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CONTENT

ÉTUDE SUR LE MECANISME DE FONCTIONNEMENT DE LA CLAUSE PÉNALE ET PARTICULIÈREMENT SUR SON APPLICATION DANS LE CAS DE LA RÉSOLUTION OU DE LA RÉSILIATION DU CONTRAT

Smaranda ANGHENI[*]

RÉSUMÉ
Cette étude vise l'application de la clause pénale dans le cas de la résolution ou de la résiliation du contrat. L'intérêt pour traiter un tel sujet est déterminé, d'une part, par la modalité d'interprétation des dispositions qui régissent la matière de responsabilité contractuelle en général et de celles qui gouvernent la clause pénale en particulier. De même, l'intérêt de l'analyse est d'ordre pratique, surtout dans la situation de l'existence de plusieurs clauses pénales qui sanctionnent, de fait, la même conduite par rapport à la discipline contractuelle, c'est à dire l'inexécution de l'obligation par le débiteur.

MOTS-CLÉS: *clause pénale, résolution, contrat, obligation, Nouveau Code Civil*

Avant-propos

Cette étude représente un défi pour les théoriciens et les praticiens du droit civil *(lato sensu)* sur un sujet assez „timidement" traité dans la doctrine de spécialité même s'il a des implications profondes dans la pratique des tribunaux et des juridictions arbitrales, c'est-à-dire l'application de la clause pénale dans le cas de la résolution ou de la résiliation du contrat[1].

[*] Professeur universitaire docteur, Recteur de l'Universite Titu Maiorescu Bucarest, Roumanie.

[1] Pour des détails concernant la clause pénale, voir: D. Alexandresco, *Explication théorétique et pratique du droit civil roman en comparaison avec les vielles lois avec les principales législations étrangères,* vol. VI, Typographie Nationale, Iaşi, 1900, p. 256-258; C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, *Traité de droit civil, roman, restitutio, vol.* II, Édition All, Bucuresti, 1996, p. 336-338; J. Carbonnier, *Droit civil, vol.* IV, Les Obligations, Dalloz, 1971, p. 474; V. Babiuc, I. Rucareanu, C. Barsan, D. Sitaru, N. Turcu-Seclaman, *La clause pénale dans les contrats commerciales internationales,* L'Institut d'Économie Mondiale, Bucarest, 1985; C. Statescu, C. Birsan, *Droit civil. La théorie générale des obligations,* IXème édition, Édition Hamangiu, Bucarest, 2008, p. 344 et suivantes; S. Angheni, *La clause pénale dans le droit civil et commercial,* IIème édition, révisée et mise à jour, Édition Oscar Print, Bucarest, 2000; T.R. Popescu, P. Anca, *La théorie générale des obligations,* Maison d'édition Scienti-

L'intérêt pour traiter un tel sujet est déterminé, d'une part, par la modalité d'interprétation des dispositions qui régissent la matière de responsabilité contractuelle en général et de celles qui gouvernent la clause pénale en particulier, et d'autre part, par la présentation d'une proposition de *„lege ferenda"*. De même, l'intérêt de l'analyse de la problématique de la clause pénale dans le cas de la résolution ou de la résiliation du contrat est d'ordre pratique, surtout dans la situation de l'existence de plusieurs clauses pénales qui sanctionnent, de fait, la même conduite par rapport à la discipline contractuelle, c'est à dire l'inexécution de l'obligation par le débiteur.

En même temps, cette étude traite la possibilité des juges de réduire, en vertu de l'art. 1541 al. (1) lettre b), le quantum des pénalités „manifestement excessives" par rapport au préjudice prévisible au moment de la conclusion du contrat.

La prémisse qui représente le fondement de l'analyse que nous commençons consiste *dans le caractère accessoire de la clause pénale et dans le but de l'établissement de celle-ci.* Ainsi, par la stipulation de la clause pénale *on désire l'exécution des obligations contractuelles* et, en aucun cas, l'encaissement des pénalités. La base légale du caractère accessoire de la clause pénale est l'art. 1538 al. (3) Code civil, selon lequel „le débiteur ne peut pas se libérer en offrant le dédommagement convenu" mais aussi l'article 1539 Code civil, qui stipule que „le créancier ne peut pas demander en même temps l'exécution en nature de l'obligation principale, et aussi le règlement de la pénalité, sauf le cas lorsque la pénalité a été stipulée pour l'inexécution des obligations dans les délais convenu et au lieu établi".

Même si le but de la clause pénale est de déterminer le débiteur à exécuter ses obligations, malheureusement, dans la pratique, plusieurs fois, le créancier préfère l'encaissement des pénalités au lieu de l'exécution forcée des obligations par le débiteur. Ainsi, le créancier "attend" l'accumulation des pénalités, en particulier les pénalités stipulées pour les retards d'exécution, situation dans laquelle la clause pénale devient encombrante pour le débiteur, les fonctions qu'elle accomplit étant ainsi changées. En même temps, en ignorant le caractère accessoire de la clause pénale, on porte atteinte au principe de l'équilibre des prestations

fique, Bucarest, 1968, p. 334 et suivantes; L. Pop, *Traité de Droit civil. Les obligations, vol.* 11, Le contrat, Édition Universul Juridic, Bucarest, 2009, p. 55-78; *idem, La réglementation de la clause pénale dans les articles du Nouveau Code Civil,* dans la Revue „Dreptul" no. 7- 8/2011, p.11 et suivantes;

des parties contractantes, au solidarisme contractuel[2] et, le plus important, à la bonne foi, principe consacré par le législateur dans l'art. 1170 Code civil, texte selon lequel „Les parties doivent agir avec bonne foi pendant la négociation et la conclusion du contrat, mais aussi durant son exécution. Elles ne peuvent pas éliminer ou limiter cette obligation".

1. Les différentes catégories de pénalités et leur modalité d'application dans le cas de la résolution ou de la résiliation du contrat

L'analyse du mécanisme d'application de la clause pénale dans le cas de la résolution ou de la résiliation du contrat impose quelques considérations sur les différentes catégories de pénalités et leur modalité d'application.

Parmi les différentes catégories de pénalités stipulées dans une seule clause ou dans plusieurs clauses contractuelles importantes pour leur application dans le cas de la résolution ou de la résiliation du contrat, on retrouve : *des pénalités de retard dans l'exécution des obligations, des pénalités d'inexécution et des pénalités pour la résolution ou la résiliation du contrat.*

En même temps, il faut analyser les trois catégories de pénalités dépendamment aussi de *l'objet de l'obligation principale, et plus particulièrement l'obligation qui a comme objet des sommes d'argent.*

En analysant les dispositions légales, nous constatons que, en général, dans les réglementations antérieures le Code Civil de 1864 (art. 1068, 1069, 1088) mais aussi dans le cadre du Nouveau Code Civil (art. 1538 et 1539 corroborés avec les art. 1535 et 1536) le régime juridique des différentes catégories de pénalités reste le même.

Ainsi, si le contrat prévoit des pénalités de retard, celles-ci peuvent être cumulées avec l'exécution en nature de l'obligation mais aussi avec des pénalités pour d'inexécution.

Si le contrat prévoit des pénalités d'inexécution des obligations, la clause pénale est, d'habitude, alternative, dans le sens qu'elle ne peut pas être cumulée avec l'exécution en nature.

Dans un contrat, il est possible que les parties puissent aussi prévoir des pénalités pour la résolution, ou au cas par cas, pour la résiliation du

[2] *idem, La réglementation de la clause pénale..., op. cit.,* p. 20; *idem, Certaines exigences du solidarisme contractuel quand à la ne réalisation par une partie contractante de l'intérêt de l'autre partie,* dans la „Revista romana de drept privat", no. 2/2012, p. 205-209;

contrat qui, en effet, représentent toujours des pénalités pour l'inexécution coupable des obligations par le débiteur.

La problématique des pénalités pour la résolution ou la résiliation du contrat impose le traitement des deux aspects suivants : premièrement, à quel degré la clause pénale peut être cumulée avec la résolution ou la résiliation du contrat, ou quels sont les effets de la cessation du contrat par résolution ou résiliation sur la clause pénale et, deuxièmement, si la cumulation entre des clauses pénales différentes est possible.

Concernant le premier aspect, la doctrine de spécialité[3] a „nuancé" la réponse en fonction de l'objet de la clause pénale, respectivement de la nature de la violation de l'obligation. Ainsi, si la pénalité a été prévue pour le retard d'exécution ou au lieu établi par les parties, la clause pénale ne survivra pas à la résolution ou à la résiliation du contrat parce que le contrat a été cesse et d'une manière implicite, il n'est plus question de pénalités de retard.

Par contre, si les pénalités ont été établies pour l'inexécution de l'obligation, la clause pénale peut se cumuler avec la résolution ou la résiliation du contrat, et peut donc survivre en s'appliquant après le moment, de la résolution ou de la résiliation du contrat.

Selon quelques auteurs[4], la survivance de la clause pénale ne représente qu'une garantie de plus pour le créancier.

Toutefois[5], dans la doctrine il y a aussi l'opinion selon laquelle, les pénalités pour l'inexécution ne peuvent pas être cumulées avec la résolution ou la résiliation du contrat parce que le créancier bénéficierait d'une réparation double du préjudice, premièrement pour l'inexécution dans le temps prévu de l'obligation (pénalités de retard) et deuxièmement pour la résolution ou la résiliation du contrat.

Concernant le deuxième aspect, la possibilité de cumulation des clauses différentes ou des pénalités prévues, notamment la clause pénale dans laquelle sont stipulées *des pénalités d'inexécution et la clause pénale en cas de résolution ou de résiliation du contrat* (pacte commissoire) il y a des arguments *pro* et *contre* visant l'admissibilité d'une telle cumulation.

Les arguments en faveur d'une telle cumulation entre les deux clauses contractuelles dans lesquelles des pénalités sont prévues, parviennent

[3] I.L.Toma, *La résolution*, thèse de doctorat soutenue à l'Université de Bucarest, Faculté de Droit, dans l'année 2013, p. 232 et suivante;
[4] B. Starck, H. Roland, L. Boyer, apud I.L.Toma, *op. cit.*, p. 233;
[5] I.M.Serinet, apud I.L.Toma, *op.cit.*, p.234;

d'un point de vue légal mais aussi de l'interprétation de certains textes du Code Civil et de la législation spéciale.

Dans ce sens on mentionne l'article 1538 al. (5) Code civil, en vertu duquel : *„Les dispositions sur la clause pénale sont applicables à la convention par laquelle le créancier est en droit, dans le cas de la résolution ou de la résiliation du contrat de la faute du débiteur, de garder le paiement partiel réalisé par ce dernier. Les dispositions sur les arrhes font exception"*.

En même temps, dans la pratique on a décidé l'admission de la cumulation de la clause pénale avec la résolution du contrat au cas où les parties du contrat ont prévu un pacte commissoire[6].

En ce qui nous concerne *nous considérons que l'application de la clause pénale après le moment de la résolution ou de la résiliation du contrat* représente une question qui *doit être délimitée* de celle qui concerne la *cumulation* de la clause avec la résolution ou la résiliation du contrat.

Dans le cas de la *survie* de la clause pénale, ça veut dire que celle-ci s'appliquera *après le moment de la résolution ou de la résiliation du contrat* (aspect qui n'a pas été traité dans la doctrine de spécialité). Ponctuellement, on a le cas de l'application *des pénalités de retard* pour l'inexécution à l'échéance des obligations financières, même après la cessation du contrat par la résolution ou par la résiliation. Pratiquement, le contrat a cessé mais les pénalités sont toujours calculées jusqu'au règlement effectif de débit restant, interprétation qui découle du contenu de l'art. 1535 al. (1) Code civil, texte selon lequel, *les dommages moratoires* dans le cas des obligations monétaires sont calculés *„à compter de l'échéance et jusqu'au paiement, au taux convenu par les parties ou, à défaut, au taux légal..."*. Mais, dans le cas de la clause pénale, les dommages moratoires sont établis (convenus) par les parties.

Par contre, dans le cas *de la cumulation de la clause pénale* avec la résolution ou la résiliation du contrat, on discute sur la *clause pénale compensatoire* (de réparation), la question de droit étant *les dédommagements* qui, dans les deux situations (clause pénale résolution) sont compensatoires, de réparation.

Dans cette situation la question est la suivante : *le débiteur pourrait être obligé à payer des dédommagements pour l'inexécution tant en vertu*

[6] Voir, Section civile décision no 27/2007, dans V.A.Vlasov, *L'arbitrage commercial. Jurisprudence arbitrale 2007-2009. Pratique judiciaire*, Édition Hamangiu, 2012, p. 233;

de la clause pénale mais aussi en vertu de la clause sur la résolution ou la résiliation du contrat.

Autrement dit, est-ce que les pénalités pour l'inexécution des obligations et pour la résiliation du contrat peuvent être cumulées ? La réponse à cette question est *différente en fonction de l'objet de l'obligation.* Dans le cas des obligations de *„donner"* et de *„faire"* qui *n'ont pas* comme objet des sommes d'argent, en principe, la cumulation est possible parce que, les pénalités pour l'inexécution remplacent l'exécution, et les pénalités pour la résolution ou la résiliation du contrat représentent, en fait, les dédommagements qui *peuvent être payés jusqu'à la réparation intégrale du préjudice causé au créancier par le fait de la résolution ou de la résiliation du contrat.*

En même temps, il est important à préciser que, dans le concours des trois catégories de pénalités: *pour des retards dans l'exécution, pour l'inexécution, pour la résiliation du contrat,* les pénalités de retard peuvent être cumulées avec les pénalités pour l'inexécution (qui remplacent l'inexécution en nature) et pour la résiliation (à titre de dédommagements pour la réparation intégrale du préjudice).

Tel qu'on a déjà précisé, nous considérons que la survie de la clause pénale à la résolution ou à la résiliation du contrat dans les conditions du cadre normatif actuel (art. 1535 al. 1 Code civil) n'existe que dans le cas des pénalités de retard pour des *obligations qui ont comme objet des sommes d'argent.*

De *„lege lata",* selon l'art. 1535 al. 1 Code civil, si le débiteur est en retard les pénalités sont dues jusqu'à la date de l'exécution de l'obligation „à partir de l'échéance jusqu'au moment du payement."

Mais, le plus souvent, la date de payement se situe après la cessation du contrat par résolution ou résiliation.

Si le contrat a cessé par résolution ou résiliation on ne peut plus „parler" de pénalités de *retard* d'exécution, parce que, de fait, nous nous trouvons devant une situation d'inexécution de l'obligation, inexécution qui a déterminé la résolution ou la résiliation du contrat.

Après le moment de la résolution ou de la résiliation du contrat, les sommes qui peuvent être demandés *ne représentent que des dédommagements.* Dans ces conditions nous apprécions que, dans le cas des obligations monétaires, les pénalités de retard pour l'inexécution dans les délais prévus, ne peuvent être calculées que jusqu'à la *date de la cessation du contrat* (la date de la résolution ou de la résiliation). Après cette date, selon nous, le créancier est en droit à recevoir des dédommagements qui, dans le cas des sommes d'argents, sont composés des taux légaux. Selon

nous, s'il y a un pacte commissoire avec la clause pénale, les pénalités de retard sont calculées jusqu'à la date de la cessation du contrat et seront cumulées avec les pénalités pour la résolution ou la résiliation du contrat.

La pratique des tribunaux et des instances arbitrales d'accorder des pénalités de retard après la fin du débit même si le contrat où on a stipulé la clause pénale a cessé par résolution ou résiliation, nous semble incorrecte même si elle est fondée sur la disposition de l'article 1535 al. 1 Code civil. En tenant compte des raisons montrées ci-dessus, nous considérons que ce texte ne peut pas s'appliquer dans le cas de la cessation du contrat par résolution ou résiliation du fait que l'obligation principale a cessée et, d'autre part, il faut prendre en considération le fait qu'on a changé *la cause* de l'obligation de paiement dont le débiteur est tenu.

Si pendant l'existence du contrat *la cause de l'obligation de paiement* était la clause contractuelle par laquelle le débiteur s'est obligé envers le créancier à payer un certain somme, après la cessation du contrat *la cause de l'obligation de paiement* des dédommagements demandés par le créancier est l'inexécution même.

Les deux obligations, contractuelle et de réparation par équivalent en argent, ne se confondent ni comme source ni du point de vue du contenu. La source de la première obligation est le contrat, l'accord de volonté des parties et, en ce qui concerne la deuxième il s'agit de l'inexécution d'obligations contractuelles.

Le contenu de la première obligation est déterminé par le contrat et consiste dans la prestation contractuelle. La deuxième est liée au préjudice causé par l'inexécution[7].

Ainsi, l'obligation de réparation par équivalent ne remplace et ne représente pas une prolongation de l'obligation contractuelle. Pour faire apparaitre l'obligation de paiement des dommages-intérêts il est nécessaire que l'obligation primaire ne s'exécute pas.

La réglementation des dommages-intérêts pour le retard d'exécution représente un argument de plus en faveur de la thèse de l'extinction de l'obligation primaire.

La résolution ou la résiliation du contrat sanctionne exactement le fait de l'inexécution de l'obligation principale assumée par le débiteur dans le contrat, tel qu'on ne peut plus appliquer la pénalité de retard pour contraindre le débiteur à accomplir l'obligation, parce que à cause de cette raison le contrat a été anéanti ou résilié.

[7] T.R. Popescu, P. Anca, *La théorie générale ...op.cit.,* p. 320;

Ainsi, de *„lege ferenda”* le texte prévu à l'art. 1535 al. 1 devrait être modifié et appliqué afin d'accorder les pénalités de retard dans l'exécution d'une obligation monétaire, à partir de l'échéance jusqu'au moment du règlement, à la somme établie par les parties, sans devoir prouver le préjudice, *si le moment du règlement se situe pendant l'existence du contrat.*

Cette précision du législateur éliminerait la pratique non équitable déjà créée d'accorder au créancier des pénalités de retard jusqu'au paiement effectif du débit par le débiteur mais aussi des pénalités prévues par la résiliation du contrat.

Les pénalités de retard pour le débit principal ne peuvent pas être accordées par après jusqu'à son extinction, par ce qu'il a été remplacé avec les pénalités pour l'inexécution qui ont déterminé le créancier de considérer le contrat comme étant résilié de droit.

Si nous acceptons que dans le cas des obligations qui consistent en sommes d'argents il n'y a pas d'exécution par équivalent ou des pénalités pour l'inexécution alors on peut poser la question suivante: quel est le rôle de la clause pénale stipulé pour la résolution ou la résiliation du contrat qui représente, en effet, des pénalités pour l'inexécution, parce que la résolution ou la résiliation est intervenue justement suite à l'inexécution des obligations?

D'autre part, il ne faut pas ignorer la fonction accomplie par les pénalités de retard, respectivement celle de mobilisation, de contrainte du débiteur pour l'exécution de l'obligation.

Mais, dans le cas de la résolution ou de la résiliation on ne peut plus poser le problème de l'exécution de l'obligation mais on peut poser seulement le problème du règlement des dommages (des dédommagements).

Le quantum des dédommagements sera établi en prenant en considération le dommage effectif produit *(damnum emergens)* qui consiste dans la somme d'argents non payé par le débiteur (le débit principal) et le gain non réalisé *(lucrum cessans),* respectivement la pénalité prévue dans la clause de résolution ou de résiliation du contrat.

Dans ces conditions nous considérons que les pénalités de retard seront calculées (comptées) jusqu'à la date de la résolution ou de la résiliation du contrat, des pénalités qui seront cumulées avec les pénalités prévues dans la clause de résolution ou de résiliation du contrat.

2. Réduction du quantum des pénalités par le juge[8]

L'une des nouveautés absolues du Nouveau Code civil est celle qui concerne la possibilité accordée au juge de réduire le quantum des pénalités si celles-ci sont „excessivement" grandes par rapport au préjudice qui pouvait être prévu par les parties à la conclusion du contrat.

Pour une longue période de temps, un argument décisif pour les théoriciens, mais aussi pour les praticiens du droit qui ont rejeté l'idée de la possibilité de l'intervention du juge pour réduire le quantum de la pénalité prévue dans la clause pénale stipulée dans le contrat a été le respect du principe de la force obligatoire du contrat *(pacta sunt servanda)*. A part le cas prévu par le législateur dans l'art. 1070 du Code Civil de 1864, qui offre le droit au juge de *„réduire"* la clause pénale, si l'exécution était partielle, sous le droit de respecter le principe *pacta sunt servanda* les pénalités n'étaient pas réduites par les tribunaux. Pourtant, le législateur est intervenu encore avec quelques „corrections" au sens de la fixation des pénalités au niveau du débit non acquitté, mais seulement dans la situation où dans le contrat, les parties n'ont pas prévu d'une manière expresse la possibilité que la pénalité soit plus grande que la valeur du débit, ce qui représente, de fait, un retour à la règle de la force obligatoire du contrat [art. 4 al. (1) et (2) de la Loi no. 469/2002 à présent abrogée].

En analysant les dispositions comprises dans le Code Civil de 1864 (art. 1066- 1072), mais aussi les dispositions existantes dans le Nouveau Code Civil (art. 1538-1543), *le principe de la force obligatoire du contrat,* concernant *le quantum des pénalités est maintenu.* Ainsi, selon ces dispositions, *en principe, les pénalités qui font l'objet de la clause pénale ne peuvent être ni réduites ni augmentées.* Autrement dit, la clause pénale ne peut pas être réduite ou aggravée. Le créancier est en droit de demander une pénalité, n'importe l'étendue du préjudice, en prouvant le simple fait de l'inexécution des obligations par le débiteur. Par ailleurs, l'existence de la clause pénale dans le contrat ne suppose pas, nécessai-

[8] Voir L. Pop, *La réglementation de la clause pénale...*, op. cit. p. 21 et suivantes, *idem, Traité de Droit civil. Les obligations, vol. II,* Le Contrat, Édition Universul Juridic, Bucarest, 2009, p. 55-78; Voir aussi S. Angheni, *La réduction de la clause pénale. Repères législatives, doctrinaires et jurisprudentielles,* dans „Justitie, Stat de drept si Cultura juridica - Institutul de Cercetari Juridice „Acad. Andrei Radulescu", de l'Académie Roumaine, Édition Universul juridic, Bucarest, 2011, p. 556-574; *idem, Quelques aspects concernant l'interprétation de l'application des dispositions du Nouveau Code civil concernant la réductibilité de la clause pénale,* dans „Curierul judiciar" no. 3/2012, p. 147-152;

rement, l'existence d'un préjudice. Toutefois, tant la doctrine de spécialité, et aussi la pratique judiciaire se sont occupées au fil du temps de la réductibilité de la clause pénale, mais aussi de son augmentation par rapport à l'étendue du préjudice, fait normal vu que la clause pénale représente une évaluation anticipée du préjudice causé, par le fait coupable du débiteur d'inexécution des obligations, d'exécution inappropriée ou avec retard.

Les opinions doctrinaires et les interprétations des jurisprudences ont été, dans une certaine mesure, dépassées par l'inclusion dans le Nouveau Code civil de la disposition prévue dans l'art. 1541 al. (1) lettre b), disposition selon laquelle, la pénalité peut être réduite par le tribunal si elle est "*manifestement excessive par rapport au préjudice qui pouvait être prévu par les parties à la conclusion du contrat"*.

Ainsi, les deux catégories de situations dans lesquelles le juge peut intervenir pour réduire le quantum de la pénalité sont : la situation *quand le débiteur a réalisé en partie l'obligation et le cas lorsque la pénalité est „manifestement excessive" par rapport au préjudice qui pouvait être prévu par les parties au moment de la conclusion du contrat.*

En ce qui concerne la première situation, du point de vue légal, l'art. 1070 du Code civil de 1864 et l'art. 1541 al. (1) lettre a) du Nouveau Code Civil prévoient que, exceptionnellement, la pénalité peut être réduite par le tribunal lorsque l'obligation principale a *été exécutée en partie et*, le Nouveau Code civil ajoute, *cette exécution „a profité au créancier"*. Dans les conditions de la réglementation antérieure la doctrine a été constante pour soutenir que la réduction du quantum des pénalités dans le cas de l'exécution partielle ne contrevient pas au principe de l'indivisibilité du paiement prévu dans l'art. 1101 Code civil de 1864, selon lequel, le débiteur ne peut pas forcer le créancier à recevoir une partie de la dette, même si l'obligation est divisible. La disposition légale concerne le cas lorsque le créancier a reçu de bonne foi un paiement partiel ou il a réalisé partiellement une obligation susceptible d'exécution successive[9].

Concernant le paiement partiel par le débiteur et la possibilité du tribunal de réduire le quantum de la pénalité, nous mettons en évidence les dispositions prévues dans l'art. 1542 et 1543 sur le mécanisme de l'application de la clause pénale dans le cas de l'obligation principale in-

[9] S.Angheni, *Considérations théorétiques et pratiques concernant la diminution de la clause pénale*, dans „Revista de drept comercial", no 6/2001, p. 60;

divisible (art. 1542) mais aussi dans le cas de l'obligation divisible (art. 1543).

Ainsi, dans le cas *de l'obligation principale indivisible,* en excluant la solidarité, si son inexécution représente le résultat du fait de l'un des co-débiteurs, la pénalité peut être demandée, soit en totalité, à celui qui ne l'a pas réalisé, soit aux autres codébiteurs, chacun pour sa part. Toutefois, le législateur prévoit aussi le droit de recours de ceux qui ont payé au co-débiteur qui a déterminé l'inexécution de l'obligation.

Dans la situation de *l'obligation principale divisible* le législateur prévoit aussi que la *pénalité est divisible,* étant subie par le codébiteur qui est coupable pour l'inexécution de l'obligation, et évidemment, pour sa partie de dette.

Concernant la deuxième situation quand la pénalité est *„manifestement excessive",* avant l'actuel Code civil, à défaut d'une raison légale qui pourrait permettre au juge d'intervenir, même de l'office, dans le cas des pénalités excessives, la doctrine, et en particulier, les solutions de la jurisprudence ont été différentes.

Ainsi, la plupart des auteurs[10] ont exclu la possibilité de la réduction des pénalités, opinion motivée, premièrement, par le fait que par la réduction des pénalités on porterait atteinte au principe de la force obligatoire du contrat *(pacta sunt servanda),* et, deuxièmement, que par la réduction des pénalités on pourrait apporter atteinte à la fonction de sanction, mais aussi à celle de garantie de la clause pénale.

Dans une autre opinion, la réduction des pénalités aurait été possible dans la situation où les sommes d'argent dus à ce titre dépassaient le préjudice réel[11].

Dans la pratique des tribunaux arbitraux on a eu cette controverse nuancée, dans le sens que si les pénalités prévues dans le contrat étaient excessives, leur quantum pouvait être réduit selon l'idée de l'abus de droit. Ce quantum ne peut pas être accepté en considérant que, selon les dispositions du Code civil, le tribunal n'aurait pas le droit d'intervenir.[12]

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[10] St.D. Cărpenaru, *Contrats économiques. Théorie générale,* Édition Scientifique et Encyclopédique, Bucarest, 1981, p. 370-371;

[11] A. Theodoru, *L'inadmissibilité des clauses de non-responsabilité ou de limitation ou accroissement de responsabilité dans les contrats économiques*, dans "L'Arbitrage du Star", no. 5/1971, p. 20-40;

[12] La Cour d'Arbitrage Commerciale Internationale de la Chambre de Commerce et Industrie de la Roumanie, décision arbitrale no 158/19.10.1999, dans Revista de Drept Comercial no 4/2000, p.125-127;

Dans une autre décision[13] le Tribunal arbitral a rejeté en totalité la demande concernant l'octroi d'intérêts de pénalisation en considérant que dans le contrat une clause abusive a été stipulée.

En présent, la disposition de l'art. 1541 al. (1) lettre b) Code civil prévoit la possibilité du juge de réduire les pénalités si elles sont *„manifestement excessives"* par rapport au préjudice qui pouvait être prévu au moment de la conclusion du contrat.

Selon nous, la consécration législative de la possibilité de la réduction du quantum des pénalités contractuelles par l'implémentation d'un *contrôle* du tribunal ne peut pas résoudre en totalité le problème des pénalités excessives. Autrement dit, par cette réglementation, dans tous les cas où on constate des pénalités excessives par rapport à l'étendue du préjudice, *est-ce que la seule solution est représentée par la réduction des pénalités?* On ne peut en aucun cas trouver la réponse à cette question seulement dans le contenu de la disposition légale analysée. Tel qu'on a précisé, la problématique de la réductibilité de la clause pénale est très complexe et suppose des considérations théoriques mais aussi pratiques.

Toutefois, si le tribunal considère, même d'office, que la solution serait la réduction des pénalités excessives, la question normale est *jusqu'à quel niveau ou somme d'argents la pénalité peut être réduite ?*

La seule certitude est la disposition de l'art. 1541 al. (2) Code civil, selon laquelle *„Dans le cas prévu au al. (1) lettre b), la pénalité réduite de telle manière doit rester supérieure à l'obligation principale",* et selon l'art. 1541 al. (3) Code civil *„Toute stipulation contraire est considéré non écrite".*

La question de droit qui reste à discuter consiste à savoir si le juge, à défaut d'une stipulation contractuelle de compléter les pénalités avec les dédommagements, pourrait, sur la demande du créancier, admettre ce fait.

La réponse a des arguments pour l'admission, mais aussi pour le rejet de la demande de compléter les pénalités avec des dédommagements.

A l'appui de la solution du complètement des pénalités avec des dédommagements, même à défaut d'une disposition contractuelle dans ce sens, on peut mentionner l'art. 1531 du Nouveau Code Civil et son correspondant, l'art. 1084 du Code civil de 1864. Le créancier a le droit à la réparation intégrale du préjudice subi suite à l'inexécution [art. 1531 al. (1) du Nouveau Code civil].

[13] La Cour d'Arbitrage de la Chambre de Commerce et Industrie de Cluj, décision arbitrale no 80/24.10.2000, dans "Revista de Drept Comercial" no 1/2000, p.119-122;

La solution du rejet de la demande de complètement des pénalités avec des dédommagements, à défaut d'une disposition contractuelle, est fondée par l'existence de la clause pénale introduite dans le contrat par laquelle les parties ont évalué d'une manière anticipée le préjudice et ont compris que celui-ci doit se situer entre les limites de la clause pénale. Par ailleurs, le créancier n'est même pas obligé à prouver l'existence d'un préjudice quiconque [art. 1538 al. (4) du Nouveau Code Civil][14].

Quand même, en ce qui concerne le fait que le tribunal peut réduire les pénalités manifestement excessives, le caractère excessif étant rapporté au préjudice prévisible au moment de la conclusion du contrat pour une identité de raison on devrait admettre l'augmentation du quantum des pénalités, si le préjudice est beaucoup plus grand que celui prévu, antérieurement, au moment de la signature du contrat; augmentation qui pourrait se faire, bien évidemment par l'octroi de dédommagements pour compléter les pénalités.

Par rapport à ces incertitudes nous considérons que, en principe, les juges ne pourraient pas accorder des dédommagements pour compléter les pénalités à défaut d'une clause contractuelle à ce sens, parce que par l'intermède de la clause pénale les parties ont évalué par anticipation le préjudice, en étant dispensées de toute preuve concernant son étendue.

La seule exception apparait quand les pénalités sont dérisoires, symboliques, situation quand la clause pénale ne pourrait pas accomplir une fonction, en faisant abstraction de son existence, cas où on ne peut accorder *que des dédommagements.* Les parties sont obligées à montrer prudence et diligence au moment de l'établissement des clauses contractuelles, de telle façon que la clause pénale soit en concordance avec les dispositions légales. Tel que mentionné, dans le droit français, selon l'art. 1152 du Code civil, le législateur a la possibilité d'augmenter le quantum des pénalités lorsqu'il est dérisoire, aspect qui n'est pas réglementé d'une manière expresse dans notre législation.

[14] "Le créancier peut demander l'exécution de la clause pénale sans être tenu de prouver un préjudice". De l'expression du législateur, il en découle que même si le créancier n'est pas *tenu* de prouver l'existence d'un préjudice, par contre, il a le *droit* de demander une expertise pour déterminer l'étendu du préjudice et, en fonction de celle-ci demander des dédommagements en plus?

CONCLUSION

L'analyse comparative de la clause pénale selon le Code civil de 1864 et le Code civil actuel n'a traité que certains aspects très importants pour la modalité d'interprétation et d'application des dispositions légales, avec un regard spécial sur le mécanisme du fonctionnement de la clause pénale dans le cas de la résolution ou de la résiliation du contrat et de la possibilité que les juges ont a de réduire les pénalités *manifestement excessives* par rapport au préjudice prévisible au moment de la conclusion du contrat. Toutefois, il y a encore des incertitudes, comme par exemple l'application de la clause pénale dans le cas du retard dans l'exécution d'une obligation qui a comme objet des montants après le moment de cessation du contrat par résolution ou par résiliation, ou la possibilité dont le juge dispose pour réduire ou augmenter le quantum des pénalités.

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HIGHER EDUCATION, BETWEEN THE CRISIS OF QUALITY AND THE CRISIS OF IDENTITY – ROMANIAN AND EUROPEAN PERSPECTIVES –

Iosif R. URS[*]
Sorin IVAN[**]

ABSTRACT
After the fall of communism, Romanian higher education has undergone an unprecedented institutional and territorial expansion. In a hyper-pragmatic approach, universities have predominantly accessed only some programs of study, rather than developing a comprehensive offer. The system has experienced an uneven and unbalanced development by overbidding some specializations and ignoring others. The quantitative institutional growth, unrestricted access, insufficient funding, dependence on taxes led to the severe decline of the quality and competitiveness of the studies. Higher education has been going through a crisis of system and process which affects its identity and vocation. A relevant sample is the constant absence of the Romanian universities in the international rankings. Romanian higher education must synchronize with the developments and trends which reshape higher education in Europe. Open access, digital university, digitization of teaching and learning, MOOCs, lifelong learning are concepts and processes which show the direction of evolution of higher education in Europe.

KEYWORDS: *higher education, crisis, synchronization, open access, digital university, lifelong learning*

1. Higher Education – The Crisis of the System

Even though it undergoes, at least theoretically, a process of reformation, the Romanian higher education system is gradually immersing in a crisis of concept and of system that questions the process itself. Paradoxically, instead of attenuating the historical crisis in which the academic education and research are until the crisis is surpassed and a new stage of evolution begins, the change under the auspices of the Bologna Process is augmenting and acerbating the crisis. This phenomenon reveals either a vice in terms of conception and vision at the reform level, or vices of procedure in applying the philosophy of change. Or, very likely, both hypotheses are true. Under these circumstances and at the current

[*] Professor Ph.D., President of Titu Maiorescu University of Bucharest, Romania.
[**] Professor Ph.D., Dean, Faculty of Social, Political and Humanistic Sciences, Titu Maiorescu University of Bucharest, Romania.

stage of the process, which, across Europe, is now approaching the objectives set through the Europe 2020 Strategy, it becomes a priority for us to reflect in a critical and proactive way on the content and on the meaning of the reformation of the Romanian higher education system.

In order to understand its current situation, it is necessary to look back into the recent past, starting with the moment that has separated two worlds and two systems, represented by the fall of communism. Since 1990, the academic system has faced an institutional explosion, through the foundation of several private and public institutions of higher education. These have proliferated quickly, shortly leading to the development of a system that had been ossified over half a century of centralism and ideological control. In a short period of time, the society faced an abundant offer of academic studies, which was trying, on the one hand, to fulfil a historical necessity and, on the other hand, to develop in an entrepreneurial manner a field of major social importance in a world that was slowly returning to the mechanisms of market economy. The institutional expansion was not necessarily accompanied by a qualitative offer for the target public of the academic studies. The new universities, some of them wearing abusively and only formally this title, did not meet, with a few notable exceptions, of course, the level required by the academic education. Actually, most of them promoted a form of education which was less qualitative than the one developed by the public universities before and after 1989. The phenomenon of institutional expansion of the system has continued until today. The system's development in *form*, very fast and sometimes chaotically, has not evolved in a synchronic way with the development in *substance*, that is in *quality*, of the educational process and of the academic research. In this heterogeneous landscape, there are some public universities, the oldest in the country, that are trying to be qualitative and maintain the standards of the academic requirements at a high level. Besides these, there are also a few other private institutions that are preoccupied with quality and that are struggling to meet the European and international criteria.

The today's reality of the higher education system offers solid arguments that sustain the fact that this is in a *complex crisis,* which concerns both *the system* and *the process* as such, both in form and in substance. The crisis has been developing, in concentric circles, within the specific reality of the Romanian educational system and, at the same time, within the system configured by the Bologna Process. Today's higher education forms a system that has been extended in a contrived way in the last 25 years through the expansion in number of private and

public universities. To a great extent, the academic studies in Romania represent a recent field, with over 70% of the universities having been founded after 1990. On the other hand, the oldest Romanian universities have their historical roots in the second half of the 19th century: the University of Iasi, the first university of the country, dates from 1860, and the University of Bucharest, from 1864. As compared to the birth date of the medieval universities of Europe (Bologna – 1088, Oxford – 1096, Paris – 1200, Cambridge – 1209), the Romanian academic system is very young. But (let us say that) age is not a decisive factor in what quality and efficiency are concerned. There are many new private or public universities in Europe or worldwide that, with a strong budget and a clear managerial vision, produce quality and performance. The specific situation of the Romanian higher education system is given by *a few defining traits*: it is relatively young; it has developed especially in terms of quantity and not of quality; it does not have an appropriate financial support; the reformation is not sustained by a coherent vision, conceived on a solid project and towards clear objectives. These particular features determine both its current capacity and limits, and its dynamics of development in the process of reformation.

The brief analysis of each trait reveals essential aspects. Firstly, the consequence of the fact that *it is not based on a longstanding existence* and that, to a certain extent, *it dates mostly from the '90s* is that the Romanian higher education system does not benefit from the time that is necessary for a solid development of the academic studies, for an academic history and tradition which represent the foundation of quality and excellence, of performance and competitiveness, of authority and prestige. Secondly, the development that took place after 1990 consisted (as mentioned before) mainly of *a horizontal expansion in terms of quantity* through the exponential growth of the number of universities, which was not accompanied by a qualitative edification on the vertical of exigency and quality. On the contrary, quality has been outrun by quantity and a void space that is gradually increasing has appeared between the dimension of the system, augmented by the growth of the number of universities, and their capacity to produce quality and performance. The famous antithesis of the *forms without substance* (as it judged in the nineteenth century man of culture Titu Maiorescu), which is defining for the Romanian civilisation and culture, came to be critical for the development of the higher education system too. The third trait, *the insufficient funding*, is decisive in this process. Actually, underfinancing represents the most serious difficulty of the Romanian higher education system. The chronic

lack of financial resources and the poor financing of the system undermine the chances of the Romanian higher education system to surpass its historical condition and its current limitations. Both the absence of a great academic tradition and the uncontrolled horizontal development of the system in a short period of time might be solved by an appropriate financing of the universities, which would offer the support for their development and would create the possibility of gradual surpassing of the two obstacles. All these specific elements are acerbated *by the lack of a coherent and unified vision in terms of reformation* at the politic and administrative level, by the lack of a project to establish the lines and the phases of evolution, as well as the desired objectives within the change process. At present, the Romanian higher education does not have a coherent, European law of education, but only a confusing, ambiguous and even contradictory legislative frame.

2. Higher Education – The Crisis of the Process

The Romanian higher education system is nowadays evolving within a frame that is given, on the one hand, by *the unbalanced and inflationist academic offer* and, on the other hand, by *the insufficient financing.*

In what *the first aspect* is concerned, the horizontal expansion of universities has gradually generated a rich offer of academic studies. But this offer is not a comprehensive one and it does not include all the domains of education and research. The managerial option of the leaders of the new institutions has favoured very few and often the same educational programmes within the domains that are mainly sought on the labour market. This tendency has manifested itself on the grounds of a simplistic pragmatism, in a kind of automatic and opportunistic feedback to the demands of the target audience, and in the absence of the conceptual altitude of an academic vision complying with the complex meaning and mission of the university. Thus, some academic domains are intensely exploited up to super saturation and others are minimized or completely ignored. Real sciences as mathematics, physics, chemistry, and humanistic specialisations such as letters, philosophy, theology, sociology, anthropology, history, cultural studies etc. and others are among the programmes that have failed at the admission exam in the new era of Romanian education, especially of the private one. There is another cause of the exclusive option for some areas of studies and of the ignorance of the others, that is not related to the lack of response within the target audi-

ence: the difficulty to manage some of them, given their nature and specificity. The programmes that require a special infrastructure and logistics, as well as qualified human resources in specific or niche domains are generally avoided. This is the case of a great variety of technical sciences, such as agronomy, horticulture, veterinary medicine, general medicine, dental medicine etc. As these specialisations are, from one reason or another, excluded from the configuration of the new Romanian higher education system, only a few others, from the area of socio-human sciences, remain accessible for the public.

This phenomenon bears two major risks. *The first risk*: a severe unbalance is created among the academic domains, some of them being exploited by all universities, be they private or public, and some of them being almost inexistent. This reality of today's higher education reveals a one way orientation: the managers of the universities, led by a pragmatic and entrepreneurial vision, are preoccupied especially with the idea of making profit, of developing an academic business (if there is not a contradiction in terms), and less interested or not interested at all in establishing a higher education in the complex and authentic meaning of the term. A modern, complex and developed society in the Knowledge Era requires not only a few specializations and professions, but all specializations, skills and qualifications, which are prepared in university, through the undergraduate and postgraduate programs and also within the lifelong learning process. Even if they are not at the same level as a degree of necessity and importance, all are necessary and all must be ensured through university training. *The second risk* is related to the very meaning of the syntagm "higher education system". The university has been conceived as a space dedicated to education, research and holistic knowledge. The medieval university remains the absolute model of the initial idea of university, through the fact that it approaches the fundamental domains of studies and instruction, such as sciences, humanities and arts, in a complex synergy under the auspices of knowledge. Going back to the Romanian higher education, it is beyond any doubt that each institution has the right to build its own academic structure, in accordance with the demands of the public and with its own vision. But when the same vision is common to most institutions, be they public or private, then a major risk occurs – that of restraining higher education to only a few domains and of thus losing its academic diversity and complexity, traits that are fundamental to its existence. Under the circumstances of this drastic limitation, the *university* education – qualified by the formula *university* – risks to lose its originary *diversity* and become the restricted space of study dedi-

cated to a limited number of specialisations. This is very insufficient for the idea of University. In fact, there are universities in Romania that have only two or three study programmes. As there are other universities too which were initially conceived as highly specialised ones, for instance technical ones, with niche domains, which have gradually expanded, in the spirit of the same entrepreneurial pragmatism, and have come to include some other specializations, successful on the market, very far, academically speaking, from their initial mission. Such higher education institutions are thus ignoring their vocation, contained within their very name, and undergoing an unnatural metamorphosis that generates a contradiction between their denomination and their offer. Further on, such a phenomenon has a serious impact not only on the concept itself, but also on the society, and generates great unbalances in the professional areas through the prevalence of certain domains and the inexistence of others. This way, such an academic genesis will result into a society that has, on the one hand, a very large number of specialists in a few domains, highly specialised and professionalised in these areas of activity (although the mere existence of a programme does not automatically secure quality, specialization and professionalization), and, on the other hand, no qualified human resources in a great number of other domains. This major unbalance, which glides from being a risk towards turning into a reality, creates a major vulnerability at the level of the society.

The situation of the Romanian higher education system is even more problematic if we analyse things from *the second perspective,* that of financing. Even though the National Law of Education states, at article 8, that education is financed with 6% of GDP, in reality, the threshold of 3.6% has never been exceeded. And the percentage allotted for higher education and scientific research has been and still is more than insufficient. Higher education is in a financial crisis which has increased over the last 25 years. The crisis impacts especially on the private universities which do not benefit from financial support from the state, as public universities do, even though the law allows the possibility of such a support. Irrespective of how it is interpreted, seen from the perspective of reality, the funding of the Romanian higher education reveals discrimination between the public and private universities. However, the problem is not solved even in the case of public universities, under the circumstances of insufficient financing. Within this administrative and financial frame, against the autonomy of universities and against self-governance, higher education institutions search solutions for survival and, where possible, for development. The private universities are in a difficult situa-

tion, as they finance themselves from the fees paid by the students. A complementary source of financing is represented by European projects, in their specific conditions, with a substantial financial effort of the HEIs. However, this source is only accessible to the universities that succeed in being admitted to such experiences. As the main source of financing for the private universities is represented by the tuition fees, these institutions depend on the fee payers, the students. This dependence generates a series of effects at the level of the process of education and of the quality of the educational process. Its exigency and quality itself risk to be directly affected by this reality. The educational process is thus forced by the circumstances to lower the academic standards towards the limits of extreme toleration in order not to lose students and, thereby, not to lose fees. Each student represents a fee and, thus, a source of financing. The situation must be analysed not only at the level of the university, but also at the level of the system, which is defined, as mentioned before, by a rich, even inflationist, offer in the case of the most sought programmes. Due to the existence of such an offer, the problems begin with the very admission to the university. Many universities have eliminated the entrance examination for most of their programmes in order to attract students; thus, they make use only of the formal instrument represented by questionnaires and of the criterion of the average grade obtained at the high-school graduation exam. In these terms, the process of selection becomes very accessible. Other programmes are governed by the rule "first-come, first-served". Given this formal selection, it is easy to get access to amphitheatres, without the necessary censorship of a complex admission exam meant to check the candidates' knowledge. The relativization of admission and liberalization of access are reflected in the quality of the students and, as a direct consequence, in the quality of the educational process. The situation is determined by the competitive environment, in which universities gradually lower their fees and, further on, their standards to attract students and by the institutional dependence on the source of financing which is represented by the fees paid by the students. It is a situation of severe compromise as compared to the vocation and the status of the university, which triggers a vicious circle. In order to survive, universities are engaged in a dramatic race for students, in which the quality of the studies remains at the bottom of the list of priorities.

Again, the situation must be analysed within the larger frame of the Romanian education system as a whole. In the last quarter of a century, confronted with a series of attempts of reformation in an incoherent, fragmentary and contradictory process that has lacked concept and vi-

sion, it has undergone *a continuous decline in quality and efficiency*. Not only the higher education, but also the secondary one is in a complex crisis, which is essentially reflected in the increasingly lower level of instruction and of knowledge of the high-school students. The high-school graduates are, thus, lesser and lesser prepared at the moment when they apply for academic studies. This objective state of affairs, rooted in the crisis of the system, is augmented by the regime of the access to university, free or almost free, as it has previously been underlined. The increasingly lower degree of instruction of the new generations that enter the space of academic studies makes it almost an objective necessity for the HEIs to synchronise the level of the educational process with the level of the target public, which means lowering the standards of difficulty and complexity of the educational process. It is difficult to talk about quality in education under these circumstances, and even more of excellence, performance or high scientific research.

This whole situation fundamentally affects the very *idea of higher education*. Under these circumstances, it is affected the very essence of the academic studies as a form of education meant to form elites, as an experience of instruction built upon selection and competitiveness, as a space of excellence and performance in education and research. In this framework, a question comes into view: to what extent is still higher education "higher" or "academic", in the spirit of its vocation and mission, consecrated across the tradition of the medieval university? The crisis of the system, the insufficient financing, the dependence on the fees paid by the students, the lowering of standards in terms of quality and exigency in the educational process, all these place education in a situation of compromise. It is a severe compromise, which undermines the very *concept* of higher education. The crisis of the system triggers a *conceptual crisis,* which is related to the very *identity* of the higher education, placing it in a fundamental difficulty in relation to its meaning and mission in the Knowledge Society.

3. Changes and Trends in Higher Education in the Europe of Knowledge

To meet the demands of the third millennium and Knowledge Society, Romanian higher education must, above all, overcome the current situation, defined by the crisis of the system and the crisis of the process, which both lead to *the crisis of the very concept of higher educa-*

tion. Further, in this process of reform and modernization, higher education in Romania must align to the developments and trends in European higher education, to the dynamic processes involving universities in the European Knowledge Area. Towards achieving these goals, the Romanian higher education needs, primarily, a modern, European law of education, to form a favourable legal framework for the development of academic education and scientific research. It also needs a more consistent funding for education and research. In this context, a new, dynamic, European vision is needed, concerning the meaning and content of the education reform, developed and implemented in the spirit of Romanian higher education synchronization with the developments and trends in European higher education.

How should the University in the 21st century be? Is there a model of university for the needs of the current era? What are the developments and trends in Europe in the reform of higher education and scientific research? Where is the academic education and scientific research at European and global level heading to? How is it, how should it be the European University as a pillar of the Knowledge Society and Economy? To what type of university should Romanian higher education strive? These are fundamental, difficult questions, able to submit answers and create guiding lines to the Romanian higher education reform.

A possible answer provides the European forum of higher education reform in Europe: European University Association. A relevant image on the stage and issues of the reform in the European higher education and in the European universities involved in the change process shapes the **EUA Annual Conference**, held between the 7th and the 8th of April 2016, at the National University of Ireland (Galway). Entitled "**Bricks and clicks for Europe: Building a Successful digital campus"**, the EUA Conference aimed to examine how universities combine academic education with digital technology, with the advantages and benefits that ICT offers, how higher education institutions are open to change and to innovation processes in order to meet the challenges of today's world.

In the current era, when the world is reshaped by rapid developments in all fields, in the era of digital technology that has revolutionized human existence, knowledge plays a crucial role in the progress of society and economy. Universities, as an environment that produces and transfers knowledge, as institutions that train, form, qualify and specialize, have a first-order mission in the processes that change the world from the grounds. To face all these challenges, universities must reform themselves, and, with them, higher education too in both its dimensions: aca-

demic education and scientific research. Starting from their traditional mission, universities facing the challenges of the knowledge-based society and economy are increasingly integrating digital technology in all areas and departments of their activity. It takes place a process of digitizing learning and research, which, by the technological facilities it offers, opens unprecedented possibilities in the production and transfer of knowledge. Increasingly more, in a process started several decades ago, but accelerated in the last 20 years, there takes place a transition from the classical paradigm of learning to a new model, the *digital model of academic education and scientific research*. The institution that promotes this new model of higher education is the *Digital University*.

It is very interesting to see which are the fundamental data of the discussion and the defining elements of this new model of higher education, and, at the same time, of the university that implements it. Some of these items were presented during the Plenary Session of the Conference. In one of the presentations[1], it was emphasized that computer technology generates changes in teaching and learning both in form and in content. Not only the access to educational resources on the Internet and intranet should be considered, but also the interactive teaching, learning and evaluation. It thus takes place a process of transition from the "standardized teaching to individualized studies", involving the multiplication of the learning offer, a greater emphasis on customized studies. The involvement of the new digital forms in the classical learning increases the quality of teaching and learning. At the same time, the addressability of education to a wider and more diverse audience grows, together with the development of education in the *lifelong learning* model. The student mobility also increases. Through digital technology, the teaching process becomes "more open and comparable", learning becomes "independent of location and time", universities are transformed into "global providers of education and continuous education" and also "compete globally for the best students". In another communication[2], it was mentioned the idea that digital technologies contribute broadly to "opening up education, modernising and innovating Higher Education systems in Europe", and,

[1] Martin Wirsing, Ludwig Maximilians Universität München, *MOOCs and E-Learning at LMU*, *http://www.eua.be/Libraries/eua-annconf-2016/1-martin-wirsing.pdf?sfvrsn=0*

[2] Yves Punie, Andreia Inamorato dos Santos & Jonatan Castaño, Joint Research Centre -Institute for Prospective Technological Studies, European Commission, Spain, *Opening up Education through the use of Digital Technologies: A support framework for Higher Education Institutions*, *http://www.eua.be/Libraries/eua-annconf-2016/yves-punie-plenary-ii.pdf?sfvrsn=0*

at the concrete level of the process, favour "open and innovative education and training". Another communication[3] in the Plenary Session of the Conference highlighted the main challenges in Higher Education regarding: "excellence in teaching", "education and innovation" (high quality education by involving students in research), "inclusiveness" (education must become accessible to more students, according to EU 2020). Solutions to these challenges involve: "new modes of teaching and introducing ICT-based learning", "online courses, degrees and MOOCs", "personalized teaching and learning", "rich learning environments", "openness to learners through flexible, inclusive structures and methods", "networked education and mobility". Tomorrow's University would thus be defined by three "educational segments", in a complementarity relationship: "blended and online mainstream education", "blended and online continuous education", "non-degree education and online open education and MOOCs". In the Plenary Session, within the general pleading for massive involvement of digital technology in teaching and learning and in scientific research, there were also expressed opinions that targeted the balance between the classical model of academic education, developed, in time, by the European University, and the new models emerging through the contribution of information and communication technology (ICT)[4].

4. Conclusions: A Double Challenge for Romanian Higher Education

Romanian higher education is in a complex crisis, which involves *the system* and *the educational process*. It affects the very substance of education, its quality and, hence, the system's ability to produce performance, excellence and competitiveness. The crisis of the educational process is associated with the crisis of scientific research, which is in a chronic deadlock because of the inadequate funding. In the *research-based education* paradigm, the crisis of quality and efficiency in teaching and learning affects scientific research, and the crisis of scientific research negatively influences the educational process. A very seri-

[3] Drs. George Ubachs, Managing Director EADTU, Prof. Jeff Haywood, Vice Principal Digital Education University of Edinburgh, UK, *The Changing Pedagogical Landscape*, *http://www.eua.be/Libraries/eua-annconf-2016/george-ubachs-plenary-ii.pdf?sfvrsn=0*
[4] Jaak Aaviksoo, Rector, Tallin University of Technology, former Minister of Education and Research, Estonia

ous sign of the crisis in scientific research – deeply interconnected with the teaching-learning process – is the constant absence of Romanian universities in the major international rankings of universities, or, at the most, their presence in the latter section of these hierarchies. This situation, which has become a normal state of affairs, reflects the gravity of the crisis of the Romanian education and research.

Higher education in Romania has to face *two major challenges*: Firstly, *to overcome the actual crisis*, and, secondly, *to synchronize itself with the developments in the areas of education and research in Europe and worldwide*. The second is not possible without the first. Overcoming the crisis should be a priority of the policies of higher education and of the reform, and also of the management of higher education institutions. Romanian higher education and scientific research require a modern, flexible and European legal framework and a better financing. All these – policies, reform, vision, management, action, funding – are needed in a synergistic approach, because every item in question depends on the other. The second challenge, leading to the increasing difficulty of the whole process, is a priority as well: the synchronization of the management policies, of education and research, of higher education institutions with the changes and trends in EHEA (European Higher Education Area), ERA (European Research Area) and EKA (European Knowledge Area). In Europe, fundamental changes at the level of universities, teaching-learning process and scientific research are in full progression nowadays. The model of the classic, traditional university is, slowly, but surely, substituted by another type of university and a different type of education. This fundamental transformation is taking place in the new conditions of society and economy, of the globalization process, against the background of the expansion of digital technology in human life. The new type of university is the *Open University*, the *Digital University*, which promotes the *open access*, a new model of teaching and learning, new strategies and means, MOOCs (Massive Open Online Courses) to a wide and diverse public, without limitations of time and distance. It is a paradigm shift, in the full meaning of the phrase, in academic education and scientific research, in which digital technology plays an essential role.

In the framework designed by the two major challenges – overcoming the crisis and the rapid modernization in the data of the new paradigm of academic education and scientific research and of the new university model –, Romanian higher education must undergo a *complex reformation* in terms of *quality, flexibility, efficiency* and *pragmatism*. The

complex involvement – but not exclusive – of digital technology, digitalization of teaching and learning, of educational resources and libraries, open access, online courses, nurturing creativity and innovation are the means of this transformation, which establishes a new model of higher education and scientific research, a new type of university at European and global level. Higher education in Romania and Romanian university cannot and must not remain outside this global trend and this model in expansion today in Europe and in the whole world that bases its development on Knowledge.

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THE LEGALITY OF THE MEANS OF APPEAL IN THE NEW CODE OF CIVIL PROCEDURE SYSTEM

Gabriela RĂDUCAN[*]

ABSTRACT

Customization of the principle of legality in relation to the matter of the means of appeals by means of the provisions of Article 457 Code of Civil Procedure is a novelty in the Romanian Civil Procedural Law system, the legislature opting for ensuring the "equality of arms", in case of the erroneous determination of the means of appeals in the judgment enactment terms. Thus, a mechanism for ope legis reinstatement, of the parties of that trial was created, by rejecting as inadmissible the means of appeal declared in consideration of the wrong determination of the court and its communication to all parties, moment which from the deadline for the exercise of the means of appeal provided by law begins or, as applicable, no term will begin when that decision was no longer subject to any reforming means of appeal. Meanwhile, the legal rule is criticized because it does not expressly provide a mechanism similar to the incorrect determination in the enactment terms of the judgment of the deadline for the exercise of this means of appeal, although according to the intended law we consider that the legislative definition of the same solution would be imposed. On the other hand, the provisions of Article 457 Civil Procedure Code have the quality of distinguishing the institution of this ope legis reinstatement within the exercise of the means of appeal provided by law by the institution of the means of appeal requalification.

KEYWORDS: *means of appeal, means of appeal deadline, the principle of legality, reinstating the appeal, solution of inadmissibility, lateness*

Legality is an imperative warranty of any state subject to the rule of law, designed to ensure justice in optimal and normal conditions since it excludes arbitrariness and unpredictability.

In the Romanian procedural law system, the principle of legality is defined by Article 7 Code of Civil Procedure, which provides *that the lawsuit is conducted in accordance with the law* and that the *judge has a duty to ensure compliance with the law on the realization of the rights and obligations of the parties in the lawsuit.*

However, according to Article 22 paragraph (1) Civil Procedure Code, the judge solves the dispute *according to the rules of law applicable to it.* So, the lawsuit in both its phases (*cognitio* and *executio*) should be

[*] Professor Ph.D. at the Faculty of Law of Titu Maiorescu University Bucharest, Romania, lawyer in the Bucharest Bar, trainer of the National Institute for Training of Lawyers and teacher-expert within the seminars of continuous training of judges, under the aegis of the Superior Council of Magistracy - National Institute of Magistracy.

conducted only in accordance with legal norms governing it, and the measures ordered by the courts must be based on the legal provisions applicable in each case, in part otherwise, the decision may be overturned by the means of appeal.

An important customization of the principle of legality is defined expressly in the matter of the *means of appeal*. Thus, the provisions of Article 457 paragraph (1) Code of Civil Procedure are an application of the fundamental principle of procedural law defined in Article 7 Code of Civil Procedure and establish the ***rule*** that "the *judgment is subject only to the means of appeal allowed by law, under the terms and conditions laid down by it, regardless of the entries in the enactment terms*."

As results from the legal norm, the principle of legality of the means of appeal governs not only the means of appeal itself (appeal, second appeal, appeal for annulment, review), but the conditions and terms in which it may be exercised. However, the rule of Article 457 Code of Civil Procedure is not far from any criticism. It is apparent therefore that Article 457 paragraph (3) Code of Civil Procedure offers procedural solutions just for the inaccurate mentioning of the "means of appeal" and not of the term in which it can be exercised, although judicial practice faces alike, such errors that would require equal treatment for the same reasons.

Specifically, of the wording of Article 457 paragraph (3) Code of Civil Procedure "*if the court rejects as inadmissible the appeal not provided by law ...*" it follows that the legislature omitted the hypothesis of the erroneous determination of the term of exercise of the means of appeal, a situation as possible as the incorrect determination of the means of appeal.

But, we do not think that the right argument would be the one used in the doctrine[1], namely that the sanction of the procedural deadlines should not be *inadmissibility,* but the *delay* because what was intended by the institution of Article 457 paragraph (3) Code of Civil Procedure was to achieve *a balance of arms* between parties and the state (through its authorities), *creating a process to dismiss the means of appeal* exercised *by reason of incorrect particulars of the enactment terms* precisely *to oper-*

[1] M. Tăbârcă, *Drept procesual civil. Căile de atac (Civil Procedural Law. Means of appeal),* 3rd vol., Universul Juridic Publishing House, 2014, p. 14, nr. 17; **G. Boroi, M. Stancu**, *Drept procesual civil (Civil Procedural Law)*3rd edition, Hamangiu Publishing House, 2016, p. 606.

ate a reinstatement of the right (legal) means of appeal for all parties. As for us, we believe that in this context, it would not have been possible for the legislature to expressly regulate the cancellation of the late means of appeal, so as to have thereafter a new right to the means of appeal for stakeholders, and this is why it was confined to dismiss the appeal as *inadmissible (in the sense that it is not acknowledged that this was the means open / prescribed by law).* However, it seems that the solution lies in the very content of the rule which *specifically* refers only to the inaccurate mention *within the judgment on the means of appeal*, thus excluding the cases related to the incorrect determination of the term for the exercise of such means of appeal.

However, given that the legality of the means of appeal includes "*the terms set by it (by law- n.n.)"*, a safeguard solution under the rule of law *eadem ratio eadem solutio* must be found. Moreover, we believe that according to the intended law, it is required for the legislature to expressly regulate the solution and for the hypothesis of the erroneous mention in the enactment terms of the means of appeal deadline, in order to meet the same goal of "*equality of arms*" component of law in a fair trial, provided by article 6 of the ECHR.

Until the occurrence of an express legal rules in this regard, it is necessary to consider, however, the *possible solutions* in such a situation. As far as we are concerned, we share, in principle, the opinion expressed in the research literature[2] related to this issue.

Thus, when the means of appeal is indicated correctly, but by mistake the judgment states that:

- The *term* of appeal or, where appropriate, of second appeal *starts from the communication,* although according to the law, in that matter, *the term starts from the ruling* according to the *principle of the means of appeal legality*, the term starts to be calculated from ruling, having regard to the provisions Article 457 paragraph (1) Code of Civil Procedure:

- *The term is longer than the one required by law*, the solution is the same as in the previous case.

In either of the two scenarios presented above, it is possible for the party to pursue the means of appeal within the term set by the judge, trusting the determinations of the judgment under appeal, with the risk that it be rejected as formulated with *delay.* In this case, there are two possible solutions: a) the court may apply by analogy the provisions of

[2] G. BOROI, *The New Code of Civil Procedure Conferences, http://www.inm.lex.ro/NCPC/doc/Brosura%20NCPC.pdf,* p. 229.

Article 457 paragraph (3) Code of Civil Procedure (According to the arguments presented above); b) or *at the request of the party, can reinstate the means of appeal*. And we appreciate that there are "justified grounds" within the meaning of Article 186 Code of Civil Procedure because we can say that the one who ruled the decision is at fault, which is likely to balance the lack of legal knowledge of the party regarding the means of appeal and the term of its exercise.

In the situation covered by Article 457 paragraph (3) Code of Civil Procedure, when the error is made by the court and the party declares the means of appeal wrongly referred in the enactment terms, the court for judicial review entrusted with such a cause, *rules a judgment of dismissing the means of appeal as inadmissible.*

This judgment dismissing the means of appeal as inadmissible shall be mandatorily communicated by the judicial court to *all parties that took part in the trial in which the judgment under appeal was ruled,* while according to Article 457 paragraph (3) the final thesis Code of Civil Procedure after the date of the communication begins, if necessary, *the term for exercising the means of appeal provided by law.*

Regarding the meaning of the phrase "if necessary", we make the following statement: there are situations where the *party wrongly names the means of appeal formulated*, even if the enactment term of the judgment under appeal correctly mentioned the appeal under the law. In such circumstances, we stress that the provisions of Article 457 paragraph (3) Code of Civil Procedure will not be applicable, but those of Article 152 Code of Civil Procedure and Article 457 paragraph (4) Code of Civil Procedure (if the *error* of the party can be retained in the name of the means of appeal). Thus, if the party states erroneously a means of appeal which is not regulated by law, and there is no question that against that judgment there is a means of appeal, but that only the fact that the party gave it a wrong name (for example, the sentence of the trial court is subject to appeal, and the parry declares an 'appeal' or, on the contrary, the sentence ruled is directly placed under second appeal and the party calls the means of appeal "*appeal*"), the means of appeal will be dismissed as *inadmissible***,** being unable to redefine the means of appeal .

According to the special provisions of Article 457 Code of Special Procedure, all parties that took place in the trial ended with the judgment under appeal will benefit *of the beginning of the new term for the exercise of the means of appeal prescribed by law,* and not just those between which the trial was held within the means of appeal dismissed as inadmissible in the court of judicial review. However, as noted above, we

emphasize that the decision of dismissal of the means of appeal as inadmissible under Article 457 paragraph (3) Code of Civil procedure, does not give the right to exercise a means of appeal, when according to the law, no other means of appeal is any longer provided (for example, the enactment terms of the appellate court ruled in a trial of separation or divorce wrongly determines that the judgment is subjected to second appeal, although in these matters, the court's decision is final and not susceptible of second appeal, etc.)

In the same situation, in which the party declares a means of appeal provided by law, relying wrongly on the erroneous determination within the judgment under appeal, the court for judicial review may, however, rule the *requalification of the means of appeal*, based on Article 457 paragraph (4) Code of Civil Procedure. If this is done, from the date of delivery of the *interlocutory decision* ordering the requalification for the parties present, or from the date of the communication of the authentication, for the parties who were absent*, a new term for the declaration or, where applicable, for the motivation of the means appeal provided by law will begin***.**

So, when the party declares a means of appeal *which it not provided by law*, wrongly relying on the erroneous mention within the judgment under appeal, the court of judicial review *may choose* one of the following *options*[3]:

- Either *to dismiss the means of appeal as inadmissible*, pursuant to Article 457 paragraph (3) Code of Civil Procedure, communicating, ex officio, the judgment of the Court of judicial review to all parties in the dispute completed with the judgment under appeal;

- Or to *redefine the means of appeal*, pursuant to Article 457 paragraph (4) Code of Civil Procedure, moment from which a new term for the declaration or, where applicable, for the motivation of the means of appeal will begin (term that will begin since the ruling for the parties present, and since the communication, for the missing parties).

Regarding this *possibility of choice* of the court for judicial review a number of clarifications have been made[4], to which we fully agree, namely:

[3] See in the same line G. BOROI, D.N. THEOHARI, *Sinteza principalelor modificări şi completări aduse Codului de procedură civilă prin Legea nr. 138/2014 (Summary of key changes and additions to the Code of Civil Procedure by Law no. 138/2014),* introductory article to the republished Code of Civil Procedure following the entry into force of Law no.138 / 2014 at Hamangiu Publishing House, 2014, p. XIII.

[4] See G.Boroi, M.Stancu**,** *op.cit.,* p.608.

a) it exists only when a *reforming* means of appeal is involved (appeal or second appeal), and not in case of the withdrawing means of appeal (appeal for annulment and review);

b) this possibility of option does not exist if the court for judicial review finds that, under the law, the decision was *final,* even if wrongly, the court which ruled it, pointed out a reforming means of appeal. In this latter case, the court of judicial review will reject the means of appeal as *inadmissible,* according to Article 457 paragraph (3) Code of Civil Procedure, as this judgment, by definition, cannot challenged subsequently by any reforming means of appeal.

Moreover, we note that the provisions of Article 457 paragraph (4) Code of Civil procedure are applicable in other situations as well, such as those where, although the means of appeal is correctly stated in the enactment terms of the judgment under appeal for various reasons (ignorance, lack of legal knowledge, the error of the defender or of the non-lawyer defender, but not limited to these) *the party wrongly names the means of appeal formulated*. In such a situation, seeing the provisions of Article 152 Code of Civil Procedure and noting that the demand for the exercise of the means of appeal is validly made, the court hearing the means of appeal will rule *the requalification of the means of appeal provided by law*, according to Article 457 paragraph (4) Code of Civil Procedure, which are fully applicable.

Moreover, since Article 457 paragraph (4) Code of Civil Procedure, unlike the previous paragraph does not refer to the court for judicial review, it is understood that this rule is applicable even in the case where, b*y the request which bears a wrong name, the party declares a withdrawing means of appeal.* So, whenever it is found that the requalification of the withdrawing means of appeal is required (under Article 152 Code of Civil Procedure), for which the law requires a declaration or motivation deadline, that the party did not respect, the court will apply Article 457 paragraph (4) Code of Civil Procedure[5].

CONCLUSIONS

To conclude, the incorrect reference in the enactment terms of the judgment, of a means of appeal that the law does not recognize as open, is not likely to result in the right of the parties to formulate the means wrongly mentioned against that judgment because it would violate the

[5] Within the same line, **G.Boroi, M.Stancu***, op.cit.* p.608.

principle of legality of the means of appeal. But even if the court noted incorrectly in the enactment terms the means of appeal or the time limit when it shall be exercised or indicated wrongly that it begins from the communication, when it began from ruling or vice versa, within the law, the party may exercise the means of appeal provided by law within the legal term. If, however, the party exercises the means of appeal erroneously determined o by the court in the enactment terms of the judgment and the law provides another reforming means of appeal, the court for judicial review will dismiss the means of appeal as *inadmissible*, will communicate this decision to all parties, moment which from the deadline for the exercise of the means of appeal prescribed by law will begin, an *ope legis* reinstatement of appeal operating.

According to the intended law, the legislature would be required to provide a solution similar to the one finding the incorrect determination of the means of appeal by the judge in the enactment terms of the judgment, and on the erroneous determination of the term for exercising the means of appeal.

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LE DIALOGUE SOCIAL: LA CRISE D'UN CONCEPT DANS L'ÈRE DE LA COMMUNICATION GÉNÉRALISÉE

Nicolae VOICULESCU[*]

RÉSUMÉ
Bien que les médias sociaux virtuels se sont multipliées de façon spectaculaire et déjà couvrent des milliards de personnes dans tout le monde, ils ne contribuent sensiblement à améliorer et renforcer le dialogue individuel et collectif entre les travailleurs et leurs employeurs. L'auteur présente les évolutions des politiques législatives et jurisprudence auprès les organisations internationales en ce qui concerne le dialogue social et le droit de grève de d'action collective.

MOTS-CLÉS: *dialogue social, droit de grève, affaires Viking et Laval, Proposition de Règlement*

1. Introduction

Dans le contexte de la mondialisation des relations économiques et commerciales et l'évolution de l'emploi à la suite des avancées significatives dans la technologie (y compris l'informatique), le statut des travailleurs dans de nombreuses régions et secteurs se trouve dans des situations de précarité et le mouvement syndical en général et le dialogue et social en particulier enregistre un déclin alarmant.

Paradoxalement, bien que les médias sociaux virtuels se sont multipliées de façon spectaculaire et déjà couvrent des milliards de personnes dans tout le monde, ils ne contribuent sensiblement à améliorer et renforcer le dialogue individuel et collectif entre les travailleurs et leurs employeurs.

De plus, si nous suivons l'évolutions au niveau des organisations internationales compétentes en la matière, ce qui fait l'objet de cette étude, nous observerons même une régression de la culture du dialogue social,

[*] Professeur universitaire docteur, Directeur du Conseil des Etudes Doctorales, Universite Titu Maiorescu, Bucarest, Roumanie. Ancien Représentant de l'Organisation Internationale du Travail (OIT) en Roumanie.
Communication à la Conférence internationale «Gestion des ressources et gouvernance", organisée par l'École Supérieure de la Francophonie pour l'Administration et le Management (ESFAM), Agence Universitaire de la Francophonie, Bucarest, Roumanie, le 16-17 Septembre 2016.

prévu par les règles adoptées à ce jour, et, pire encore, des regrettable tendances de faire sortir de la zone de coopération et de contrôle internationaux des questions visant l'action collective, y compris la grève.

2. L'Organisation Internationale du Travail et le droit de grève

L'Organisation Internationale du Travail (O.I.T.) est un fervent promoteur du dialogue social, son mécanisme fondamental basé sur le principe du tripartisme (gouvernements, syndicats, employeurs) assurant depuis sa création en 1919 un véritable succès dans la réalisation des objectifs énoncés dans sa Constitution.

Toutefois, ces dernières années, un solide débat est entamé sur la possibilité des mécanismes de contrôle de l'Organisation Internationale du Travail d'analyser le respect du droit de grève. Il convient de noter que ni *la Convention no. 87 sur la liberté syndicale et la protection du droit syndical* (1948) ni les autres conventions de l'O.I.T. en matière ne prévoit *expresis verbis* le "droit de grève", par opposition aux instruments adoptés par d'autres organisations où il peut être trouvé, tels que le Pacte international relatif aux droits économiques, sociaux et culturels (article 8)[1], la Charte sociale européenne (révisée) [2] et la Charte des droits fondamentaux de l'Union européenne[3].

Pendant la Conférence de l'Organisation Internationale du Travail en 2012, le groupe des employeurs a annoncé qu'il refuse d'examiner les affaires concernant le droit de grève soumis au Comité d'experts pour l'application des conventions et recommandations de l'OIT, en motivant la décision, entre autres, par le fait que le texte de la Convention no. 87 ne dit pas un mot sur le droit de grève, et par conséquence, il ne serait pas une question sur laquelle le comité d'experts doit exprimer un avis. C'est pourquoi, compte tenu de l'absence de références sur le droit de grève dans le texte de la convention. 87, les règles d'interprétation adoptées au

[1] Adopté et ouvert à la signature par l'Assemblée générale des Nations Unies le 16 Décembre 1966 par la résolution 2200 A (XXI).
[2] Adoptée par le Conseil de l'Europe à Strasbourg le 3 mai 1996.
[3] Adoptée à Nice en 2000. En Décembre 2009, avec l'entrée en vigueur du traité de Lisbonne, la Charte des droits fondamentaux et a reçu la même force juridique contraignante que les traités.

niveau international exigent que la Convention doive être interprétée sans tenant compte d'un droit de grève[4].

Il est évident que la position des employeurs ne pouvait être acceptée par les représentants syndicaux, qui ont apprécié que „l'argument du groupe des employeurs repose sur une conception profondément erronée de la liberté syndicale. Il adopte une position grandement conservatrice (et minoritaire) selon laquelle la liberté syndicale est un droit autonome, individuel, complètement indépendant du contexte des relations professionnelles. Pour le groupe des employeurs, la liberté syndicale n'implique rien de plus que le droit de se rassembler en organisations, qu'il s'agisse de clubs de lecture ou de syndicats. Pourtant, le droit à la liberté syndicale est depuis longtemps entendu comme un droit collectif, surtout dans le cadre des relations professionnelles et comme un ensemble des droits incluant celui de faire grève »[5].

D'autre part, la négociation collective suite à ce point de vue, gagne consistance. „Le droit international à la négociation collective jamais contesté (et incontestable) apporte un soutien supplémentaire à l'existence du droit de grève en tant que droit dérivé de la liberté syndicale. Si le droit de faire grève ne doit pas se limiter à faire progresser ou à défendre la négociation collective, le droit de négocier collectivement est, du point de vue des travailleurs, sans effets pratiques en l'absence d'un droit de grève »[6].

Ce qui est intéressant, et le fait a été noté par le groupe syndical, dans les 40 dernières années, les représentants des employeurs n'ont soulevé aucune objection sur la jurisprudence de l'O.I.T. sur le droit de grève.

Le différend entre les partenaires sociaux sur le droit de grève vise un aspect fondamental des relations professionnelles qui doit être clarifié, malgré les divergences d'opinions et d'intérêts. Par conséquent, à la fin de 2014, était envisagée la possibilité offerte par l'art. 37.1 de la Constitution de l'OIT de renvoyer l'affaire devant la Cour internationale de Justice de rendre un avis consultatif sur la question.

Cependant, au mois de février 2015 les représentants des syndicats et les employeurs ont parvenu à un accord lors d'une réunion spéciale de

[4] Déclaration des employeurs lors de la Commission de l'application des normes de la Conférence internationale du Travail du 4 juin 2012, *http://www.uscib.org/docs/2012_06_04_ioe_clarifications _statement.pdf.*

[5] Résumé du mémoire détaillé de la CSI sur le droit de grève, pct.4.1. *http://www.ituc-csi.org/IMG/pdf/right_to_strike_executive_summary_french.pdf*

[6] *Idem*, pct. 4.5.

l'O.I.T.[7] Ainsi ils ont dépassé l'impasse et ils ont reconnu le droit de recourir au mesures revendicatives, accord soutenu par la reconnaissance explicite du lien entre le droit de grève et la liberté d'association[8] par les représentants des gouvernements, en vertu de la Convention O.I.M. no. 87 sur la liberté syndicale[9].

3. Le droit de négociation et d'actions collectives dans l'Union européenne: normes et jurisprudence. Les affaires *Viking et Laval*

Au niveau de l'Union européenne le contenu du droit de négociation et d'actions collectives a eu une évolution contradictoire en termes de la reconnaissance de son caractère communautaire. Initialement, le droit à la négociation collective ne faisait pas partie des droits fondamentaux du droit communautaire[10]. Dans une interprétation plus large, la situation normative est resté la même si nous prenons en considération le paragraphe 5 de l'article. 153 du TFUE qui établit laconiquement que les dispositions relatives à l'action de l'Union en matière sociale (énumérés dans les paragraphes précédents) « ne s'appliquent ni aux rémunérations, ni au droit d'association, ni au droit de grève, ni au droit de lock-out. »

Cependant, l'article 151 du TFUE dispose que l'Union et les États membres ont pour objectif la promotion du dialogue social entre les employeurs et les travailleurs. De même, l'article 152 du TFUE dispose que l'Union reconnaît et promeut le rôle des partenaires sociaux et facilite le dialogue entre eux.

Ultérieurement, la Charte des droits fondamentaux de l'Union européenne a prévu dans l'article 28, le droit de négociation et d'actions collectives, en assurant, ainsi, la base juridique de ce droit. La formulation de la Charte souligne que "les travailleurs et les employeurs, ou leurs

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[7] Réunion tripartite sur la convention (n°87) sur la liberté syndicale et la protection du droit syndical), 1948, pour ce qui est du droit de grève ainsi que les modalités et pratiques de l'action de grève au niveau national, 23 - 25 février 2015.
http://www.ilo.org/global/meetings-and-events/WCMS_340487/lang--fr/index.htm

[8] Selon pt. 61 du Rapport de cette réunion. Voir aussi Document de référence pour la Réunion tripartite sur la convention (no 87) sur la liberté syndicale et la protection du droit syndical, 1948, concernant le droit de grève et les modalités et pratiques de l'action de grève au niveau national (révisé)
http://www.ilo.org/gb/events/WCMS_344249/lang--fr/index.htm

[9] Pour details, voir egalement, *Nicolae Voiculescu, Vasile Neagu, La protection des droits des travailleurs dans le droit international et europeen*, Editions Universitaire, Bucarest, 2016, p. 66-72.

[10] Pierre Rodiere, *Droit social de l'Union Europeenne*, L.G.D.J.,Paris, 2008, p. 448.

organisations respectives, ont, conformément au droit de l'Union et aux législations et pratiques nationales, le droit de négocier et de conclure des conventions collectives aux niveaux appropriés et de recourir, en cas de conflits d'intérêts, à des actions collectives pour la défense de leurs intérêts, y compris la grève".

Si l'engagement des partenaires sociaux à l'échelon européen et national en utilisant le dialogue social est considéré au niveau de l'Union Européenne indispensable à la réussite aussi bien de la conception que de la mise en œuvre des politiques économiques et sociales, le droit aux actions collectives est encore disputé.

La Cour de justice de l'Union européenne a apprécié dans deux affaires très connus, *Viking et Laval*, que le droit de mener une action collective, y compris le droit de grève, doit être reconnu comme un droit fondamental qui fait partie des principes généraux du droit communautaire[11].

Dans l'affaire *Viking*, une compagnie maritime finlandaise avait l'intention d'immatriculer un navire en Estonie pour recruter des travailleurs à bas salaires. Mais, un syndicat international a décidé d'interdire à ses membres de négocier avec la société Viking, empêchant ainsi la société de s'établir en Estonie.

En ce qui concerne l'affaire *Laval*, une entreprise de construction lettone a détaché des travailleurs lettons pour mener des activités en Suède. Un syndicat suédois a organisé un blocus sur tous les sites de Laval en Suède afin de contraindre la société à se conformer au salaire et la convention collective en vigueur en Suède. Suite à ces actions, la société Laval a déclaré sa faillite.

Dans les deux affaires, la Cour devait peser deux principes reconnus: respecter les libertés économiques qui permettent aux entreprises d'exercer leurs prestations dans toute l'Union européenne et le droit de mener une action collective, qui est un droit fondamental[12].

D'autre part, cependant, la Cour a reconnu que le droit de mener une action collective pour la protection des travailleurs constitue un intérêt légitime pour justifier, en principe, les restrictions aux libertés fondamentales garanties par le traité[13].

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[11] Affaire C-438/05 *Viking Line*, Arrêt de la Cour (Grande chambre) du 11 décembre 2007, point 44; Affaire C-341/05 *Laval*. Arrêt de la Cour (Grande chambre) du 18 décembre 2007, point 91.

[12] *Droit de greve et libertes garanties par les traites europeens, L'impossible conciliation?,* Collection CEPESS, Bruxelles, 2012, p.5.

[13] L'affaire *Viking Line*, point 77, C-438/05; L'affaire *Laval*, point 103, C-341/05 .

La Cour a également déclaré clairement que, alors que l'Union européenne n'a pas seulement une finalité économique, mais aussi un but social, les droits en vertu des dispositions du traité relatives à la libre circulation des marchandises, des personnes, des services et des capitaux doit être mis en balance avec les objectifs poursuivis par la politique sociale, qui comprennent l'amélioration de conditions de vie et de travail, une protection sociale adéquate et le dialogue social[14].

Ce qui résulte, dans l'interprétation de la Cour, c'est que le droit à l'action collective doit se concilier avec les libertés fondamentales du marché intérieur européen. Par conséquent, son exercice peut être soumis à des restrictions justifiées par des raisons impérieuses d'intérêt général, telles que la protection des travailleurs, à condition qu'il soit établi qu'ils sont capables d'atteindre l'objectif légitime poursuivi, respectant ainsi le principe de la proportionnalité.

Les solutions de la Cour de justice de l'Union européenne, mentionnées ci-dessus, ont fait l'objet de nombreux commentaires des partenaires sociaux, des politiciens, des juristes et des universitaires[15]. Bien que certains de ces commentaires ont accueilli favorablement les décisions comme une clarification nécessaire des règles du marché intérieur, d'autres ont estimé que les décisions ont reconnu la primauté des libertés économiques sur l'exercice des droits fondamentaux et risque de créer, sinon d'approuver, un «dumping social» et la concurrence déloyale.

D'une part, on a apprécié le fait qui a été reconnu la nature fondamentale du droit de grève, ce qui en fait un principe général du droit communautaire. D'autre part, certaines opinions ont jugé que le droit à l'action collective est si important qu'il est un droit supérieur à la libre prestation de services[16].

La Confédération européenne des syndicats (CES) a critiqué dans une résolution ces solutions jurisprudentielles considérés comme antisociales et a souligné le regrette que l'interprétation de la Cour du «droit de grève est un droit fondamental, mais pas aussi fondamental que les dispositions de l'Union européenne sur la liberté de mouvement. »[17]

[14] Point 79 (*Viking-Line*) et point 105 (*Laval*).
[15] Sophie Robin-Olivier, Professeur à l'Université Paris X – Nanterre et Etienne Pataut, Professeur à l'Université de Cergy-Pontoise, *Europe sociale ou Europe économique* (à propos des affaires Viking et Laval). *https://www.etui.org/.../robinolivierpataud.pdf*
[16] Les positions des gouvernements suédois et danois dans l'affaire Viking Line.
[17] Resolution de la Confederation europeenne des syndicats du 7 mars 2008, *http:// www.etuc.org/fr*

Suite à une consultation au niveau européen, la Commission européenne a adopté le 13 Avril 2011, une Communication présentant différentes actions clés, y compris "une loi qui vise à clarifier l'exercice de la liberté d'établissement et de libre prestation de services ainsi que les droits sociaux fondamentaux[18]. »

Ces activités préparatoires ont été utilisées pour élaborer une proposition de *Règlement relatif à l'exercice du droit de mener des actions collectives dans le contexte de la liberté d'établissement et de la libre prestation des services*[19]. Le préambule reconnaît la contribution de Cour de justice qui a établi que l'Union européenne a non seulement une finalité économique mais également une finalité sociale et que les droits résultant des dispositions du traité relatives à libre circulation des marchandises, des personnes, des services et des capitaux doivent être mis en balance avec les objectifs poursuivis par la politique sociale, parmi lesquels figurent l'amélioration des conditions de vie et de travail, une protection sociale adéquate et le dialogue social.

D'autre part, les affaires *Viking et Laval* ont mis en évidence des tensions entre la liberté de fournir des services et droit d'établissement, d'une part, et l'exercice des droits fondamentaux tels que le droit à la négociation collective et le droit de mener une action, d'autre part. Ces décisions ont été perçus par les syndicats comme imposant un examen de l'action syndicale par l'UE ou les tribunaux nationaux chaque fois quand ces actions pourraient affecter ou pourrait être préjudiciable à l'exercice de la libre prestation de services et la liberté d'établissement. L'interprétation de la Cour européenne a généré, cependant, de la part des organes de contrôle de l'OIT des «profonde préoccupations» sur les limites pratiques sur l'exercice effectif du droit de grève, alors que le droit de grève est inscrit dans la Convention O.I.M. no. 87, qui a été signé par tous les États membres de l'UE[20].

Ainsi motivé, l'objectif déclaré de la proposition était de « définir plus clairement les principes généraux et les règles applicables au niveau de

[18] Communication de la Commission au Parlement Européen, au Conseil, au Comité Économique et Social Européen et au Comité des Régions, *L'Acte pour le marché unique Douze leviers pour stimuler la croissance et renforcer la confiance "Ensemble pour une nouvelle croissance"*. COM/2011/0206 final pct. 2.10.

[19] Proposition de Règlement du Conseil relatif à l'exercice du droit de mener des actions collectives dans le contexte de la liberté d'établissement et de la libre prestation des services (COM/2012/0130 final)

[20] Le Rapport du Comité d'experts pour l'application des conventions et recommandations de la O.I.T., Geneve 2010.

l'UE en ce qui concerne l'exercice du droit fondamental de mener des actions collectives dans le cadre de la libre prestation des services et de la liberté d'établissement, y compris la nécessité de concilier en pratique ces droits et libertés dans les situations transfrontières »[21].

Compte tenu de l'absence de dispositions explicites dans le traité pour les compétences nécessaires, parce que l'art. 153 paragraphe 5, du TFUE exclut le droit de grève de la gamme des questions qui peuvent être réglées par des normes européennes, le projet de règlement a été fondé sur l'article 352 alinéa 1 du TFUE, en vertu duquel « si une action de l'Union paraît nécessaire, dans le cadre des politiques définies par les traités, pour atteindre l'un des objectifs visés par les traités, sans que ceux-ci n'aient prévu les pouvoirs d'action requis à cet effet, le Conseil, statuant à l'unanimité sur proposition de la Commission et après approbation du Parlement européen, adopte les dispositions appropriées. »

Le principe fondamental du règlement proposé était inclus dans l'art. 2 de celle-ci et formulé dans les termes suivants: " L'exercice de la liberté d'établissement et de la libre prestation des services énoncées par le traité respecte le droit fondamental de mener des actions collectives, y compris le droit ou la liberté de faire grève, et, inversement, l'exercice du droit fondamental de mener des actions collectives, y compris le droit ou la liberté de faire grève, respecte ces libertés économiques".

L'article 3 (4) de la proposition apporte des précisions sur le rôle des juridictions nationales en consonance avec la jurisprudence antérieure de la CJUE: quand, dans un cas particulier, l'exercice d'un droit fondamental restreint la liberté économique, ils devront trouver un juste équilibre entre les droits et libertés en question [22] et de le réconcilier.

La proposition de règlement reconnaît que les États membres restent libres de déterminer les conditions de l'existence et l'exercice des droits sociaux. Toutefois, dans l'exercice de cette compétence, les États membres doivent se conformer à la législation européenne, en particulier aux dispositions du traité relatives à la liberté d'établissement et de libre prestation de services, qui sont des principes fondamentaux inscrits dans le traité de l'Union.

[21] Proposition de Règlement du Conseil relatif à l'exercice du droit de mener des actions collectives dans le contexte de la liberté d'établissement et de la libre prestation des services, alin. 3.1 par.4

[22] Voir l'Avis AG Trstenjak dans l'affaire C-271/08, *Comission c.Allemagne*, points 188–190.

La protection des travailleurs, notamment la protection sociale et leur protection contre le dumping social et le désir d'éviter des perturbations sur le marché du travail ont été reconnus comme des raisons impérieuses d'intérêt général justifiant des restrictions à l'exercice des libertés fondamentales par le droit communautaire[23].

La formulation de la proposition de règlement a profondément insatisfait la Confédération européenne des syndicats (CES) comme faisant pas plus que consacre l'interprétation de la Cour de justice de l'Union européenne. Par la déclaration du 19 Avril 2012, le Comité a rejeté la proposition estimant qu'elle limite le droit de mener actions collectives, parce qu'il n'y a aucune garantie que les libertés économiques ne prennent pas la priorité sur les droits sociaux fondamentaux et que, en cas de conflit, les droits sociaux fondamentaux seront prioritaires.

En outre, un nombre important de parlements nationaux ont rejeté la proposition de règlement, en faisant valoir que l'article 153 du TFUE exclut explicitement le droit de grève dans les zones qui peuvent être soumis à l'intervention de l'UE. On a considéré, ainsi, que "sans apporter les clarifications nécessaires dans l'intérêt des droits sociaux, ce texte semble plutôt confirmer la jurisprudence antérieure en passant aux juridictions nationales l'obligation de soumettre à examen de proportionnalité le droit aux actions collectives dans le cadre de la liberté d'établissement et la libre circulation des services "[24].

La Commission a reçu de la part de 12 parlements nationaux (19 voix sur 54) des opinions négatives au sujet de cette proposition de règlement au motif qu'elle est en conflit avec les compétences nationales et qu'elle ne respecte les principes de subsidiarité et de proportionnalité, en appelant ainsi pour la première fois au mécanisme prévu par le Protocole. No 2 TFUE, qui exige qu'un projet doit être réexaminé. Considérant qu'il sera difficile d'obtenir de la part du Parlement européen et du Conseil le soutien politique nécessaire, la Commission a décidé, le 29 Septembre 2012, de retirer la proposition de règlement

Les partenaires sociaux européens ont été satisfaits de cette décision, mais chacun pour des raisons différentes. Pour les employeurs, regroupés en BusinessEurope, un règlement n'était pas été nécessaire, étant

[23] Preamble, alin. 6-8.

[24] *Resolution de la Chambre des deputes du Grand-Duche du Luxembourg du 15 mai 2012*, citată în Droit de greve et libertes garanties par les traites europeens, L'impossible conciliation?, Collection CEPESS, Bruxelles, 2012, p.11.

suffisante l'application de la jurisprudence de la Cour de justice de l'Union européenne. Par contre, la Confédération syndicale européenne a considéré qu'en renonçant à ce projet de règlement ne sont pas résolu les problèmes soulevés par la jurisprudence de la Cour[25].

Il est regrettable, évidemment, que l'approche normative n'a pas été achevée dans une forme améliorée, étant donné la décision de la Commission de retirer le projet. D'autre part, l'analyse du problème et l'échange de vues au niveau européen ont constitué *ipso facto* un pas en avant. Sans doute le sujet reste soumis à être abordé avec attention en association avec les développements et les décisions prises par l'Organisation Internationale du Travail[26].

Par ailleurs, il est très important mentionner l'initiative de la Commission européenne de lancer une consultation sur un *socle européen des droits sociaux*[27]. L'initiative a été annoncée dans le discours sur l'état de l'Union, prononcé par le président Juncker devant le Parlement européen le 9 septembre 2015, et qui précisait que "Ce socle européen des droits sociaux devrait compléter ce que nous avons déjà fait en matière de protection des travailleurs dans l'Union européenne. (...) J'espère que les partenaires sociaux joueront un rôle central dans ce processus. Je pense que nous faisons bien de commencer cette initiative au sein de la zone euro, tout en permettant à d'autres États membres de l'Union de s'y joindre s'ils le souhaitent. »

L'une des grandes priorités de l'actuelle Commission est également d'encourager le dialogue social à tous les niveaux. À la suite d'une conférence de haut niveau intitulée «Un nouvel élan pour le dialogue social de l'UE», en mars 2015, les partenaires sociaux européens au niveau interprofessionnel ont convenu de procéder ensemble à une analyse approfondie de l'emploi et d'élaborer un programme de travail commun pour la période 2015-2017.

L'objectif du socle est de définir un certain nombre de principes essentiels afin de garantir le bon fonctionnement et l'équité des marchés du travail et des systèmes sociaux. Comme le président Juncker l'a souligné, le socle sera mis en place au sein de la zone euro, tout en permettant à d'autres États membres de l'Union de s'y joindre s'ils le souhaitent. Le

[25] *Droit de greve et libertes garanties par les traites europeens, L'impossible conciliation?,* Collection CEPESS, Bruxelles, 2012, p.13.
[26] Voir aussi, Nicolae Voiculescu, Vasile Neagu, *Op.cit*., p.273-281.
[27] Communication de la Commission au Parlement Européen, au Conseil, au Comité Économique et Social Européen et au Comité des Régions. Lancement d'une consultation sur un socle européen des droits sociaux. Strasbourg, le 8.3.2016.COM(2016) 127 final

socle s'appuiera donc sur les acquis sociaux existants de l'UE et les complètera[28]. Espérons que ces efforts seront fructueux à court terme dans l'intérêt des citoyens européens…

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[28] Idem, points 2.4, 3.

NATIONAL AND INTERNATIONAL JURISDICTION OF ROMANIAN COURTS

Andreea-Lorena CODREANU[*]

ABSTRACT

In terms of enforcement of civil procedure law, regarding judicial decisions, they remain subject to appeal, the grounds and terms set by the law under which the lawsuit began. The provisions of the new Civil Procedure Code apply to the lawsuits of private law with extraneity elements, as long as the international treaties that Romania is part of, the European Union Law or special laws does not provide otherwise. Romanian legislator thus brought together, under the term of civil international lawsuit, the provisions that apply to the lawsuits of private law with foreign elements, which are detailed in Book VII of the Code of Civil Procedure.

KEYWORDS: *international jurisdiction, extraneity, convention, „lis pendens", conjunction*

INTRODUCTION

Jurisdiction was defined in doctrine as the ability recognized by law, the task of a court/organ of jurisdiction or with judicial activity, to judge a particular dispute[1]. The Code of Civil Procedure contains norms on the jurisdiction of the courts in their majority. Besides these, there are enactments concerning jurisdictional competence, provided that they have the same legal force as the procedural norms, reasoning arising from Article 122 Civil Procedure Code - "New rules of jurisdiction can be established only by changing the rules of this code"[2].

According to the Civil Procedure Code, the jurisdiction is classified in material competence (by subject and value - Art.94-97, by the value of the introductive application by the court - Art.98-106) and territorial jurisdiction (Art.107-121); concerning competence, they are supplemented by special provisions (Art.122-128), procedural incidents concerning the com-

[*] Ph.D. Candidate, Titu Maiorescu University, Bucharest, Romania.

[1] Viorel Mihai Ciobanu, Marian Nicolae (coordinators), „New Civil Procedure Code commented and annotated – Vol.I – Art.1-526, 2nd Edition, reviewed and completed", Universul Juridic Publishing, Bucharest, 2016, pag.316;

[2] Gabriel Boroi, Mirela Stancu, „Civil Procedural Law – 3rd Edition, reviewed and completed", Hamangiu Publishing, Bucharest, 2016, pag.160;

petence of the court (Art.129-137), *lis pendens* and connection (Art.138-139) displacement of processes and court delegation (Art.140-147).

A. National jurisdiction

• *Material jurisdiction*

Material jurisdiction – ratione materiae assumes a delimitation of jurisdictions according to their ranks: Court, Court of Appeal, the High Court of Cassation and Justice. In some areas, in the context of free movement of persons in European space, but also in the circulation in the extra-European, may appear extraneity elements, influencing the rules for determining competence of courts, fields like: requests given by Civil Code in the competence of the court guardianship and family[3], the request concerning the registration in the civil records, request concerning obligations to do or not to do-monetary regardless, no matter the contractual source or extra-contractual[4] (concerning the execution of a contract or other judicial document, according to Art.101 Civil Procedural Code[5], for establishing court jurisdiction it will take into account the value of its object or, if there is the case, of that of the object submitted to litigation).

• *Territorial jurisdiction*

Regarding the *territorial jurisdiction,* the general rule from Art.107 Civil Procedural Code, establishes that the request for summons to court introduces to the court where the defendant has his domicile or office, the court remaining

[3] Council Regulation (EC) No.2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000;

[4] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I);

[5] Art.101 C.pr.code.: „Value of the request in special cases: (1)In requests concerning the execution of a contract or of another judicial document, for establishing the judicial competence will take into consideration its object or, if necessary, of that of the part from the object submittend to litigation; (2)The same value will be considered also in the request concerning ascertainment of absolute nulity, cancellation, rescission or termination of the legal act, even if it is not requested the reposition of the parties in the previous situation, as well as in applications for finding whether there is or isn't any wright. (3)In similar requests, concerning contracts of location or leasing, as well as in those concerning giving or returning the rented or leased good, the value of the request is calculated by anual rent or lease";

competent to judge the process/lawsuit even though, after the intimation, the defendant changes his domicile or office.

The Romanian Civil Code, in force since 1 October 2011, has new provisions, linking the concept of *domicile* of *main dwelling of the person*[6]. In addition to competence related to the domicile or headquarter of the defendant, the Civil Procedure Code contains rules on alternative territorial jurisdiction, namely the cases referred to in Article 113 C.pr.code.[7]

Concerning inheritance, Art.118 disposes the rules of *exclusive jurisdiction of courts*, therefore the parties cannot derogate, linking determin-

[6] Art. 87 C.civ.: „Domicile of individual, in order to exercise his civil rights and freedoms, is where he says it has his main dwelling".
Art. 90 C.civ.: „(1) The residence will be considered domicile when it is not known. (2)The lack of residence, the individual is deemed to reside at the place of last domicile, and if this is not known, at the place where that person is".
Art. 91 C.civ.: „(1) Proof of domicile and residence is done with the particulars in the identity card. (2) In the absence of such claims or where they are not true, establishment or change of domicile or residence can not be opposed to others. (3)Dispossals of Paragraph.(2) does not apply if the domicile or residence was known by other means by the person who opposes to".

[7] Art.113: „Alternative territorial jurisdiction
(1) Besides the Courts mentioned at Art.107-112, there also have jurisdiction:
1. court of applicant's residence in applications relating to the establishment of parentage;
2.court in whose jurisdiction the applicant creditor resides in applications relating to maintenance obligations, including those on state allowances for children;
3. court of the place stipulated into the contract for execution, even partialy of the obligation in the case of applications for execution, cancellation, rescission or termination of a contract;
4. court of the place where there is the property, for applications that come from a report of the lease of the building;
5. court of the place where there is the property, for applications in tabular benefit in tabular justification or tabular rectification;
6. court of the place of departure or arriving, for applications comming from contract of transport;
7. court of the place of payment, in claims regarding its obligations arising from a bill of exchange, checks, promissory note or another comparable security;
8. court of domicile of the consumer, in claims concerning the execution, noticing the absolute nullity, cancellation, cancelation, resolution or unilateral annulment of the contract with a professional or claims for compensation for damages caused to consumers;
9. the court in whose district the wrongful act was committed or the injury occurred, for applications on obligations arising from such an act.
(2) When the defendant exercised steadfast, outside his domicile, a professional activity or agricultural, commercial, industrial activity or other similar, the application for summons can enter the court within whose jurisdiction the place of that activity, for the existant patrimonial obligations or that follows to run there".

ing jurisdiction for the last domicile of the deceased[8]: „(1) In matters of inheritance, *until the exit of individuals are exclusive competence of the court of last domicile of the deceased*: 1.Requests concerning the validity or enforcement of testamentary dispositions; 2.Requests regarding inheritance and tasks, as well as those regarding the claims of the heirs would have against one another; 3. requests of legatees or creditors of the deceased against any of the heirs or open successively legacies are the exclusive competence of the court from the last domicile of any of the dead. (2) The claims according to paragraph (1) referring to several inheritances successively opened will be exclusively solved by the court under whose jurisdiction is the last known residence *of any of the deceased*".

Once the court is noticed, follows the verification of its competence. According to Art.131 C.pr.code, at first term where the parties are legally summoned before the court of first instance, the judge is obliged *ex officio* to verify and determine whether the rules of general, material and territorial jurisdiction are fulfilled; the end of the session by recording the legal grounds by which the court finds justice competence, is interlocutory in nature; According to the same article, where the judge thinks it is necessary for a clarification or additional evidence, will give the parties a new term for this purpose.

When establishing the jurisdiction, both *lis pendens* and *conexity* notions are equally important. So, the *lis pendens* exception establishes that nobody can be summoned to litigation for the same cause, same object and by the same party, before the same court, or several competent courts, via different claims; when the courts are of the same rank, the *lis pendens* exception will be raised before the last court; when the courts have different ranks, *lis pendens* exception will be claimed before the *lower* ranked one (Art.138 C.p.code). The *convexity* exception refers to the situations when, for the purpose of "good judgment", is possible, in

[8] It is to mention that also, in the case of the debate succession procedure on notary, - non-contentious jurisdiction of Romanian notary public in this matter is one of the exceptions to the general jurisdiction of the notary, the criterion for determining being, also, the last domicile of the deceased, respectively the latter deceased died in case of successive inheritances, according to Article 15, item a) and b) of the *Law no.36/1995 on public notaries and notary activity, republished*: "In carrying out its duties, the notary public has general jurisdiction, except as provided in the following situations: a) notary succession procedure is in jurisdiction of notary public from notary office located in the territorial circumscription of the court in which *the deceased had his last domicile*; b) in case of successive inheritances, heirs may choose the jurisdiction of any of notaries who work in an individually office or in a professional society of territorial circumscription of the court in which he had last domicile one of the authors *who died last*";

the court of first instance, the connection of several litigations with same parts or even together with other parts whose object and cause are strongly connected (Art.139 C.p.code), the purpose being avoiding conflicting decisions and judgment expedience – without overruling the stipulations referring to exclusive courts competence[9].

In the previous regulation, *the Law no.105/1992 on the regulation of private international law* stated that: "The court seized verifies, *ex officio*, competence to solve the process concerning relationships on private international law, and whether it is not competent, nor another Romanian court, it will refuse the application as not being of Romanian courts competence", the essential difference being the current sending to the provisions of Art.1070 Civ.pr.code - on the forum of necessity.

B. International jurisdiction

❖ *The application domain and the verification of international jurisdiction*

To resolve disputes regarding the relations of private international law, the issues amounting refers to determining the competent court to solve the litigation, establishing procedures that will follow, determining the applicable law to the judicial relation subjected to judgment, the effects of the adjudicated judicial decisions, all of these being brought into discussion by *extraneity* elements and, in some cases, by the conflict of laws. Romanian legislator thus brought together, under the term of *civil international lawsuit,* the provisions that apply to the lawsuits of private law with foreign elements, which are detailed in Book VII of the Code of Civil Procedure, the jurisdiction being closely related also, to territoriality of procedural law[10]. Of course, it is necessary to respect the general principles, such as: the right to ensure the right to equitable lawsuit, completed within an optimal and predictable procedural time[11], the prin-

[9] Gabriel Boroi, Mirela Stancu, „Civil Procedural Law – 3rd Edition, reviewed and completed", Hamangiu Publishing, Bucharest, 2016, pag.260-261;

[10] To which refers Article 28 of New CPC: "(1) The provisions of procedural civil law applies to all lawsuits that are judged by the Romanian courts, subject to contrary legal provisions. (2) When procedural relations with foreign element, the determination of the applicable law of procedure is done according to the rules included in book VII";

[11] Principle established by Article 6 of the Romanian Civil Procedure Code, the *Convention for the Protection of Human Rights and Fundamental Freedoms* (Article 6): "(…) everyone is entitled to a fair and public hearing within a reasonable time by an

ciple of legality according to which the compliance must be provided for the legal provisions during the lawsuit[12], the principle of equality, that guarantees the non-discrimination for the parties of the lawsuit[13]. The trial in Romanian comply with a constitutional principle, established in Article 128 of the Romanian Constitution, according to which the judicial proceedings are conducted in Romanian language, noting that the use of authorized interpreters and translators must ensure a proper administration of justice.

Therefore, the provisions of the new Civil Procedure Code apply to the litigations of private law with extraneity elements, to the extent that the international treaties that Romania is part of, the European Union Law or special laws do not provide otherwise. In terms of enforcement of Civil Procedure law, the judicial decisions remain subjected to the remedies, the grounds and terms set by the law under which the litigation began.

Art.1066 of Civil Procedure Code establishes the principle of jurisdiction based on domicile or headquarters of the *defendant*, establishing (subjected to other contrary legal disposals), the rule that the Romanian courts are competent to solve the litigation if the defendant has the domicile or, in the absence thereof, the habitual residence, respectively

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independent and impartial tribunal established by law (...)" and the Charter of *Fundamental Rights of the European Union* (first signed in Nice in December 2000 by the European Parliament, Council and Commission and, in December 2009, with the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights have been given the same binding legal force as the Treaties. to this end, the Charter was amended and proclaimed a second time in December 2007) - Article 47: "(...) everyone has the right to a fair and public hearing within a reasonable time, before an independent and impartial tribunal, previously established by law (...) ";

[12] Article 7 NCPC: "(1) The civil lawsuit is conducted in accordance with the law. (2) The judge has the duty to ensure the compliance of the legal provisions regarding the realization of the rights and obligations of the parties in the process";

[13] Article 8 NCPC: "In civil trial there is guaranteed to parties the exercise of procedural rights, equally and without discrimination"; article 14 on the prohibition of discrimination, of the *European Convention on Human Rights* (ECHR): "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"; non-discrimination emerges also from the content of Article 18 NCPC, concerning the fact that "foreigners and stateless persons who do not speak, nor understand the Romanian language have the right to inspect all documents and materials of the file, to speak in court and conclude, through an authorized translator, unless the law provides otherwise";

the main headquarter or, in the absence thereof, a secondary office or the goodwill *in Romania at the date of submission for the beginning of litigation*. As for the representation of parties in the process, Article 86 - the second thesis of the *Code* provides that, if the one who gave a general mandate has no domicile or no residence in Romania or if the mandate is granted to a person designated as an *agent*, the right to representation in judgment is considered to be given. Considering that refers to the mandatary and not to the representative (under the Article 84), result that text is applicable when the person who represents the party/the parties, is other than an attorney or a legal adviser[14]. Procedural legitimation to other persons, must also be mentioned, established by Article 37, which states that "in the cases and conditions *provided exclusively by law*, requests may be introduced or defences can be formulated also by people, organizations, institutions or authorities, which, without justifying a personal interest, are acting in defence of legitimate rights or interests of individuals in special situations or, where appropriate, in order to protect an interest of a group or general "(such as in matters concerning the interests of the state)[15].

In cases of multiple defendants, if one of them is in situation disposed by Article 1066 para. (1), the Romanian courts have jurisdiction, apart from cases where the request was made only for the purpose of excluding the defendant from the jurisdiction of domicile or habitual residence/principal or secondary headquarter located abroad. Romanian courts are also competent to judge any request regarding the activity at the secondary office of a legal person not having its headquarters in Romania, when this secondary office is located in Romania at the date of the request.

When in the matters covering rights that the parties have freely under Romanian law and *the parties have agreed* for the competence of Romanian courts to judge current or potential disputes concerning such rights, *Romanian courts* are the only ones competent for resolution. The Romanian court, before which the defendant is summoned, remains competent to judge the application, if the defendant appears before the court and makes substantive defences, without invoking the exception of incompetence, at the latest until the end of the research of process in front of the first instance. The notified Romanian court may deny the request when, from all the circumstances, results that *the dispute has no*

[14] Mihaela Tăbârcă, *Civil Procedural Law - Vol. I - General Theory*, Universul Juridic Publishing House, Bucharest, 2013, page no.446;
[15] *Idem*, page no.191;

meaningful connection with Romania. An example in this regard may be the Article 15 from European Regulation no.650/2012[16], which establishes that the court that was notified but has no jurisdiction under the Regulation, shall decline the competence, resulting that the notified body must be an instance in the sense of the Regulation, by therefore, *international jurisdiction prevails*[17].

Verification of international jurisdiction is held *ex officio* by the seized court, according to internal rules on jurisdiction, and if it is established that the dispute falls outside the jurisdiction of any Romanian court, the request is denied *as not being of the Romanian court competence*. Lack of international competence of Romanian court can be invoked at any stage of the process, even directly, in appeals. The court decision can be appealed to a higher court. It should be mentioned that the provisions of this article are subjected to the application of provisions of Article 1.070, regarding the *forum of necessity*. So, if it turns out that it is not possible to file a request abroad, or that can't reasonably pretend to be introduced abroad, the Romanian court *from the place with which the case has a sufficient connection* becomes competent to solve the case, even the law does not stipulates Romanian courts competence. If the request is made by a Romanian citizen or a stateless person with the domicile in Romania or a Romanian legal entity, *the Romanian court competence is mandatory.*

❖ *The choice of forum in patrimonial terms and the Agreement of choice of the forum*

In patrimonial matters, the parties may agree on the competent court to hear an actual or potential dispute derived from a judicial report with extraneity elements. The text of Article 1068 of the Civil Procedure Code provides several ways to conclude the agreement, with the condition - through document, telegram, telex, facsimile or any other means of

[16] The integral title of Regulation is *Regulation (EU) No.650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession,* which was completed by Regulation implementing (EU) nr.1329/2014 of the Commission of 9 December 2014 establishing the forms referred to in Regulation (EU) nr.650/2012;

[17] Ioan-Luca Vlad, "International successions. Regulation no.650/2012. International treaties in domain", *Universul Juridic* Publishing House, Bucharest, 2016, page no.183;

communication which allow to determine its probation through a text. In the absence of contrary stipulation, *the jurisdiction of the chosen forum is exclusive* (text thus leaving the possibility for the parties to opt, also, for non-exclusivity).

The choice of the court has no effect if it leads to abusively depriving of one party, of the protection ensured by a court under Romanian law. By this provision, we observe a way through which the internal law protects parties from an abusive choice of a foreign court. Also, in terms of exclusivity, the text is imperative, in the sense that the choice of a specific court is of no consequence, if the chosen court is foreign and the dispute is within the exclusive jurisdiction of the Romanian courts, or if, in the reverse situation, the chosen court is Romanian and the dispute is within the exclusive jurisdiction of foreign courts. There are two situations in which the chosen court by the parties can't be declared non-competent, namely when: a) one party has its domicile/habitual residence, respectively a secondary office *in the jurisdiction of that court*; b) the applicable law to the litigation under the private international Romanian law is *the Romanian law.*

As for *the exception of arbitrage,* should be noted that the option to extinguish the litigation through transactions, corresponding to the matter of arbitration, it is limited by mandatory legal rules[18]. Therefore, the exception of arbitrage provided by Article 1069 of the *Code* describes the situation where, if the parties have concluded an arbitration agreement regarding a arbitral litigation, solved under the Romanian law, the Romanian court seized shall decline its competence, except the situations where: a) the defendant did not invoke the exception of arbitrage before the first term that was legally summoned; b) the court notices that the arbitration agreement is obsolete or ineffective; c) the arbitral tribunal can't be constituted or the sole arbitrator can't be invested for reasons clearly attributable to the defendant.

❖ *International lis pendens and international conjunction of judicial causes*

In national law, the exception of *lis pendens* (Article 138 of Civil Procedure Code) implies that no one can be sued for the same cause, the same object and the same party of litigation, before several courts having

[18] Valentin-Stelian Bădescu, *Business Law*, Universul Juridic Publishing House, Bucharest, 2012, page no.381.

jurisdiction or before the same court, by different requests. International *lis pendens* (art.1076), represents the situation where, when a request is pending before a foreign court and it is *foreseeable that the foreign judgment will be liable of recognition or enforcement in Romania*, Romanian court seized later with a request between the same parties having the same object and the same cause, *may suspend* judgment until a foreign jurisdiction pronounces a judgement. Romanian court *will deny* the petition when the foreign judgment is liable to be recognized under the rules governing the international civil lawsuit.

It is observed that, in various matters as of international successions, in the European Regulations, the European legislator did not specify a certain extend for establishing a habitual residence or a business establishment to a particular person in a particular state[19], leaving (of course, within the imperatives limits of European and national legislation), the possibility of determining the applicable laws on the basis of the state criteria with which the person has the closest connections (social/emotional/professional/of family), hence the jurisdictional diversity and the settlement of disputes with extraneity elements. In case of suspension referred to in para. (1) Article 1076 of the *Code*, to which we referred above, if the foreign jurisdiction declares that is non-competent or if the pronounced foreign judgment is not rendered liable[20] to be recognized in Romania, the Romanian court reopens the course of litigation, following the request of the party concerned.

The text continues with an important criteria, which establishes if a cause is pending or not before a foreign jurisdiction, namely, this aspect is determined according to the *law of the state where the litigation runs its course* (it would result, for example, that if a court of French state was seized with an application and, subsequently, the same party addressed a request having the same object to a Romanian court, it will be determined

[19] Ioan-Luca Vlad, *quoted work*, page no.208;

[20] For understanding the concept of *foreign judicial decision liable of recognition in Romania*, see the provisions referring to recognition of the foreign judicial decisions (Book VII, Title III, Chapter I of the Civil Procedure Code), the provisions of the *Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, in force since 10.01.2015 and which repealed the *Council Regulation (EC) No.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* - with the remark that Regulation (EC) no.44/2001 shall continue to apply for the judicial decisions stated before 10.01.2015 and after 10.01.2015 but on the basis of an action filed before 10.01.2015;

if the cause is pending before the French jurisdiction, under the law of the French State, since the lawsuit takes place in this country; if, on the contrary, the French court has no jurisdiction to solve the litigation, the Romanian court will reinstate the lawsuit).

When the Romanian court is seized to solve a request, it has also the jurisdiction to solve the request in such a close connection to the first one, that there is the interest in examining and judging them at the same time, in order to avoid solutions that could not be reconciled if the requests would be judged separately, in this situation being in a case of international conjunction of judicial causes, provided by Article 1077 of Civil Procedure Code. Therefore, we encounter the idea of requests closely linked by a judicial report, in order to resolve the litigation with celerity and to avoid separate requests that would not reconcile. Naturally, the conjunction of causes affects also the judicial decision, for example, in case of Regulation nr.650/2012, the principle is the recognition without a special procedure of a decision from a Member State in other Member States; reasons for non-recognition are restrictive and include contrariety to public order, procedural reasons for protection of the defendant and contradictory with another previous judgement[21].

Regarding the *exclusive personal jurisdiction*, Romanian courts are exclusively competent to solve disputes with elements of extraneity, in the sphere of *personal status* concerning certain aspects, exclusivity being related to the domicile and citizenship criteria, namely:

- documents for civil status elaborated in Romania regarding persons residing in Romania and who are Romanian citizens or stateless persons;
- adoption consent, if the one to be adopted has the domicile in Romania and is a Romanian citizen or stateless person;
- guardianship and trusteeship to protect a person domiciled in Romania, who is a Romanian citizen or stateless person;
- placing under judicial interdiction of a person residing in Romania;
- dissolution, nullity or annulment of marriage, and other litigations between spouses, *except those disputes relating to real estate property situated abroad*, if at the date of the application, both spouses residing in Romania and one of them is a Romanian citizen or stateless[22].

In addition, art.1080 of the Code of Civil Procedure, establishes cases of exclusive competence of the Romanian courts in matters of *patri-*

[21] Ioan-Luca Vlad, *quoted work*, page no.14;
[22] Art.1079 from the new Civil Procedure Code, – which in the old regulation was found in Article 151 of *Law no.105/1992 on the regulation of private international law;*

monial actions, meaning to solve litigations with elements of extraneity concerning:

- real estate properties located in Romania;
- possessions left in Romania by the deceased with last domicile in Romania (mentioning is that the text does not distinguishes between movable and immovable property);
- contracts with consumers with domicile or habitual residence in Romania, for consumer benefits for personal or family use of the consumer and unrelated to its professional or commercial activity, if: a) the supplier has received the order in Romania; b) the signing of the contract was preceded in Romania by an offer or advertising and the consumer has fulfilled the necessary documents to bind the contract.

In all cases referred to Article 1079-1080, the Article 1082 text "emphasizes" the idea of exclusivity, stating that any agreement for electing another forum than Romanian court is inoperative.

In addition to these exclusive jurisdiction, the new Code of Civil Procedure gathered in Article 1081, the *cases of preferential jurisdiction of the Romanian courts*, observing, from the diversity of the matters listed in this legal text, that preference is linked by criteria such as: domicile, citizenship, place of performance of contractual obligations, the place of situating transported goods and other.

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THE AGREEMENT ON THE FREE MOVEMENT OF PERSONS SWITZERLAND – EUROPEAN UNION

Camelia COSTEA*

ABSTRACT
In an international political, social and economic context where everyone wishes to move freely, to circulate freely and unhindered, to emigrate or to work in a different state than where she/he was born, the question is how this can be achieved in respect to the countries that did not join the European Union. Switzerland is an example of a country characterized throughout its history through neutrality and independence, which can be a model for the actual and much controversial BREXIT and why not, for any other country that has not come yet through the stages of joining the European Union but wants its citizens to enjoy the benefits of free movement within the European Union.

KEYWORDS: *free movement of person, migration*

1. Neutrality, historical trait of Switzerland in Europe

Economic problems caused by the Second World War led to the need to build different political and economic associations between the European states. These constructs eventually led to the formation of today's European Union as an association of 28 European countries cooperating in order to regulate various areas of common interest (exploitation of resources, environment, migrations, free movement of person etc.) Switzerland remained neutral both during the Second World War and about the accession treaties that led to the founding of the European Union.

On 4 January 1960 Switzerland along with the United Kingdom, Denmark, Norway, Sweden, Austria and Portugal, became a member of the European Free Trade Association (EFTA). EFTA was founded in Stockholm in order to eliminate customs taxes between Member States. Subsequently also Finland (1966), Iceland (1970) and Liechtenstein (1991) have joined the European Free Trade Association. Currently only Iceland, Liechtenstein, Norway and Switzerland are members of European Free Trade Association, the remaining states withdrew in order to join the European Union.

* Lawyer, Ph.D. Candidate, Titu Maiorescu University, Bucharest, Romania.

On 2 May 1992 the states participating in European Free Trade Association (EFTA) and the Member States of the European Union (EU) signed an Agreement which founded the European Economic Area (EEA), providing for the establishment of a single market subject to common rules and enshrining the free movement of persons, goods, services and capital within the European Economic Area. Unlike the other EFTA member states, Switzerland voted in a referendum against participating in the European Economic Area and chose to establish relations with the European Union by means of concluding bilateral agreements.

Adept of continuing the policy of neutrality, through a new referendum in 2001 the Swiss people again voted against starting EU accession procedure. Starting 12 December 2008 Switzerland joined the Schengen area of free movement, which abolished the control of persons at borders between member states.

This shows despite the isolation tendencies, it is obvious that Switzerland realizes the need and importance of preserving cooperation relations with the European countries, most of them now in the European Union. Switzerland wants however that the implementation of European law in domestic law to be made by concluding bilateral agreements, thus allowing the application of EU rules to be adapted to the specific realities of Switzerland.

Knowing well the political history of Switzerland we can say that through this kind of European foreign policy based on bilateral agreements, the primary aim is that the rules contained in bilateral agreements stay consistent with national standards, and less to implement the European standards in the national legislation.

2. The bilateral Agreement on the Free Movement of Persons and its additional protocols

After rejecting in 1992 through referendum the accession to the EU, Switzerland has chosen to take advantage through bilateral agreements of the benefits of the European Union on the free movement of persons and the right to work.

The bilateral *Agreement on the Free Movement* between the Swiss Confederation on the one side and the European Union and its Member States on the other side was signed on 21 June 1999 and entered into force on 1 June 2002. This Agreement concerned the citizens of the European Union Member States of the time namely Germany, France, Italy,

Austria, Spain, Portugal, Belgium, Netherlands, Luxembourg, Denmark, Sweden, Finland, UK, Ireland, Greece, plus the future Member States Cyprus and Malta and regulated the progressive introduction of free movement of persons and the prohibition of discrimination between workers from Switzerland and from the countries concerned. The Agreement dispositions were extended to the nationals of the other Member States of the European Free Trade Association, Norway, Iceland and Lichtenstein.

Through a *First Protocol* signed on 26 October 2004 and entered into force on 1 April 2006, the Bilateral Agreement on the Free Movement between the Swiss Confederation and the European Union and Member States was extended to the new European Union Member States that acceded on 1 June 2004 respectively Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, Hungary (for Cyprus and Malta already applied since 2002).

A *Second Protocol* signed on 27 May 2008 which entered into force on 1 June 2009 extended the dispositions of the Agreement on the Free Movement concluded between the Swiss Confederation and the European Union and its Member States to Bulgaria and Romania, which joined the European Union on 1 January 2007.

The *Third Protocol* was signed on 4 March 2016 and will extend the dispositions of the Agreement on the Free Movement concluded between the Swiss Confederation and the EU and its Member States to Croatia, which became a European Union member on 1 June 2013. The protocol effective date has not yet been determined, depending on the current renegotiation of the Agreement between the Swiss Confederation and the European Union.

We appreciate that by establishing and conducting relations with the European Union on the basis of bilateral agreements and their Protocols, Switzerland has found the best way to benefit from economic agreements within the European Union without being a member of the European Union. However, this agreement is objectionable because that free movement of persons did not take into account the population ratio between the two Contracting Parties, presently Switzerland with a population of approx. 8 million inhabitants and the European Union with a combined population of over 500 million people, leading very quickly to a saturation of the small Swiss labour market with workers from the EU. Thus the regulations which stipulated that, under the Agreement on the free movement of people, all citizens of the EU member states have the right to establish residence and work freely and unhindered in Switzerland

while all Swiss citizens have the same rights in any of the countries, are now being renegotiated to protect the Swiss domestic labour market. The new regulations will have to keep in mind the fundamental principles of international law applicable to labour relations, which also include the "elimination of discrimination in employment and occupation" so that the new rules protecting the domestic market labour of Switzerland should not be discriminatory.[1]

3. The steps to achieve free movement of persons

For each of these categories of countries the freedom of movement was achieved gradually, the Agreement stipulating a five-year transition period in which it took into account the successive fulfilment of three conditions-limitations regarding the acquisition of work permit:

a) quotas: it stipulated the maximum amount of short and long term work permits which can be issued to citizens of EU Member States in one year;

b) national priority: the possibility of the employers to hire a worker from the European Union only if it has not found a person on the domestic labour market with the required specialization or qualification;

c) control of wages and working conditions: the cantonal authorities were empowered to verify compliance with the internal norms of the labour law in order to avoid granting "dumping" salaries, under the amounts practiced on the labour market or stipulated by collective work agreements of the different branches;

After a five-year transition period, the citizens of each category of states enjoy an unrestricted right of free movement. The Agreement includes as well a safeguard clause defining the possibility in case of an excessive immigration to return to the quotas for a period of another two years, after which the free movement will be free and unhampered by any limitations.

As expected, the agreement on free movement of persons has sparked conflicting views in Switzerland, making heard both appreciations and criticisms. The entry into force of the Protocols extending the Agreement to the new member states of the European Union has undergone every

[1] See in this regard: Voiculescu, Nicolae, Neagu, Vasile, *Workers rights protection in international and European legislation*, Universitara Publishing House, Bucharest, 2016, p.31.

time a referendum which led to controversy and to repeated presentations nationwide of the pros and cons of the voted issue.

One of the main concerns is that EU workers will call and receive social services and benefits. In this regard Dr. Andreas Zund and Thomas Hugi Yar from the Swiss National Court of Justice, appreciated that although according to the Agreement there are no social security benefits granted, the control of how there are granted by the authorities is limited and is possible only with the support of the Migration Office. According to the authors' opinion the analysis can be made only based on each individual case, and must discern whether the applicants or beneficiaries are covered or not by the Agreement. It is estimated further that this analysis is more difficult for persons holding long term work permits or residency permits. Their control can be achieved only through an "unified administration" and an exchange of data and information between all concerned institutions, taking into account the provisions regarding the protection of personal data.[2]

Referring to the same aspects of social aid requests by EU workers looking for a job in Switzerland, Prof. Dr. Christa Tobler, the Chair of European Law at the University of Basel shows that between European law and the bilateral right as established by the Agreement there is one key difference granted by the EU citizenship which is not conferred by the agreement. Therefore a different treatment of EU workers looking for a job Switzerland by not granting them social benefits does not have a discriminatory aspect.[3]

Another restraint amply analyzed refers to the fact that EU workers will accept to work for lower wages than those prevailing on the labour market in Switzerland, which will leads to a rise in unemployment among domestic workers. In this regard Dr. Andreas Zund and Thomas Hugi Yar appreciated that for instance an economic crisis with rising unemployment implications in southern European countries will lead necessarily to an increase in emigration and a decline in wages in the Nordic

[2] Zünd, Andreas and Hugi Yar, Thomas, *Staatlische Leistungen und Aufenthltsbeendigung unter dem FZA*, in Peronenfreizugigkeit und Zugang zu staatlichen Leistungen, Astrid Epiney und Teresia Gordzielik, Schultess 2015, p. 210.

[3] Tobler, Christa, *Auswirkungen einer Übernahme der Unionbürgerrichtlinie für die Schweiz*, in Peronenfreizugigkeit und Zugang zu staatlichen Leistungen, Astrid Epiney und Teresia Gordzielik, Schultess 2015, p. 70.

countries. As a solution to this situation is seen primarily the European economic policy and only then the immigration policy.[4]

4. The provisions of the bilateral Agreement on the Free Movement of Persons in relation to the European Union law

According to the Agreement between Switzerland and the European Union concerning the Free Movement of Persons, the nationals of Member States of the European Union have the right to live and work in Switzerland provided they have a domicile and an employment contract or they are self-employed, if through these activities they gain sufficient financial means to support themselves and if they possess a health insurance. Free movement of persons does not apply to applicants for social benefits.

The Agreement also includes dispositions of cross-border services by freelancers and employees of companies in international assignments while respecting the conditions of work and pay as regulated by the industry and place of activity in Switzerland.

It regulated as well the residence rights of persons not engaged in lucrative activities, of people having financial means to support themselves or who want to study in Switzerland. The Agreement on the Free Movement also stipulated the mutual recognition of diplomas, professional qualifications and professions. The European Union issued special recommendations for the recognition of several professional activities such as: doctor, dentist, pharmacist, veterinary surgeon, nurse, lawyer and architect. This means that these persons can exercise their profession under certain conditions in Switzerland as well.

The Agreement also stipulates the coordination of social security systems so that employees do not lose their social rights acquired from working in another country, respectively taking into account the periods of time worked on the territory of the other states. Also it was stipulated the right of persons with a right of residence to acquire property in the same conditions as the nationals of the host country. When leaving Switzerland it is not mandatory to alienate the property.

As reciprocity the Agreement provides the same rights for the Swiss citizens. Swiss citizens can live and thus exercise their professions in all

[4] Zünd, Andreas and Hugi Yar, Thomas, *Staatlische Leistungen und Aufenthltsbeendigung unter dem FZA*, in Peronenfreizugigkeit und Zugang zu staatlichen Leistungen, Astrid Epiney und Teresia Gordzielik, Schultess 2015, p. 212.

EU states and Swiss firms can in a much simpler way send workers for determined periods in EU states or hire specialists from European Union states.

In regulating the free movement of persons, the Agreement between Switzerland and the European Union reiterates the freedom of movement as provided by European law and applicable to nationals of the Member States of the European Union.

Referring to European law we have to remember primarily the Charter of Fundamental Rights of the European Union where the art. 45 para 1 provides that "Every citizen of the Union has the right to move and reside freely within the territory of the Member States", freedom which can be extended according to paragraph 2 also to the "third-country nationals legally resident in the territory of a Member State".[5] Although officially proclaimed at Nissa only in December 2000, the Charter of Fundamental Rights of the European Union included the rights provided by the Community Charter of Fundamental Social Rights of Workers adopted already in 1989 which followed the adaptation of labour conditions and social rights of workers to the existing developments.[6]

Equally important, the Treaty on the Functioning of the European Union (as revised in 2007), starting with defining the European citizenship in art. 20 also defines the following rights and freedoms of citizens of EU Member States:

- Discrimination prohibition, Art.18 TFEU[7].
- Free movement and Right of residence, Article 21 TFEU
- Duty-free, Art. 30 TFEU
- Free movement of goods, Art. 34 et seq. TFEU
- Free movement of workers, Art. 45 et seq. TFEU
- Freedom of establishment, Art. 49 et seq. TFEU
- Freedom to provide services, Art. 56 et seq. TFEU
- Free movement of capital, Art. 63 et seq. TFEU

[5] Charter of Fundamental Rights of the European Union, art. 45 *http://ec.europa.eu/ justice/fundamental-rights/charter/index_en.htm*

[6] Voiculescu, Nicolae, Neagu, Vasile, *Op.cit.*, p.100.

[7] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences, *Official Journal* C 326 , 26/10/2012 P. 0001 - 0390

Relating to these European dispositions, the Agreement between Switzerland and the European Union on the Free Movement of Persons provides:

- Freedom of movement of persons, art. 1 of Annex 1 AFMP[8]
- Right to stay for work and looking for a job, art. 2 of Annex 1 AFMP
- Right of residence and employment of family members, art. 3 in Appendix 1 AFMP
- The right to equal treatment of workers and self-employed persons, art. 9 and 15 of Annex 1 AFMP
- The right to conduct independent activities art. 12 of Annex 1 AFMP
- Unrestricted right to provide services up to 90 days per year, art. 17 of Annex 1 AFMP

Unlike European provisions that distinguish between free movement of persons respectively the right of residence and the free movement of workers respectively the right to work within the European Union, the provisions of the bilateral agreement concluded between Switzerland and the EU on the free movement of persons condition (with some exceptions) granting the right to stay in Switzerland with the existence of an employment relationship.

Comparing the provisions on the free movement of persons provided by the Treaty on the Functioning of the European Union (TFEU - Consolidated versions Adopted the Treaty of Lisbon, signed on 13 December 2007) with the provisions of the bilateral Agreement on the Free Movement, we find similarities of the rights granted by the two laws. However limitations of those rights are provided both by the Agreement during periods of transition and by the internal rules implementing the provisions of the Agreement which change even several times a year. An example is the provisions conditioning the work permit by the existence of a full-time work relationship or proof of domicile for at least 3 months etc.

[8] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons - Final Act - Joint Declarations - Information relating to the entry into force of the seven Agreements with the Swiss Confederation in the sectors free movement of persons, air and land transport, public procurement, scientific and technological cooperation, mutual recognition in relation to conformity assessment, and trade in agricultural products, *Official Journal L 114, 30/04/2002 P. 0006 – 0072.*

Contrary to these conditions established by the Swiss internal rules of implementation of the Agreement, the European Court of Justice case law has clearly established that both part-time labour relations and insignificant lucrative activities fall under the free movement of persons.[9]

Thus while in the European law the granted rights and freedoms are based on the concept of European citizenship and the idea of forming a single and common labour market, by the bilateral Agreement concluded by Switzerland with the European Union on the Free Movement of Persons there are provided also protectionist rules that condition and at the same time restrict the free movement. But although the European law by defining these freedoms pursues the elimination of all discrimination and an equal treatment of all European citizens, we can notice on the level of the European law also about regulations that establish discrimination. On one hand we can speak of "public discrimination" when they are expressly stipulated in the European standards such as those set forth in art. 45 para.3 of the Treaty on the Functioning of the European Union referring to the limitations of the right to free movement of workers for reasons concerning public order, safety and health. On the other hand we can also talk of "hidden discrimination" when limitations are determined by certain formulations of these laws that leave room for a different treatment or for national regulations implementing the European rules.[10]

We are not referring here only to discrimination against foreign workers, since the implementation of European standards that relate to the rights of foreign workers in a Member State may result in certain cases to a worsening of the situation of their own workers, in which case we can speak of a "national discrimination"[11] (when the foreign workers accept to work with dumping payment).

In our opinion, as at the individual level we notice the self-defence instinct, at national policies level there is the tendency to protect their own citizens and the national labour market, and finding a balance between implementing European standards and adapting national legislation remains in the end still the responsibility of the Member States. And both in European law and in national laws, we do not know any law providing for unlimited rights without any limitations.

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[9] Judgment of the Court of 23 March 1982. *D.M. Levin v Staatssecretaris van Justitie.* Reference for a preliminary ruling: Raad van State - Netherlands. Case 53/81. *European Court Reports 1982 -01035*

[10] Walter, Frenz, *Europarecht*, Edition II, Ed. Springer 2016, p. 82.

[11] Grabiz, Hilf, Nettesheim, *Komentar zur Europäische Union*, Munich 2011, Art. 45, 54 R.

5. Effects and the importance of the Agreement on the Free Movement of Persons

For Switzerland, a small country isolated as result of the policy of neutrality, closing the Agreement on the Free Movement implicitly leads to advantages both political and economic causing an increase in the number of jobs. It should not be neglected any experience that specialists from European Union bring with them in Switzerland. This concerns mainly those areas and professions where Switzerland lacks specialists such as IT and medical professions, as well as seasonal activities covered mostly by seasonal workers from the EU. Add to this the collabouration with universities in the European Union in joint research projects for students. Erasmus student exchange programs between universities make annually for approx. 3000 students.

6. The popular vote of Swiss Confederation people against of mass immigration

Following the popular vote of the citizens of the Swiss Confederation on the 9th of February 2014 against mass immigration, the Agreement on the Free Movement of Persons will be renegotiated.

We believe that through this vote the Swiss people only wanted to show that Switzerland's domestic policy is a protectionist policy, the way they promote and protect national products and want to protect the domestic labour market and its own citizens. Both politicians and the Swiss people are aware that the effects of this vote could mean a denunciation of all bilateral agreements with the EU and the loss of economic benefits brought by these agreements. At the same time Switzerland counts on the fact that also the EU, a continuation of the agreement on free movement of persons, even with an acceptance of protectionist clauses, is more advantageous than its denunciation.

For the Swiss Confederation it's very important to continue the implementation of the Agreement on the Free Movement. However it is expected that the renegotiation of the Agreement with the European Union will achieve the introduction of clauses meant to protect the domestic labour market, such as prioritary employment of domestic workers and limiting the number of workers of the EU by setting quotas. We'll find out soon if the European Union will accept those terms or consider them discriminatory.

Maybe we can find the answer in the book "The Rule of Law" of Lord Tom Bingham, the winner of the Orwell Prize for the best political book in 2011:

"For although international law comprises a distinct and recognizable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states, and in no way antagonistic to them; it is not a thing apart; it rests on similar principles, and pursues similar ends; and observance of the rule of law is quite as important on the international plane as on the national, perhaps even more so."[12]

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5. Charter of Fundamental Rights of the European Union *http://ec.europa.eu/justice/fundamentalrights/charter/index_en.htm.*

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[12] Bingham, Tom, *The Rule of Law*, Penguin UK 2011.

THE POLLUTER PAYS PRINCIPLE

Anisia-Teodora DONIGA*

ABSTRACT

The polluter pays principle, alongside precaution, prevention and correction at the source represent the four pillars on which the entire system of environmental tort liability is built. Subject to ample international debate, the aforementioned principle came into being as proof of modern society's growing concern when faced with the dangers of industrial and technological development. The irrefutable reality of pollution, as well as its negative consequences on the ecosystem, has made it imperative to identify the major infringers who pose a threat to the environment and to somehow devise a proper system of holding them accountable for their actions. This endeavour is made all the more difficult by the fact that, behind each and every major environmental disaster, there lays a tangled web of causes and contributing factors, which is more often than not impossible to decipher. The goal of this article is to present an overview of the defining characteristics of the polluter pays principle, as well as a few examples of its practical application in international case-law.

KEYWORDS: *cost internalization, cost of pollution, environmental damage, Erika oil spill dispute, joint liability, polluter, polluter pays principle, tort liability*

As a reputed author once said, the role of the polluter pays principle resides in "*channelling liability towards the operator (exploiter) of the enterprise, because he is the one who generally possesses all the technical knowledge, the resources and the operational control of the activity and is also the best suited to assume the full risk it poses*"[1]. In order to fully understand the essence of this principle, we will begin by portraying its genesis and evolution.

Origins of the polluter pays principle

The polluter pays principle was born as a result of ample economical debate on the ***internalization of pollution costs*** (otherwise known as transferring the burden of these costs back to the operator who caused them in the first place). At the dawn of the twentieth century, when public awareness of the long-lasting negative effects of pollution was still in its infancy, as far as economic theory was concerned, environmental

* Attorney at Law**,** Ph.D. Candidate, Titu Maiorescu University, Bucharest, Romania.

[1] M. Duțu, *Prevenirea şi repararea pagubelor de mediu potrivit Ordonanței de Urgență a Guvernului nr. 68/2007*, în Dreptul, nr. 11/2007, p. 9-24

damage caused by pollution was considered a "social cost". For instance, the damage brought about by toxic gas emissions, be it damage to the atmosphere itself, a decline in human and animal health or subsequent property damage, was a cost paid by society as a whole, not by the industrialists who caused it. The market price of the product did not include the pecuniary value of the damage wrought on the environment as a result of the production process; therefore, these specific costs were called *externalities*.[2] Economist Arthur C. Pigou argued that these costs should be internalized, in other words, industrialists ought to bear the expenses of the damage caused to the environment, in order to eliminate the social and economic imbalance caused by pollution. Pigou believed that internalization could be achieved by imposing a new tax on these entrepreneurs.[3]

However, the first time the polluter pays principle was mentioned by its proper name was in the context of the 1972 Recommendation of the Organisation for Economic Co-operation and Development. Therein, the principle was brought forth as a possible solution to balance the costs of international environmental protection. It was concluded that nations should strive to properly allocate the costs of pollution prevention and control measures so as to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment. The polluter should be the one to bear the expense of carrying out the measures decided by public authorities to ensure that the environment is in an acceptable state.

This idea was reiterated later through Principle 16 of the Rio Declaration on Environment and Development in 1992: "*National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment*". A fair amount of emphasis was put on the fact that, if entrepreneurs should fail to be held accountable for these costs, or if member states were to subsidize polluting industries or otherwise bear

[2] In economics, externality was a notion first theorized by British author Alfred Marshall. Externalities refer to situations in which market prices do not realistically reflect the costs and benefits of actual production and consumption. An externality is a consequence of an economic activity experienced by unrelated third parties; it can be either positive or negative, depending on the beneficial or disruptive effect it has on society as a whole.

[3] A.C. Pigou, *The Economics of Welfare*, Macmillan and Co., 4th edition, London, 1932

the expenses of the preventative measures, it could lead to a distortion of international trade and investment.

Presently, as far as the European Union is concerned, the polluter pays principle can be found among the pillars of European environmental policy as illustrated by art. 191 (2) of the TFEU. The implementation of this principle was best conveyed through Directive 2004/35/CE, which in its statement of reasons decrees: "*The prevention and remedying of environmental damage should be implemented through the furtherance of the "polluter pays" principle, as indicated in the Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimize the risks of environmental damage so that their exposure to financial liabilities is reduced.*"

Emphasis is therefore put on the preventative nature of the polluter pays principle, working on the assumption that the operator will take measures to limit pollution once it is made clear to them that the penalties will be more cumbersome than the benefits reaped from the polluting activity. It is also believed that the same desire to avoid further costs with preventative measures will encourage the operator to invest in better risk assessment methods.

The polluter

In order to better convey the substance of the polluter pays principle we must first understand who the polluter is.

In a strict sense, the polluter is ***an operator who has already caused a certain environmental damage*** and who can be held accountable for the destructive consequences of his actions. According to Directive 2004/35/CE, the *operator* is defined as "*any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity"*.

However, if we consider the problem from an extensive point of view, the operator who actually "pollutes" is not the only person liable to suffer the burden of pollution expenses; this category also includes ***the***

operators whose activities pose a risk to the environment, even though their respective enterprises have yet to cause an actual disaster. Because the nature of their enterprise is in itself a dangerous one, these persons will have to bear the costs of the appropriate preventative measures devised to mitigate the risk.

Lately, a valid argument has been raised for the inclusion of the consumers themselves within the category of people who can be considered bearers of the pollution cost. As a result of the internalization of production costs, the preventative measures expenses made by the manufacturers are included within the market price of the final product, therefore being ultimately borne by ***the consumers who buy that specific product***.

Another paramount issue that concerns civil liability in cases of pollution is actually pinpointing the person responsible for the damage, when oftentimes a dangerous enterprise consists of a vast array of individual manufacturers, suppliers, distributors, technicians and corporate managers, each and every one of them interfering at one point with the production process and, thus, each retaining at least part of the responsibility when either the product itself, or the means by which it was created are revealed to have negative effects on the environment.

As a solution to the insurmountable task of seeking out the real culprit within this intricate tangle of cause and effect, international as well as national regulations have implemented **joint liability**, which is an efficient means of lessening the burden of proof in case of a trial, and also provides the victims with full payment in a timely fashion for the damages suffered.

Joint liability is unanimously accepted as a method of ensuring reparations for environmental damage. One such example is offered by the Lugano Convention of 1993[4], which has synthesized this principle within art. 6 thus:

(1) "If an incident consists of a continuous occurrence, all operators successively exercising the control of the dangerous activity during that occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence during the period when he was exercising the control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only.

(2) If an incident consists of a series of occurrences having the same origin, the operators at the time of any such occurrence shall be jointly

[4] Although the Lugano Convention of 1993 never did enter into force due to a regrettable lack of signatures from the member states.

and severally liable. However, the operator who proves that the occurrence at the time when he was exercising the control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only.

(3) If the damage resulting from a dangerous activity becomes known after all such dangerous activity in the installation or on the site has ceased, the last operator of this activity shall be liable for that damage unless he or the person who suffered damage proves that all or part of the damage resulted from an incident which occurred at a time before he became the operator.(...)"

The Convention also provides that "*If the person who suffered the damage or a person for whom he is responsible under internal law, has, by his own fault, contributed to the damage, the compensation may be reduced or disallowed having regard to all the circumstances.*"[5]

Romanian legislation also mentions joint liability in art. 31 of Government Emergency Ordinance no. 68/2007:

(1) If the damage or imminent threat of damage to the environment was caused by more than one operator, the latter are jointly liable for the costs of the precautionary and remedial measures.

(2) The effects of joint liability, including the apportionment of costs between co-debtors, are subject to the relevant national legislation, including the provisions which govern several liabilities between the producer and the user of a product.

(3) If the operator who has caused the damage or imminent threat of damage to the environment is a member of a consortium or a multinational company, the operator, as well as the consortium or company are jointly liable.[6]

In order to better illustrate the mechanism of joint liability, we will make a succinct presentation of the judgement of the French Court of Cassation in the context of ***the Erika oil spill*** dispute.[7] The relevance of the French court's ruling lies in the fact that it represents the first practical application of the polluter pays principle before a national court of

[5] *http://www.worldlii.org/int/other/COETSER/1993/2.html*

[6] As far as joint liability is concerned, Directive 2004/35/CE abstains from postulating specific rules, instead deferring to the internal regulations of each member state, in art. 9: "T*his Directive is without prejudice to any provisions of national regulations concerning cost allocation in cases of multiple party causation especially concerning the apportionment of liability between the producer and the user of a product*."

[7] CJEC ruling no. C-188/07, *Commune de Mesquer/Total France SA, Total International Ltd*, 24 June 2008

law. It also provides a creative interpretation of the term "polluter" in regard to the scope of joint and several liabilities.

On December 12th 1999 the oil tanker Erika, flying the Maltese flag and chartered by Total International Ltd, sank about 35 nautical miles south-west of the Pointe de Penmarc'h (Finistère, France), spilling part of her cargo and oil from her bunkers at sea and causing pollution of the Atlantic coast of France. As a result of the ecological disaster caused by the spill, action was taken to enforce both international liability under the International Convention on Civil Liability for Oil Pollution Damage[8] - which had also established an International Fund for Compensation for Oil Pollution Damage – as well as liability under national French law.

In order to clarify the scope of civil liability within the boundaries of the Convention, the French Court formulated a series of questions for a preliminary ruling by the Court of Justice of the European Communities. The referring court sought to know whether, in the event of the sinking of an oil tanker, the producer of the heavy fuel oil spilled at sea and/or the seller of the fuel and charterer of the ship carrying the fuel (Total International Ltd.) were required to bear the cost of disposing of the waste thus generated, even though the substance spilled at sea had been transported by a third party (in this case a carrier by sea).

Art. 15 of Directive 75/442/CE on waste was invoked by the Court as legal basis for civil liability in this case: "*In accordance with the "polluter pays" principle, the cost of disposing of waste must be borne by:*

– the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9, and/or

– the previous holders or the producer of the product from which the waste came."

The Court argued that art. 15 enforces two different methods of managing the repercussions of an ecological disaster. The first paragraph refers to the remedial measures taken immediately after the spill (the actual recovery or disposal operations), which fall under the responsibility of any "holder of waste" – the person who, at the moment of the spill, had control over the hazardous waste (either the producer, or the possessor). The second paragraph refers to the overall responsibility of bearing the costs of the remedial measures, which applies to the "producer of waste" in accordance with the polluter pays principle, regardless of whom had actual control of the waste at the time of the incident.

[8] Adopted at Brussels on 29 November 1969, as amended by the Protocol signed in London on 27 November 1992.

Any other interpretation of this article would allow polluters to circumvent legal responsibility by claiming that the incident took place at a moment when the hazardous waste was beyond their control.

The Court also proposed a series of guidelines for identifying the person who should be held accountable in cases of environmental damage at sea, thus providing a clever interpretation of the notion of "polluter" under Directive 75/442/CE.

First of all, it must be held that the owner of the ship carrying those hydrocarbons is in fact in possession of them immediately before they become waste. In those circumstances, ***the ship owner*** may thus be regarded as having produced that waste within the meaning of art. 1 para. b) of Directive 75/442, and on that basis be categorised as a 'holder' within the meaning of art. 1 para c) of that directive.

Secondly, the national court may also consider that ***the seller of the hydrocarbons*** and ***charterer of the ship*** carrying them has "produced" waste, if that court, in the light of the elements which it alone is in a position to assess, reaches the conclusion that that seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship. In such circumstances, it would be possible to regard the seller-charterer as a previous holder of the waste for the purposes of applying the first part of the second indent of art. 15 of Directive 75/442.[9]

The CJEC preliminary ruling in the Erika oil spill dispute has thus created a precedent for victims of oil spills to demand reparations from the ship owner, the seller of the hydrocarbons and the charterer of the ship whenever the compensation offered by the fund proves insufficient to cover the entirety of the damage caused.

Another more recent ruling which brought into discussion the notion of "polluter", this time through an interpretation of Directive 2004/35/CE, was the ***Italian Ministry of Environment vs. Fipa Group SRL, Tws Automation SRL and Ivan SRL*** dispute, regarding the liability of landowners for soil contamination.[10]

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[9] *http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d544a55544c9764880a06ab6f09d44cb62.e34KaxiLc3eQc40LaxqMbN4Pa3uNe0?text=&docid=69388&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=954810.*

[10] C-534/13, *Ministero dell'Ambiente e della Tutela del Teritorio e del Mare ş.a./Fipa Group ş.a.* – request for a preliminary ruling by the CJEU from the Consiglio di Stato (Italia), lodged on 10 October 2013, *http://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:62013CN0534&from=RO.*

From the 1960's to the 1980's, two companies specialized in the manufacture of insecticide and herbicide operated on an industrial site in a municipality of the Province of Massa Carrara, in Tuscany (Italy). As a result, the land suffered extensive contamination by various chemicals, including dichlorethane and ammonia, and subsequent rehabilitation measures failed to fully restore the site to its former state.

Decades later, various plots of the land were purchased by three private companies: TWS Automation (specialized in the sale of electronic devices), Ivan (a real estate agency) and Fipa Group (specialized in construction and boat repair work). Between 2007 and 2011, the Italian Ministry of Environment issued a series of decisions addressed to the three undertakings, ordering them to take specific measures towards the safety and restoration of the land, as part of these companies' so-called duty as "guardians of the land".

The three landowners refused to comply and took legal action against the Ministry's orders before the Regional Administrative Court of Tuscany, which ruled in their favour and annulled the decisions in question on the grounds that the polluter pays principle as decreed by Directive 2004/35/CE does not apply to undertakings which bear no direct responsibility for the contamination observed on the site. The Ministry of Environment brought an appeal against those judgements before the Consiglio di Stato, which in turn submitted a request to the CJEU in 2013 for a preliminary question on the interpretation of the polluter pays principle in light of Directive 2004/35/CE. The CJEU finally provided an answer to this question in 2015.[11]

The question referred for the preliminary ruling can be summarized as such: if the person who actually caused the contamination can no longer be identified and held responsible for their actions, is there any way to hold the current landowner liable for these damages directly on the basis of Directive 2004/35/CE, even though they have not contributed in any way to the contamination, and the national law expressly exempts them from legal action on these grounds?

The Court has established that, in order for the environmental liability mechanism to be effective and for remedial actions to be required of an operator, one must first establish a causal link between the activity of the operator and the concrete environmental damage. In the absence of this causal link, the current landowner should be exempt of tort liability for

[11] *http://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:62013CJ0534&from=RO.*

the damage. This opinion takes into account the fact that, under art. 8 para. 3a) of Directive 2004/35/CE, the operator is not required to bear the costs of the preventative and remedial measures if they can prove that the pollution was caused by a third party.

However, the Directive allows member states to adopt more onerous systems of liability for tortfeasors within their own national laws, as long as these mechanisms refrain from coming into conflict with other imperative EU regulations. According to art. 16: "*This Directive shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements of this Directive and the identification of additional responsible parties.*" Therefore, the Court concluded that the liability of present landowners in regard to the rehabilitation of contaminated sites is an issue to be resolved by national Italian law.

In this particular case brought before the Court, Italian regulations exempt current landowners from the obligation of implementing safety and rehabilitation measures if they can prove that they have not contributed in any way to the contamination of the land. However, if restorative measures intended to eliminate the damage are undertaken by public authorities of their own free will, landowners will have to reimburse the authorities up to the equivalent of the increase in value the land has gained as a consequence of these measures.

All in all, even though this specific ruling has exempted Italian landowners from liability on the grounds of the polluter pays principle when no fault of their own can be proven, the provisions of Directive 2004/35/CE could still allow for a stricter liability regime to be applied when state law expressly permits it.

The cost of pollution

While the previous section of our presentation was focused on the notion of "polluter" and the many intricacies of its interpretation in both theory and practice, this final chapter of our work will be centred on the actual "paying" part of the polluter pays principle.

The fundamental idea behind the polluter pays principle is that the operator can be held liable and thus forced to pay the monetary equivalent of two main categories of measures:

– preventative measures: *a priori* measures designed to forestall the occurrence of environmental damage and mitigate the risks of potentially dangerous activities;

– remedial measures: *a posteriori* measures intended to eliminate the damage caused by an incident that has already taken place, when reparations are sought for the visible damage to the environment (*pure ecological damage*)[12] and to the health and property of individuals (*knock-on damage*)[13].

It goes without saying that the operator must be held accountable when the damage has already been done, and there are visible and quantifiable consequences to the health and property of people. Some regulations pertaining to specific areas, such as liability for nuclear damage or oil pollution damage, require setting up specialized funds meant to reimburse pollution victims within a certain limit.[14] If the actual damage exceeds the limit imposed by the fund, the remaining amount can be petitioned within a court of law, on the grounds of tort liability.

We will not delve into the matter of the various types of damages for which an operator can be held liable. Instead, we will make a succinct presentation of the ***categories of pollution costs***, as defined by Directive 2004/35/CE:

- **the cost of preventative and remedial measures employed by the operator himself**

"*According to the "polluter-pays" principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures.*" (para. 18 of the statement of reasons of Directive 2004/35/CE). This principle is reiterated under a more assertive form within art. 8 para. 1 of the same document: "*The operator shall bear the*

[12] For a comprehensive analysis of the notion of *pure ecological damage*, see also: Patrice Jourdain, *Le dommage ecologique et sa reparation. Rapport francais*, *http://www.fdsf.rnu.tn/useruploads/files/jourdain.pdf*

[13] For more details on the distinction between *direct damage* and *knock-on damage*, see also: L. Pop, I.-Fl. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile*, ed. Universul Juridic, București, 2012, p. 419-420

[14] For a comprehensive historical presentation on international funds dedicated to the reparation of environmental damage, see also: Ș.A. Stănescu, *Repere privind perfecționarea regimului juridic al răspunderii civile pentru daune cauzate prin poluare în context internațional*, în Curierul Judiciar, nr. 1/2013, p. 21-24

costs for the preventive and remedial actions taken pursuant to this Directive."

- **the cost of preventative and remedial measures employed by a public authority**

"In cases where a competent authority acts, itself or through a third party, in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator." (para. 18 of the statement of reasons)

Nevertheless, the public authority may choose not to recover the full costs where the expenditure required to do so would be greater than the recoverable sum or where the operator cannot be identified. (art. 8 para. 2)

- **the cost of risk and/or damage assessment**

"*It is also appropriate that the operators should ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring."* (para. 18 of the statement of reasons)

- **the cost of preventative measures that have failed to be implemented through the fault of the operator**

"*Operators should bear the costs relating to preventive measures when those measures should have been taken as a matter of course in order to comply with the legislative, regulatory and administrative provisions regulating their activities or the terms of any permit or authorisation*." (para. 21 of the statement of reasons)

Whenever the appropriate measures are implemented by a public authority, the latter will have recourse against the operator within a court of law so that their contribution will be reimbursed in full.[15]

In order to ensure that the operator will effectively be able to afford these costs, regardless of his solvency at the moment when they are supposed to paid, both general framework legislations and sectorial laws demand that the operators offer appropriate **financial security instruments** before they undertake dangerous activities. Sometimes, the neces-

[15] Art. 26 of OUG 68/2007: „*The operator will bear the cost of the preventative and remedial measures, even if these costs have been employed by the County Environmental Protection Agency.*"

sary authorizations for the undertaking will not be released by the authorities if the operator fails to present a guarantee beforehand.

Art. 14 of Directive 2004/35/CE postulates that each member state is allowed to establish which financial security instruments are the most appropriate to offer sufficient warranty against potential pollution costs.[16] In Romanian law, OUG 68/2007 states that the specific forms of financial security are subject to approval by Government Decision and offers a series of guidelines to aid in making that decision, within art. 33:

- the type of guarantee will be chosen taking into account the level of risk of the professional activity;
- the level of risk of the professional activity will be established taking into account the potential damages it can cause to the environment;
- the potential damages it can cause to the environment will be determined through environmental impact evaluations and/or risk assessment reports provided by the operator.

Another example is afforded by art. 13 of Law no. 703/2001 concerning civil liability for nuclear damage, which states that an **insurance contract** or a financial security instrument is a necessary condition to be fulfilled by the operator in order to obtain the authorization required by Law no. 111/1996.

Additional security measures may be required by internal legislations in the form of *post factum* guarantees, which can be employed in the context of legal recourse against tortfeasors. For example, art. 29 of OUG 68/2007 explains that "*in order to guarantee the recovery of the costs, the County Environmental Protection Agency establishes a* ***mortgage on the operator's assets*** *and* ***seizure of their bank accounts****, in compliance with national law.*"

In conclusion, all these mechanisms have been devised as a means to place pecuniary responsibility firmly within the hands of the tortfeasor, also ensuring that there will be sufficient funds to both restore the affect-

[16] Para. 27 of the statement of reasons of Directive 2004/35/CE: "*Member States should take measures to encourage the use by operators of any appropriate insurance or other forms of financial security and the development of financial security instruments and markets in order to provide effective cover for financial obligations under this Directive.*" Art. 14 para. 1: " *Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive.*"

ed area to its former state and fully reimburse the collateral victims of pollution.

Although the polluter pays principle has set the grounds for adequate and full reparation of ecological damage, it will have to be implemented carefully, in order to avoid it being unwittingly diverted from its original purpose. In the future, careful consideration should be given to cases when the polluter might invoke the reasoning "I pay, therefore I can pollute", especially concerning those operators with vast financial means, for whom the cost of reparatory measures is a small price to pay when compared to the benefits they can derive from pursuing dangerous activities.

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THE REDUCTION OF LAWYER'S FEE, AS PART OF THE COURT EXPENSES

Laura-Mihaela IVANOVICI[*]

ABSTRACT

The legal ties which result from the civil court procedures regarding Court expenses were given consideration, either in accordance with the Civil procedure code from 1865 (further on, former Code), or with the Law no. 134/2010 on the Civil procedure code – the new statutory regulation on the matter (further on, NCPC). The burden of Court expenses, including the lawyer's fee is borne by the party who loses the case, but the Court is enabled to reduce the expenses, depending on the circumstances of the case. One has to stress out that the intention of the legislator was to ensure the access to a fair trial, without an excessive burden for the party who loses the case resulting in obliging him/her to pay a large sum of money representing Court expenses, including the fees for legal representation of the party who won the case. The legal competence of the Court to reduce the expenses is not meant to affect the legal obligations established by contract between the lawyer and his client, contract concluded on the base of the Law no. 51/1995 and the Statute of the advocates.

KEYWORDS: *assignment Court expenses, lawyer s fee, reduction of the lawyer' s fee*

Section 1

The legal nature of the Court expenses

1.1. Legal provisions regulating the matter

The former Code regulated the Court expenses in articles 274-277 and NCPC regulates the matter on art. 451-455, comprising a series of modifications which will be further analysed in this paper.

Some authors[1] make a distinction considering the legal obligation established between the claimant and the defendant in the course of the civil proceedings before the Court of law and the legal obligation established by contract between the lawyer and his client.

[*] Judge, High Court of Cassation and Justice of Romania, Ph. D. candidate, Titu Maiorescu University, Bucharest, Romania.

[1] G. Boroi, and others, *The New civil procedure code, comments on articles*, Hamangiu Publishing House, 2013, p. 843.

The article 451 para. 2 from NCPC provides that the reduction of the Court expenses, does not affect, by any means, the legal bounds established by contract between the lawyer and his client. In comparison with the former Code, the difference consists of the allegation that the Court expenses are subject to reduction, including thus the fees for the legal representation, depending on the circumstances of the case.

Theoretical dispute has arisen on the application of the article 274 para. 3 from the former Code, because the Courts were given the task to assess the performance of the lawyer during the civil proceedings, even though the Court expenses[2] were subject to reduction.

1.2. The content of the Court expenses

According to the article 451 para 1 from NCPC the Court expenses consist of Court fees and taxes, the fees for legal representation, experts and other professionals appointed by the Court in accordance with art. 330 para 3 (…) as well as any other expenses necessary for an effective course of justice. In other words, the Court expenses are those made during the civil proceedings.

The legal provision comprises a reference of the fee for legal representation, so the person employing a lawyer, in accordance with the Law no. 51/1995 and Statute of the advocates, may ask the Court, if winning the case, to oblige his opponent to pay the Court expenses, comprising the lawyer fee, as resulting from the contract and the bills confirming the payment was made.

Article 451 para. 2 NCPC provides that: "The Court may, even *ex officio*, to reduce, in a justifiable manner, the portion of the Court expenses consisting of the fees for legal representation, when this is manifestly unfounded in relation to the value or the complexity of the case or the performance of the lawyer, taking into account the circumstances of the case. The measure ordered by the Court would not impede upon the legal bounds established between the lawyer and his client. "

The legal provision clarifies that what the Court is entitled to reduce is the amount of the Court expenses (as a whole), not the fee for the legal representation, the fee remaining the same, because the order rendered by the Court would not impede on the legal ties between the lawyer and his client.

[2] I. Stoenescu, S.Zilberstein, *Civil procedure law*, Ed. Didactica si Pedagogica, Bucuresti, 1983, p. 438.

1.3. The legal grounds for granting the Court expenses to one of the parties

Granting the Court expenses depends upon the result of the Court case and as a consequence, who wins the case may ask to be compensated for the costs incurred during the civil proceedings. This matter is regulated by art. 453 NCPC, named "Granting the Court expenses" providing that: "The party who loses the case will be ordered to pay, upon the request of the winning party, the Court expenses. When the claim was only partially granted, the judges would assess the extent of the costs borne by each party. The case being, the judges may order the compensation of the Court expenses."

The claim for Court expenses is secondary, from procedural point of view, nevertheless when the Court decision becomes irrevocable would comprise an obligation to pay a sum of money, borne by the party who lost the case. As a result, one should make a distinction between the secondary claim and the secondary legal obligation, the first having a procedural nature and second one deriving from positive law.

The legal nature of the claim for granting Court expenses is not contested either in the jurisprudence or in doctrine, as being secondary to the claim made on the merits of the case.

The legal bound deriving from the civil proceedings results in a civil obligation (prescribed by the positive law), thus there is a right to obtain the sum of money and the obligation to pay it.

Essentially, the grounds for establishing the entitlement of one of the parties to the expenses made during the course of the proceedings is the law itself (NCPC), even though in the doctrine, as well as in the jurisprudence it is considered that entitlement for the Court expenses is due to the fault of the party who lost the case (according to the former Code, as well as to NCPC).

It is to be considered if the fault of the party who lost the case could be equated to a tort[3] action, for the other party. We do consider this not the case, since a tort action may be brought before the Court, only if there are no legal or contractual grounds to file the claim. The regulation in the NCPC is clear, so there is no need to engage a tort action.

The distinction is important since the intention of the legislator was to ensure the right to a fair trial, which comprises, amongst other things,

[3] G. Boroi, O.S. Matei, *The civil procedure code, comments*, Hamangiu Publishing House, 2011, p. 460.

access to justice, meaning that the Rule of Law implies the right to claim one's right before a Court of Law. Thus one cannot consider that losing a case before Court gives the right to a tort action. In other words, if we cannot render justice ourselves, a claim filed before the Court is the main option, the Court being enabled by the law to establish whether there is an abuse, or a civil fault.

If we assert always that losing a case before the Court is the result of a civil fault, then by extension we assert that the mere fact of filing a legal action would constitute a civil fault, which cannot be accepted.

1.4. The legal grounds for the reduction of the fee for legal representation

We have already mentioned that article 451 para. 2 from NCPC constitute the ground for the reduction of the fee for the legal representation, stressing that the intention of the legislator was to allow the Court to assert the amount of the Court expenses as opposed to the performance of the lawyer involved.

It is unfortunate the choice of the legislator to provide that the Court, may, even *ex officio* to reduce, in a justifiable manner, the portion from the Court expenses representing the lawyer's fee, if these are disproportionate in relation to the circumstances of the case[4]. The type of expenses which are subject to reduction are determined by law and consists of the fees for legal representation and fees of the experts involved in proceedings.

Article 3 from the NCPC establishes as an element of legality in civil proceedings the European Convention of Human Rights and Fundamental Freedoms, thus the judges being compelled to take into account the right to a fair trial and to reduce the Court expenses, including the lawyer's fee, if there is an excessive amount charged for the legal representation.

We point out that the reduction of the Court expenses does not affect the contract concluded between the client and his lawyer, which is legally binding and the parties are compelled to observe it.

[4] S. Beligradeanu, *The entitlement of the Courts of law to apply article 274 para. 3*, published in Law review no. 6/1997.

Section 2

Jurisprudence

2.1. Judgement rendered by the High Court of Cassation of Justice (HCCJ)

The Civil Section of the HCCJ rendered the judgement[5] no. 866 from 12th of April 2016, asserting that in accordance with legal provisions, the Court may reduce the amount of the fee for legal representation without affecting the contract between the lawyer and the client, the contract holding all the effects prescribed by the law. If one of the parties paid the fee for legal representation, consisting in a quota of the value of the object of the claim, does not necessarily mean that the case is difficult and consequently should not burden the other party who acted in accordance with the legal provisions, filing the claim before the Court.

In this particular case, one should notice that the defendant, an insurance company offered to the claimant a compensation for the damage occurred on her mobile property as a result of arson, consisting of 37,406 Romanian lei, but asked the Court to oblige the claimant to pay a sum of 46,761 Romanian lei, as Court expenses equating the lawyer's fee. The Court rejected the claim, asserting that the sum granted by the Court as compensation would be annihilated by the Court expenses, which would affect the access to justice as part of the fair trial. Another argument brought by the ICCJ was that the right to a fair trial has to be ensured to all the parties participating in the Court proceedings, so the payment made for the lawyer's fee should not burden excessively the claimant who pursued actively his rights before Court.

2.2. The European Court of Human Rights rendered the judgment no. 75218/01 from 12 of June 2007 pointing out that the financial means of one of the parties does not create in itself a disproportion encroaching upon the equality of arms.

Ordering one of the parties to pay the Court expenses may lead, depending on the circumstances to a violation of the right to a fair trial[6].

[5] Decision published on the website of the HCCJ, *www.scj.ro.*

[6] D. Bogdan, *The right to a fair trial in the jurisprudence of the European Court of Human Rights*, C. H. Beck Publishing House, vol. II, 2011, p. 371.

The European Court asserted that it is surprising to order the claimant (with limited resources) to pay the expenses in favour of a prosperous multinational corporation. In this case the French Supreme Court (Conseil d Etat) sanctioned the party having less financial means, thus discouraging the claimant to use in the future the option to file a claim before a Court of law in order to accomplish its statutory interest[7].

Section 3

CONCLUSIONS

The law represents the grounds for ordering the party who lost the case to pay the Court expenses, this aspect being regulated by article 453 from NCPC.

We do consider that the intention of the legislator was to ensure the right to a fair trial which includes amongst others, access to justice, as part of the Rule of law mechanisms, enforced through the means of procedural guarantees regulated by the NCPC. One cannot consider that the party who filed a claim before Court and lost the case can be a subject of a tort action.

The procedural law refers to the reduction of the Court expenses only when the fee for the legal representation is manifestly disproportionate in relation to the value or the complexity of the matter or with the performance of the lawyer.

Maintaining a procedural balance between the claimant and the defendant gives the Court the grounds to reduce the fees for legal representation, as part of the Court expenses, thus preserving the equality of arms and not necessarily asserting on the performance of the lawyer involved in the case. If one the parties disposes of important financial means and wishes to employ the services of a high profile lawyer then is his option to proceed this way, by paying an appropriate fee for the chosen jurist.

This aspect cannot lead to an excessive burden for the opposing party who lost the case and should not be ordered by the Court to pay the entire sum of the fee for legal representation, depending on the circumstances of the case.

The right to a fair trial compels the Court to maintain a balance between the parties, so that none of them would be manifestly disadvan-

[7] *Idem*, p. 372.

taged, *exempli gratia* by being ordered to pay an excessive amount for the Court expenses, in relation to the importance of the case and the financial means of the parties involved. This situation would equate as a deterrent for access to justice, if the party filing a claim before Court is aware of the fact that the opposing party disposes of important financial means which can be, eventually, reflected in the Court expenses.

Thus the Court would reduce the Court expenses, including the fee for legal representation in order to ensure the equality of arms as a fundamental component of the right to a fair trial.

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THEORETICAL APPROACHES TO THE CONCEPT OF INTERNATIONAL RECOGNITION

Gabriel MICU[*]

ABSTRACT

The development of the international doctrine fundamentally aimed at shaping a specific behaviour within the international community, a behaviour that would primarily foster peace and security in the world. Such a world order had obviously to be rooted in concepts and theoretical notions meant to equip the normative framework with the tools required to regulate the creation and the implementation of international rules. Early in the 20th century, states became cornerstone to building international law, but it took several decades before the legal concept of state would take shape. On its way to coming to the fore as the main international player, the notion of state was attached more than one interpretation. Therefore, one of the main topics of philosophical, political and legal disputes was the procedure through which international society sanctions the legitimacy of a newly formed state. Given the primeval role a state has to play in the context of the current international relations, this study is a review of the main positions towards the international recognition of a state to which the author adds a personal point of view on the recognition of the formation of a new state, in the final remarks.

KEYWORDS: *international law, state, legitimacy*

1. Forms and types of international recognition of new states

In terms of the effects and the legal nature of state recognition, international doctrine and practice distinguishes between recognition in law (*de jure*) and recognition in practice (*de facto*). The difference **does not consist in the essence of recognition**, as they both stand for the expression of unilateral will and entail quite similar legal effects, but it lies however, in their revocable or final natures.

Recognition in law (*de jure*)

De jure recognition of a state is complete and final, and free from any normative contents as such.[1] It is an **irrevocable** form of recognition

[*] Minister Plenipotentiary, Romanian Ministry of Foreign Affairs, lecturer at the National University of Political Studies and Public Administration (SNSPA), Bucharest, Romania.

since its effects cease only with the cessation of the quality of a subject of international law of the recognised state. It makes no sense to think that a subject of international law may lose this quality simply because another state withdraws its recognition.

The legal effects of *de jure* recognition consist in the establishment of international relations between the recognised and recognising states, which is a **prerequisite to the establishment of diplomatic relations**. *De jure* recognition appears as final. Should the fulfilment of the conditions fail, recognition must necessarily be withdrawn, unlike *de facto* recognition that is temporary and automatically rendered ineffective once the recognised government is ousted.

De facto recognition entails different legal effects, since the international recognition of a state automatically triggers the complete protection of the assets that state owns abroad as well as the benefits of local jurisdiction immunity. In this respect, recognition is deemed to cover the real estate assets of the *de jure* recognised state and the moment it is granted, other rights become operational too, such as the right to defence in a court of law and the right to claim the estates in the national courts of the recognising state.

This type of recognition **has a retroactive effect**, starting with the time when the newly recognised entity proclaimed its statehood. This aspect enjoys unanimous recognition and it goes back to the time the new state met the statehood conditions and chose to proclaim its independence.

Recognition in practice (*de facto*)

De facto recognition is **limited and provisional** in nature. Its legal effects consist in the establishment of general political relations on a limited scale, such as trade relations. This type of recognition is resorted to when the recognising state has some reserves about the new state and is **carried out implicitly**, typically on signing multilateral treaties or when the new state becomes a member in an international organisation, etc.

De facto recognition **is revocable**, which is a characteristic that limits the international relations established between the recognised and the recognising states. They not comprise diplomatic and consular relations, or the establishment of permanent diplomatic offices.

[1] W.T. Worster, *The Indeterminate Normative Value of State Recognition*, Durham University, International Boundaries Research Unit, 1.Avril, track 1, session 3.

One of the immediate effects of *de facto* recognition is that it authorises state activities in the area found under the effective territorial control of the new entity, which entitles it to becoming a subject of international law. As for the public property the newly recognised state has abroad, it can assumingly be ignored by the recognising state, especially when it is faced with the same claims coming from another entity that still enjoys *de jure* recognition.

International practice shows *de facto* recognition as a preliminary step to *de jure* recognition whenever there are reasons to defer complete and final recognition. Such deferral reasons can for instance be reserves as to the viability of the new state, non-compliance with international obligations or the refusal of the state to find a solution to severe matters, including matters pertaining to human rights and/or the rights of the minorities.

De facto recognition of a foreign authority also means the recognition of this authority as a *de facto* government of a new or existing state. This is a highly relevant aspect in matters such as the protection of the nationals' lives or properties when abroad. In the situation when the existence of the new state is conditional only to external recognition, the new state can obviously deny the establishment of the relations with the recognising state, if they are deemed non-compliant with international law. Consequently, the *de facto* authority is free to reject such informal international relations.

In general, *de facto* recognition comes into play when the new authority, though independent and exerting effective power on its territory, is still unstable, offers insufficient safeguards to grant its recognition and has a provisional nature. Another feature of *de facto* recognition is that it can be withdrawn if the authority at the helm of the state seeking recognition remains provisional.

There are situations where there is no difference between *de facto* and *de jure* recognition, meaning that the internal as well as the legal actions the *de facto* authorities take are just as seriously considered by the recognising institutions. The same applies to the deeds a *de jure* recognised state concludes. In such a context, the *de facto* recognised states and governments enjoy the same jurisdiction immunity as the recognising states and they are no less liable than a *de jure* recognised state.

2. Explicit and tacit recognition

Depending on how recognition is manifest, it can obviously be *explicit* or *tacit*. Since recognition is a **unilateral act** stemming from the recognising state, the act of **will of that state is obviously presumed** in the very substance of the act of recognition.

Explicit recognition translates in a declaration, a formal notification addressed to the new state whereby the will to grant recognition is unequivocally expressed. Explicit recognition is achieved through official declarations, conveying a message, telegram or diplomatic note. It is noteworthy that the **nature of the recognition act** is of utmost importance in explicit recognition.

Tacit recognition translates in concrete activities and actions of the recognising state, in the legal relations it establishes with the newly recognised state. Signing of a treaty, sending diplomatic staff, etc., are all illustrations of implicit recognition.

International doctrine shows several points of debate on the institution of international recognition, such as:

- concern for the relationship between declarative and constitutive doctrines;
- the nature and substance of the current criteria;
- the role and effectiveness of state recognition;
- the nature attributable to international recognition, whether political or legal.

As for the first issue, regarding the prevalence of the declarative or the constitutive doctrines, one must consider the context where an entity can be deemed a state, the authority that decides whether and entity is a state, the legal nature of recognition (*de facto* or *de jure*), as well as the legal outcome of recognition. It is relevant for our study to list some of the antagonistic opinions embraced in time, as they makes us better understand the legal phenomenon at play.

In this context, the first opinion is Oppenheim's, stating, "*for every state that is not, but wants to be, a member of the family of nations, recognition is therefore necessary. A state is and becomes an International Person through recognition, only and exclusively"*. Oppenheim nuanced his opinion and added, "*international law does not stipulate that a state does not exist as long as it is not recognised, as there is no need for any approval prior to its recognition."*

Criticism against this point of view is rooted in the counterargument that the notion of sovereignty as *suprema potestas, non recognoscens*

superiorem is **incompatible with the concept of foreign recognition**. Consequently, positivism maintained that the obligation of a state to be subject to international law derived from the **agreement** of that state to be recognised as part of the international community. As far as the existence of a newly established state is concerned, the positivist thinkers agree with Oppenheim and decide that a state can exist even before it is recognised. However, they diverge from Oppenheim in terms of mandatory behaviour. They believe that the new state would not hold any rights on the international arena before the international community endorses it.

From the previous explanations, there emerges that the positivist approach regards recognition as if it were the membership of the new state in an exclusive club and supports the utmost importance of the state as a political-legal entity by admitting that **international law rests on the agreement among states**. The current international practice, based on customary rules and treaties, underlines the role of international law, not that of formal structures, theoretical constructs or moral stipulations.

International recognition is also critical to the determination of the **international person status**, which amounts to the creation of a new state, legally speaking. This interpretation must be understood in the sense that before its recognition, the state reflected a practical, not a legal reality. It is possible to have such an interpretation only if we distinguish between the legality of facts and the state of facts relative to the state, which is emblematic in the debate about recognition and its results in either the constitutive or the declarative institution of rights.

Constitutive theory focuses on **the creation of a state's legal personality based on its recognition**. Criticism against this theory argues that the states existing before the recognition of the new state are thus entitled to act as guardians of the international community and to deprive the new states of the opportunity to join the international community. Moreover, the constitutive theory introduces a point of contradiction in the principle of sovereign equality of the states.

Supporters of the constitutive theory think that a mere accident of an entity's prior existence should not grant it the status of an international person within the international community. They appreciate legal personality cannot occur automatically because it requires first to establish the prior factual and legal circumstances that gave rise to it, before it is sanctioned. Absence of an impartial international body whose role would be to award the international person status leads to the substitution of its function by the already existing states.

Unlike the constitutive theory, **the declarative theory reduces the recognition of a state to a mere political act** and considers that recognition is not a mandatory component of statehood. A state must not necessarily form and maintain relations with another state. Seen in this light, **recognition reduces to the expression of a will to enter relations with other states,** to conclude treaties with them and proceed to the exchange of diplomatic officials. An act of will cannot represent a concrete legal obligation, though it may have relevant economic, social and political consequences.

The doctrine also consists of a mixed approach where the two points of view, the declarative and constitutive ones are reconciled. This vision tries to overcome the shortcomings of a single theory and puts together the effects of both the constitutive and the declarative theories. According to this approach, recognition is neither declarative nor constitutive, but a mere **political act** with significant effects on the internal and international law orders. It is an exclusivist idea on the concept, whereby recognition only **occasionally** gives rise to declarative and constitutive effects and the constitutive effects are often linked to the effects of recognition by virtue of internal law.

As for the second issue, the nature and the substance of the current criteria, an issue that underpins the current relevance of the declarative and constitutive doctrines, debates around recognition showed that the distinctions between the declarative and the constitutive doctrines are weaker in practice than they are in the exchanges among experts. An interesting opinion shows that the declarative and constitutive recognition theories seem to have lost their practical importance and turned into doctrines of theoretical significance, useful in scientific and historical research or as doctrinaire concepts.

Scientific debates also raised the issue of the role recognition plays in the context of state sovereignty, but the conclusions emphasised that is it impossible to reach a definition embraced by all. Among the relevant legal formulas is the solution sanctioned in the 1933 Montevideo Convention on the rights and duties of states, according to which in its capacity of international person the state should fulfil the following conditions: **permanent population**, **defined territory**, **autonomous government** as well as the **capacity to enter into relations with the other states**. Non-existence of any specific provisions bearing on the institution of recognition obviously leaves no room for doubt that a state can exist in the absence of democracy, in violation of human rights or the rights of

the minorities. Nevertheless, states have a **right, not an obligation** towards recognition.

The third most important topic of debates is the **effectiveness of recognition**. The Montevideo Convention together with a number of other agreements relied on the idea that a state was founded on the principle of effectiveness resulting from an equation of the effectiveness of the state rather than the state of facts. Such a vision shows that the exercise of the authority of the state over the population and the territory is equal to **efficiency**, as it is impossible to conceive a state can exist but not be efficient.

This point of view was contradicted by a number of practical cases of state international persons that lacked efficiency, such as Rhodesia and the Turkish Republic of Northern Cyprus. There were also cases of state entities illegally annexed by another in 1936-1940, such as Ethiopia, Austria and Poland.

As for the fourth main topic of the debate, the analysis of the conditions and the reasons of recognition evince that international law notions such as **territorial integrity** and **self-determination** come most often into play when it comes to the recognition by another entity. Even if some agreements were concluded on the existence and the substance of such principles, their actual reflection into legal facts was many times debatable.

For the non-recognition of Kosovo, for instance, countries like Argentina, Brazil and Russia raised the legal objection of its lack of territorial integrity. The Russian Federation maintained that the principle of territorial integrity had already become a universal and pre-emptive rule, and that a state that abided by the right of a people to live on a territory was **protected by the implementation of the right of the peoples to self-determination, in the form of secession**. There emerges therefore, that the principle of territorial integrity does not protect from secession the state that does not respect the rights of the peoples living on its territory, which entitles the people belonging to national minorities to resort to self-determination **when they are faced with severe and repeated violations of their rights** under international norms.

In the same context, the Russian Federation maintained that the interventions in Kosovo from 1991 or 1999 were not legally justified by virtue of the right to self-determination of the population living on that territory. The goal of the UN Security Council Resolution 1244 was to protect human rights and put an end to a situation that was believed to be a threat for international peace and security. Russia considered that the UN

had reached its goal once Kosovo declared its independence in 2008. A number of states that agreed with the independence of Kosovo region, such as Albania, Estonia, Finland, Ireland, Poland, Switzerland and the Netherlands argued their option based on the right of the Kosovar population to secession, which was rooted, however, in the right of peoples to self-determination.

3. Conditional and unconditional recognition

This classification was needed because of the particular historical and political circumstances where the admission of a state in the international community also required warning that state as to its rights and duties. Consequently, some international agreements explicitly provide that the attitude of a state does not stand for its diplomatic recognition by the government of another state, as it is the case between the United States of America and Palestine Liberation Organisation (PLO). There are specific procedures in place to that end, such as **protest** and **reserving rights** that *inter-alia* can be used to expressly reject the intention of implicit recognition of a situation or transition that would otherwise be enforceable against the subject of international law concerned.

Conditional recognition

This form of recognition seems an exemption from the *pure and simple* character of recognition and an interference with the internal matters of the new state, which is not the case. Many times, democratic states require the state seeking recognition to bring **guarantees of the state of law**. Poland is such a case, when at the end of WWI the European states committed to recognise Poland provided it could demonstrate that it effectively protected the rights of the German minority.

The same applies to the *Declaration on the recognition of the new states in Eastern Europe and in the Soviet Union,* adopted by the European Community in Brussels in December 1991, whereby these states were required to comply with the rules of international law, or a certain model of a state, in other words. Among the rules, the European body mentioned abidance by the UN Charter and the commitments undertaken by the states of the international community in the Paris Charter and the Helsinki Final Act. The conditions concerned are the state of law, protection of human rights, safeguard of the rights of the minorities, peaceful resolution of differences and of any other issues related to the succession

of states or regional disputes, as well as the respect of the inviolability of the borders.

The same mechanism applied to the breakup of the former Socialist Federal Republic of Yugoslavia, when on December 17, 1991, Germany subscribed to the validity of a historical reality under the reserve of a number of duties. The recognition of the new states was conditional to their strong commitment not to question their respective borders and to comply with the obligations they previously undertook in the field of disarmament. The newly formed states were also required to peacefully resolve any potential difference that might occur among them and to guarantee the protection of human rights and the rights of the minorities, by setting up an adequate legislative and institutional framework. It did not take long before the effects of such conditionality emerged, namely Croatia amended its constitution to guarantee effective protection of minorities.

As for the potential interference with the internal matters of a state generated by conditional recognition, under the declarative theory, recognition is thought not to represent a *sine qua non* condition of the existence of the state, but a political one. In the light of the constitutive theory, we should dismiss any interpretation in the sense of interference in the internal matters of the state, because the state did not even exist at the very moment of its recognition.

4. Premature, tardy and/or collective recognition

Recognition of a state can be premature, such as that of the State of Palestine, proclaiming its independence in the Declaration of Algiers of November 15, 1988. The State of Palestine thus replaced the Palestinian National Authority exercising official control over a number of territories, a reality that the international community endorsed based on the 1993 Washington Agreements between Israel and PLO.

Recognition of a state can also come tardy, as it happened to the German Democratic Republic whose recognition involved two stages. It was first recognised by the Eastern European states and only later by Western European states that actually believed East Germany was only an area of Soviet occupation, according to Hallstein doctrine.

5. Comparative analysis of the substance of the declarative and constitutive recognition theories

General considerations

As mentioned in the international law doctrine, state formation gave rise to two different schools of thought, namely the declarative and constitutive theories.[2]

The constitutive theory emerged in the 19th century as a standard applying to state creation in that period. The declarative theory, on the other hand, developed in the 20th century and addresses the deficiencies of the constitutive theory. The constitutive theory stems from the idea that other states would recognise an exclusive status, but does not consistently address the constitutive effect of recognition, which makes the nature of recognition unclear. It is an approach that does not make it clear whether we are dealing *purely and simply* with recognition, that is with the exclusive recognition of the existence of the state, or more than that, diplomatic recognition.

According to declarative theory, a political-legal entity becomes a state when it fulfils the statehood minimum criteria, which makes recognition by other states purely declarative. According to this theory, we may consider that **territorial entities** enjoy a special legal status by virtue of their very existence, which erases the line between the state of facts and the legal reality. *Per a contrario*, the constitutive theory warns on the need to know or to identify these entities as subjects of international law, which does not rely on the state of facts.

In this context, **it is wrong to equal recognition and diplomatic recognition**, as such an approach fails to consider the possibility that observation/recognition of new subjects of international law should rather be something *ad hoc* than something compliant with general rules and principles.

Irrespective of the theory we may analyse, we can identify a common denominator of both theories, namely that **recognition means the acceptance of a situation**, both of the legal effects it generates and of the relevant factual criteria. Therefore, the recognition of an **entity as the government** of a newly created state means this state fulfils the necessary conditions, on the one hand, and that it exercises the capacity to rule

[2] See F. Benjamin, *Calling a State Somaliland and International Recognition, Emory International law Review*, vol. 24, nr. 2, 2010, September 13.

and accept the legal consequences of privileges and immunities arising from the internal legal order, on the other hand.

As far as these theoretical constructs are concerned, contemporary history witnessed an atypical situation with the creation of the German Democratic Republic by the USSR. East Germany was not granted the exercise of authority by the Soviet government, which raises serious doubts on the sovereign character of the state. Early in its history, the GDR was not a sovereign state, but that does not entitle us to say that the country passively accepted this status, even if its state bodies were not empowered to conclude agreements independently, without the endorsement of the USSR government. Under such circumstances, the USSR seemed to hold the governing exercise. It is hard to believe that a sovereign authority may give up on its responsibility for the agreements concluded by the subordinated bodies it founded and that did not try to overturn its sovereignty. The same was true for the GDR courts that could not rule on the agreements the government concluded on behalf of GDR, as they were deemed null and void.

A major situation in history was the recognition by the mother-states of the new states emerging from a revolutionary movement. In the 18th century, recognition did not play an important role in the doctrine, as there was no clear and specific theory in this field. Later, in the 19th century, when the constitutive theory closely reflected international law as *voluntarium jus gentiom*, the doctrine postulated that in essence **international law was the same as the voluntary and consensual behaviour of the states** within the international community. Thus, according to the constitutive theory, recognition is one of the sovereign prerogatives of the states already enjoying recognition in the international system.

The declarative theory

According to this theory, recognition is not a *sine qua non* condition of the existence of a state, as the new state does not need any political recognition to exist. The 1933 Montevideo Convention stipulates that the **political existence of a state is independent from its recognition by other states**. International case law demonstrated that failure to maintain effective control over the territory is not decisive in the position of a legal entity in front of the UN. Thus some countries, such as South-Western African countries, did not cease to exist as political-legal entities holding rights and duties, even if they did not maintain effective territorial control. The arbitration commission of the European Community on Yugo-

slavia was another supporter of the declarative theory and analysed the independence and the status of the new states formed after the breakup of the former SFRY.

Since the act of recognition comes somehow later in time than the emergence of a new member state, recognition is declarative[3] in effect. National authorities strengthened this approach and many times recognised the international rights the states acquired before the actual recognition of the entities as new states. The decision was based on the fact that the state pre-existed its recognition.

In international doctrine, this idea was countered by another theory stating that states cannot acquire international rights before they are recognised. The fact that states can acquire international rights only upon their recognition acts as a deterrent to newly formed political-legal entities and results in undermining the very principle international law relies on, namely that it is a law made by the states themselves.

Supposing, by reduction to absurdity, that the declarative theory raised no objection and were unanimously adopted by the states, there would still subsist a number of difficulties about the implementation criteria, their legitimacy, the instability and unpredictability of competing criteria, their application and well as the discretionary implementation of different criteria for different situations. Such issues make it questionable that states should choose to be subject to the constraints of the declarative theory.

The constitutive recognition theory

According to this theory, the act of recognition is an **act of acknowledgement by a state** of a new reality born with the emergence of a new state in the international community. The role of the new state is limited only to the acknowledgement of other states as to the emergence of the new state, which is not a convincing argument in our study. As we mentioned before, the new state has existed from the moment its constitutive elements were in place and the role of third states is only to admit to the existence of this legal reality.

The current practice still shows cases where the constitutive theory applies at the expense of the declarative theory that embraces the idea that once the state assumingly acquires the exercise of territorial sover-

[3] R.D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 e mory int'l L. Rev. 107, 117 (2002).

eignty, it is entitled to enter international relations. This approach is the opposite of the constitutive theory in the sense that the declarative theory admits to the irrelevance of recognition, arguing that states are not called to appreciate whether a new entity makes a new state. Statehood is based on its very existence and not on the individual discretionary appreciation of another state. Most of the researchers and experts in the field have subscribed to this point of view.

This interpretation is unanimous not only politically but also legally. Most of the international case law supports this approach, according to the opinion expressed by *ad hoc* judge M. Krecia. He expressed a dissenting opinion in the application of the Convention on genocide and was critical of the way in which the ICJ applied the constitutive recognition theory. The court was about to endorse the constitutive character of the recognition in two of its advisory opinions, i.e. in the *Faruri* case, where effectiveness was dismissed as a fiction of continued suzerainty of the Turkish state and the case of the US nationals in Morocco that acknowledged continued suzerainty even if at that time it was placed under French protectorate. Another supporter of the constitutive theory is the International Criminal Tribunal for the Former Yugoslavia that considered that the conflict from the former SFRY is international in nature **after the international recognition** of the independent states of Croatia and Bosnia-Herzegovina.

In spite of that, apart from these decisions of international courts, the act of recognition is **customary associated with a constitutive effect** in the international law system. Eritrea, Croatia, the countries from Central and Eastern Europe resulted from the dissolution of the Habsburg and Ottoman empires survived the dissolution thanks to recognition by the international community. The admission of smaller states in the UNO and their recognition by other states can be relevant in the identification of their position in international law, irrespective of the results pursued in their recognition.[4] Consequently, large scale recognition of several smaller European states can be somehow constitutive in character, making up, in some cases, for non-compliance with several criteria that traditionally applied to statehood.

There have also been situations where the existence of emerging states was **blocked by other stronger states**, a situation that is only

[4] J.C. Duursma, *Fragmentation and International Relations of Microstates: Self-determination and Sovereignty*, Cambridge, Studies in International and Comparative Law, 1996, p. 142.

made possible when statehood is already under control by the existing states. There have been other situations when states that lost their legal status continued to preserve their essence in the shape of legal fictions, a situation that was accepted by the international community. It is something that demonstrates that **recognition results in establishing and maintaining the legal personality of a state**.

Should state recognition be declarative in nature, loss of independence and of the effective exercise of control would basically mean that the state could disappear. Under the circumstances, it becomes clear that the states are given international rights and undertake duties provided they are recognised by other states. "Only states can be members in the UN Security Council only states can submit a dispute to the International Court of Justice and can take part in the nuclear regime of the non-proliferation treaty."[5]

Unlike the declarative theory that actually focuses on the internal situation, the constitutive theory focuses on the external legal rights and duties, **but neither can cover but partly the issues raised by the institution of recognition**. On the one hand, both theories interact by their nature, as recognition alone cannot create an internal situation of statehood, but can contribute to it. On the other hand, recognition of a state of facts is only limited to facts and does not require the apparent existence of international rights, though it enables the acquisition of such rights. Consequently, **any act of recognition must necessarily treat both aspects** even it only one will prevail in either vision.

In spite of its advantages, the constitutive theory is **not widely applied in practice,** as there is no clear evidence to show that the international society would think of unrecognised states as *terra nullis*. In this context, the international community sanctioned the customary practice that on the territory concerned **there should live an international person** that does not cancel a state or determine its emergence. A state should be able to exercise authority over the territory and its residents regardless of its international recognition or the position of other states, even if they consider that the alleged state does not fulfil the required constitutive conditions.

The constitutive theory allows states to ignore the facts, namely the existence of the state that acts like a state and is so recognised by its

[5] R.L. Jepperson, A. Wendt & P.J. Katzenstein, *Norms, Identity and Culture in National Security*, in the Culture of National Security: Norms and Identity in World Politics, 33, 35-6, Peter J. Katzenstein, ed. 1996.

citizens. It thus becomes unnecessary to develop a law to reflect facts or other conclusions, to give recognition a purely political character. It would rather be necessary to have some tool that would enable us to recognise whether existence of the rights is fair enough.

Concurrently, the doctrine appreciates that the **constitutive theory is subjective** and gives rise to inconsistencies in the determination made by other states, generating uncertainty whether a legal entity should be deemed a state or not.

In international ethics**, it is not fair to consider that some states can act of the guardians of the community**, since the very emergence of the declarative theory was rooted in the need to overcome the objections of the states and in the fact that the principle of self-determination is at the core of recognition.

The theory of the two-fold or dual, declarative and constitutive effect of recognition

The international doctrine and practice appreciates **recognition to have a two-fold effect**: a declarative effect with respect to the emergence of a new state and a constitutive effect with respect to enforceability against the recognising state.

As the new state cannot manifest itself effectively unless it is recognised by other states, recognition entails the admission of the government or the state in the international community, which is the same as to endow it with all the rights and duties attached to statehood.

As neither of the theories we mentioned is completely convincing, some experts tried to make them merge into a consistent unitary vision. One of the daring scholars to try that was Hersch Lauterpacht. According to him, "*recognition is an important, decisive and indispensable function of checking and confirming whether the constitutive elements of statehood are in place; it has a constitutive effect, namely the acquisition of the international rights and duties of the legal entity concerned."*

The novelty of this point of view was the **duty to recognise** that counters the extreme situations when reality is denied. In case a duty to recognise were in place, **recognition would make a new status**, turning irrelevant the role of the political-legal entity that has the power to form a new state. On the other hand, should states be empowered to create other new states, **this competency would not be properly grounded**.

The constitutive theory is applicable to documenting the birth of the new state as of its recognition, while the declarative theory is relevant for

the margin of appreciation given to the states in the recognition of the new state.

Lauterpacht's theory was adopted and developed by John Dugard, who identified the source of the duty to recognise in the admission in the UN.[6] Even if he admits to the decisive role of the aspiring state as well as the constitutive role of such an aspiration, Dugard considers that the discretion of such acts should be countered by international monitoring. Although states could be thought to have a duty to recognise a new state as an UN member (imposed on them individually or collectively by the organisation), there is no explicit regulation providing for the sanctions to be applied if such a duty is violated. Under such circumstances, should the unrecognised state be able to file a case for violation of the UN obligation, **denial of recognition by any state would not be equal to the non-existence of that state**, as a remedy for breach of obligations.

On a different note, there are authors that suggest that the same act of recognition results in different legal effects, even if states do not seem to discriminate among rigid types of recognition. As states are not willing to create more than one institution to deal with the issue of recognition, it may happen that the existing institution triggers a single legal consequence or a combination of several such consequences, where each prevails in different situations.[7]

The case of Somalia gave rise to a new interpretation rooted in a division of the effects of succession. More precisely, recognition was suggested to have a declarative nature when there was no antagonism against the reality of the new state, or a constitutive nature when the international person of the new state was challenged. Practice showed, however, that states do not pursue such a result, which makes it doubtful whether such an interpretation could translate in practice or into a principle of law. There is also nothing in international practice that would point to the fact that a state could not form simply because it was not recognised.

[6] J. Dugard, *Recognition and the United Nations*, Grotius Publ, 1987.
[7] T.D. Grant, *State Recognition: Law and Practice under Debate and Development,* Greenwood Publishing Group, 1999.

6. The position of the International Law Institute on the effect of recognition

In the meeting from Brussels in 1936, the International Law Institute appreciated that recognition had a *declarative effect. The existence of a new state with all the legal effects stemming from this existence is not impaired by denial of its recognition by one or several states.* According to the constitutive theory, the state can become a subject of international law provided it was recognised as such.

CONCLUSIONS

1. According to the constitutive theory, recognition amounts to the acceptance of a situation both as concerns the **effects it generates as of right** and the **relevant criteria as of fact**. Thus, the recognition of an entity as the government of a newly formed state means that the entity fulfils the necessary conditions, on the one hand. On the other hand, it means that it has the capacity to act as the ruling authority of the state and to accept all the legal consequences of the privileges and immunities stemming from the internal legal order.

2. The 1933 Montevideo convention stipulates that the **political existence of a state is independent from its recognition by other states**. It is an aspect that supports the declarative theory. According to this theory, **territorial entities** can easily be deemed to have a special legal status by virtue of their mere existence, which makes the state of fact one with the law.

Per a contrario, the constitutive theory warns about the need to know or to identify the subjects of international law, which requires considering the relevant principles, which are not rooted in the state of facts. In this context, **it is wrong make recognition one with diplomatic recognition**, as such an approach fails to consider the possibility that the identification of new subjects of international law should rather be something *ad hoc* than something compliant with general rules and principles.

3. International practice has shown that **recognition is not constitutive in character** for all states and that there are exceptions such as mandated territories, the Free City of Danzig or the Holy See. International organisations admit to the legal person of the new state as recognised only by those states that explicitly recognised it. Consequently, we may say

that the special legal person status only works in association with the states who gave their consent.

4. The international doctrine and practice admit to the **two-fold effect of recognition**: declarative as to the emergence of a new state and constitutive as to enforceability against the recognising state.

As a new state cannot manifest itself effectively unless it is recognised by other states, **recognition entails the admission of the government or the state in the international community.** It is the same as to endow it with all the rights and duties attached to statehood.

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THE PRINCIPLES OF LAW – MEANS OF PROTECTING THE ENVIRONMENT IN ROMANIA

Mihail NIEMESCH*

ABSTRACT
The principles of law are far older than the legal norms, and the latter cannot, within the rule of law, come into force unless they obey the principles of law. Certainly, some principles generated by laws can be considered true 'constants of law', along with legal concepts, social relationships, objective laws, and so on, and they are the basis of law, coordinating and steering its application. The principles of law are far older than the legal norms, and the latter cannot, within the rule of law, come into force unless they obey the principles of law.

KEYWORDS: *Principles of law, rule of law, legal norm*

General aspects

The origin and emergence of the principles of law represent controversial aspects regarding law and the legal phenomenon as a whole. Opinions regarding the origin and nature of the principles of law are different and have in mind either, for example, divine will or human reason and so on. Even from the oldest of times, law specialists, doctrinarians, researchers have tried to explain the development and functioning of law, the reasoning of law and the determination of the guidelines and of the principles of law. It is undeniable that the principles of law are the cornerstone of the legal phenomenon and that they ensure the homogenous, balanced, and unitary aspect of law.

In a remarkable work of the author A.F. Măgureanu it is shown that the principles of law appear *a priori* when it comes to their relationship

* Lecturer at the Faculty of Law, "Titu Maiorescu" University, Bucharest, Romania.
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with legal norms, as a result of certain objective requests of society, a result of certain needs (be them of justice, safety, recognition etc.) a social group feels they need to satisfy. [1]

The word 'principle' comes from the Latin term *principium* which means beginning, primordial source, carrying also the meaning of fundamental element.

As G. del Vecchio illustrates: „if we wish to know law in its logical entirety, that is to know which elements are essentials common to all legal systems, we must go over the particularities of these systems and follow the universal concept of law."[2]

Certainly some general principles of law can be considered true 'constants of law', alongside legal concepts, social relationships, objective laws etc. and they are the basis of law, coordinating and steering its application.

As mentioned, the principles can be either included or not in the text of the legislation. If they are included, they gain the same legal power the legal standards possess. In the case in which they are not included in the written legislative text, the legal practice can apply them in individual cases, but, these principles do not allow the courts of law to ignore the legal provisions that state otherwise.

It is shown in the doctrine that the principles of law are those general ideas, postulated as guiding or directing principles that orient the elaboration and application of legal rules in a branch of law or at the level of the entire system of law. They have strength and signify superior general laws, which can be formulated in the texts of the legislation, usually in Constitutions or if they are not expressly stated, they can be deduced with the help of the promoted social values. Some of them are expressed in the form of maxims, especially those formulated during the time of Roman law. [3]

The legal consciousness of any society in which the rule of law dominates is profoundly influenced by perennial, moral, profoundly human values contained and protected by the principles of law.

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[1] A.F. Măgureanu, *Principiile generale ale dreptului,* Universul Juridic Publishing House, Bucharest 2011, p.84

[2] G. del Vecchio, *Lecțiuni de filozofie juridică*, ed. a IV-a, Bucharest, Societatea Română de Filozofie, 1943, p. 2.

[3] I.Craiovan, *Filosofia dreptului sau dreptul ca filosofie,* Universul Juridic Publishing House, Bucharest, 2010, p. 256

The environment as a configuration factor of law and of the protection principles

Presently, the environment with all its subcomponents is "under siege" by certain hostile actions or by certain indifferent attitudes of people. This is why it is necessary for the viewpoint of humanity to radically shift in order to hastily intervene at both national and international level so that the negative and sometimes even devastating effects can be eliminated. Sure enough, among the mechanisms that can support this desideratum, are the environment protection principles.

When we say natural environment, we say demographics, fauna, flora, geographical environment, and so on. All these factors configure and influence all components of law. As Montesquieu said, "Laws need to be set in accordance with the physical conditions of the land, the climate – be it cold, warm or temperate –, with the quality of the soil, the settlement, the overall size(...)".[4]

The environment, also named when necessary the **surrounding environment**, **the ambient environment**, or the **natural environment** is a notion that refers to the entirety of natural conditions on Earth, or to a region of it, in which beings or things evolve. These conditions include the atmosphere, the temperature, the light, the land, the water, the soil, etc., as well as the other living beings and things. The environment has a very important role in the process of the evolution of living beings, which in turn, are they a factor which influences the environment. [5]

Taking the aforementioned into account, we notice that at a national level the Romanian legislation has already identified and acquired a series of principles regarding the protection of the environment as follows:

- The principle of integrating the environmental requirements in the other sectorial policiesThe principle of precaution in making decisions/the principle of preventing pollution
- The principle of preventive action
- The principle of retention of pollutants at source
- The principle "the polluter pays"
- The principle of biodiversity and ecosystems specific to the natural biogeographic environment
- Sustainable use of natural resources

[4] Charles de Montesquieu, *Despre spiritul legilor*, vol. 1, Editura Ştiinţifică, Bucharest, 1964, p. 17.
[5] Internet source: *https://ro.wikipedia.org/wiki/Mediu*

- Information and Public Participation in Decision-making
- Access to Justice in Environmental Matters Development of international cooperation for environmental protection.[6]

It is worthy to mention that according to the current Romanian legislation the principles of law represent a source of official law.

In Romania the surrounding environment are protected not only by the principles of law but also by the Constitution and by multiple special laws. Also, the state recognizes the right of all people to a healthy environment, for this purpose guaranteeing:

a) access to information regarding the quality of the environment;

b) the right to associate in defence organizations of environmental quality;

c) right of consultation in decision-making regarding the development of policies, legislation and environmental laws, in issuing agreements and environmental permits, including for landscaping and urban planning;

d) the right to appeal directly or through associations, administrative or judicial authorities in order to prevent or in the event of direct or indirect damage;

e) the right to compensation for the damage suffered.

Thus it results that any subject of law, regardless of nationality, premises or residence must receive, upon request the desired information held by the authorities, regarding the environment. The authorities have the obligation to provide free of charge the information they have, without being able to ask for a justification from the questioner.

Presently awareness for the environment has appeared and keeps developing at the level of the population. The crude and objective reality demonstrates the fact that a big segment of the population is lacking civic culture and ecological awareness. This is why there is need for a coercive force of the state which can employ specific forms of responsibility in case of prejudice. In order to train responsibility in environmental law, it is necessary that the cumulative and generally known elements be met, to which the existence of the ecological damage is added under the shape of prejudice, by damages referring to a grave harm, sometimes even irreversible, done to the natural or artificial environment.

Certainly not only the state can help with the protection of the environment and the elimination of the potential produced damages but also organizations defending environmental quality can also take part. Thus,

[6] Internet source: *http://mt.gov.ro/web14/pagina-pentru-articole/176-principii-mediu*

within the pale of the U.N.O. we find institutions and programs with attributions such as The Commission on Sustainable development of the United Nationsor the United Nations Development Programme, offering people knowledge and information for improving the quality of life.

A presentation of certain principles of environmental protection

- *The principle of preventing pollution*

The reasoning behind this principle resides in the fact that preventing ecological risks presupposes lower costs than the interventions through which the consequences of pollution are remedied and removed. The principle imposes preventive action meant to prevent pollution and the degrading of the environment through implementing responsibilities and sanctions.

- *The principle of biodiversity and ecosystem conservation*

This principle consecrates the necessity of maintaining ecological resources at a durable level (both renewable and non-renewable resources) as well as the conservation of biodiversity and of ecosystems through durable managing of natural resources.

- *The principle "the polluter pays"*

The principle is established at a national and international level, as well as at the level of the European law. The principle consecrates the polluter's obligation to bear the cost of preventing and fighting against pollution. The polluter is required cover the negative effects their actions or inactions produced upon people, goods or the environment through the payment of the depollution measures and/or depollution investments.

- *Development of international cooperation for environmental protection.*

The fight against pollution imposes internal cooperation between the state and economic entities or other non-state entities but also the collaboration between states together with international organizations specialized in the fight against pollution.

- *Sustainable use of natural resources*

This principle is connected to the principle of "the rights of the future generations". The essence of the principle consists of the *erga omnes* obligation of preserving and protecting the surrounding environment for the benefit of the future generations.

For legal sanctioning of the actions produced against the environment, the goal was educating the guilty part through forming a green environmental consciousness, thus instating the special legal literature, an institution of great importance, and that is the legal liability in environmental law.

Legal liability for damages brought to the environment is indispensable in order to be able to repair the damages done to the environment, but also for defending its defining values.[7]

These principles of law, among many other factors, have contributed to the apparition of a true *science*, **ecology**, a real discipline through which the environment is protected and with the help of which empower and civilize the people. Ecology is a configuring factor of law which is based on its fundamental rights, being apt to generate other principles in the future.

Between the principles protecting the environment there is a close connection which formed a whole entity meant to protect the environment both on the level of substantial and procedural law, but also from an institutional point of view.

Of course, the protection of the environment also calls on the general principles of law, such as the principles of legality, fairness and of justice or on the principle of recognizing and ensuring the fundamental human rights and freedoms etc. The general principles of law are the pillars of the state of law, and they significantly contribute to establishing and adapting the legal order.

Brief overview of certain ECHR decisions regarding Romania in the matter of infringement of certain environment protection principles

Through the decision made in 30.III.2010, ECHR in the case of **Băcilă vs. Romania**[8] **–** the pollution in little town Copşa Mică, it was found that the right to a healthy environment was infringed upon. The state authorities have the obligation of providing citizens with a balanced

[7] Mihaela Cristina Paul, *Răspunderea contravențională în materie de mediu,* article published in the International Conference Volume „Europa în derivă. De la unitate în diversitate, la diversitate fără unitate. Efecte juridice, sociale, politice, economice şi culturale", Ed. Universitară, Bucharest, 2016, p.188

[8] For more information: *http://jurisprudentacedo.com/Bacila-c.-Romaniei-Poluarea-din-Copsa-Mica-Dreptul-la-un-mediu-sanatos.html*

environment that won't negatively affect their health. According to the aforementioned decision, ECHR sanctioned the passivity of the state regarding SC Sometra, due to not taking measures in removing the pollution from the surrounding environment and in assuring the health of the population. Taking into account the considerations of the decision, the judges retained as a means of proof tests done by a specialized laboratory but also by the Public Health Department, tests which affirm unquestionably a real ecological disaster: the soil, the vegetation, the watercourses within a radius of 35 kilometres around the Copşa Mică city were laden well above allowed limits with heavy metals (such as lead, cadmium, and zinc). Furthermore, acid rains fell over the city, eliminating in the atmosphere sulphur dioxide and preventing the development of vegetation. Another noted anomaly: the incidence of respiratory diseases in people was 7 times higher than in the rest of the country.

Through the 07.IV.2009 decision, **Brânduşe vs. Romania**[9] – olfactory pollution, ECHR found the violation of the right to a healthy environment and binds the Romanian State to pay the plaintiff I. Brânduşe moral damages up to 8000 euros plus payment of any amounts owed in taxes.

In fact it was proved that Ioan Brânduşe, arrested and imprisoned in the Arad Penitentiary, was forced during his incarceration to bear the pestilential odours emanating from a household waste deposit located in the near vicinity of the prison in which he was serving his sentence. Furthermore it was also proven that in the penitentiary which could hold just 868 prisoners there were imprisoned 1229 people and the food was of poor quality.

CONCLUSIONS

The surrounding environment, the ambient environment, and the natural environment represent one of the fundamental and irreplaceable goods humanity possesses. Any small human intervention upon the environment can generate irreparable damages which will cause suffering for the future generations. Which is why it is our mission, the current generations, to act responsibly, preventively and to respect the principles of environmental protection such that the right to health of the future generations will remain unaffected.

[9] For more information: *http://jurisprudentacedo.com/Branduse-c.-Romania-Dreptul-la-un-mediu-sanatos.-Poluare-olfactiva.-Persoana-detinuta.html*

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ON THE NEED FOR A STRATEGY ON PROFESSIONAL TRAINING FOR THE PUBLIC ADMINISTRATION AND ITS EFECTIVENESS

Stefania STANCIU[*]

ABSTRACT
In early October 2016 the Romanian Government adopted a Strategy on professional training for the public administration 2016-2020, in a declared effort to address the multiple issues that have been identified in relation to the training of personnel working in the public administration by various national and international bodies. This paper analyses the causes that led to the need to adopt such a strategy, and expected results of its implementation, in direct relation to the content of the strategy, and the substantiation note prepared by the issuer.

KEYWORDS: *national strategy, professional training, public institutions, public administration, civil servants*

On October 4th, 2016 Government Decision no. 650/2016 for approving the Strategy on professional training for the public administration 2016-2020 was published in the Official Gazette no. 777bis[1]. Developing this strategy, according to the Substantiation Note[2] of the issuer is based on the need for professionalization of human resources in public administration and on the need to reform the professional training, being generated by the continuing concern that the Romanian Government has in developing human resources in public administration. It is also pointed out in the content Substantiation Note that the development of the strategy reflects the recognition of the important role of human resources have in providing quality public services to the citizens, the need of an efficient and effective use of public resources and of ensuring a balanced economic and social development.

Although assumed by the Romanian Government through its adoption by a Government Decision the Strategy was developed by the National Agency of Civil Servants, public body with responsibilities in management

[*] Ph.D. student, Titu Maiorescu University, Bucharest, Romania.
[1] In the First Part of the Official Bulletin
[2] Fully available for consulting here: *http://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-hg-nr-650-08-09-2016&page=12*

of public and civil servants[3]. An important aspect to be highlighted in connection the institution that developed this strategy, something that is also reflected in the content of this work document that was assumed by the Romanian Government, is precisely about these responsibilities that the National Agency of Civil Servants has, but only in relation to civil servants, while the majority of public administration staff does not have a civil servant status, being what it is called contractual personnel, meaning that the individuals are employed under individual contracts of employment conducted with the public institutions. This is relevant in the light of the document's content precisely because many problems identified during the process of the development of the Strategy and raised by national and international bodies seem to have a root in the fact that the public function, including the professional activity and training of civil servants is regulated in a more strict manner than the professional activity and training of other personnel working in the public administration, mainly as contractual personnel, but also as public dignitaries.

Regarding the professional training of the public servants there are special provisions such as the ones included in Law no. 188/1999 regarding the statute of civil servants, and in the specific normative acts, such as the Government Decision no. 1066/2008 for approving the rules on the professional training of civil servants[4] or the Government Decision no. 611/2008 for approving the rules on the organization and career development of civil servants[5]. Professional training of contractual staff of the public administration is regulated in accordance with labour law - namely those contained in Title VI of Law no. 53/2003 on the Labour Code. The rules in the Code regarding the organization of labour training are rather general and suppletive, often leaving to the discretion of the employer, or the employer and its negotiating partners for the collective bargaining - where that applies, the possibility of organizing the professional training activity.

This distinction is extremely important in the evaluation of some of the current state of the activity of staff training in public administration and in setting targets for improving the current conditions. The analysis

[3] In accordance with Article 4 paragraph 1 subparagraph a, of the DC no. 1000/2006, republished, as amended and supplemented, "*in the management of public and civil servants, the Agency performs the following tasks: a) develops principles, policies and strategies on management of the public and civil servants, which they present to the Minister of administration and Interior to be acquired and submitted to the Government*".

[4] Published in the First Part of the Official Bulletin no. 665 of 24.09.2008

[5] Published in the First Part of the Official Bulletin no. 530 of 14.07.2008

contained in the Strategy that is the subject of this paper reveals that for civil servants training activity is organized and efficient, which would justify a conclusion on the degree of training activities superior to other categories of personnel administration in public where there is no legal framework or control bodies no sanctioning mechanisms related training. Even so, also in the content of the analysis onset the Strategy shows that, although professional training programs finds itself on an ascendant path, it does not cover the need for professional training, not even for the public servants.

According to information provided by the Ministry of Finance that has access to information on income of all individuals in the public administration, both civil servants, as well as contractual personnel or public dignitaries, the number of existing positions in the public sector in Romania amounted in late June 2016 1.189 .800, but due to the fragmented management of human resource and a lack of a centralized evidence, there is no relevant unitary information available on the employment profile of the occupants and their professional training other than the one for public servants (a number of 164.125 public functions representing approximately 10% of total employment in the public administration). This causes real problems even in developing a strategy like the one which this paper analyses because extrapolating existing information from a rate of only 10% to may prove to be far from the real situation.

As shown in the first Chapter of the strategy on the professional training in the public administration in achieving that planning of the professional training aspects related to the size, composition and training of human resources in the administration, such as: distribution functions administrative levels territorial, even after the tasks, age structure, the responsibilities and functions performed, profile their education and training must be taken into account. Such data are currently available only for the civil servants but is expected to become available for other categories of human resources in public administration with the completion of the recording system unit from the National Agency of Civil Servants. The Government plans to extend the powers of the National Agency of Civil Servants in terms of not only monitoring public functions but also the contractual personnel.

At this time, with visible correlation with the governmental effort for implementing a general policy on keeping evidence of its personnel, a first step of achieving this centralized situation in terms of all personnel that operate in the public administration either under an employment relationship (contractual personnel), under a service relationship (civil

servants) or under an administrative relationship (public dignitaries) is the presentation for public debate of a draft for a Government Decision amending and completing Government Decision no. 500/2011 on general registry of employees[6] that is aiming to obtain a special record registry for personnel in public administration, that will cover all personnel paid from public funds regardless of its professional status.

Moreover, by implementing the strategy the Government also aims to obtain a global, integrated vision. In the Substantiation note accompanying G.D. no. 650/2016, the issuer points out that so far, the definition of professional training was based simply on defining the professional training by categories of positions, lacking an overall vision of the entire system of public administration in Romania. Professional training strategies were aimed at the general training of individuals already involved in the public system, without taking into account the possibility of recruitment correlate with initial professional training for people who want to develop their careers in the public system. It also notes that in terms of public administration system in Romania that system is currently in the process of institutional reform and adapting to the standards of good practice implemented at European level. In this context, professional training should be a priority, regardless of the domain of reference - national or local, institutional or individual - the support for this process being the competence and responsibility of each authority or central and local institutions. Moreover, the adoption of this Strategy is foreseen in the Action Plan for the fulfilment of ex-ante existence of a strategic policy framework to strengthen member states' administrative efficiency including public administration reform in the area of human resources.

The Strategy is aimed as a general objective at Romania acquiring by the end of 2020, the capacity to provide appropriate training and quality of human resources to be employed or are employed in public administration, in line with the needs of existing skills at the level of the public administration, with 6teh mentioning that these needs are to be assessed and updated regularly. In order to achieve the general objective the

The Strategy on professional training for public administration also establishes a series of specific objectives, including:

- Implementing an institutional framework and adequate regulatory requirements regarding the unitary, coherent, transparent, integrated and performance-oriented management of professional training for directors

[6] Fully available for consulting here: *http://www.mmuncii.ro/j33/index.php/ro/transparenta/proiecte-in-dezbatere/4599-2016-09-28-proiecthg.*

(Redefining the professional training system, by modifying the strategic, regulatory, methodological and institutional framework, clarifying the roles and mandates of institutions/entities in charge of defining and implementing policies and rules on the training of various categories of personnel who work in public administration, establishment of a public body with responsibility for professional training in public administration, in this case the National Institute of Administration, defining an integrated system for identifying training needs to cover both the prioritization mechanisms alternative/supplementary funding and periodic assessment of the impact of training; correlation, including adequate IT tools, training administrative staff with the mechanisms of learning throughout life and ensuring accurate and consistent information (under "training *and professional development portfolio*") on the state level of training for staff in public administration. National Strategy envisages that the institutional framework will be implemented by the end of 2018;

- Linking standardization skills with reforms of the recruitment system, of the promotion system and evaluation by providing quality training to increase participation in various forms of learning throughout life, impacting both on the community, government, public institutions and individuals (establishing a clear framework on stimulation/attracting graduates to careers in government, creating tools correlation/coupling of the different forms of existing learning forms that directly impact the career in public administration, integration standards for quality programs completed nationally recognized system management quality of administration, stimulating smart investments in training);
- Ensuring efficient professional training activities, focused on specific needs and types coupled with strategic priorities and needs, sustainable and durable, and using the expertise gained in providing specialized professional training to date;
- Improving communication on the professional training process, development of tools to promote professional training process and the actors involved, facilitating participation, consultation and exchange of experience both within the administration and in its dealings with other parties in the professional process, marketing development of professional training programs.

To achieve these goals existing legislation at this time needs to be amended. However, an analysis of the legislation that is expected to be changed reveals the fact that they cover all public functions and different categories of civil servants mainly and only in subsidiary the contractual personnel. It is true that the content of the strategy does not detail in what

direction these legislative changes will be made, so we can't identify at this early moment this to be a problem in the sense that the new vision will be also a divided one. We consider that in order for the Strategy to be effective and to be able to really generate a coherent overview amendments on normative acts regarding public servants mentioned in the Strategy (Law no. 188/1999 on the status of public, Government Decision no. 611/2008 for approving the rules on the organization and development of career civil servants, the Government Decision no. 341/2007 concerning the entry into the category of senior civil servants, career management and mobility of senior civil servants, the Government Decision no. 832/2007 approving the Regulation on the organization and conduct specialized training program for public office for the category of high civil servants, the Government Decision no. 1000/2006 on the organization and functioning of the National Agency of civil servants, Government Decision no. 1066/2008 for approving the rules on the training of civil servants) should cover at least an extension of their applicability to contractual personnel.

In the content of the Strategy is also mentioned the need to unify the special provisions contained in right now in several rules and regulations (Government Decision no. 611/2008 nr.1066/2008, Government Decision no. 341/2007, Government Decision no. 832/2007 and Government Decision no. 833/2007) in a single act that will take the new role of methodological regulations for the statute of civil servants, or Law no. 188/1999 as it will be amended. From our point of view, this will increase the availability and accessibility of these provisions.

Of special importance from our point of view has to be given to the adoption of laws on the strategic, regulatory, methodological and institutional training in public administration for strategic categories of staff, as well as some normative acts correspondent to the sectors amended and supplemented after the adoption of the law amending and supplementing Law no. 188/1999 regarding the statute of civil servants so as the Government to be able to achieve the goal of a coherent legislative framework.

The most important aspect with legislative implications though from our point of view is the establishment of the entity in charge with professional training. The structure of this entity, its subordination and its institutional duties will be extremely important elements in ensuring the functionality of this Strategy for the future.

An extremely important aspect revealed by analysing the current situation in the content the Strategy aims that the contents of the Final Report

- Analysis of activities and building capacity in public administration, a World Bank issued document stated - referring to the civil servants - that at both the central and territorial level, there are few people working in HR management, IT & C and acquisitions (which, according to the authors, could partly explain the poor quality of these processes in the central and territorial public administration). These areas are of special importance to ensure optimum functionality in the public administration. Failing to ensure the functionality of this field is affecting the activity of the entire personnel that functions in the public institution concerned by this shortage.

The World Bank in its document also draws attention to the fact that the roles of civil servants are unevenly distributed between levels of government (with more weight on the local level), reflecting on the one hand improper allocation of responsibilities and on the other hand the lack of capacity in some areas of practice.

Any legislative changes that will occur during the period for which the Strategy on the professional training of public administration 2016-2020 has been developed for, we appreciate that it has to consider these irregularities and find viable solutions so that deficiencies resulting from disproportionate allocation of human resources can be at least partially remedied by effective programs and consistent professional training of personnel involved in areas identified as sensitive and also as of big impact in the activity of the public administration.

Being a general document, addressing the entire field of public administration in general, the Strategy notes that it is advisable that every sector of the public administration to develop and implement sector strategies for professional training.

This orientation from the general to the government sector is important though it can be effective only to the extent that the general objective and the specific objectives of the Strategy will be met, so the sectors of public administration will have clear references accessible and functional at the general level that they can follow.

It should also be noted that the Strategy that is subject to this analysis does not present complete new ideas, National Agency of Civil Servants drawing attention to the fact that in terms of planning for professional training, public authorities and institutions at central level and local level are still facing problems related to lack of funds that can be allocated to this process, the lack of concrete experiences for identifying training needs and substantiation of training needs since the establishment as early as the end of 2010 in its Report on the professional training and for-

mation of civil servants (personnel category that the authority has competences over, as we stated before). These documents are drafted periodically.

It is also stated in this report that planning professional development of civil servants is still a necessary step in ensuring a coherent vision for the distribution of funds for professional training in public administration. Providing training and professional development of personnel in public administration, a standard competitive professional training market, based on a process of rigorous regulatory framework consistent and based on beneficiaries' needs and a set of complex methodologies are prerequisites process development and professional training to the needs and expectations of citizens. We find in this document some of the ideas developed in the Strategy, but also mentions of the fact that the financial allocation is still an important element without which cannot be taken concrete measures for the professional training of civil servants, both at central and regional levels. Although Strategy does not mention these issues, we believe that it has further relevance in its implementation.

It can be observed that at the general level of document analysis and making proposal for solutions National Agency of Civil Servants had a constant concern to generate a unified framework to ensure effective professional training of personnel in public administration.

What so far has not been achieved, however, is the implementation of these general principles set out in this document, so as to verify the effectiveness of the ideas in practice and also to check if they produce the expected benefits.

CONCLUSION

We appreciate that the Strategy could lead to a more efficient professional training activity for the public administration to the extent that the changes to the legislative framework will be made in due course, will be managed in a way that will lead to unification of procedures for all categories of personnel in public administration, whatever relationship with the public institution they have, the law will be reoriented at sector levels, creating verifying mechanisms and implementing them effectively, and most importantly from our point of view, professional training needs can be properly and consistently identified so as to achieve the professional training goals that are set in this governmental document.

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7. National Agency of Civil Servants Report on the professional training of civil servants for 2010.

COMMITTING THE OFFENSE USING ACTS OF CRUELTY OR DEGRADING TREATMENTS

Simona Elena TAŞCU[*]

ABSTRACT
Acts of cruelty and degrading treatments are factors which incompatibility with democratic society values is consecrated in national and international acts, generating vast jurisprudence. The Romanian Criminal Code regulates these aspects within the aggravating circumstances of the individualisation of punishment, subsequent to the pointing out of an increased and concrete social danger of the offense and a higher dangerous character of the perpetrator. The European Convention on Human Rights, in addition to other international instruments, consecrates the ban of torture and inhuman and degrading treatments.

KEYWORDS: *cruelty, degrading treatments, Criminal Code, European Convention on Human Rights, jurisprudence.*

1. Rules in the National Law regarding the Committing of Offense Using Cruelty Acts or Degrading Treatments

The effect of committing an offense is the breaking of the balance standing at the basis of the society, due to the failure to comply with the rules that make living possible and that differentiate human being from other beings, as a rational being, with rights and obligations. The consequence of committing an offense and determination of criminal liability is the application of the corresponding criminal sanctions for restoring the legal order and for reintegrating the perpetrator in society.

Circumstances represent those deeds or previous situations, concurrent or subsequent to committing an offense, which are in connection to the perpetrator, the victim or the method of operation, which are not integral part of the contents of the offense, but which may contribute at the determination of the degree of concrete social danger and of the social dangerous character of the perpetrator.

Aggravating circumstances represent deeds or circumstances presenting an increased concrete social danger of the offense or a higher danger-

[*] Ph.D. Candidate, Titu Maiorescu University Bucharest, Romania

ous character of the perpetrator, giving to the Court the possibility to apply severer punishment.

Art. 77 lett. b) of the Criminal Code regulates the committing of offense with cruelty or subjecting the victim to degrading treatments.

The old Criminal Code foresaw as legal aggravating circumstance the committing of the offense by cruelty acts or methods or means presenting public danger, therefore, the new Criminal Code associate acts of cruelty to degrading treatments.

Circumstance presupposes the existence of some ruthlessness savage means and procedures. Aggravating exists if it comes from the very ferocious manner in which the offense is committed, being the direct consequence of acts (by means of which severe and extended consequences were caused to the victim) and not of circumstances exceeding the objective side of the offense[1].

Acts of cruelty are usually used against person, respectively against life and its corporal integrity, but cruelty may manifest also by torturing animals, within the offense of destruction. Acts of cruelty imply ferocious nature of the perpetrator, undeniable savageness in committing the offense, which prove the dangerous character and moral decaying of the perpetrator. These acts should express horror, indignation, and terror to those around the perpetrator. Despite the fact that the meaning of the term cruelty is not defined by the law, both the literature of speciality and the solutions pronounced by the Courts lead to a definition that has met with unanimous approval. Thus, criminal legal dictionary defines cruelty as a manifestation of ferociousness in committing an offense that cause tormenting and extended sufferings to the victim; the same, the meaning of the word "cruel" in the Oxford dictionary of the English language is similar to the definition from the legal dictionary: "wilfully causing pain to others, feeling no concern about it; cruelty, ferociousness, barbarism"[2].

In practice, it has been proven that cruelty is not only causing physical suffering to a victim – suffering that, most of the time, would be impossible to establish – but also the aspect of exceptional ferociousness of

[1] Bodoroncea G., Cioclei V., Kuglay I., Lefterache L.V., Manea T., Nedelcu I., Vasile F-M., (2014). *Criminal Code. Comments on Articles. Art 1 – 446*, C. H. Beck Publishing House, Bucharest, p. 205.

[2] Boroi Al., (2014). *Criminal Law. Special Part*, C.H. Beck Publishing House, Bucharest, p. 5.

the perpetrator when committing the offense, awakening a feeling of horror in the consciousness of those who become aware of the offense[3].

The savage means and procedures used by the perpetrator are not normally necessary for obtaining the result. The aggravating part exists even if the perpetrator used those means and procedures only to torment the victim, which did not lead by themselves to the obtaining of the result of the offense.

The Courts' practice has proven that when acts of cruelty represent an element of circumstance related to an aggravated offense, being part of its objective side, as it is the case of aggravated murder committed with cruelty, as foreseen by art. 188 par. 1) of the Criminal Code, correlated with art. 189 lett. h) or the case of capital murder foreseen by art. 176 lett. a) of the old Criminal Code, these acts become special aggravating circumstances, which have precedence over the general circumstance and remove its application. Striking a person with fists and feet for several days, with a wooden stick and fire rake, crushing the toes with a metallic pair of tongs, causing injuries, particularly in vital anatomic regions, such as head, tearing internal organs and causing other severe lesions, wounds, by knife and incandescent objects, which had as result the death of the victim, all these represent the offense of capital crime, using acts of cruelty[4].

In accordance with the supreme doctrine and jurisprudence, the deed of the perpetrator of repeatedly applying strikes to the victim, with great intensity, using hard tools, in a vital area of the body, up to crushing the skull, causing severe fracture of the maxillary, numerous wounds, proving excessive, merciless violence, ferociousness, all these represents acts of cruelty.

In order to maintain the aggravating side of the offense, it is not important whether the acts of cruelty have themselves led to causing the result of the offense or whether the perpetrator used them only to torture the victim before or after causing the result[5].

Degrading treatments consist in applying to a person acts that cause him/her strong physical or psychical sufferings, these being the result of manifesting the direct intent of causing such consequences, and also the

[3] Udroiu M., (2015). *Criminal Law. General Part*, C. H. Beck Publishing House, Bucharest, p. 318.
[4] Ristea I., (2009), *Regime of Circumstances in Romanian Criminal Law*, C.H. Beck Publishing House, Bucharest, p. 203.
[5] Boroi Al., (2000), *Offenses against life*, All Beck Publishing House, Bucharest, p. 91.

pursue of a well-established purpose. Degrading treatments are the exposure of the victim to public disgrace, to deprive him/her of sleep, of food and drink, to cut his/her hair, to undress him/her in public and other similar acts that humiliate and traumatise the human being.

In order to maintain the aggravating side of the offense, the perpetrator may act with direct or indirect intent. Also, it is important that this is a real circumstance that has an impact on the participants, if it has been foreseen or known.

2. Individualisation of Punishment in Case of Committing the Offense by Acts of Cruelty or Degrading Treatments

Individualisation of punishment represents one of the most important legal operation, respectively the operation by means of which the degree of criminal liability of the perpetrator is determined, by means of which the punishment is adapted at the needs of social defence, in relation to the gravity of the offense, the dangerousness of the perpetrator, in order to fulfil its functions and purposes.

The literature of speciality refers at the fact that preoccupation for the individualisation of punishment in relation to the person of the perpetrator appeared, as basic orientation in the criminal policy, in the second half of the 19th century, as a result of the progress made in the domain of criminology and humanistic sciences. In the antique law and in the Middle Age, the preoccupation was mainly to confer to the punishment an intimidating character. Later, in the modern law, the issue of individualising the punishment was put practically as an issue of criminal policy and also in this period the very term of individualisation of punishment was put in circulation[6].

The Criminal Code, with its sanctioning regime for the committing of the offense with aggravating circumstances as specified above, foresees that a penalty may be applicable up to the special threshold. If this is not enough, in case of prison, an increase of 2 years may be added, which may not exceed one third of this threshold, and, in case of fine, an increase of at most one third of the special threshold may be applied. Increasing special limits may be made only once, no matter the number of aggravating circumstances maintained.

[6] Lefterache V. L., (2009), Criminal Law. General Part. Course for 2nd Year Students, Universul Juridic Publishing House, Bucharest, p. 486.

The actual Criminal Code regulates the concurrence between aggravating and mitigating causes of the punishment, under art. 79. We would like to discuss about these aspects, because there are situations in judicial practice when the perpetrator has committed the offense using cruelty or degrading treatments, for example, being subject to a strong emotion or disturbance, which represents mitigating circumstance.

The actual Criminal Code presents the order and successive effect of several aggravating and mitigating causes.

Art. 79 par. 1) foresees that, when two or more stipulations are applicable to one offense, that have the effect of reducing a penalty, the special threshold of the penalty stipulated by law for that offense shall be reduced by successively applying the stipulations concerning attempt, mitigating circumstances and special cases for sentence reduction, in that order.

Among special cases of reducing a penalty, there is the procedure of admission of guilt (art. 487 and the next one from the Civil Procedure Code), according to which, in case of admission of guilt and signing an agreement for following this simplified procedure, the offender benefits from reducing with one third of the threshold of penalty foreseen by the law in case of prison and with one quarter of the threshold of penalty foreseen by the law, in case of penalty with fine.

Art. 79 par. 2) foresees that, when two or more stipulations are applicable to one offense, that have the effect of increasing a penalty, the penalty shall be established by successively applying the stipulations concerning aggravating circumstances, continuing offense, multiple offenses or repeat offense. In this case as well, subsequent to successive increases of the special threshold of the penalty, its general threshold may not be exceeded.

Art. 79 par. 3) mentions that, when one or more stipulations are applicable to one offense that have the effect of reducing a penalty and one or more stipulations are applicable that have the effect of increasing a penalty, the special threshold of the penalty stipulated by law for that offense shall be reduced according to par. (1), after which the resulting penalty shall be increased according to par. (2).

3. Cruelty and Inhuman Degrading Treatments in the International Law

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ban these practices that totally infringe human rights, particularly the right at living, integrity and dignity.

Article 3 of the European Convention on Human Rights prohibits torture, and inhuman or degrading treatment or punishment.

This safeguard is an intangible right: the right of not suffering any treatment against human integrity and dignity. Adhering at the Convention, the States have assumed a true objective liability on the behaviour of their agents, and these may not avoid this liability by invoking the impossibility to comply with the interdiction imposed in the text. The right of not being subject to bad treatment is an undeniable right and an essential right in a democratic society. The victim's behaviour may not be deemed at all a justification for making use of forbidden treatment.

The European Court of Human Rights has constantly underlined the importance of this provision of the Convention and the absolute character of the interdiction it contains. Even in the most difficult circumstance, such as fight against terrorism or criminality, the Convention forbids in absolute terms torture and inhuman or degrading treatment or punishment.

The jurisprudence of the European Court of Human Rights has shown that the States have a series of obligations deriving from the compliance with art. 3 of the Convention. Thus, the States must: protect any individual from any danger of violating his/her right at physical integrity and mental health; incriminate torture and bad treatment carried out by individuals; undergo official efficient investigations when a person claims he/she was subject to such treatment by the State's agents. This obligation has two aspects: (1) the State must assure that the victims of bad treatments sanctioned by official agents can require an internal effective investigation that may lead to the punishment of the guilty persons, and (2) the obligation of making such an investigation may be an obstacle for bad treatment, because the officials might be afraid of being discovered and punished; the obligation of providing medical treatment with celerity in order to prevent the degradation of the health status, because convicts are entitled to ask to be examined by an appointed physician.

CONCLUSIONS

During time, the compliance with the rights and liberties of human beings has been influenced by the events making up history at national and international level. The inexistence of the rule of law and of clear acts led to the inexistence of legal instruments to defend the citizens' rights, their physical and mental integrity. Simply mentioning the acts of cruelty, inhuman and degrading treatments, makes us think at the suffering of the victim and shows the lack of humanity of the perpetrator or the psychical issues he/she has. We must remove the danger of repeating such crimes by severe sanctioning.

The ancient peoples used to apply the law of retaliation (an eye for an eye, a tooth for a tooth), in order to promote behavioural reciprocity; the guilty person was treated in the same manner in which he/she acted, or wanted to act, with the victim, respectively the defendant was applied an identical or similar penalty to the damage committed.

On the background of world's conflicts and atrocities committed on behalf of victory, there appeared the need to adopt some documents which would protect human being, life and freedom. Today, banning treatments that were usual before is consecrated in the national and international law, in order to protect human being and to avoid committing abuses, without being sanctioned. There is also the desire of preventing treating human being with lack of consideration, of compassion and particularly with sadism.

Given that the States must protect individuals from the violation of their right at physical and mental integrity, when the perpetrator commits a crime using the above-reminded procedures, obviously, he/she must be sanctioned more severely.

In this regard, the Romanian lawmaker has considered it necessary to specify in the actual Criminal Code a milder sanctioning treatment as compared to the previous one. Besides, Romania has been recently convicted by the ECHR for the bad treatment applied particularly in prisons, requesting the Romanian authorities to give particular attention to preventing any forms of torture and to hastening the approaches in initiating a national efficient mechanism of preventing torture. There remains to be seen if the practice shall reveal the need of more severe sanctions in case of committing acts of cruelty, inhuman or degrading treatments.

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FREE ACCES TO ROMANIAN CIVIL JUSTICE IN THE CONTEXT OF ROMANIAN'S EU INTEGRATION

Mihai Mădălin ȚIBULEAC*

ABSTRACT

Given harmonizing Romanian legislation with the Community law in the context of Romania's EU integration and consequently the transposition of EU directives in effect in domestic law, to ensure free and effective access to justice, Romania transposed the Directive 2003/8 / EC on improving access to justice in cross-border disputes. Thus the Romanian state as a guarantor of rights and freedoms of citizens applying democratic principles in a state of law ensured, in certain circumstances, from the public financial resources, the access to justice, ensuring effective access of all citizens of the Member States, creating internally conditions to not appear discriminatory between its own citizens and EU citizens. This free access to civil justice concerns such processes where free legal assistance is requested, either in court or before other public authorities.

KEYWORDS: *access to justice, legal aid, rule of law, legislative harmonization*

1. PRELIMINARY ISSUES

Given Romania's European Union integration, both national legislation with the Community harmonization and transposition of EU directives into national law, they have become essential in creating an effective justice reform.

The Romanian legislature imposed the adoption of legislation to comply the requirements of Directive 2003/8 / EC of the European Union, related to improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes to not raise the discriminatory situations between Romanian citizens and EU citizens.[1] The European Union aims at creating and developing an area of freedom, security and justice, and to achieve this objective, it is necessary to create a mechanism for judicial cooperation in civil matters.

The art.16 of the Romanian Constitution provides equal rights of all citizens before the law without discrimination and in art. 21 free access to

*Ph.D.Candidate, Titu Maiorescu University, Bucharest, Romania.

[1] Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes**,** *OJ L 26, 31.1.2003, p. 41–47*

justice. Civil Procedure Code emphasizes effective access to justice through art. 90, which provides legal assistance, regulated by GEO 51/2008 assistance, regarding legal aid in civil matters in Romania.

Corroborating these issues, both in Community law and in national law, European or any Romanian citizen has the right to equality before the law and access to Romanian justice. Access to justice in a state of law include the right to a fair trial, no law can restrict this right, nor the financial situation of a party, whether the defendant or the plaintiff and any difficulties arising from the cross-border cause.

Fundamental Rights Charter states in Art. 47 (3) legal aid institution, so people who lack sufficient resources can resort to this measure, if legal assistance is necessary to ensure effective access to justice .

Romanian legislator refers to these financial resources to art. 90 Civil Procedure Code, which points out that who will benefit from legal aid is unable to meet costs entailed triggering and sustaining a civil law suit, without jeopardizing their own maintenance or his family.[2] With regard to effective access to justice we talk about effective access to justice (which creates effects) to any person who wants to go to court to defend a right or a legitimate interest.

But if one of the parties, because of the precarious pecuniary situation to not afford to hire a lawyer who gives him a real chance of success, we cannot talk about free access to justice.

Romanian legislator transpose Directive 2003/8/EC by GEO 51/2008 in order to prevent a breach of the right to a fair trial and to ensure access to justice both to its own citizens and the community.

2. THE CONDITIONS FOR GRANTING LEGAL AID

Legal aid is that assistance provided by the state which aims to ensure the right to a fair trial and the guarantee of equal access to justice for realization of rights or legitimate interests through the courts, including the enforcement of judgments or other enforceable titles.[3]

From this definition it is presented the scope of legal aid, which applies both to disputes pending before civil courts, regardless of the stage, but also in foreclosure proceedings.

[2] Art. 90 (1) Civil Procedure Code.

[3] See, art. 1 GEO no. 51/2008 on legal aid, published in the Official Gazette. no. 327 of 25 April 2008 as amended, and GEO no.80/2013 published in the Official Gazette. No. 392 of June 29, 2013.

This activity covers the whole of justice, enforcement of fulfilling its role of judicial decisions. Legal aid, as regards enforcement, has an essential role in achieving an effective judiciary; otherwise its role and the rule of law would be met only partially.

Ordinance 51/2008 provides that legal aid is provided in all cases it is requested before the courts or other authorities having jurisdiction Romanian by any individual domiciled or habitually resident in Romania or in a Member State of the European Union. The domicile or habitual residence is determined according to the date when the application for legal aid.

This ordinance is applicable to other individuals who are not domiciled or habitually resident in the territory of a Member State, where between Romania and those states are international treaties or conventions regarding legal aid.

For countries that have no conventional ties with Romania[4], international access to justice is applied under international comity while respecting the principle of reciprocity.

May request the grant of legal aid any individual that cannot meet the costs of a trial or expenses involving legal advice in defending a right or legitimate interest, without jeopardizing his or her family maintenance.

The family term concerns spouse, children or other descendants on straight aged 18 years or at most until the age of 26 if they are in further education. Also in the category of family enters the persons who reside or have resided common household of the applicant, and children or other descendants aged 18 years or at most until the age of 26, if they are in further study.

Regarding the financial situation of persons who may apply for legal aid, the ordinance states that can benefit from legal aid any person whose net monthly income per family member in the last two months prior to the formulation and application, are below 300 lei. In this case, the amount is paid entirely by the state.

If the average monthly net income per family member in the last two months before the application is below 600 lei, the legal aid covered by the state may be 50 % of the value of expenditure.

In exceptional cases the state provides legal aid to certain categories of persons irrespective of the applicant's status. These special situations cover such aspects as minority, disability, but only for protection or

[4] Florea Măgureanu, *Civil procedure law*, Universul Juridic Publishing House, 2015, p. 109.

recognition of the rights and interests connected with the particular situation.

The amount of legal aid granted, aggregate or separately, may not exceed a period of one year, the maximum amount equivalent to 10 gross minimum wages, in the year when the application has been made. Under current law the gross national minimum wage is 1,050 lei starting from 1st July 2015[5] , thus the amount of legal aid cannot exceed 10,500 lei (where the request was made after 1st July 2015).

In establishing the income are taken into consideration any regular income, such as salaries, allowances, fees, annuities, rents, profits from commercial activities or from self-employment. The Ordinance provides the calculation of income and amounts owed by citizens, such as rent and maintenance obligations. If the applicant's condition improves or if the applicant will die, the right to legal aid will end.

2.1. The difference between legal aid granted for individuals and legal person

Civil Procedure Code[6] provides also the possibility for legal person to benefit from facilities, reductions, rescheduling or delays to pay court fees due to the actions and claims brought to court.

Thus, the legislature provides also free access to justice for legal person, by these exemptions, reductions or postponements, without assuming that those legal entities are disadvantaged by the justice.

Unlike individuals that may request legal aid for triggering and sustaining a process, including enforcement, but also for non-contentious proceedings in relation to public authorities having jurisdiction, the legal person can only benefit from certain exemptions of court fees or certain reductions, rescheduling, delays.

2.2. The scope of legal aid

In Romanian law, legal aid is granted in civil, commercial, administrative, labor causes and social security. The area where legal aid is not applicable is criminal law branch, where the legislature provides a different system of assistance to citizens in criminal cases.

[5] According by the Government decision 1091/2014, art. 1 alin. 2, published in în M. Of. no. 902/ 11.12.2014.

[6] See Romanian Constitution, art. 90 alin. 3

The Community legislation[7] foresees that public aid is granted only in civil and commercial cases. We see that Romanian legislature has expanded its scope to several reasons which include labor law cases, administrative cases or those concerning social security, thus ensuring better access to justice.

2.3. Legal aid forms

Under Article 6 of the Ordinance, legal aid may cover the payment of attorneys' fees for providing representation, legal aid, defense or protection, to achieve or to defend a legal right or a legitimate interest in preventing a court case. The lawyer may be elected or appointed; the only restriction is concerning the amount of legal aid.

Legal aid provides the payment of experts and the translator or interpreter used in the process with the approval of the court, and also the payment of the bailiff.

Legal aid covers also reductions, rescheduling or delays in payment of court fees, including those related to the enforcement phase.

Given the provisions of Ordinance 80/2013[8] regarding judicial stamp duties, we can consider that the imposition of these duties would constitute an obstacle to the achievement of a fair trial and an obstacle to free access to justice.

On the procedural plan, free access to court concerns the right to proceedings. Even if access to justice is not free, we believe that it violates the principle of proportionality if there are established exorbitant stamp fees that exceed the financial resources of the applicant. It is assumed that there isn't a reasonable relationship of proportionality between the public interest requirements relating to the proper administration of justice, the increased quality of justice and the protection of individual rights. Even if the general interest is concerned, individual interest is affected therefore the person's right to defend or assert legal rights or legitimate interest.

Art. 6 of GEO 51/2008 on the legal aid includes the point d) "exemptions, reductions, rescheduling or delays in payment of court fees prescribed by law" and point a) provides the payment of attorney's fees in

[7] Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes**,** *OJ L 26, 31.1.2003.*

[8] See Government Emergency Ordinance no. 80/2013 regarding the judicial stamp duties, published in Official Gazette. Nr.392 of June 29, 2013.

any phase of the process yet the 462 decision of the Constitutional Court in 2014 found unconstitutional articles art. 13 (2), art. 83 (3), art. 486 (3) of the Civil Procedure Code. These articles restrict the right to a fair trial and effective access to justice due to financial considerations.

Court declared unconstitutional those articles, taking into account the benefits of art. 90 Civ.Pr.C. on judicial assistance and EGO.51/2008 through which any party is entitled to free legal assistance in whole or in part, depending on financial conditions.

The Constitutional Court considered that the ordinance 51/2003 only covers a limited category of citizens, and attached to conditions relating income, legal aid amount is limited during one year.[9]

The difference between the judicial stamp duties and fees paid to lawyers is the fact that judicial stamp duties are intended to support the quality of justice, going into the state public budget, and the lawyer's taxes are private. But legal aid which aims exemption, reduction, rescheduling or postponement of judicial duties prescribed by law covers only a narrow class of citizens according the conditions provided by the law. Article 16 from the Constitution provides equal rights of citizens, irrespective of the financial status, citizens are equal before the law and public authorities without any privilege or discrimination. Free access to justice is also guaranteed by the supreme law without abstraction, no law may restrict this right.

Consequently, we might consider that the Ordinance 80/2013 disregards the provisions of the supreme law regarding equality and free access to justice.[10]

3. PROCEDURE FOR GRANTING LEGAL AID

Legal aid can be requested by the person who meets the conditions requested, in a written application that will include the nature and object of the process, personal data, regarding his wealth and family. The economic situation must be substantiated by documentary evidence, documents related to incomings and maintenance costs, to justify the financial situation and inadequate resources that cannot ensure effective access to justice of the applicant, without creating a discriminatory situa-

[9] The Constitutional Court decision nr.462 / 2014 regarding the exception of unconstitutionality of the provisions of Article 13 para. (2) The second sentence of Article 83 para. (3) and art.486 par. (3) of the Code of Civil Procedure

[10] See Romanian Constitution, Art. 16 alin. (1) şi (2) şi art. 21 alin. (1), (2), (3)

tion. Ordinance also provides the duty of the applicant to give a statement, confirming that he benefited in the past 12 months of legal aid, in which form, for what reason, and the amount of the aid.

The application shall be raised to the competent court or to the executing court in case legal aid aimed at enforcement. Where jurisdiction cannot be established, the application for legal aid shall be determined by the court whose territorial jurisdiction applicant is domiciled or resident.

Legal aid may be granted at any time during the trial from the time of application until the process. Applications for legal aid are exempt from stamp duty.

If the party calls for legal aid in order to pursue an appeal, it will be required to formulate a new application that will be submitted to the court whose decision is appealed, due to the deadline for exercising remedies. This request shall be settled by another panel than the one that decided the case on the merits. An important aspect of this procedure is that the request, the deadline for lodging an appeal is interrupted once. The deadline begins to run from the date of notification of the conclusion. If the request is accepted, the applicant requested payment of fees or legal assistance from an attorney, the court will send the applicant conclusion of the Bar.

The legislature formulation is slightly ambiguous regarding the period for exercising remedies. Thus, Article 13 para. (3) provides that "from the date of communicating the conclusion in which is solved the demand for legal aid, or where appropriate, the review request, the admission or rejection, starts a new period for lodging an appeal" and at para. (5) "by the time the lawyer is appointed, starts a new period for lodging an appeal".

If legal aid is requested for the enforcement of a court order, the application is the competence of the executing court. Both the request and the conclusion are sent to Bailiffs Territorial Chamber from the territorial jurisdiction of that court. The beneficiary may request a bailiff or the Board Director of the territorial chamber of bailiffs appoint an executor within three days. After fulfilling their duties, the bailiff is entitled to a fee based on the complexity of the case and the workload.

The legislature provides the possibility for the court to approve applications for tax incentives to pay court fees. Thus, the court may determine the total exemption of judicial fees, a share discount, payment terms and amount of the installments.

If the payable court fees are greater than twice of net monthly income per family of the applicant in the month prior to the application for legal

aid, the law allows rescheduling the payment so that the monthly installment due to not exceed half of the net income per family, if the court doesn't consider it necessary to grant other forms of aid. Staggering payment of court fees can be made in 48 monthly installments.[11]

Legal aid implies also the aid granted in extrajudicial procedure. Through a lawyer, the applicant may be supported in providing consultations, formulation of applications, petitions, complaints, initiate legal proceedings as well as representation before public authorities other than judicial.

4. ASPECTS REGARDING THE PUBLIC NATURE LEGAL AID

Legal aid in civil matters is public since the state is the guarantor of ensuring free access to justice and equality before the law. The state is the one who provides legal assistance in civil matters from the public purse by paying all costs of the proceedings for both Romanian and Member State's citizens.

European Directive 2003/8 / EC to improve access to justice in cross-border litigation requires that each state has the power to cover or not the costs of the party in opposition, in case when the person who benefited from legal started to have claims. Romanian legislature noted that if the applicant loses the trial, the judicial fees of the other party will be on his own task and also the restitution of the other amounts received as legal aid. Besides this court can compel restitution and a fine up to 5 times the amount for obtaining unjustified the exemption.[12] Funds needed to cover the grant of legal aid are contained in the fund for legal aid, fund included separately in the income and expenses of the Ministry of Justice.

The Ministry of Justice has been designated as the central Romanian authority on granting legal aid, having supervisory, coordination, information and assessment tasks.

CONCLUSIONS

Legal aid has the role to improve access to justice both for Romanian and European Union citizens, thus, Romania complies with Directive

[11] Art. 34 alin. (1) and (2) G.E.O. no. 51/2008 on legal aid.
[12] Florea Măgureanu, *op. cit*, p. 110.

2003/8/EC of the European Union, related to improving access to justice in cross-border disputes by establishing common minimum rules regarding legal aid for such disputes to not lead to discriminatory situations between Romanian citizens and Member States citizens.

But in some cases legal aid does not provide access to justice for all citizens. Every citizen must be able to assert or defend their rights through the court without personal financial situation being an obstacle. Consequently we think that must be completed and extended the conditions for granting legal aid in order to have access larger number of citizens.

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