of the Constitution relative to the decisions of the Constitutional Court in the rear control of entry into force of a law. Decisions being binding are made source of law as they may lead to the removal of the application for a text and, as according to art. 3 of the old Civil Code, the judge cannot refuse to judge because there are no legal regulation, it comes indirectly to the effect of solving a case on the basis of provisions or principles resulted as applicable by the Constitutional Court decision on an exception of non-constitutionality.

Professor Sofia Popescu, expressing her view on Betinio Diamond's arguments, shows that[6]:

- the case relied on the evidence of foreign law is irrelevant, being an exception to the *iura novit curia*, foreign law is considered as an element of fact and not of law;
- regarding the obligation of the court of appeal's interpretation she stresses that it cannot give an interpretation *contra legem* and the performer is prohibited to alter or supplement the law by interpretation;

Starting from the definition given to the formal legal source, it means that we express reservations about the latter opinion.

[6] Sofia Popescu, A*gain about the practice of law as formal, legal source* Romanian Studies, Romanian Academy P. H., Bucharest, year 11 (44), no. 1-2/1999, p 199 et seq.

- relative to the constitutionality of laws, based on the idea that settling sources of law answer to the question: Who is the author of norm?, Professor Sofia Popescu notes that scrutiny of the constitutionality of the law is entrusted to a judicial body (as was the High Court of Justice according to the Constitution of 1923), but the Constitutional Court with a different nature.

After highlighting that the issue of judicial practice as a source of law is restricted to the question of whether judicial practice is the **direct** source of law and not whether it is indirect source (the latter quality not being challenged), Professor Sophia Popescu shows that it cannot be ignored that in countries with Romanist-Germanic legal systems (among which is Romania) the judge's role is not only in obedience to the law and its application, but also to adapt the law to the concrete social conditions and remedy gaps in the law in inspiring the legislature. In addition, the influence of the doctrine of the legislature runs through judicial practice, even if it is not a formal source of law.[7]

Further, it is noted that recently in specialized works there has been highlighted the trend manifested in written law countries resorting to judicial practice as a supplementary source of law and in jurisprudential legal systems countries using law as an extra source. These trends are blurring the contrast between legal Romanist-Germanic systems and Anglo-Saxon ones.

In the absence of written law, the role of judicial practice is not only to implement but also to create legal norms. To reach a judgment, English judge must look, first of all, if a similar case was settled earlier.[8]

Constitutionally speaking, judicial antecedent cannot be recognized as having the force of law that is source of law, only exceptionally, in cases provided for in the Basic Law and other laws. It's about: Supreme Court of Justice decisions, issued in appeals in the interest of law, Constitutional Court decisions, certain decisions of the administrative courts and decisions of the European Courts[9].

Standby attitude towards legal recognition of jurisprudence as source of law is based on the principle of separation of powers. Indeed, in a state

[7] Even if socialism in Romania does not recognize that judicial practice is a formal source of law, there should not be neglected the role of judicial practice of transmiting to the legislature the signals of social reality. See A. Naschitz, I. Fodor, *Jurisprudence role in training and developing socialist norms*, People's Republic Romanian Academy P.H., Bucharest, 1961, cited in Sofia Popescu, *op. cit.,* p. 200.
[8] M. Agheniței, I. Flămânzeanu, *op. cit.*, p. 112.
[9] M.A. Hotca, *op. cit.*, p. 46.

of law, legislative bodies create laws, judiciary bodies has to enforce laws in specific cases. To recognize the courts the right of direct normative development would force the door to legislative creation, disturbing the balance of power.[10]

Starting from the assumption that the decisions of the High Court of Cassation and Justice may be sources of law because it may not contain rules of law and from the distinction made in the literature [11] between sources of law and origin of law, the author Marius Andreescu[12] states that the obligation laid for this category of decisions by the Supreme Court of Justice do not provide the quality of origin of law, but they can be considered a source of law. For the same reasons, also a source of law, and not origin of law are the decisions of the Constitutional Court, which, according to Article 147 para. (4) of the Constitution "are generally binding and effective only for the future."

Having to review the constitutionality of art. 329 last para. final thesis of the former Code of Civil Procedure[13] motivated by the fact that the obligation of these decisions violate constitutional principles of justice in the name of law, the independence of judges and their obedience only to the law, the Constitutional Court also found that the interpretation of the laws is a rational operation used by any subject of law in order to apply and observe the law, clarifying the meaning of a legal rule or its scope. Courts interpret the law, necessarily, in the handling of cases with which they were entrusted. In this sense interpretation is the indispensable stage of the enforcement process." As clear as the text of a legal provision may be in any legal system there is inevitably an element of judicial interpretation [...] - as it is said in a decision of the European Court of Human Rights (case "C.R. versus the United Kingdom", 1995)". The complexity of certain causes can lead sometimes to different application of the law in practice courts. In order to eliminate possible errors in the legal characte-

[10] N. Popa, M. C. Eremia, S. Cristea, *General theory of law*, ed. 2, All Beck P.H., Bucharest, 2005, p. 176, Chapter prepared by N. Popa.

[11] M. Voicu, *Protection of Human Rights. Theory and jurisprudence,* Lumina Lex Publishing House, 2001, p. 33-34.

[12] M. Andreescu, *Issues on appeal on the constitutionality of the law and the decisions rendered in this case*, Internet source, www.juridice.ro.

[13] See Constitutional Court Decision no. 93/2000, published in Official Gazette no. 444/08.09.2000, Constitutional Court Decision no. 1014/2007, published in Official Gazette no. 816/29.11.2007, nr.992/2007 Constitutional Court's decision, published in Official Gazette no. 826/04.12.2007, Constitutional Court Decision no. 601/2009, published in Official Gazette no. 357/27.05.2009, nr.32/2009 Constitutional Court's decision, published in Official Gazette no. 109/24.02.2009.

rization of facts and circumstances and to ensure uniform application of the law in practice of all courts, the legislature created the institution of the appeal in the interest of law. Interpretative decision rendered in such cases is not *extra law,* and more so cannot be *contra legem.*

The Constitutional Court also found that interpretative solutions given in the appeal in interest of law, called "*dispensations in law*" cannot be considered a source of law in a classic sense of the concept. Institution of appeal in interest of law gives judges the right to give the Supreme Court of Justice a certain interpretation, thus unifying the differences of interpretation and application of the same legal text by the lower courts. Such constant and uniform interpretative solutions that are not affecting certain parts and have no effect on previously delivered solutions that have entered the power of judged thing are invoked in doctrine as "judicial antecedent" being considered by the legal literature "secondary law sources "or" interpretative sources ".

In another decision[14], the Constitutional Court held that in the case *Moşteanu versus Romania*[15], the European Court of Human Rights, decided - on the obligation of judges to comply with the case law established by the Joint Sections of the Supreme Court - that "reunification rooms or sections of a court is intended to confer special authority of the most important decisions of principle that the court has a duty to decide. This special authority - as in this case, a supreme court - imposes to the sections of this court as inferior jurisdictions without undermining their right and duty to examine independently concrete cases that are referred to".

Analyzing issues of appeal in interest of law in the new projects of procedure codes, in Romania, Dan Lupascu[16] stated that the decision to appeal in interest of law, despite its obligation, is not mistaken with the law and has no *extra legem* legal efficiency or *contra legem* or above time limitation of the law that interprets it.

To remove any doubt about the fact that these decisions do not violate mandatory constitutional principles of justice in the name of law, the

[14] See Constitutional Court Decision no. 916/2008, published in Official Gazette nr. 731/29.10.2008.

[15] *Case Moşteanu and Others versus Romania, judgment of the European Court of Human Rights of 26.11.2002,* published in the Official Gazette, Part I, no. 710 of 18 August 2006.

[16] D. Lupaşcu, *Appeal in interest of law in the projects of the new Procedure Codes*, Internet Source, www.juridice.ro. This text was presented at the conference *The legal force of the judgments in the appeal in interest of law.*

independence of judges and their obedience only to the law [17] – given that all judges do not always fully manifested an attachment to some decisions of the High Court of Cassation and Justice – the author acquiesces to the proposal of constitutional consecration of the binding force of decisions rendered in the resolution of appeals in interest of law, modeled on other states.

Even though, by law, the obligation concerns only the courts, the decision rendered in an appeal in interest of law is devoid of any legal significance to other institutions or individuals, but is indicative, and could impose by force of arguments that based it.

Acording to author Dragos Calin[18] by the new provisions of the draft of the Code of Civil Procedure and Criminal Procedure Code provisions relating to notification of the High Court of Cassation and Justice to deliver a prior decision for revealing certain legal issues there is proposed a new mechanism for unification of jurisprudence practice to contribute, along with the appeal in interest of law, to the Romanian jurisprudence transformation into one predictable, responsive to the reasonable expectations of individuals and also to lead to shorter trials, thus preventing completion of all appeals.

We dare to believe that today, the decisions of the High Court of Cassation and Justice can be considered at least as a "helping source of law" and that, in the context of the pronounced Supreme Court of Justice decisions are considered as rules to guide lower courts. Of course, we know that these decisions are more interpretive in nature, related to pre-existing rules of law.

Settlement by the Romanian courts of the action claiming assets confiscated by the state from March-6-1945 to December-22-1989, made in a common law by reference to the provisions of the European Convention on Human Rights (this is art. 6 of the Convention and art. 1 of

[17] See Constitutional Court Decision no. 93/2000, published in Official Gazette no. 444/08.09.2000 by which, being notified with an exception of non-constitutionality of the provisions of art.no. 329, final thesis of the Code of Civil Procedure motivated by the fact that these decisions violate constitutional principles of practice justice in the name of law, of the independence of judges and their obedience only to the law, the Constitutional Court rejected the plea of non-constitutionality, saying that it does not affect the principles stated and that the legislative solution does not contravene European Court of Human Rights concerning the right of every person to a fair trial.

[18] D. Călin, *The effects of a recent decision of the Constitutional Court, Internet Source*, www.juridice.ro. This text was presented at the conference The legal force of the judgments in the appeal on points of law.

Protocol No. 1) shows an interest for Romanian jurisprudence analysis as a source of law.

Even though, according to art. no. 20 of the Romanian Constitution there was established the prevalence of international regulations concerning fundamental human rights to internal regulation, disputes arising in the practice of courts, controversies partly motivated by the many legislative changes occurring during the trials, led to the formulation, by the General Prosecuter of Romania, of an appeal in interest of law settled the decision of the High Court of Cassation and Justice of 09.06.2008.[19]

Under this decision it is stated on legal claims based on in force legislation, concerning demanding buildings abusively taken from March-6-1945 to December 1989, made after the entry into force of Law no. 10/2001 and settled incompletely by the courts, as follows:

"The competition between the special law and general law is resolved in favor of the special law, in conformity with the principle *specialia generalibus derogant*, even if it is not expressly provided in the special law.

If there are noticed inconsistencies between the special law, Law no. 10/2001, and the European Convention on Human Rights, the latter shall prevail. This priority can be given in a legal claim for recovery based on in force, insofar as such would not affect the property or other right of legal certainty. "[20]

Relative to this decision stands the innovative way that the Supreme Court of Justice has agreed to rule without disposing in any way of issue of law subject to analysis, leaving further burden to the courts to analyze, in different cases, the problem of legal claims with the aim to demand properties taken over by the State improperly, with the consequence of creating a general climate of insecurity and legal uncertainty.

Following this decision, legislation continued to fluctuate, the most significant changes being the adoption of Law no. 1/2009 amending and supplementing Law no. 10/2001 on the legal status of property abusively taken from 6 March 1945- to 22 December 1989, published in the Official Gazette, Part I, no. 63/03.02.2009, respectively Law no. 165/2013 on

[19] For a comprehensive development, see M. Niemesch, *Action to recover assets confiscated by the state from March-6-1945 - 22 to December-22-1989, made by way of common law in the light of the European Convention on Human Rights and the decision of June 9 2008 in the appeal in interest* of law to the High Court of Cassation and Justice, research Bulletin no. 17 Romanian University of Sciences and Arts "Gheorghe Cristea", Little Star P. H., Bucharest, 2008, p.145-151.

[20] Internet source: www.scj.ro.

measures to complete the restitution in kind or by equivalent of buildings abusively confiscated during the communist regime in Romania, published in the Official Gazette, Part I, no. 278/17.05.2013.

An example of the Romanian jurisprudence under the former rules of the Civil Code aims to the institution of right of retention. Concerning this, author Marin Voicu in his doctoral thesis says "so there appears the idea of retention as a means of self-defense exercised under specific conditions taking into account the interest of the legislature to regulate the relations of lesser importance. Therefore, the right of retention was originally a means of self-defense exercised through an asset belonging to the borrower." The same author also states that "the doctrine and jurisprudence have emerged from the provisions, as many as there were, of legal basis and principles legitimizing the institution of right of retention and its modes of application backed by justice – the chief handbook of the law in general".[21]

One effect of the case law as a source of law, jurisprudence that recognized the legal institution of the right of retention, is that the new Civil Code (Law no. 287/2009 on the Civil Code published in Official Gazette no. 511/24 July 2009) this institution is clearly regulated in art. 2495 - 2499. Thus the right of retention is defined in art. 2495 as follows: "One who is obligated to remit or refund a good may withhold it as long as the creditor does not compensate him for the necessary and useful expenses he did for that good or for harm that good caused him."

In Romania, the judge is subject to the law and in his work he applies the rules of law. Interpretation of the law, as does the magistrate must be adapted to immediate reality and must be a real inspiration source to the legislature, which confirms personal opinion on the nature of jurisprudence "as a helping source of law" in our legal system.

In fact, the Swiss Civil Code since the first article states that in the absence of applicable legal provisions, the judge shall decide according to the rules he would settle if he were the legislator.

The law of every state not only requires different independent sources of law, creating legal norms, but also their interaction and, practically, achievement of the law.

In a comprehensive formulation Professor Jean-Louis Bergel says "No one can imagine that the judge may be indifferent to the law, doctrine or practice, or that the legislature ignores doctrine or jurisprudence, or that doctrine or case law is not interested in law or jurisprudence.... There is a

[21] M. Voicu, *Retention right*, Lumina LEX P. H., Bucharest, 2001, p. 30-31.

legal community who beyond internal differences, cooperate in the creation, implementation and evolution of the law and where mutual influences are exercised."[22]

Certainly, in Romania, the Constitutional Court's decisions in matters of unconstitutionality can be seen as helpful sources of law. These judgments may be invoked as a precedent, because if a law has been declared unconstitutional it cannot be the subject of another exception of unconstitutionality.[23]

Regarding the quality of source of law of the decisions of the Constitutional Court, the author George Mihai expressed the view that "we should think whether legal acts of the Constitutional Court can be considered as positive indirect sources of law."[24]

According to the author Steluta Ionescu[25] as "it results from some important decisions delivered in the first years of existence, the Constitutional Court means to identify itself with a "rulemaker", but insists to specify the sense in which we should understand that appellation namely that its position is that of "negative" legislator, which excludes any possible assumption of prerogative of an entity with power to legislate (which in fact would mean "positive legislator")".

From the perspective of the legal practice analysis as a source of law there should be raised also the judicial review of the legality of administrative acts in the form of direct action (which involves the cancellation of illegal act or obligation of public authority to adopt a conduct prescribed by law) and the way of the indirect action, that is exception of illegality (it aims only to remove a unilateral administrative act in settling a law dispute).

Starting from their regulation in art. 18 and 23 of Law. 554/2004 on administrative contentious, published in the Official Gazette, Part I, no. 1154 of 7th December 2004, it is noted that the solutions delivered in subjective contentious and on the objection of illegality have individual character, with *inter partes effects*, whereas judgments delivered in actions of objective contentious that canceled normative administrative acts, have *erga omnes* character, and are generally binding.

[22] J.-L. Bergel, *Théorie générale du droit*, Dalloz, Paris, 1989, p. 67.
[23] Decision of Constitutional Court no.. 19/1997, M. Of. no. 119/11.06.1997.
[24] G. Mihai, *Unavoidable law*, Lumina Lex P. H., Bucharest, 2002, p. 35.
[25] S. Ionescu, *Justice and jurisprudence in the state of law,* P.H. Juridical Universe l, Bucharest, 2008, p. 197.

*Finally,* we note that the importance of jurisprudence will increase in the system of European law. Judicial precedent will acquire a special role that only continental evolution of the law will consider or not as a source of law in the near future. Quite right is retained by the authors Luiza Popescu and Sorin Manea that, inevitably, the judge's role of law creator in settling cases, a role that is not compatible with the skills the principle of separation of powers involves, makes this qualification even more difficult in the hierarchy of sources of law.[26]

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# RELATIONSHIP BETWEEN MEDIATION AND ARBITRATION IN THE LIGHT OF THE NEW MEDIATION RULES ISSUED BY THE INTERNATIONAL CHAMBER OF COMMERCE

**Manuela SÎRBU**[*]

**ABSTRACT**

*Officially launched in Paris, on 4 December 2013, at the International Conference hosted by International Chamber of Commerce, the new ICC Mediation Rules are entered into force from 1 January 2014, replacing the ICC Amicable Dispute Resolution (ADR) Rules, which have been in force since 1 July 2001.*

*The ICC Mediation Rules have been prepared by the ICC Commission on Arbitration and ADR through the work of the Consultative Task Force on the Revision of the ICC ADR Rules, Expertise Rules and Dispute Board Rules, whose members include dispute resolution practitioners and users from widely diverse legal and cultural traditions around the world.*

*Drafted by dispute resolution specialists and users representing a wide range of legal traditions, cultures and professions, the new ICC Mediation Rules provide a modern framework for the conduct of procedures and respond to the needs of international trade today. At the same time, they remain faithful to the ethos and essential features of ICC dispute resolution and, in particular, its suitability for use in any part of the world in proceedings conducted in any language and subject to any law.*

**KEYWORDS:** *Amicable Dispute Resolution, ICC Mediation Rules, Mediation Guidance Notes, International Chamber of Commerce, ICC Commission on Arbitration and ADR, Consultative Task Force on the Revision of the ICC ADR Rules, Expertise Rules and Dispute Board Rules, confidentiality, transparency, efficiency, fairness, negotiated settlement, third party neutral facilitator, arbitration proceeding, jurisdiction.*

The International Chamber of Commerce (ICC) through the International Centre for ADR (the "Centre") launched on 4 December 2013, in Paris, the new ***Mediation Rules*** that will become effective as of January 2014. In the context of the new mediation regulations, published together with the arbitration rules, the mediation procedure is intended to support the arbitration proceedings, facilitating a faster resolution of the case files pending before the arbitration court.

Arbitration under the ICC rules is a formal procedure leading to the obtaining by the parties of a binding decision, susceptible to enforcement pursuant to the both domestic arbitration laws and international treaties.

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Mediation under the new ICC rules is deemed a flexible procedure for dispute resolution governed by the confidentiality principle, a private procedure aimed at achieving a negotiated settlement with the help of a third party neutral facilitator.

The current market requirements and the increased need for a complete approach of the ADR dispute resolution techniques has prompted the Centre to publish in the same booklet the arbitration rules and the mediation rules, thus outlining a well-structured, institutional framework intended to ensure transparency, efficiency and fairness in respect of each individual procedure.

The International Arbitration Court and the International Centre for ADR are the two bodies of the ICC empowered to prepare and administer proceedings specific for the two types of dispute resolution methods[1].

The parties participating in these proceedings benefit, in as much as they refer to the ICC rules for arbitration or mediation, of the experience, expertise and professionalism of a leading international ADR (Alternative Dispute Resolution) provider.

The new ICC mediation rules have been drafted by a group of specialists, the so-called "task force", specialists and experts in the alternative dispute resolution. The work group has had in view all the particular aspects of these proceedings, the specific nature of the jurisdictions, traditions, unwritten law, etc.

The new ICC Mediation Rules, applicable as of January 2014, address the mediation matters, and intend to respond to the current needs mainly but not only of the business environment. An assessment performed by the Centre ascertained that the rate of reaching a settlement in case of conflict is very high, of over 70 percent where the file reaches a mediator, and of over 80 percent where the first meeting of the parties takes place in the presence of a mediator. At the same time, in terms of the time allocated to this proceeding, the files subjected to mediation are resolved within less than 4 months from the date of their transfer to the mediator, with much lower costs[2].

The new mediation rules provide for a series of standard clauses that the parties may use when referring their dispute to this Centre. In accordance with the applicable rules, the parties may set forth in their contract either a clause stipulating the party's option to resort, at any time during the agreement performance, to the resolution of any possible disputes in

[1] www.iccwbo.org.
[2] www.iccwbo.org.

accordance with the ICC mediation rules, or the obligation to refer their dispute to the mediation proceeding[3].

In accordance with the new ICC mediation rules, the mediation may take place either prior to the commencement of an arbitration proceeding or before the courts of general law, or during such proceedings.

Where the mediation occurs during the arbitration proceeding the latter will be stayed throughout the course of the mediation. Thus, the parties may focus on the particular aspects of the mediation procedure. The stay is not compulsory, however we believe it is appropriate at least for the aforesaid reason. In pursuance of the provisions of art. 24 of the ICC arbitration rules, the parties and the arbitral tribunal may decide at their discretion whether the arbitration proceeding is to be stayed during the mediation.

Where the mediation takes place before arbitration proceedings have been commenced, the parties may agree on the statute of limitation periods applicable during the mediation proceeding. Of course, the setting of such periods cannot prevent a party from initiating the arbitration procedure or the proceedings before the general law courts in connection with the dispute referred to mediation. The domestic laws may contain provisions to this effect, or may provide that the statute of limitation periods will not expire whilst mediation proceedings are pending.

"The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules.[4]"

This clause stipulates the parties' option to refer to the ICC mediation rules inasmuch as they are willing to do so, and does not commit the parties to do anything. Should they decide to refer to mediation, the parties may ask the International Centre for ARD for its assistance during the development of this process.

Unlike the foregoing case, according to another proposed clause the parties are obligated, in the event of a dispute arising out or in connection with the development of the respective contract or the performance thereof, to discuss and consider in the first instance resolving their disputes in accordance with the ICC mediation rules. To that effect, one or several parties may ask the Centre for its assistance throughout the course of this process. Thus, it is stipulated that, "In the event of any dispute arising out or in connection with the present contract, the parties

[3] Mediation Guidance Notes, ICC, Commission on Arbitration and ADR.
[4] ICC Arbitration Rules, Mediation Rules - Mediation Clauses, Clause A, page 88.

agree in the first instance to discus and consider referring the dispute to the ICC Mediation Rules[5]."

This clause goes a step further and requires the parties to refer to mediation before commencing any other legal process aimed at the dispute resolution.

In the light of the relationship between mediation and arbitration, ICC proposes two types of clauses that may be inserted in the commercial contract between the parties, both creating an obligation in charge of the parties.

"In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration.

All disputes arising out of or in connection with the present rules shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

It follows from the wording of this clause that the parties are obligated, when a dispute arises out of or in connection with the development or performance of a contract, to attempt in the first instance to settle the dispute using the ICC mediation proceedings. The commencement of mediation proceedings under these rules does not prevent either party from commencing in parallel an arbitration proceeding. Therefore, having in view the provisions of this clause the parties may run in parallel these two dispute resolution proceedings, which are not exclusive of each other. We believe that the arbitration proceeding does not entail the stay of the mediation proceeding; however the arbitral tribunal will be the "forum" for the final determination of the dispute. In as much as a settlement is reached during the mediation proceeding, we believe that such settlement will be presented to the arbitral tribunal, which will acknowledge it and include it in the arbitral award.

Another type of clause that can be included in the commercial contract between the parties specifically refers to the parties' obligation to resolve the dispute in accordance with the ICC mediation Rules followed by the arbitration proceeding.

"In the event of any dispute arising out of or in connection with the present contract, the parties shall refer the dispute to proceedings under

[5] ICC Arbitration Rules, Mediation Rules – Mediation Clauses, Clause B, page 89.

the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration."

According to these provisions, the arbitration proceedings may not be commenced as long as the mediation proceeding is in progress. Inasmuch as a settlement cannot be reached during the mediation proceeding, within 45 days from the filing of the petition for the commencement of the mediation proceeding (this being a recommendation period that the parties may amend in writing by mutual consent and notify it to the Centre), the parties will commence the arbitration proceeding.

Where the parties have included these types of clauses in their contract, the applicability of the provisions of art. 29 of the ICC Arbitration Rules referring to the emergency arbitrator will have to be established. If the parties do not wish to resort to the respective provisions, a specific mention to that effect will be made.

In the course of the arbitration proceedings the parties may decide whether a sole arbitrator (where the tribunal is composed of a sole arbitrator) or a member of the arbitral tribunal (usually the president of the arbitral tribunal) is to assist the parties in the negotiation of a settlement, thus performing the duties of a mediator.

In a such as the mediation does no result in a settlement, the parties may agree that the mediator is to resume the arbitration role, and the arbitration proceeding is to continue.

This procedure is rather frequent in certain jurisdictions, and entirely inexistent in others. In those jurisdictions where this procedure is not used, it is considered that whilst acting as a mediator an arbitrator has private meetings with the parties, and thus takes knowledge of private information disclosed by the parties in the course of the private session without the knowledge of the other party. A consequence of this fact would be that in the capacity of arbitrator such person has to pronounce an award. Therefore, due to the potential risks in certain jurisdictions, the provisions of art. 10(3) allow a mediator to act at the same time as an arbitrator only provided that the parties have consented in writing to that effect[6].

[6] see Mediation Guidance Notes, ICC, Commission on Arbitration and ADR.

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# CONCEALMENT OF SOURCES OF TAXABLE INCOME WITHIN THE MEANING TO ARTICLE 9 PARA. 1 LET. A) OF LAW NO. 241/2005 ON THE PREVENTION AND FIGHT AGAINST TAX EVASION

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**ABSTRACT**

*Article 9 para. (1) let. a) of Law no. 241/2005 on the prevention and fight against tax evasion incriminates "the act of concealing the good or the source of taxable income with a view to avoiding fulfilling the tax obligations".*

*Without attempting an actual analysis of this offence, this article proposes to make a more detailed presentation of the scope of the tax evasion offence referred to in Article 9 para. 1 let. a) of Law no. 241/2005, in the method consisting in the concealment of the source of taxable income. Therefore, we have insisted both on issues regarding the applicability of this law within the meaning of fighting against tax evasion offences and on the preventive aspect, regarded in light of the non-criminal law in force. This under the circumstances in which Law no. 241/2005 comprises very few prevention norms, although it is called the Law for the prevention and fight against tax evasion.*

*The conclusion that should be reached is that by using the expression "concealment" of the source of taxable income, which has a very broad scope, the Romanian lawmaker managed to give a slender regulation to the tax evasion offence referred to in Article 9 para. 1 let. a) of Law no. 241/2005.*

**KEYWORDS:** *Concealment, taxpayer, tax evasion, offence, taxable income*

## 1. Brief general considerations on the modality of regulating the tax evasion offence referred to in Article 9 para. 1 let. a) of Law no. 241/2005

One of the tax evasion offences provided for in Law no. 241/2005 on the prevention and fight against tax evasion consists in concealing the good or the source subject to taxation. This offence is regulated by Article 9 para. 1. let. a) of the law, as follows: "a) concealment of the good or the source of taxable income". We may define this offence as "the act of concealing the good or the source of taxable income with a view to avoiding fulfilling the tax obligations".

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The incrimination was taken over from Law no. 87/1994 on the fight against tax evasion (repealed by the coming into force of Law no. 241/2005), where it appeared with another wording within Article 11 para. 1) let. b), after the law was republished. Thus, Law no. 87/1994 regulated this offence as "the full or partial avoidance to pay the tax obligations, with a view to deriving income, by non-declaring taxable income, concealing the good or the source of taxable income as a result of fictitious operations".

After a more thorough reading of the former regulation included in Law no. 87/1994, one can notice that Article 9 para. 1) let. a) of Law no. 241/2005 takes over only part of Article 11 para. 1) let. b) of Law no. 87/1994, specifically the part relating to the "concealment of the good or the source of taxable income". It is a complete taking-over of the second thesis of this text, which acquires an independent existence, regulating a separate tax evasion offence.

As for the first thesis of the former regulation, I believe that the lawmaker properly dropped out the express provision thereof, since the "non-declaration of taxable income" may represent only one of the modalities to conceal a source of taxable income, in cases of income for which there is only the obligation to declare such income. Therefore, the provisions of Article 9 para. 1 let. a) of Law no. 241/2005 become applicable in such circumstances.

On the other hand, in what concerns the income in relation to which both the obligation to declare and to record such income exist, we may say that we are confronting the hypothesis of the offence referred to in Article 9 para. 1) let. b) of Law no. 241/2005, which refers to "theentire or partial omission to record, (…) the commercial operations performed or the income derived".

The third thesis of the former regulation, which refers to "the reduction of income as a result of fictitious operations" is taken over within Article 9 para. 1 let. c) of Law no. 241/2005, final thesis, when it refers to "the recording of other fictitious operations".

Herein below we shall particularly analyse the modalities of concealing the source of taxable income, without specifically insisting on the goods subject to taxation.

## 2. Scope of the notion of "concealment", used by the lawmaker within the incrimination norm

Attempting hereinafter to interpret the meaning of the notion of concealment, I believe it is necessary to show that, in common language, "*concealment*" means "to hide", namely not to make known, understood, seen by others, to withhold, to prevent from being seen, to shelter something in order not to be seen and found[1]. According to the Explanatory dictionary of the Romanian language, "concealment" means "to put in a place where it cannot be seen or found". Within the meaning of Article 9 para. 1 let. a) of the law, the concealment of the source of taxable income means the prevention from being seen, the hiding of the sources of taxable income, in order not to be discovered, found, by the tax authorities.

Likewise, the word "concealment" involves the hiding of the good or of the source of taxable income both from a physical and legal point of view. Thus, it is concealment when any activities are performed or any measures are taken in order for the good or the source of taxable income not to be known by the tax authorities, irrespective whether it involves physical hiding, such as holding back, or non-physical hiding, such as non-recording of goods or income or any other inventive solutions which remove the good or the source of taxable income from the visual field of the tax authorities, such as the recording thereof under other name or the concealment in another form.

An example of "concealment" is also the act of giving a company's accountant express written instructions to record with the bookkeeping as deductible expense, the value of the unstamped cigarettes which had to be destroyed at the same time with the institution of the obligation to stamp such goods, with a view to conceal the taxable good in order not to pay the due VAT[2].

"Concealment" is also when the income derived from the trade of oil products is not declared, the sources of taxable goods for operations with such goods being concealed, by the non-submission, in bad faith, of periodical tax returns, balance and balance sheet, under the circumstances in which the activities performed generated tax debts[3]. Another example

[1] Augustin Ungureanu, Aurel Ciopraga, Criminal provisions within special Romanian laws, commented and annotated with case-law and doctrine, vol. III, Lumina Lex Publishing House, Bucharest, 1998, page 130.
[2] S.C.J. Criminal Criminal section, Judgment no. 253/2003, *www.just.ro.*
[3] H.C.C.J. Criminal section, Judgment no. 472/2005, *www.scj.ro.*

of "concealment" is the act of the taxpayer which failed to declare the income derived from the lease of commercial premises to a legal person or the act of a commercial company's director which, in such a capacity, entered into two services agreements, in the balance sheet specifying however that no economic activities were performed during that period[4].

Concealed income is, for instance, the act of a loan shark which fails to declare the income derived from the interest received on the basis of an interest free loan agreement, the interest being concealed in the amount of money which was the object of the loan and which had to be reimbursed after a certain period, amount which was higher than the one loaned with the interest value[5].

Another example of concealing taxable income from a legal perspective is a person's action to declare in front of the notary public a price lower than the actual one in order to avoid paying the income tax[6]. We underline that, in order to eliminate tax evasion by the method of declaring before the notary public a transaction price lower than the actual one, Article $77^1$ para. 4 of the Tax code stipulated the obligation of the notarial chamber to draw-up expert analyses whereby the guide transfer values of immovable properties were established. According to para. 5 of Article $77^1$ of the Tax code, these expert analyses are updated at least once a year by the notarial chamber and are reported to the territorial departments of the Ministry of Public Finances. Article $151^6$ of the Methodological norms for the application of the Tax code sets forth that the expert analyses relating to the transfer value of the immovable properties communicated to the territorial departments of the Ministry of Public are used starting with the first day of the month following the receipt thereof. In case the declared value of an immovable property is lower than the guide value established by the expert analysis drawn-up by the notarial chamber, the tax shall be computed by reference to the value established by the analysis. The sole exception from this rule are the transactions concluded between relatives or in-laws up to the second grade inclu-

[4] Craiova C.A., Criminal section, Judgment no. 140/2008, Jurindex-case-law, in *Ioana Maria Costea*, Fight against tax evasion and Community fraud, C.H. Beck Publishing House, Bucharest, 2010, page 37.

[5] Teodor Teodosescu, *Application of the provisions of Article 12 of Law no. 87/1994 to loan sharks and to persons declaring before the notary public prices lower than actual ones,* Dreptul Magazine no. 6/1999, page 93.

[6] Ioana Olaru, *Legal classification of the act of declaring before the notary public a price lower than the actual one*, in Dreptul Magazine no. 6/1999, pages 81-84.

sively, as well as between spouses, case in which the tax is computed by reference to the value declared by the parties in the transfer title deeds.

Article $151^5$ of the Methodological norms for application of the Tax code also regulates the case of immovable properties transferred as share capital contribution, case in which the tax is established by the reference to the value appearing on the deed whereby the immovable has been brought as in kind contribution to the share capital, as follows:

- in case the applicable legislation imposes the drawing-up of an assessment inspection, the tax shall be set by reference to the value appearing on the deed, but no lower than the value resulted from the assessment inspection;
- in case the applicable legislation does not impose the drawing-up of an assessment inspection, the tax shall be set by reference to the value appearing on the deed, but no lower than the value established according to Article $77^1$ para. 4 of the Tax code, as shown above.

As for the creation or the transfer of dismemberments of the ownership right, the tax is established by reference to the value declared by the parties, but no lower than 20% of the guide value set forth by the analysis drawn-up by the notarial chamber. The same value is also established in case such dismemberments of the ownership right are cancelled conventionally or with the owner's consent.

Upon the transfer of bare ownership, the tax shall be calculated by reference to the value declared by the parties, but no lower than 80% of the guide value set forth by the analyses of the notarial chamber.

Upon the transfer of unfinished constructions, the value shall be established on the basis of an expert's report, which shall comprise the value of the unfinished construction plus the value of the related land declared by the parties, but no lower than the value set forth for the land by the expert analysis of the notarial chamber. The expert's report shall be drawn-up on the taxpayer's expense by a duly authorized expert.

In case of exchange of properties, the tax shall be computed by reference to the value of each of the transferred immovables. If an immovable property is exchanged for a movable good, the tax shall be computed by reference to the value of the immovable property, the natural person transferring the immovable property being the taxpayer.

Furthermore, with a view to preventing tax evasion by the modality of "concealing" the source of taxable income, para. 6 of Article $77^1$ of the Tax code stipulates that the tax on the income derived from the sale of immovable properties pertaining to one's personal assets shall be computed and collected by the notary public prior to the authentication of the

deed or, as the case may be, the drawing-up of the certification of the inheritance's completion.

In case the ownership right or the dismemberments thereof are transferred pursuant to a court decision or by any other proceedings, the aforementioned tax shall be computed and collected by the competent fiscal authority. For this purpose, in order for the tax authority to be able to find about the existence of the source of taxable income, courts which make final and irrevocable decisions are compelled to communicate to the competent tax authority the decision alongside the related documentation within 30 days as from the final and irrevocable decision's date.

For other proceedings than notarial or court ones (such as, for instance, the acquisition of an immovable property as a result of forced execution), the taxpayer has the obligation to declare the derived income within maximum 10 days as from the transfer date, with the competent tax authority, in order for the tax to be computed. It is obvious that in this situation, if the taxpayer fails to declare the transfer with the competent tax authority, the latter cannot find about the source of taxable income in due time. Nevertheless, according to Article $151^7$ of the Methodological norms for application of the Tax code, in case of transfer of property by forced execution, after the expiration of the 10-day term, within which the taxpayer has to declare the income with the competent tax authority, for the transfers pursuant to other methods than notarial or court proceedings, the forced execution body or the purchaser, as the case may be, have to request the competent tax authority to compute the tax and to issue the taxation notice, in accordance with the legal proceedings, by submitting the transfer documentation.

It is true that the person acquiring the good should declare it with the local taxes and duties department within the city hall where the property is located, for the purpose of being registered for the payment of the local tax, but the city hall has no obligation to convey such information to the competent tax authority in order for the latter to compute and collect the tax on sale of property.

The only measure that can coerce the taxpayer to declare the sale of the immovable property is the final thesis of para. 6 of Article $77^1$ of the Tax code, which stipulates that for the registration of the rights acquired on the basis of the deeds authenticated by notaries public or of inheritance certificates or, as the case may be, of court decisions or of other documents in other cases, the registrars of the land book offices shall verify the fulfilment of the obligation to pay the tax on sale of the immovable property pertaining to one's personal assets and, if no proof

related to the payment thereof is produced, they shall deny the registration request until the tax payment. Nevertheless, in case the purchaser applies not for the registration of the acquired rights with the land book, neither this measure shall produce its intended effects.

On a different note, it should be remembered that, in case of constructions, for a period of time, the property could be sold pursuant to a deed under private signature, the authentic form of the property sale deed being not necessary. If an initial form of Law no. 7/1996 on the cadastre and real estate publicity stipulated that the ownership right and the other real property rights shall be registered with the land book only pursuant to authenticated deeds[7], the lawmaker later removed the requirement regarding the authentic form by Law no. 247/2005, taking into consideration that in practice there were concluded many deeds under private signature for the transfer of ownership right upon certain constructions, deeds which were perfectly valid, but which could not be recorded with the land book. However, on 01.10.2011, at the same time with the coming into force of the new Civil code, Article 888 of this normative act re-imposed the compulsoriness of the authentic form of the convention for the transfer of the ownership right upon immovable properties for the transfer of the ownership right to be recorded with the Land book. Thus, Article 888 of the Civil code provides for that "the registration with the land book shall be made on the basis of the notarial authenticated deed…"

Therefore, the sole institution that can objectively force the tax declaration and payment is the land book, which denies the acquirer the registration of the ownership right without proof of payment of the transaction tax. The payment of the tax is, however, incumbent upon the seller, and not upon the purchaser. We have also noticed that the purchaser may not register the transfer of the ownership right with the land book, assuming the risks which may derive from such failure of registration.

We cannot fail to notice that the purchaser may find himself in the unpleasant position in which he finds about the seller's obligation to pay the tax of sale of property only when he wants to record the ownership right acquired from such seller, a right which cannot be registered due to the seller's unlawful act, which cannot be imputed to the purchaser. Such situations may arise both in cases of goods acquired pursuant to court

[7] E.G.O. no. 41/2004 amended Article 22 of Law no. 7/1996 by stipulating the compulsoriness of the authentic form for registration with the land book of the ownership right and of other real rights upon an immovable property.

decisions and in cases of goods acquired by forced execution, because the acquirer cannot register his ownership right until the payment of the tax by the person transferring the ownership right. For the aforesaid reasons, I believe that the final thesis of para. 6 of Article $77^1$ of the Tax code is unconstitutional, because this regulation infringes a person's right to freely dispose of his good. To this end, we mention Article 44 para. 2 of the Romanian Constitution, which provides for that "private property shall be equally guaranteed and protected by the law, irrespective of its owner". Taking into consideration this situation and, concurrently, in order to remove the possibility of concealment by the taxpayer selling the immovable property, of the source of taxable income, we recommend that the obligation to withhold the tax from the sale price and to pay such tax on behalf of the taxpayer be incumbent upon the person acquiring the property.

As for the price declared by the parties before the notary public in case of transfer of an immovable property, the question is what happens in case it is proved that the price agreed upon by the parties for the transaction is higher than the one declared before the notary public. In all cases, the notary has the obligation to compute the tax by reference to the value laid down in the expert analysis of the Notarial Chamber, even if the price declared by the parties is lower,

What happens if it is subsequently proved that the price declared by the parties was not the actual transaction price? We have two possible case scenarios: a) the actual transaction price proves to have been higher than the one declared by the parties, but lower or equal to the one laid down in the expert analysis of the Notarial Chamber or b) the actual transaction price proves to have been higher than the expert analysis of the Notarial Chamber.

a) If the actual price is lower or equal to the one laid down in the expert analysis of the Notarial Chamber, the question will be whether we are still in the case of "concealing the source of taxable income". In such a situation, we may notice that the parties apply the decision to avoid fulfilling tax obligations, the acts are consummated by declaring a price lower than the actual one, but the effect thereof fails to produce due to the notary public's intervention which computes the tax by reference to the value set out in the expert analysis. Therefore, we have no "concealment of the source of taxable income", but we may say that we have an attempt to commit the offence referred to in Article 9 para. 1 let. a) of

Law no. 241/2005[8]. It is true that the attempt to commit this offence is not punishable, so this classification has no consequences from a criminal point of view. However, we wonder whether in this case we are in the presence of an attempt, considering that the effect intended by the perpetrator would have been practically impossible to be produced, because, irrespective of the price declared, the notary public would have computed anyhow the tax by reference to the value laid down in the expert analysis, which was higher even than the actual price agreed upon by the parties. In consideration of the fact that the outcome intended by the perpetrator fails to produce due to the wrong method of conception of deed commitment, I believe that in this case we are in the presence of an absolutely improper attempt, which is also called "absurd attempt"[9]. In fact, we are not even in the presence of an attempt, considering that the lawmaker expressly provided for in Article 20 para. 3 of the Criminal code that "there is no attempt when the impossibility to commit an offence is due to the modality in which its commitment has been conceived".

b) If the actual transaction price proves to be higher than the value laid down in the expert analysis of the Notarial Chamber, then we are in the presence of the tax evasion offence referred to in Article 9 para. 1 let. 1) of Law no. 241/2005. This is because, even though the notary public computes the tax by reference to the value set forth in the expert analysis, if the actual transaction price is higher than this value, the taxpayer has to pay the tax by reference to the transaction price, therefore the source of taxable income is concealed for avoiding fulfilling tax obligations.

The activities falling within the provisions of Article 9 para. 1 let. b) of Law no. 241/2005 are not included within the scope of the notion of "concealment". These provisions incriminate the omission to register commercial operations performed or income derived.

The notion of "source of taxable income" refers to the basis for calculating tax or duties, as the case may be[10]. This notion includes the resources which are subject to taxation. These resources may consist in a company's profit, a natural person's income, value added or any other sums which, under the law, are taxable and from which the tax or duty is paid.

It is not important whether the source of taxable income is of the perpetrator taxpayer or of another person, who has not committed the

[8] See in this respect Ioana Olaru, *op. cit.*, page 81.
[9] Constantin Mitrache, Cristian Mitrache, *Romanian criminal law. General part*, Universul Juridic Publishing House, Bucharest, 2007, page 243.
[10] *A. Ungureanu, A. Ciopraga*, *op. cit.*, page 131.

deed, if the perpetrator directly aimed at the avoidance by the taxpayer of the compliance with his tax obligations.

As one can notice in the above analysis, the legal concealment within the meaning of Article 9 para. (1) let. a) of the law is based upon the premise of existence of a taxpayer's legal obligations to declare the source of taxable income, obligations set forth by the Tax code. The failure to comply with these obligations incumbent upon the taxpayer, with a view to avoiding fulfilling his tax obligations, could incur criminal liability, according to Article 9 para. (1) let. a).

As regards the income, the Tax code stipulates that the activities may be taxed on the basis of income standards or in a real system.

In case the activity is subject to taxation on the basis of income standards, the taxpayer does not have to keep accounting records, because the taxable income is established on the basis of income standards. Therefore, in such a situation, the concealment of the source of taxable income can be done only in case the taxpayer fails to declare the income derived, because, failing to declare the income, the tax authority is not aware of such income and cannot subject it to taxation, a source of taxable income being thus concealed. We have two possible case scenarios: the taxpayer carries out an activity for which no authorization is required (such as income from agricultural activities), case in which we can talk about concealment only if the taxpayer fails to submit the tax return; b) the taxpayer carries out an activity which requires prior authorization (for instance, income from liberal professions subject to taxation on the basis of income standards), case in which we can talk about concealment both if the taxpayer performs the activity without having previously declared it and declares neither the income derived [case in which the offence referred to in Article 9 para. (1) let. a) is corroborated with the offence of pursuing a profession in an unauthorized manner], and in case in which, although he has obtained the authorization for the performance of the activity, the taxpayer has failed to declare the income derived. If the taxpayer fails to previously declare the activity performed, although having this obligation, but he declares the income derived, the constitutive elements of the notion of concealment are not met, since the taxpayer avoids not the income derived from taxation.

If the activity is subject to taxation in a real system, the taxpayer is bound both to declare the income derived and to organize and keep the accounting records. In such a situation, we cannot be in the presence of the act of concealment within the meaning of Article 9 para. (1) let. a) of Law no. 241/2005, because it is obvious that income that has not been

recorded on legal documents cannot be declared. If the income has been recorded on legal documents, but it has not been declared with the competent tax authority, the constitutive elements of the offence referred to in Article 9 para. 1) let. a) of the law are met, since it is not an act of concealment, taking into consideration that the tax authorities can take a note of the income derived by the taxpayer by the mere inspection of his accounting documents. If the non-declared income has not been recorded on legal documents, the act falls within the meaning of Article 9 para. 1 let. b) of Law no. 241/2005, which refers to "the entire or partial omission of recording, (…) the performed commercial operations or the income derived". It is true that in such a situation we also have a failure to declare the income, but the offence referred to in Article 9 para. 1 let. b) of the lawcannot be held, since the concealment is the natural consequence of the first criminal activity, and not an independent action, committed with direct intent, which meets the constitutive elements of the act of concealment.

In case of withholding tax, such as taxes on wages, the act of concealment consists in the non-declaration of the actual income gained by the employee. However, the offence is not committed by the income's beneficiary, namely the employee, but by the employer, which is the income's payer and which concludes not an individual employment agreement with the employee or a salary lower than the actual one is laid down in the individual employment agreement. The employee shall also incur criminal liability, but for accessory to the offence provided for by Article 9 para. (1) let. a). As examples of such income, I mention the income gained by lawyers, for which there is, first of all, the obligation to record such income with the Registry of receipts and payments. Based on the data within this registry, the lawyer has the obligation to declare such income by means of a special tax return[11].

## 3. Conclusions

We may say that the act of concealing the source of taxable income includes not only the mere failure to declare such income, but any activities which are intended to "conceal", within the meaning pursed by the lawmaker, the term of concealment being the expression of the lawmaker's con-

[11] *M.Şt. Minea, C.F. Costaş, D.M. Ionescu*, Tax evasion law. Comments. Explanations, C.H. Beck Publishing Haouse, Bucharest, 2006, page 121.

cern to identify a more generic, comprehensive wording, with regard to the activities which may fall under the provisions of Article 9 para. 1 let. a).

By using the expression of concealing the source of taxable income, the lawmaker attempts to give a more slender definition to the tax evasion offence which consists in avoiding fulfilling the tax obligations by the act of "concealment" of the taxable good. The slenderness of the regulation of this offence consists precisely in the very broad scope of the notion of "concealment", used by the lawmaker in the incrimination norm.

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# ASPECTS REGARDING THE CONTRAVENTIONAL LIABILITY AND THE CRIMINAL LIABILITY FOR ENVIRONMENTAL DAMAGES

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**Silviu DEACONU[**]**

***ABSTRACT***
*Legal liability for environmental protection has three main forms: civil liability, contraventional liability and criminal liability for environmental damage. This article is dedicated to the overall presentation of two of the three forms of liability meant to punish human behaviors that attract illegal environmental damage, respectively the contraventional liability and the criminal liability for environmental damage.*
*In the lines below, we have examined in the context of the contraventional or administrative liability: the notion of ecological contravention, the constituent elements of liability offenses, the concept of sanction and limitation of liability offenses, and in the context of criminal liability: the notion of ecological crime and the constituent elements of criminal liability for environmental damage.*

**KEYWORDS:** *contravention, ecological damage, liability, ecological crime, criminal responsibility*

## 1. THE CONTRAVENTIONAL LIABILITY FOR ENVIRONMENTAL DAMAGES

The contraventional liability, as opposed to civil liability which is characterized by a predominant reparatory character, has a predominant sanctioning character, intervening if a subject does not comply with conduct as determined by a rule of public law [1].

We agree with the authors who stated that the basis of the contraventional liability, the illicit fact that triggers it, is the contravention. They also stated that this is one form of individual and personal respon-

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[1] Şerban-Alexandru Stănescu, *Protecţia mediului marin împotriva poluării cu hidrocarburi. Prevenirea, limitarea efectelor, angajarea răspunderii,* Hamangiu, Bucharest, 2010, p. 287.

sibility, the active subject of the offense responding in their own responsibility which is not transferable[2].

Also, we agree with the views advanced in doctrine, according to which the contraventional environmental liability is a form of liability which consists in applying sanctions to those responsible for the breach of environmental laws penalizing offenses committed in relation to environmental protection and development[3].

**The contravention** is defined by art. 1, paragraph 2 of EO no. 2/2001, which is the framework law in the matter of sanctioning offenses, as "the act committed with guilt established and sanctioned by law (...)".

**The ecological contravention**, although not legally defined, received the following definition of the doctrine: "ecological contravention is the offense committed with guilt, having a lower social danger than the crime which affects the environmental factors"[4].

It follows from this definition that the offense is an act committed with guilt and provided for and punished by law.

Regarding the **constituents of contraventional liability**, only because the contravention is not an offense other than a time of social and cultural development is perceived as less serious, we relate the study to the constituent elements of the contravention, which are the same of that of the crime: *subject, object, objective side and subjective side*[5].

**The subjects** of contraventional liability are two: active and passive.

It may become passive subject of this liability, but also an active subject of the contravention, any person, who has reached the age of 14, except the permanent irresponsible. A minor who has reached the age of 14 is responsible in terms of the contravention, but is has a less restrictive sanctioning regime, according to art. 11 of O.G. no. 2/200, because the minimum and maximum fine is reduced by half in this case.

The active subjects of the contravention may also be a legal persons and in this case the penalties for offenses are higher.

So, the active subject of the ecological contravention will be either the natural or legal persons who have behaviors that violates culpably the

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[2] Alexandru Țiclea, *Reglementarea contravențiilor*, sixth edition,Universul Juridic, Bucharest, 2008, p. 7.

[3] Ernest Lupan, *Tratat de dreptul protecției mediului*, C.H. Beck, Bucharest, 2009, p. 539.

[4] Valentin-Stelian Bădescu, *Dreptul mediului. Sisteme de management de mediu*, C.H. Beck, Bucharest, 2011, p. 246.

[5] Mircea Ursuța, *Procedura contravențională*, second edition, Universul Juridic, Bucharest, 2009, p. 86.

rules and regulations on environmental protection or do not conform to them. Besides these, the doctrine has identified certain situational active topics represented by local authorities, land owners and holders of title or no title, etc.

With regard to the contraventional liability for the environmental protection we have to identify the **passive subject** of the contravention, namely its victim, as represented by the entire community, because of the interest of environmental protection and nature conservation[6].

**The object of contraventional liability** is represented by the social values protected and by the property and the interests protected by the legal texts that are violated by the wrongful act of the author.

Exact knowledge of the object of the contravention is of importance in terms of legal classification of the act that constitutes a contravention, especially if rules similar offenses[7].

**The objective side of the contravention liability** consists in the act or omission described in the rule setting and enforcement of the contravention, the result produced by the unlawful conduct and the causal link between the two items above[8].

Such actions may include the burning of wood and herbaceous vegetation, the land flooding by building dams on stream beds, etc. The omissions may relate to the failure of the authorities to take measures of street cleaning or maintenance and management of green spaces.

**The subjective side** concerns the mental attitude of the offender, namely the form of guilt because administrative liability is necessarily a subjective liability, whether the act is committed intentionally or negligently.

The same view was advanced by other theorists who have said that "there can be no offense without fault"[9].

The categories of environmental contraventions were seen in doctrine[10] as part of the following classification:

*A. Contraventions on the framework law*, respectively GEO. 195/2005, which includes 25 offenses penalized differently

[6] Mircea Duțu, *Tratat de dreptul mediului*, third edition, C. H. Beck, Bucharest, 2007, p. 543.
[7] Mihai Adrian Hotca, *Regimul juridic al contravenţiilor. Comentarii şi explicaţii*, C.H. Beck, Bucureşti, 2009, p. 19.
[8] Ovidiu Podaru, Radu Chiriță, *Ordonanța Guvernului nr. 2/2001 privind regimul juridic al contravențiilor*, Sfera Juridică, Cluj-Napoca, 2006, p. 24.
[9] Ernest Lupan, *op. cit.*, p. 547.
[10] Daniela Marinescu, *Tratat de dreptul mediului,* All Beck, Bucureşti, 2003, p. 654.

depending on the person who commits them; in the case of individuals the fine is between 3000 and 6000 lei, and if this is about legal persons, between 25 000 and 50 000.

*B.* *Contraventions provided by special laws regarding the protection of environmental factors*, such as Law. 171/2010 establishing and sanctioning forestry contraventions, Law. 17/1990 on the regime of internal waters, territorial sea, contiguous zone and the exclusive economic zone of Romania, Water Law. 107/1996 etc.

*C.* *Contraventions contained in various laws that make reference to the protection of certain environmental factors*, such as the Government Decision no. 984/2005 establishing and sanctioning contraventions to the sanitary veterinary and food safety.

**The contraventional sanction** can be defined as a concrete measure through which the offender is held accountable because he needs to be punished in order to prevent him from doing similar acts punishable by law.

The penalties can be of two kinds: *the main category* which includes: the fine, the warning and the provision of community activities and *the complementary category,* which is much broader than the first including the confiscation of assets used for or resulting from the offense, the closing of the unit, where the author is a legal person, the suspension of the operator, etc..

We agree with the authors[11] which concluded that the protection of the environment through contraventional sanctions pursues the following purposes:

- the polluting agent should be determined to precisely endorse the legal provisions, in other words, to promote the technologies and techniques by which it protects the environment, avoiding pollution and reducing as much as possible the consequences;
- as a rule, the sums paid by way of the contraventional fine should be deposited in special funds, to finance anti-pollution investments, supporting research, providing incentives for entrepreneurs who invest in this area and for the ecological reconstruction;
- contraventional fines for pollution fulfils the role of a factor of economic balance between polluting agents and those who do not pollute the environment. It aims so that polluters not to reach

[11] Andrada Mihaela Truşcă, *Particularităţile răspunderii juridice în dreptul mediului,* Universul Juridic, Bucharest, 2009, p. 174.

higher profits than the units that comply with the requirements, by avoiding more investments in prevention and reduction of pollution.

Among the persons competent to impose sanctions, in accordance with O.U.G. No 195/2005 in conjunction with a. G. 2/2001, may be: Commissioners and authorized persons of the Guard of Environment and Biosphere Reserve "Danube Delta", local public administration authorities, the National Commission for Nuclear Activities Control etc.

In the case of several offences by a person, the legislator has not opted for a system of legal overlapping, as in the case of criminal law, which presumes the sum of the punishments for the crimes committed, and the resultant penalty to be executed at the largest, to which it can be applied an optional raise, but has adopted the system of arithmetic overlapping, infringer as the perpetrator should pay all administrative penalties imposed on him.

If several persons participate as coauthors to committing an offence, the offence and penalties for each participant are ascertained through the same report[12], and the penalty will apply to each one separately.

With regard to **liability prescription**, one must begin with GO. 2/2001, the framework law in the field of contraventions, which states that the application of the administrative fine shall be submitted within six months from the date of commission of the offence or at the time of its ascertainment, if it is a continuous contravention, but no later than one year and if there aren't specific provisions to the contrary.

With regard to the payment of the fine, the limitation period is one month from the date of application of the penalty, which must be communicated to the guilty party.

Whereas specific provisions protecting the environment do not contain provisions contrary to the General provisions set out above, it is normal that the above should be applied.

However, we appreciate the need for the adoption of an express legal text which takes into account the indefeasibility of the sanctions in relation to certain environmental offences or a major increase limitation period whereas the damage caused by pollution, typically has several authors, and consequences, not just one that develops over time, but one which can occur only after a certain time.

[12] M. Ursuța, *op. cit.*, p. 189.

## 2. CRIMINAL LIABILITY FOR ENVIRONMENTAL CRIMES

Unlike civil liability, administrative and disciplinary responsibility, criminal liability arises where members of society do not comply with the requirements of the norm of criminal offenses, and thus break the law, thus reeducation is only possible by coercion, namely through criminal liability[13].

The Offence, namely the deed provisioned by the criminal law, which reflects a social danger and is committed with intent, is one that attracts a specific, criminal liability of its author, may it regard an individual, or a company.

General features of it include the social danger of the action or inaction of the author, guilt, within its forms: intent, fault and praeter-intent, and its provision within the criminal law, which will sanction the author, and which complies the Court to determine in a concrete manner the penalty and the individualization, taking account of the limits of punishment and other specific criteria relating to the deed and the author.

Environmental Crimes have been defined by the doctrine as ”those dangerous acts which affect social relations whose protection is conditional on the defense of natural and artificial environmental factors, which is materialized from the point of view of the consequences of the damage produced by people and companies who administer, by endangering the health of humans, animals and plants or by producing damage to the national economy“[14].

A second definition, which we share and see as an application of the concept of crime to the general protection of the environment, was that an environmental offence is a crime committed with guilt, posing threat to values of the utmost importance to society, human health and the environment in general and which are punished by criminal law[15].

The elements of environmental crime are the same as for other types of offences: object, subjects, the subjective and objective aspects.

The peculiarities of criminal liability for environmental crimes, reported to the elements of the offence, regard mainly the nature of the subject protected by law, which in this case is given by the social values different of common ones, as well as the life and health of living beings

[13] Gheorghe Diaconu, *Răspunderea penală*, Lumina Lex, Bucharest, 2008, p. 289.
[14] Alexandru Boroi, Mirela Gorunescu, *Protecţia penală a mediului*, Editura Universitară, Bucharest, 2007, p. 155.
[15] Ileana Duşcă, *Dreptul mediului*,Universul Juridic, Bucharest, 2009, p. 270.

and elements of the environment (water, air, soil, etc.), and represents a legal generic object, as opposed to the specific object, depending on the content of each offence separately.

It should be differentiated, as well, the legal object, which represents the social value protected by the material object, which takes into account the physical object that withstands the effect of the criminal act.

For example, in the case of the crime of poaching, subject to specific legal provisions related to the protection of game, and the material object represented by wild animals which suffer from the physical actions of the perpetrator; in the case of the Forest Code, the crime of destroying trees, the qualified legal object represents the social relations on the protection of forests, and the material object represents the forests, etc.

Not all environmental offences have a material object, constituting a danger crime, as an example we have the crime of phonic pollution.

With regard to the subjects of this type of liability, we note that the passive subject of liability, by which we mean the person who is held responsible, may they be people or companies, author of the wrongful act, some offences may be committed by any of them, and others only by individuals, and as regards the subjective side, the result of the specific form of guilt should be referred to the preponderance requirement, either with or without provision, however, it is not excluded that, in rare cases, guilt can be seen and in the form of intention.

From the point of view of the subject, environmental crimes were classified in: simple subject offences and offences with a qualified subject, in the case of the latter the author having a special quality in the field of environmental protection, such as that of an individual, committed to an institution with the task of identifying the sources of risk in the case of the crime of omission of report of any major accident.

Active subject of liability, i.e. the injured party who has the right to ask for compensations or to request prosecution, correspondent of the passive subject of the crime, the State, as opposed to the active subject of secondary liability represented by any individual or company, bearer of the protected value. For example, in the case of the crime of poaching, the active subject of the liability is the Romanian State, and the secondary subject is the hunting Fund Manager.

Analyzing the objective side of environmental crimes we noted that the vast majority of offences were originally polluting actions that destroy ecosystems, particularly natural ones.

It is sometimes difficult to establish the causal link between the act and the result, in particular with regard to the infringements involving

pollution, as it is diffuse, with late and outstretched effects, unlike other environmental offences, with immediate result, where causal relationship doesn't raise special problems, such as the crime of unlawful cutting of trees.

Analyzing the degree of social danger of the crime we noted that the law requires them to present a serious threat to the social values protected.

We conclude by saying that there are many environmental offences, contained within the Penal Code, but in some sections, there are no express references to the concept of the environment, but regulates certain specific activities, as well as in special laws on the protection of the environment.

Throwing a glimpse into European legislation, we see a unification of the provisions relating to the environment, whether we speak of environmental codes, as is the case of France and Sweden, whether we are talking about the introduction of environmental offences in the criminal code, as is the case of Spain, the Republic of Latvia and Canada.

This led us to propose *de lege ferenda* for future adoption of one of the solutions shown above, after the model of the states indicated. We appreciate as necessary and useful to adopt a code of environment or if not, at least, the harmonization of criminal law, the Criminal Code offences. We appreciate, however, that it would impose tougher criminal penalties for offences in this area and further measures of criminal infringements regarding intentional with plurality of offenders, aimed at environmental pollution so as to affect the life of people, where there have been multiple deaths as a result of this action. Such actions may be considered acts of terrorism in certain European countries.

Moreover, as we have already seen, there are many States that have adopted an environmental Code, which represents a fundamental tool for environmental protection.

## CONCLUSIONS

In conclusion, we consider that Romania should also develop a *Code of the environment*, structured on the three types of liability:

1. **Civil liability**, which should contain general statutory provisions adopted so far, summarized and structured systematically, but encompassing, necessarily, also the contractual liability provisions in this area; this type of liability provisions should include namely

the governing state liability insurance for various ecological damage and it should analyse the problem of successors liability, in the situation of bankruptcy or liquidation of companies selling their assets situation or actions;

2. **Contraventional liability**, which will present the situation of environmental agreements and approvals,better said the entire administrative procedure, that is based on the special preventive role that should be played by public authorities and awareness of responsibility they have for not being " accomplices ", intentionally or not, to the pollution and environmental degradation, which can be done by special training programs and possible administrative sanctions to the issue of bad faith or negligence in giving agreements, permits or authorizations that led to unlawful environmental harm;
3. **Criminal liability** that include the environmental crime situation so that it would not have multiple sources of regulation.

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# REGULATIONS REGARDING THE SUPERFICIES RIGHT IN THE NEW CIVIL CODE

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**ABSTRACT**

*The New Civil Code (Law 287/2009) came in force according to Law 71/2011, for the enforcement of the Civil Code, starting 1 October 2011, and the effects of its enforcement are extremely complex, as there are both alterations and additions to the existing legislation, and new fundamental institutions.*

*Thus, the new Civil Code expressly acknowledges, for the first time, the existence of five dismemberments of the ownership right, by the legislative consecration of the superficies right. The superficies right is granted an impressive number of articles by the new Civil Cod, as compared to the previous legislation which was quite scant in this respect.*

*The Romanian legislator of 2009 has added to the juridical system of the superficies right, outlined in the past by the specialty literature and jurisprudence, a few novelty aspects for the juridical literature in Romania, getting inspiration from certain foreign legislations.*

*With this article, we are trying to deal with this juridical system of the superficies right in the regulations of the new Civil Code, highlighting certain inconsistencies of the code writing. We analyze the superficies right, starting with the term superficies right, its features, the effects of constituting this right, and ending with the ways of extinguishing it, and the consequences of its disappearance on the possible juridical relations which have occurred in relation to this right.*

**KEYWORDS:** *dismemberment, superficies, ownership right, accession.*

## The works contains

The superficies right is an institution expressly regulated in the new Civil Code, i.e. in art. 693-702 C. Civ.

By means of this express regulation, the legislator acknowledges the existence of this right, and includes it in the category of the dismemberments of the ownership right. The Civil Code of 1864 did not contain special dispositions regarding superficies. Thus, the discussions in the

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specialty literature on the issue that the real properties and the rights of claim must expressly be consecrated by the legislator, have stopped.[1].

It has been noticed that, at the time art. 553 of the Civil Code fr, whose concurrent was art. 492 of the Civil Code of 1864, was translated into Romanian, the final disposition has been omitted, which prevented the artificial real estate accession, provided that a third party had acquired the ownership over the basement of a building[2]. It has wrongly been concluded that the Romanian legislator did not want to acknowledge the superficies right.

In the doctrine[3], the majority opinion was that the superficies right is a derogation of the rule provided by art. 492 of the old Civil Code – the owner of the land is presumed to also be the owner of all the buildings, plantations or works in the ground or on the ground, "until it is proved wrong". Proving wrong the accession right precisely means the proof of the superficies right.

Including the superficies right among the dismemberments of the private ownership right makes the controversies regarding the juridical nature of this right become lapsed. The opinions, according to which the superficies would be either a juridical way of the ownership right, or a genuine ownership right, or a complex real property, are nowadays left without a legal support[4].

The judicial practice[5] has stated the fact that the superficies right is the lawful ground of the decisions pronounced by the courts of law, i.e. the ownership right over the building, plantation or other works located on the land which is the property of another person entails a right of user over the respective land, while these rights objectify the real superficies right.

[1] V. Stoica, *Civil Law. Main real rights, vol. 1,* Humanitas Publishing house, Bucharest, 2004, p. 555.

[2] Iosif R. Urs, Petruţa Ispas, *Civil law. The non-ancillary right in rem,* Hamangiu Publishing house, 2013, p. 210.

[3] C. Bîrsan, M.Gaiţă, M.M. Pivniceru, *Civil law.Real properties,* European institute Publishing house, Iaşi, 1997, p. 185.

[4] For a short presentation of the theories regarding the juridical nature of the superficies right, see I. Sferdian, *Discussions regarding the superficies right,* in Law no. 6/2006, p. 58-64.

[5] C.S.J., s. civ., dec. no. 893/1994, in B.J., Collection of decisions for year 1994, p. 29-30.

Please note that the dispositions included in art. 693-702 regarding the superficies right is not applied to the rights constituted before the enforcement of the Civil Code, according to art. 68 of Law 71/2011.

The juridical system of the superficies right, as presented by the ten articles of the Civil Code, is not completely new, as the legislator considers the doctrinaire solutions expressed before the enforcement of the new regulation, but also the *legislations of other states,* whose civil codes contain regulations of this real property which are more or less detailed.

**Definition of the superficies right**

In art. 693 of the Civil Code, called "Term", the superficies right is defined as "*the right to have or build a construction on somebody else's land, underneath or in the basement of that land, on which the superficiary acquires a right of use*". This wording, by means of which the superficies right is defined, is complete if we also highlight the fact that, according to art. 702 of the Civil Code, the norms concerning the superficies right are also applied in the case of the plantations and other autonomous sustainable works[6].

A similar expression of the superficies right as defined by the Romanian Civil Code can also be found in the Swiss civil code, which, in art. 779 of Book Iia, Title XXI, Chapter 2, dedicated to the "Usufruct right and other easements" shows that "*the owner can establish, in favour of a third party, an easement by means of which he gives him the right to have or build a construction, either on the encumbered land, or in its basement".*

By means of the superficies right of the Civil Code, we are witnessing the overlapping of two real properties, as already established in the judicial practice. The superficiary is the holder of the ownership right over the construction and the holder of the right of user over the land, by dismembering the ownership right over the land. The holder of the ownership right over the land shall have the quality of bare owner over the dismembered land by means of the right of user in favour of superficiary, holder of the ownership right over the construction built on that land.

[6] For an easier formulation, we shall usually use in this article only the term "construction", but also in consideration of the sustainable autonomous plantations and works which are referred to by art. 702 C.civ. Also, *over the land* means in all the cases the *basement* of that land. For autonomous works, see art. 578 C. civ.

A similar definition of the superficies right can also be found in the Civil Code of the Republic of Moldova. We note that "*the superficies is the real estate right to use somebody else's land in order to build and exploit a construction, over and underneath this land, or exploit an existing construction"*(art. 443 align. 1).

Further to all the regulations related to the superficies right, the conclusion is that this is a real estate right, either stand-alone, or an easement category, which necessarily includes a right of user over a land which belongs to another person, and, in its complete form, the ownership right which the superficiary has over the construction built on or in the basement of that land.

As resulting from the dispositions of the Civil Code, the superficies can occur under a ***main form***, which consists in the superficiary's right to have a building, i.e. an ownership right over the building, and under the ***secondary form,*** by means of which the superficiary obtains the right to build a construction on somebody else's land, while at the moment the superficies right is constituted, the construction, plantation or work does not however materially exist[7].

As resulting from the previous accounts, the superficiary has, on the one hand, a right of user over the land which is not his, and on the other hand, an ownership right over a construction, work or plantation which either exists at the moment the superficies right is constituted, or it has been built as an effect of the superficies.

At any rate, in the legislator's opinion, the construction does not belong to the superficies right, in other words, such a right can only exist under its incipient secondary form, for the entire period for which it has been constituted, while the right to build may never be exerted by the superficiary.

*This concept has an effect on the manners of extinguishing the superficies right, as this is the only dismemberment which is not extinguished by lack of use.*

A different view of the superficies right can be found in the Civil Code of Quebec, where the Romanian legislator got inspired from at the time he prepared the new Civil Code, which defines the ***superficies***

[7]S. Cercel, *The dismemberment of the ownership right,* in Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord), *The New Civil Code. Comments of articles.* Art. 1-2664, Ed. C.H. Beck, Bucharest, 2012, p. 749. Related to the same topic, see V.Stoica, *op. cit.,* p. 555; C. Bîrsan, *Civil law. The non-ancillary rights in rem in the regulation of the new Civil Code,* Hamangiu Publishing House, Bucharest, 2013, p. 257.

***property*** *as a manner of the ownership right, i.e. "that of the buildings, works and plantations located on a real estate belonging to another person, who is the owner of the soil and basement."* (art. 1011 CCQ). This manner of the ownership right can occur either from the division of the object of the ownership right over a real estate, or from the assignment of the accession right, or from the remission of the benefit of this right[8].

In the civil law of Quebec, they make a distinction between two different institutions, i.e. the *superficies property*, which is over the soil of the land excluding the basement but including an accession right, and the *superficies right*, which grants the ownership over the buildings, but does not however imply a property transfer from the owner of the land to the superficiary[9].

Both in the specialty practice in Romania, and in the doctrine, they expressed the idea of the superficies under the form of a superposing right, a more and more current solution, considering the lack of space in the urban localities, as well as the fact that the current town planning drawings provide the vertical extension of the towns, not only the horizontal one[10].

In jurisprudence, it has been shown that the limitation of establishing a superficies right only in the situation in which the building is on the ground, without being received in case a story is built, is unacceptable, because the connection between the construction and the land is made through the common parts of the construction.

We cannot ignore an essential element of the superficies right, resulting from the overlapping and coexistence of the ownership right of the contractor with the right of user over the land used for building, the property of another person, overlapping in the absence of which the contractor's right could not be exerted[11].

Certain authors consider that the superficies right "takes the shape of an air cube delimitated not only as length and width, but also as height

[8] S. Normand, *Du droit de superficie a la propriete superficiaire,* în Revue Generale de Droit, nr. 38/2008, p. 224.
[9] J. Goulet, *Les droits de superficie et l'imprecision du langage juridique*, în Cahiers de Droit nr. 19.1978, p. 1109.
[10] I. Sferdian, *Discussions regarding the superficies right,* in MagazineThe Law, issue 6/2006.
[11] C.A. Braşov, dec.civ. no. 319/R/1995 on www.legenet.indaco.ro.

and depth"[12], and there can even be an overlapping of several real estate properties over the same land.

**Acquiring the superficies right**

According to art. 693 of the Civil Code, the superficies right is acquired based on a juristic act(unilateral or bilateral, *inter vivosor mortis causa*), as well as by usucaption or another manner provided by the law. The dispositions related to the real estate register remain applicable.

The superficies right can be entered into the Real Estate Register in favour of the contractor on somebody else's land, if the owner of the land abdicates his right to invoke accession, as well as in favour of a third party, in case the owner of the land transfers him the right to invoke accession (art. 693 align. 4 C. civ.).

The juristic act under the shape of the convention shall be signed and authenticated by a notary, and shall be entered into the Real Estate Register under the sanction of absolute nullity (art. 1244 C. civ.).

If the juristic act of acquiring the superficies right is *inter vivos*, the right occurs at the same time as the fulfillment of the real estate advertising formalities. If the superficies right is constituted *mortis causa,* by means of a will, the existence of this right is no longer conditioned by its being entered into the Real Estate Register, according to art. 887 C. civ.

Art. 693 align. 3 includes two special hypotheses of constituting the superficies right. On the one hand, the right is constituted by estranging the construction, but keeping the land, and on the other hand, the superficies right an occur by the owner's directing the land and construction, separately, towards two different persons. With both hypotheses, the authentic juristic act shall be entered into the Real Estate Register, even though the constitution of the superficies has not expressly been stipulated[13].

The last paragraph of art. 693, as inspired by the Civil Code of Quebec, provides two special cases in which the superficies right occurs:

[12] O. Ungureanu, C. Munteanu, *Civil Law Treaty. Assets.Non-ancillary rights in rem,* Ed. Hamangiu, Bucharest, 2008, p. 578.

[13] F. Morozan, *Dismemberments of the ownership right, Collectively,* The New Civil Code, comments, doctrine and jurisprudence, vol. I, art. 1-952, Hamangiu Publishing House, Bucharest, 2012, p. 999.

a. The first case refers to entering the superficies right in favour of the one who has built on somebody else's land, based on the fact that the owner of that land has abdicated the right to invoke ***accession***.

This abdication can also be provided in advance, for a future construction or plantation[14], as it can also regard, as a rule, a construction which is already built on a land which does not belong to the contractor.

In this case, we are witnessing the negative, however express, exertion of the potestative right to invoke accession, a right acknowledged to the owner of a land on which a third party builds a construction, plantation or another work.

In the specialty literature, they have outlined two distinct juridical terms in the matter of the act by means of which a right is abdicated, notions which explain the juridical nature of this act, as well as its effects: extinctive or translative.

One can thus speak about the *abdicative renunciation and the in favorem renunciation.* The *abdicative renunciation* is an actual remission, as the unilateral act of will, with a stand-alone existence, which extinguishes the right of the author of the remission.

The *in favorem renunciation* is not the unilateral act of will, but a translative contract of rights, gratuitous or onerous, as the case may be, because the holder of the rights abdicates in favour of another specific person that thus becomes the dependant of the abdicator[15].

We consider that, irrespective of the remission kind, whether gratuitous or onerous, the entering into the real estate register of the superficies right implies the availability of a contract, not a unilateral act.

Considering the temporary nature of the superficies right (art. 694 of the Civil Code – 99 years at the most, with the possibility of renewal), we wonder what will happen with the construction upon the expiry of the deadline for which this dismemberment has been constituted, knowing that the abdication of a right can only be definitive.

The Romanian legislator has also provided a special juridical system for this abdicative act, starting with art. 13 of the Civil Codea ccording to which *"the abdication of a right is not presumed"*[16] continuing with the

[14] O. Ungureanu, C. Munteanu, *op. cit.,* p. 588.

[15] M. Avram, *The deed poll in the private law,* Hamangiu Publishing House, Bucharest, 2006, p. 250.

[16] In spite of the imperative wording of this legal disposition, the code contains however norms violating this interdiction, e.g. art. 1112, with the marginal name *presumption of waiver.*

form that the abdication of a right must take, with those rights which cannot be abdicated, and ending with the capacity required for abdication.

b. The second particular case of constituting the superficies right is taken from the same Québécoise civil code, and implies the transfer of the right to invoke accession to a third party.

In this case, all the obligations which were incumbent upon the owner of the land regarding the indemnity of the good-faith contractor are sent to the assignee of the right to invoke accession. It has been told that the owner could opt for this variant when he may not be interested or he may not have the necessary means, at least for the moment, to invoke the real estate accession, because of the usually high costs, which he should bear[17], and neither does he want to give up the land, requesting the court to oblige the contractor upon buying the real estate to the value to which it would have had if the work had not been made.(art. 581 letter b C. civ.).

In this situation, the assignee is in a juridical relation both with the owner of the estate, and with the author of the building.

As for acquiring the superficies right by means of *usucaption*, considering its forms, we believe that only the tabulated usucaption can be a manner of generating the superficies right. One must also consider the dispositions regarding the tabulated usucaption when the superficies right could be obtained by means of usucaption when the person acquires it from a non-owner, enters it into the real estate register, and governs for 5 years, and by means of the extratabulated usucaption in the event in which the real estate has not been entered into the real estate register (art. 930 align. 1 of the Civil Code), and a third party takes over with the intention of acquiring the superficies right, a hypothesis much more theoretical because the acquiring third party has the quality of acquiring, as well as the ownership right.

In another way provided by the law, one can imagine the case of the spouses who have chosen, as a matrimonial system, the system of legal community of goods, and build together a construction on the exclusive land of one of the spouses, while she acquires the superficies right over the construction in joint property.

The superficies right ***cannot occur by means of a court decision,*** because the court of law does not have the ability to dismember the ownership right in the absence of a legal text, or according to the law, because the law is never a source of actual juridical relations in itself.

[17] F.Morozan, op.cit., p. 999.

The law produces juridical effects only indirectly, relating them to certain juridical facts in a narrow sense, whether they are in progress at the moment the law appears, or they appear subsequently[18].

**The juridical features of the superficies right**

The superficies right is a non-ancillary right in rem in its both forms.

Superficies is a ***real estate*** property, and its object is only represented by the immobile goods.

The superficies right has a ***variable content in relation to its form.***

The superficies right is ***temporary,*** according to art. 694 of the Civil Code its maximum lifetime is 99 years with the possibility of renewal, but of course the deadline can be shorter.

In the old Civil Code, the superficies right was a perpetual right; its existence was closely related to the work, construction or plantation, with reference to which the superficiary had an ownership right.

At present, the view adopted by the Romanian legislator is not singular among the European legislations; the legal lifetime of the superficies right can also be found in the Swiss Civil Code (100 years, with the possibility of renewal – art. 7791 Swiss Civil Code), and in the Belgian legislation, which limits it to 50 years. In the Spanish law, superficies can be constituted for a maximum duration of 99 years, without the possibility of renewal.

**Scope and exertion of the superficies right**

Art. 695 of Civil Code sets forth that the superficies right is exerted within the limits and under the conditions of the constitutive document, namely as the parties decided by their will.

In the absence of a contrary provision, the exertion of the superficies right is limited by the land area where construction is to be built and by the one necessary for the exploitation of the built construction.

Art. 695 par. 2 and 3 Civ. code. set forth for the superficiary a series of obligations, which are for strict interpretation and application, exclusively for the situation when the superficies right was constituted in

[18] V. Stoica, *Civil law. Non-ancillary rights in rem,* Ed. C.H. Beck, Bucharest, 2009, p. 244; I.C.C.J, civil and intellectual property departments, dec. civ., nr. 215 din 16.01.2008. Contrarily, see C.Bîrsan, *Civil law. Non-ancillary rights in rem*, Ed. All Beck, Bucharest, 2001, p. 299; M. Galan, *Acknowledging the superficies right regarding a construction which has been the object of a sale-purchase contract, prior to qualifying the juridical situation of the related land,* in The Law issue no. 11/2005, p. 134

accordance with art. 693 par. 3, "*The superficies can be entered as well based on a legal document by which the owner of the entire fund exclusively transmitted the construction or transmitted the land and the construction, separately, to two persons, even if the superficies constitution was not expressly set forth".*

In accordance with paragraph 3 of art. 695 Civ. code, "*should the person entitled to the superficies right modifies the construction structure, the land owner can request, within 3 years, the cease of the superficies right or return to the previous situation. In the second case, the expiration of the prescription deadline of 3 years is suspended until the superficies duration has expired.*[19]"

We consider that this interpretation is erroneous, as the second thesis of art. 695 par. 3 Civ. code does not refer to the prescription of the action by which the land owner would request return to the previous situation, but to the prescription of the action in the case in which the person entitled to the superficies right demolishes the construction without building it, or builds it, but without observing its initial form.

For this reason, we consider that if the construction structure is modified, the land owner can ask for the ***cease or return to the previous situation,*** within 3 years after the modification has been ascertained, and, in case of demolition, the prescription deadline which is also 3 years, for the action by which the owner could request, this time the ***return to the previous situation only,*** as the person entitled to the superficies right can fulfill their obligation to reconstruct to the initial form for the entire duration for which their actual right was constituted.

We consider that the anticipated cease of the superficies right should take place as well by launching a summons formulated by the land owner if the person entitled to the superficies right does not observe other obligations set forth by the constitutive document either, or even if their right is abusively exerted.

In accordance with art. 697 Civ. code, if the person entitled to the superficies right was onerously constituted, the parties establish by their agreement the way the person entitled to the superficies right will perform activities for the bare owner, and if parties did not set forth the modalities to pay for the activities performed by the person entitled to the superficies right, the owner of the superficies rights owes as monthly installments an amount equal to the rent established on the free market,

[19] G. Boroi, C.A. Anghelescu, B. Nazat, *Course on civil right. Main actual rights,* Hamangiu Publishing House, Bucharest, 2013, p. 136.

taking into account the nature of the land, the destination of the construction, should it exist, the area where the land is located, as well as any other criteria to establish the counter value of usage. Should the parties fail to agree, the amount owed to the land owner will be established by legal means.

**Cease of the superficies right**

Art. 698 Civil code expressly sets forth the causes for ceasing the superficies. The superficies right ceases by its removal from the Real Estate Register for one of the following causes:

a. when the deadline expires;
b. by consolidation, if the land and the construction become property of the same person;
c. by construction disappearance, if there is an express provision in this respect;
d. in other cases provided by law, for example by expropriation.

If the right appeared by usucaption, the construction disappearance does not lead as well to the cease of the superficies, which seems contrary to the meaning of acquiring the right by this initial way.

The problem of usucaption will be raised towards persons of good faith with a direct earners status from the actual owner of the right, by the title vitiated by an absolute nullity cause itself.

**Effects of cease of the superficies right**

a. should the superficies right cease at ***deadline expiration,*** unless a contrary provision exists, the land owner acquires the ownership right upon the construction built by the person entitled to the superficies right by accession, having the obligation to pay for its circulation value on the date the deadline expires.

If, when the superficies right was constituted, the construction does not exist, and its value is equal to that of the land or higher, the land owner can have the constructor be obliged to buy the land at the circulation value it would have had if the construction had not existed. The constructor can refuse to buy the land, if the land is turned into the previous situation by building the construction at their own expense.

The mortgages burdening the superficies right are moved *de jure* upon the amount received from the land owner that obtained the construction by paying to the person entitled to the superficies right its circulation

value, or are extended *de jure* upon the land when the superficiary buys the land or moves upon the materials resulted from the construction demolition, unless they are used for another construction, hypothesis leading to extinguishing the mortgage (art. 2356 Civ. code).

The mortgages constituted related to the land during the existence of the superficies do not extend over the entire real estate when the superficies right ceases in the case in which the bare owner acquires ownership upon construction as well.

b. If the superficies right has been extinguished by ***consolidation,*** unless a contrary provision exists, the dismemberments agreed upon by the superficiary are maintained for the period for which they had been constituted, but not later than the meeting of the initial deadline of the superficies.
c. in case the superficies right extinguishes ***by construction loss***, the actual rights burdening the superficies right are extinguished unless law sets forth otherwise. The mortgages appearing in relation to the bare property upon the land during the existence of the superficies right are maintained upon the replenished ownership right.

## Conclusions

We have tried, in the above work, to emphasize the necessity of the superficies right as a constant research theme for jurists, with a personal hope which is not fantasist at all, of a plus of consistency for receiving this right in the juridical culture in the Romanian law system, but in the French law system as well.

We consider that the regulation of the superficies right in the current Civil Code is both expected by law theoreticians and practitioners, and perfectible. A more detailed analysis of this right in the matter of other states would be welcome. The current Civil Code has widely dealt with certain aspects related to the superficies right, but other aspects were left uncovered.

In order to cover these aspects, the doctrine and jurisprudence will be the ones contributing to covering certain gaps, should the Civil code not suffer any changes in the closer or further future.

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# SOCIAL AND ECONOMIC PREMISES ON THE RULE OF LAW

**Mircea TUTUNARU***

**ABSTRACT**
*The idea of "rule of law" is even older than his own name, for it is not hard to be found various individual elements of the rule of law in various stages of modern history. The rule of law is the result of historical development of the existence of two social phenomena - State and law are indissolubly and organically related to one another, both to fulfill essential functions in the organization and governance of the company.*
*The rule of law is characterized by a content of the law in force characterized by a set of values and principles to ensure effective safeguards citizens in their relations with the state.*

**KEYWORDS:** *state, law, normativity, government, freedom, rights, democracy*

The word "state" is the modern origin, and means politically organized society. The Romans have not used, said P. Negulescu[1] because they state to designate use of the word "republic" or "civitas" and on that of the Greeks 'polis'. Latin and Greek are found several phrases indicating a type of political organization, but we will not meet a deadline and no adequate theory of the state. The word "status" in Latin expresses a certain position, signifies the idea of stability, permanence. Machiavelli is the first who used the word "stato", but it only generalizes the beginning of the eighteenth century, when we find the names of "état" in France, "Staat" in Germany, "states" in England etc.[2]

Giorgio del Vecchio unit defines the state as a legal system that closes itself its own autonomous center and is equipped accordingly with supreme quality person. The state is the supreme organ of the law and the right an emanation of human nature.[3]

In his pure theory of law, Hans Kelsen defines the state as a relatively centralized legal order limited in its spatial and temporal validity, subject

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[1] P. Negulescu, *Curs de drept constituţional român*, Bucureşti: Alex. Th. Doicescu, 1927, p. 49.

[2] Th. Fleiner Gerster, *Théorie générale de l'état*, Paris, PUF, 1986, p. 150.

[3] Giorgio del Vecchio, *Lecţii de filozofie juridică*, Bucureşti, Europa Nova, 1998, p. 292.

to international law and effective immediately, and the general assembly.[4]

Domestic legal literature the notion of "state" appears as a political society which exercises sovereign power, organization and management of the company by ensuring that it has the prerogative to develop and apply the law, compliance with which can guarantee the coercive force. State means as stipulated Prof. Ion Deleanu "specific and essential dimension of political society, the society that resulted from fixing a given territory of a relatively homogeneous human community, embodying the nation, and is governed by an institutional power with the capability and the means to express themselves and will make a part of the community as a general will."[5]

Dictionary of Social Sciences published in 1964 under the aegis of UNESCO states that the term "State" means people living in an area distinct organized in such a way that some part of it is able to exercise, directly or indirectly, control, operating with social values (real or illusory) and if necessary resorting to force, this control is reflected in an area more or less limited by the activity of people. Therefore, the policy is the main institution of society occurred almost 6000 years ago in ancient East (Egypt, Babylon, China, India)[6]. Various current and philosophical theories explain the significance of different positions, his role in the promotion of social interest group or society as a whole.

In classical theories state was studied in the abstract, is a concept based elaborating more on what we want to be him than what he really is. Thus, for example, the Kantian conception of the State is a multitude of people living under the law and are linked by a contract.

For Kant, freedom and law are the two points around which binds civil law. For civil law to be effective and not remain an empty argument, there must be a third term, in this case the State. Governments (state) has the task of realizing the right[7]. In his view, the state of nature is characterized, as in Hobbes, the "*bellum omnium* contra *omnes*" but the end of this war is not achieved by force, as in Hobbes, but through reason. Reason can establish the state. By means of the state of nature is

[4] Hans Kelsen, *Théorie pure du droit*, Paris, Dalloz, 1962, p. 383.
[5] Ion Deleanu, *Drept constituţional şi instituţii politice*, Iaşi, Europa Nova, p. 8.
[6] Nicolae Popa, *Teoria generală a dreptului*, Bucureşti, Actami, 1999, p. 98.
[7] Immanuel Kant, *Antropologie din perspectivă pragmatică*, Bucureşti, Antaios, 2001, p. 336.

replaced with civil society, people are born with rights and reason is to protect and ensure their state[8].

Representatives solidarist theories, from other positions and other arguments are mainly presentation ideal state. For them, political power is placed at the right strength, although the premises from which we would have imposed a different conclusion. Duguit Leon stated that the state by law is obliged to observe as it exists. He can do no act only within the limits set by law, so the state is the only state.[9]

The emergence of state was determined by the changes in the ordinance primitive community, changes that made the old forms of organization and management (gens, tribe) is no longer sufficient, imposing a new form, the policy states.[10]

Analytical approach where the state of the company's management and organization emphasized the historic nature of the state, its dependence shapes social-historical transformations[11]. The state thus appears as a way (option) social-historical social organization and social groups have promoted common interests and which found expression concentrated whole society.

The result is the need to study the state as a historical phenomenon and outline the characteristic features.

Conditions on state organizations were formed during decomposition of primitive communism through the gradual development of the productive forces and production relations. These changes have made the old forms of organization and management is no longer sufficient, imposing a new form, the policy states.[12]

Changes in the basic needs have led to the replacement of the main human concerns - hunting, fishing, gathering, with new concerns about animal husbandry and plant cultivation. The primitive society man is the producer. This enabled rapid development of labor and division of labor (separation tribes of farmers, hunters, shepherds). Making the first great division of labor led to an important consequence - the accumulation of a large quantity of goods in the hands of people (gens chiefs of tribes, families). The second great division of labor takes place with the discovery of metals and craftsmen separation from the rest of the

[8] Immanuel Kant, *Critica raţiunii pure*, Bucureşti, IRI, 1994, p. 23 et seq.
[9] Leon Duguit, *Manuel de droit constitutionnel*: *théorie générale de l'état, le droit et l'état, les libertés publiques, organisation,* Paris, E. de Boccard, 1918, p. 33.
[10] Nicolae Popa, *op. cit.,* p. 98.
[11] *Idem*.
[12] Liviu P. Marcu, *Istoria dreptului românesc*, Bucureşti, Lumina Lex, 1997, p. 24.

manufacturers. Developing the exchange of goods, funds need economic development led to the third great division of labor - the emergence merchants.[13]

As a result of these changes, there was the possibility of human exploitation appear freemen and slaves, asset inequality occurs among free men. Also continued social change: family, tribe, matriarchal gens, gens patriarchal village communities, military democracy, the state organization.

The state is the result of a society reached a certain stage of development, a power that provides the ruling class political supremacy. Referring to the history of state type definition, we can say that they understand all the characteristic features of all states in the same socio-economic formations that are generated by the same economic base class and have the same structure and common features being that all these countries have basically the same class, the same functions and the same social purpose. As pointed out by Prof. Ion Deleanu[14], in a restrictive state is all political organs of government and it designates the device targeting political society.

Typology scientific materialist State Historical State four types: slave state, feudal state, state capitalist (bourgeois) and the socialist state. Between these types of state are similarities and differences. Common features are based on the relations of private property, a form of ownership by foreign labor exploitation. These countries entail the domination of the ruling minority, a minority dictatorship of the overwhelming majority of the population. These states function in a similar way: exercising dictatorship mechanism, the activity of the state, prevailing method of coercion.

Ancient state is the first state historic history human society. The economic base of slave society was based on property relations of the slave owners of the means of production, the producers and slaves. Slaves could be sold, bought and even killed. The main source of procuring slaves were wars of conquest[15].

Another source constituted a turning free people into slaves debtors. A special feature was made up of contradictions between different cate-

[13] See extensively: Constantin Daicoviciu, *Istoria României*, Bucureşti, Combinatul Poligrafic „Casa Scânteii“, 1972, p. 14 et seq.
[14] Ion Deleanu, *op. cit.,* p. 8.
[15] Emil Molcuț, *Drept roman*, Bucureşti, Edit Press Mihaela SRL, 2000, p. 24-26.

gories of free people. Also externally, contradictions between slave states gave rise to numerous military conflicts and wars.

Medieval state was based on relations of production that is characterized, on the one hand, the feudal property of the main means of production, the land, and on the other by the producers of tools and property livelihoods. Characteristic of the feudal state is economic coercion monopoly on earth peasant serfs of feudal dependence, forced to work and give to feudal rent in kind or in cash. Feudal mode of production emerged in several ways: the gradual replacement of slave labor exploitation colony direct transition from feudalism village communities based on the territorial development by making a military democracy of feudal polity. The struggle between the feudal serfs and the driving force of the development of feudal society.

Capitalist state is the result of bourgeois revolutions. Capitalist relations of production based on private ownership of the means of production, ownership concentrated in the hands of the bourgeoisie. Appears proletariat class, lacking the means of production and which work together with other social categories, ensures the existence of society. Also present in the structure of capitalist society and a blanket of intellectuals and officials.

The socialist state emerged in the early twentieth century, with the socialist revolution in Russia (1917). Thus, nationalized land and means of production, and the state was led by the working class - the proletarians with the peasantry class. It was formed socialist ownership and management of the company by a single party - the Communist Party.

Scientific and technical revolution has important consequences for social relations, relations which differ from those found by Marx in his time. In the process of transformation classes and relations between them, in a world created by man is no question of a new role played by the state. The solution offered by the socialist state, the single party replace the class act in her name alone, is ultimately reduced to the appliance and its rulers (one man get to think and decide for everyone) cannot seduce anyone.[16]

Rule of law, as a concept and as a form of expression of the modern state is not a simple word association (state law), it expresses a condition on power, a move to streamline its ordering and also a new conception of law on the functions and role. Concept of power system requirements of the rule of law develops, essentially limiting the power of the right idea.

[16] N. Popa, *op. cit.,* p. 102.

Limiting state power by law, however, requires some reconsideration of depth:

- An authentic and humanistic conception of democracy;
- A sober view on the role of the state in society.

Reconsidering the relationship between the individual and the state aims subjectivation instrumentalization of the state and law - the essence or foundation of the concept of rule of law in that state power should be limited by fundamental rights of its citizens.

Individuals, on the basis of law, may oppose power. The State is only the instrument of coercion, but the guarantor of rights and freedoms. State law aims to reconcile liberty and authority. The rule of law is an ideal form of state organization, which ensures the rule of law even legislative organ in which all subjects of law, including policymakers, are subordinated to the law, is a concept that includes the rule of law, which is adopted by a parliament that expresses the sovereign will of the nation, is a social response to the abuse of power.

Prof. Gheorghe Boboş[17] show called rule of law theory to suggest that the state is absolutely independent in its work, but is limited by the authority of law, also shows that the rule of law is emerging theory during the nineteenth century liberalism century, is closely related to the theory of separation of powers.

In the absence of an international authority to guarantee human rights, the state itself must do this and it can be achieved with the separation of powers between the three branches of its - legislative, executive and judiciary, which is controlled in such a way that each can not be abused. The judiciary has the main role to protect individual rights but power position is not the same in different countries. For example, England has created an authoritative law, subjecting both state bodies and citizens the same authority - customary law applied by the courts. In Western European countries, the principle of separation of powers has led to the development of a theory of subjective rights of individuals in their relationship with the state, through the public law. It is designed as a group of rules aimed at protecting the individual against arbitrary administrative bodies.

Regarding the theoretical foundations of the rule of law, Prof. Gh. Boboş show that, as claimed by German jurist Jelinek, it starts from the theory of state power authority that the state grants individual rights of

[17] Gheorghe Boboş, *Teoria generală a dreptului*, Bucureşti, Editura Didactică şi Pedagogică, 1983, p. 50.

citizens, rights which sometimes goes against him, and in external relations must respect international law.[18]

Government by law in the rule of law has its qualitative determinations in relation to all its domestic and international conditions specific to a given stage. Ideal aim, as stated Prof. Nicolae Popa, this rule involves weight (or repression) misuse trends discretionary older structures and affirming environment in which man to find peace in a legal order processing (which contains the reassuring trend conservative, for each individual).[19]

The concept of rule of law has developed in the concern of determining a relationship between the state and the law, which guarantees the citizens' right to shelter abuses of those in power. Understanding the state political institution exercising their sovereign authority over a territory and a population, the state is less defined and more qualified as rule of law, state etc. good condition. In a democracy power emanates from the people and it belongs. The basic principle governing a state as whole political organization, relations between the public authorities and citizens, relations between the different branches of government is the principle of separation of powers[20].

In the exercise of political power comes a certain separation of powers (functions) powers of public authorities, separation does not imply a unique division of political power, however, requires a balance of a collaboration between them.[21]

From the legal point of view, the principle of separation of powers enshrined in numerous documents of constitutional law. He is found in the famous Declaration of Rights of Man and Citizen of 1789 as well as documents of the American Revolution and most modern constitutions (constitutions of countries like Germany, Spain, Belgium, Switzerland, France, Italy, Romania and so on). Our age is undoubtedly an increased presence of law era in the regulation of all social processes and phenomena. The maximum known Latin *"ubi societas, ibi jus*" today finds full realization and usefulness. Legal phenomenon today is called to respond to new situations, to deal with issues of life and human activity, less

[18] Gh. Boboş, *op. cit.,* p. 50.
[19] N. Popa, *op. cit.,* p. 120-121.
[20] Charles Montesquieu, *Despre spiritul legilor*, vol. 1, Bucureşti, Editura Ştiinţifică, 1964, p. 194-195.
[21] Ioan Muraru, *Drept constituţional şi instituţii politice*, Bucureşti, Actami, 1997, p. 265.

known in the past, to establish firm rules for areas of vital importance that people are directly interested.

In this context, the constitutionalization of the right, which has a long tradition and a long history, to fulfill a prominent role in The establishment of democratic, totalitarian and ensuring triumph in eliminating the rule of law. There is currently traveling and profound changes in the international arena, in that it appeared important transnational forces that play a most important role in world politics. International organizations have become more and more power, and if the European Union states have agreed to exercise joint even within it, some sovereign powers to transfer certain powers or supranational bodies.

The main purpose of Romanian society, the democratization process is the establishment of the rule of law that respects human dignity and other values its perennial. Only democracy is the form of government that ensures not only every right and opportunity to express their views, but also guarantee that this opinion will be heard and considered. The concept of rule of law transposed to the new economic and political development of the states are currently form of state organization founded on the rule of law, the separation of the three powers, the state assuming responsibility for the rights and freedoms of citizens, embodied in the constitutional enshrining human rights and ensuring their legal exercise unhindered[22].

## CONCLUSIONS

The specific form of political power - the power of older - are traditional and current fund for political scientific research, philosophical meditation - politics, current political practice.

Nature and structure of the state, its current stage of development specific to different regions of the world, the correlations between social structure and form of government, possibilities and limits of state intervention in the economy and society, class and social functions of the state are some of the typology of states old and new theoretical and practical issues related to the state.

Proper understanding of the status and trends in the contemporary world state phenomenon has important practical implications in order to establish social development strategy.

[22] Cristian Ionescu, *Principii fundamentale ale democraţiei constituţionale*, Bucureşti, Lumina Lex, 1997, p. 231.

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# REPRESENTATION IN THE NEW CIVIL CODE

**Oana Cristina NIEMESCH***

**ABSTRACT**
*It is noticed a better structuring of contracts, including those that allow mediation professionally, their regulation sending, as appropriate, to the trustee contract with or without representation, and to other special contracts (such as the case of the agency contract whose legal regime will also be completed with the provisions of the commission contract). In this context, a thorough knowledge of the provisions on representation reveals its usefulness and also allows the analysis and understanding of the other legal institutions mentioned.*

**KEYWORDS:** *Legal representation, conditions of representation, the effects of representation, ratification, cease of representation*

## Introduction

Without a legislative consecration of representation institution, the Civil Code in 1864 and the Commercial Code contained only its application, the trustee contract, which was covered in art. 1532-1559 in Civil Code 1864, namely in art. 374-391 of the Commercial Code. Currently, the New Civil Code regulates distinctly the representation institution in art. 1295 -1314.

It was stated[1] that without defining the concept, the provisions of art. 1295-1314 NCC establish self-representation and indicate operating mechanism, clarifying aspects of its terms, conditions and effects. These provisions regulates mainly external side, respectively the relationships between represented or representative, on the one hand, and the third party with whom the representative contracts, on the other hand, and not the internal side related to the relationship between represented and representative (which is governed depending on its source, by law, legal act or judicial decision).

Therefore, the novelty of the rules of the New Civil Code results from distinct regulation of the mandate with representation as special civil

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[1] H. Dumitrescu in Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *New Civil Code. Comment on articles*, C. H. Beck P.H., Bucharest, 2012, p.1368.

contract, and general regulations on representation were included in Section 7 of "Representation", in Book V "On obligations" Title II, "Sources of obligations" Chapter I "The Contract".

Representation was regulated in the chapter on contracts, but it will be applied to all legal acts therefore it will also be applied to unilateral legal act and to juridical licit factor, but it is incompatible with the notion of juridical illegal factor.

## 1. Notion. Classification of representation

Representation is the technical and legal process by which a person (the representative) signs a legal act in the name and on behalf of another person (the represented), the effects of such legal act concluded occurring directly to the person represented, so directly between the represented and the other party (the of art. 1296 Civil Code).[2].

Relative to the basis of representation, as reflected in art. 1295, power of representation can result from either law or a legal act, or a court decision. Depending on the grounds of the representation, this may be:

– **Legal representation**,

– **Conventional representation**,

– **Judicial representation**[3].

Examples of legal representation may be found in art. 43 par. 2 (representation of the minor without exercise capacity) or art. 1436 par. 1 (mutual legal representation of solidary creditors), while an example of

[2] G. Boroi, C.A. Anghelescu, *Civil law course. General Part*, Hamangiu P.H., Bucharest, 2011, p 214; G. Boroi, L. Stănciulescu, *Civil law institutions in regulating the new Civil Code*, Hamangiu P.H., Bucharest, 2012, p 165, chapter prepared by Professor G. Boroi.

[3] In previous doctrine before coming into effect of the new Civil Code (A. Pop Gh. Beleiu,Civil Law. General theory of civil law, Bucharest, 1980, p 338, note 472 quoted in G. Boroi,Civil Law. General part. Individuals second edition revised and enlarged, All Beck P. H., Bucharest, 2002, page 217, note 1) there was expressed the opinion that legal representation is the same with judicial representation because, on the one hand, the law (art. 598 et seq. Civil Procedure Code) is the source of power of the person named as sequestrator of concluding certain legal acts (acts of conservation and management of the property or assets seized under judicial sequester) for the parties to the dispute, and, on the other hand, the appointment of the representative by the court is not sufficient to infer the existence of a third kind of representation, because it would mean to change the classification criterion (the body designating the representative, in fact, the minor without exercise capacity represented by tutor, the latter being designated by the guardianship authority, without ceasing to be a legal representation).

judicial representation is regulated in art. 182 par. 3 (appointing the curator by the court). Conventional representation can be based on a trustee contract with representation (art. 2013 - 2038) or a unilateral legal act called procure (art. 2012 par. 2).

Regardless of its kind (legal, conventional or judicial) doctrine[4] confirmed that the representation is only apparent exception to the principle of relativity, in the sense that the effects of the legal act occur to the represented, although the legal document was signed (physically) by the representative, but in case of conventional representation, the representative becomes part of legal document (through the trustee contract, the represented expressed his will to become the holder of the rights and obligations that will arise from the legal document that will be concluded by the representative) and, in case of legal or juridical representation, the represented sees himself under the law holder of rights and obligations arising from the legal document signed by representative and not solely based on the will of another person, party in the legal act in question.

Regarding this opinion there should be emphasized that, at present, conventional representation is not confused with trustee contract.

Of course there should be also acknowledged the classification of representation after the extent of the powers conferred to the representative, which may be:

5. **general representation (total)** - implies the possibility of concluding all the legal acts in the interest of the represented, except strictly personal legal documents and those on all goods,
6. **special representation (partial)** - recognizes the possibility to conclude only certain legal documents expressly indicated on the good or all the goods or to perform legal acts related only to certain goods explicitly determined.

As representative acted or not on behalf of the represented the specialized literature [5] distinguished between **direct representation** and **indirect representation**. Thus, the distinction between subject whose manifestation of will participates in the formation of the contract and the one in whose heritage effects of this contract are produced is the main feature of direct representation.

[4] G. Boroi, C.A. Anghelescu, *op.cit*., p. 214; G. Boroi, L. Stănciulescu, *op.cit*., p. 165. Likewise, D.-A. Sitaru *Considerations on representation in the New Romanian Civil Code* in Romanian Journal of Private Law, no. 5/2010, Legal Universe P.H., Bucharest, 2010, p. 141-142.

[5] H. Dumitrescu in FL.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit*., p. 1370 şi 1372.

## 2. Conditions of representation

According to art. 1296 one of the conditions of representation is the existence of empowerment to represent that can result from the law or the contract, or procure of a court decision. For the representation effect to occur, that is the represented to become part of the contract concluded through representation, which is expected to produce its effects for the represented as had been signed personally, the doctrine found the need to meet two more conditions: intention of representation and the valid will of representative.

### 2.1. Existence of empowerment

In principle, the existence of true empowerment involves giving representation to represent under which the authorized representative will conclude the legal act on behalf of another person, the represented, and not in his name.

As seen from the analysis of art. 1295, power of attorney to represent may result from a legal provision, an agreement, by proxy or a court order.

According to an opinion expressed in doctrine[6] power to represent can be classified in express power (empowerment limits are set within limits), implied powers (not expressly granted are imposed by circumstances) and apparent powers (though absent, were exercised by representative in a manner that created the belief that they would be legitimate).

The specialized literature[7] has shown that, normally, representation empowerment is given to the representative before he concludes with third parties legal acts envisaged by the represented, but the empowerment may be given *post factum*, as legal acts ratified by the concerned person and signed by a person without the necessary prior empowerment. It should be noted that, in some cases, representative empowerment may be given within an employment contract.

According to art. 1301 representation empowerment is effective only if given in compliance with the forms required by law for the valid conclusion of contract, which the representative is to conclude. Consequently, if representative is to conclude a contract in the name and on behalf

[6] S. Neculaescu, *Sources of obligations in Civil Code: art. 1164-1395*: *Critical and comparative analysis of new regulatory texts,* C.H. Beck P.H., Bucharest, 2013, p. 485.
[7] S.D. Cărpenaru, *Romanian commercial law treaty,* Third edition, revised according to the new Civil Code, Legal Universe P.H., Bucharest, 2012, p. 514.

of represented, for which the law imposes a condition of form, then including representation empowerment, which conferred powers of representation to representative, should take the same requirements of form respecting the principle of forms symmetry.

If for the validity of the act following to be concluded the law demands certain requirements of form, then the empowerment must also take the same form. If the condition of the form is required by law only to its probation, then failure to comply with form condition for representation empowerment, could not affect the validity of the act concluded.

The question is whether the principle of forms symmetry regarding representation empowerment will also apply when a conclusion in a solemn form is based upon the will of the parties and not on a legal provision. I appreciate as founded the opinion[8] that provisions of art. 1301 should be interpreted narrowly, namely as referring only to legal acts for which the law provides requirements of form *ad validitatem*, and does not consider the acts that are to be completed in solemn form by the parties will.

From the wording of the art. 1301 it is considered only conventional representation, the one that is based on represented manifest will in a mandate contract with representation, or on a unilateral legal act-proxy. But We appreciate that art. 1301, as is the entire regulation of representation, takes into consideration not only conclusion of contracts through representation but also unilateral legal acts, or legal licit factors. The provisions of art. 1301 on the form of empowerment will be interpreted with reference to any form required by law to the unilateral legal act.

There should be emphasized the fact that the power to represent requires not only the existence of empowerment to represent, but compliance with the powers conferred by the representative, that is to act within the limits of authority granted.

### *2.1.1. Contract with himself. Dual representation*

Dual representation and contract with himself should be analysed related to the condition of empowerment and contract with himself. Both contract with himself and dual representation are regulated in art. 1304.

[8] H. Dumitrescu in FL.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit*., p. 1374.

The contract with himself involves the conclusion of a contract of representation by representative on behalf of represented, on the one hand, and by a representative in his own name, on the other hand.

Dual representation is the situation in which the contract is signed between two distinct parts that are represented at the conclusion of the contract by the same person. The situation of dual representation should not be confused with the hypothesis where there are more represented, but with common interest, or more representatives of several represented with distinct interests.

It was said[9] that in both cases the law presumes the existence of a conflict of interest. If in contract with himself represented interests could obviously be affected, in case of dual representation the interests of one of the represented may be affected.

The old regulation notes certain legal provisions prohibited, for certain situations, such operations (art 128 of the Family Code stopped completion of legal documents between the legal guardian and minor, art. 1308 par. 2 Civil Code prohibited attorneys to become, directly or through intermediaries, successful auctioneers of goods, which they were commissioned to sell, for other cases, which were not expressly prohibited by law, it was appreciated[10] that the represented may request the cancellation of the fraud by reluctance or, more generally, for representative's violating the duty of loyalty towards represented, out of the situation when the represented received empowerment thereof, or the terms of the act are so specified that any injury of interests of one or more represented is excluded).

According to art. 1304, contract concluded by representative with himself, in his own name, is voidable only at the request of the represented, unless representative was expressly authorized as such, or content of the contract excludes the possibility of a conflict of interest. These provisions apply in the case of dual representation.

Consequently, in case of contract with himself or dual representation to avoid sanction of relative nullity, representative must prove that he was expressly empowered to conclude the contract with himself or was expressly empowered by both represented to conclude the contract on their behalf. The representative will also be enabled to prove that the content of the contract, in terms of law and parties obligations, was

[9] H. Dumitrescu in FL.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op.cit.*, p. 1376.
[10] G. Boroi, *op. cit.*, p. 217, note 1.

conceived in a way that excludes the possibility of any conflict of interest.

Conflict of interest between represented and representative occurs when the representative follows at the conclusion of the contract for his own interests or those of a third party, interests (not necessarily patrimonial) that are incompatible with those of the represented. A contract concluded by the representative who is in a conflict of interest is an abuse of the power of representation, as the representative does not exercise his power of representation in accordance with his obligations, but pursuing an interest that is not of the represented[11].

Both in the case of conflict of interest, in general, and the contract with himself and dual representations, relative nullity of the concluded act may be required by the represented, regardless of whether or not the production of an injury in his heritage. In the event of conflict of interest covered by art. 1303, for the protection of third parties, the relative nullity of the act cannot rule unless it proves that the third party knew or should have known of the conflict existence. Examination of the third party knowledge of the existence of conflict of interest will proceed considering the date the contract was concluded.

It was shown[12] that unlike most civil penalties that have restorative purpose, conflict of interest is a preventive punishment of the contract expressing reservations to qualify it as abuse of representation. Thus, the conflict of interest is part of the curative actions of contract, which is designed precisely to avoid abuse of representation, and is used only when the contract thus concluded is causing injury, as described in art. 1310 NCC.

### 2.2. Intention to represent

Regarding the intention to represent, par. 1 of art. 1297 provides that if the contract concluded by representative within the limits of powers conferred, when the third party contractor knew or should have not known that the representative acted as such, obliges only representative and the third party, if the law does not provides otherwise.

Thus, the intention of representing means knowledge of both the representative and the third party with whom legal act is concluded, that

[11] H. Dumitrescu in FL.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit*., p. 1375.
[12] S. Neculaescu, *op. cit.,* p. 501.

the legal operation is based on a ratio representation. At first glance, the representative is the first obliged to inform the fact that he acts as a representative of another person, though the legislature should have taken into account that, even if representative failed to make this acknowledgment, the circumstances in which negotiations to conclude the contract are conducted, third party should have been aware the representative acted in that capacity.

As a consequence of failure to inform the third party about the circumstances that he acts as a representative, the latter will become part of the contract, being bound by obligations arising from it. In that case it was said[13] that the legal act is concluded on account of represented and not in his name, but in the name of the representative.

### 2.3. Valid will of the representative

Valid will of representative shall be considered valid in relation to the extent of the power to represent, namely function of the fact the representation is general or partial.

More specifically, the specialised literature[14] has expressed the view that the condition relating to valid will of representative is more or less intensively put in relation to the extent of representativeness. Thus, in case of total representation the representative shows full initiative in concluding the legal act by the process of representation, so he needs to fully realize the consequences of that act he concludes, as if concluding a legal act for himself. In case of partial representation, representative's initiative decreases with the increasing details given by represented on the conditions that will lead to the conclusion of the legal act through the process of representation.

Confirming[15] the view expressed above, it was added that the analysis of valid will condition in the representative or represented person is available not only by the extent of the power of representation, but also by way of representation, expressly stating that legal representation is a total representation.

As for the capacity of the parties, art. 1298 expressly provides that where conventional representation of both represented and the represen-

[13] G. Boroi, L. Stănciulescu, *op. cit.*, p. 168.
[14] G. Boroi, L. Stănciulescu, *op. cit.*, p. 168.
[15] H. Dumitrescu in FL.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit.*, p. 1372.

tative must be able to conclude the act for which representation was given. Therefore, although representative does not become, in principle, part of the contract on behalf of the represented, however, the legislature understood to verify if representative has the capacity that will be appreciated by the legal act to be concluded: conservation act, management act and disposition act.

Legislature has expressly dealt on ability of the parties only in case of conventional representation, as for legal representation or legal situation regarding the ability of the parties there shall be applied the rules established by law or by court judgment for each particular case.

The legislature has also established rules related to examination of validity of the contract concluded by representation in terms of consent. Thus, according to art. 1299, contract is subject to cancelation when the representative's consent is vitiated (error, fraud or violence). Only if the vice of consent refers to elements set by the represented, the contract is void if the will of the latter one was vitiated.

In the latter case, the defect of consent will be analysed by reference to the represented will, as representative does not outwardly show any willingness on his own on elements set by represented, but act within the limits of empowerment.

Starting from the fact that the law admits the effects produced by the good or bad faith of the parties, in art. 1300, the legislature considered that the good faith or bad faith, knowledge or ignorance of certain circumstances are analysed, in principle, in representative person, unless situations would be relevant to the facts established by represented, when they will be analysed in the represented person, because in this case the representative shall not manifest his own will.

Represented of bad faith can never invoke good faith of representative, the legislature admits the efficiency of *fraus omnia corrumpit* principle.

### 3. The effects of representation

#### A. Effects in relations between represented and third party

In analysing the effects of the representation it is meant to distinguish between representative state acting within the limits of representation (art. 1296 and 1297) and the one acting by overcoming these limitations (art. 1309).

According to art. 1296 as a result of the representation, the contract concluded by representative within the limits of empowerment and in the name of represented, produces direct effect between represented and the other party.

As shown, although regulated in the chapter on contract institution, representation can also be applied to concluding of unilateral legal acts or juridical licit factors, following the effects of the relevant represented person to correspond to the physiognomy of these legal institutions.

The interpretation of the legal text of art. 1297 par. 1 shows that both in case the third party knew that the contracting person was acting as the representative of someone else, and when, without being expressly acknowledged, but due to circumstances the third party ought to have known the quality of the representative, effects will occur in the represented person.

Analysis of provisions of par. 1 of art. 1297 should be correlated to the provisions of art. 1302 according to which the contractor can always ask the representative to prove the powers entrusted to represent and if the representation is contained in a document, to submit a copy of the document he signed for compliance.

The possibility that the law recognized to a third party contractor to require to representative proof of the representative powers entrusted by represented, in the conditions under which legal provision does not distinguish, only target both evidence of relationship representation and prove the extent of the powers conferred. Consequently, whenever a third party contractor has indications that the contracting person is acting as agent, may request the contracting person to legal clarify his position, that is whether he is acting on his own or as a representative, in which case the third party will consider provisions of art. 1302.

If in the situation of direct representation the agreement does not produce, in principle, any effect against representative, because he is only part of the legal representation, in case of indirect representation effects of the contract will go directly on the representative, in his heritage. There are also consequences in terms of performance of the contract, as in direct representation, the third party may require performance of the contract only from the represented, while in the case of indirect representation contract execution rests to the representative.

As between the represented and the third party a direct legal connection is not established, the doctrine[16] stated that they can act against each other only by an oblique action subrogating the representative's rights, or may require the representative to transfer them his action.

However, par. 2 of art. 1297 provides that if the representative, when contracting with a third party within the powers conferred on account of a company, is claiming to be its holder, the third party who subsequently discovers the true identity of the holder may exercise against the latter the rights he has against the representative.

As defining elements for "enterprise" there has been retained[17]:

- systematic exercise, by one or more persons, of an organized activity (group of people and capitals);
- this company is the one that has acquired legal personality (corporate enterprise) or is unincorporated but has a *de facto* heritage with implications in economic or financial and fiscal terms;
- activities that are performed as a profession have a defining continuous character, not isolated.

It was also stated that the term *enterprise* has two connotations:

- organizational structure that brings together labour, capital, for an activity, the legislature calling it 'exploitation'
- activity, performing an activity.

Systematic, continuous and organized activity is specific to the professionals, which means that the person carrying out one of the activities provided by law, as singular, occasional activities without creating an organized framework cannot be considered professional[18].

According to the New Civil Code, all professionals are those operating a business, regardless of the name they had prior to the adoption thereof according to the regulations, that is the name of the merchant, entrepreneur, authorized individual, personal enterprise, family business, civil professional society, and so on. There are differences depending on the legal status of the legal regime applicable to each category[19].

[16] Fr. Deak, Treaty of Civil Law. Special Contracts second edition, revised and added, Actami P.H., Bucharest, 1999, p. 352.

[17] See S. Angheni, *Regulate legal relations between professionals*, lecture presented at the Conference New Civil Code (September 2011) organized by the National Institute of Magistracy, Internet source, www.inm-lex/NCC.

[18] S. Angheni, *Commercial Law. Professionals Merchant*, C.H. Beck P.H., Bucharest, 2013, p. 1-2.

[19] S. Angheni, *op. cit.*, p. 3.

The trader is no longer defined according to the work he performs, but eventually, according to formal, procedural criteria, i.e. to statutory authorizations obtained and registration in the trade register, whether he is an individual merchant who carry out his work as individual freelancer, individual or family business enterprise, whether they are companies. Production activities, trading or services may be exercised both by traders and other professionals, i.e. individuals who operates a business[20].

Exceptionally, in case of a contract signed by a professional, third party may exercise against representative the rights he has under contract concluded with the person he is represented by. Thus, the third party who considered that he concludes contract with the business owner and not with a representative, thereof he is entitled to start legal claim against the represented for fulfilling the obligations arising from the contract[21].

It was expressed the view[22] that the art. 1297 par. 2 of Civil Code uses the term improperly, designating a business enterprise and not a matter of law. In reality, the law takes into account the case where the legal act is concluded on behalf of a professional, that is, of a person who operates a business.

Legislative solution recognized by in art. 1297 par. 2 was already applied in the matter of companies, and according to the new regulation is extended to all enterprises.

Lack or excess, or overpass of representative power was regulated in art. 1309, paragraph 1 providing that in the event the contract was concluded by the person acting as a representative, but without authorization or by exceeding the powers granted, it does not take effect between represented and third party. The consequence will be acquiring by the person acting as a representative of the quality of party in the legal act concluded with third party.

A special situation occurs in case of apparent representation, i.e. when by the conduct of represented, the third party contractor was led to reasonably believe that the representative has the power to represent him and act within the powers conferred, the represented cannot avail oneself, confronted with third party contractor, of lack of representative power (art. 1309 para. 2). In such a case, the contract will take effects for the person in whose name was signed, the represented, even if empowering

[20] S. Angheni, *op. cit.*, p. 6.
[21] H. Dumitrescu in FL.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit*., p. 1371.
[22] S.D. Cărpenaru, *op. cit.*, p. 515.

missed or was exceeded, justification of this legislative solution being the represented behaviour.

There must be emphasized the difference to the situation of conflict of interest, the so-called abuse of representation, when it is not about a lack of empowerment to represent or exceeded powers conferred, but of using the powers granted in conformity with empowerment against the interests of represented.

### 3.2. Ratification

It has been shown[23] that in some cases a legal act concluded without authorization or in excess of empowerment would be of interest to "represented". This one has the possibility as post factum to ratify the legal act in question (*ratihabitio mandato aequiparatur*).

According to art. 1311, in cases referred to in art. 1309, the one on whose behalf the contract was concluded may ratify it, observing the forms required by law for its valid conclusion.

Therefore, if according to the law, the act concluded with exceeding of empowerment or lack of authority must meet some form *ad validitatem*, then the act of ratification must take the same form in conformity with the principle of symmetry form. At first glance it would seem that ratification can only be express, but in case of a valid contract concluded by the mere agreement of the parties, ratification may also be tacit resulting from the conduct of represented, for example, means to fulfill obligations arising from the contract signed by representative with third party.

Another aspect that should be remembered in the statutory provision is that the possibility of ratifying is the sole responsibility of the person on whose behalf the act was concluded, being a unilateral act that involves only the manifestation of the will of the represented.

In principle, the one on whose behalf the contract was concluded with exceeding empowerment or without ompowerment has the initiative of ratifying the act, but par. 2 of art. 1311 provides that the third party contractor may, by notification, grant a reasonable time for ratification, after whose fulfillment the contract may not be ratified. To end the uncertainty regarding the validity of the contract and thus his rights, the third party may ask the represented to express his will for ratification within reasonable time.

[23] S.D. Cărpenaru, *op. cit.*, p. 516-517.

In connection with such reasonable time, the doctrine[24] stated that this is a limitation period because, once expired without occurrence of ratification, this one is deemed rejected and the contract remains ineffective: no effect is done on the alleged represented as at the conclusion of the contract there was no power of representation and produces no effect either on the representative, because not with him did third party intend to contract.

Referring to the effects of ratification art. 1312 states that ratification has retroactive effect, without affecting the rights acquired by third parties in the meantime. In terms of the effects of ratification we must distinguish between contract parties, concluded with exceeding the powers of empowerment or lack of authority, and third parties.

Between the parties of the contract concluded with exceeding powers of warrant or lacking authority, ratification produces retroactive effect, with the result that the effects of the signed contract will occur between the represented and the third party contractor from the time of concluding the contract. However, in respect of the third parties who, from the time the contract was concluded to the time of its ratification, have acquired rights in connection with the contract (third party contractor does not fall into this category) according to art. 1312 final thesis of ratification shall take effect only from the date it was completed.

The legislature considered the assumption that the faculty to ratify is transmitted to heirs. Represented has the opportunity to choose between acquiring or not the act concluded by the alleged representative according to his own interests, possibility of option is transmitted by inheritance.

Consequently, if the alleged representative died before to ratify by his own initiative, the contract in accordance with art. 1309 or before expirying the reasonable period set by the third party contractor for ratification in accordance with art. 1311 par. 2, then heirs of alleged represented can proceed to ratify this contract. I consider that in the second case, assuming of par. 2 of art. 1311 heirs of alleged represented will only ratify the contract within reasonable time set initially by third contractor. On the other hand, nothing precludes that, just after the death of alleged represented, the third party contractor to turn to provisions of art. 1311 par. 2 and through a notice to give directly to heirs of alleged represented a reasonable time for ratification.

[24] H. Dumitrescu in FL.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit.*, p. 1381.

Regarding the dissolution of the contract prior to ratification, art. 1314 provides that the third party contractor and the one who concluded the contract acting as representative may agree to cancel the contract before it had been ratified. Thus, although the conclusion of the contract by the person acting as a representative, but having no authorization or in excess of the powers conferred, and the third party does not lead to the establishment of contractual relations between the representative and the third party, as representative is not acting on behalf of another person, however, for contract termination, the third party contractor and representative agreement is necessary. Obviously, to produce effect the abolition of this agreement must be made up to the time of ratification, because after this time, retaining the retroactive effect of ratification, the contract is deemed to take effect only between the represented and the third party contractor since the time of its conclusion.

The one who signs a contract as representative, not having empowerment or having exceeded the limits of powers that have been entrusted, is responsible for damages to third party contractor who has trusted in good faith the valid conclusion of contract. Through the expression "not having empowerment" legal provision of art. 1310 envisages the assumption where the authorisation for representation is missing or it existed, but has ceased.

It was considered[25] necessary accomplishment of the following conditions for the representative responsability to be liable:

a. representative to have acted in the name of the representative (the provisions of art. 1310 NCC shall not apply in the event of indirect representation, nor art. 1297 NCC where the abuse of power was committed by the representative-art. 1303-1304 NCC);
b. representative must have known or could have known the cessation of representation or that he acts outside its limits;
c. third party must have been in good faith at the conclusion of the contract (contrary proof lies to representative);
d. representative must have not ratified the agreement in terms of art. 1311 et seq. NCC.

From this latter condition, the absence of ratification, with the result that between the third party and the representative it is not established a contractual relationship because the latter does not contract in his own

[25] H. Dumitrescu in FL.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op.cit.*, p. 1380-1381.

name but on behalf of another, the same author found that the legal nature of the liability of the representative is non-contractual.

### 3.3. Effects in relations between represented and third party

Legal document signed by a representative, within empowerment, produces direct effect between the represented and the third party. Therefore, in compliance with empowerment received, after fulfilling its role, the representative will not gain any quality in the legal act concluded, he remains alien towards this and the effects the legal document produces.

## 4. Cease of representation

Relative to cases of representation ceasing, art. 1305 states that the power of representation ceases by renunciation of representative to empowerment or by its revocation by the represented, and art. 1307, par. 1-3 considers the cessation of representation by death or by the cease of existence, incapacity, opening of insolvency procedure of representative or of represented.

Regarding the death or incapacity of any procedural representative art. 1307 par. 1 recognized the possibility of continuing representation, if by convention or the nature of the business stems this. Of course, nothing precludes further this point, heirs or parties may revoke the representation empowerment in compliance with legal provisions.

It has been shown[26] that the termination of representation because of death or incapacity of any kind of representative or represented is explained by *intuitu personae* character of representation. Such termination cause because of representation power may be removed through convention or due to the nature of business.

Regarding the cease of the representation there should also be considered the general cases of termination provided by art. 1321, that is through execution, will agreement of the parties, unilateral termination, expiration of time, fulfillment or, where appropriate, non-compliance of condition, fortuitous impossibility of enforcement.

Since the revocation of empowerment is equivalent to termination of representation, with legal consequences in terms of assuming valid obligations as required by art. 1309, the legislature has settled that revocation should be done observing certain advertising rules. Thus, according to

[26] S.D. Cărpenaru, *op. cit.*, p. 519.

art. 1306, amendment or revocation of empowerment must be notified to the third party by appropriate means. I believe that mentioning change of empowerment was made by the legislature in art. 1306 together with empowerment revocation, because in some individual cases amendment of empowering may equalize with a diminuation of the powers granted, being in the situation of partial revocation of the original authority statement.

To the extent that the represented does not notify third parties the modification or termination of the empowerment, then this is not enforceable against third parties unless it is proved that they knew or could have known when the contract was concluded. Failure of represented to respect obligation to inform third parties of revocation of empowerment, entails the fact that as far as representative concludes a contract with third parties on behalf of the represented, the effects of the contract will occur in the person's represented being held by his obligations as assumed. However, the represented will be able to defend himself by proving that, although he did not bring to the attention of others revocation of empowerment, they knew or could know such revocation before the conclusion of the contract.

Moreover, for all cases of termination of representation, par. 4 of art. 1307 stated that the termination of power to represent does not have any effect on third parties who, when concluding the contract, did not know and did not need to know this fact.

Obligation of representative at termination of powers entrusted is to return the document that proofs the power to represent. Moreover, par. 2 of art. 1308 provides that the representative cannot keep that document as a guarantee of his debts on the representative, but may request a copy of the document, certified by the represented, noting that the power of representation ceased.

Legal return of empowerment does not exonerate the represented from the obligation to inform third parties through appropriate means, according to art. NCC 1306, on the termination of powers of representation, since they have no obligation, but rather faculty to demand the represented to prove the powers conferred[27].

[27] H. Dumitrescu în Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit.*, p. 1379.

## Conclusions

More rapid development of business relations imposed legal regulation of juridical institutions to meet these requirements. New Civil Code legislature has considered distinct regulation of representation, noting that the legal status of other institutions is to be completed by reference to the provisions from the institution of representation. Thus, the mandate contract appears to return to its classical form of special civil contract that can be represented or not.

It is noted a better structuring of contracts, including those that allow intermediation with professional capacity, their regulation sending, as appropriate, to the trustee contract with or without representation, and to other special contracts (such be the case of the agency contract whose legal regime will also be completed the provisions of the commission contract). In this context, a thorough knowledge of the provisions of representation reveals its usefulness and also allows the analysis and understanding of the other legal institutions mentioned.

No doubt both doctrine and practice will highlight accomplished progress as a result of new regulations, and, why not, its weaknesses, following to present, when appropriate, solutions that are to be adopted.

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# CONSIDERATIONS ON THE MODIFICATIONS OF THE LABOUR LEGISLATION BROUGHT BY LAW NO. 42/2011 AND LAW NO. 62/2011 (LAW OF THE SOCIAL DIALOGUE) AND FLEXISECURITY REQUIREMENTS. SPECIAL FOCUS ON COLLECTIVE BARGAINING

**Radu Ştefan PĂTRU***

**ABSTRACT**
*Individual and collective labor relationships have made the object of some important legislative modifications in 2011. Among the reasons invoked there was flexisecurity which under its two components, namely the flexibilization of labour relationships and the security of manpower, constituted one of the main justifications of the legislator for the reconfiguration of some major labour law institutions. In this study, we intend to analyse whether the main modification brought by the legislator to the labor legislation and especially in terms of collective bargaining, (by the Law no. 62/2011), are concordant with the requirements for flexisecurity.*

**KEYWORDS:** *modifications of labour legislation in 2011, flexisecurity, collective bargaining, Social Dialogue Law, flexibilization of the labour relationships*

## I. INTRODUCTORY CONSIDERATIONS

Flexisecurity is defined as an integrated strategy for the simultaneous consolidation of flexibility and security in the labour market[1].

This strategy widely used at the level of the European Union has laid at the bottom of adaptation of labour legislation of the Member States to its two components, namely the flexibility and security in terms of labour relationships.

We may affirm that flexisecurity has as its main goal the flexibilization of regulation of the labour relationships, more precisely rendering the legal provisions elastic.

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[1] See the Communication of the Committee to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions "Towards joint principles of flexisecurity COM (2007) 359 final: More and better jobs by flexibility and security" [SEC(2007) 861] [SEC(2007)862].

In the juridical doctrine, the principal components of flexisecurity have been synthesized in other way: flexible and safe contractual provisions, lifelong learning strategies, efficient policies in the labour market that might provide the possibility of going from one job to another, modern systems of social security that may sustain the fluctuations of labour from one workplace to another.[2]

Flexisecurity, by its components, largely interferes with the fundamental labour law institutions which have been reconfigured through the legislative modifications in 2011.

The law no. 40/2011[3] modifying the Labour Code and the Law no. 62/2011 (on Social Dialogue)[4] bear the stamp of flexisecurity which by these two legislative acts has penetrated the Romanian law system as well.

## I.1. FLEXISECURITY IN THE INDIVIDUAL LABOUR LAW

As for the individual labour law, from the angle of applicability of flexisecurity, the term for the conclusion of the fixed-term individual employment contracts has been extended from 24 to 36 months.

Another manner of manifestation of flexisecurity is represented by the consideration of the probationary period as a main modality to check employees' aptitudes. Thus, the probationary period has been extended generously both for the managing personnel and the operating personnel, namely to 90 calendar days for the operating personnel and 120 calendar days for the managing personnel. In case of the disabled persons, the probationary period is 30 calendar days and it represents the only form of verification of professional skills.

In the light of flexisecurity they have also reconfigured the provisions regarding the working and the holiday time. This was achieved by increasing the reference period for which the working time may not be extended to more than 48 hours per week from 3 to 4 months in line with the Directive 2003/88/CEE which really provides a maximum period of 4

[2] See Raluca Dimitriu, O schimbare de paradigmă în dreptul românesc al muncii: problema flexicurității, în Știință şi codificare în România, Comunicări prezentate la Sesiunea ştiinţifică a Institutului de Cercetări Juridice, CD with ISBN 978-606-091-4, Ed. Universul Juridic, Bucureşti, 2013.

[3] After the modifications brought by the Law no. 40/2011, the Labour code was republished in the Official Gazette, Part I, no. 345 of May 18th 2011.

[4] Republished in the Official Gazette, Part I, no. 625 of August 31st 2012.

months, but the 3 month-period previously provided was more permissive for employees.

In the same direction, art. 122 paragraph (3) from the Labour Code establishes that "in the periods when the activity is reduced the employer has the possibility to grant paid holidays against which the additional hours that will be worked in the next 12 months may be compensated", a provision that is clearly favorable to the employer[5].

At the same time, art. 52 paragraph (3) from the Labour Code, in agreement with the strategy of flexisecurity and representing one more measure for the defense of employer's interests decides as follows: "In case of temporary reduction of activity due to economic, technological, structural or similar reasons, for periods exceeding 30 working days, the employer shall have the possibility to reduce the working hours from 5 days to 4 days a week, with the adequate reduction of salary, until the situation which caused the reduction of the working hours comes back to normal, after the prior consultation of the trade union representative at the level of company or the employees' representatives, as the case may be".

By means of flexisecurity, the legal status of professional training has also been modified, and the employer may claim the amounts invested for their professional training in case of their resignation, according to an additional act to the individual employment contract, so they have passed from a vision regulating the details of the professional training clause to a new flexible vision establishing these details through individual bargaining registered by additional act to the individual employment contract.

As for the professional training we must also remind the fact that the employer may refuse the granting of unpaid leave for employee's professional training without consulting any more the trade union or employees' representatives.[6]

We may say that the legislative modifications brought to the individual labour law in 2011 comply with the flexisecurity strategy.

[5] See Raluca Dimitriu, *op. cit.* pages 367 – 368.

[6] See Nicolae Voiculescu, Considerations on the provisions related to the flexibilization and security of labour relationships in the Law no. 40/2011 modifying and completing the Law no. 53/2003 – Labour Code, Revista Română de Dreptul Muncii, no. 3/2011 page 55.

## II. FLEXISECURITY IN LABOUR COLLECTIVE LAW. COLLECTIVE BARGAINING. REPRESENTATIVENESS OF SOCIAL PARTNERS. CONCLUSION OF COLLECTIVE AGREEMENTS

The flexisecurity strategy may also be encountered in the collective labour law by influencing the juridical status of some important legal institutions such as the labour conflicts, the strike or the collective bargaining.

As far as we are concerned, we will analyse the way in which flexisecurity reflects collective bargaining from the angle of the principal modifications in this field made by the Law no. 62/2011 (of Social Dialogue).

### II.1. *FLEXISECURITY AND COLLECTIVE BARGAINING*

Taking into consideration the new legislative modifications, we may affirm that a series of legal provisions defining the legal status of collective bargaining concord with flexisecurity.

Thus, in art. 143, paragraph (5), from the Law no. 62/2011 they regulate the institution of extension of the collective agreements concluded at the level of a sector of activity for all the units from such sector. For this purpose, the legal text mentioned above provides as follows: "if the condition provided in paragraph (3) is met, the application of the collective agreement registered at the level of a sector of activity shall be extended at the level of all units from such sector, by order of the minister of labour, family and social protection, with the approval of the National Tripartite Council based on a petition addressed to it by the signatories of the collective agreement at sectorial level".

This legal provision is in accordance with flexisecurity since by the institution of extension of the collective agreements concluded at the level of the sector of activity the employees from the units of such sector that did not initially sign the collective agreement may also benefit from the provisions within it.

Another legal provision in terms of collective bargaining which concords with flexisecurity may be found in art. 153 from the Law no. 62/2011 stipulating as follows: "pursuant to the principle of mutual recognition, any trade union organization legally set up may conclude with an employer or an employers' association any other types of agreements, covenants or understandings representing parties' law and whose provisions shall apply only to the members of the signatory organizations".

In this case, the legislator allows the participants to the social dialogue, in compliance with the realities of flexisecurity, to conclude other collective agreements that may exclusively apply to the signatory parties.

Except these cases where they are in concordance with flexisecurity, the legislator has also regulated some provisions that contradict the strategy of flexisecurity.

For example, for the budgetary sector, the collective agreements may not contain clauses that contain a superior level of pecuniary or in-kind rights than the one established under the law for the employees from such sector.

Thus, art. 138, paragraph (3), stipulates that "the salary entitlements from the budgetary sector are established under the law within precise limits that may not make the object of negotiations and may not be modified by the collective agreements. If the salary entitlements are established by special laws between minimum and maximum limits, the salary entitlements are determined by collective negotiations but only within legal limits".

Even if this provision is not in concordance with flexisecurity, it is still opportune because it is correct that collective bargaining should be pegged out by legal provisions in the public system, especially when we speak of entitlements in cash or in kind.

Besides these provisions that do not contradict the strategy of flexisecurity, the legislator has also provided some disputable provisions in terms of collective bargaining as we will show in the following lines.

## II.2. PARTIES' REPRESENTATIVENESS WITHIN THE COLLECTIVE BARGAINING

An important aspect introduced by the Law no. 62/2011 (on Social Dialogue) is the criteria of representativeness of the social partners at the level of unit.

Furthermore, the level of unit is defined in a criticizable manner because the legislator in art. 1 letter k) from the Law no. 62/2011 defines the unit as being "the legal entity directly employing labour".

In these conditions, the "unit" may not be assimilated to the natural person employing labour, which means that art. 129 paragraph (1) stipulating that "collective bargaining is mandatory only at unit level, except when the unit has less than 21 employees" shall not apply to the employees of the natural person employer thus establishing a discriminatory legal status for the employees of natural person employers as compared to the legal person employers.

As for trade unions, for the unit level, in art. 51 paragraph (2) from the law mentioned above, they have established the following representativeness conditions:

„a) they have a legal status of a trade union; b) they have organizational and patrimonial independence; c) the number of trade union members represents at least half plus one from the number of unit employees".

We may notice that as compared the previous legal provision, the legislator has risen the threshold of representativeness of trade unions to half plus one from the number of employees, a fact that visibly hiders collective bargaining at the unit level.

This is mainly due to the low level of unionization from our country, a situation which is not very different at the level of the European Union either.

For this purpose, in the doctrine was judiciously affirmed that as far as representativeness of trade unions at the unit level is concerned the observance of the number of members required under the law is a condition "difficult and sometimes even impossible to achieve at this level"[7] also sustaining that "the amplification of attributions of employees' representatives to the detriment of those of the trade unions equally represents a legislative tendency with a negative social effect".[8]

## II.3. FLEXISECURITY AND SOLE COLLECTIVE LABOR AGREEMENT AT NATIONAL LEVEL

The elimination of the sole collective labor agreement at national level has meant the release of employees from their obligation to offer a series of advantages to their employees, rights that were established by the sole collective labor agreement at national level mainly due to some gaps in the labour legislation.

Seeing the object of this study, we shall not analyse in detail this erroneous and even unconstitutional decision of the legislator to give up the sole collective labor agreement at national level[9].

[7] Raluca Dimitriu, Reflections regarding the current labour legislation – Interview taken by Editorial Office of Revista Româna de Drept al Muncii, Revista Română de Drept al Muncii, no. 3/2013, page 17. For the same purpose see also Al. Țiclea, Proposals on the modification of some provisions of labour legislation, Revista Română de Dreptul Muncii, No. 3/2013, page 21.

[8] See Raluca Dimitriu, op.cit. page 17.

[9] By decision no. 574 of May 4th 2011 regarding the objection of unconstitutionality of the provisions of the law on social dialogue in its entirety as well as of art. 3 paragraphs (1) and (2), art. 4, art. 41 paragraph (1), title IV on the National Tripartite Council for

We may affirm that in the context of the new legislative framework the unit level becomes the main level of collective bargaining, though, as we have seen, the legislator did not offer the necessary guarantees for an efficient collective bargaining at this level either.

In the context of legislative modifications of 2011, the abrogation of the legal provisions regarding the possibility to conclude the sole collective labor agreement at national level represents, as we have shown, a serious error of legislator in contradiction with the principles of flexisecurity.

For this purpose, in the judicial doctrine they affirm about the priority of this legislative modification on legislator's agenda that "in the conglomerate of issues contained in this law" *(Law on Social Dialogue, sub. ns. RSP),* the central "target" followed by the legislator was the elimination of the sole collective labor agreement at national level, a source of law which - being binding in general – deeply disturbed the employers, especially the companies with foreign capital. Thus, they took a step back in the exercise of the social-constitutional role of the Romanian state".[10]

At the same time, they affirm that "as we know, the idea of flexisecurity, attractively formulated, has been launched as a necessity, but which incorporated and still incorporates a negative potential for the many who work".[11]

## III. CONCLUSIONS

**I.** Although in the field of collective bargaining the legislator provided a series of provisions in line with flexisecurity, there are still certain essential components of collective bargaining which, as we have shown, do not observe the realities imposed by this strategy at the level of the European Union. As a conclusion, we wish to present possible *de lege ferenda* solutions for the main legal provisions on the collective bargaining introduced by the legislator in 2011 that do not comply with the objectives of flexisecurity:

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Social Dialogue, title V on the Economic and Social Council, art. 138 paragraph (3), art. 183 paragraphs (1) and (2), art. 186 paragraph (1), art. 202, art. 205, art. 209 and art. 224 letter a) from the law, the Constitutional Court inexplicably and even unconstitutionally pronounced in favour of the legal provisions regulating the abrogation of the provisions related to the national collective employment contract.

[10] Ion Traian Ștefănescu, Labour Law – vocation and vision, interview taken by Editorial Office of Revista Româna de Drept al Muncii, in Revista Română de Dreptul Muncii, no. 2/2013, page 17.

[11] *Ibidem*, page 16.

**II.** As for the representativeness of social partners, in the concrete case of the current situation of trade unions, we consider that an important principle of the trade union law is violated, namely the one referring to trade union pluralism by the condition imposed to the representativeness of trade unions at unit level in terms of the number of members half plus one.

By virtue of this principle, many trade unions may be set up even at the unit level. The Romanian legislator allows for the setting up of several trade unions at unit level but only one trade union shall be able to negotiate collectively or conclude a collective agreement, namely the one made up of half plus one of the number of employees.

This provision violates the principle of trade union pluralism since a trade union which may not negotiate collectively or conclude collective agreements on behalf of employees it represents has been set up almost uselessly as it cannot exercise their attributions and prerogatives characteristic to the trade unions within the work relationships.

This is not the only risk for the units having a single representative trade union because there would be the possibility for the employer to make the trade union follow their own interests and the trade union might become a "homely" one that no longer answers loyally the needs of employees, a thing that would be much difficult to achieve in case of several representative trade unions.[12]

This also affects another important principle of the trade union law, namely the independence of trade unions.

This is the reason why we consider as grounded the *lege ferenda* proposal by which the legislator would return again to the solution with a third of the number of employees necessary to the setting up of a representative trade union.[13]

Moreover, again as *a lege ferenda* proposal, we consider that the legislator should provide the obligation of collective bargaining at the unit

[12] Ion Traian Ştefănescu, *Tratat teoretic şi practic de drept al muncii,* Editura Universul Juridic, Bucureşti, 2013, page 154.

[13] The Law no. 130/1996 on the collective agreement, initially regulated as today the condition of half plus one from the number of employees for the representativeness of trade unions at unit level. But subsequently, the legislator becoming aware of that error shortly returned and established by the Law no. 143/1997 regarding the amending and supplementing of the Law no. 130/1996, regarding collective agreement, the 1/3 threshold from the number of employees for a trade union to be representative at unit level. At present, the legislator has returned to the initial solution of 1996 which they considered as erroneous at that time.

level for the natural person employees as well because at present there is a discriminatory regime violating the policy of flexisecurity, too.[14]

**III.** As we have shown, pursuant to the Law no. 62/2011, no sole collective labor agreement at national level may be concluded any more at national level. For this purpose, art. 128 paragraph (1) from the law establishes as follows: "labour collective agreements may be negotiated at level of units, groups of units and sectors of activity". This contradicts both the constitutional provisions, since the Romanian Constitution stipulates in art. 41 paragraph (5) that "The right to collective negotiations in terms of labour and the binding character of collective conventions are guaranteed", and the provisions of the International Labour Organization in this field.

We may notice that the legislator did not establish in the Romanian Constitution that the right to collective bargaining is guaranteed "under the law" so that collective bargaining should be regulated by legal way and thus return to the bargaining aspects, but it is regulated in general and the legislator fails to discriminate between the bargaining levels and *ubi lex non distinguit nec nos distinguere debemus.*

The limitation of the national sphere for the conclusion of the collective agreements is a measure contradicting flexisecurity because the sole collective labor agreement at national level may have as a result the provision of a legal framework favorable to employees from the entire country that might increase their labour stability and provide a balanced ratio between the parties involved in the labor relationships.

This fact otherwise anticipated in the doctrine before materializing in the internal legislative domain has been considered ever since as unacceptable, unconstitutional and with a bad potential both for employees and employers.[15]

Besides these considerations, we have recently expressed our opinion according to which the sole collective labor agreement at national level represented an important element of tradition in our legal system, and yet the Romanian legislator acted for the elimination thereof thus registering

[14] See Alexandru Athanasiu, *Codul Muncii. Comentariu pe articole*. Actualizare la vol. I-II, Editura CH Beck, Bucureşti, 2012, pages 123-124.

[15] See Mara Ioan, Paul Bălțățeanu, Analiza unei propuneri de renunțare la contractul colectiv de muncă unic la nivel național, Revista Română de Dreptul Muncii, no. 1/2009, page 115.

a discontinuity at the level of juridical regulation, a fact which may not be received without reserve due to its consequences.[16]

As an argument of compared law, a series of states such as Italy, Germany, Croatia or the Republic of Moldova have kept the sole collective labor agreement at national level in their legislation.

As a *de lege ferenda* proposal, we are in favor of the reintroduction of the sole collective labor agreement at national level in the internal legislation because this represents a superior guarantee in terms of the juridical status of employees and it concords with the strategy of flexisecurity.

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[16] Radu Ştefan Pătru, Unele aspecte privind continuitatea şi discontinuitatea reglementărilor în materia contractului colectiv de muncă unic la nivel național, Ştiință şi codificare în România, Comunicări prezentate la Sesiunea științifică a Institutului de Cercetări Juridice, CD with ISBN – 978-606-091-4, Ed. Universul Juridic, Bucureşti, 2013, pages 384-398.

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# STATE SOVEREIGNTY IN THE CONTEXT OF EUROPEAN CONSTRUCTION

**Gabriel MICU***

**ABSTRACT**

*This study aims to clarify certain aspects related to the national sovereignty of Member states, in particular, the measure to which this concept still retains, or not, it's defining characteristics. To this end, the steps of a systematic research method were followed, addressing the concept of sovereignty by many subjects but also in the contexts of different legal-political constructions in which it appears. It was started from the analysis of the concept of sovereignty in the light of the specificity of International Relations, then its coding results being exposed, after a determination of its main features as they emerge in the light of Public International Law science, both as a separate legal institution and as part of a construction such as international organizations. Finally, based on the specified argumentations and the European Union particulars, the political - legal characteristics of national sovereignty in this context were analyzed, highlighting some misinterpretations of the nature of community construction, leading to confusions that can be harmful not only for the existence of the states, but even for the future of the European Union.*

**KEYWORDS:** *sovereignty, state, international organization, European Union, multilateral treaty*

European Union Member states' sovereignty and the manner in which they relate to the construction of the community they consent to develop constituted from the very beginning a subject of major controversy, between the followers of the federalist current and those that militate for maintaining the juridical international personality of Member states in a confederate-type construction. Failing to adopt the Constitutional Treaty project that the Member State representatives themselves negotiated and initialed, as well as the heated debates taking place even at present, both in the frame created by European Institutions, as well as among the public opinion of Member states, on the theme of restriction of state sovereignty, indicate the persistence of some diametrically opposed positions with regards to the juridical-political nature of community construction.

The history of international relations attests the emergence of the sovereignty concept in the modern age, consecrated through the Westphalia Peace from the year 1948, as being rather a convention, initially destined at designating the affirmation of the supreme will of the state

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over its subjects who later on became citizens. In this way, through the emergence of the sovereign state, an anarchic world was built outside the borders of the state, in which the Christian unit could no longer function in the same paradigm, the Popes authority or that of the Emperor becoming irrefutable. The Westphalia Peace represented a new diplomatic arrangement, through which Europe was organized by the states for the states, on the principle of particularity, replacing thus the oldest remains of hierarchy, on the top of which lied the Holy Roman Emperor and the Pope.[1] In this manner, the domestic space of a state was delimited from its foreign space, separating thus the legal arbitrary order from anarchy.

It is important to underline the fact that, regardless of the orientation of ideas in the international relations space, anarchy must not be mistaken for chaos. The lack of a central authority that organizes international society after the model of those inside states does not equal a lack of order. International order is defined with many inexactitudes, being built on an axiomatically different system than the one underlying the domestic one, but nevertheless a coherent relationing system exists, a certain type of order. Precisely due to this specificity, the territories from the international relations space have a free expression range, sometimes reaching diametrically opposed positions, according to the perception, explanation and interpretation of international order.

The Westphalia Peace represents only the starting point in the creation of an international society and a correlate international order, their forming process being one of the most prolonged. The post-westphalic international system did not offer a recipe for international order, did not conceive a system of authority principles, a governing system that will apply them, nor a set of institutions to ensure solving divergences peacefully, all these constituting the necessary instruments for crowned heads in their affirmation process, in order for them to be able to guide the relationships existing between themselves on peaceful cohabitation criteria. Undoubtedly, in the absence of those regulated by the Westphalia Peace, things would have been even more severe, even if the delegates and governments of the states involved were unable to build more than a small part of a peaceful order, building the first step in the edification of a society of states, in the sense of their closeness and interdependence.[2]

[1] Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order, 1648-1989*, Cambridge University Press, 1991, Cambridge, p. 25.
[2] *Ibidem*, p. 26.

The recognition of sovereignty state principle is a cornerstone of modern international society construction, one substantially different from the previous era semantics, which was based in particular on a feudal sovereignty over his vassals, as well as on the paradigm of unity of universal moral values, considered to be those of Christianity, found in hierarchical forms of organization such as the Holy Roman Emperor or the Pope.

The sovereignty principle consecration led not only to the promotion of differentiation in the management of policy, but also in values, constituting a determining factor in the arming of interdenominational conflicts in the European space. This evolution has obviously generated reactions in the Pope, but the change taking place among the roman-catholic community has lead to the fact that few partisans of this belief remain willing, able or entitled to oppose Luther or Calvin's followers. Thus begins the process of secularization of the public sphere, of separation of the political and ecclesiastical authorities, through the clauses of the westphalic agreement component treaties, the catholic's one from Münster and the protestant's one from Osnabrück. In this way, Rome's legitimacy to intervene in Europe and its axiomatic attribute to change the destiny of the people of Europe ends.

A somewhat more plastic interpretation of the consequences of the Westphalia Peace is that sovereignty brings civil peace and unity in a domestic order on the one hand and the right to war and violence from the state on the other hand. Exercising state sovereignty over the territory, which distinguishes it from other international actors present in the modern era, leads to the consolidation of parceled and customized authorities in a public domain. In this way, two fundamental demarcations took place: between public and private domain on the one hand and between the domestic and foreign one on the other hand. Starting from this consequence, in the modern era, the exertion of political domination is also fragmented, determining the occurrence of a specificity in the modern regulatory system, consisting of differentiation of the collectivity which constitutes the subject of the said regulation, into territorially defined legitimate dominance enclaves which are fixed and mutually exclusive.[3]

Historical evolution has demonstrated that the immediate post-westphalic reality would transform, evolving into a form of state interaction, so much so that the interactions between them go beyond the limits

[3] John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 1993, în *International Organizations*, 47 (1), p. 151.

traced by political frontiers. To his sense, the states have come to only physically share the space over which they exercised their sovereignty, the actual relation between different actors eluding their authority. This reality created the niche of opportunity in which international society was about to manifest itself, due to the existence of different types of functional regimes, political communities or shared markets. Considering this, ideological currents exist denying the exclusive territory concept.[4]

The fragmentation of the European political elite moral unity continued, two centuries later, this time being generated by the nationalist trend, which, without going into historical details, lead to the forming of nation-states. In this context, national ethics replaced the one formulated in the terms of transnational aristocracy, following a long process of social, moral and political transformations due to the rising of liberal ideology trends.[5]

This tendency does not represent by far the ending of a progressive evolution, in the current anarchy conjuncture of the modern era, the state concept entailing a foreign differentiation and a domestic unification. In time, the state's sovereignty attribute has generated a series of controversies and starting from here, an entire intellectual and political tradition, which was founded in Europe and then extended gradually throughout the world. Also, this concept was not only spread throughout the world, but was also subject to profound analysis in all schools of thought in the matter, reaching interpretation subtleties specific to each one.

Without going into excessively technical details, the deepening process can be exemplified by revealing four fundamental meanings of the term sovereignty: *domestic sovereignty*, which refers to the organization of public authority in a state and the effective level of control exerted by those in authority; *interdependence sovereignty*, which refers to the ability of public authorities to control cross border movements; *legal international sovereignty*, referring to the mutual acknowledgement of states or other entities; *westphalic sovereignty*, which refers to the exclusion of foreign actors from the configuration of domestic authority.[6] It is easily noticeable that these ramifications of the semantics of the term sovereignty have each constituted axioms that gave way to a series of

[4] John Gerard Ruggie, p. 165.
[5] Hans J. Morgenthau, *Politica între naţiuni. Lupta pentru putere şi lupta pentru pace*, Polirom, Iaşi, 2007, p. 269-279.
[6] Stephen D. Krasner, *Sovereignty: Organized Hipocrisy*, Princeton University Press, 1999, Princeton, NJ, p. 9.

theories that afterwards constituted the basis coding of some imperative Public International Law norms, such as international cooperation, lack of interference in domestic affairs, territorial integrity, frontier sacredness. For these reasons it is difficult to separate the analyses in the sphere of international relations from the encodings carried out by International Law in the basis of the first.

In the field of International Relations research it was argued that respecting international norms or the institutionalizing of particular structures is directly influenced by the power and interests of decision makers of the anarchic system.[7] To this sense, it was demonstrated that the states, especially the Great Powers, show increasing flexibility when reporting to any of the elements associated to sovereignty, such as territory, control, autonomy or recognition. Regarding each of the theoretical characteristics of sovereignty, powerful states can show great ability to negotiate the importance of each of them, of narrowing or widening the meaning of the term or even inventing solutions that will justify or offer answers to the sovereignty claims, be it even relative, made by actors such as the Sovereign Order of Maltese Knights or the European Union.[8] It is also noticeable that even though they possess the ability and interest to impose their own rules in the system, some states refuse to do so under force, but through an attempt of making their desires legitimate, through a so-called negotiation that will take place in the frame provided by the fundamental principles of international law.

Similar ideas, giving nuance to the absolute character of sovereignty, but viewed from another perspective, can be found in the history of the Cold War USSR, eloquently exemplifying the informal empire notion, which is defined as hierarchical structures that transcend the anarchic system. Essential to the existence of such a structure is the existence of an uneven distribution of military powers, so that the strong will have the ability needed to offer the weaker one with safety warranties. For this, in exchange, the stronger state must intervene in the less powerful one, in order to create a friendly regime that will allow such a positioning without political and social convulsions from the latter. Thus a transnational hierarchic system is born, in which the stronger state accomplishes states functions in the weaker ones, giving birth to a non-anarchic states system. Consequently, it is the case of imposing a friendly regime by the

[7] *Ibidem*, p. 228.
[8] *Ibidem*, p. 228-237.

patron-state in the client state, thus limiting the sovereign prerogatives of the latter.

In this paradigm of international security, in which military force would have been the only element ensuring the existence of the informal empire, it would have been hard to explain the crash of the Soviet Empire, seeing as nothing seemed to threaten it, reported to its impressive nuclear arsenal, the states under its wing continuing to be protected by the Red Army. The weak link of the mentioned hypothesis consists of the fact that the military aspect of a states power is not sufficient, the practice contradicting this. In accordance the intellectual frame in which we must position ourselves when approaching themes such as renouncing sovereignty must comprise, beyond the aspects relating to military force, a series of cultural and material factors, a mutual state-international system influencing, an involution in the interests and identities of some societies that are found decreasingly in a state, finally reaching the moment of renouncing it.

Synthesizing those mentioned, we may state that the link between the state and its pretention for domestic sovereignty must be contextualized, it having variable meanings in time and space. The same approach must be considered when focusing on the foreign dimension of security, defined by the lack of involvement of one state in the affairs of another, there existing enough evidence to demonstrate the evolution of a tendency of the international society to become involved increasingly more in aspects of domestic affairs of a state, that were believed to be reserved to the states.[9] Such a situation can be identified more recently in the case of recognition of state sovereignty, conditioned by declaring and proving the commitment towards democratic values and practices. The attitude of the states towards an foreign intervention can also be mentioned in the same context, attitude conditioned by both political and regulatory criteria.[10]

Of the comments made regarding sovereignty, by means of the idea flows crystallized during time in the sphere of international relations, a common feature emerges, that sovereignty is identified with the notion of state, here also stemming the generic character we attribute to it in the frame of international law. Also, another element that can be identified I

[9] Thomas J. Biersteker, Cynthia Weber, *The Social Construction of State Sovereignty*, în Thomas J. Biersteker, Cynthia Weber (eds), State Sovereignty as Social Construct, Cambridge University Press, 2002, Cambridge, p.167-170.
[10] *Ibidem*, p. 163-164.

any of the existing theories refers to the state as a juridical-political construction projected with the purpose of managing international security issues. In order to observe the erosion of the traditional semantics of sovereignty, it is sufficient to follow its evolution on three different planes: ceasing the final authority pretention, changing the norms regulating international recognition, as well as the emergence of other types of actors demanding their right to authority.

It is not only the case of the sovereignty concept that undergoes a continuous dynamics of its significance, but also the case of its constitutive elements, such as authority, identity and territory. At the present, the tendency of the states to maintain their legitimacy of monopole over violence, being willing, at the same time, to support or at best to remain passive against the manifestation of a great number of actors undermining their authority, to renounce their basic symbols of state at some times, such as their currency, to even accept repositioning with respect to the demand of a higher authority. The European Union is an eloquent example to this sense, even if unique in many ways. National security remains the one thing that the states did not agree to share with other actors, in other words, the monopole on violence, idea that we also identify in the theories regarding the concept of state and that attribute to the states a decisive role in maintaining a peaceful world order.

In the same spirit, that of finding the most appropriate means for creating a peaceful world order, also act the promoters of international law science, but using specific contextual instruments and approaches, whose sources can be identified in the ideological theories and flows that form the field of international relations. To this sense, the sovereignty concept also holds a central place in international law science, having the same meaning, representing the capacity of each state to decide on its own with regards to the manner in which its problems are solved, domestic and foreign, as well as on the manner in which it values its potential and its role as a participant in international life.

Domestic, sovereignty is translated as the states independence to decide in all domains of political, economic, cultural etc. life. Foreign, the state is at freedom to choose its dialogue partners, to create relations with any state it desires and to become affiliated to any international organization it deems as useful for promoting its foreign policy vectors. Thus the state decides both on domestic and foreign policy, both in an independent manner. The two sides of sovereignty, domestic and foreign, constitute a whole, being the expression of the indissoluble link between domestic and foreign policy of the state.

In its political-legal content, sovereignty has the following characteristics: exclusive, undividable, inalienable and originating.[11]

*The exclusiveness* of a state's sovereignty consists in the fact that the territory defining it can only be subject one sovereignty, the possibility that two distinct powers exert their sovereignty on the same territory being excluded.

The *undividable* character of sovereignty entails that it cannot be fragmented and its attributes cannot belong to more than one holder in one state.

The *origin* of sovereignty expresses its capacity to belong to the state itself since the moment of its creation, not being a quality that must be attributed to it from the outside. To this sense, there is no actor or entity in international society, no state or international organization that holds the competence of attributing sovereignty to a newly formed state. In this context we must underline that origin must not be mistaken for the institution of recognition of a state or government, which compulsory intervenes after the state has declared its independence, namely after it was placed on the world map. In this context, the recognition institution itself must take into consideration the fact that the other states, that already exist, recognize or not the new state that is already sovereign. This observation is also necessary for the newly created state, this in its turn having the opportunity to recognize or not recognize the already existing states.

The *plenary* attribute of sovereignty is translated through the fact that sovereign power is exerted on the whole of the state's territory and on its citizens. To this sense, sovereignty is exerted on all the richness of s states soil and its underground, the prerogatives of state power being exerted on the entire political, economical, social etc. activity.

Also, sovereignty is inalienable, this meaning that a state's sovereignty cannot be given, borrowed or abandoned to other states or international organizations. The states participation in the process of international cooperation with the purpose of achieving its national interests does not mean by far the alienation of one of another of the sovereign attributes of the state. On the contrary, sovereignty itself allows the state to participate in any form of international collaboration, in conferences, international organizations, negotiations and the signing of treaties, on the basis of which the states take on rights and obligations, under the uncorrupted

[11] Ion M. Anghel, *European Union and the position (the feature of subject of the international law), of their member states*, in Communitary Law Review, p. 75.

expression of its will, in the promotion and maintaining peace and international security.

In the virtue of the attributes conferred by sovereignty, the state has the right to become organized on an domestic political, economical and social plane according to the will and the interests of the people defining it, without any interference from the outside, aspect that was coded under the existing theories in the sphere of international relations. At the same time, in exerting its sovereign attributes, the state must respect the conduct imposed by the international society to its members, being obliged to comply with the fundamental principles of international law, implicitly the sovereignty and national independence of other states. Starting from this axiom, within the frame of the sovereignty principle, the equal sovereignty concept of the states was developed, acknowledging their equality in rights, should differences appear, the states being obliged to resort to information and consultation measures in order to identify viable solutions.

Consequently, the mutual respect of sovereignty and independence in international reports of the states constitute the sine qua non condition of all members of the international community, in order to maintain and consolidate a climate marked by peace and understanding.

In this context, we must mention that among the papers of the Montevideo Conference of the year 1933, it was underlined that the rights of each state do not depend on the power to ensure their exertion, but on the fact that they exist as an international law subject. The encoding of right equality has already been done in resolutions and projects elaborated by international scientific organizations, as well as by the UN International Law Commission (ILC).

It is useful at this point to make certain clarifications on the notion of international subject of law. In the International Justice Court vision, this notion refers to those entities that possess international legal personality, meaning that they are capable of having rights and assume obligations at an international plane, as well as of maintaining these rights by taking action in justice.[12] The international law subject is thus an entity that participates in legal reports regulated by international law.

[12] *Reparation des dommages subis au service des Nations Unies, Avis consultatif*: C.I.J. Recueil 1949, p. 174.

The above definition was completed by doctrine, showing that an entity can have restricted legal personality, depending on the agreement or tacit approval of other recognized entities.[13]

Another definition consecrates international law subjects as being entities that on the one hand participate in the elaboration of international law norms and on the other hand, in conducting legal reports governed by these norms, thus directly acquiring rights and taking on obligations in the international legal order.

Origin, typical, fundamental subjects that have full capacity of international law are the states. Aside from them, as a result interests and collective action of the states, other subjects appeared in international society, derived, secondary subjects, such as governmental international organizations that are created by the states. We refer to them as being derived because the legal capacity of international organizations is determined by the states, in all its dimensions, not being taken for granted, nor having the liberty to take on any rights or obligations.

A third category of international law subjects is constituted by the nations fighting for conquering independence and constituting their own state. Also, it is admitted that to a certain extent, even the Vatican has the quality of international law subject and can make religious treaties.

Acknowledging the existence of more categories of international law subjects does not entail the existence of an identity between the nature and extent of their rights.

An element that is common in the doctrine and practice of International Law is constituted by the unanimous vision on the fact that state sovereignty is the political and legal base of its quality as a public international law subject.[14]

Sovereignty is an essential attribute of the state and consists in the domestic supremacy of state power and its foreign independence no matter what the proposition.[15] Sovereignty is manifested in the states independence in all domains of public, economical, social life etc. and becomes concrete through the establishment and carrying out of its own independent domestic and foreign policy. The two sides of sovereignty

[13] Brownlie Ian, *Principles of Public International Law*, 4th edition, 1990, Oxford, Clarendon Press.

[14] Miga Beşteliu, Raluca (2003) *Drept International.Introducere in dreptul international public,* editia a III-a, Bucureşti, Editura All-Beck.

[15] Selejan-Gutan, B., Craciunean, L. *Drept International Public* Bucuresti, Editura Hamangiu, 2007, ISBN 978-973-1836-55-3.

constitute a whole, the expression of the insoluble link between domestic and foreign state policy.

The most important consequence of state sovereignty is their equality. State equality was first convened as a contemporary international law norm during the works of the 1945 San Francisco reunion for preparing the UN Charta and then recognized through the UN Charta, which in article 2 paragraph 1 states that the organization is created on the principle of sovereign equality of all its members, and the Declaration on the principles of international law regarding friendly relations and interstate cooperation according to the UN Charta, adopted through the 1970 General Assembly Resolution no. 2625 of the UN shows that ″all states have equal sovereignty. They have equal rights and obligations and are equal members of the international community, regardless of the economical, social, political or any other type of differences″. This principle was later developed through the dispositions of the 175 Helsinki Final Act.

State equality entails the recognition of the same legal capacity in the conventional relations between them. They determine equality of status and of legal capacity in exercising rights and obligations, with the respecting of rights inherent to the sovereignty of other states, equality in participating in the elaboration of international law norms, equal application of means of peaceful resolving of international differences.

In exercising its sovereignty, the state must behave as an integrated member of the international society and, as such, respect the principles and norms of the international law among which, especially, the sovereignty and national independence of other states, their equality in rights, and to proceed, according to each case, to actions of informing and consulting in view of identifying viable solutions to the problems they are confronted with.

Regarding these elements of sovereign equality, the Helsinky Act also ads each states right to establish its own rules and regulations, the right to define and lead its relations with other states in a free manner, in accordance with international law, the right to belong to international organizations or not to do so, to be part of bilateral or multilateral treaties or not, including the right to be or not to be part of alliance treaties, the right to neutrality.

Of all the international law subjects categories, the state possesses the capacity to assume the total of rights and obligations with an international character. The quality of international law subject of the state is the natural result of its sovereignty and is not dependant on its recognition by

other states. Sovereignty constitutes the political and legal grounds of the states international personality and this belongs to the states regardless of their power, size or development degree.

The state as an international law subject is the bearer of an ensemble of international rights and obligations. Out of these, a central space is held by the fundamental rights and obligations that are intrinsic to the international personality of these states.[16]

Concerns related to the conceptualizing of fundamental rights and obligations of the state have emerged in international law doctrine since the 18th century, E de Vattel being the one that, starting from the analogy between mans fundamental rights, given by nature and those of the states, elaborated a more complete theory in the matter. This theory was subsequently developed, in 1933 the Convention of Montevideo being made, regarding the rights and duties of states, convention signed by 21 states. After the Second World War the problem of fundamental rights and obligations of the states was revitalized, to this sense, a chapter (IV) of the Bologna Pact (1948), the constitutive act of the American States Organization (ASO) deals with the fundamental rights and duties of the states.

Also, through the International Law Commission, the UN elaborated a declaration project regarding the rights and duties of states, project that was never finalized. Although an encoding of the fundamental rights and obligations of the states was never done, they are contained in a series of resolutions of the UN General Assembly, such as the Declaration regarding granting independence to colonial countries and people (1960), the Declaration regarding the prohibition to threaten by force (1966), the Declaration concerning the principles of international law (1970). In 1971, the UN General Assembly adopted under declaration form, ″The Charta of economical rights and duties of states″.

The following are considered to be fundamental rights of the state: the right to exist, sovereignty; the right to peace and security; equality of rights, the right to participate in international life; the right to self defense; the right to access the conquests of science and technology, the right to development and progress, to cooperation and to decide their own fate.

With regards to the fundamental obligations, these are, regularly, correlated to the rights, such as the obligation to not resort to force or threaten by force, to respect the frontiers and territorial integrity of each

[16] M. Beşteliu, Raluca, *Organizaţiile internaţionale interguvernamentale,* ediţia a II-a, 2003, Bucureşti, Editura All Beck.

state, to peacefully resolve all differences, the obligation to willingly fulfill assumed international obligations, the obligation to protect the environment.

As it results from the brief presentation of the different categories of fundamental rights and obligations of the state, this institution of international law is in the middle of a continuous development process, one of becoming more precise and of adapting to the concrete imperatives of international society.

Summarizing what was mentioned, one can state that the principle of right equality of the states contains their equal capacity of assuming obligations and gaining rights, in the conditions of a full equality in treatment, independent of the actual inequalities between states.

Before concluding these general character considerations on the principle of sovereignty in the context of international law regulations, some comments and clarifications would be useful, in order to avoid creating confusions in the interpretation of existing realities on the international stage.

Firstly, the level that human society has currently reached imposes a more profound interdependence and an increasingly intense cooperation between states, while respecting the fundamental principles and international law norms by the sovereign states and with the mutual respect of their sovereignty and equality.

Second, sovereignty cannot be mistaken for the absolute freedom of the states to act, inside each of them or one towards the other. Such an approach would lead to the false conception of an absolute sovereignty, opening the way for breaking the imperative norms underlying international cohabitation.

On the other hand, one must not fall in the other extreme, in which some authors deny the topicality of the sovereignty principle. The interpretations according to which, should the states not be able to reach the regulation of international problems using peaceful means had at their disposal, as would be desirable, the nature and content of fundamental principles of international law is modified, leaving way to interpretations according to which the sovereignty of states is an outdated concept that must be ignored or that it represents an obstacle in the way of international law development are dangerous interpretations.

This approach is completely wrong, seeing that the states are regarded as elements foreign to the forming of international law, wrongly ignoring the fact that they represent the main reason for forming and applying international norms. The states must thus be regarded as being part of the

international regulations process, the forming and application of international law norms objectively requiring interaction and action from them, exactly in order to consider and accommodate mutual positions and interests. Consequently, the existence of sovereign states and correlatively of reciprocity of rights and obligations they have in the process promoting national interests are determining factors for forming and applying international law.

Third, sovereignty excludes through itself the existence of a supra-state authority but requires international norms for the regulation of state cooperation and coexistence. These can only be encoded through signing treaties, assuming obligations, participating in the life of international organizations, as well as other forms of cooperation, which in themselves represent as many forms of exercising sovereignty.

Fourth, sovereignty shouldn't be mistaken for a *reserved field* in which no international law norms were regulated. The evolutions and progress of current international society lead to an unprecedented expansion of international cooperation and consequently of the sphere of application of international law norms. For this reason, this *reserved field* is continuously narrowing, but even so, state sovereignty continues to exist in all fields regulated by international law.

The different forms of economical and political understanding, among which European construction holds a special place, can be examined in the same spirit. The manner in which the European Union is evolving mustn't be understood as being in the situation of renouncing national sovereignty, in favor of other states or foreign factors. This European construction constitutes rather a set of rules and ways regulated by the states and recorded as a result of their freely expressed agreement, through which they convene to **delegate the exertion of one of their sovereign attributes** in the frame of the integrated common space and **not of their sovereignty**, maintaining full capacity to organize their foreign and domestic policy, unscathed by external factors. The states continue to be the decisive factors with regards to the content and rhythm of integration, which they harmonize according to their common interests.

The fact that community norms are opposable to Member states is a natural consequence of their agreement regarding a sovereign decision that they can revisit at any time.

Following another train of thought, again in the process of international cooperation and collaboration, states can convene through treaties, engagements regarding the demilitarization of territories or their neutrality. These agreements do not constitute infringements of the sovereignty

principle. In the same situation are transit understandings in the favor of states that have no seaside or for any other reasoning, as well as objective regimes created through international conventions, but that create *erga omnes* obligations, such as those regulating the freedom to sail on international waters.

Another relevant comment for the approached theme refers to the cases in which certain interpretations cause prejudice to the sovereignty principle. To this sense, international law norms do not admit limitations of sovereignty through the assignation of spheres of influence or interest or security areas, practiced by more powerful states which have established and practiced them with the purpose of subordinating less economically or military developed states, in order to accomplish their interests.

In the age of globalization, the interdependence between states increases, along with it appearing new challenges, some constituting real threats to the territorial sovereignty of states, such as ethnical, religious or ecological ones, but all these impose an intensifying of the international cooperation for the developing and implementation of new solutions, that must constitute forms of exertion of the sovereign power of states.

A final comment proposes to reveal the fact that regardless of the technical-scientific evolutions and progresses, or the ones recorded on an idea plane, state sovereignty remains an important feature of international life. The sovereignty concept objectively adapts to new conditions, so one can state that sovereignty remains a principle of organizing and implementing universal norms and values, such as international peace and security, respecting human rights or durable development, not solely as grounds on the basis of which the states gain certain rights, but also as a source of international accountability of these states and as a basis for international cooperation.

The main actors of the current international relations system are the nation-states and the intergovernmental international organizations. The degree to which each of them, separately or in interaction, influence the reports in this system is different. With their converging or diverging interests, states continue to be the dominant political entities of the international relations contemporary system. They are free to admit or to reject the regulation of conflicts existing between them through an international organization, they can accept, in the limits of the constitutive act of the organization, its decisions or claims, or they can deny cooperation for their implementation.

Still, international organizations, created through the will of the states, play an important role in international society. Their main function is to

provide the means of interstate cooperation, in fields in which they have common interests or in the fields in which cooperation ensured advantages for all states or for the vast majority of them. Seeing as, in the contemporary world states have to cooperate in an increasing numbers of fields and resort to compromise in order to promote common interests and solve problems that, through their implications, exceed their borders, it seems logical that they create, to this purpose, varied cooperation forms, of which the most effective remain intergovernmental international organizations. These organizations function on the basis of voluntary cooperation principle, act as a glue between states, as a catalyst of accommodating their divergent national interests and as institutions for the identification and implementation of actions that can serve the entire international community.

International public law regulates the relations between states and the operations between intergovernmental international organizations. The latter participate in international life, have rights and obligations as a result of their international legal personality. The states are those that, through their constitutive act, give intergovernmental international organizational distinct legal personality from that of its members.

On the basis of that personality, intergovernmental international organizations can sign treaties with the states and other international organizations, benefit from privileges and immunities and their actions are governed by international law norms.

Each organization is created through its own constitutive act, which doesn't stop Member states from later dissolving it and it also has its own rules for accepting new members or for excluding existing ones. In addition, international organizations are created to fulfill certain objectives established and stipulated in the constitutive act, that also conditions the margin to which it can participate in international life, the limits of its actions.

The institutional structure of international organizations determines their manner of functioning, of adopting decisions and applying them. International organizations have been gradually involved in an international scale normative action, the legal grounds of their activity in this regard being established in each organizations constitutive act. Due to the fact that international organizations are created on the basis of the sovereign will of the states, the same will and cooperation will be needed in applying the measures taken by them.

The increasing interdependence between nations and the technical character of some fields in which certain international organizations de-

velop their activity, highlights the necessity of cooperation between states, on a permanent basis, through actions coordinated and harmonized at a global level, in whose preparation and materializing a great role is that of the main international organizations, first of all, of the United Nations.

In general terms, an international organization is an association that can have a character state, reuniting many states, or a non-state character, constituted of legal or physical persons of different nationalities and who do not follow lucrative purposes. The first category of associations is named intergovernmental international organizations, while the second, nongovernmental international organizations[17].

The United Nations international law commission, through its report Sir Gerald Fitzmaurice, proposed that the definition of international organizations contain referrals to the fact that it is an association of states, constituted by treaty, endowed with a constitution and common bodies and that it possesses distinct legal personality from that of member states.

A close definition to the proposition advanced by G. Fitzmaurice belongs to professor Bindschedler, who views the international organization as an ″association of states, established through and based on a treaty, which has common goals and its own special bodies, fulfilling particular functions inside the organization″.[18]

Although, generally, this definition was accepted by the doctrine, it was not retained as such in the two Vienna conventions of 1969 and 1986, regarding the right of treaties. Thus, article 2 of the Vienna Convention regarding the right of treaties defines the term ″international organization″ as an ″intergovernmental organization″, thus excluding those forms of association that, although operate at an international level, are not carried out through the states (Nongovernmental International Organizations - NGO). In the present study, the term international organizations refers to intergovernmental international organizations.

At the same time, in the understanding provided through article 2 of the 1969 Vienna Convention, international organizations are founded by the states and function through their will. The quality to represent the states in these organizations and to act on their behalf, is usually the attribute of the government representatives of the respective states. The exceptions, very limited, in favor of parliamentary presence (European

[17] M. Besteliu, Raluca, *Drept International Public,* vol. 2, 2008, Editura C.H. Beck, Bucureşti.
[18] Planck, M. (1981) Encyclopedia of International Law, volume V, p. 119-120.

Council, NATO, European Union) or of some social segments (patronages or unions, in the case of the International Work Organization, the European Economical and Social Committee) only confirm the rule.

Up to the present, international law doctrine does not mention a unanimously accepted definition of international organizations, but the elements necessary for a state association to be considered an international organization were identified:

- A primordial condition is that the association have these states as contracting parts.
- State association in an international organization must be constituted on the grounds of the agreement of the states, usually expressed as a multilateral international treaty. Most international organizations were formed on the basis of multilateral treaties, which represent the constitutive papers of the respective organizations, which are called Carta, Status, Constitution, Pact etc. The treaty of constitution of international organizations contains mutual agreements and imposes to participant states cooperation inside and with the organization. Through constitutive acts, mutual obligations are created, opposable to all members.
- The association of states in international organizations entails establishing and following common objectives or goals such as maintaining peace and international stability, economic development, financial cooperation, development of commerce, transfer of technology. The proliferation of international organizations after World War II stems from the diversification of activities which impose cooperation between states, which also reflects in their preoccupations to circumscribe as exact as possible, in the constitutive act, each newly created organization's objectives and purposes.
- The fourth condition for an association of states to qualify as an international organization is the requirement that it have its own institutional structure, formed of periodical or permanent functioning bodies, with attributions determined by the constitutive treaty, capable of adopting acts opposable to the members of the organization. Among the bodies of an international organization there must be at least one body formed of representatives of all member countries, and this body must not be dependent of a certain state.
- The doctrine also establishes the necessity of conformity of the organization to international law norms. A convention between two or more states for the constitution of a hydroelectric plant does not

confer the body created for the accomplishment of this objective the quality of international organization. The entity created, responsible for the two or multiple states, cannot have international organization status if it was constituted and functions according to the internal legislation of one or more partners.

In a wider frame, it can be stated that an international organization, as subject of an international agreement that creates it, has, on the one hand, juridical person status, with the capacity to poses, gain or transfer property, to make contracts, participate in international agreements with states or other international organizations and to pursue specific purposes through legal means, and on the other hand, benefits of rights and responsibilities created through international legislation or the respective agreement [19].

The cumulative effects of the mentioned constitutive elements (states associating on the basis of a treaty, having common goals, own institutional structure and respecting international law norms) confers international organizations with their own juridical personality, of internal right (inside the organization), as well as international, on the basis of which they gain rights and assume obligations on the territory of either member state or in the relations with them or with other international law subjects. The rights and obligations of an international organization are acquired through the will of the states, which transfer to this entity the exercising of some of their sovereign attributes. The purpose of the international organization is to promote the collective interests of its members and, to this end, it will perform public functions in the virtue of which it will come into contact with other international order entities, especially with the states and other organizations. Thus, international organizations acquire their own legal personality, distinct from that of the states and opposable *erga omnes*[20]. This thesis is consecrated in the United Nations Convention on the representation of the states in intergovernmental international organizations, since 1975. According to these hypotheses, the legal personality has two facets, one on an international plane and the other on an internal one.

At the end of this article, starting from the historical, political and legal argumentations mentioned regarding sovereignty and international organizations, some pertinent conclusions can be made with regards to the manner in which the state continue or not to maintain their sovereign

[19] http://www.law.columbia.edu/library/Research_Guides/internat_law.
[20] Erga omnes = regarding all; without exception (cf. www.euroavocatura.ro).

attributes in reports with the European Union, regarded as a *sui generis* construction.

Firstly, we must underline the fact that the *European Union*, following its institution through the Lisbon treaty, appears as an international organization, being constituted as an organization of states, on the grounds of an international multilateral treaty, endowed with its own bodies and own will, distinct from that of its founding states and also has international legal personality[21]. The *sui generis* character comes not from the fact that it is a union of states in an international organization, but from the competences attributed to it by states and that make this construction one with specific statehood elements (governing, legislature creation etc.). Also of a *sui generis* nature is the fact that this organization with obvious state competences cannot be generically framed in the federate model, nor the confederate one.

With regards to the sovereignty of member states, a first remarque is related to the fact that regardless of the international organization's nature, states are made to respect its internal right (following the rules established for the good development of reunions and organizational life on its whole), but also the engagements they take in the different forms of cooperation they consented to participate in. Finally, the actions of the international organization represent actions that the member states agree to respect and for the realization of which they assume commitments. Consequently, any type of state cooperation, but especially those taking place in international organizations inevitably entails assuming obligations that lead to the restriction of the liberty of action in favor of the organization or other members of it.

On the other hand, with all the current importance of international organizations, after their expansion creating a real structured network of entities, thus transforming the international community, they do not substitute the states[22], still they remain the primary element of the construction of international society, with whose existence they are interdependent. The own will of the international organization does not lead to an imposing of obligations to member states, due to the fact that they are the only ones that have the full capacity to establish them and consequently, to participate in the forming of their will. To this sense, the states are not subordinated to the international organization but have

[21] See art. 47 of TUE.

[22] G. Geamănu, *Drept Internaţional Contemporan*, vol.2, Ed. Didactică şi Pedagogică, Bucureşti, 1975, p. 171.

commitments to them. All acts, regardless of their name, decision, resolution or any other document, are adopted by the states and do not become mandatory for them only according to their constitutive rules (ratification, adoption etc.).[23]

The European construction does not stray from international law norms. What appears to be an act of direct governing of the European Union in report with member states, actually is a competence, exclusive or shared, attributed by them to European institutions, to regulate in certain domains, on their behalf and for them, that national authorities themselves have consented to surrender in favor of community institutions. To this sense, also regulated were the principles after which the act of European governing is carried out, such as attributing competence, subsidiarity, proportionality[24], that have in view precisely harmonizing the fundamental principle of international law, sovereignty, with the decisional process of the community structure constructed by them.

To this sense, from the beginning of the Lisbon Treaty, it is mentioned that, what remains under the jurisdiction of member states and is not contained in the EU portfolio with the title of community competences are those fields that define and compose national identity, needed for the actual existence of fundamental political and constitutional structures of member states, that respect the essential functions of the states and especially those that have as an object ensuring territorial integrity, maintaining public order and national security.[25] In sustaining what was stated, arguments can be brought demonstrating EU's refrain from creating a military block and consequently of communitarisation of the common defense function by maintaining regulation in this field in the logics of intergovernmental cooperation.

Maintaining the states in the front of European construction results from the fact that they continue to have the quality of subject of international law, exerting all their attributions, with the exception of those that, on the grounds of their freely expressed will, were transferred to community institutions, or that would be incompatible with their quality of EU member. In conclusion, the European Union represents an association of states that remain sovereign and that, together with community institutions, form the basis of the entire community construction.

[23] The convention for encripting states rights, section 1, article. 2, letter. (j).
[24] P. Maillet, *Trois défies de Maastricht (convergence, cohésion, subsidiarité)*, Ed. L'Harmattan, 1993, p.105
[25] European Union Treaty, article. 4, paragr. (2).

The Union cannot exist without the member states, seeing that they represent the constitutive element of the European Union, which has as an origin and perennial basis the member states, community construction itself being the work of the founding states which attribute to it competences for accomplishing their common objectives, as it can be seen in article 1 of the Treaty.[26]

In certain specialty papers, the phrase *sovereignty transfer* appears, creating confusion and inducing harmful currents for the existence and proper functioning of community construction itself. According to what was mentioned in this study, from the use of this phrase we can deduce that sovereignty is neither exclusive, nor inalienable, thus loosing the constitutive material elements of the sovereignty concept and, along with it, disappearing the corner stone of the entire international modern order.

This approach is not reflective of reality in the sphere of international relations either, due to the fact that such an interpretation would lead to the dissolution of statehood and implicitly the erosion of one of the fundamental pillars of community construction which is formed of sovereign member states. It would be most appropriate to use terms reflecting that the referral is made to the lack of exertion of sovereign attributions by member states, as a result of attributing competences to the European Union, seeing as it does not sovereign attributes, but competences.[27]

This does not mean that in the future states will be unable to decide to coalesce in a federal type construction, the newly formed entity gaining sovereignty, in the current sense of the term, starting with the ceasing of member state sovereignty, phenomenon that would subscribe to the rules of the current international order.

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[26] Ion M. Anghel, *Uniunea Europeană şi poziţia (calitatea de subiect de drept internaţional) a statelor membre*, în Revista Română de Drept Comunitar, 2009, nr. 6, p. 97.
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# INTERNATIONAL RULES AND POLICIES ON THE RIGHT TO FOOD SECURITY AND SAFETY

**Maria Iuliana NEAGU***

**ABSTRACT**
*With globalization of the food chain, the main international organizations have made a careful regulatory activity and normalization in matters of food safety. The two global acting organizations, United Nations Food and Agriculture Organization (FAO) and World Health Organization (WHO), but also the European Union at our continent have developed a coherent framework of international standards aimed at improving foods and food safety, and reducing environment aggression and protecting the health. The author presents some new and important standards which enforce the right to food security and safety adopted by these international organizations and their impact on Romanian economy.*

**KEYWORDS:** *food security, food safety, Guidelines for Consumer Protection, food safety management systems*

The current period is characterized globally by issues of particular concern, such as climate change, human population growth, intensified resources exploitation of Earth, problems threatening food security by overcoming production capacity in terms of exponential growth of demand for food.

Therefore, solutions must be found to ensure food quality as high as possible, that meets agreed standards, including those concerning protection of health and nutritional efficiency.

United Nations Food and Agriculture Organization (FAO) is the one that launched internationally in 1963 the concept of food security, and with the World Health Organization launched in 1996, the Declaration on World Food Security. On that occasion, it was noted that "food security at the individual, familial, national, regional and global level [is achieved] when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets nutritional preferences and dietary needs for an active and healthy life"[1].

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[1] FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action*, World Food Summit, 13-17 November 1996, Rome.:"Food security, at the individual, household, national, regional and global levels [is achieved] when all people, at

Recognition of the importance of food security lies in the fact that it is recognized as part of the security of each nation and thus to global security and stability.

Food security is linked to population nutrition, both quantitatively and qualitatively, with the key driver the agricultural production development and use of resources. Insufficient food or limited access to it generates on smaller or greater areas hunger or malnutrition among populations and hence failure to ensure food security.

In each state, the way food security of their populations is ensured, has direct implications in the economic, social, demographic, cultural and, not least, the political domain. Efficiency and competence of government actions can be determined from the analysis of the policies they develop and implement on matters such as economic development, social protection, prices, trade.

Currently, in the content of the concept of food security is included not only access to food but also the desire to ensure a healthy diet.

Therefore, the corollary notion of food security, food safety, refers to a number of features that food must fulfill. These are[2]:

- Does not contain toxic, anti-nutritive, radioactive, pathogenic microorganism additives in excess;
- Have nutritional value, determined by the amount and quality of the main macronutrients (carbohydrates, proteins, fats) and micronutrients (biominerals, vitamins, biologically active substances);
- Have energetic value.

These requirements that relate to food include all stages of their economic and technical circuit, from raw material stage till the finished product consumption.

Quality of food and nutrition in general have a direct influence on the health of the population. Modern agriculture based on excessive use of chemical fertilizers and pesticides, as well as highly processed food products and industrial and genetically modified threaten not only the environment but also the health of consumers.

all times, have physical and economic access to sufficient,safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life".

[2] *Idem*, p. 65.

From year to year, issues regarding food security and safety have become increasingly important with the rise in the public attention of unwanted events of food contamination[3].

As such, in the first plan has passed the need to manage issues and risk factors such as consumer protection, biotechnology, safety of genetically modified products, the precautionary principle, traceability, applying international standards of quality, response to bioterrorist threats, free trade and legitimizing trade restrictions, international cooperation and risk management in public health matters.

Concerns were raised globally by food diseases by virulence and the devastating effects they can have. The actual impact that food contamination with toxic products has on the health of the population is not really known. Unfortunately, "in this field, we are witnessing approximations and empirical evaluation, quite often contradictory (to give an example only how the milk contaminated with aflatoxin crisis in the Romania, in early 2013 was handled), and reports that regional and international bodies or competent authorities presents them to public opinion does not necessarily reveal the situation".[4]

Therefore, internationally has established itself from farm to fork approach, which involves tracking the compliance to national and international legislation regarding food hygiene at all stages of the food chain, including primary production and (products from farms, fisheries, aquaculture, and so on).[5]

With globalization of the food chain, the main international organizations have made a careful regulatory activity and normalization in matters of food safety. The two global acting organizations, United

[3] Let us recall some of them: dairy products contaminated with melamine (China, 2008), dioxin contamination of feed for poultry and pigs (Germany, 2011), contamination of milk with aflatoxin (Bosnia, Croatia, Serbia, Romania, 2013) the scandal of substituting beef with that of horse (France, UK, Romania, 2013).

[4] Anamaria Bianov (Toma-Bianov), *Protecţia sănătăţii şi securitatea alimentară în cadrul Organizaţiei Mondiale a Comerţului. O abordare din perspectiva interferenţei dintre sistemul drepturilor omului şi sistemul multilateral de comerţ,* PhD thesis, Titu Maiorescu University ,Bucharest, 2013, p. 28.

[5] Farm to fork concept was evoked at the pan-European Conference on Food Safety and Quality (Budapest, February 25 to 28, 2002 *http://www.fao.org/docrep/MEETING/004/-AB500E.HTM)*, and the Forum held at the Second FAO / WHO Global Forum on Food Safety Regulators (Bangkok, October 12 to 14, 2004, http://foodsafetyforum.org/global2/index_en.asp). See also the paper published by the European Commission From Farm to Fork - Safe Food for Europe's Consumers, 2005 *(http://ec.europa.eu/food/resources/publications_en.htm*).

Nations Food and Agriculture Organization (FAO) and World Health Organization (WHO),but also the European Union at our continent have developed a coherent framework of international standards aimed at improving foods and food safety, and reducing environment aggression and protecting the health.

We exemplify first with the ***Codex Alimentarius***, created since 1963 by FAO and WHO, which establishes standards of a number of 237 types of food and 41 codes of practice for hygiene and technology for all basic foods.

Codex Alimentarius contains a set of standards and guidelines regarding food safety and quality, including food additives, veterinary drugs and pesticide residues, toxic contaminants agents, methods of analysis and sampling, and in the matter of best practice codes and guidelines relating to hygiene. Codex standards are fundamental points of reference in the field of food safety and the application of these standards voluntarily is stimulated.

Reflecting the will of the international community to develop and implement effective policies of food safety the ***"Beijing Declaration on Food Safety"*** was adopted in 2007[6]. This document adopts an integrated approach in matters, requesting all stakeholders to conduct concerted cooperation actions in all sectors related to the food sector. The idea promoted by the Declaration is that the integrated food safety systems are more suited to face potential risks that may arise throughout the food chain, from producer to consumer. It also stresses that the attention paid to the issue of food security is to be regarded as an essential function of public health, function that protects the consumer from potential risks. To this end, it requires the states to develop a regulatory transparent framework of the standards regarding ensuring food security, to ensure effective and proper implementation of the legislation on food safety, using methods of identifying the risks set out internationally, to establish specific procedures, including screening systems and withdrawal from the market of contaminated products in cooperation with the manufacturing industry, to quickly identify, investigate and monitor incidents

[6] The declaration was adopted by consensus in the International Forum regarding Food Security, *Enhancing Food Safety in a Global Community*, held in Beijing on November 26 to 27, 2007 (http://www.who.int/foodsafety/fs_management/meetings/forum-07/en/index.html).

related to food safety and to alert the WHO on those events that fall under "international Health Regulations"[7].

The United Nations has contributed to the awareness raising activity of the acyions regarding consumer protection and food safety regulation. The United Nations has contributed to awareness raising the level of business operations related to consumer protection and food safety regulation. In 1995 the United Nations General Assembly unanimously adopted a set of general guidance, called "*Guidelines for Consumer Protection*" which are actually a set of internationally recognized minimum standards, having a potential for specialized care provided to emerging and underdeveloped states[8].

These guiding principles intend to satisfy the need for consumer protection against existing dangers to its health and safety. Such an objective is achieved through programs of information and education on food related diseases or counterfeiting of food, as well as by promoting national policies of prioritizing the safety of key products for consumer health (food, water, pharmaceuticals) and maintaining the development and improvement of food safety measures (control of product quality, proper and safe facilities for distribution, labeling at international standards, information, etc..).

Relevant in our field of interest is a document drafted in 2004 by the FAO Committee on Worldwide Food Security which includes "***Voluntary guidelines designed to support the progressive realization of the right to adequate food in the context of national food security***"[9].

We note from this document Guideline 4, which provides that States must ensure adequate protection of consumers against fraudulent practices on the market, against misinformation and unsafe food. However, national measures of consumer protection shall not constitute unjustified obstacles to international trade and must be in compliance with WTO agreements.

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[7] *International Health Regulation*, Regulation promulgated by the World Health Organization (WHO) regarding the declaration of certain contagious diseases (cholera, yellow fever, plague), and measures to take to prevent the spread from one country to another.

[8] General Assembly resolution 39/248 of 9 April 1985 and Annex: *Guidelines for Consumer Protection*.

[9] *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security – September 23, 2004,* Annex 1*,* Report of the 30th Session of the Committee on World Food Security (CFS), Rome, September 20-23, 2004.

Also, Guideline 9, specifically concerning food safety and consumer protection, urges or encourages the states:

1) to take measures to ensure that all food, either locally produced or imported, put freely available or sold on the market, are safe and consistent with national food safety standards;

2) to establish comprehensive and rational food control systems, that reduce the risk of food diseases, using risk assessment and critical control points, and to establish monitoring mechanisms to ensure food safety throughout the food chain, including the food for animals;

3) to adopt food safety standards based on scientific evidence, including standards for food additives, contaminants, residues of veterinary drugs and pesticides as well as microbiological risks, and establish standards for packaging, labeling and advertising of foods, taking into account internationally accepted standards regarding food (such as Codex Alimentarius standards);

4) to adopt measures to protect consumers from fraud and misrepresentation in the context of packaging, labeling, advertising and sale of food and facilitate consumer choice by providing adequate information on foods sold, and provide individual right to action for any injury caused by unsafe or altered food, including food offered by vendors, in accordance with WTO agreements;

5) to cooperate with all stakeholders, including regional and international consumer protection organizations, in addressing food safety issues, and to consider their participation in national and international fora where policies affecting the production, processing, distribution, food storage and marketing are discussed.

At European Union level we must remember the *White Paper on food safety matters*, drafted in 2000 by the European Commission which recognizes the need for measures to regulate the food chain from farm to table. The Commission also considered it necessary to create an independent European authority whose mission is the protection of food.

Based on this concept, the Commission adopted ***Regulation (EC) no. 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety***[10] which is the most important norm of the European Union in this field.

[10] Regulation (EC) no. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law,

This regulation lists a number of ***general principles*** (art. 6-10) which refer to:

a) the general objectives to be pursued in food law, among which would include a high level of protection of human life and health, protection of consumer interests and promoting fair practices in food trade;

b) creating specific risk analysis resorts in food law, risk assessment based on the available scientific evidence and undertaken in an independent, objective and transparent way;

c) applying the precautionary principle where possible harmful effects on health have been identified, and on which scientific uncertainty persists;

d) protection of consumer interests and protecting him from fraudulent or deceptive practices, from counterfeit food, and any other dangerous practices;

e) ensuring transparency through public consultation and information activities.

The Regulation also sets out the ***obligations of Member States*** concerning food trade, the general requirements regarding food safety legislation as well as those relating to traceability, specifying the basic rule applicable, namely "food will not be placed on the market if they are unsafe". It is considered that foods are unsafe when they are injurious to health or unfit for human consumption (Article 14).

The conformity of food with specific provisions applicable to that food shall not prevent the competent authorities to take appropriate measures to impose restrictions regarding the placing on the market or to require its withdrawal from the market, where there is reason to suspect that, despite such compliance, that food presenting risks in terms of food safety (art. 14, alin. 8).

There are regulated the liability issues, by making reference to *the responsibility* of both EU Member States as well as private operators. On this last point, it is important to take proper account of the direct effect of the regulation, which allows European citizens the right of action in case of violation of consumer rights, on the one hand, against Member States before the European court (vertical direct effect) and against other people and companies before national courts (horizontal direct effect).

establishing the European Food Safety Authority and laying down procedures in matters of food safety, published in JO L 31, 1.2.2002, p. 1-24.

Therefore, operators in the food and feed business must take action in all stages of production, processing and distribution within the businesses under their control, in order to ensure that foods or feeds satisfy the requirements of food law relevant to their activities and shall verify that such requirements are fullfilled (art. 17 alin. 1).

The regulation states, however, the paramount importance of *safety and consumer confidence*, the Community being a major global trader of food and, in this context, a major supporter of free trade principles governing food, but also its realization under safety, fairness and ethics conditions.

The Regulation also provides that in trade *relations with third countries* is necessary to ensure that food exported or re-exported from the Community comply with EU law and that even if there is agreement of the importing country, food injurious to health are not exported or re-exported.

Of particular importance is Article 19 of Regulation (EC) no. 178/2002, which in its four paragraphs, specifically establishes *responsibilities in the field of food that accrue to the of food business operators.*

Thus, if a food business operator considers or has reason to believe that a food which it has imported, produced, processed, manufactured or distributed does not meet food safety requirements, he must immediately initiate procedures to withdraw the food from the market if the product has left the immediate control of that initial operator and shall inform the competent authorities. If the product may have reached the consumer, the operator informs efficiently and accurately, consumers about the reason for its withdrawal, and if necessary, recall from consumers products already supplied to them when other measures are not sufficient to achieve a high level of health protection.

Also, a food business operator responsible for retail activities and distribution which does not affect packaging, labeling, the safety or integrity of the food initiates, within its activities, procedures to withdraw from the market products that do not meet safety requirements of food and participate in the safety of food process by passing on relevant information necessary to trace a food product, cooperating in the actions taken by producers, processors, manufacturers and / or authorities.

The food business operator shall immediately inform the competent authorities if it considers or has reason to believe that a food which it has placed on the market may be injurious to human health. Operators shall inform the competent authorities of the action taken to prevent risks to the final consumer and shall not prevent or discourage any person from

cooperating, in accordance with national law and legal practice, with the competent authorities, where this may prevent, reduce or eliminate a risk arising from a food product.

Finally, food business operators shall cooperate with the competent authorities on action taken to avoid or reduce risks posed by a food product which they supply or have supplied.

The purpose of those rules is to ensure the highest possible quality of products and services. The concept of **quality** has been defined by *International Organization for Standardizatio*n in its *ISO Standard 8402* as "all the properties and characteristics of an entity, that gives it the ability to satisfy expressed or implied needs."[11]

Also, additional standards were adopted retaining the responsibility of the enterprises managers, in this direction and we exemplify with the standards of *ISO 9000 quality management systems family*. Fundamentals and Vocabulary: ISO 9001 Quality Management Systems. Requirements, ISO 9004: Quality Management Systems - Guidelines for performance improvement[12].

For the management of food businesses it is recommended the ***HACCP*** *system (English acronym expression of Origin: Hazard Analysis of Critical Control Points)* based on the identification, evaluation and control of all chemical, physical and biological risks that may arise in the manufacturing, storage, distribution of food.

This management system is governed by the *ISO 22000*[13] standard and it is assimilated nationally[14], and the methodology and elaboration of a implementation plan is based on seven guiding principles, namely[15]:

[11] http://www.iso.org/iso/catalogue_detail.htm?csnumber=20115.

[12] In matters of *food safety management systems* there were adopted the following standards:

• ISO 22000 food safety management systems. Requirements for any organization in the food chain.

• ISO 22002 food safety management systems - Guidelines for the application of ISO 9001 in the vegetal production for new projects.

• ISO 22004 food safety management systems - Guidelines for the application of ISO 22000:2005.

• ISO 22005 traceability in the food chain. General principles and basic requirements for system design and implementation.

[13] Rezumatul Standardului ISO 22000 poate fi consultat la adresa: https://www.iso.org/obp/ui/#iso:std:iso:22000:ed-1:v1:fr.

[14] See, *Ordinul Ministrului Sănătăţii nr.1.956 din 18 octombrie 1995 privind introducerea şi aplicarea sistemului H.A.C.C.P. (Hazard Analysis Critical Control*

1. Assessing the risks of obtaining and harvesting raw materials and ingredients, processing, handling, storage, distribution, preparation and consumption of food.
2. Determination of critical control points that can control the identified risks.
3. Establishing critical limits which must be respected in each critical control point.
4. Establishing the procedures for monitoring the critical control points.
5. Establishing corrective actions to be applied when after the monitoring of critical control points a deviation from critical limits is detected.
6. Organizing an efficient system of record keeping which constitutes the documentation of the HACCP plan
7. Establishing the procedures that will verify that the HACCP system is working correctly.

Assimilation HACCP system can create for economic units of the food business a number of *advantages and benefits* that relate to improving the company's image and credibility in the international markets and to potential investors, increasing the possibilities to enter on new markets, creating competitive benefits, provides a framework for control and intervention within the company leading to reducing of loss-generatin consumption, prevention of passing possible diseases from animals to humans and prevention of outbreaks of food poisoning that affect the health of consumers.

Also, incidents involving legal responsibility of the organization are reduced, consumer confidence in food security is regained by ensuring hygienic quality of products, and last but not least, the confidence of the employees is increased by improving the working conditions of employees.

An important place in the standards listed in this section is occupied by aspects that secure *the responsibility of managing food businesses*, ranging from the need for it to express its commitment to implementing policies on safety and legality of products as well as responsibility towards customers and other stakeholders.

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*Point) in activitatea de supraveghere a conditiilor de igiena din sectorul alimentar,* published in M.Of. nr. 59 bis/22 mar. 1996.

[15] Constantin Oprean, Letiţia Oprean, *Managementul calităţii,securităţii şi siguranţei alimentelor în contextul dezvoltării durabile,* Editura Universităţii Lucian Blaga, Sibiu, 2013, p. 261.

Perhaps the most appropriate concept launched in doctrine in matters of management, that takes into account the requirements of corporate social responsibility is that of "*Total Quality Management*" (TQM abbreviated) which is a way of leading of an organization, centered on quality, based on the participation of all its members and aiming at long term success through customer satisfaction and benefits to all the organization members and society[16].

*Total quality management* has also been adopted by **the standards of ISO 9000**, which defines this concept as a management system of an organization centered on quality, based on the participation of all its members, aiming to ensure long-term success through customer satisfaction and obtaining benefits for everyone in the organization and for society[17].

Such a management system requires consistent economic units leadership involvement but also the training and continuous education of staff.

For the *economic agents* that activate in the food industry, a management system which complies with international standards involves, especially issues such as:

- Identify, assess and control potential food safety concerns, thus be avoided any unwanted effects, directly or indirectly, on the health and safety of consumers;
- Providing communication of useful information on product safety throughout the technological process;
- Providing information on the introduction and implementation of food safety management system to the entire organization;
- Evaluation and regularly update of food safety management system so that it takes into account the latest developments regarding the factors that may affect food safety.

It is obvious that the success of such an management approach depends on how the communication and cooperation with other economic units, of government or non-governmental units, that can contribute to the surveillance and control of food throughout their production chain, for increasing consumer health and protection, is ensured.

[16] SR ISO 8402: 1995. Quality managementul calităţii.Vocabulary.

[17] ISO Standard 9000 (2005)-Quality management system - eseential principles and vocabulary which remapleced a ISO Standard 8042. See: https://www.iso.org/obp/ui/fr/#iso:std:iso:9000:ed-3:v1:en.

In an era of impressive development of the media, especially in this field is vital to ensure *effective communication* and a transparent economic behavior to engage all economic and social actors which intervene in the process of food production.

Necessarily each economic agent has to structure an internal communication system to wich should have acsess at least the staff with responsibility for ensuring food safety Necessarily within each economic agent must be structured an internal communication system at least have access to staff with responsibility for ensuring food safety. This is especially about providing information on the development and launch of new products, changes in the use of raw materials and ingredients, modifying production processes, developments regarding customers and their requirements.

Equally important is the communication with customers, suppliers, legal and regulatory authorities and other organizations to exchange information designed to avoid any potential hazard in the food chain. Based on this dialogue is agreed upon safety levels that must be met by food products.

For *Romania*, the connection to international standards and norms in food security and safety matters is not only necessary in view of some "slippage" that have captured the attention and public concern in recent years, but also useful for increasing the acceptance of domestic products and services on the specific international market.

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# FEMINISM – THE ARGUMENT FOR A JURIDICAL CONCEPTUALIZATION OF WOMEN'S RIGHTS

**Maria Beatrice BERNA***

**ABSTRACT**

*Feminism brings a peculiar juridical model in scientific reports. The depiction of women's rights is made in a different legal note: on one hand, women's rights are* ***claimed in a comparative manner*** *(if we take into account that equality for women is solicited by reference to men's rights which are legaly and socialy guaranteeed), on the other hand, women's rights are claimed* ***in a introspectiv manner*** *(by re-evaluating the feminine nature). From here arises the central idea of our study: feminism generates, within the protective action of women's rights, two alternatives (both equaly pertinent): (1) aiming to give expression to gender equity, the solution resides in including women as subjects of rights in the general legal framework that ensures human rights; (2) in order to obtain a superior system of protection of women's rights, the concern of the legislator must be directed towards the recognition of an ensemble of specific rights-derived from the feminine nature.*

*Subsequently to the central idea, we are of opinion that feminism operates with the concept of gender (and gender differences) in two senses: (1) in a militant sense (thus satisfing the requirements of formal equality) and (2) in a analytical sense (validating female nature by virtue of legal norms).*

**KEYWORDS:** *feminism, women's rights, peculiar juridical model*

## Feminism – epistemology, serendipity, ideology

Associating feminism with women's rights issues seems to be a scientific redundancy. The need of overtaking this scientific appearance, demands, first of all, explaining the general paradigm of analysis. From an empirical point of view, feminism is a counterweight to the patriarchal world[1] which aims at ensuring social justice in the sense of rebalancing the socio-political relations of genders – hence, overcoming gender dis-

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[1] According to professor Mihaela Miroiu, patriarchy designates *the power scheme which disavows the discernment and the free will of a broad category of people in favor of a symbolic, spiritual father or (...) in favor of a political or ideological father who owns the true discernment, freedom, the capacity of being legislator and of imposing norms;* Miroiu Mihaela, *Fetzele patriarhatului,* published conference in the Journal for the Study of Religions and Ideologies, vol. I, nr. 3, Cluj, 2002, p. 210.

crimination. In the scientific approach[2], *feminism may be identified with an ideology corresponding to a social sub-category that promotes specific features of feminine research and creations.* The evoked concept emphasizes the epistemological difficulty of the *feminism* concept. This polemic extends on two coordinates: (1) the epistemological value exists as far as one can apply transcendental rules to the scope of obtaining scientific knowledge, disregarding extra-logical conditions (among which gender)[3]; (2) gender can be assessed as a catalyst factor of acceding to knowledge, activating as a constituent and transformer[4]. Re-visiting the idea of associating feminism with wider female experiences, a possible conceptualization of feminism consists in recognizing scientific value to the feminine approach of the world and to the act of reflecting feminine attributes. Certainly, feminine values precede feminism; nevertheless, these values were re-evaluated and empowered within the feminist movement. We esteem that, beyond the multiple possibilities of epistemological conceptualization, feminism refreshes a silent reality of the patriarchal world in a cvasi-adventitious manner. Once established this paradigm, *feminism can be included in the scope of serendipity phenomena.* We will explain, hereinafter, this assessment. As we have already stated, feminism is the movement that is intimately tied to the patriarchal organization of society – this type of organization overestimates the masculine values in configurating human existence. This motto gives course to the institution of feminism on scientific and rational criteria. Nevertheless, feminism cannot be assigned (unanimously) to a deterministic process whose etiology is sheer-prescribed and single. Hereby, feminism ment removing from the lull feminine values and experiences and locating them on a militant and scientific rut. From the setting of the coordinates results the casual discovery, by means of feminism, of new scientific dimensions – ergo the link serendipity-feminism.

Framing feminism in the ideological pattern lacked a clear scientific support as scholar's opinions were disrupted. Reiterating the thesis

[2] Hesse Mary, *How to Be Postmodern without Being a Feminist*, The Monist, nr. 77, 1994, trad. rom. de Mihai Ungheanu, Revista de Filosofie, XLVII, nr. 5-6, p. 499-515, Bucureşti, apud Dima Teodora, *Ideologia feministă şi epistemologia contemporană.*

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[4] Tufan Eleonora Mirabela, *Feminismul în relațiile internaționale*, published article in the review *Analele Universității Constantin Brâncuşi,* Seria Litere şi Ştiinţe Sociale, nr. 3/2011, Târgu Jiu, p. 132.

according to which abigo concepts preserve scientific relevance, the ideological quality of feminism can be appraised solely by reference to those concepts: *a feminist ideology is a corpus of ideas describing society's sexism and a future society where sexist contradictions wil be eradicated*.[5] Apart from the complexity of finding or not finding the ideological comprehension of feminism, we notice a paradox at least strange: feminism's ideological legitimation is consecrated in a conflicting manner, by reference to sexism, although, through itself, feminism is not identified with a Manichean approach of the world and of the existence. Accordind to this idea, feminism is not absonant with sexism but it dosen't aim to convert sexism's logic to the detriment of androgynous values and on behalf of feminine values. The re-affirmation of feminine values rather tends to restore gender equity ratios.

In its evolution, feminism gave profs of programmatic coherence, in spite of different depictions-determined by different social contexts. This statement is validated if we consider the idea, by virtue of which, in general terms, feminism equals to the improvement of social-political-cultural condition of women, even though, at the particular level, some nuances are noticeable. The case of the three waves of the feminist movement supports the above demonstration: *the firts wave feminism* – was based on the idea of obtaining civil and political equality between sexs (mainly, it was persued the formal equality – of juridical nature, not the substantial equality – referring to clear conditions and manners of exercising women's rights); *the second wave feminism* – harnessed the differences and the emancipation, acknowledging the lack of substantial equality and the condition of gender as a social construct[6]; *the third wave feminism* – is centered on autonomy and multiple identity, developping based on women's common experiential basis[7].

At a mere glance, the content of feminist claims is divided between *formal claims* (juridical configuration related to women's rights) and *specific claims* (resulting as a consequence to gender difference). It is clear that, we encounter some difficulties in estimating which claim is subsi-

[5] Humm Maggie, *Ideology*, în The Dictionary of Feminist Theory, second edition, Prentice Hall & Harvester Wheatsheaf, New York, 1995 (1st edition published 1989), p. 128 apud Frunză Mihaela, *Feminismul ca/şi ideologie,* published article Journal for the Study of Religions and Ideologies, vol. I, nr.6, Cluj, 2003, p. 5.
[6] Miroiu Mihaela, *Drumul către autonomie. Teorii politice feministe*, Publishing House Polirom, Iaşi, 2004, p. 23.
[7] *Ibidem*.

diary to the other, especially, if we take into account that, a category of domination to another is a historical given.

## Gender and discrimination – validation through feminism

As we stated above, the combination of formal and specific claims gives content to the feminist programme, the phenomenon of *discrimination* being representative for both categories contested within the feminist movement. Weather we argue feminism's vindications by means of the juridical paradigm or we take into consideration the peculiar paradigm (encompassing all the social, behavioral, biological aspects that give the precise feminine nature), it is necessary to start from the concept of *discrimination*.

First of all, it is self understood that, feminist hypothesis re-construe in a critical manner the concept of discrimination, searching for meaning beyond legal regulations but without completely neglecting the legal framework. The legal framework is not excluded from the discrimination equation due to the clarity advantage in conceptualizing the phenomenon of discrimination based on gender: *discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*[8] Relating to the social or political approach of the discrimination problem in general and of women's discrimination in particular, the juridical approach has preeminence because it shows *what is the meaning of discrimination* and *how it affects women.* Disbarring those two advantages, the juridical paradigm seems to alienate from the real concern brought by the discrimination problem because the normative power ceases to activate upon cultural relicts the consequence being the possibility to form a critical mass in thinking that is reluctant to gender equity. Accordingly, the legislator regulates behaviors stating those conducts which are desirable but, the legislator' s activity doesn't necessarily extend upon mental attitudes – hence the mandatory intervention of the

[8] Convention on the elimination of all forms of discrimination against women, adopted by the United Nations General Assembly by means of resolution no. 34/180 of 18 th December 1979, entered into force the 3rd September 1981 according to the provisions of art. 21 (1). Romania ratifies the legislative instrument on 7th January 1982.

socio-political paradigm that will correct the reticence of all the subjects of law regarding the compliance with the rules of gender equity. The socio-political model will be concerned with the correct identification of the *causes* for women's discrimination and of the *forms in which discrimination manifests itself*. If in terms of the causes of women's discrimination, the absolute power of analysis returns to the political and social sphere, the forms in which discrimination is observed are in the shared competence of the juridical and the socio-political sphere of analysis. By way of example, *direct discrimination* and *indirect discrimination* are assigned to the explanations offered by the juridical field: *discrimination means any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social category, convictions, sex, sexual orientation, age, disability, chronic un-contagious disease, HIV infection, belonging to an under priviledged category, and any other criterion which has the purpose or the effect of restraining or removing the recognition, usage or the exercise, in conditions of equality, of human rights and fundamental freedoms or of the rights recognized by law in the political, economic, social and cultural field or in any other field of the public life* [9] indirect discrimination consists in: *any active or passive behavior that, through the generated effects, unduly favors or under privileges or subjects to unfair or degrading treatment a person, a group of people or a community compared to other persons, groups or communities.*[10] The political and social analyses signal other forms of discrimination that are insidious and exceed the scope of the regulatory power. It is the case of *discrimination by omission* and *positive discrimination.*[11] In our opinion, both forms of discrimination are justified in an ancestral manner, by means of setting up and developing the patriarchal society. We will be more specific: (1) *discrimination by omission* corresponds to the abiding image of the world that recognize masculinity as the sole creator of values; as a result, feminism will be excluded the role of manufacturer of values and culture, assuming the role of subjecting to masculine values; (2) *positive discrimination* derives and validate by calling the discrimination by omission: by virtue of the intellectual and

[9] Article 2, paragraph 1, Ordinance of the Government, no. 137/2000, modified and republished.

[10] Article 2, paragraph 4, Ordinance of the Government, no. 137/2000, modified and republished.

[11] For details concerning the two forms of discrimination, see Chiș Ancuța-Lăcrămioara, *O critică a conceptului de discriminare din perspectiva feminismului,* doctoral thesis, Cluj Napoca, 2010.

spiritual evolution of masculinity, feminism will be excluded from the act of producing values and will be protected from the outside world (including from itself).

Second, the gender appears as a primordial criterion and concept that directs the analysis. Including this point of our work, emphasizes the demarcation between the juridical and the non-juridical (political and social) sphere. Juridical prescriptions prohibit discrimination on the basis of gender, defining the gender in a basic, biological sense, as all the features that distinguish masculine from feminine. The socio-political paradigm attach to the gender the meaning of social construct, thereby, the gender is situated past the anatomical and biological determinism; the gender is found in cultural renewals, in behaviors and in social attitudes. The reasoning of the social construct was validated in the case of conceptualizing feminism and *patriarchy.* Discrimination based on gender is fountained by the antagonistic approach of feminine and masculine values; objectivity and reasoning were assigned to the masculine gender (universal values that express the identity) whereas subjectivity and emotions were assigned to the feminine gender (derived values that express alterity).

The real comprehension of discrimination in terms of a social phenomenon and of gender in terms of discriminatory criterion entails a junction between juridical and non-juridical (political and social) issues. The juridical norm regulates the appearance (we allude to formal equality, to gender equality) whilst the political and juridical framework seeks behind the legal reality in order to depict the essence. Likewise, the juridical-non-juridical junction gives expression to the programmatic content of feminism (formal claims-specific claims). The clarification of feminism and of the influences that feminism brought upon the issue of women's rights is a consequence of the conditioning of two analytical approaches.

## Feminism in the juridical paradigm: women's rights

The formal content of the feminist program makes explicit reference to the principle of gender equity. Equally, the formal content of the feminist program equates to the juridical dimension of revitalization feminist values. Up to this point, the scientific discourse emerges in logic of its own, even more so if the juridical dimension of feminism vindicates women's rights. The issue occurs when we interrogate upon the significance of these vindications – respectively, upon the categories of

claimed rights. In this order of ideas, feminism's eccentric character resides, not in the vindication of rights but in the characteristics of this type of vindication. As a result, by reference to women's rights, feminism shows interest for *the manner of depicting women's rights* not for *the sole significance of women's rights*.

In light of those shown above, we advance the following working premise: *the major peculiarity of feminism is in conjunction with the analysis and interpretation of the principle of gender equity*. In a large sense, gender equity expresses equality in rights between men and women - motto under which was manifested the first wave of feminism. The logic of the rights that were claimed arises the difficulty of identifying and defining those rights. This limit is felt in the scientific literature, by stating that: *some feminist theories pursue a re-balancing of justice, vindicating equal rights for women, other deem as necessary the recognition of specific women rights adjusted to women's needs (child birth, maternal leave, confinement, abortion).* [12]

Weather it subsist at the international, regional or national level, the rules and regulations that have as object women's rights touch both lines of action. At the international level, legal documents designed to ensure gender equity were focused upon formal equality.

*The Charter of the United Nations* specifies, from the beginning (art. 1), the main orientation of the normative process: *the respect for human rights, the respect for fundamental freedoms, without any distinction of race or sex, (...)* In the same spirit are elaborated the other articles: *there will be no distinction imposed by the Organization to the access of men and women, in equal terms, at all functions, in its principal and subsidiary organs (art. 8).*

The first *International Treaty with universal vocation which defines women's status* also known as the *Convention on the political women's rights* was adopted by the General Assembly of the United Nations in 1952. The document stipulates in articles 1 and 3: *the right to vote in all elections, under conditions of equality with men, without any discrimination; the right to employment and to exercise public functions under the same conditions as men; the right to be elected in public bodies under the same conditions as men.*

It is of utmost importance, through its regulations, the *Declaration on the elimination of discrimination against women* – unanimously adopted by the members of the Commission for women's condition. The focus of

[12] Miroiu Mihaela, work cited, p. 16.

this document resides in article 3 – which emphasizes the role of education in changing the traditional perspective in analyzing women's rights, warning that *all appropriate measures should be taken in order to educate the public opinion and to instill in all countries the desire to abolish all bias and to suppress all customary practices or other similar practices founded on women's inferiority.* Around this maxim revolve other rights: *the right to vote and to be elected, the right to vote in any public referendum; the right to hold public posts and the right to exercise all public functions under the same conditions as men without any discrimination (art. 4); the right to citizenship (art. 5); the right to education (art. 9); economic and social rights for women (art. 10).*

In the same vein, we make reference to the *Convention on the elimination of all forms of discrimination against women – adopted by the United Nation General Assembly in 1979.* Structured in 6 parts and 30 articles, the Convention can be qualified as one of the most complete documents at the international level that focuses entirely on the social aspects regarding women as law subjects. From *defining discrimination against women*[13] (first part), to the consecration of political and civil equality between men and women (second part), to the statutory of social, cultural and economic equality (third part) or to the equality before the law of men and women (fourth part) to the recommendation to establish a structure specialized for combating discrimination against women (fifth part), the Convention deepens the degree of protection offered by legal documents.

If at the international level, the regulatory process is heading with predilection towards areas of formal equality by avouching, by default, the general framework of women's economic, social, civil and political rights, the regional (European) legal framework refreshes the general framework stated at the international level and moreover, brings into the normative process, peculiar women's rights. The Revised European Social Charter establishes norms with the purpose of protecting women's motherhood, by imposing to this aim, an additional protection. Thereby, *employees, in case of maternity, and other women that work in similar situations, have the right to special protection during the time of la-*

[13] Discrimination against women shall mean any distinction, exclusion or restriction *made on the basis of sex* which has the effect or purpose of impairing women's possibility to rejoice of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field;

*bour*[14]; this kind of protection is ensured through granting paid vacation, protection against dismissal during maternity leave, prohibition of female employment in areas that have an unwholesome, harmful or difficult character. By establishing a fair system of social services, by encouraging the construction of housing adapted to the needs of families, by supporting young families, are transposed into practice various provisions of the Charter: *mother and child, regardless of the matrimonial situation and family relations, have the right to appropriate social and economic protection*[15]*; family, (...) has the right to social, juridical and economic protection in order to ensure a good evolution.* [16]

At the European Union level is noticed the same trend – of establishing a set of rights that arise from feminine peculiarities. *Directive 92/85/EEC regarding the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding* implements an extensive set of benefits. Among these we mention: *the granting of maternity leave with a duration of 19 weeks allocated before and/or after delivery, the maternity leave will also comprise the mandatory period of two weeks allocated in a similar manner before and/or after delivery; non-involvement in night work; reducing work time without diminishing the salary, including for the purpose of performing prenatal examinations; ensuring jurisprudential ways and/or appeals in the court of justice in order to enable the rights enshrined in favor of this category*. Pursuing the same goal - the protection and the guarantee of women's social rights - the European legislator elaborated the *Council Directive 96/34/CE* aiming to harmonize parents professional and private activities. The objective was reached at the European level by means of juridical norms that regulate the parental leave. In secondary, the directive aimed to order measures for the implementation of the *Framework Agreement regarding the parental leave*. In accordance with the agreement, all workers - men or women - parties in a work contract/relation – have the right, in case of child birth/adoption to a leave of absence for a period of at least three months (that can be extended up to reaching the age of 8 years). Besides, workers who benefit from the right to parental leave, rejoice of collaterals such as: *returning to work on the previous post* (or

[14] Art. 8 of the Revised European Social Charter.
[15] Art. 17 of the Revised European Social Charter.
[16] Art. 18 of the Revised European Social Charter.

on an equivalent or similar post); *protection against abusive dismissal* (the request of parental leave may not be grounds for dismissal).[17]

Finally, national rules satisfy both requirements (general and peculiar) of guaranteeing women's rights, keeping present the fact that, the national legal norm is marked by the influences of European and international regulations.

From all the above, we can assess a certain reorganization in the act of guaranteeing women's rights: the rights relating to the extension of the civil, political, economic, social protection from the larger field of human rights to the peculiar field of women's rights are reflected in international regulations; women's rights that evoke the peculiarities of female experiences are especially present in European regulations; at the national level, are formally guaranteed both categories of rights due to the influences of European and international norms exerted upon the domestic framework.

Another relevant observation issues from the fact that, the juridical model of guaranteeing women's rights (although extended) does not cover all rights vindicated by the feminist movement. Exempli gratia, *the right to feminine self-determination, the right to assert one's identity* (involving crossing feminity from the perception of otherness to the perception of identity), *the right to autonomous solving of problems relating to common feminine experiences* are not covered.

Despite the evolutionary trend of guaranteeing women's rights (from the international juridical framework that ensures the general lines of protecting women's rights to the European juridical framework that customs the women's rights issue, by prescribing prerogatives derived from the status of mother and wife) there are limits of the feminist juridical model - exceeding these limits will undermine the cultural benchmarks that prevents the full exercise of women's rights.

## Final Notes

The feminist juridical model is a consequence of the dictum: *what is personal is political.* The delimitation public-private gains a special relevance - the public sphere being artificially destined to men and the private sphere being consigned under feminine authority. Feminist militancy pursued form a juridical perspective, both women's accession to the

[17] Popescu Andrei, *Drept internaţional şi european al muncii*, Publishing House C.H. Beck, 2008, Bucureţti, p. 418.

public sphere and the consolidation of a protection system in the private field. Consequently, the private affaires have overtaken the boundaries of the private field, becoming a pretense (and subsequently foundation) for legitimating a modern vision of conceptualizing a juridical model for women.

Self-evident assumptions show us that, the feminist movement has served as a tool for vindicating and especially *creating* rights. *The creation of rights* through and in the feminist context may be construed as appointing a set of rights in favor of the feminine gender- rights that, even though were guaranteed in favor of all people by virtue of natural law, were initially guaranteed in a discriminatory manner, solely in favor of men. The rights to life, ownership, education, the right to accede to public resources, the right of involvement in public affairs were naturalized in favor of women within the feminist movement.

In other orders of ideas, feminism submits a theory of women's rights more extended than a sole juridical approach. In order to implement gender equity measures, it is most important to complete the juridical guaranties that were already achieved with new perspectives – within those perspectives; the normative process will append new juridical feminine replies where there are regulations in favor of masculine values. Considering that, at the axiological level, the correspondents between masculine and feminine are easily identified: justice (masculine) – carefulness (feminine); power (masculine)-cooperation (feminine); rationality (masculine) – sensibility (feminine), – at the juridical level, the correct projection of the rule of law must be able to counteract the above mentioned conflicts or, at least to re-balance those conflicts, attending the masculine and feminine peculiarities.

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