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CONTENT

GENERAL CONSIDERATIONS ON THE CONTRACT AS THE MAIN SOURCE OF LEGAL LIABILITY BETWEEN TRADERS

Smaranda ANGHENI[*]

ABSTRACT

When talking about the relations between traders, the free will of the parties is expressed both in the manner in which the content of the agreement is established, and in the form the consent takes, as an essential element of the will to contract.

The basic principles of closing, carrying out and ending an agreement are the same, as the Civil Code states, no matter the object of the contract or the parties reaching an agreement.

Nevertheless, there are a few principles which are outlined, thus becoming more obvious when traders are involved, or at least one party is a trader, and we could name: the principle of good faith when negotiating, the principle of maintaining a balance between the provisions of the parties, the solidarity within the contract, the principle of collaboration between the contracting parties, etc.

KEYWORDS: *Agreement, trader, good faith, solidarity, balance between the parties'rights and obligations, collaboration*

While performing their economic activities, *traders reach a series of legal agreements or perform some legal deeds, which create, modify or end legal rights and obligations.*

Similarly to the civil law, legal deeds or actions may be defined *lato sensu*, meaning in a broad sense, including the events, the situations that occur independently to the will of the parties, as well as the human actions, performed under the intention of having legal effects (legal acts), or without the intention of leading to legal effects, but having legal effects under the law.

The latter represent the content of the legal deeds *stricto sensu*, in a less broad sense, and these actions may be lawful (licit) – business management, undue payment, unjust enrichment – or unlawful (illicit) actions which lead to civil liability in tort.

Within the economic relations among traders, legal deeds and agreements may be one-sided, bilateral or multi-sided.

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Hence, the law considers the following as one-sided legal deeds: the issuing of a promissory note, the agreement to represent a party within a legal relation, the offer to reach an agreement, founding a limited liability company with only one share-holder, etc.

The most frequent legal agreements performed by traders are *unilateral* (one-sided) agreements or *bilateral* (mutual) agreements, for consideration (risk free or subject to risk, uncertain). Most contracts are for consideration, each party aims a certain patrimonial, financial benefit or advantage. Seldom one can find benefit-free agreements between traders, with or without affecting one's own patrimony.

Legal obligations can be caused by legal acts or deeds.

Among all the sources of a legal obligation, the contract (the legal agreement) is the most important one. Even though one can easily find numerous similarities between the agreements performed by non-professional and professional traders, including the obligations, there are also some undeniable differences the legislator considers exceptions and emphasizes by using the expressions "within the relations between traders" (art.no 1233 of the Civil Code) or "during the performance of a trading activity" (art.no 1523, par. (1) letter d) of the Civil Code).

Searching the works published before the Civil Code was issued and came into force, the subject of the traders' obligations was approached either under the chapter named "The General Theory of Traders' Obligations", or "Special Provisions Regarding the Establishment and the Execution of Traders' Obligations".

By forsaking the duality of the private law, once the new Civil Code came into force, the monist theory was adopted and the Commercial Code was abolished, and, at the same time the provisions emphasizing the special features of the traders' obligations were repealed.

Moreover, the moment the new Code of Civil Procedure came into effect, the provisions of the Commercial Code regarding the probation of the trader's obligations were abolished.

In our opinion, the subject of the traders' obligations might be thoroughly assessed by analysing the general provisions of the Civil Code and also the special laws, such as Law no.193/2000, modified, on the unfair terms within the agreements between professional traders and consumers.

The special provisions one can find within the Civil Code highlight the particularities or the special traits of the traders' obligations, which concern the rise, the execution and the end of the obligations.

By assessing the provisions of the Civil Code, one can find a few basic principles governing the contract as a legal institution, and more specifically those concerning the agreements between traders. More precisely, we find that, even though the basic principles of closing, executing and ending an agreement are the same, no matter the object of the contract or the parties reaching the agreement, still some of these principles are more obvious when it comes to the agreements between traders. For example, the principle of good faith when negotiating, the principle of keeping a balance between the provisions of the parties, the principle of solidarity, the collaboration between the parties etc. Some of these principles can be seen directly in the way the obligations are carried out, for example the principle of good faith the parties show while negotiating prior to the signing of the contract is visible in the **obligation to inform** that each party has, to inform the other party on the final terms and conditions of the agreement, on the data concerning the parties, and, last but not least, on the quality of the goods or the services rendered under the contract in question

The principle of free will under an agreement.

Basically, closing any deal, reaching any agreement happens on the parties' own free will, and, more than that, the parties establish the terms of the agreement when all the parties freely agree on each term.

The principle of free will that has to govern the establishment of any agreement has its origin in the definition of the contract the legislator makes within art.no 1166 of the Civil Code, which states that: "The contract represents the meeting of two or more parties freely willing to establish, modify or end a legal relation".

The freedom to reach an agreement is emphasized within art.no 1169 of the Civil Code, according to which "the parties are free and have the right to reach any contract and to agree on any terms within the limits imposed by the law, the public order and morals."

This legal provision leads to some conclusions, firstly two sides, two dimensions of the principle of free will when reaching an agreement, namely: the parties are free to show their intent to contract and to reach

an agreement, and secondly their rights to establish the content, each term of the contract.

Both sides of this principle of free will mentioned above are based on an independent will, and this base, throughout the history of judicial and philosophical doctrine, has taken many shapes and defined in many ways, up to the theory which states the decline of the free will, consequently to the idea that some contracts are mandatory, under certain imperative, public, mandatory norms, consequently to the establishment of the adhesion contracts (standard form contracts) where the parties may not choose or modify the terms, consequently to the extension of the term „public order", given the need to protect the consumers and other types of professionals, etc.

One modern theory is based on and is intricately connected to the idea of the **contractual solidarity**, which can easily be considered an important principle, and this idea created by the French legal system has been adopted by the Romanian law and by the legislator within the new Civil Law. This theory, which is a principle at the same time, is based on the realities supporting the agreement, firstly the interest that each party has to reach an agreement. In order to achieve its goal, each party has to actually take into consideration a „common goal/interest", which leads to a mutual dependency between the performances/benefits of the parties. This mutual dependency of the parties' obligations determines the necessity of maintaining a **„contractual balance",** and this balance is aimed by the judge when asked to solve a case where one party is favoured. For example, the intervention of the court where a penal, obviously excessive, clause, surpassing the prejudice one could have anticipated when reaching the agreement, may diminish the amount of the penalties [art.no 1541 paragraph (1) letter b) of the Civil Code] or change (adapt) the contract in the case of a hardship clause [art.no 1271 paragraph (2) letter a) of the Civil Code].

Hence, the principle of the **contractual solidarity** leads to the establishment of other principles, namely the **principle of preserving the balance within an agreement**, and the **principle of proportionality**, as well as the principle of **coherence** within a contract. Nevertheless, the principle of **free will** together with the principle of **good faith** should govern the reaching, the execution and the end of a contract, as they are

firmly stated by the legislator within the art.no 1169 and 1170 of the Civil Code, and are expressed throughout the entire agreement.

The free will, in a legal sense, should be used, though, within the general legal limits. These limits are generally framed within art.no 11 of the Civil Code, which states: „there will be no exemptions by conventions or unilateral agreements from the laws governing public order or morals", 1169, corroborated with art.no 1236 paragraph (2) and (3) of the Civil Code.

The **principle of free will** within a contract should be taken in consideration in conjunction with the principle of mandatory enforcement of the agreement, clearly stated within art.no 1270 paragraph (1) of the Civil Code as follows: "a valid contract or agreement constitutes law between the parties, as it has the same force", which implies, on the one hand, that in order to be valid and legally binding, an agreement has to abide by the public order and the morals, and, on the other hand, at the time the contract is perfected it has to comply with the validity terms stipulated by art.no 1179 of the Civil Code (the legal capacity to enter into binding contracts, the consent of the parties, a clear and legal subject of the agreement), and, in some cases, the form required by the law.

Basically, if the parties comply with the provisions of art.no 1169 and 1179 of the Civil Code, the agreement is lawful and mandatory between the parties.

The limits the principle of free will has to face, namely the public order and the morals, are defined as follows:

a) The legal public order is, basically, the public law, namely the legal provisions belonging to different branches of public law: the constitutional law, the administration law, the tax (fiscal) law, penal law, etc., and is founded on the need to protect the **general interests** of society, and, implicitly, the community rights.

For these reasons, when it comes to the public law, the state and the public authorities are the main participating parties, and the most important regulation is that a "private person", more precisely its will, is subordinated to the state, thus having a lower position, and, secondly, the norms are mandatory.

b) The public order, as far as the law is concerned, is determined, when it comes to an agreement, by the **rules of economy**, and a very

good example are the rules regarding the **competition**, the rules regarding the **consumer rights**, etc., and we should not forget the European norms which form a legal system regarding public order within the **European Community**.

c) **Morals** actually refer to a conduct code that is to be complied with, and, regarding an agreement, abiding the morals means that the subject of the contract should not bring any prejudice to the person's dignity or cause any physical damage, or violate the provisions of art.no 58 of the Civil Code.

The penalty in the case of violation of public order and morals is either the absolute nullity of the contract (agreement), or the relative nullity, when the economic rules are violated, or the respective terms of the agreement are considered "unwritten" (implicit).

In conclusion, free will should and must be expressed both within a legal frame and within an ethical frame, even though these norms do not have the form required by the law in order to become mandatory.

Within the relations between traders, the free will of the parties comes to light when establishing the content of the agreement and also the form in which the consent is manifested, as a key element of any agreement.

Hence, regarding the content, the contracting parties may establish terms and conditions which exempt the common law, such as:

– the clause regarding the means of proof, exceeding the general provisions, meaning any means of proof is acceptable (accepted invoices, mail, traders' registers or witnesses) within the legal limits (The Code of Civil Procedure);

– the loyalty or confidentiality terms, particularly used when it comes to producing, trading or distributing a good, or in the case of service render. This clause may also be named a non-compete clause, etc.;

– the exclusivity clause, used when distributing goods, technology or *know-how* etc.;

– the clause stating the solving of any disputes through arbitration, also known as the "arbitration clause".

The free will of the parties has certain particularities when traders are involved, in the way the consent of the parties takes shape and comes to light

A valid agreement has a written form in order to be lawful, one document, a written offer followed by the acceptance of the offer, or the execution of the contract, and we can also find other particular means to conclude legal operations, for example: mail (letters), telex network, fax, telephone, invoice.

The principle of speedy operations implies the existence and acceptance of simplified forms of agreement when it comes to traders, and these simplified agreements show in an obvious way the will of the parties to reach an agreement.

Conclusions

When talking about the legal relations traders develop, the agreement (the contract) is the main source of obligations and, due to the particular traits of the trading business, these agreements also have special features, namely the general principles governing businesses, such as: good faith, the obligation to inform on each participating party, the solidarity, the balance within the contract, etc.

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POSTING OF WORKERS IN THE EUROPEAN UNION: AFFECTS AND EFFECTS AT POLITICAL AND LEGAL LEVEL

Nicolae VOICULESCU[*]

ABSTRACT
The author outlines the different positions at the European Union level regarding the revision of the Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 on the posting of workers in the framework of the provision of services so as to reduce the phenomena social dumping and damage to the rights of posted workers. In this context, the essential the content of the proposal for amending Directive 96/71/EC and the position of the Romanian authorities regarding the new provisions under discussion are presented.

KEYWORDS: *posted workers, Directive 96/71/EC, speculative behaviours, social dumping, equality of remuneration, Romanian position*

1. The political context

At the end of August 2017, French President Emannuel Macron made for the first time a tour of persuasion in Central and Eastern European countries about the need to obtain a qualified majority to amend Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, which is the subject of a *proposal for a European Commission directive initiated in early 2016*[1].

In the public statements on this subject, Emannuel Macron considered that the wording of Directive 96/71/EC constituted a "treason of the European spirit in its foundations", favouring "social dumping"[2].

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[1] *Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*, COM/2016/0128 final – 2016/070 (COD).

[2] Le Monde, *Pour Emmanuel Macron, la directive sur les travailleurs détachés est une « trahison de l'esprit européen »*,

The problems have become worse since 2004, when countries in Central and Eastern Europe, characterized by substantially lower wage burdens than those in the West, have begun to become members of the European Union.

Thus, *speculative behaviours* have emerged to circumvent both national regulations in the Member States and the specific European directive, such as hiring exclusively for the purpose of posting, through fictitious companies, the establishment of posted workers platforms by certain large trade groups, by creating subsidiaries in a state with more financially and socially more advantageous financial rules and posting employees out of them, the abusive recourse to posting in posts that are in fact permanent or the non-declaration of posting.

Also, as a *negative phenomenon*, which especially concerns the officials in the states where an important number of detached workers are registered, the creation of "*post box*" companies was highlighted, especially in the fields of construction and road transport. These companies, without a real economic activity in the "home" country, use false postings to circumvent national rules on social security and the protection of posted workers and to speculate more disadvantaged tax systems[3].

The need to find the most effective legal framework to limit such behaviours lies in the idea that Mr. Macron has emphasized, namely that "the European single market and the free movement of workers are not intended to favour countries that promote the lowest rules of social law". Such behaviour is able to "increase populism and erode confidence in the European project ".[4]

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http://www.lemonde.fr/europe/article/2017/08/23/pour-macron-la-directive-sur-les-travailleurs-detaches-est-une-trahison-des-fondamentaux-de-l-europe_5175661_3214.html#oOV43wzkXhp5IPhh.99

[3] See, Nicolae Voiculescu, Vasile Neagu, *The protection of workers rights in international and European legislation* (*Protecția drepturilor lucrătorilor în dreptul internațional şi european)*, Editura Universitară, Bucureşti, 2016, p.225-226.

[4] « Le marché unique européen et la libre circulation des travailleurs n'ont pas pour but de favoriser les pays qui font la promotion du moindre droit social (…) C'est ce qui dans nos pays nourrit le populisme et érode la confiance dans le projet européen. » Le Monde, *Op. cit*.

Failing to do so would constitute, in the opinion of the French President, a danger of "explosion" and "disintegration of the European Union"[5].

The proposed remedies aim at reducing the time for the mission of posting workers, reinforcing checks on the application of the principle "for equal work, equal pay".

However, the consensus is far from achieving, at the diplomatic level, and living disputes and allegations of ignoring the European spirit can be noticed[6].

2. The legislative framework

The negative phenomena recorded in the application of Directive 96/71/EC were clearly well-known until the launch of the proposal to amend it in 2016.

Furthermore, a specific control rule, namely *Directive 2014/67/EU on enforcement of the implementation of Directive 96/71/EC on the posting of workers in the framework of the provision of services*[7], has been adopted. It contains provisions on the identification of a genuine posting and prevention of abuse and circumvention (art. 4), the organization of

[5] Le Monde, *En Roumanie, Macron critique le « cadre trop faible » de la directive des travailleurs détachés,*

http://www.lemonde.fr/europe/article/2017/08/24/en-roumanie-macron-critique-le-cadre-trop-faible-de-la-directive-des-travailleurs-detaches_5176125_3214.html#I6CLsOtd0wByCHU3.99

[6] Responding to the Polish Prime Minister's assertion that "in the interest of Polish workers, " the country will "refuse to complete a reform of the Directive", President Macron estimated that "it is a new mistake in Warsaw, " and that " Poland "isolates (...) and decides to go against European interests on many subjects. The Polish people deserve something better than that (...) ". See, Cristian Unteanu, *Criză diplomatică gravă între Franța şi Polonia pe tema Directivei „lucrătorilor detaşați*"(*Serious diplomatic crisis between France and Poland on the "posted workers" Directive*), in Adevărul, 26 august 2017.

http://adevarul.ro/news/societate/criza-diplomaticagrava-franta-polonia-tema-directivei-lucratorilordetasati-pozitia-romaniei-1_59a10f115ab6550cb8539253/index.html

[7] *Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation')*.Text with EEA relevance, OJ L 159, 28.5.2014, p. 11–31.

effective and appropriate inspections and investigations on the territory of the Member States (art. 6), the establishment of complaints mechanisms or procedures to allow posted workers to protect their rights, including salary rights (Article 11), the solving of the issues related to subcontracting (art.12)[8].

Member States had set a deadline of 18 June 2016 for the transposition of Directive 2014/67/EU. However, we note that the initiation of the proposal to amend Directive 96/71/EC was made on 8 March 2016 before the deadline was reached and, of course, in the absence of an analysis of the its effects on the European labour market[9].

Moreover, in the public space, in the context of the debates mentioned above at the beginning of our study, even though they were mainly focused on political issues, the Directive 2014/67/EU was not mentioned as a possible normative vector for embedding negative phenomena on the European labour market.

Within the time limit laid down in Article 6 of Protocol No. 2 to the Treaties, fourteen Chambers of National Parliaments, particularly Central and Eastern Europe, including Romania, sent to the Commission reasoned opinions stating that the Commission's proposal of 8 March 2016 did not comply with the subsidiarity principle, starting, thus, the "*yellow card*" procedure.

By its *Communication of 20 July 2016*, the Commission concludes that its proposal of 8 March 2016 on a specific review of Directive 96/71/EC on the posting of workers respects the principle of subsidiarity enshrined in Article 5 (3) Treaty on the Functioning of the European Union (TFEU) and that there is no need to withdraw or modification of that proposal[10] and, therefore, the Commission maintained its proposal.

The Commission proposal is based on an Internal Market legal basis, namely Articles 53(1) and 62 of the TFEU. As the Commission emphasis in its Communication, „Posting, by definition, is of a cross-border

[8] See, Nicolae Voiculescu, Vasile Neagu, *Op. cit*., p. 224-231.

[9] By 18 June 2019, the Commission must submit a report on its implementation to the EP, the Council and the EESC and to propose, where appropriate, the necessary amendments and modifications.

[10] *Communication from the Commission to the European Parliament, the council and the national parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2*, COM/2016/0505 final(Conclusion pct.5).

nature. Any posting activity has effects in at least two Member States. The rules on posting necessarily create rights and obligations between persons in different Member States – that is to say between an employer in the Member State of origin and a worker who temporarily resides in another Member State". As result, "The posting of workers plays therefore an essential role in the Internal Market, particularly in the cross-border provision of services (pct.3)".

At the same time, the European Commission considers that „Individual action by the Member States could not achieve another important objective of the measures: bringing legal consistency throughout the Internal Market and clarity to the legal framework applicable to posted workers since the protection afforded to them would vary depending on the host Member State's approach"[11].

Looking at the text of the Commission's proposal, we note that it aims at *amending the 1996 Directive on three essential points*:

1. Firstly, the proposal provides that all rules on *remuneration* in the host member state apply to posted workers in that member state. The Commission proposes to replace the notion of "minimum wage" with "wage". According to the proposal, remuneration integrates all the elements of remuneration that are mandatory in the host member state[12]. Rules set by law or universally applicable collective agreements become mandatory for posted workers in all economic sectors. Where

[11] *Idem*, pct.4.2.2.

[12] *Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services' [COM(2016) 128 final — 2016/0070 (COD)]*, pct.4.1.3. The EECS opinion details in this regard, stressing that " The concept of "remuneration" encompasses all the elements that are paid to local workers if they are laid down by law or by collective agreement which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or in the absence of such a system, by collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory. "Remuneration" could include some elements that are not included in the concept of "minimum rate of pay", such as seniority allowances, allowances and supplements for dirty, heavy or dangerous work, quality bonuses, 13th month bonuses, travel expenses, meal vouchers – although most host countries have already included several of those elements in the "minimum rate of pay" (pct.4.1.3.).

Member States in accordance with their national rules and practices require undertakings to subcontract only with undertakings that grant workers the same conditions on remuneration as those applicable to the contractor, the proposal allows Member States to apply such rules equally to undertakings posting workers to their territory[13].

The proposal *does not have the objective of aligning wages across member States*, as it has mistakenly understood some disputed positions. As the Commission mentioned, "The proposal merely ensures that mandatory rules on remuneration in the host Member State are applicable also to workers posted to that Member State. Moreover, the fact that economic development may bring more convergence in the wages over time does not exclude the need to ensure – also in the interim – a level playing field for companies and an appropriate protection for posted workers"[14].

The Commission proposal „*fully and unequivocally respects the competence of the Member States to set the remuneration and other terms and conditions of employment, in accordance with their national law and practice and it states this explicitly*.(…) The proposal hence does not regulate remuneration, nor does it define remuneration or the constituent elements of remuneration at Union level. It merely provides that mandatory rules on remuneration, as set by the Member States, should apply in a non-discriminatory manner to local and cross-border service providers and to local and posted workers"[15].

Substantial change by reference to remuneration is also justified by the case-law of the Court of Justice of the European Union, particularly in Case C-396/13, *Sähköalojen ammattiliitto*, aiming the increasing of the level of legal certainty for both workers and enterprises[16].

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[13] *Communication from the Commission to the European Parliament, the council and the national parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2*, COM/2016/0505 final (pct.3).

[14] *Idem*, pct.4.2.1.

[15] *Idem*, pct.4.2.3.

[16] Judgment of the Court (First Chamber) of 12 February 2015, *Sähköalojen ammattiliitto ry proti Elektrobudowa Spolka Akcyjna*. Case C-396/13. By the judgment cited, the Court included in the content of the minimum wage referred to in Art. 3 par. (1) and (7) of Directive 96/71 daily allowances and indemnities for daily journeys (provided that the daily commuting which they carry out in order to travel to and from the place of work is longer than one hour) and holiday pay (pct. 71).

Also, in relation to previous case law, there is the view that the future amendment to the posting directive should correct the erroneous interpretation of the Directive as a maximum standard stemming from a series of rulings of the CJEU (the *Laval*[17], *Rüffert*[18] *cases*) and redefine as a *minimum standard*[19].

However, it seems necessary to clarify *the concept of „remuneration"* in view of the positions expressed and the case-law cited.

On the other hand, it is necessary for the various economic actors not to be placed in a *disadvantageous or discriminatory situation*. The European Economic and Social Committee consider that „any discussion on posting should take account of the fact that the situations of foreign and domestic companies are different". As attention has been drawn, "a foreign service provider that wants to post workers bears additional costs

[17] Judgment of 18 December 2007 in the *Laval* case, Case C-341/05. C.J.U.E. observes that 'in order to ensure compliance with a core of mandatory minimum protection requirements, the first subparagraph of Article 3 (1) of Directive 96/71 provides that Member States are to ensure that, irrespective of the law applicable to employment relationships, in the context of a supply of services transnational undertakings provide workers posted to their territory with working and employment conditions on the issues listed in this provision, namely: maximum working periods and minimum rest periods; the minimum rate of paid annual leave; minimum wage, including overtime pay; the conditions for the provision of workers, in particular by temporary employment undertakings; safety, health and hygiene at work; protective measures applicable to working and employment conditions of pregnant women or women who have recently given birth, children and young people; equality of treatment between men and women and other provisions on non-discrimination "(point 73). In addition, the Court considers that 'the level of protection to be afforded to workers posted to the territory of the host Member State is, in principle, limited to that laid down in points (a) to (g) of the first subparagraph of Article 3 (1) 96/71, except where those workers already enjoy, by application of the law or collective agreements of their Member State of origin, more favorable terms and conditions of employment in respect of the matters referred to in that provision (pct.81) ".

[18] *Judgment of the Court (Second Chamber) of 3 April 2008. Dirk Rüffert v Land Niedersachsen.* Case C-346/06.

[19] *Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services'(COM(2016) 128 final – 2016/0070 (COD))*, pct. 5.7.

resulting solely from performing services in another Member State – additional operating expenses[20] and indirect cross-border labour costs[21].

2. The proposal for a Directive contains a new point laying down the conditions applicable to workers referred to in Article 1 (3) (c) of the Directive, namely *workers posted by a temporary agency* established in a Member State other than the Member State in which it is established the user undertaking. Undertakings will have to guarantee posted workers the conditions applying to temporary workers made available through temporary employment agencies established in the Member State where the work is carried out under Article 5 of Directive 2008/104/EC on temporary agency work[22] to the temporary workers made available through temporary employment agencies established in the Member State where the work is carried out.

3. The directive proposal foresees that whenever the expected duration of the posting exceeds 24 months or whenever the real duration of the posting is longer than 24 months, *the host Member State is considered to be the country in which the job is normally conducted*[23].

[20] Indirect expenses are mentioned in the cited document: cost of becoming familiar with administrative requirements and regulations in other Member States, e.g. notification procedures, translation of documents, cooperation with inspection authorities.

[21] *Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services'(COM(2016) 128 final — 2016/0070 (COD))*, pct. 4.1.11. EESC warns that this indirect cross-border labour cost could increase by up to 32%, mentioning the preliminary results of a study on *"Labour cost in cross-border services"*, conducted by Dr. Marek Benio of the Department of Public Economy and Administration of the Krakow University of Economics and presented during the EESC Labour Market Observatory conference entitled "Towards a fairer mobility within the EU" held on 28 September 2016.

[22] *Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work*, JO L 327, 5.12.2008, p. 9-14.

[23] Labour ministers in the European Union arrived on 23 October 2017 at a Council specializing in an agreement on the duration of the posting of workers for a maximum of 12 months (an idea promoted by France), which could be extended for another six months at the request of the company. The new directive will apply from 2021 and does not cover the transport sector, which will be subject to a specific rule. See *http://www.consilium.europa.eu/ro/press/press-releases/2017/10/23-epsco-posting-of-workers/*

The original Directive 96/71/EC does not set any fixed limit and states that for the purpose of the Directive "posted worker" means a worker who, for a limited period, carries his activity in the territory of a Member State other than the State in which he works normally. The limitation introduced by the directive proposal is intended to eliminate situations such as long-term or repeated posting, or even posting, for several years, which are currently common practice.

However, in its opinion, the *European Economic and Social Committee* (point 4.2.5) considers a problem the fact that recital 8 refers to the Rome I Regulation[24] („The employee will in particular enjoy the protection and benefits pursuant to the Rome I Regulation"). In accordance with Article 8 of the Rome I Regulation, the individual employment contract is governed by the law chosen by the parties ("An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3-freedom of choice ". Therefore, a problem of interpretation is arisen, since the passing of a certain term cannot be the basis of the change of law chosen by the parties.

A solution is suggested in the *Opinion of the European Committee of the Regions* that the text of the Directive „should make it clear that it remains possible to agree to apply the law of a country other than the host country under the conditions provided by Article 8 of the Rome I Regulation. It should also be ensured that applying the law of the host country to the employment relationship does not put the employee in a less favourable position, for example because it provides less protection or less favourable terms for employees"[25].

The directive proposal *does not deal with any of the issues covered by Directive 2014/67/EC* on enforcement of Directive 96/71/ EC, which, in initiators view, are complementary and mutually supportive.

However, the implementation of the provisions of Directive 2014/67/EC should be a priority for the institutions concerned which "should assess its impact and determine whether the adopted measures have led to adequate and effective implementation and enforcement, as

[24] *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),* JO L 177, 4.7.2008, p. 109-116.

[25] *Opinion of the European Committee of the Regions – The Revision of the Posting of Workers Directive* (2017/C 185/10), 9.06. 2017, Recommendation for amendment 4.

these are key elements in protecting the rights of posted workers and ensuring a level playing field for service providers". Furthermore, „its next steps should also focus on combating fraudulent practices and eliminating the phenomenon of irregular or undeclared work, primarily in the form of the abuse of letterbox companies"[26].

3. The position of Romania

In the documents submitted during the legislative procedure in March 2016, Romania considered that "the proposed directive in its present form may represent an additional barrier to the free provision of services in the internal market and affect the competitiveness of the European Union as a whole, – in a moment when Europe needs a cohesion of the internal market and the collective strengthening of its economic growth. By adopting current provisions, a significant number of workers in the European Union will remain unemployed with the limitation until the end of the activity of companies currently providing cross-border services (including SMEs), including Member States with high wage levels ". [27]

Romania's point of view is not far from any criticism. Amending the Directive in the form as it was exposed would not constitute an "additional barrier" and would not affect competitiveness but would eliminate the possibility of avoiding speculation of wage differences as a component of it.

It is possible, indeed, that, in the first phase, a number of workers remain unemployed, but it is those jobs in which it is precisely this conduct and not the economic gains.

Romania, like other Member States with comparable levels of development, must focus on the *reconstruction of the internal labour market*, including in terms of wage levels, internal measures (such as

[26] *Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services'(COM(2016) 128 final — 2016/0070 (COD),* pct. 5.1, 5.4.

[27] *Intervention elements within the AOB point for PRES presentation of the negotiations' progress, Employment Council, Social Policy, Health and Consumer Affairs, Brussels, March 3, 2017*, apud Cristian Unteanu, Op.cit.

wage increases already initiated[28]) and should be linked to those at European level that promote *economic convergence* and living standards (as is the case with the proposal to amend the posting directive).

Otherwise, there is a risk of accelerating imbalances, with increasing economic, financial and human resources costs, significantly reducing the benefits of the country's integration into the single European market.

Romania's point of view also draws attention to the risk of "significantly affecting the competitiveness of companies providing transnational services", by increasing labour and information expenditures. This risk has also been recognized by other actors involved in the adoption of the directive, but it may be diminished by the provisions included in it. However, its removal cannot be accepted by affecting the salaries of posted workers.

The Romanian document also had a lexical dissatisfaction, disagreeing with the "widespread use of the term "*social dumping*" when discussing the posting of European workers and the different levels of pay between the Member States." It is considered that "we are in the face of an unfavourable exploitation of economic terms, which ultimately throws a negative light on the social domain." As such, it would be more correct to use the phrase "*pay gap*" to avoid the confusion and negative connotation of the expression "social dumping"[29].

In fact, both terms have their coverage. On the one hand, it is a fact that there is a wage gap between Member States, and on the other hand, this reality is used and speculated generating undesirable economic effects of an economic and social nature, for which the term "social dumping" is suitable.

Later, the President of Romania expressed a more balanced position, pointing out that "European rules were built to facilitate convergence, or, in simpler translation, to facilitate a development that leads us all on the same level of living standards. There are, and it is known, agencies and firms in Europe that exploit precisely the level differences in order gain and, in conclusion, such political discussions that do not help absolutely

[28] *Framework Law no. 153/2017 of 28 June 2017 on the remuneration of staff paid out of public funds*, published in the Official Gazette no. 492 of 28 June 2017.

[29] *Intervention elements within the AOB point for PRES presentation of the negotiations' progress, Employment Council, Social Policy, Health and Consumer Affairs, Brussels, March 3, 2017, apud Cristian Unteanu, Op.cit.*

anyone." On the other hand, "no one wants to remove the competition or the free market, but what is obviously wanted, for example in France, is to avoid using a system that is very open to avoid paying taxes, fees and so on. It is clear that things are not solved simply. It is far from enough to rewrite the directive, even in the improved form. Clearly, there is a need for much more intensive and integrated collaboration between the social systems in all the countries of the European Union "[30].

What is implicit in the position expressed is that the exploitation of social differences (the salary of this legal nature) is capable of *accentuating the differences between Member States* with negative effects on the quality of life and individual status, beyond the objectives assumed at Community level.

4. Conclusions

In our view, the issue of amending the posting directive, paradoxically, makes it possible to take into account the different, sometimes even irreconcilable, reactions of the various European states on the point of becoming aware and acting on the substance in the sense of structuring those economic instruments and normative ones to *accelerate the convergence process* on the various plans.

It is obvious that eastern European countries have had different rhythms in terms of narrowing the gap with the Western European ones, but for some of them, such as Romania, they were dissatisfied.

Reasons are complex, but one of them is precisely social dumping, as a negative phenomenon of the posting of workers. Beyond the effects in developed countries, for the less developed countries this phenomenon, along with others, has acted as a brake on investment and labour market developments.

Speculation of wage differences and tax and social burdens is only a short-term, unsustainable solution to lack of jobs. Over time, the labour market in states massively supplying posting workers is losing its

[30] *Joint Press Conference of the President of Romania, Mr. Klaus Iohannis, with the President of the French Republic, Mr. Emmanuel Macron, 24 August 2017*, http://www.presidency.ro/ro/media/agenda-presedintelui/conferinta-de-presa-comuna-a-presedintelui-romaniei-domnul-klaus-iohannis-cu-presedintele-republicii-franceze-domnul-emmanuel-macron.

dynamism and adequacy to social requirements through lack of investment and adequate labour supply.

It is possible for a number of governments to consider that the mechanism of posting workers is useful as a valve of various pressures on their own labour market. Such an approach is, however, capable of affecting future prospects for development.

The Treaty of Lisbon has stated that the European Union is a "social market economy"[31]. As such, *all regulations must take into account the social dimension* from the point of view of the objectives pursued. That is why we believe that social issues need to be addressed, beyond the economic and financial ones, in terms of the fundamental principles underpinning European construction.

The final form of the proposal for a Directive amending Directive 96/71/EC should therefore be a guideline of these principles contributing to the matching of the European labour market in line with the fundamental interests of all Member States.

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[31] Article 3 (3) of the Treaty on European Union.

Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM/2016/0128 final – 2016/070 (COD).

ARGUMENT IN FAVOUR OF IDENTIFYING THE RIGHT TO TRUTH AS AN AUTONOMOUS PREROGATIVE WITHIN THE GENERAL THEORY OF HUMAN RIGHTS

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ABSTRACT

The modern perspective upon human rights advances the matter of community-individual interaction thus mainly underlining the implications of the collective dimension in regard to ensuring individual prerogatives. By means of tradition, the general theory of human rights presents the truth as the scope of fair judgement hence associating the concept of truth rather to the framework of State obligations than to the field of individual prerogatives. The experiences of modern society (from authoritative government to human rights violations undertaken within the socio-juridical paradigm dictated by authoritative governments as enforced disappearances and other crimes against humanity) highlight the necessity of construing the truth from an individual perspective as an individual right that springs from the correlation of other individual prerogatives – that benefit, at present, of juridical acknowledgement within regional systems of human rights protection.

The present paper advances the scientifical objective of observing the peculiarity of guaranteeing the individual right of discovering the truth in relation to the fate of victims of authoritative governments' abuse by relation to the main juridical instruments of the European, African, Inter-American systems of human rights protection.

KEYWORDS: *human rights, the right to truth, enforced disappearances, authoritative government*

The philosophical-juridical difficulty of conceptualizing the truth

The discovery of truth represents, in relation to any juridical case, the primary objective from which several issues may derive. The objective of disclosing the truth involves problems of conceptualization and identification. The chosen paradigm and its *modus operandi* serve the notion of *polyvalent truth* – that includes various dimensions and identifies, in return, the cause of its germination.

First, disclosing the truth is confused with a problem circumscribed to the philosophical paradigm within which we simultaneously report the

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internal and the *external dimension of facts.* [1] The first dimension implies the identification of facts that are true according to the individual's conscience and according to the manner in which he understands the logical concatenation of the analysed events. Also, the internal dimension implies accessing the truth inclusively through the emotional state of the subject that interacts with the environment. The external dimension evokes an objective truth – composed of the facts independently developed by comparison to the manner in which the individual perceives them and also independently from the fact that the subject may or may not be the witness of the analysed events. The internal dimension places the truth in relation to the individual's inner perception regarding the facts and the latter cannot objectively exist outside the cognitive sphere of the individual; on the other hand, the objective dimension attests that truth may be identified apart from the perception and the rationale of the individual, thus being absolute.

Secondly, juridical sciences conceptualize the truth by means of a hybrid structure resulted from the two philosophical dimensions previously presented.

The interest of the judge consists in disclosing the objective truth nevertheless, having this objective in mind, the judge evaluates the activity of the human factor through specific means (the hearing of witnesses, the analyse of the documents brought by the parties, etc.). The juridical truth is, by consequence, a more intricate objective than the philosophical truth or the pure juridical truth because it is found at the interaction between social facts, the rule of law and the perception of the individual that is involved within the evaluated activity.

We retain the fact that juridical truth may reveal different understandings based on the *type of court to which we refer.* In this sense, doctrinaire studies[2] discriminate between *the truth resulted by means of administrating evidence before a court of justice (juridical truth)* and the truth pursued by specialized mechanisms, with cvasi-juridical profile known as the tribunals (commissions) of truth. Truth tribunals will refer

[1] For further details, see Maurizio Ferraris, *"Happiness is overrated : It's better to be right." On truth as emergence,* Geneva University, online lecture, p. 63-72.

[2] Kevin Avruch, *Truth and Reconciliation Commissions : Problems in Transitional Justice and the Reconstruction of Identity,* Transcultural Psychiatry Journal, Vol. 47, Issue 1, p. 33-49.

to specific categories of truth that, through correlation, may serve to reaveal juridical truth: *narrative (subjective) truth* – that consists of personal testimonies regarding the aspects in question; *intersubjective truth* – resulted from the collective perception upon the aspects in question and *restoration truth*-whose objective resides in ensuring social reconciliation through the correlation of all obtained data.[3]

The complexity of juridical truth determines *qualification* dilemmas in regard to *its nature, character and sphere of action.* With regard to qualifying the juridical nature of truth, the dilemma exists in relation to the possibility of certain affirmation, within the sphere of international law, of *the right to truth.* If within the philosophical sphere the truth may be observed as the objective of the individual which results from his desire to rationalize the events of his own existence, in the juridical sphere can-we affirm that *the main objective of courts of justice –that of establishing the truth- corresponds to the right of the individual of finding the truth?* In the case of an affirmative answer, *is the nature of the right to truth exclusively circumscribed to the individual* or *the right to truth has by default a collective dimension, aiming to clarifying past events for the benefit of the entire membership community of the individual?* The recognition of the dual character (both individual and collective) of the right to truth leads to enclosing some additional features within its sphere of action (the reconciliation between the victim and the perpetrator or social reconstruction).

Sectorial analysis of legal and case-law foundations of an autonomous right to truth

Before proceeding to the scientific demonstration of the juridical right to truth, we deem as necessary the establishment of several defining social-juridical benchmarks. The right to truth is a juridical prerogative that emerges on the foundation of direct violations of human rights perpetrated during authoritarian governments. Within the given context, the right to truth is identified with the right of family members to be informed in regard to the fate of those who disappeared in the aftermaths of the abuses committed by the authorities of totalitarian

[3] *Ibidem*.

regimes. Likewise, the right to truth exists within the coordinates of international humanitarian law, thus being introduced as the prerogative of family members to find out information concerning the persons that were missing during armed conflict. By correlating both previously stated thesis, we observe that the connection that characterizes the right to truth consists *in the right of family members to have access to information concerning individuals that have disappeared* (in armed conflicts or on account of the abuses committed by authoritarian regimes). In the given coordinates, *the right to truth* coincides with *the right of knowing (having access to information)*. Following this rationale, it becomes clear the fact that *the right to truth* relates to both the family and the extended community because the fulfilment of the given right (the access to information) produces repercussions at the community-scale, thus informing the public opinion regarding the information in the field of human right abuse and constituting the premises of officially rending responsible the perpetrators and preventing abuses. In the following lines we will develop the legal and jurisprudential aspects connected to guaranteeing the right to truth.

Within juridical sciences, the qualification of truth as *an autonomous right* represents an argumentation endeavour founded upon two essential aspects: (1) consecrating truth as an independent right through juridical documents and (2) the recognition of *the right to truth* by means of case-law.[4]

In expresis the right to truth is mentioned in article 24, paragraph 2 of the International Convention for the Protection of All Persons from Enforced Disappearances[5] being underlined the relation between *the right of the victims of enforced disappearances* and *States' obligation to adopt suitable measures in counteracting enforced disappearances: Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and*

[4] To be consulted the opinion of professor Meron apud Yasmin Naqvi, *The right to the truth in international law: fact or fiction?* International Review of the Red Cross, Volume 88, No. 862, 2006, p. 254.

[5] Adopted on 20 December 2006 at New York and entered into force at 23 December 2010 according to the dispositions of article article 39, paragraph 1, which reads : *this Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.*

the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

In a peculiar wording, the ensuring of the right to truth is achieved in the First Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts. In article 32 of the previously cited document, the right to truth is identified under the wording the *right of families to know the fate of their relatives*- subsuming this prerogative to the norms consecrated in Additional Protocol I in favour of disappeared and deceased individuals.

The previously cited documents were invoked in the preamble of the Resolution of United Nations General Assembly regarding the *right to truth*[6] as juridical foundations that are intended to ensure the prerequisites of the official recognition of the right to truth. The resolution consecrates the importance of the juridical recognition of the right to truth and also the importance of the juridical recognition of the role of autonomous specialized structures (commissions/tribunals of truth) in establishing the right to truth in cases regarding violations of human rights. By comparatively analysing the manner of setting regulations by the International Convention for the Protection of All Persons from Enforced Disappearances, respectively the regulation manner of the First Additional Protocol to the Geneva Conventions in the field of guaranteeing the right to truth, we observe that both juridical instruments relate the right to truth to the circumstance of *disappeared individuals.* In its turn, the circumstance of disappeared individuals implies certain nuances as we refer to the International Convention or to the Additional Protocol. The first legal instrument refers to *enforced disappearances,* and the right to truth is embodied, as mentioned in the preamble, in the victim's prerogative to discover the circumstances in which enforced disappearances occurred, to discover the fate of those who disappeared and the freedom to seek and to find the information that will endorse the achievement of this objective. Article 2 of the Convention defines *enforced disappearances* as *the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of*

[6] The Resolution of the General Assembly no. 2595 XL-O/10 adopted within the Fourth Plenary Session undertaken on 8 of June 2010.

liberty or by concealment of the fate or whereabouts of the disappeared person (...). In addition, article 5 of the Convention underlines the possibility of converting enforced disappearances in *crimes against humanity* if they represent widespread and systematic practices.

The peculiarity of defining the right to truth in the field of international law of human rights resides in the circumstance of *enforced disappearances perpetrated within a complex social context that allows the coexistence of peace and authoritative government which enables the violation of human rights.* On the other hand, Additional Protocol I to the Geneva Conventions mentions in article 32 the right of the families to know the fate of their relatives and article 33 describes the procedure of cooperation between conflicting powers to the aim of facilitating the identification of missing persons in conditions of armed conflict.

In both juridical instruments previously described, the right to truth presents a dual structure, enshrining in its content, on one hand, *an emotional dimension* – that allows family members of the missing person to acknowledge and to accept their personal lost and *a material dimension* – which consists of the actual information accessed by the persons who look for their family members. The material dimension is concrete in the moment of identifying and punishing perpetrators which usually coincides with obtaining clear information in concern to the fate of missing persons. Doctrinaire studies[7] resemble the right to truth to *the right to an effective remedy* underlining in this sense both dimensions contained within the right to truth – the emotional dimension (the effective remedy consists in the information obtained by the family of the victim) and the material dimension (the compensation offered to family members for the moral and material damages they suffered).

Likewise, in both legal instruments subjected to analysis, the right to truth is stated in correlation to *the obligations of State or the obligations of States' agents to ensure all the practical guarantees in order to access factual information regarding those individuals subjected to disappearances (enforced).* The provisions of the International Convention for the Protection of All Persons from Enforced Disappearances regulates in a detailed manner States obligation in obtaining the right to truth,

[7] Brianne McGonigle Leyh, *The right to truth in international criminal proceedings: An indeterminate concept from human rights law,* chapter published in *The realisation of human rights: when theory meets practice,* Cambridge Press, 2014, p. 1-22.

consecrating, *inter alia,* the following : (1) the State obligation to take appropriate measures to investigate acts of enforced disappearances committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice (article 3); (2) the obligation of State-parties to the Convention to take the necessary measures to ensure that enforced disappearance constitute an offence under their criminal law (article 4); (3) the State obligation to adopt all necessary measures to held criminally responsible the persons involved in committing enforced disappearances (article 6); (4) the obligation of the State to establish a special system for punishing enforced disappearances (article 7).

In regional law systems (European, African, Inter-American), the recognition of the right to truth by means of an autonomous text enshrined in representative conventions at the regional level has constituted an authentic *juridical insufficiency*. The European Convention on Human Rights and Fundamental Freedoms[8] does not contain express references to the right to truth but, having the international pattern adopted through the International Convention, we can deduce through the interpretative method the juridical existence of right to truth in the content of this instrument by correlating the provisions of article 8 – the right to respect for private and family life and the provisions of article 6 – the right to a fair trial. The justification of the connection between the two categories of rights results from the following rationale : if the right to truth is dependent on the circumstance of enforced disappearance of individuals and of the prerogative of family members of finding information relating to the fate of those disappeared, then the right to respect for private and family life may serve as a juridical argument for the request by family members of information referring to those disappeared and the access to information will be founded on the right to a fair trial.

In the same token, the African system of human rights protection- founded upon the African Charter on Human and Peoples' Rights[9]- does not contain express references concerning the right to truth. The protection of the right to truth may be extracted by interpretative means,

[8] Drafted in 1950 under the aegis of the Council of Europe entered in force on 3rd 1953.

[9] Adopted on 27 June 1981 at Banjul, Gambia, entered in force on 21 October 1986.

by correlating articles 7- the right to a fair trial and article 9 – the right of receiving information and freedom of expression. In the given context, we deem that the right to truth is identified in the legal hypothesis evoked by article 7, paragraph 1, letter *a* that establishes the fact that the right of the individual to have his cause heard comprises the right of the individual to *appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.* Article 9, paragraph 1 prescribes the right of the individual to receive information. Both prerogatives may be applied to the family members of disappeared persons, thus re-making the content of the right to truth as it was regulated in the International Convention for the Protection of All Persons from Enforced Disappearances.

In the inter-American system of human rights protection, the right to truth is founded upon the right to an effective remedy by means of corroborating articles 8 and 25 of the American Convention on Human Rights[10] that regulates the right to a fair trial and the right to juridical protection. In relation to this observation, doctrinaire studies[11] advance the understanding of the right to truth as the result of the interaction between the content of the right to a fair trial and the right to juridical protection, the content of the right to truth exceeding the simple obligation of researching and of clearly establishing the facts that may be attached to public authorities. By consequence, the right to truth implies both the prerogative of every individual of being considered not guilty until proven otherwise, the right to benefit of a correct judgement issued by an impartial and an independent body, legally established (the conditions of a fair trial) and the possibility of accessing and of exerting effective legal remedies ensured through law in favour of the victims of human rights' violation.

The legal recognition *in expresis* of the right to truth is restricted by the provisions of the International Convention for the Protection of All Persons from Enforced Disappearances. Within case-law, the right to truth has extensive recognition, being brought in its favour several

[10] Adopted at San Jose, Costa Rica, on 22 November1969, entered in force on 19 July 1978.

[11] Thomas Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, Michigan Journal of International Law, Volume 23, 2002, p. 986.

interpretations that allow the approach between the right to truth and other juridical prerogatives that are already certified (the publicity and transparency of the procedures, the public recognition of human rights violations perpetrated by authoritative governments). The contributions of the Inter-American Court of Human Rights in the process of determining the content of the right to truth are observed on account of social-cultural circumstances that upheld the dissemination and the sustentation of authoritative governments that violate human rights. Doctrinaire studies have selected[12] the main standards established by the Inter-American Court of Human Rights within the content of the right to truth: (1) the State's obligation to offer information to family members upon the circumstances in which the crimes occurred; (2) the dissemination of the results of investigations with the purpose of developing the conscience of truth at the social level; (3) the interdiction of granting amnesty in favour of the perpetrators of human rights crimes.

The evolution of the content of the right to truth within the inter-American system of human rights protection is obvious if we relate the previous interpretation of the inter-American Court of Human Rights to the first understandings of the right to truth presented by the inter-American Commission of Human Rights. The latter underlines the collective dimension of the right to truth and, implicitly, its repercussions upon public policies. In this sense, doctrinaire studies[13] noted the transformation of the right to truth achieved by means of the interpretations advanced by the inter-American Commission of Human Rights : starting from *the right of knowing the truth regarding the facts, the motifs and the circumstances that have determined violations of human rights* to *the right of knowing the full, complete and official truth concerning the facts, the peculiar circumstances and the persons who participated in committing those crimes.* The conclusion reached by the inter-American Commission of Human Rights in the *case of Ignacio Ellacuria*[14] refers to

[12] Eduardo Gonzalez, Howard Varney, *En busca de la verdad : Elementos para la creacion de una comision de la verdad eficaz,* Informe, 2013, Capitulo 1 – *El derecho a la verdad,* p. 9.

[13] Comision Colombiana de Juristas, *Derecho a la Verdad y Derecho Internacional,* Bogota, 2012, p. 35.

[14] Informe No. 136/99, de 22 de diciembre de 1999, *Caso Ignacio Ellacuría y otros c. El Salvador*, paragraf 221, apud Comision Colombiana de Juristas, *Derecho a la Verdad y Derecho Internacional,* Bogota, 2012, p. 35.

the recognition of the relation between the *right to truth*, the *right to a fair trial* respectively *the right to an effective legal remedy* mentioned in articles 8 and 25 of the American Convention on Human Rights. In other words, the Commission admitted the complex character of the right to truth, thereby establishing within its content the right of *knowing all the facts that constitute violations of human rights* and also the right of *identifying perpetrators.* The merit of the Commission does not resume to observing the complex character of the right to truth but it extends to correlating the components of the right to truth (we refer to the right to a fair trial and also to the right to juridical protection) with the homologated obligations of public authorities. Likewise, in the commentaries in the *Ellacuria* case, the inter-American Commission advances the idea according to which *the right to truth constitutes the necessary element of a democratic society, enshrining both a collective (public) dimension by enhancing the action of State institutions and a peculiar (individual) dimension by offering a concrete remedy to the family members of the victims.*[15]

The application of the pluridisciplinary dimension of the right to truth in the context of the activity of truth tribunals

The right to truth corresponds to the obligation of the State to ensure, by means of its authorities, the necessary means of finding information concerning *violations of human rights committed during authoritative regimes and/or during armed conflicts* and also information *concerning the perpetrators of those violations.* From this fact derives the idea according to which *the right to truth* represents the essential legal prerequisite for *achieving justice.* From a procedural point of view, *the achievement of justice by means of truth revealing* represents the objective circumscribed to courts of justice; nevertheless, the approach of truth in all its depictions constitutes the objective of specialized courts of justice, denominated in doctrinaire studies as *truth commissions/tribunals*. The rationale of truth tribunals cannot be exclusively referred to the purpose of decomposing truth in its multiple depictions (we mainly relate to factual truth, personal-narrative, philosophical truth) although

[15] *Ibidem.*

this purpose is pursued with priority. Thus, truth commissions pursue the reconciliation between individuals whose rights have been violated during authoritative governments and perpetrators by means of promoting an adequate framework within which will be discovered and promoted the truth in connection to the acts of human rights violations. In the context offered by truth commissions, the truth is re-defined as a consequence of personal exposures of victims, of their family members and of perpetrators with the scope of achieving *restorative justice.*[16] The latter differs from *retributive* justice because its scope exceeds the fair resolution of facts, thus extending to the re-establishment of social harmony.[17] The re-establishment of social harmony is a complex matter that simultaneously regards both the perpetrator and the victim. On one hand, the victim would be assisted by the community and helped to overcome the trauma determined by the violations of human rights to which the victim was subjected; on the other hand, the perpetrator will be concealed in the sense of acknowledging the unlawful and inhuman character of his acts thus being guided towards the path of rehabilitation.[18] Hereby, doctrinaire studies[19] underlined the difference between *the narrow truth* (regarding the fact of discovering the perpetrators and their criminal liability as a consequent of violating human rights) obtained by courts of justice and *the complex truth* (structural truth-that includes the victim's perspective and also the perspective of the victim's family members with regard to the victim's suffering) derived from the activity of truth commissions. The latter is independent from the activity of courts of justice nevertheless it can serve as a complementary source of information as long as the activity of truth commissions precedes the activity of courts of justice. The relation between truth commissions and

[16] To be consulted Association for the Prevention of Torture, *Truth Commissions Can they prevent further violations?, Executive summaries of relevant papers,* Geneva, p. 8-10.

[17] For further details regarding the features of restaurative justice and the features of the communities to which this type of justice applies, to be consulted Cody Corliss, *Truth Commissions and the Limits of Restaurative Justice : Lessons Learned in South Africa's Cradock Four Case,* Michigan State International Law Review, Volume 21, 2013, p. 280-281.

[18] *Ibidem.*

[19] Sam Szoke-Burke, *Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies*, Berkeley Journal of International Law, Vol. 33, Issue 2, 2015, p. 555-557.

international jurisdiction (the International Criminal Court) was characterized by doctrinaire studies[20] through complementarity.

Complementarity upholds the *autonomy* characteristic of truth commissions, by specifying the fact that international courts cannot intercede in State activity unless there are certain facts according to which national authorities are genuine reluctant in regard to violations of human rights. Article 17, paragraph 1, letter *a* of the Statute of the International Criminal Court of Justice[21] invokes (as was remarked in doctrinaire studies) the genuine unwillingness of States in the process of investigating human rights violations as an exception from the rule according to which if a State has jurisdiction upon a cause, it will be investigated by the State in question. In other words, by derogation from the principle of national jurisdiction, the international criminal justice may intercede only if national authorities are not competent/capable to solve the conflict.

The preservation of the independence of truth commissions by reference to the activity of national/international courts of justice is a fact that is justified by means of the *peculiarities* of truth commissions. Truth commissions represent, from our point of view, entities that express a profound *symbolism* due to their *transitional* character. The latter is in strict connection to promoting restorative justice so that both have the scope of ensuring the transition from an authoritative government to a democratic government by exposing the violations of human rights committed by authoritative regimes so that such violations would not repeat and would allow the establishment of democratic government – oriented towards the protection of human rights and of the rule of law. Truth commissions are *symbolic courts* because they do not constitute condemnation mechanisms and their activity is centred on the re-actualization of some grave violations of human rights that have impacted collective conscience. The reiteration of facts that have constituted violations of human rights (usually is the case of genocide and

[20] Yav Katshung Joseph, *The Relationship Between The International Criminal Court And Truth Commissions* : *Some Toughts On How To Build A Bridge Across Retributive And Restorative Justices,* 2005, Transitional Justice and Human Security Conference organised at the Lord Charles Hotel /Cape Town/South Africa (28 March-1 April 2005) by the International Center for Transitional Justice and sponsored by the Japan International Cooperation Agency (JICA)/Japanese Government, p. 1-28.

[21] The Statute of the International Criminal Court, adopted at Rome on 17 July 1998, entered into force at 1st of July 2002.

crimes against humanity) and that determined the forced disappearances of victims have the symbolic value of bringing into the public eyes the abhorrence of past rulings with the scope of rendering responsible the government authorities of the new regime in the sense of preventing and counteracting any form of human rights violations which may occur at present. Also, the symbolism that sheers from the activity of truth commissions results through the fact that *truth commissions bring into present facts from the past with the aim of building in the future a democratic society that is accountable for the field of human rights.* In the same token, the identification of perpetrators and their criminal liability has an informative-exhibiting role and not a punitive role.

Due to their comprehensive vocation by reference to courts of justice, truth commissions represent a peculiar pattern, being characterized in doctrinaire studies[22] as *entities that are established on an official, temporary and non-judicial manner* producing a non-binding result. By means of exception, in Sierra Leone and in El Salvador, truth commissions have been authorized to issue recommendations with binding power, the government endorsing their fulfilment. The mentioned cases have exceptional and isolated character, bringing into discussion *the legitimacy of truth commissions of interfering with the activity of legislative and/or executive power.* By definition, truth commissions have the activity -objective of discovering truth in its multiple depictions, without underlining judicial truth and, by consequence, truth commissions do not have the possibility of solving the conflict by issuing mandatory decisions. Thus, is justified the rule *of the non-binding character of acts emerging from the activity of truth commissions.* Furthermore, in order to be functional, truth commissions fulfil some procedural and substantial requests as follow : (1) the object of research of truth commissions must be reported to *past facts that consists in human rights violations;* (2) the conflict referring to human rights violations must be concluded until the date of establishing truth commissions; (3) the establishment of truth commissions results from the agreement between government and civil society – *agreement that is dictated by the interest of one of the survivors/family members of the*

[22] Office of the United Nations High Commissioner For Human Rights, *Rule-of-law tools for post-conflict States. Truth Commissions,* United Nations, 2006, p. 2.

survivors and by *the governmental endorsement granted in favour of the good organization of truth commissions*.[23]

A possible scenario of applying the transitional justice of truth tribunals to the Syrian conflict

In Syria, the need of achieving transitional justice is pronounced given the deep humanitarian character of the ongoing crisis. [24] Conciliation and social harmonization are two different objectives that can be achieved if the problems connected to the human factor would be simultaneously pursued on two distinct spheres : (1) the needs (of sanitary, economic, juridical assistance) of the victims that remained in Syria and the needs (of social reintegration) of victims that have left Syria during the conflict; (2) the requests of perpetrators – who desire to participate to social reconstruction only as long as it is ensured their impunity for the facts committed during the ongoing conflict. For achieving restorative justice by means of truth commissions, we must consider some political coordinates : (1) the annulment of martial law; (2) the affirmation of the desire, coming from the local political class, of achieving a democratic government; (3) obtaining an agreement between government authorities and the social class that would express the desire of collaborating with the purpose of finding the truth referring to the violation of human rights committed during armed conflict and also with the purpose of granting reparations to victims.

The coexistence of impunity with the activity of truth commissions in the context of establishing potential scenarios of obtaining transitional justice in Syria represents a peculiar juridical problem. The condition according to which perpetrators are ought to be exempted for the violation of human rights committed during Syrian armed conflict brings into discussion the legitimacy of truth commissions. Are truth commissions a viable alternative for ensuring the transition towards a democratic juridical system if the testimonies of perpetrators and their cooperation with the victims of armed conflict are obtained through promises of adopting several amnesty laws that are ought to favour them?

[23] *Ibidem.*

[24] For further references, please see Paul Seils, *Towards a Transitional Justice Strategy for Syria*, ICTJ Justice, Truth, Dignity, September 2013, p. 1-6.

Amnesty is one of the elements that are sensible to evaluation within the (theoretical!) process connected to the possibility of implementing mechanisms of transitional justice in Syria. Doctrinaire studies[25] have underlined the fact that, from a psychological point of view, the adoption, at the national level, in the context of solving the Syrian conflict, of an amnesty law in favour of perpetrators of crimes in the field of human rights constitutes an advantage for perpetrators; the latter would be willing to offer information to truth commissions regarding human rights violations if they would be granted security on three levels: social, economic, juridical.[26]

The evaluation of the compatibility level between the legitimacy of truth commissions and the adoption of amnesty laws in favour of those liable for violations in the field of human rights would be different according to national peculiarities. *Exempli gratia,* in South Africa the adoption of amnesty laws regarding acts committed during the apartheid period has led to the exoneration of criminal liability of a significant group of perpetrators, remaining, at the same time, outside the provisions of the amnesty law, a category of perpetrators that would be investigated according to the norms of the National Authority of Investigation.[27] In South Africa, the provisions concerning the amnesty of facts committed by military officials/politicians during the apartheid period are comprised in Chapter 4-*Mechanisms and Procedures of Amnesty, Sections 16-22* of the *Act for Promoting National Unity and Reconciliation no. 34/1995*[28]. In the post-apartheid period, the segregation act was applied to the individuals that were the beneficiaries of amnesty and to those individuals that were not beneficiaries of amnesty as the study of the legal provisions in the matter leads us to the following conclusions : (1) amnesty may be granted at the request of the interested party, by consequence of the evaluation undertaken by the Amnesty Committee; (2) formulating the amnesty request is conditioned by respecting a 12 month term that elapses from the date of mentioning the members of the

[25] Arab Reform Initiative, Syria Papers, *Criteria and Mechanisms of Accountability for Syria. Conference Report,* April 2014, p. 1-11.

[26] Arab Reform Initiative, Syria Papers, *op. cit.,* April 2014, p. 3.

[27] Bogdan Ivanisevic, *Comparative Study on the Impact of Truth Commissions*, International Center for Transitional Justice, 2009, p. 20.

[28] The act was adopted on 19 July 1995 and entered into force on 1 December 1995.

Truth Commission in the South-African Official Gazette; (3) amnesty may be requested by reference to the acts that are connected to achieving political objectives and that must fulfil the requirements mentioned in sections 19-21. In other words, amnesty selection is conditioned by the fulfilment of legal formalities so that the individuals that have not fulfilled the requirements have been taken within the jurisdiction of the National Investigation Authority.

Re-addressing the Syrian situation, we feel that the establishment of a truth commission in the hypothesis of ending the conflict will not presuppose the adoption of an amnesty law that would favour the perpetrators of human rights violations. It is necessary to take into consideration the fact that human rights violations in Syria were committed by 3 different forces: Daesh, governmental forces and rebel forces so that the number and the gravity of human rights violations reach a higher level by relation to other historical conflicts. At the same time, crimes against humanity have a peculiar status within international law, thus crimes against humanity are being included within the *category of crimes against the common value of jus cogens.*[29] The definition of crimes against humanity – as was depicted in the content of the Statute of the International Criminal Court, article 7, paragraph 2, letter *i*, – mentions as a form of manifestation, *enforced disappearances.* We reiterate the fact that enforced disappearances were the main reference that configured the legal consecration of the right to truth. In these conditions, the establishment of a truth commission is a plausible solution as long as it does not require the adoption of an amnesty law.

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[29] Dawlaty Organization, *Transitional Justice in Syria,* p. 30-31.

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EFFECTS OF THE CONSTITUTIONAL COURT OF ROMANIA DECISION NO. 264/2017 ON THE UNCONSTITUTIONALITY OF THE PHRASE "IN CASE OF COHABITATION" IN ART. 5 LET. C) OF LAW NO. 217/2003

Rodica BURDUŞEL *

ABSTRACT

The Constitutional Court of Romania (CCR) clarified the meaning of the phrase "in case of cohabitation" by checking the constitutionality of art. 5 lit. c) of Law no. 217/2003 on the way of the exception of unconstitutionality, the control ending with the admission of the exception, and finding the unconstitutionality of the phrase and publishing Decision no. 264/2017 in the Official Gazette of Romania.

Given that the decisions of the Constitutional Court take effect erga omnes and not only inter partes, we are following in the present study whether the articles of the Penal Code containing the concept of family member in the meaning of persons who have established relations similar to those of spouses will be affected, such as art. 5 let. c) of Law no. 217/2003, declaring the unconstitutionality of the phrase "in case of cohabitation".

KEYWORDS: *family member, cohabiting, unconstitutionality, legal effects*

1. Introduction

As of March 25, 2016, a new international act complements the legislation on combating family violence.

This refers to the Council of Europe *Convention of 11 May 2011 on Preventing and Combating Violence Against Women and Domestic Violence*, also known as the Istanbul Convention, named after the locality in which it was adopted[1].

The Convention encompasses the broadest approach to the most serious human rights violation – violence – in any form whatsoever, so

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[1] The Convention was ratified by Romania through Law no. 30/2016, published in the Official Gazette of Romania, Part I, no. 224 of March 25, 2016.

that no human being, vulnerable by its very nature, will remain outside protection.

To this end, the Convention also seeks to protect people living in other forms of cohabitation than the legal ones (husband, wife) irrespective of whether or not they live together.

This reference concerns concubines who must have the same rights as ascendants, descendants, brothers and sisters, their children, and the persons who have become such relatives by adoption. They must be protected from their right to life, physical integrity, health as individuals, and not as concubines.

The Istanbul Convention is among the considerations of the CCR Decision no. 246/2017, the effects of which we will continue to follow, in which it was found that the way in which art. 5 of the Law no. 217/2003 on the prevention and combating of domestic violence, the family member, referring to persons who have established similar relations with those spouses, violates their fundamental rights and at the same time discriminates them in relation to traditional family members.

2. CCR Decision no. 264/2017[2] – presentation

The issuing of the protection order may be requested by the civil court only by the family member whose life, physical or mental integrity or freedom are endangered by acts of violence committed by another family member, as provided by art. 23 of Law no. 217/2003[3].

According to the definition of family member in art. 5 let. c), the victim of domestic violence may be "the person who has established similar relations with those of spouses if they live together".

The final condition, "in case of cohabitation", was the object of the exception of unconstitutionality in a case in which the petitioner was denied the request to issue the protection order for failing to meet this requirement at the time of requesting the protection order, the petitioner having ceased cohabitation with the other part for 4 months.

In justifying the exception, the petitioner considered that the provisions of Art. 5 lit. c) of Law no. 217/2003, in the sense of the phrase

[2] Published in the Official Gazette of Romania, Part I, no. 468 of 22 June 2017.

[3] Republished with amendments and additions in the Official Gazette of Romania, Part I, no. 205 of March 24, 2014.

"in case of cohabitation", violates art. 1 par. 3 on the rule of law, art. 16 par. 1 on the principle of equality before the law, art. 22 on the right to life and to physical and mental integrity and art. 26 on the intimate, family and private life of the Constitution.

In connection with this phrase, a non-unitary practice has been formed in the sense that some courts have considered that "in order for a protection order to be issued, together with the fulfilment of the other conditions provided by the law, the persons having established similar relations to those of spouses or of parents and children must cohabit at the time of filing the application for the protection order."

The same view was expressed by the Public Ministry: „The cohabitation of the persons involved in the act of violence must be present at the time of requesting the protection order, otherwise it is not justified to request this procedure, which does not prevent the victim from addressing the protection of rights through other ways to the courts".

Likewise, in the Government view, „The existence of the condition of admissibility between the fact of cohabitation and the moment of filing the petition (in view of the urgency of the issuing of the protection order involves the passage of the shortest time between the moment of aggression and the introduction of the application by the victim) finds its reason in the fact that the cessation of cohabitation and the passage of a long period of time from the exertion of violence no longer justifies the application of the provisions of the special law on the combating of domestic violence, proceeding with the use of general law. The cohabitation of the persons involved in the act of violence must be present at the moment of requesting the protection order, otherwise it is not justified to issue it urgently, the victim having access to other legal ways of obtaining reparations or cessation of the violence exercised. "

Other courts considered that "in order for a protection order to be issued, together with the fulfilment of the other conditions laid down by law, the persons who have established similar relations to those of spouses or similar to those between parents and children must have cohabited, but not necessarily, at the moment of submitting the application for the issuing of the protection order ".

The Constitutional Court admits the exception of unconstitutionality and decides that "the phrase "in case of cohabitation" from the provisions of art. 5 let. c) of Law no. 217/2003 violates the constitutional provisions

of art. 1 par. (3) on the rule of law, art. 22 on the right to life and physical and mental integrity and art. 26 on intimate and private life. "

In so doing, the Court held that "the requirement of coexistence imposed by the provisions of Art. 5 lit. c) of Law no. No 217/2003 to persons who have established relationships similar to those of the spouses or between parents and children in order to issue a protection order is *unreasonable* as it may lead to the inadmissibility of the application for the issuing of the protection order even if there is an established exercise of the an act of violence endangering life, physical or mental integrity, or the freedom of the victim, and even if it demonstrates before the court that similar relationships have been established between the parties to those between spouses or between parents and children. Thus, this conditioning imposed by the criticized law contravenes the very purpose for which Law no. 25/2012, introducing the new concept of family member, namely the creation of an effective civil legal instrument for preventing and combating domestic violence – the protection order (...) ".

3. The extent of the effects of Decision no. 264/2017

The finding by the Constitutional Court, by way of the exception of unconstitutionality, of the unconstitutionality of the phrase "in case of cohabitation" in art. 5 lit. c) of Law no. 217/2003, as set out in the Decision no. 264/2017, is followed by the publication of the Decision in the Official Gazette of Romania, so that its legal effects begin to occur.

As the issue of unconstitutionality was raised in the context of a concrete civil action concerning the request for the issuing of the protection order by the applicant-victim of domestic violence, Decision no. 264/2017 will necessarily produce the *inter partes* effects, through which the court, to which the decision was notified by the CCR, will settle the civil case.

Also, Decision no. 264/2017 will be invoked and will have its effects in all civil cases seeking protection, not only in the case of the exception of unconstitutionality, since the requirement that concubine persons live together in the same family, at the time of requesting the protection order, was declared unconstitutional.

The same Decision no. 264/2017 will produce legal effects in all situations related to the family member in the meaning of persons who have established relations between them similar to those of spouses of art. 5 let. c) of Law no. 217/2003, unless there are other derogatory legal provisions.

The possibility of effects Decision no. 264/2017 to occur also in cases other than the one in which the incident is directly and compulsorily incidental, it is permitted by the provision in Art. 147 par. 4 of the Constitution, according to which "from the date of publication decisions are generally binding and have power only for the future" and from which it follows that definitive constitutional decisions always produce *erga omnes* effects.

It is known that the legislator whenever he defines a concept mentions that he will have a certain meaning in the sense of the law in which he is defined[4].

The concept of a family member is also present in the *Criminal Code,* and the concept is specific to the purpose of this law, namely to protect the family member, the passive subject of the offenses provided in the Code.

Thus, in the Criminal Code, the concept of family member is defined in art. 177, identical to a point, with the same concept defined in art. 5 let. a-c) of Law no. 217/2003, but this Law extends the concept to other categories of people who are considered to be family members, the two concepts, finally, differentiating[5].

[4] Art. 5 of Law no. 217/2003. In the sense of the present law, by family member we understand:

a) the ascendants and descendants, brothers and sisters or their children, as well as the persons who by adoption became such relatives;

b) the husband/wife and/or the ex-husband/ex-wife

c) those who have established a relation similar to those between spouses or between parents and children, if they cohabit;

d) The tutor or other person exerting, *de facto* or *de jure*, the rights in the name of the child;

e) The legal representative or other person who cares for the person mentally ill, with intellectual disability or physical handicap, except those who perform these as professional duties.

[5] Art. 177 Family member in the penal code

(1) Through *„family member"* we understand:

a) the ascendants and descendants, brothers and sisters or their children, as well as the persons who by adoption became such relatives;

In this situation, the question arises whether Decision no. 264/2017 will also produce legal effects in the Criminal Code by removing the condition "in case of cohabitation" in Art. 177 lit. c) as a result of its declaration as unconstitutional by the aforementioned decision.

We consider that if the status of a family member of this category of persons is also defined in another law, such as the Criminal Code, but its object of regulation is not in reference to the object and purpose of the Law no. 217/2003, then the definition of the family member will not be affected by the modifying effects of Decision no. 264/2017.

Otherwise, if such a law, which may also be the Penal Code, has a common object and purpose with those of Law no. 217/2003, then Decision no. 264/2017 will produce legal effects and art. 177 lit. c) will be modified in the sense of constitutional decision.

Although the new Criminal Code no longer mentions in a distinct text such as the precedent of the Criminal Code, the purpose of the criminal law, it is easy to observe, especially from Chapter I called *Crimes against the person*, that it protects the fundamental attributes of the individual against all forms of violence, including domestic violence, which allows us to notice that the two laws have common goals.

In the Criminal Code, the concept of family member is present, besides art. 177 where it is also defined in other normative texts, in which the legislator assigned different roles.

We identified in the special part of the Criminal Code a number of 10 norms in the content of which the concept of family member is mentioned: art. 199 – *Domestic violence;* art. 207 par. 2) and 3) – *Blackmail*; art. 231 par. 1) – *Preliminary complaint and reconciliation;* art. 266 par. 2) – *Non-denunciation*; art. 269 par. 3) – *Favouring the perpetrator*; art. 270 par. 3) – *Concealment*; art. 272 par. 1) – *Influencing statements*; art. 274 – *Revenge for help given to justice*; Art. 279 par. 3) – *judicial contempt*; art. 410 par. 2) – *Non-denunciation of crimes against national security.*

b) the spouse;

c) those who have established a relation similar to those between spouses or between parents and children, if they cohabit;

(2) The provisions of the criminal law relating to a family member, within the limits provided for in paragraph (1) let. (a), shall apply, in case of adoption, also to the adopted person or their descendants in relation to the natural relatives.

► The offense called *Domestic Violence*, provided in Art. 199 Criminal Code, is an aggravating version of the offenses that comprise it, namely, murder, homicide, injury or other violences, bodily injury, bodily harm, injuries or death-causing injuries because the violence characteristic of these crimes is being applied the family member by another family member, the quality of the passive subject attracts the harsher sanction of the perpetrator.

The new Criminal Code amends the concept of family member, including not only the spouse and close relatives, but also other categories of persons, namely those who have established similar relationships to those of spouses.

The widening of the concept of family member has been imposed on the legislator by the social reality that shows that more and more people choose to live in a family form outside marriage but similar to husband relations, called concubinage.

Relationships between concubines must be characterized, as well as relationships between spouses, by durability, and this is given by the concubines themselves who choose to live and hold house together in a place of their choice in a communion of love, respect, loyalty , trust, support, safety, as well as the one existing between spouses.

Although it is not legally sanctioned, this communion should not be dealt with, to a point distinct from a marital legal family union.

Positive as well as negative aspects of cohabitation are present on both sides, and they should not be dealt with separately but by putting equality between *law* and *fact*[6].

Not only violence is a concrete reality common to both husbands and concubines, but also the social values harmed by it – life, body integrity, physical and mental health, dignity – as well as human consequences – fear, pain, illness, mistrust. In the face of this evidence, the legal solution can only be equal and common, to protect the fundamental rights of the human being.

[6] https://www.jurisprudenta.com/jurisprudenta/speta-b3jedjt/.
https://www.jurisprudenta.com/jurisprudenta/speta-biqorys/.
https://www.jurisprudenta.com/jurisprudenta/speta-b1y0gdf/.
http://lexcafe.ro/articole/relatia-de-concubinaj-poate-conduce-la-retinerea-unei-infractiuni-privind-violenta-familie/

It is a progress in providing equal legal treatment to victims of domestic violence the acceptance by the legislator of the new Criminal Code as a family member and persons who have established similar relations to those of spouses and this has also started from a common factual record – *cohabitation*.

In the absence of this, the former concubines return to their previous status, like former spouses after divorce, benefiting, without any discrimination, from protection against any form of violence (physical, psychic, sexual, economic, psychological).

► The assimilated version of the *blackmail offense* provided in art. 207 par. 2 Criminal Code consists in threatening to impersonate a real or imaginary fact compromising the threatened person or a member of his family for the purpose of unjustly obtaining non-patrimonial or patrimonial benefit in the case of the aggravated variant in art. 207 par. 3 Criminal Code.

Threatening the victim with revealing a compromising act to themselves or to a family member includes a compromising act for the threatened person's concubine[7].

The condition of cohabiting of the concubines at the moment of committing the offense required by art. 177 let. c) Criminal Code is fully justified given that in both cases the victim lives the fear of being discredited both by herself and by her life partner through the disclosures to be made by the perpetrator, a fear which, if serious and strong, may lead to the handing over of the non-patrimonial or patrimonial property required by them.

The fear of the victim is not only about the loss of reputation, honour, or dignity, but also about the possibility of breaking the concubinage relationship that would not exist if the concubines did not live together.

► The possibility that the offense of theft is committed between family members in the traditional sense or by assimilation, as provided by art. 231 Criminal Code, presupposes that these persons live together,

[7] http://adevarul.ro/locale/alba-iulia/agresiunea-concubinului-predepsita-violenta-familie-instantele-judecata-barbat-orastie-primit-5-ani-inchisoare-1_59f1d9075ab6550cb8818249/index.html.

that is to live together in the same dwelling, a period of time to give stability to their relationship.

The quality of family membership must exist at the time of committing the offense.

In the absence of living together, it would be difficult to speak of relationships similar to those of spouses, the perpetrator and the injured party, in this case, being occasional and temporary occupants of a space where the goods of the two were, and the removal of the goods by one of them, from the possession of the other, would constitute the offense of theft that will be pursued ex officio.

Unlike family member-spouses, in respect of which there is no legal relevance, if they are actually separated at the time of committing the offense of theft, in the case of family members-concubines, their separation, leaving the common dwelling and termination of cohabitation leads to the loss of family status.

► In the case of *offenses of non-refoulement, of perpetrator's favour and of concealment*, the family member referred to in let. c) is present in the clause of non-punishment:

Art. 266 par. 2 – Non-denunciation committed by a family member is not punished;

Art. 269 par. 3 – Favouring committed by a family member is not punished;

Art. 270 par. 3 – Concealment committed by a family member is not punished;

The reason for this particular cause is based on emotional, protective, defence, relief relationships that must exist between family members and thus between the perpetrator of these offenses and the person with whom he has established similar relations to those of spouses.

This type of relationship is formed and exists only between people living together, that is living and keeping house together.

The condition of cohabitation is necessary for this category of people not only to be considered family members, but also to benefit from the cause of non-punishment, as the condition must exist when the offenses are consumed, otherwise the perpetrator will not benefit from the cause of non-punishment.

The family member is also present in the case of non-punishment of the offense of *Non-denunciation of crimes against national security*, in the same wider sense of art. 177 Criminal Code which also includes the concubines.

The feelings of love, protection, defence, irrespective of the fact that they originate in family legal relations or in family relations, equally justify the non-denunciation both of spouses, close relatives and concubines.

► In order to protect the activity of justice and ensure free access to justice, the legislator has criminalized in art. 272 of The Criminal Code, under the name Influencing statements, acts of a person who, through coercion, corruption or any other intimidating action, seeks to influence the decision of the persons involved or to be involved in judicial cases, irrespective of their quality, in the sense of not notify the criminal investigation body, not to make statements, to make false statements or to withdraw statements or not to file evidence.

Also, acts of corruption or coercion are directed not only against the person whose conduct is wanted to be changed, but also against the family member of the latter, whose power of behavioural determination of their life partner is targeted by the perpetrator[8].

However, such a possibility of influence is formed over time between persons living in a biological, spiritual, psychological, moral and social context, and is lacking in the case of paternal relations, cohabitation being a characteristic of both the marital family formed by marriage and the family outside of marriage.

► By incriminating and sanctioning in art. 274 of the Criminal Code of the act called *Revenge for help given to justice*, the legislator sought to protect both the achievement of justice and the social values of the individuals who contributed to the act of justice, such as life, health, bodily integrity, patrimony[9].

[8] Mihail Udroiu, Victor Constantinescu, *Noul Cod penal, Codul penal anterior, prezentare comparativă*, Hamangiu Publishing House, Bucharest, 2014, p. 364.

[9] Sergiu Bogdan, Doris Alina Şerban, George Zlati, *Noul Cod penal, partea specială, perspectiva clujeană*, Universul Juridic Publishing House, Bucharest , 2014, p. 357.

The victim of this crime is not only the person who notified the criminal investigative body, who made statements or presented evidence in a court case, but also a member of the family.

By acting on the family member, the perpetrator takes direct revenge on him and indirectly on the person who has provided assistance to justice, aiming at deliberately producing both physical and mental sufferings.

Although the family member is not directly involved in making the act of justice, he becomes a weapon of revenge by virtue of the reciprocity of the feelings of attachment, support, solidarity that exists between the persons living together.

► The implementation of justice is protected by art. 279 Criminal Code also against violent, intimidating or revengeful acts committed against the judge, prosecutor or lawyer, as well as against their family members.

The extension of legal protection to this category of people is justified not only by the importance of the socially protected value, but also by the importance of family safety for persons who carry out justice.

Their family members can at any time become factors of negative influence on the act of justice, the perpetrator relying precisely on the relationships of love, trust, respect, consideration that exists both within the traditional family and in the couple assimilated to the family.

Conclusions

The rules of the Criminal Code, which have the term "family member" as defined in art. 177 Criminal Code, either as an active subject or as a passive subject, are not affected by the effects of CCR Decision no. 264/2017, in the sense that the phrase "in case of cohabitation" is a necessary condition for persons who have established similar relations with spouses to be considered family members and to benefit from the legal protection of those rules.

The phrase "in case of cohabitation" does not contravene the constitutional provisions for the 10 norms, on the contrary, it is a legal requirement to provide the concubine with equal treatment of the other family members, according to the purpose of the criminal law.

The *erga omnes* effects of Decision no. 264/2017 are produced in all legal situations regarding the obtaining of the protection order, as well as in other such situations where the phrase "in case of cohabitation" is contrary to the purpose of the protection order, namely to protect the victims of domestic violence, whether or not they shared the same home with the aggressor.[10]

Therefore, CCR decision no. 264/2017 will only modify the definition of family member in art. 5 let. c) of Law no. 217/2003 on the prevention and combating of domestic violence, not the definition of the family member in art. 177 of the Criminal Code.

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[10] https://rm.coe.int/168046253e.

RIGHTS OF THE PARTIES IN INTERNATIONAL CIVIL LAWSUIT

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ABSTRACT

Free access to justice is established as being a fundamental principle of organizing of any democratic judicial system, with important meanings in the civil procedure law. Foreign citizens benefit in front of the Romanian courts, during international civil trials, of exemptions and tax attenuations and other procedural expenses, as well as free of charge judicial assistance, to the same extent and under the same conditions as the Romanian citizens under the mutual understanding with the citizenship or residence government of the applicant. According to Article 1083 of the Civil Procedure Code, the processual capacity of each of the parties in the trial is governed by its national law, and the processual situation of stateless is governed by the Romanian law. Means of proof for proving a legal act and probative force of an ascertaining document are those nominated in the convention the parties agreed upon, if the law where the document was filed allows this liberty. If the parties don't use this criteria, it is applicable the law of the place where the judicial document has been concluded. Probation of the facts is submitted to the place where they took place of have been done.

KEYWORDS: *Free access to justice, citizenship, the condition of reciprocity, means of proof*

1. Capacity and Rights of Parties in the Lawsuit

Ability to introduce, by own will and consideration, a judicial action, is considered a legal aptitude, recognized by the judicial order to any individual or judicial person[1]. The procedural means that citizens can use to access the judicial system, stated by the Romanian Civil Procedure Code, are: request for summons to court (Article 68) and ordinary and extraordinary remedies against court rulings (appeal – Article 466; recourse – Article 483; litigation for annulment – Article 503; review – Article 509). These procedures ensure the interested parties access to

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[1] European Convention on Human Rights Article 6, section 1, states the right of any person to a fair trial. Free access to justice is established as a fundamental right, also, in the Romanian Constitution Article 21, in the Universal Declaration of Human Rights Article 10, in Article 14 section 1 of the International Covenant on Civil and Political Rights.

courts that have been previously been established competency to rule in civil law. It is important to mention that accessibility of justice doesn't mean it is also the free of charge, and the limitations need to be reasonable and proportional with the objective in place.

According to Article 1083 of the Civil Procedure Code, the processual capacity of each of the parties in the trial is governed by its *national* law, and the processual situation of stateless is governed by the Romanian law. *The Code* rules, also, the situation of the foreigner, stating that foreign individuals and judicial persons have, in situations mentioned by the law, in front of the Romanian courts, the same procedural rights and obligations as the Romanian citizens/judicial persons. Foreign citizens benefit in front of the Romanian courts, during international civil trials, of exemptions and tax attenuations and other procedural expenses, as well as free of charge judicial assistance, to the same extent and under the same conditions as the Romanian citizens under *the mutual understanding with the citizenship or residence government of the applicant.*

In order to clarify and corroborate some of the provisions of international private law with provisions of internal civil law, must be stated that, European Union Treaty imposes the principle of equality of its citizens, defining as a citizen of the European Union any person with the citizenship of a member state, with the utmost important mention that *European Union citizenship does not replace the national citizenship*[2]. Therefore, the latter becomes a common *criterion* when establishing the applicable law in situations with alien status elements. This way, citizenship becomes a bond the citizen has with his nation or, depending case by case, with the country offering this status[3]. Hence, we can talk about correlation of judicial directives on conflict of jurisdictions with those referring to international judicial cooperation[4].

As for access to justice, we meet regulation also in the *Directive 2003/8/CE of 27th of January 2003 – Directive of improvement of access to justice in trans-border litigations through establishing of minimum*

[2] Ion Gâlea, *European Union Treaties – Comments and Explanations*, Ed. C.H. Beck, Bucharest, 2012, pg.31-31.

[3] Cristian Ionescu, *Citizenship Notion*, article published in "Judicial Courier" magazine, nr.5/2015, ed.C.H. Beck, Bucharest, pg.273-274.

[4] Flavius George Păncescu, *International Procedural Civil Law*, Ed. Hamangiu, Bucharest, 2014, pg. 4.

common rules and regulations on judicial assistance granted in such litigations[5]. The purpose of the directive is to ensure judicial cooperation on civil grounds between member states of the European Union, to encourage the public and specialists to be informed and to simplify and acceleration the transmission of judicial assistance between member states.

As its text states, the directive targets granting judicial assistance in trans frontier litigations to individuals that do not have sufficient resources to effectively get access to justice, it is general recognized right through Article 47 of Fundamental Rights Charter of the European Union. In order to ensure the exercise of this right, the directive states that "not the lack of resources of a party in a litigation, no matter the processual ability of defendant or complainant, nor the difficulties deriving from the trans frontier nature of the litigation, mustn't be considered as obstacles".

Judicial assistance is defined as counselling and reaching an agreement before the judicial procedure, assistance before intimation of a court and representation in court, payment of the judicial expenses or exemption of payment. Inclusion of judicial of the other party that the beneficiary of the judicial assistance is obliged to pay is determined by the internal law of the member state where the court is located or of the state where the execution of the court's decision is demanded to be executed. Minimum expense thresholds that a person can bear are determined by the European Union's states, by criteria such as incomes or family situation.

The directive offers the possibility of member states to overrule judicial assistance requests referring to groundless actions, but if the pre-litigation assistance and access to justice are insured and,

[5] Published in Special Edition of the Official Journal number 0 of 1st of January 2007 and regulated by Governmental Ordinance nr. 51/2008 *on public judicial assistance,* published in the Official Gazette nr. 327/25.04.2008, in effect since 25th of May 2008; according to article 20th of the Directive, this, "regarding the relationships between member states and with regard to any issue to whom it may apply, prevails the regulations contained in the bilateral and multilateral agreements inked by member states, including: a) European agreement on transmitting requests for judicial assistance, signed in Strasbourg on 27th of January 1977, amended by Additional Protocol of the European Agreement on transmitting the requests for judicial assistance, signed in Moscow, in 2001; b) The Hague Convention, of 25th of October 1980 on international access to justice".

respectively, guaranteed. States can deny any judicial assistance petition for damages in situations/cases of detriment of reputation (when the person in question didn't suffer any material or financial prejudice) or in the case the objective is a claim deriving directly from commercial activities. Judicial assistance must be granted both in traditional judicial procedures, as well as in extra-judicial procedures, such as mediation (when legislation imposes these procedures or a court sends the parties to such a procedure) or imposing authentic acts in a different member state.

The rule is established in the sense that the judicial assistance is given by the member state *of the court driving the enforcement.* As an exception, in the case of counselling offered in pre-litigation phase, then when the applicant does not have the residence or regular residence in the court's member state, this state needs to apply its own legislation, in conformity with the principles of the directive.

The directive establishes *principle of continuity of judicial assistance*, to be granted to beneficiaries, whole or part of it, to cover expenses for obtaining the enforcement of the decision in the member state of the court. As said before, judicial assistance is extended and over extra-judicial procedures, when legislation imposes these procedures or a court send the parties to such a procedure. Therefore, through analogy with the situations when a decision is issued, assistance is granted for *enforcement of authentic documents in another member state.* The directive contains also the rule of most favourable dispositions, in the sense that does not forbid member states to adopt these kind of provisions for applicants and beneficiaries of judicial assistance. In cases when representation or assistance of foreigner without capacity or with reduced exercise capacity was not assured according to its national law, and because of that the trial is delayed, the court can *temporarily* appoint a ***special curator***.

The above provisions are also applicable to stateless, *without* the *reciprocity clause* being requested. The text is completed by the content of *The Convention for the statute of stateless of 28.09.1954*, with effect from 6.06.1960. According to the Convention, contracting states must grant stateless, as much as possible, a favourable treatment, and, under no circumstances, not less favourable than the one granted to foreigners, "under the same circumstances, on the matter of acquisitioning of mobile and fixed goods and other connected rights, as well as loans and other

contracts connected to mobile and fixed goods". Also, any contracting state must allow stateless, according to their legislation, to transfer their goods brought on their territory to another state where they have been admitted for rehabilitation. Any contracting state will take under consideration the request of stateless regarding the permission of goods transfer, no matter the location, that are necessary for them to settle down in another country where they have been admitted. As for the protection of industrial property, such as inventions, sketches or industrial models, trademarks, brands and copyrights for literature, science or art, the stateless will benefit, in the residing country, from the same protection the citizens on that country benefit. As for the access to justice, any stateless person will have free access to the courts on the territory of the contracting states. In the contracting state where the person has the normal residence, any stateless person will benefit from the same treatment as the citizens of this state, including judicial assistance and exoneration *cautio judicatum solvi* (exoneration of expenses for judicial access of the foreigner). Is important to remember that any dispute between parties of this convention, linked with interpreting or applying it, that cannot be solved through other means, will be submitted to the International Court of Justice, at the request of any litigation parties.

2. Procedural Quality, Publicity Formalities and Official Documents Filed by Foreign Authorities

In international civil lawsuit, procedural quality of the parties, subject and cause of action are established according to the law governing the essence of the judicial relation *subject to trial.* Means of proof for proving a legal act and probative force of an ascertaining document are those nominated in the *convention the parties agreed upon*, if the law where the document was filed allows this liberty. If the parties don't use this criteria, it is applicable *the law of the place where the judicial document has been concluded.* Probation of the facts is submitted *to the place where they took place of have been done.* Nonetheless, the Romanian law can admit also other probation means than the ones stated by the laws according the above provision. Likewise, the Romanian law is applicable also in the case the witness evidence is admitted and with the judge's assumptions, even in the situations when these probation

means would not be admissible to the foreign law declared applicable. The proof of civil service documents and the proof power of the civil service documents are governed by the law of the place they have been issued.

Management of proofs in the international civil trial is governed by the *Romanian law*. Registration and publicity formalities, their effects and authorized authorities to investigate are the ones stated in the legislation of the country where the operation took place. In the matter of real estate, is applicable *the law where the real estate is situated*.

When in a litigation the judge finds *ex officio* of the right of a foreign state, then has the obligation, with the possibility to ask so that the evidence be made through attestations obtained from the qualified government institutions that have issued it, with the approval of an expert[6]. Customs and practices established between parties must be proved by the person invoking them while the local regulations and dispositions must be proved only if the courts have no knowledge of them[7]. For example, in family relations, according to Article 420 of the Civil Code, on dispute of filiation, acknowledgement that is not in line with reality can be contested any time and by any interested person. If the acknowledgement is contested by the other parent, by the recognized child or by its descendants, proof of filiation is on to the author of the acknowledgement or its inheritance. Therefore, this text specially states that the obligation of proof does not devolve upon the one who states a claimed fact, but to the defendant[8].

In the European legislation, *Regulation (EC) no.1206/2001 of 28th of May 2001 on cooperation between member states courts in the sphere of obtaining civil or commercial evidence*[9], has joined several provisions on the matter, out of which, briefly, have presented the ones linked to

[6] Andreea Tabacu, *Procedural Civil Law – Internal and International Legislation. Doctrine and Jurisprudence*, Ed. Universul juridic, Bucharest, 2015, pg. 236.

[7] Andreea Tabacu, *op. cit*., pg. 236.

[8] Andreea Tabacu, *op cit.,* pg. 237.

[9] Published in the Special Edition of the Official Journal number 0 of 1st of January 2007; article 24 states the following: "(1) The current regulation is effective as of 1st of July 2001. (2) Present regulation is applicable as of 1st of January 2004, except of article 19, 21 and 22 who will enter to force as of 1st of July 2001.

applicability[10]. According to the Regulation, the good operation of the internal market needs "improvement, especial simplification and acceleration of cooperation between member states courts in the field of obtaining evidence".

Applications (mentioned in Article 2 of the Regulation) are directly transmitted to the court before the procedure is registered or is to be registered – "petitioner court", to the competent court of another state – "asked court". Each member state appoints a central body responsible with courts data feeding, to find solutions to various difficulties that may emerge with applications and with forwarding application to the competent court, in exceptional situations, at the request of a petitioner court. Federal courts, states where several judicial systems are applicable or having autonomous territories are free to appoint several central bodies. Within 7 days since the application is received, responsible asked court sends the petitioner court a received confirmation. If an application is incomplete, the asked court communicates the petition court about this thing without delay and, during 30 days timeframe since the application, asks the petitioner court to send the missing information, that needs to be mentioned as specific as possible. According to the Article 14 of the Regulation, the hearing application of a person is not enforced when this person pleads the right to refuse to testify or the interdiction of testifying.

Civil procedure code mentions, in Article 1093, official public documents drafted or legalized by a foreign authority or by a public foreign agent, that can be produced in front of the Romanian courts only if they are legalized, on administrative hierarchical way in the state of origin and then by the diplomatic mission or Romanian consular office, for certification of signatures authenticity and of the applied seal. Legalization exception is allowed on the basis of the law, of an international treaty which Romania is a part of or based on reciprocity. Legalization of drafted documents or legalized by Romanian courts is

[10] Data transmitted according to this regulation must benefit from protection, according to the *Directive 95/46/CE of the European Parliament and of the Council of 24th of October 1995 on protecting individuals and personal data processing and free circulation of these data* and of *Directive 97/66/CE of the European Parliament and the Council of 15th of December 1997 on personal data processing and personal life protection in the area of telecommunications.*

made, on behalf of Romanian authorities, as follows, by The Justice Department and The Foreign Affairs Department.

On the basis of Article 81 of the Treaty on The Functioning of European Union (ex Article 65 of the Treaty), regulation on adoption of applicable law have been adopted on various specialized matters, such as communication and notification of judicial and extra-judicial documents, obtaining evidence, simplification of execution procedure of the court's decision, inheritance, matrimonial regimes, divorces, contractual and non-contractual obligations *et caetera*[11]. Together with Section VII of the New Civil Code and Section VII of the New Civil Procedure Code, in the area of international judicial cooperation on civil matter, has been nationally adopted the *Law 189/2003 on international judicial assistance on civil and commercial matters, republished*[12]. Article 2 of the Law also concerns judicial cooperation with states Romania does not have conventional ties, therefore international judicial assistance on commercial and civil matter can be granted on *international courtesy,* under the reserve of the reciprocity principle, whose existence is proved based on article 2561 paragraph (2) of the Civil Code. While applying *The Regulation (EC) no.1393/2007 of the European Parliament and of the Council of 13th of November 2007 on notification or communication in the member states of judicial and extra judicial documents on civil and commercial matter*[13] and of annulment of Regulation (EC) no.1348/2001 of the Council, above mentioned law states the communication procedure of judicial and extra judicial documents. Therefore, international judicial assistance on civil and commercial matter refers to *ensemble of cooperation procedures between Romanian and foreign judicial authorities in order to solve a litigation, throughout its course*, Romanian entities authorised with the enforcement of the law being the Justice Department and the courts.

[11] Şerban Alexandru-Stănescu, "International Judicial Cooperation", Ed. Hamangiu, Bucharest, 2014, pg. IV-V.

[12] Published in the Official Journal no.392/04.06.2015.

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ESTABLISHING CONSUMER STATUS IN THE CJEU CASE LAW THE CASE OF COSTEA AGAINST SC VOLKSBANK ROMANIA S.A.

Mihaela ILIESCU[*]

ABSTRACT

In the context in which the notion of consumer is a concept with variable content in Union law, an operational and dynamic notion, which is defined by reference to the provisions of each piece of legislation concerned, has a significant role in the process of uniformization of the application of the legal norms that are incidental to the notion of consumer and implicitly in the clarification of this notion came to the Court of Justice of the European Union. The judgment delivered by the Luxembourg Court in the case of Costea v SC Volksbank Romania S.A. is very comprehensive, giving clarification from a dual perspective: that of determining the quality of the consumer as a natural person exercising the profession of lawyer in the light of Directive 93/13/EEC on unfair terms in consumer contracts and on the possible effects on which the guarantee of the principal credit agreement – even by the borrower, as a representative of his lawyer's office, so as a professional, could have on determining his consumer quality.

KEYWORDS:, *notion of consumer, contractor, credit agreement, extra-professional purpose, right to consumption*

It is well known that the premise from which the legal relationship is based on the right of consumption is that the parties to the legal relationship – the consumer and the professional – are in a position of inequality. This is an inequality seen from a multitude of perspectives: economic, legal, informational, psychological, etc. which has the main consequence of altering the contractual balance. In this context, the consumer, *the weaker part* of this legal relationship, becomes the beneficiary of protective legal norms, which have the role of rebalancing the existing inequalities between consumers and professionals, thus restoring the traditional legal equality between the parties to the civil law relationship. Thus the unequal relationship between the parties is counterbalanced by the rules of consumer law, which in turn are inequitable, which impose on the professional the important limitations or constraints of contractual freedom, fully justified by the imperative of

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legal equality between the parties, with the consequence of returning the consumer to the possibility of expressing a free, unalterable and informed consent, and thus to the remedy of the contractual imbalance.

The need to clarify the notion of consumer has as its main reason that the many consumer protection directives do not lead to a unified conception of this notion. Also used in many other areas of Union law, this notion has a different meaning in each of the relevant derivative instruments. If the notion of consumer is a variable concept, it is largely the result of the fragmentation of legal rules in Union law in general and consumer law, in particular[1]. It is an operational and dynamic notion, which is defined by reference to the content of each normative act concerned.[2] However, two features that characterize this notion can be noted, while giving them unity: the consumer's individuality and the extra-professional purpose of contracting.[3]

In this context, the Court of Justice of the European Union has played a significant role in the process of standardizing the application of the applicable legal rules to the notion of consumer and implicitly in clarifying this notion. Thus, the Luxembourg Court, by virtue of its interpretative role, had the opportunity to rule on a multitude of aspects circumscribed to the quality of the consumer.[4]

Thus, in the case of *Costea v SC Volskbank Romania SA*, the CJEU ruled on the interpretation of the concept of *consumer* covered by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in connection with an application to establish the

[1] H.-W. Micklitz, « La main visible du droit privé réglementaire européen », *Revue Internationale de Droit Economique*, 2014/1, p. 5.

[2] See also, K. Mortelmans and S. Watson, „The Notion of Consumer in Community Law: A Lottery?", in J. Lonbay (ed.), *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, p. 36-57; M. Ebers, «The notion of "consumer"», in *Consumer Law Compendium*, www.eu-consumer-law.org.

[3] Regarding the notion of consumer, please see M.Iliescu, *Consumatorul-între prevederi legislative şi opinii doctrinare (Consumer – between legislative provisions and doctrinal opinions)*, as well as the cited bibliography, in Judicial Courier No.8/2014, p.435.

[4] For a broad study of CJEU interpretations in the field of consumer law, see C.Toader, F. Lecomte**,** *Ultimele evoluții în materia dreptului consumatorului în jurisprudența Curții de Justiție, in Romanian Journal of European Law, no. 3/2015.*

unfairness of a clause contained in a credit contract.[5] The Costea decision[6] is a very comprehensive one, with a twofold perspective: the determination of the consumer's quality of a natural person exercising the profession of lawyer in the light of Directive 93/13/EEC on unfair terms in consumer contracts and the possible the fact that the fact of guaranteeing the credit contract (principal contract) by the borrower himself, as a representative of his lawyer's office, hence as a professional, could have the effect of determining his consumer quality.

In the present case, Mr. Costea, having the profession of lawyer, concluded a credit agreement with SC Volksbank România SA. The repayment of this loan was secured by a mortgage on a building belonging to Mr. Costea's lawyer's office. That credit agreement was signed by Mr. Costea, on the one hand, as a borrower, and, secondly, as the representative of his lawyer's office, given the quality of the latter's mortgage guarantor. On the same day, this mortgage was constituted by a separate notary agreement between Volksbank and this lawyer's office, which was represented in this act by Mr. Costea. On 24 May 2013, Mr. Costea brought an application to the Oradea District Court for a declaration requesting, on the one hand, the finding of an unfair nature of a contractual clause relating to a risk commission and, second, the annulment of that clause and the reimbursement of that fee perceived by Volksbank. The Oradea Court decided to stay the proceedings and to refer the preliminary questions. The Court of Luxembourg has been asked to determine whether Article 2 (b) of Directive 93/13 must be interpreted as meaning that a natural person exercising the profession of lawyer and concluding a credit agreement with a bank without the purpose of the credit being specified in this contract may be considered to be a "consumer" within the meaning of that provision. At the same time, the Court will also respond to the fact that the claim arising from

[5] According to paragraph 2 (b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, 'consumer' means any natural person who, in the context of contracts covered by this Directive, acts for purposes outside his professional activity.

[6] C-110/14, ECLI:EU:C:2015:538. For a doctrinal analysis of this decision, see S. Moracchini-Zeidenberg, *Consommateur ou professionnel : double qualification selon l'objet de l'opération,* La Semaine Juridique – entreprise et affaires, 2015, nº 49, p.1599-1600; E.Terryn*, 'Consumers, by Definition, Include Us All'... But Not for Every Transaction*, Revue européenne de droit privé, 2016, p.271-286.

that contract is guaranteed by a mortgage bond contracted by that person as a representative of his lawyer's office and having as its object a building belonging to that cabinet.

In giving arguments for its judgment, the Court begins by recalling that that directive defines the contracts to which they apply by reference to the *quality of the contractors*, respectively, whether they act for purposes relating to their professional activity or not.[7] That is also emphasized by Advocate General P. Crusz Villalón, who states in his Opinion that the key factor of the concept of consumer, as defined in that provision, refers to an element which can be clearly determined: the quality contractor in the legal act in question. In that regard, the Court has again had occasion to state that that criterion of the quality of the contracting parties corresponds to the idea on which the system of protection implemented by that directive is based, namely that a consumer is in a situation of inferiority to a professional in terms of both the negotiating power and the level of information, which leads him to adhere to the pre-written conditions of the professional, without being able to exert influence on their content.[8] The Court will next prove that a lawyer may also be in such a situation of inferiority, while recalling that one and the same person can act as a consumer in certain operations and as a seller or supplier within others.[9] The same is true of the Advocate

[7] See also the Asbeek Brusse and de Man Garabito Decision, C-488/11, ECLI:EU:C:2013:341, point 30, as well as the Šiba Decision, C-537/13, ECLI:EU:C:2015:14, point 21.

[8] See also in this sense the Asbeek Brusse and de Man Garabito Decision, C-488/11, ECLI:EU:C:2013:341, point 31, the Šiba Decision, C-537/13, ECLI:EU:C:2015:14, point 22, The Vapenik Decision C-508/12, ECLI:EU:C:2013:790 , The Banco Español de Crédito Decision, C-618/10, ECLI:EU:C:2012:349, point 39; The Pannon GSM Decision, C-243/08, ECLI:EU:C:2009:350, Pct.22; The Océano Grupo Editorial and Salvat Editores Decision, C-240/98-C-244/98, ECLI:EU:C:2000:346, point 25; The Mostaza Claro Decision, C-168/05, ECLI:EU:C:2006:675, point 25, as well as the Asturcom Telecomunicaciones Decision, C-40/08, ECLI:EU:C:2009:615, point 29; The Aziz Decision, C-415/11, ECLI:EU:C:2013:164, point 44.

[9] See, to that effect, the Opinion of Advocate General Mischo in the Di Pinto case, C-361/89, ECLI:EU:C:1990:462, point 19, on the meaning of the notion of consumer within the scope of Article 2 of Directive 85/577/EEC. Thus, the persons referred to in that provision "are not defined *in abstracto*, but as they act *in concreto*", so that the same person in different situations may sometimes have the quality of consumer and sometimes the seller or supplier. In this case, the Advocate General proposed to establish the quality of consumers for traders who have received visits for the purpose

General's Opinion, in which he mentions that the notion of consumer is an *objective and functional* notion whose expression depends on *a single criterion*: the classification of the legal act in the field of activities outside *the professional activity*. Per a contrario, the specialist knowledge that the person in question may have or the information that this person actually possesses are therefore irrelevant for determining the quality of the consumer. In addition, as the Advocate General has pointed out, this is a notion which is defined *in a situational context*, in other words, in relation to a specific legal act. In consequence, no person may be deprived of the possibility of having the quality of a consumer in relation to a contract concluded outside his professional activity because of his general knowledge or his profession, but that quality should be determined solely by reference to a concrete legal operation.[10] Further to its reasoning, the Court will issue a first interim conclusion: a lawyer concluding with a natural or legal person acting for purposes relating to his professional activity *a contract* which, in particular as a result of the absence of a link with the work of his cabinet , is *not related to the exercise of the profession* of lawyer, is in the situation of inferiority with respect to that person.[11]

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of selling their own business. However, the Luxembourg Court has not followed this approach.

Similarly, according to the Opinion of Advocate General Jacobs in Case C-464/01 ECLI: EU: C: 2004: 529, paragraph 34, "there is no personal status as a consumer or non-consumer; the quality in which the buyer acted when the contract was concluded was important. "

[10] Relevant in this respect are the Advocate General's conclusions: "The notions of vulnerability and inferiority of conditions, both in terms of negotiation and information capacities, are the raison d'être of the directive as it starts from a reality where the consumer adheres to conditions previously drawn up by the seller or supplier without being able to exert any influence on their content. *However, the ideas of vulnerability and inferiority on which the whole set of rules on consumer rights at Union level are generally based have not materialized in the normative configuration of the notion of consumer as necessary conditions in relation to its definition of positive law. Thus neither the definition of the consumer nor any other provision of this Directive makes the 'consumer quality' conditional upon a specific situation, of lack of knowledge, disinformation or a position of actual inferiority.*

[11] Another argument put forward by the Court in support of its interpretation is the lack of the possibility of modifying the content of the standard clauses, despite the level of specialist knowledge: "'Even if a lawyer is considered to have a high level of technical competence, ithe presumption that he is not a less-favored party in regards to a seller or supplier would not be allowed", because, "'The consumer's inferiority to the

As regards the second question of law which is found in the content of the question referred for a preliminary ruling to the Court, in accordance with the Advocate General's Opinion[12], The Court will take the view that the fact that the claim arising from a principal credit agreement in which the lawyer is a borrower is guaranteed by a mortgage guarantee contract concluded by that lawyer as a representative of his lawyer's office and having as its object immovable property intended for the exercise of his professional activity, has no bearing on the assessment of the consumer's quality. This solution will be argued very clearly and concisely in the recitals. The CJEU will point out that the main purpose of the case is the determination of the consumer or professional quality of the person who has concluded the *main contract, namely the credit agreement* and not the quality of that person under the ancillary contract, namely the mortgage guarantee ensuring the payment of the debt arising from the main contract. Therefore, the qualification as a consumer or professional of the lawyer under his mortgage guarantee contract cannot determine his quality under the main credit agreement.[13]

Finally, the Court will decide that Article 2 (b) of Directive 93/13 must be interpreted as meaning that *a natural person exercising the profession of lawyer and concluding a credit agreement with a bank without the purpose of the credit being specified in that contract, may be regarded as a 'consumer' within the meaning of that provision where that contract is not linked to the professional activity of that lawyer. The fact that the claim arising from the same contract is guaranteed by a*

seller or supplier which the system of protection implemented by Directive 93/13/EEC seeks to remedy concerns both the level of consumer information and its negotiating power in the presence of conditions written in advance by the seller or supplier and on whose content that consumer can not exert influence ". In this sense, see also the Šiba Decision, C-537/13, ECLI :EU:C:2015:14, point 23.

[12] According to the Advocate General's Opinion, "there are two distinct legal relationships: on the one hand, between Mr Costea, as a natural person – as a borrower – and a bank, and, on the other hand, between the individual Cabinet" Costea Ovidiu " a mortgage guarantor – and a bank. Both legal relationships must be examined individually, so that the latter – which, moreover, has an ancillary character – has no effect on the nature of the former

[13] As regards the relationship between the contracts which may be regarded as accessories and the main contracts relating thereto, see the case law of the CJEU in the Dietzinger Decision, C-45/96, ECLI:EU:C:1998:111 and the Česká spořitelna DecisionC-419/11, ECLI:EU:C:2013:165.

mortgage bond contracted by that person as a representative of his lawyer's office and having as its object goods intended to pursue the professional activity of that person, such as a building belonging to that cabinet, is not relevant in this regard.

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CONSIDERATIONS ON THE SCOPE OF NOTION OF DISCRIMINATION IN EUROPEAN AND DOMESTIC LEGISLATION

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ABSTRACT

For the lawyers is important, while examining a case to ascertain over the legal elements which shape the notion of discrimination, either based on domestic law, or on international law instruments enshrining the principle of equality and precluding the discrimination on different grounds, depending on the legal instrument referred to.

The issue of discrimination was deemed as a matter of great importance for the effective protection of the human rights, since it has been noticed that only their formal recognition was not enough insurance in order to be enjoyed in the spirit and the letter of the international covenants and pacts. So, it was a compelling need to go beyond their mere recognition and to dismiss any hindrance in their application, one of the most important being the discrimination on certain grounds for some persons or groups of persons. For them would have been denied the right to access education, work, social services, health or any other aspects which would impede on the life of individuals or groups of persons. Thus, the principle of non-discrimination is complementary to the principle of equality both being a guarantee for the enjoyment of the human rights or any rights as prescribed by the international or domestic law.

KEYWORDS: *discrimination, the principle of non-discrimination, grounds of discrimination, equality*

Section I
Notion of discrimination

1.1. *Dictionary definition*

According to the Romanian Language Explanatory Dictionary[1], to discriminate means the action to discriminate and its result, one first meaning refers to segregation, net distinction between different objects, ideas etc. A second meaning refers to the politics by which a state or a category of citizens are deprived of certain rights on illicit grounds.

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[1] Romanian Academy, Iorgu Iordan Linguistic Institute, Enciclopedic Pubilishing House, 2009, pg. 596.

According to the Cambridge Dictionary[2], to discriminate means to treat a person or a particular group of people differently, especially in a worse way from the way you treat other people, because of their skin colour, religion, sex, etc.

1.2. *Legal definition*

In order to establish a legal definition, one needs to make reference to the international instrument or domestic legislation which provides for the notion of discrimination. The wording used in different statutes envisages the following terminology: "principle of non-discrimination", "without discrimination", "precluding discrimination", "elimination of discrimination" etc.

1.3. *International instruments*

By analysing the content of the provisions from international documents one can notice that although there is a reference to discrimination, this notion is not defined as such, rather indicating elements that allow fighting against discrimination.

In order to illustrate this aspect, we will present the provisions from several international instruments which refer explicitly to the principle of equality and non-discrimination.

Universal Declaration of Human Rights[3], article 7 provides that:

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

European Convention of Human Rights[4] in Article 14 refers to the prohibition of discrimination:

"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

[2] Cambridge Dictionary, Cambridge University Press, 1995, fila 392.

[3] See, *Principalele Instrumente internaţionale privind drepturile omului*, p.7, vol. I, Institutul Român pentru Drepturile Omului, 6th ed., Bucharest, 2003.

[4] *Idem*, p. 13.

social origin, association with a national minority, property, birth or other status."

Article 1 from Protocol 12 additional to ECHR refers to the general prohibition of discrimination:

"The enjoyment of any right set forth by law 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. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

The Treaty for the Functioning of European Union provides in Article10 that:

"In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

European Union Charter for Fundamental Rights in Article 21 refers to non-discrimination and provides that:

"1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

1.4. *Domestic legislation*

In domestic legislation has been enacted *the Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination* which provides a definition for discrimination, the scope of application being much wider that the one provided for in international instruments.

Article 2 paragraph 1 establishes *the definition of discrimination* as "Any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of a disadvantaged group and any other criteria which has the purpose or the effect of restriction, elimination of

recognition, use or exercise of fundamental human rights and freedoms or of rights recognized by the law in the political, economic, social or cultural field or in any other field of public life."

We consider that the definition for the notion of discrimination entails all necessary elements to tackle a situation involving discrimination, such as: protection of human rights and fundamental liberties or the rights established by law, reference to the principle of equality, grounds for discrimination, deeds committed by the perpetrator and their purpose or their effects.

From the aforementioned definition stems out the necessity to analyse the following elements: a right established by law; principle of equality; prohibition of discrimination; scope of application of the law (field of application); grounds for discrimination and the deeds committed by the perpetrator- all these aspects shaping the legal notion of discrimination.

Section 2
Legal content of the notion of discrimination

2.1. *A right established by law*

Illustrative for the rights established by law is the content of the Article 2 from Government Ordinance no. 137/2000:

"The principle of equality among citizens, the elimination of all privileges and discrimination shall be guaranteed, in particular with regard to the exercise of the following rights:

a) the right to equal treatment before courts and any other jurisdictional bodies;

b) the right to personal security and to be granted state protection against violence and mistreatment perpetrated by any individual, group or institution;

c) political rights, namely electoral rights, the right to take part in public life and the right to access to public positions;

d) other civil rights, in particular:

i) the right to freedom of movement and of choosing one's residence;

ii) the right to leave and return to one's country;

iii) the right to obtain the Romanian citizenship;

iv) the right to marry and to choose one's partner;
v) the right to property;
vi) the right to inheritance;
vii) the right to freedom of thought, conscience and religion;
viii) the right to freedom of expression and opinion;
ix) the right to freedom of peaceful meeting and association;
(x) the right to file a petition.

e) economic, social and cultural rights, in particular:
i) the right to work, to freely choose an occupation, to fair and satisfactory working conditions, to protection against unemployment, to equal pay for equal work, to fair and satisfactory wages;
ii) the right to establish and to join trade unions;
iii) the right to housing;
iv) the right to health, medical assistance, social security and social services;
v) the right to education and to professional training;
vi) the right to take part in cultural activities in conditions of equality;

f) the right of access to all public places and services."

One should highlight that the above mentioned rights are not established by the G.O. no. 137/2000, but the protection against discrimination is prescribed from point a) to f) in art. 1 paragraph 2 of the law.

The rights established by law enable the person entitled to benefit from the prerogatives stemming out from their rights and to exercise them without prejudice.

Exempli gratia, the right to a fair trial as prescribed by Article 6 from ECHR shall be secured to everyone within the jurisdiction of the High Contracting Parties, without discrimination on any ground as enshrined by Article 14, 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.

The European Court of Human Rights, in Affaire *Moldovan and others v. Romania*, stated that there was a violation of the right to a fair trial on the ground of ethnicity.

In the affaire *Malarde v. France*[5] the Court stated that Article 14 is only applicable for the enjoyment of the rights and freedoms set forth in the Convention.

The High Court of Cassation of Justice, by decision no. 1586 from 2nd of May 2017, not published, stated that in order to ascertain whether there is a case pertaining to discrimination, one needs to observe which right is established by law and subsequently, if the person entitled to it is discriminated against on grounds of sex, religion belief etc.

2.2. *Principle of equality*

Principle of equality is well established stemming out from several international instruments and from domestic legislation.

As we have already mentioned article 7 from UDHR provides as follows: "All are equal before the law and are entitled without any discrimination to equal protection of the law."

Article 1 from ECHR having marginal denomination – obligation to respect human rights – provides that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

Article 8 from the Treaty on the Functioning of the European Union provides that: "In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women."

Article 20 from Charter of Fundamental Rights of the European Union provides that: "Everyone is equal before the law." And Article 1 paragraph 2 from G.O. no. 137/2000 provides that: "The principle of equality among citizens, the elimination of all privileges and discrimination shall be guaranteed (…)"

Principle of equality is well established within the international human rights law and also within the constitutional traditions of all the states from European Union. Principle of non-discrimination is complementary to the principle of equality, this being the presupposition for asserting the protection granted for preventing any discrimination.

[5] Decision from 30th November 2005, no. 41.138/98 and 64.320/01, published in Official Journal no. 317/10.04.2006.

Legal analysis of the principle of non-discrimination must refer to the principle of equality in order to claim the violation of the interested person rights in a discriminatory fashion.

2.3. *Prohibition of discrimination*

It is necessary to observe the legal provision establishing the principle of prohibition of discrimination, either by the statute which recognizes the protected right, or by general prohibition of discrimination for all the rights established by law.

Thus, even though certain rights or liberties are established by law, in order to ensure enjoyment of these rights, it was deemed necessary to specify that the discrimination is prohibited on certain grounds.

Illustrative on this matter is Article 14 from ECHR which specifies the protection of the rights and liberties set forth in the Convention, Article 51 from Charter of EU, the Directive 2000/43/EC, Directive 2000/78/EC, Article 1 Protocol 12 ECHR, Article 2 from G.O. 137/2000 etc.

2.4. *Scope of the law*

One should observe that every international instrument or domestic legislation have a field of application, *exempli grazia* for the Charter of Fundamental Rights of EU, article 51 provides that:

"(1) The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. (2) The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

Directive 2000/43/EC prohibits discrimination on the grounds of racial or ethnic origin in the spheres of employment and occupation, social protection, social advantages, education and access to and supply of goods and services, while Directive 2000/78/EC prohibits discrimi-

nation on the grounds of age, disability, religion or belief and sexual orientation in the sphere of employment and occupation.

2.5. *Grounds of discrimination*

The international instruments and domestic legislation refer to grounds which determine the discriminatory behaviour on certain fields e.g. Directive 2000/43/EC prohibits discrimination on the grounds of racial or ethnic origin and not on other grounds.

The field of application of the Directive is employment and occupation, social protection, social advantages, education and access to and supply of goods and services.

Article 14 from ECHR and Article 1 from Protocol 12 to ECHR do not bring any limitation to the grounds of discrimination: "(…) sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Thus, the enunciation from the aforementioned text is not exhaustive which allows the extension of the analysis regarding the factual situation to other grounds – flexibility very useful in practice, where the social evolution may determine the apparition of elements of discrimination which were not taken into account when the texts were written.

According to Article 2 paragraph 1 from G.O. no. 137/2000, grounds of discrimination are: race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of a disadvantaged group and any other criteria.

This legal text demonstrates that the Romanian legislator adopted the approach taken by the Protocol 12 to ECHR, allowing the identification of other grounds of discrimination, besides those from the enunciation, which grant the Courts the possibility to analyse any ground for discrimination.

The High Court of Cassation and Justice, civil decision no. 793 from 2nd of March 2017, not published, stated that: "The claim of the plaintiff that the deed was not explicitly enunciated in Article 2 paragraph one of G.O. no. 137/2000 will be disregarded by the Court. Since it has been demonstrated that the behaviour of the employer amounted to a discriminatory attitude towards the claimants, regardless of the criteria,

they are entitled to seek the legal remedies prescribed by the law in order to eliminate the harm produced as a result of the discriminatory deed."

2.6. *Material deeds amounting to discrimination*

The legal definition given by Article 2 paragraph one from G.O. no. 137/2000 prescribes that:

"Any distinction, exclusion, restriction or preference based on (…) which has the purpose or the effect of restriction, elimination of recognition, use or exercise of fundamental human rights and freedoms or of rights recognized by the law in the political, economic, social or cultural field or in any other field of public life."

This enunciation[6] allows the identification of situations or deeds of segregation from one person to others, in different contexts of social life, segregation that amounts to the violation or restrain of the rights or liberties of the respective rights. These deeds are not described because they are of a large variety and the law has a degree of generality – what is important is the effect or the purpose which lead eventually to the infringements of the rights.

This being the case, the law prescribes that not every type of exclusion or restriction of participation of some persons to social life is sanctioned, but only those facts, material deeds that lead to violation of rights, violation based on discriminatory grounds.

Section 3
Conclusions

The analyses of the legal protection against discrimination presupposes firstly, the rights and liberties are established by law, there is an obligatory reference to the principle of equality and prohibition of discrimination on certain grounds.

The scope of the statute either in international or domestic law determines the limits of application for the principle of non-discrimination on certain domains of social or economic life on grounds of discrimination (sex, race, disability etc.)

[6] We reiterate here the jurisprudence of the HCCJ, the Administrative and Tax Complaints Division, the decision no. 793 of 2 March 2017, referred to above.

For the purpose of identifying the discrimination from the legal point of view one needs, obligatory the following elements:

– A right or fundamental liberty established by the law through an international instrument or domestic legislation;

– Mandatory reference to the principle of equality;

– Protection against discrimination, prescribed by the law, referring to a certain right or generally, for all the rights established by the law;

– Protection against discrimination on certain grounds, explicitly prescribed by statutes -sex, race, sexual orientation etc. – or by introducing the phrase "any other status", or a similar phrase "any other situation".

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FORENSIC AND CRIMINOLOGICAL ASPECTS RELATED TO THE CRIME OF COUNTERFEIT CURRENCY AND OTHER VALUES

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ABSTRACT

The transition of the countries of Eastern Europe to a democratic regime in the immediate aftermath of the collapse of the Union of the Soviet Socialist Republics generated with the exaltation of the high degree of freedom and high permeability to the infusion of new criminal phenomenon. In this study, we have paid more attention to the money-laundering offense. The "development" domain, which in the small-scale period in which it manifests itself, can be categorized as being at an amateur stage, with access to technology being drastically controlled by the state. The article follows, in text, the presentation of information that would be relevant to the proposed topic, such as: the impact of the counterfeit to the financial state security; the social and economic favourable environment and the main characteristics and the technically means to the issue of banknotes.

KEYWORDS: *Crime, counterfeiting currency, national currency, transactions, the counterfeit currency, the falsification of the remaining means of payment*

In the current context, given the fact that both the rules on free movement of persons at the level of the community space and at global level have been re-evaluated, combined with the specific phenomena generated by the economic crisis, the offense of forgery of means of payment has remained one of the serious crimes in the sphere of organized crime. This type of crime can help amplify the economic imbalances of a country and generate so-called "monetary storms". That is directly affecting both public and private funds, damaging the image of a state's financial system by weakening confidence population in national currency or other currencies.

At the national level, the phenomenon of counterfeit currency and other values is characterized by the constant level of the criminal interest for counterfeiting of the currency, especially for the national currency. By increasing the quality of counterfeits by using materials, printing

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techniques and professional printers; by preserving the tendency of introducing counterfeiting in the country unintentionally by people who were not aware of the quality of the banknotes and who came into their possession as a result of the remuneration received for the activities carried out abroad and by the specificity for the American currency introduced in the country on various in most cases, through the South and North East of the country, with the most common counterfeiting being the $ 100 coup (denomination[1]).

At European level, the phenomenon of currency counterfeiting and other values highlights the rapid technical evolution, the reproduction and falsification methods implicitly have the effect of increasing the number of persons involved in this kind of deeds and widening the area of the locations where these counterfeits occur (the increase of the degree of specialization of international branches, the increase of cases where the counterfeit currency and other values is a "criminal offense" to support and amplify the major organized crime (e.g. trafficking in human beings, drug trafficking).

The counterfeit is possible in that countries where the economy is poor, because the corruption level is higher and for the traffickers, in these countries, is a favourable environment where they can involve some of the technically means. More than that, in law countries there is not framework.

In the domestic legislation *The Romanian Criminal Code*[2], Title VI, Chapter I is dedicated to falsifying coins, stamps, or other values.

As regards the European Union legislation, we notice *Directive no. 62/2014*[3] on the protection by criminal law of the euro and other coins against counterfeiting, *Council Regulation (EC) No 1338/2001* on

[1] Definition, denomination = the face value of a banknote, coin, or postage stamp."high-denomination banknotes" sinonime: value, unit, rade, size, measure, "the banknotes come in a number of denominations" the rank of a playing card within a suit, or of a suit relative to others, Link: *www.google.com/search/definition/denomination,* accessed on 10.09.2017.

[2] *Criminal Code and Criminal Procedure Code*, updated June 19, 2017, Hamangiu Publishing House, 2017.

[3] *Directive no. 62/2014*[3] on the protection by criminal law of the euro and other coins against counterfeiting and replacing Council Framework Decision 2000/383/JHA

the protection of the euro against counterfeiting[4] and *Decision ECB/2001/11 – 2001/912/EC*[5].

The issue of counterfeit currency is the typology of groups or networks of marketers who have the means to cover a broad geographic area, which favours the circulation of large quantities of counterfeits (means of transport, resources financial, false documents etc.) and a high-tech technical knowledge base to obtain quality forgery (printers, IT specialists, offset printing machines, computing techniques etc.).

In order to identify the area of operative interest, we need to identify the area of interest, within such an offense can be committed.

In this respect, in terms of places of placement, we find that the majority of situations are those in which the placement of preference places such as markets, fairs, as well as street shops and night time.

Also, there are locations where "blacklists" are made between individuals, locations where drugs are purchased or consumed or for the payment of sexual services.

From the point of view of the persons involved, usually they are concerned with modest individuals who do not know the authenticity of banknotes, those unfamiliar or involved in various pseudo-illegal transactions, on this occasion speculating different favourable circumstances. Typically, marketers come from the category of people who know the quality of the banknote and who intentionally try to place counterfeit notes. Another category is the occasional occupiers who either entered the possession of the counterfeit banknotes and placed them in a situation of factual error or took possession of the counterfeit banknote without having the quality of the counterfeit bank, but who subsequently suspected that the banknote was counterfeit, put it into circulation on the basis of checking its own suspicions.

In the course of criminal activities, the boss may come from the category of recidivists who, due to social evolution, reorient themselves to less risky areas and, why not, more profitable.

[4] Which set up a system enabling EU countries to collect and exchange information on counterfeit notes and coins among themselves and with the European Central Bank (ECB), the European Commission, the European Police Office (Europol) and non-EU countries, where appropriate.

[5] *Decision ECB/2001/11 – 2001/912/EC* of the European Central Bank of 8 November 2001 concerning certain conditions regarding access to the Counterfeit Monitoring System (CMS). This decision regulates counterfeit offenses.

Another category is the persons who have knowledge in the field and who, financially motivated, engage in such activities as: printing specialists, IT specialists, graphic designers, who are usually counterfeiters (in practice demonstrated that depositors can also come from foreign exchange operators, bankers, commercials, hotel staff).

From the point of view of counterfeiting, it is necessary to make a strict delimitation.

A first category is the places in which the detection and retention of counterfeit or suspected counterfeit means are regulated, banking institutions, foreign exchange offices, commercial establishments, service sector units and any other another institution working with liquidity. Another category is the place where any commercial or other business activity involving liquidity transactions takes place.

Taking into account the criteria discussed, the particularities of the place of placement of the persons involved and of the place of operative identification, the area of interest that can be constituted in the field of counterfeit currency can be established.

Thus, areas suitable for the prevention and combating of counterfeiting will be determined taking into account the particularities of the aforementioned criteria. Also, by constant monitoring of placements, analyses will be conducted that will concretely indicate the risk areas and the categories of persons involved.

At the national level, a number of areas of interest have been identified, influenced by the specificity of the geographical area concerned, the activities carried out in that area and the persons involved.

In this respect we describe some specific area features. In rural areas, the number of counterfeit banknotes placed on transactions between individuals, the purchase of live animals in fairs or at the seller's home, transactions with traders selling products on public roads, village shops, as well as on occasions social: weddings, cultural manifestations; in these situations, the persons involved are of an average level of education with superficial knowledge of the banknote safety features. Therefore, the location of the banknote detection is different from the place of placement, which, from the police point of view, generates complex activities regarding the establishment of the factual circumstances, the identification of the persons involved, the connections, the origin of the fakes etc. In the urban area, agglomerations, shopping centres, agro-food

markets, kiosks, boutiques but also places where out-of-season shopping, banks and currency exchange offices are taking place. As a rule, the persons involved are part of the category of non-quality individuals who occasionally market various goods, trade workers, foreign exchange operators, banking staff but also service providers (e.g. taxi drivers). Most of the counterfeit banknotes found in the urban area are identified in places where there are imperative rules that specifically regulate this, namely: commercial units of any kind, banks, exchange offices, followed by the natural victims of the crime.

Another important element is the location where, as a rule, other crimes are committed and where counterfeit banknotes are available.

Places where goods from crime, illegal gambling, drug trafficking, prostitution – pimping, smuggling are sold.

From the point of view of cross-border crime, counterfeiting of currency and other values is a crime that has ramifications that may involve several states (falsification on the territory of a state and placement on the territory of another state), with the organization of real specialized networks, involved both in forgery and transport and placement.

The above-mentioned issues are encountered in particular in the case of broad-money currencies, USD and Euro, which are transported using certain travel itineraries depending on the country of origin/destination.

In order to establish areas of operative interest in the field of currency counterfeiting, it will always be necessary to take into account some of the specificities phenomenon at national level: the social danger of the deed, counterfeiting of currency may endanger the economy of a state by weakening citizens' confidence in national currency; increasing the interest of offenders in improving counterfeiting activities by using modern materials and techniques; increasing the number of people involved in such activities, organized in specialized groups and having increased financial possibilities. The ever more frequent involvement of Romanian citizens in carriage activities of generally counterfeited means of payment and its introduction in the country in particular; an increase in the number of cases when foreign currency transactions are made "illegal work" outside the legal framework, which often leads to those who have taken possession of counterfeits not to refer to the competent institutions, but to try to escape of false money, placing it to others; the ever-im-

proved technical means at the fingertips of counterfeiters give them the opportunity to make successful counterfeits that can mislead not only the general public, but even the specialized institutions; the internationalization of the phenomenon, which offers the possibility for offenders to work "quietly" away from the borders of the country whose currency is falsified.

As far as case law is concerned, banknote counterfeiting was frequently committed between 1990 and 1992, targeting American banknotes. Since 1992, the number of this kind of forgeries has diminished. Instead, a large-scale counterfeiting of domestic banknotes was registered, especially after computers, scanners and printers have become very powerful. For the existence of the counterfeiting of coins, the criminal law requires the cumulative fulfilment of two essential requirements: the forged currency corresponds to one of the metal or paper coins expressly provided by law; the counterfeit currency has a correspondent in coins with circulating power.

The situation is explained by the fact that counterfeiting of coins cannot be conceived and done without the prior existence of a genuine coin to serve as a model, so that the result of forgery gives the appearance of a real coin. The condition for the existence of the offense is that the currencies referred to by the law have circulatory power. In conclusion, the falsification in its entirety realizes the material effect of the offense, only if their product corresponds to a coin legally in circulation.

Besides the main form, counterfeiting of coins also has two forms of derivation, both the putting into circulation and the holding for the circulation of coins. These are subsequent offenses, which presuppose the commission of another criminal offense at a previous date. For this reason, the premise is the pre-existence of the counterfeiting of coins in any of the actions used by the perpetrator for this purpose and regardless of the means or means of committing it.[6] The offense of putting into circulation counterfeit coins cannot be conceived until the counterfeiting of coins has been proven.

Putting into circulation involves the introduction of fastened coins into the monetary circuit, along with the real ones, by making payments, foreign exchange etc., usually repeatedly, which is why the deed looks

[6] I. Vochescu, V. Bercheşan – *Banknote and Banknote Counterfeiters*, Ed. Şansa, Bucharest, 1996.

for the appearance of a continuing crime, which will be taken into account legal framing of the deed.[7]

A crime of counterfeiting may also be carried out in an aggravating way, in which the forging, putting into circulation or possession for the purpose of putting into circulation counterfeit or altered counterfeit coins caused or could have caused significant damage financial system.

As for the protection of banknotes, all bank tickets have special features, including: elasticity, colour, strength and outstanding format. Each issuer provides the banknotes with certain security features to protect them from counterfeiting and counterfeiting in the papermaking, printing or finishing process. The main features of banknote protection in circulation are: banknote printing paper has a special composition with high fibre content – usually cotton – which gives it a high resistance to moisture and folding (for example, American banknotes have in composition 85% cotton). Its manufacture is limited and strictly controlled, the type being not found on the free market. The watermark is a drawing printed on paper in the manufacturing process by the frame sieve, on which the desired pattern worsens or is stitched or it is visible in transparency. The security thread, metal or plastic thread embedded in the paper, after a transverse direction (parallel to the narrow edge of the banknote); it is clear when fully embedded in paper and visible directly on one side when the thread is partially embedded. The thread may be printed or non-printed, semi-transparent and may be visible in the UV; Colored fibres, inserted into the paper mass in the manufacturing process, when the paper pulp is fluid. They can be of silk or polyester, where they have a specific shape in the section, hard to imitate; "Intaglio" printing (deep printing) allows for a great deal of design and colour, causing an ink relief on paper, which can be highlighted by pallor but also by examination using a stereomicroscope. Intaglio printing is generally used for the main drawing, portrait, issuer name and face value (expressed in figures and letters). The other elements can be made with lithographic or offset printing. Specific to this printing process is the engraved die (showing engraved cavities from which the ink is transferred to paper by pressing); Hologram – a particle of plastic or metal, embedded or glued to paper. Images and colours of the hologram vary depending on the

[7] Gheorghe Popa, N. Buzatu, *Expertise of banknotes and other payment instruments*, Little Star Publishing House, Bucharest, 2003.

angle under which they are viewed; Fluorescent items – coloured paper fibres, garments or particles embedded in paper and visible in UV; The micro text is that high-fidelity print of text in small or very small characters (less than 1 mm), visible with magnifying glasses; The colour of the drawing which is usually degraded, with nuances that cannot be broken down by the colour separator. Two-sided overlay elements printed with high dimensional precision in the same place on each side of the banknote; when examining it in transparency, the two drawings overlap perfectly or form a composite image; Wave or Linear Text – High-fidelity print of a text with small characters (1-2 mm), following a straight or curved line visible to the naked eye; Very thin, anti-copy lines cover a portion of the surface of the banknote and are not reproducible with the copier; Inkjet printing, the colour of which is not reproducible with the copier (e.g. light grey); Fluorescent ink printing – Ink-high ink content, visible in UV, is used; Magnetic ink printing using ferromagnetic pigments, which can be highlighted by a magnetic tester.

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THE LEGAL EFFECTS OF INTERNATIONAL RECOGNITION AS AN INSTITUTION

Gabriel MICU[*]

ABSTRACT

International theory and practice have gone through several disputes regarding the institution of the international recognition of states and governments, which maintains even currently a state of ambiguity as to its regulation. The present-day world order, however, while keeping in mind its fundamental objective of maintaining international peace and security, states a number of norms that help matching the political requirements with the legal ones, in its attempt to reach a compromise between power and authority. This essay aims at analysing the elements underlying certain regulations in the matter, since it is on their understanding that the political approach a state may have regarding the alterations or completions of the world order actually depends.

KEYWORDS: *international law, recognition*

1. Elements of the process of recognition

There are two important aspects of the process of recognition under international law. The former refers to **the role that the object of recognition may play in international law**. It is known that, according to the internationally acknowledged requirements for the recognition of the existence of a state, it can establish itself into such a political and judicial state entity in virtue of the freely expressed volitional agreement of other states that have decided to treat it as such. The latter aspect is the **actual regulation of the recognition under international law**, since the states are sometimes bound in their choices with regard to recognition.

These two aspects intertwine and in certain situations they even become contradictory, inasmuch as the states wish to create a new arrangement through recognition, one that would challenge the judicial *status quo* or the sovereignty of a new state, thereby establishing themselves in contradiction with the obligations they have towards another state or group of states whose rights are being affected by the

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arrangement in question. It is useful to pinpoint, from the very beginning, that in the Romanian specialized legal texts, recognition is not being treated as a process that includes or implies a two-stage process.

Concluding in brief, it can be said that the judicial foundation of the institution of international recognition is based on two constitutive elements, of which the former regards **the existence of the state before its recognition** by other states and the latter consists in the **degree of appreciation granted by other states** in order to recognize it or, if such may be the case, to deny it recognition. In this sense, what we have involved is an objective element and a subjective one.

In international theory, there have been other opinions, too, referring to the two elements that make up the process of recognition.[1] According to one interpretation, the essence of the former element is being described by the postulate that, prior to recognition, the international community possesses neither rights, nor obligations at international level, while the content of the latter element implies the postulate that recognition is a matter of political appreciation, not a legal obligation as to the community in question. This separation of effects is important, because the two elements contained in the institution of recognition are being treated distinctly for the first time.

A partisan of the constitutive theory, Lautterpaht maintained that the new state never existed before its recognition, yet insisted on the effects of being declared, stating that the existing states have no right to refuse to recognize a new state. In the process of recognition, one has to follow both the way in which the conditions of existence of the state are being conceived, and the way in which the margin of its appreciation and its contribution to the formation of international law are being conceived differently.

Regarding **the conditions of existence of the state**, the theory comprises the concept of **constitutional state**, which has rights that are applicable against other states, as well as obligations towards them. Viewed as such, the state represents an edifice of legal rights of a strictly judicial nature, **whose existence begins and ends with the acquiring and loss of said rights**.

[1] H. Lautterpaht, *Recognition in International Law*, Cambridge, 1947.

On the other hand, the existence of the state cannot simply consist of an accumulation of rights, because it represents more than a strictly judicial edifice and, simultaneously, a sociological entity characterized by **the collectively holding the right to self-determination**, which **can legitimate the existence of the state**. Seen as such, the state may proceed to the acquisition of national legal rights and goes on existing even after the loss of those rights.

Consequently, **there is no standard model** that could point to the origins of the state, the application of the theories presented above depending on what the concept of state and the conditions of its existence represent for each nation. Moreover, the theories partially overlap, they cannot be presented in a unique, satisfactory form of unanimously accepted recognition.

A source of international law that is relevant with regard to the things already mentioned is *the Montevideo Convention* that is being constantly referred to and frequently appealed to in the international practice of the recognition of states. The provisions of that international document stipulate that "the political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit (…) **The recognition of a state merely signifies** that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable."

This passage has a triple judicial significance, inasmuch as:

• it sanctions the political existence of the state prior to its recognition;

• it appreciates that the recognition amounts to the acceptance of its judicial international personality, with the all the rights and obligations that the international law provides for;

• and affirms that the recognition is unconditioned and irrevocable.

There are theoretical interpretations in which the declarative effect of recognition may be more encouraging, in the sense that the existence of the state depends on its recognition by other states. However, in this situation, a risk will always exist that certain states may abuse their position. An example to that effect is the 1941 case of the USSR, which

claimed to have freed the Baltic States from German occupation, when in fact it had occupied them itself.

At a first level of analysis of the subject-matter of this study, a corner stone may be said to exist in the construction of the institution of recognition and that is **the critical mass of the states that recognize a new entity**, inasmuch as there is no unanimously accepted criterion to determine the threshold from which that mass is to be thought of as relevant for the recognition of a state. To this respect, there is a total lack of uniformity and certitude. Certain authors claim that it is not logical that some states may discretionary recognize the quality of a newly created entity, according to international law, while others do not.

In case it is accepted that the recognition represents a precondition of the existence of a state's legal rights, questions arise immediately, such as: the number of states that are necessary for a would-be state to be recognized as such, before it becomes a real state; it if exists only for those states that have formally expressed their recognition, by using any of the elements accepted in this sense (for instance, the development of diplomatic relationships); if the recognition is strictly discretionary or based on the adequate knowledge of facts.

This inconsistency in the interpretation of the institution of international recognition of states triggers a number of consequences regarding both the conclusion of international treatises, and the application of state theories, such as the immunity of jurisdiction. The concerns expressed in this matter reflect the fact that what we are facing here is a basic problem, the solving of which also impacts the answer to the question whether the international law of recognition can be reduced to the exclusively political will of a newly formed state and, by way of consequence, whether this is the only one that judicially certifies its lawful status.

The international theory has tackled this topic and brought forward a number of points of view, some radically different from others. For instance, Crawford put things as follows: "If there is nothing conclusive here regarding a conflict between different states, within the status of a certain judicial entity […], the non-recognition of those means that those

entities may not exist, they may not be states, there may not be any right in time"[2].

Other authors wonder whether the international common law can force states that have previously refused to recognize a would-be state to change their attitude and, thus, grant it recognition. It is useful to pinpoint, in the context, that **predictability in itself is not a convincing judicial argument** for the limitation of the power of states. Such recognition of a judicial entity, that claims to be a state, would grant it right and obligations at international level.

The international practice has proven that **recognition does not have a constitutive character** for all states; there are exceptions such as the territories under mandates, the free city of Danzig, or the Holy See. In the case of the international organizations, it is accepted that the personality of the new state is only recognized by those states that have expressly recognized it. Consequently, one can interpret that **the special judicial personality is only connected to the states that have given their consent**.

In case one accepts the idea of the actual existence of a state prior to its recognition, one has to mark off very clearly from which moment on a state exists for the first time, that it, from which it comes into existence and becomes active at international level by acquiring an international judicial personality that allows the new state to assume obligations in its relationships to other states, including the ones that have not yet recognized it expressly.

A further important commentary on the subject of recognition refers to the way in which a state can **gather its own proof** in order to document a distinct cultural identity. An example in this sense is the position expressed by Vello Pettai, according to which the Lithuanian nation existed and a number of convincing arguments may be invoked regarding its political independence from the Soviet Union, since it was much more homogeneous, nationally speaking, than other Baltic states.[3] Moreover, the Supreme Court of Justice in Poland referred to the international

[2] J. Crawford, *The Creation of States in International Low*, Clarendon Press, 1979, p. 20.

[3] V. Pettai, *Contemporary International Influences on Post-Soviet Nationalism*: *The Cases of Estonia and Latvia, Presented at the American Ass'n for the Advancement of Slavis Studies*, 25th Nat'l Convention (Nov. 19-21, 1993).

judicial personality, stating that **the states cease to exist in case the population loses its consciousness of social differentiation**.

From what has been said so far, another difficulty arises, namely that referring to the means of examination, claiming that the declarative theory were more pragmatic than the constitutive one. What can mean recognition in the declarative theory may remain outside the sphere of ideas in the constitutive one, inasmuch as an entity that is not recognized by other states remains a non-entity in practice.

The necessity of the existence of a judicial certainty, within the current world order, as to the personality, under international law, of a state and its capacity to open and maintain relationships with other, already existing, states generates certain questions in practice, within the analysis of the recognition and existence of states. For instance, not everything is clear when it comes to the legitimacy an entity possesses, or should possess, in order to enjoy the privileges befitting the states. The nature and extension of those privileges, in their turn, depend on the free will of the already existing states to decide to extend or deny those privileges.

For this study, the **effects of recognition** are particularly important, although there are several points of view in this respect as well. For instance, Lauterpacht suggests that recognition is a consequence of the acquisition of rights and obligations by the entity in question, while Grant assesses that that state is a lawful creation made up from a judicial system that controls a territory and the people living in it. Thus, Lauterpacht maintains that an unrecognized state cannot be judged based on the predictable legal criteria of effective power or on the basis of some sociological unpredictable factors.

In case it is being accepted that the rights are not defining in order to determine the status of a new political and judicial entity, it becomes arguable to what extent rights are necessary in order to determine the entity's independence and status at international level. There are a number of examples in which states were treated as *de facto* states, enjoying several rights a constitutional state would have, even if they had not been recognized as such by other states. In such cases, it becomes obvious that the rights of a subject of international law do not stand as requirements for the state's formation.

While Kelsen maintains that the acquisition of a lawful personality is tantamount to the existence of rights and obligations, Crawford criticizes the manner in which the acquisition of rights deriving from the state's recognition is being erroneously identified with the diplomatic relationships.

A further level of analysis is the identification of yet another element situated within the sphere of uncertainty regarding the evaluation of the recognition of states, namely **the concern regarding its formal appearance**. It has been noticed that states fear that the formal admittance of such recognition represents an approval by the international community as to the acceptance of the new state. The persistence of such holdbacks regarding recognition proves that it is seen as having a certain effect of legitimation, thereby even a constitutive effect.

The international practice shows that a state which is reluctant to approve the existence of a new state still has at its disposal the alternative solution of recognizing the new state in a deliberate manner, by means of a form of engagement, without any suggestion of approval, such as the launching of a commercial mission. In this case, what we have is the *implicit* and the *tacit* recognition.

Consequently, the form of recognition may be connected both to the theory of the state's conditions of existence, and to that of the implementation of recognition. Thus, a state of confusion may arise in practice, which can even be worsened by several judicial factors existing in the national system, which obviously evaluate differently the way in which a state fulfils certain requirements that are necessary for it to be recognized as such and, consequently, to possess the legitimacy of requiring a potential recognition by other states.

Generally speaking, **the declaration of recognition is being issued by the executive body**, which has a mandatory effect in the judicial system. In certain cases, the judicial system is being called upon to state its position in a dispute at law in which a new state is being involved and to determine whether the said entity actually is or is not a state. In some situations, a state's government, according to its law-making prerogatives, can influence the evaluation of the fulfilment of the requirements of statehood.

History has shown that the deficiencies in the consistency of the judicial interpretation of the institution of recognition allow for its being

used as a political instrument for the advancement of a state's national interests. The most text bookish example in that sense is the USA that has made use of it in several historical moments. President George Washington made use of the institution of recognition in order to favour the anti-royalist governments; then, under Roosevelt, it was used to facilitate economic imperialism. During the Woodrow Wilson Administration, the recognition of states became the main tool of promoting constitutional governments; finally, during the presidency of Dwight Eisenhower, recognition became one of the most efficient means by which democratic states could oppose the widespread of communism.

A further observation that is relevant for this study, within the paradigm of the current world order, is that **states cannot pass laws for other states**, so the admittance of the constitutive effect of recognition must follow the same logic of relativizing the effect of recognition, which further leads to the idea that **it bears consequences only for the recognizing state**, not for other states.

2. The judicial effects of the recognition of a new state

General considerations

The recognition of a new state triggers the investment by the international community of statehood rights and competences, such as territorial integrity, the right to organize itself internally according to its own will, without any outer interference, the capacity to conclude treatises, the right to implement judicial norms regarding the people on its territory.[4] Among the most important consequences deriving from the recognition of the new state, the following stand out:

• acquiring the capacity of establishing diplomatic relationships with other states that have recognized it and to conclude treatises with them;

• the right to open up judicial proceedings before the courts of the state that has recognized it;

• acquiring the immunity of jurisdiction and execution before the courts of the state that issues the act of recognition;

• the admittance of its executive and legislative acts before the courts of the state that has recognized it.

[4] C. Naticchia, *Recognizing States and Governmments*, in *Canadian Journal of Philosophy*, vol. 35, no. 1, March 2005, pp. 27-82.

The right to establish diplomatic relationships with the state that has recognized it and with other states

Starting from the sovereign equality of the states under international law, the principle of reciprocity has been established, according to which states bestow upon each other privileges and immunities. This principle also applies in case a new, recognized state wishes to establish diplomatic relationships with the state that has recognized it. The acquiring of recognition is but a first step in the process of establishing diplomatic relationships.

The right of asylum and immigration in relationship with the citizens of the state that issues the act of recognition. The regime of refugees and displaced persons.

The norms of contemporary international law grant an outstanding importance to the refugees, especially after World War II, by drawing up a set of regulations meant for the special protection of such people, at an international standard approved of and assumed by all the states of the world.

The *main sources of the refugees' rights* at regional and universal level are the 1951 Convention relating to the status of refugees, the 1967 Protocol to that Convention, the 1969 Convention of the African Unity Organization governing specific aspects of refugee problems in Africa, and the 1999 Common European asylum system. Aside from these norms, the international community has also put in power a *soft law* complex, including the United Nations' Declaration on Territorial Asylum, the rules drawn up by the United Nations' High Commissioner for Refugees, and the resolutions of the UN Security Council.

Most states of the world have signed these sets of norms, thus assuming the compulsory of implementing the regulations they comprise in their own national legal systems and developing their systems of protecting the refugees, in accordance with the international obligations incumbent on them.

The 1951 Convention, at article 1, paragraph 2, as well as the 1967 Protocol, at article 1.2, define the notion of refugee as being any person, who, *owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing*

to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

It is considered in international theory that such a definition is being restrictive and does not cover certain categories of persons that are being dealt with more and more often, such as the refugees fleeing certain armed conflicts, the economic ones, the persons displaced within a state. This last group, for instance, is not being included in the conventional definition, since their displacement does not involve the crossing of any border.[5] In this context, it is useful to notice that the main cause of the flow of refugees in certain parts of the world **is no longer persecution, but military conflicts**, whether domestic or international.

For this study, only the relevant elements from the above-mentioned documents will be retained, that reveal the fact that the refugees enjoy a status containing a number of rights and obligations, regulated both by the 1951 Convention, and by the states' domestic right. In this sense, the Convention establishes the refugees' general obligation to observe the national laws, as well as the measures taken in order to maintain public order in the country of residence.

On the other hand, that states that are part of the Convention assume the obligation to implement its provisions **without discriminations**, to grant the refugees a treatment at least as favourable as the one granted to their own citizens when it comes to the religious freedoms, to ensure free and unrestricted access to the courts of law, to grant the refugees such rights as the right to have a lodging, the right to primary education, the right of association, the right to social security.

Finally, one if the most important rights the refugees enjoy is that of **no return**, on the basis of which the states assume the obligation of not returning or not expelling a refugee to those international spaces in which his or her life or freedom may be jeopardized on reasons of race, nationality, religion, political opinions, or belonging to a certain social group. Such a principle may be limited for reasons of national security.

[5] V. Gowlland-Debbas, *International Protection of Refugees*, curs susținut la a 34-a sesiune de învățământ, Institutul Internațional pentru Drepturile Omului, Strasbourg, iulie 2003.

The effect of collective or universal recognition on the creation of a new state

The effects of the constitutive theory have met with measurable obstacles, such as to define the exact number of states that are necessary so the process of recognition of the new state be validated the international community. The problem has also arisen as to the type of recognition that is necessary in such situations, so an entity may be thought of as a new state.

As already mentioned, recognition always has a political character and produces judicial consequences, but, while the decision regarding the granting of recognition represents a decision of a political nature, **not granting recognition can only be imposed by law**. The one-sided secession is not being forbidden by international law, so **a successful attempt at one-sided secession depends on its recognition by the international community**. From this perspective, the obligation to grant recognition does not have a unilateral or individual character.

It follows, therefore, that nothing can oppose recognition by the foreign states of an entity legally created and, in case the recognition of the attempt at one-sided secession is being universally granted, the political act of recognition creates a new judicial reality, which leads to the appearance of a new state. In the Romanian legal texts, **this is not considered an effect of recognition**.

From a strictly theoretical point of view, universal recognition is capable to create a new state, but such a way of coming into being requires a universal recognition and can be interpreted as an efficient instrument for the collective creation of the state. *Per a contrario*, if the recognition of an attempt at secession is not universal, then the judicial status of the entity in question remains ambiguous. In the theory and in specialized literature, there are opinions to the fact that, while the states are never obliged to grant recognition, there are circumstances in which international law reveals that a universal recognition could lead to the creation of a state, a reason for which the existence of recognition must be acknowledged.

Consequently, the international common law has developed the theory regarding the obligation to retain recognition, in the case of an attempt to create a new state, a theory that projects itself in the practice of the states and of the UN organisms. Moreover, the International Rights Commis-

sion has embraced the same idea inserted in the regulations meant for the international responsibility of states, asserting that *no state must recognize as being legal a situation created through a serious violation of the* jus cogens *norms, nor offer help or assistance to maintain such a situation*. The assertion is made complete by the notion that states are being obliged *erga omnes* not to grant formal or implicit recognition to a territorial situation created as a result of the violation of *jus cogens* norms.

According to the *International Rights Commission* articles having to do with the responsibility of the state, the illegal use of force is forbidden, maintaining as legal methods the **right to self-determination** and the **prohibition of racial discrimination**, that are being qualified as imperative norms. Even though these requirements, that prevent the creation of a state following the illegal use of force, with the violation of the right to self-determination and/or in accordance with racial policies, have become extra criteria of statehood, thus adding up to the regulations of the Montevideo Convention, **such an interpretation has not met with universal suffrage**. There is a notion that these extra statehood criteria create extra difficulties, reflecting the requirements of recognition more than anything else. Viewed as such, **an entity created illegally must be interpreted as being an illegal state**.

The supporters of the declarative theory, who accept the extra set of statehood criteria based of lawfulness, claim that the purpose of granting collective recognition to state entities illegally created does not have in view that recognition could create a state, but that, legally speaking, such a situation does not exist, it is not part of the legal ways de bring a state into being. Therefore, the non-recognition obligation has a declarative character, inasmuch as the member states of the international community are considered to be under the legal obligation to not recognize a specific situation which is legally already non-existing. In this case, the non-recognition only declares or confirms this fact, forcing the states to not grant recognition and preventing the validation of the illegal act or the situation created thereof.

One of the theories that have a played an important part in the history of international relationships, but could not be embraced by the contemporary international community was the necessity of a supranational entity empowered to recognize the new states. In this respect,

Lauterpacht introduced, in his theory of recognition, the opinion that such a qualification should be given by a supranational organism that would conclusively determine the statehood in waiting. Taking up the mentioned thesis, J. Dugard stated that the UN might assume the role Lauterpacht had mentioned, considering the fact that the obligations of the member states of an international organization become limited when the latter's constitutive statutes are being adopted.

Even though the theory of the existence of a supranational entity able to grant recognition has its positive aspects, deriving from the benefits the process of collective recognition provides, the cases of **recognition of the states through the UN lack very clearly defined bases**. The difficulty of the theory lies in its inconsistency, which makes it also capable of being distorted. The admittance of a state as member of the UN is certainly attractive as a form of that state's confirmation, but it is difficult to evaluate to what extent the admittance as a member state is sufficient for the recognition of that state's creation by the international community taken as a whole.

Even the UN finds that the criteria are being met that impose the obligation that the states recognize the new state, the basis remains unclear for the organization itself to create the state through recognition. It is obvious that the situation creates the legal obligation of recognition, but it does not necessarily go all the way to recognition itself, in the case of the countries who adopt the dualist theory of international law. As a state obligation, whose duty is being called upon, it can so happen that it is not fulfilled, thus refusing to recognize the state, which would trigger the responsibility for violating a right, but the state cannot be forced to fulfil its obligation. This is what emerges from the statutes of the League of Nations, which provisioned that **admittance to the League of Nations did not necessarily imply that each member of the League was obliged to recognize every other member state**.

A further important aspect to analyse within the current study is the **margin of appreciation** that the states have when it comes to recognize other states. This seems to be the second stage of the process of recognition. Generally speaking, the reduced percentage allowed to recognition in supporting the creation of a new state triggers a **diminishing of the discretionary power of the international community with respect to the creation of new states**.

The variety of practices put to use within the process or recognition confirms the freedom that the states enjoy when they accept a limited margin of action in such problems, without however being obliged to resort to it. The states do not always have a representation of the degree of appreciation they possess, an aspect which implies serious difficulties.

An example to that extent it given by the analysis of the Badinter Commission, regarding the status of the former Socialist Federative Republic of Yugoslavia, which estimated that the effects of its recognition by other states were strictly declarative, an opinion later nuanced by the Commission's statings, which admitted that the most important role in the definition of the status of the S.F.R.Y was played by the political criterion. Also, a further example regarding the margin of appreciation is that of the recognition of Tibet as a state independent from China. Most states have refused that territory the privilege of becoming an independent state, even though many states have agreed that the criteria necessary to that end are already met. There are authors who compared the situation in Tibet with the one in East Timor, whose independence from Indonesia has been recognized, following a majority decision of the Great Powers of the world, which did not agree to its annexation.

The unlimited margin of appreciation creates **the impression that it is disruptive for the sovereign equality**, inasmuch as, the states being free to mutually refuse recognition, they generate a situation in which the unrecognized states are being excluded from the implementation of their sovereign rights and from the contribution they might have to the development of international law. This would then lead to the possibility of creating states of different ranks, which would run counter to the principle of sovereign equality between states.

A further problem deriving from the states' unlimited margin of appreciation lies with the at least theoretical situation in which a state is free to completely refuse to recognize a given reality. If this were to happen at any given moment, **that state's insistence on the non-existence of its neighbour becomes irrational**, even though, from a theoretical point of view, the discretionary character of recognition would allow it. Certain authors have claimed that such a denial of reality is being limited, not necessarily by norms, but by practical considerations deriving from the interconnections of international trade and from

globalization. In case a community in full process of formation has been defined as a state, with all its deriving rights, then the interaction between the economic factors from the two states would function as a catalyser of the process of recognition and would limit one state's capacity to refuse recognition of the new state.[6]

History has confirmed a great many cases of situations in which states were recognized by the Great Powers in virtue of the principles of assertion of international politics. The unlimited margin of appreciation can, however, create difficulties, inasmuch as **it can be manipulated to political ends** and can turn into an instrument available to dominant states, that the most powerful ones use to control, by invoking the primary objective of promoting security.

Some analysts have argued extensively that the political state of recognition has become an inventive method to destroy former sovereign independent states. In this context, the disintegration of the former Socialist Federative Republic of Yugoslavia was invoked as a consequence of the hasty and incautious Western policy of recognizing new states, in disagreement with the practice put to work before, of proving the new political and judicial entity over a longer time. There are authors who appreciate that it was the Western powers that actually dismembered Yugoslavia, through a clever method of aggression, namely diplomatic recognition.[7]

Other authors who, based on profound studies regarding the theories on the states, have placed themselves in opposition with the afore-mentioned opinions, claim that the margin of appreciation is actually adequate and desirable. They maintain that the purpose of the creation of a state should permanently be thought of, namely that of organizing the populace for internal security and national defence. In those researchers' views, the modern nation-state came up as a more efficient structuring of the monopoly on domestic violence, when compared to the former situations, in which there were multi-ethnic empires. They also claim that

[6] J.M. Petersona, *Recognitions of Governmments: Legal Doctrine and State Practice, 1815-1995*, New York, Saint Martin's Press, Inc., 1997.

[7] R. Thomas, Nationalism, *Secession and Conflict: Legacies from the Former Yugoslavia*, article presented at the First Annual Association for Study of Nationalities Convention, Columbia University, New York City, April 26-28, 1996.

the state is an imagined community, not only of the monopoly of violence, and it organizes those communities for purposes of security.

Such a thesis also explains the needs of the international community, for instance that the **security and stability represent a public good in the international community**, from which the limitation of the states' margin of appreciation derives.

Despite what has been asserted, there are no tangible arguments except for the opposite of that, since the existence of the state' sovereignty and of the principle of sovereign equality lead unconditionally to a more reserved attitude from the states, when the question arises to refuse recognition. The way in which the international community evaluates the recognition of a new state influences, to a great extent, the climate of stability or, if it so happens, it can become a source of conflict.

The theory of the absolute freedom of states regarding the establishment of a margin of appreciation as to the recognition of a new state has a counterpart that states the contrary, namely **the necessity of the existence of certain limits within which the state can evaluate**. In this sense, Crawford claims that the refusal to recognize a new entity that defines itself as a new state entitles the one that refuses to act as if the new state never existed, to ignore its nationality, to interfere with its internal affairs, to generally deny the existence of certain rights that are in accordance with the international norms.

Given the declarative character of recognition, the possibility of a state to enjoy unlimited discretion when it comes to the recognition of another state does not jeopardize the existence of the new state. In the case, however, in which we embrace the logic of the constitutive effect of recognition, it is obvious that the single relevant option regarding recognition would only be the diplomatic gesture of the act of recognition.

For the current analysis, an argument against the margin of unlimited appreciation is not useful as long as there is no exact representation of the effect of recognition. Even in such a situation in which the idea is being accepted that the state consents to grant its recognition, the margin of unlimited appreciation it has at its disposal should not be taken as a threat to the international community. There are countless examples in which states permanently ignore other entities. States such as Chechnya or

Palestine are being ignored even though they fulfil the criteria that are considered necessary for the building up of a state.

The right to refuse the recognition of statehood of a political and judicial entity **may be limited by certain criteria**, such as the actual control over the territory or other similar realities. This new fact that is being advanced in order to limit the states' power of appreciation is based on the idea that, in case the state exists, the international norm must take note of it.

The approach in which an efficient control of authority is being required considerably supports the states' practice regarding the secessionist moves, in which case the elements of reference are simply of a political and military nature. Therefore, the international jurisprudence regarding the succession of states within the right of the treatises supports the criteria of an efficient control, starting from the definition of the process of succession of states, which means **the replacement of one state by another**, thus building up a responsibility that is incumbent on the territory, that of establishing international relationships.

There are authors who deny the necessity of such a criterion, claiming the efficiency has no relevance in many cases of admittance of new states within the UN, namely of those belonging to the group of small-sized states. Their acceptance as members with full rights within the international community proves that efficiency and independence cannot rely on the state's central criteria.

Given the lack of a general agreement regarding the adequate criteria that should apply in the process of recognition of a new state, numerous accusations come up as to the illegitimacy of the criteria applied, inasmuch as they are being applied selectively, being weighed in favour of some states and against others. In this sense, there are authors who claim that the European powers **exclude from the international community certain states that existed in Africa**, by efficiently making use of the method of denying statehood, on the assumption that the respective political and judicial entities do not correspond to the order imposed by the norms of international law. From their standpoint, the states in question should also fulfil certain extra conditions, even though the new criteria are often not being implemented by the already existing states.

Assuming that a set of specific criteria could be dressed up, that were to be applied, the international community would face another problem,

that of **the neutral implementation of the criteria**, regarding both the necessary agreement for the conclusion of an actual and inherent situation, and the international institutions that act in this process of evaluation. In case the states do not agree as to the actual foundations for the qualified criteria, it is possible to revert to the policy of unlimited appreciation. However, several authors maintain that currently both the basis of normative prescription and its implementation represent constant concerns of international law.

Conclusions

1. The international practice reveals that the **national legislations** that have to do the requirements of the existence of a state are not uniform, regardless of the existence or absence of an objective standard for its definition.

2. The international theory and the specialized studies of the best renowned experts in the field of international relationships reveal that **an objective standard cannot be established** for the states to apply, that would allow for the evaluation of the fulfilment of requirements by a candidate for statehood or would create an *opinio juris* competence.

3. Neither the theory of international relationships, nor contemporary international law **have succeeded to convene upon a definition of the state**, that should be unanimously recognized by all the international players, which inevitably leads to an inconsistency of the theories regarding the states' recognition. For instance, certain authors have claimed that a distinction should be made between the recognition that produces certain changes in the political and judicial entity and the situation in which everyone admit that the recognition represents a symbolic diplomatic exercise. This theoretical reality allows for a dual interpretation regarding the character of recognition: there are cases in which it has a constitutive character and other cases in which it does not. Such an approach is obviously deficient, which leads to the dismissal of the hypothesis of the devised effects of recognition.

4. Analysing the conditions and reasons for recognition reveals that international judicial notions, such as territorial integrity and self-determination are the ones most often invoked as a justification for the recognition by a certain entity.

5. Any of the criteria applied in the context of recognition may come up with significant problems in unusual circumstances. These subjective or, in certain cases, political elements contribute to the appreciation of statehood present themselves in a legal fashion. For instance, maintaining that **self-determination may be a criterion**, the international practice **has not established a rule regarding the implementation of this criterion and its efficiency**, yet it accepts that the consultation of the populace is necessary and, in case of a favourable result of a national referendum on secession, it is not clear whether the dissident state would be considered as a new state of fact.

Moreover, self-determination is a right the peoples enjoy, a reality that requires the existence of a prior determination which must be made even though there is no distinct people beforehand. It is also equally unclear in which way other states would distinguish between a recognized people and a recognized state, with the exception of the case in which the latter has been in existence briefly, without actually controlling its territory.

In conclusion, **the institution of recognition cannot be of a purely judicial nature**: the interests of all the international players regarding its application must also be taken into consideration. In order to understand correctly the role of recognition, one must also have in view the relationship between **politics and right**, or else between **power and authority**. Neither law, nor politics is capable to offer pertinent explanations as to the theory of the recognition of new states, both options being unaccepted in the states' practice and remaining choices according to the free will expressed by every state existing within the international community. The perceptions regarding the state in the theory of recognition cannot rely on clear judicial principles.

6. A state that represents the rights of the peoples living on its territory is being protected from this principle by applying the peoples' right to self-determination, in the form of secession. It thus follows that **the principle of territorial integrity does not protect from secession** when a state is concerned, that does not observe the rights of the peoples living on its territory, these being entitled to resort to self-determination, when and if **their rights deriving from the international norms are being severely and repeatedly violated**.

7. The international practice has validated the procedure of conditioned recognition as a waiver from the pure and simple character of

recognition, which apparently represents an interference in the internal affairs of the new state. Actually, however, things are a bit different, since there are many cases in which the democratic states require from the state that applies for recognition from the international community that it makes **proof of the fact that it is a constitutional state**. In this context, the guarantee of the fact that the rights of the persons belonging to national minorities are being observed has become, nowadays, one of the conditions of recognition (see the case of Poland after World War I, when the European states vouched to recognize Poland only subject to the condition that it make proof of the actual protection of the German minority or the *Declaration regarding the recognition of the new states in Eastern Europe and former USSR*, voted by the European Community in Brussels, in 1991, that required that those states conform themselves to the rules of international law or else, to a certain type of state).

8. It can be said that there are **two constitutive elements of the process of recognition**: one that has to do with the existence of the state prior to its recognition by other states and a second one that consists in the degree of appreciation the other states express in order to recognize or to refuse to grant recognition. What we have, in this sense, is an element of an objective nature and one of a subjective nature.

9. According to the provisions of the 1933 Montevideo Convention, **recognition has a triple judicial significance**, inasmuch as it sanctions the political existence of the state prior to recognition, it appreciates that recognition is tantamount to the acquiescence of the international judicial personality, with the rights and obligations that international law presupposes and asserts the fact that recognition is unconditioned and irrevocable.

10. The national law systems with respect to the requirements of the state's existence **are not uniform**, regardless of the existence or absence of an objective standard for its definition.

11. The theoretically unlimited margin of the states' power of appreciation when it comes to recognition allows them also the right to refuse a political and judicial entity the recognition of statehood, which can, however, be limited by certain criteria, such as **the actual control of its territory or other similar facts**.

This new fact, that has been advanced in order to limit the states' power of appreciation, is based on the idea that, if the state exists, then

the international norm should take this into account. The approach in which the efficient control of authority is requested considerably supports the practice of the states regarding the secessionist moves in the case in which the elements of reference are simply of a political and military nature. Therefore, the international jurisprudence regarding the succession of states within the right of the treatises supports the efficient control criteria, starting from the definition of the process of succession of states which refers to the replacement of a state by another, so the responsibility to establish international relationships is incumbent on the territory.

12. The institution of recognition **cannot be of a purely judicial nature**. The interests of all the international players must be taken into account regarding its implementation or, to be more precise, the relationship between politics and right or between power and authority must be taken into account in order to understand the role of recognition. Neither law, nor politics are capable to give adequate explanations regarding the theory of the recognition of new states, both options being unaccepted in the states' practice and remaining choices according to the freely expressed will of every state existing within the international community. The perceptions regarding the state in the theory of recognition cannot be based on clearly defined judicial principles.

13. Even though the decision regarding the granting of recognition represents a decision of a political nature, **not granting recognition can only be imposed by law**. The one-sided secession is not forbidden by international law, which is why the success of an attempt at one-sided secession depends on its recognition by the international community. Viewed as such, the obligation to grant recognition does not have a unilateral or individual character.

From a strictly theoretical point of view, universal recognition is capable to create a new state, but such a method of coming into being requires a universal recognition and can be interpreted as an efficient instrument for the collective creation of the state. *Per a contrario*, if the recognition of an attempt at secession is not universal, the lawful status of the entity in question remains ambiguous.

Consequently, the common international law has developed the theory regarding the obligation to retain recognition, given an attempt to create the new state, a theory that reflects in the practice of the states and of the UN organisms. Moreover, the International Law Commission has

embraced the same idea that is part of the regulations governing the states' international responsibility, by stipulating that *no state must recognize as being legal a situation created by the flagrant violation of the* jus cogens *norms, nor grant help or assistance in the maintaining of such a situation*. The statement is completed by the assumption that states are obliged *erga omnes* not to grant recognition, whether formal or implicit, to a territorial situation that has been reached without the violation of the *jus cogens* norms.

According to the articles of the International Law Commission, the illegal use of force is forbidden, maintaining as legal processes the right to self-determination and the prevention of racial discrimination which are being retained as imperative norms. Even though such requirements that forbid the creation of a state as a consequence of the illegal use of force, **with the violation of the right to self-determination and/or in accordance with racial policies have become extra criteria of statehood**, thus completing the regulations of the Montevideo Convention, this interpretation has not met with universal suffrage, allowing for the opinion that the extra statehood criteria create extra problems, reflecting rather the requests for recognition. Viewed as such, an illegally created entity must be interpreted as being an illegal state.

The supporters of the declarative theory, who accept the extra set of criteria for statehood based on legality, claim that the purpose of granting collective recognition to illegally created entities does not envisage the fact that recognition might in fact create such an entity, but that, from a legal point of view, such a situation does not exist. In this case, the obligation of non-recognition has a declarative character, in the sense that the member states of the international community are thought to be under a legal obligation of not recognizing a specific situation which is, legally speaking, already non-existent. In such a case, non-recognition only declares or confirms the fact, forcing the states to not grant recognition and preventing the validation of the illegal act or the situation resulting thereof.

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FUNDAMENTALS RIGHTS FOR THE PERSONS BELONGING TO MINORITIES AND ETHNIC GROUPS IN THE FORMER YUGOSLAV STATES

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ABSTRACT

In the current geopolitical context and the aspirations for autonomy/independence of several entities from different European countries (Catalonia, Basque Country, Scotland, Northern Ireland) or the Balkan region (Republika Srpska, Vojvodina, Sandzak), the issue of ethnic minority rights in the EU and Eastern Europe is of real interest to Romania. The issue of minority status has not become a secondary issue, but has expanded from the fundamental structure of the national-state system in case of the former Yugoslav republics and materialized through the creation of new independent states. The protection of minorities in the European Union is the object of policy at Member State level, each having its own practices, instruments, organs and legislation on minorities. Minorities are a constant concern at the level of the European Union, determined first and foremost by the enlargement of the Union in the ex-Yugoslav and ex-communist space, and secondly by the issue of immigrants within the Union.

In March 2017, the Federation of National Minorities in Europe (FUEN/UDMR) launched the European Citizens' Initiative Minority Safepack, which aims at adopting a legislative framework at the level of the European Parliament for the protection of national minorities, to be further implemented at the level of the EU Member States.

KEYWORDS: *ethnic minority rights, EU policy, legislative framework on minorities rights*

Introduction

After the end of World War II, Yugoslavia became, in many ways, a regional model for the multinational state concept. After coming to power in 1963, Josip Broz Tito, president of the F.S.R Yugoslavia believed that ethnic groups could develop and cultivate more effectively their identity and culture in the Yugoslav socialist system, as compared to the bourgeois democracy in the interwar period. Thus, F.S.R.Y. consisted of eight constituent elements, six socialist republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Slovenia, Serbia)

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and two autonomous socialist provinces (Kosovo and Vojvodina). After 1974, these two Autonomous Provinces had also become equal members of the federation[1].

Starting with 1991, F.S.R. Yugoslavia disintegrated during the Yugoslav wars (from Bosnia and Herzegovina, Croatia and Kosovo), followed by the secession of constituent entities of the federal state. New states emerging in the former Yugoslav area created their own Constitutions and internal laws on the protection of the rights of persons belonging to national minorities or constituents, taking into account international regulations in the field and, in the 1990s, the pressures of the international community to resolve regional conflicts.

In 1992, the UN General Assembly adopted a *Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities.* The document used the expression "persons belonging to minorities", which indicates the intention of the authors of the Declaration not to include references to collective rights of minorities.

At present, at EU-level, fundamental rights are governed by *Article 6 of the EU Treaty*, in which the Union commits itself to respect fundamental rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms (a catalogue of fundamental rights drawn up by the Council of Europe signed on November 4, 1950 in Rome and entered into force on September 3, 1953) and those provided for in the constitutional traditions of the Member States. We remember, however, that the protection of minorities in the European Union *continues to be the subject of policy at Member State level, each with its own practices, instruments, organs and legislation on minorities.* Minorities are a *constant concern* at the level of the European Union, determined first and foremost by the enlargement of the Union in the ex-Yugoslav and ex-communist space, and secondly by the issue of immigrants within the Union.

In principle, we can speak of a European Union-wide standard on the protection of minorities, taking into account the international commitments made by the Member States, the EU anti-discrimination initiatives and the European Union's access policy for candidate

[1] Huntington, Samuel P. *Ciocnirea civilizaţiilor şi refacerea ordinii mondiale (The clash of civilizations and restoration of world order)*. ANTET Publishing House, p. 388.

countries, subject to the guarantee of the rights of minorities from their territory. *However, there is no common EU policy on the protection of minorities.* This fact is due to the particularities of the development and formation of each European state and to the desire of the state authorities not to dilute national identities.

Article 13 of the Treaty on European Union contains provisions for protection against discrimination on grounds of religion or belief, race or ethnic origin. Ever since the beginning, European communities have been preoccupied with putting an end to discrimination based on national belongingness.

Article 13 allows the Council of the European Union to take the necessary measures to combat discrimination based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Thus, the Union has acquired the power to have a legislative initiative to combat discrimination. All Member States have their own legislation on equal treatment, but the objectives, content and enforcement of these laws vary widely. For example, only half of Member States explicitly prohibit discrimination on the basis of sexual orientation, and most Member States do not provide in national legislation the prohibition of discrimination on the grounds of age or disability.

Therefore, Article 13 opened the way for remedying these shortcomings in Member States' internal legislation by adopting specific directives. This legislation is only applicable within the European Union, but is part of the Community regulation that Central and Eastern European candidate countries have to implement for accession.

In the following we will present the particularities existing in each state in the former Yugoslavia.

Slovenia: The most industrialized and developed republic of the Yugoslav federation and the most homogeneous ethnic group, Slovenia separates from F.R. Yugoslavia, following the referendum of December 23, 1990. On January 15, 1992, Slovenia's independence was recognized by the EU Member States and on May 22, 1992 it was admitted to the UN and on May 14, 1993 to the Council of Europe. The 2002 census estimates a total population of 1, 964, 036 and the main minority groups are Serbs, Croats, Bosnians, Muslims, Hungarians, Albanians and

Roma. Other ethnic groups such as Macedonians, Italians, Montenegrins and Germans are also present.

The 1991 Slovenian Constitution, amended in 2013, states in Article 5 that the Slovenian state will "protect and guarantee the rights of Italian and Hungarian native communities, and will express concern for non-native national minorities to improve contacts with their original regions."

We note *special attention due to the Italian and Hungarian* communities, categorized as indigenous and the differentiated from non-native national minorities. Also in Article 11 of the Constitution of Slovenia, it is stipulated that "the official state language is Slovenian, and in those municipalities where the Hungarian or Italian national communities are located, the Hungarian or Italian language will also be official." Moreover, Article 64 provides for additional extended rights for the Hungarian and Italian communities in Slovenia. This is due to the existence of municipalities where the majority people consists of Hungarians (Prekmurije region) or Istro-Romanians (Cirarija region – speakers of an Italian dialect). It also includes the right to form economic, cultural, scientific and research organizations, as well as activities in the field of science, the right to education and schooling in their own language, the right to promote relations with the nations of origin and their respective countries. We note that the Slovenian State undertakes to provide material and moral support for the exercise of these rights and may authorize these to perform certain functions under national jurisdiction and to provide funds for the performance of these functions. The two national communities are represented directly in the representative bodies of local self-government and in the National Assembly (the Slovenian legislature).

It is also stipulated that laws, regulations and other general acts concerning the exercise of constitutional rights and the position of national communities exclusively cannot be adopted without the consent of the representatives of these national communities. Article 80, which provides for the organization of the legislature, stipulates that a deputy from each of the Hungarian and Italian communities will be elected from among the two ethnic communities.

It notes that through the constitutional amendments in 2013, Article 65 on the rights of the Roma community has been abrogated and these

are stipulated by a separate organic law, with the Slovenian authorities paying special attention to this community.

Slovenia respects the rights of national minorities in a highly applied framework in accordance with European and international regulations, coinciding with the fact that there were no interethnic conflicts in this state.

Croatia: Croatia declared its independence in June 1991 and the declaration came into force on October 8, 1991. Tensions escalated, however, in the form of the Croatian Independence War after the Yugoslav People's Army and various Serb paramilitary groups attacked Croatia. On January 15, 1992, Croatia was recognized by the members of the European Economic Community and then by the UN.

Croatia created its first constitution in December 1990, and then amended in the years 2000, 2001 and 2010. In terms of the ethnic configuration, Croatia is populated by 90.4% of Croatians, 4.5% of Serbs, and 21 by other ethnic groups under 1%.

In the text of the *Consolidated Constitution*, there are a number of historical references that have led to the formation of the Croatian State and the "universally accepted principles governing the contemporary world, from the inalienable and indivisible, non-transferable and perpetual right of the Croatian nation to self-determination and state sovereignty, including the inviolable right to secession and association, the conditions of peace and stability of the international order."

The Republic of Croatia is defined as the "national state of the Croatian nation" , defining also the status of members of its national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Russians, Bosnians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs, Albanians and other citizens, who are guaranteed equality with Croatian citizens and the exercise of their national rights in accordance with the democratic norms of the United Nations and the countries of the free world" (Consolidated Croatian Constitution, published on July 6, 2010).

The rights of national minorities are then enshrined in Article 15, which states that: Equality of rights for members of all national minorities in the Republic of Croatia is guaranteed. Equality and protection of national minority rights are governed by a constitutional act

to be adopted in accordance with the procedure laid down for organic law. More than the general provisions, the right of members of national minorities to elect their representatives in the Croatian Parliament may be provided for by law. The freedom of members of all national minorities to express their nationality, to use their own language and alphabet, and the exercise of cultural autonomy is guaranteed.

It is interesting because it is a state facing a civil war, Article 17 of the Croatian Constitution *provides for the possibility of restricting individual rights in the event of war or imminent threats to the independence and unity of the Republic of Croatia, which can be decided by two-thirds from the Croatian Parliament. The restrictions in question do not concern the right to life, religious beliefs, freedom of thought, etc.*

Article 83 provides that the Croatian Parliament may adopt organic laws that regulate the rights of national minorities by two-thirds of the votes of MPs.

Croatia adopted *the constitutional law on the rights of national minorities* on December 23, 2002 (no. 155), with new amendments adopted in 2010 (no. 47) and 2011 (no. 93). In this law there are explicitly mentioned a multitude of international principles, pacts and Agreements, the Croatian authorities trying to strengthen the fact that they fully respect the international and European principles in the matter, as well as the fundamental rights and freedoms of human and Croatian citizens, the rule of law and all the other superior values of its constitutional and international legal order.

The Republic of Serbia exists under this name after Montenegro's declaration of independence in 2006. Faced with multiple inter-ethnic issues (Kosovo's independence declaration in 2008, independent tendencies of Vojvodina) Serbia currently has the status of a state aspiring to the EU.

On February 18, 2008, the Serb Kosovo Parliament, with an Albanian-Kosovo majority population, declared its independence. So far, the international community has had a different response. *The Republic of Kosovo* is recognized by 23 of the 28 member states of the European Union. Serbia refuses to recognize its independence and considers Kosovo to be an autonomous province under the UN protectorate, while further affirming the principles set out in Resolution 1244/1999 (the

autonomy of the province under Serbian sovereignty and international protectorate). Serbia continues to face pressures of autonomy/independence from the Bosnian and Albanian communities in the Sandzak and South Serbia regions (Preševo, Bujanovac and Medvedja).

Serbia's population is mostly formed of ethnic Serbs amounting to 83.3 percent, according to the 2011 census, the first ethnic minority community being the Hungarian with 3.5%, then Roma, 2.1%, Bosniak, 2%, Croatian 0.8%, Vlachs 0.5%, Romanians 0.4% and other communities (in total 21 national minorities)[2].

Serbia's new constitution was adopted in 2006 (after the breakup of Montenegro), replacing the one from1990.*The current Constitution of Serbia* refers *in extenso to the attitude of Serbian authorities during the inter-ethnics conflicts in the 1990s,* to ethnic minority rights in several chapters.

Article 14 provides that the Republic of Serbia will protect the rights of national minorities and that the Serbian State guarantees the *special protection* of national minorities in the pursuit of full equality and preservation of identity.

Part 3 of the Constitution of Serbia, *the chapter on the Rights of Persons Belonging to National Minorities* provides in Article 75 that "persons belonging to national minorities are guaranteed special rights and privileges granted to all citizens by the Constitution. Individual rights will be exercised individually and collectively with others in accordance with the Constitution, international law and treaties. Persons belonging to national minorities must participate in the decision-making process or decide independently on certain aspects related to their culture, education, information and official use of languages and the alphabet through their collective rights in accordance with the law. Persons belonging to national minorities may choose their national councils in order to exercise their right to self-government in the field of culture, education, information and official use of their own language and alphabet, in accordance with the law".

Article 76 provides that "persons belonging to national minorities shall be guaranteed equality before the law and equal legal protection. Any discrimination on the grounds of belongingness to a national

[2] official website of the Serbian government: *http://www.srbija.gov.rs/pages/article.php?id=41.*

minority is forbidden. Specific regulations and transitional measures that the Republic of Serbia could introduce into economic, social, cultural and political life in order to ensure full equality between members of a national minority and citizens of the majority will not be considered discriminatory if they aim at eliminating extremely unfavourable living conditions that particularly affect them".

Article 77 stipulates that members of national minorities have the right to participate in the administration of public affairs and to assume public functions under the same conditions as other citizens. "When framing state bodies, public services, autonomous provincial authorities and local self-government units, *the ethnic structure of the population and the proper representation of members of national minorities will be taken into account."*

In particular, we note Article 78, which refers to the *prohibition of forced assimilation*: "Forced assimilation of members of national minorities is strictly forbidden. Article 79 provides for extended rights of minorities to express, preserve, promote, develop and express national, ethnic, cultural and religious specificity; the use of their symbols in public places; the use of their language and of their own alphabet; the right to procedures also carried out in mother tongues in areas where they constitute a significant majority of the population; education in their own languages in institutions and public institutions in autonomous provinces; the establishment of private education institutions; the use of traditional names in areas where the community represents a significant majority of the population, etc. According to the law and in accordance with the Constitution, the additional rights of members of national minorities can be established by provincial regulations.

The Republic of Serbia recognizes *the specific role of the educational and cultural associations of national minorities* in exercising the rights of members of national minorities. The members of national minorities have the right to uncontrolled relations and cooperation with their compatriots outside the territory of the Republic of Serbia. As regards the development of the spirit of tolerance, Article 81 provides that, in the field of education, culture and information, Serbia will give an impetus to the spirit of tolerance and intercultural dialogue and will take effective measures to improve mutual respect, understanding and cooperation

among all persons who live on its territory, irrespective of their ethnic, cultural, linguistic or religious identity.

It is also of interest the fact that Chapter "*The right to autonomous organization of state structures"* provides in Article 180 that: "In those autonomous provinces and units of local self-government with a population formed of mixed nationalities, a proportional representation of national minorities in the administrative bodies local law will be performed in accordance with the law ".

Serbian authorities have made a considerable legislative effort by granting multiple rights to constitutional guaranteed national minorities in the Serbian state, demonstrating a great openness and attitude of tolerance and understanding to ethnic minorities and ethnic groups in Serbia (and a concrete attitude of correcting negative historical examples such as the Srebrenica massacre – July 1995).

Also, by adopting *a series of internal laws and regulations*, the Serbian authorities have strengthened the legislative framework on the protection of national minorities' rights and freedoms.

Montenegro. The Statute of the Union Serbia and Montenegro ceased by a referendum on the independence of Montenegro of May 21 2006.

In terms of population, it includes Montenegrins (45%), Serbs (29%), Bosnians (8.6%), Albanians (4.9%), Roma (1%), Croatians (1%), and Montenegrin-Serbs (0.3%). The number of Montenegrins and Serbs has been changed from one census to another. There are also small groups of Yugoslavs, Russians, Macedonians, Bosnians, Hungarians, Italians, and Germans from Montenegro. The official language is Montenegrin, but the Croat, Albanian, Bosnian and Serbian are listed as common languages.

According to Article 16 of *the Constitution*[3], the manner in which human rights and freedoms and special rights of minorities are exercised is governed by law. Then, the Special 5th Part of the Constitution refers to *minority rights and identity protection*, in Articles 79-81[4]. We observe

[3] Published in the Official Gazette no. 01/07 of October 25, 2017.

[4] "Persons belonging to national minorities and other national minority communities shall be guaranteed the rights and freedoms that they can exercise individually or collectively with others, namely: 1) the right to exercise, protect, develop and express publicly the national, ethnic, cultural and religious particularities; 2) the right to choose, use and publish national symbols and national holidays; 3) the right to use their own

concrete similarities with the provisions of the Serbian and Croatian constitutions regarding the granting of the rights of persons belonging to minorities in Montenegro.

Article 80 refers to *the prohibition of forced assimilation of persons belonging to minorities and other national communities*. The state must protect people belonging to national minorities and other minority communities of all forms of forced assimilation.

Article 81 refers to the institution of *Protector of human rights and freedoms,* which is an autonomous authority which takes steps to protect human rights and freedoms and exercises its powers under the Constitution, the law and the confirmed international agreements, respecting the principles of justice and fairness (appointed for period of 6 years)[5].

On the other hand, to prevent the emergence of internal problems, we note that the Montenegrin authorities have paid particular attention to the fact that a large part of the population is made up of people belonging to other ethnic communities such as the Serbian (over 29%), Bosnian, Albanian, in which case a series of rights that can fall into the category of special rights are already provided for in the Constitution. This was achieved by the desire to eliminate the possibility of any tensions or social conflicts that could not be totally eliminated (the conflicts and tensions caused by the representatives of the Serbian community from

language and the alphabet for private, public and official use; 4) the right to education in their own language and alphabet in public institutions; 5) the right, in areas with a significant share in the total population, to local self-government and to enforcement of legal proceedings in the language of the minorities and of national minority communities; 6) the right to set up educational, cultural and religious associations, with material support from the state; 7) the right to write and use their own last name and first name in their own language and alphabet in official documents; 8) the right, in areas with a significant share in the population, to have local traditions and to use terms, street names and settlements, as well as topographic signs written in the language of the minority and of the national minority communities; 9) the right to genuine representation in the Montenegrin Parliament and in the general assemblies of local self-governing units in which they represent the significant share of the population; 10) the right to proportional representation in public services, state authorities and local self-government bodies; 11) the right to information in the mother tongue; 12) the right to establish and maintain contacts with citizens and associations outside Montenegro with which they share common national ethnic, cultural and historical similarities, as well as religious beliefs; 13) the right to set up councils for the protection and promotion of special rights.

[5] Montenegro also adopted the *Law on the Rights and Freedoms of National Minorities* published in the Official Gazette 31/06 on May 10, 2006.

October 2015, the attempted coup d'état on the general election day of October 16, 2016).

Macedonia is one of the successor states of F.R, Yugoslavia, declaring its independence in 1991. It became a member of the United Nations in 1993, but following the ongoing name dispute with Greece, it was accepted as the Former Yugoslav Republic of Macedonia (abbreviated FYROM), a name also used international organizations such as the European Union, the Council of Europe and NATO.

Macedonia is a member state of the UN and the Council of Europe. Since 2005, it has been a candidate for accession to the European Union and a state adhering to NATO. Macedonia was not involved in the Yugoslav Wars of 1990. However, the Republic of Macedonia was strongly destabilized by the Kosovo War in 1999, when about 360, 000 Albanians ethnics fled from Kosovo to Macedonia[6]. In the northeast of Macedonia, as the Albanian population was the majority, tensions have emerged in relation to local administrative and force structures, leading to an open conflict between February and August 2001. The war ended with the intervention of a NATO force monitoring the armistice and the Ohrid Agreement (August 13, 2001, Skopje).

We note in particular that according to the provisions of the *Ohrid Agreement,* which put an end to the interethnic tensions between the Slav-Macedonian and Albanian populations, the government agreed to transfer from its political power and grant additional rights to the Albanian minority. The Albanian party has agreed to abandon separatist demands and to recognize all Macedonian state's institutions.

The Macedonian population is thus configured according to the 2002 census: Slavo-Macedonians (64.2%), Albanians (25.2%), Turks (3.9%), Romanians (2.7%), Serbs (1.8%), Bosnians (0.8%), Aromanians (0.5%) and other ethnic groups.

Concerning *the Constitution of Macedonia*, adopted on November 17, 1991, we note that following the conclusion of the conflict and the Ohrid Agreement between the Macedonian Government and the representatives of the Albanian ethnicity, there were successively achieved until 2011, 32 amendments conferring to the Albanian community and to other

[6] *https://ro.wikipedia.org/wiki/Republica_Macedonia.*

minority groups, concrete additional rights, which also concern the legal field of activity of Macedonia.

The Constitution is also concerned with the existence of a body called *the Inter-Community Relations Committee*, made up of 19 members, of which 7 members are each of the Macedonian and Albanian populations in the Assembly and a member of the Turks, Vlachs, Roma, Serbs and Bosnians with prerogatives to examine issues related to inter-community relations in the republic and the responsibility to make assessments and proposals for the Parliament.

For laws that directly affect the culture, language use, education, personal documentation, and the use of symbols, the Parliamentary Assembly decides with the vote of the majority of the representatives in which there must be a majority of the votes of the participating representatives who belong to communities that are not the majority in the population of Macedonia. In the event of a dispute in the Assembly on the application of this provision, the Intercommunity Relations Committee will settle the dispute.

Bosnia and Herzegovina – BIH is one of the six republics of Yugoslavia. It gained its independence after the 1992-1995 war, ended by the *Dayton Agreement* (in Ohio on November 21, 1995 and signed on December 14, 1995 in Paris). It is a decentralized state and administratively divided into two entities, the Federation of Bosnia and Herzegovina and Republika Srpska and the independent district Brcko (an autonomous and neutral administrative unit within the BIH, directly under the authority of the country and located in the north of it.) Formally, it is part of both federal entities of the country, RS and FBIH). It has three forms of organization, at the level of each entity and at the Central (State) level, which affects the proportional representation of the three constituent nations at both Central and Entity level.

The constituent peoples or constituent nations of the BIH are the Croat, Serb and Bosnian ones, all of the inhabitants being called Bosnians.

Annex IV of the Dayton Agreement is in fact the BIH Constitution and its preamble refers directly to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and Economic, Social and Cultural Rights and the Declaration on the Rights

of Persons Belonging to National Minorities; ethnic, religious and linguistic as well as other human rights instruments. Recalling the basic principles agreed at Geneva on September 8, 1995 and New York on September 26, 1995. Annex IV provides that *Serbs, Croats, and Bosnians (as well as others) are the constituent nations/peoples of BIH having equal rights.*

The Constitution/Annex IV Dayton provides the central state institutions, as well as of each entity, as well as the organizational structures of the executive, legislative and judicial powers.

We note that under international mediation in BIH, the conflict in BIH ended in favour of the creation of the Bosnian nation (Islamic religion) while conferring the status of constituent people both for it and for the other nations already existing in the former Yugoslav area, namely the Serbian and Croatian nations. This fact was due to the impossibility of tracing exact boundaries between the three nations, which at the level of 1995 were spread non-homogeneously throughout the territory of BIH.

We are currently witnessing the interest of the Croatian Nation to create a third state entity in BIH, based on the principle of Republika Srpska's self-contained entity and its separation from the Croat-Muslim Federation.

At present, BIH is the Balkan state with the most extensive rights at the level of constituent peoples/nations, its long-term functionality being however question at the level of certain political and historical analysts.

The issue of constitutional changes in BIH continues to be topical, from the level of the two entities, having many exponents who, by asserting that the Dayton Agreement is old, claim that it is necessary to amend the BIH constitution in line with the current realities faced by the three constituent nations.

Conclusions

Faced with major inter-ethnic issues that degenerated into open conflicts and even acts of genocide (the Srebrenica massacre in July 1995), most former Yugoslav states (Croatia, Serbia, BIH, Macedonia) created, more or less under the pressure of the international community and the EU Member States, Constitutions and framework laws on the protection of rights and freedoms belonging to persons among minorities

(respecting the international and European provisions in the field), containing concrete and very generous provisions for minorities or constituent peoples. We recall that since 2001, after the conclusion of the Ohrid Agreement in Macedonia, there have been no major inter-ethnic conflicts or tensions in the former Yugoslav space.

Although there is no European legislative framework that would impose rights for national minorities, we are witnessing steps/pressures from international bodies such as the *European Minorities Federation* (FUEN), which *initiated the European Citizens' Initiative "Minority Safepack",* proposing in March 2017, 11 points referring to minority rights, of which 9 were accepted and registered on May 3rd by the European Commission. Through the European Citizens' Initiative Minority SafePack, the initiators ask the European Union for the protection of citizens belonging to ethnic and linguistic minorities, but in particular for the adoption of a legislative framework at European level to strengthen the cultural and linguistic diversity of the Union in such areas as: regional and minority languages, culture and education, regional policy in favour of national minorities, representation, equality, audiovisual and other forms of media content. The package of provisions is of particular importance, and after collecting the one million signatures (from at least 7 Member States), it is to be debated at the level of the European Commission and the European Parliament in order to be legalized.

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DOCTRINARY AND LEGAL SIGNIFICANCE OF JUDICIAL ERROR (CASE OF THE REPUBLIC OF MOLDOVA)

Vasilisa MUNTEAN[*]

ABSTRACT

In the research, a doctrinal and legal analysis of the concept of legal error is carried out. The author provides a self-defined definition of the concept addressed and highlights the main causes and conditions for the occurrence of judicial errors.

At present, in the specialized legal doctrine of the Republic of Moldova, the problem of defining the judicial error has been little approached. In this respect, this article is a scientific approach aimed at elucidating the theoretical and normative deficiencies and errors that occur in the area of reparation of the prejudice caused by judicial errors.

In order to achieve our goal, we aim to create a core of ideas and referral mechanisms that ensure a certain interpretative and decisional homogeneity in the doctrinal and legal characterization of the phrase "judicial error".

KEYWORDS: *judicial error, court, judge, criminal trial, judgment, jurisdiction, criminal investigation*

1. Generalities

The activity of the courts as state bodies delegated to the judiciary is governed by a single purpose: the protection of the rights, freedoms and legitimate interests of persons. The achievement of this goal is manifested through the pronouncement of legal acts.

As a rule, the examination of a case ends with the adoption of a judgment, in which the court expresses its views on the merits of the indictment brought by the prosecution or the claims made by the applicant. As a judicial act, the court must meet certain conditions of validity regarding its legality.

The way in which the conduct of the criminal trial and the professional training of those involved in the performance of justice are regulated, exclude, in principle, the risk of judicial errors. However, given that the act of justice is the work of some people, and that any

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human activity is subject to error, it is possible that judicial errors sometimes occur in the process of criminal justice[1].

Article 53 (2) of the *Constitution of the Republic of Moldova*[2] establishes that the state has patrimonial responsibility, according to the law, for the damages caused by the errors committed in the criminal trials by the investigative bodies and the courts. Considering the content of this constitutional norm, we can conclude that the basis for the occurrence of the right to reparation for the prejudice caused by judicial errors is the admission of the error in the activity of the criminal prosecution bodies and the courts.

2. The level of investigation of the problem at the moment, the objective of the research

At present, in the specialized legal doctrine of the Republic of Moldova, the problem of defining the judicial error has been little approached. In this respect, this scientific article is a scientific approach aimed at elucidating the theoretical and normative deficiencies and errors that occur in the area of reparation of the prejudice caused by judicial errors.

In order to achieve our goal, *we aim to create a core of ideas and referral mechanisms that ensure a certain interpretative and decisional homogeneity in the doctrinal and legal characterization of the phrase "judicial error"*.

3. Applied methods and materials

The methodological support of scientific research is comprised of a set of theories and concepts specific to the analysed domain, materialized as a finality in the content of the scientific article through the methods of analysis: a) *logical* (deductive, inductive, specification and so on.), consisting in using the laws, categories and logical reasoning with

[1] Popescu G. *Repararea pagubei materiale sau a daunei morale în cazul condamnării pe nedrept sau al privării ori restrângerii de libertate în mod nelegal*. In: EIRP Proceedings. Danubius University of Galati, 2011, p.229.

[2] *Constituția R.M*. din 29.07.1994. In: Monitorul Oficial al Republicii Moldova, 1994, nr.1.

reference to the synthesis of regulations aimed at defining the notion of judicial error; b) *systemic*, manifested through the research of the legal norms regulating the concept of "judicial error" and which are incorporated into different normative acts; c) *synthetic*, consisting of generalizing the analysed materials, in order to optimize the national legislation in the field.

In the research carried out, *Law no.1545 of 25.02.1998 on the way of reparation of the damage caused by the illicit actions of the criminal prosecution bodies, of the prosecutor's office and of the courts*[3] that form essential and indispensable legal support in the law in order to achieve the objectives envisaged in this paper.

Also, in the content of the scientific article were reflected the legal norms of the *Civil Code of Republic of Moldova*[4], *the Code of Criminal Procedure of Republic of Moldova*[5], as well as the provisions of other normative acts.

Increased attention has been given to judicial practice in this area, and on this occasion the judgments of the national courts reveal how to apply the law on legal guarantees to compensate for the damage caused by the illegal search at the home of the perpetrator and third party. With the aim to uniform the application of judicial practice in this field, reference was made in the scientific article to the jurisprudence of the European Court of Human Rights, with an indication of the deficiencies found by the European Court regarding the authorization and execution of the search to the competent law institutions.

4. Results and discussions

What do we mean by error? Error is a false representation of the facts. If we refer to the issue that concerns us, by judicial error we mean punishment or enforcement criminal procedural constraint towards an innocent person for committing the offense. Russian author *T.Beker* noted that no matter how well the judges were prepared, however responsible and careful their attitude towards the fulfilment of their

[3] Published in Monitorul Oficial al Republicii Moldova, 1998, nr.50-51.
[4] Published in Monitorul Oficial al Republicii Moldova, 2002, nr.82-86.
[5] Published in Monitorul Oficial al Republicii Moldova, 2003, nr.104-110.

obligations, they are never guaranteed against deviations and errors[6]. The existence of judicial errors sabotages all judicial activity, thus contributing to the image of the entire judiciary. Moreover, the judgment cannot be considered as fair and equitable, and judicial protection – complete and effective, if a judicial error has been admitted[7].

In the literature, there is no unanimous opinion on the meaning of the notion of judicial error. According to the doctrinal opinion of the Russian Federation, judicial error is a mistake admitted by the court, manifested by violation of procedural and/or substantive law rules, which contradicts the purpose of the civil proceeding, as a result of which the act of justice becomes illegal[8]. According to another view, judicial error is one of the obstacles that stand in the way of the civil process[9]. Thus, the author *I.M.Zaitev* includes in the category of judicial errors any violations admitted by the judges at different stages of the examination of the case[10]. In another opinion, it is argued that the definition of the notion of judicial error needs to be succinct in order not to create difficulties in understanding the essence[11].

We appreciate that we are in the presence of judicial error whenever a person has been finally convicted of a criminal act as an offense, regardless of whether the punishment applied or the deprivation measure was or was not enforced under the condition that such a decision be subsequently abolished or annulled by extraordinary means of redress (review), and in retrial to give a final decision to acquit the person

[6] Беккер Т.А. Установление истины как основа предотвращения судебных ошибок в уголовном производстве: автореферат диссертаций кандидата юридических наук. Томский государственный университет, 2017, p.17.

[7] Терехова Л.А. *Система пересмотра судебных актов в механизме судебной защиты*. Москва: Wolters Kluwer, 2007, p.6.

[8] Терехова Л.А., *op.cit*., p.19.

[9] Блазомирская И.В. *Исправление судебной ошибки в гражданском процессе как составная часть права на судебную защиту* // Журнал. Историческая и социально-образовательная мысль, 2014, nr.6, p.222.

[10] Скрипина С.В. Понятие, виды и причины судебных ошибок в гражданском процессе. In: Отечественная юриспруденция, 2017, nr.5, p.64.

[11] Анишина Д.И., Файзулина Г.С. *Судебная ошибка в гражданском судопроизводстве: понятие, проблемы, предупреждение*. In: „Журнал Наука. Общество. Образование", 2017, nr.3, p.67.

concerned for a new or recently discovered fact that proves to have occurred miscarriage of justice[12].

The Russian researcher *A.A.Ustiugov* concludes that the judicial error is manifested by the failure to reach the purpose of the procedure. Judicial error is distinguished by a number of features: 1) it becomes visible from the time of the judgment; 2) bears an intentional character; 3) the finding and removal of the judicial error is made by an authorized person in the order of a special procedures; 4) the specific nature of the samples; 5) occurs independently of the guilt of the judge who adopted the judgment[13].

The reasons for the occurrence of judicial errors can be diverse, such as: excessive burden on judges, staff shortage, insufficient training and education of judges, lack of a proper working chart of judges, leading to a hasty and superficial case analysis, inadequate remuneration of judges, insufficient technical and material endowment of courts, deficiencies in the selection mechanism of judges with emphasis on moral and ethical dimensions, increased complexity of criminal and contraventional cases[14], lack of specialization of judges in the lack of uniformity of the judicial practice, the permanent updating of the legislation, the imperfection of procedural law and the contradiction of many of its provisions, the existence of time limits for carrying out procedural actions, the superficial examination by the institution the complexity of complex cases in order to finalize their examination more quickly, the poor quality of postal services, the irresponsible attitude of some judges, etc.

Some authors have divided the reasons for the occurrence of judicial errors in objective reasons, such as: workload, law making and subjective

[12] Barac L. *Câteva considerații cu privire la procedura reparării pagubei materiale sau a daunei morale în caz de eroare judiciară sau în caz de privare nelegală de libertate ori în alte cazuri*, 25 iunie 2017, *www.juridice.ro/382615/.*

[13] Устюгов А.А. *Судебные ошибки: проблемы, интерпретации, понятия* // Молодой ученый, 2013, nr.5, p.556-557.

[14] Степанова Н.А. *Классификация ошибок, допускаемых при производстве по уголовным делам*. In: Юридическая наука и правоохранительная практика, 2016, nr.1, p.45.

reasons: the level of training and the moral qualities of magistrates, the superficial attitude in the exercise of service duties, etc.[15].

In Romanian literature, the judicial error is defined as the situation that is manifested by the conviction or imprisonment of an innocent person, as a result of mistakes in the process of criminal justice[16]. Judicial error may arise from the lack of knowledge of essential facts or circumstances by the court, the use of distorted evidence (through criminal activities), the corruption of the judicial bodies that investigated or tried the case, the existence of contradictory judgments[17].

In another definition, a legal error is the error committed in the trial of a case, consisting in the misstatement of the facts, which resulted, in the criminal proceedings, in the final conviction or imprisonment of an innocent person or the exoneration of one person guilty of committing an offense[18]. Judicial errors are mistakes made by judges or prosecutors in court proceedings. Judicial errors form the basis for the exercise of ordinary or extraordinary ways of attack. They can also generate an indemnity obligation of victims[19]. It has also been mentioned that the judicial error refers to a procedural defect, which is so fundamental that it invalidates the final judicial decision and once known, may lead to another judicial solution diametrically opposed to the one affected by this defect[20].

Judicial errors are divided into: procedural errors that exist when the judicial task does not solve the basic task of the criminal proceedings, which refers to the offense and the person who committed it, and

[15] Майорова Л.В., Назаров А.Д. *Следственные и судебные ошибки, связанные с неправильным применением уголовного закона и нарушениями его запретов*. În: Сибирский юридический вестник, 2016, nr.3, p.28.

[16] Olteanu A. *Analiza cazurilor de revizuire în reglementarea procesual penală*, http://old.mpublic.ro/jurisprudenta/publicatii/analiza_cazurilor_de_revizuire.pdf.

[17] Юрова К.И., Аликумов В.В. *Виды следственных и судебных ошибок в уголовном процессе*. In: Журнал „Инновационная наука" , 2016, nr.5, p.32.

[18] Степанова Н.А., *op.cit*., p.43.

[19] Ciuncan D. *Dicţionar de procedură penală*. Bucureşti: Universul juridic, 2015, p.101.

[20] *Studiu cu privire la crearea mecanismului naţional de remediere şi compensare pentru erorile judiciare şi vicii de procedură*, http://agent.gov.md/wp-content/uploads/2016/12/Studiu-eroare-judiciara-.pdf

criminal errors related to the qualification of the deed incriminated and punishment[21].

In order to determine in which circumstances the actions of the responsible persons within the criminal investigation bodies and the courts can be qualified as judicial errors, it is proposed to use two interdependent criteria: ethical and legal. The essence of the first criterion refers to equity, the supreme principle that governs the relations between people and which is reflected in the state-citizen, society-personality. Being an ethical category by nature, equity goes beyond moral relations and is a beginning for law, law, justice[22].

According to *I.Caraman*, one of the main conditions for the occurrence of judicial errors is the conduct of the participants in the trial, especially the parties who often show a lack of good faith in the exercise of their procedural rights and aim to mislead the judge to obtain a favourable decision. In order to counteract any abuses by the litigants, good theoretical and practical training of judges is necessary[23].

The finding and removal of judicial errors can be made by using appeals (appeal, appeal, review) by the participants in the trial. However, there are situations in which appeals do not have the desired effect. Thus, in the opinion of the author *V.Daghie*, the judgments handed down on appeal are often no better than the ones appealed, and sometimes the wrong decisions replace the right ones, irrevocably going into the power of the trial[24].

The legal significance of the judicial error. The Criminal Procedure Code, the Code of Civil Procedure[25] and the Code of Contravention[26] are using three *closely related terms*: "judicial error", "error of law" and "fundamental vice".

[21] Salas D. *L'erreur judiciaire*. Paris: Dalloz, 2015, p.45.

[22] Caraman I. *Erorile judiciare şi puterea lucrului judecat (res judicata)* // Conferința științifică națională cu participare internațională Integrare prin cercetare şi inovare, 28-29 septembrie 2016. Rezumatul comunicărilor, Vol. I, Chişinău: CEP USM, 2016, p.213.

[23] Caraman I., *op.cit*., p.212-213.

[24] Daghie V. *Căile de atac de reformare în procesul civil*. Bucureşti: Național, 1997, p.11.

[25] Published in Monitorul Oficial al Republicii Moldova, 2003, nr.111-115.

[26] Published in Monitorul Oficial al Republicii Moldova, 2009, nr.3-6.

In the *Code of Criminal Procedure*, the notion of "judicial error" is used twice but without the legislator explaining the meaning of this term. The first reference to the notion of judicial error is found in Article 23 of the Code, entitled "Ensuring Victims' Rights following Crime, Abuse service and judicial errors". Although in the name of the nominated article the phrase "judicial error" exists, the legislator no longer refers in the content of the article to that notion.

In the second situation, the term "judicial error" is used in the context of indicating the grounds for re-examining the case. Under Article 435 (2) (c) of the Code of Criminal Procedure, when examining the appeal, if it is found that the judicial error can no longer be corrected, the court of appeal may order that it be re-judged in court call.

A special situation is found in the *Code of Criminal Proceedings of the Republic of Moldova*, which excludes from the use of the term "judicial error" and operates exclusively with the basic vices notion that affected the decision to terminate the contravention process (art.380 paragraph (1)) and error (Article 466). Thus, according to art.380 paragraph (1) of the Code, the resumption of the contravention process which has ceased can only take place in the case of discovering new circumstances or in the case of the detection of a fundamental defect, which affected the decision to terminate the contravention process.

The term error of law is used in Article 466 (a) to (l) of the *Code of contravention*. According to the rule concerned, court orders for contravention issued by the courts of law may be appealed against in order to correct the errors of law.

When examining the grounds under Article 466 (a) – (l) of the Code of Contravention, we can see that they are very varied and result in the submission of the file at a retrial because of the existence of errors of law. By way of example, we mention some of the errors of law: the provisions on competence have not been respected; the hearing was not public; the case was tried without the legal quorum of a party; the judgment under appeal does not contain the grounds on which the decision is based; the constituent elements of the contravention have not been met; the offender was sanctioned for an unforeseen code of conduct; sanctions have been applied to limits other than those prescribed by law; the offender was subjected before the contravention to the deed; the wrongful act was committed; there was a more favourable law for the

offender; the Constitutional Court declared unconstitutional the provision of the law applied, etc.

Regretfully, the Code of Contravention does not regulate the compensation procedure for the detection of fundamental flaws. Under these circumstances, it would appear that, from the formal point of view, the legislature excluded the possibility of bringing actions for damages for procedural defects (judicial errors) detected in the contravention proceedings. However, taking into consideration the provisions of art. 382 para. (6) and art. 384 para. (6) of the Code of Contravention, which makes direct reference to the application of the norms of criminal law in the examination of the contravention cases, we conclude that the right to indemnity procedural defects in the contravention proceedings are possible, by directly applying the provisions of the Criminal Procedure Code.

This conclusion is reinforced by the evolution of the *jurisprudence of the European Court of Human Rights,* where no distinction is made between the contravention and criminal proceedings, but it is pointed out that both procedures need to be governed by the guarantees of a fair trial (*Fomin vs. Moldova, no. 36755 of 11.10.2011, Guțu vs. Moldova no. 20289 from 07.09.2007* etc.).

More details on the correlation between the notions of judicial error and the error of law are found in the Plenary Session of the Supreme Court of Justice no.9 of 30.10.2009 "*On the Judgment of the Ordinary Appeal in the Criminal Case*"[27]. Although the Supreme Court of Justice does not define the notion of interest, we can infer that, in the supreme court's view, the notions of judicial error and error of law would be synonymous. According to point 31 of Judgment of the Plenary of the Supreme Court of Justice no. 9 of 30.10.2009, if the court of appeal establishes an error of law committed by the court of first instance, it will show what constitutes the unlawful nature of the activity of the court of first instance, expresses the violation committed by the law, as well as the remedies by analysing the matter of regulation and jurisprudence. If the contested decision is inadequately reasoned, but the solution is lawful, the appeal court will correct this judicial error.

[27] Hotărârea Plenului Curții Supreme de Justiție a R.M. nr.9 din 30.10.2009 „Cu privire la judecarea recursului ordinar în cauza penală”, *http://jurisprudenta.csj.md/search_hot_expl.php?id=46.*

In the Code of Criminal Procedure of Republic of Moldova the legislator prefers to operate with a notion of alternative, called a fundamental flaw in the previous procedure that affected the ruling. Thus, in Article 6 (4) of the Code, the defect of fundamental importance in the previous procedure which has affected the judgment is defined as an essential violation of the rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, other treaties international, by the Constitution of the Republic of Moldova and other national laws. In other words, a vice is called fundamental because it refers to the violation of fundamental rights of the person in the course of judicial proceedings.

In the light of the Code of Criminal Procedure, the discovery of a fundamental flaw in the previous procedure is a basis for the extraordinary ways of reopening the criminal proceedings completed both at the criminal investigation stage and at the judicial stage. Thus, finding a fundamental flaw at the criminal investigation stage may be a basis for resuming criminal prosecution (Article 287 paragraph (4)), repeated prosecution, committing the same act (Article 22 (3)).

The discovery of a fundamental flaw gives the person an opportunity to appeal against a judgment that has become irrevocable. In accordance with Article 453 (1) of the Code of Criminal Procedure, irrevocable judgments may be appealed by way of an appeal for annulment in order to correct the errors of law committed in the examination of the case, where a fundamental defect in the previous procedure has affected the judgment under appeal.

In the specialized doctrine, it is mentioned that fundamental vice is a procedural violation that may or may not affect a judgment or a judicial solution, but not necessarily on the substance of the case. A vice can evolve into a legal error when it affects the merits of the case. For example, it is procedural defect to use coercive evidence by torture and that can affect the fairness of the process, but not the cause of the case, that is, the solution of the whole process[28].

There is a fundamental flaw and if the decisions of the hierarchically inferior courts contain serious errors of law in that they do not contain the

[28] Studiu cu privire la crearea mecanismului național de remediere şi compensare pentru erorile judiciare şi vicii de procedură, *http://agent.gov.md/wp-content/uploads/2016/12/Studiu-eroare-judiciara-.pdf.*

grounds on which the solutions are based, violate the provisions of Articles 2 and 6 of the European Convention on Human Rights, it affects the rights of the injured party[29].

We mention that the notion of judicial error also exists in procedural-civil law, but without being explicitly defined. Thus, in accordance with Article 445 (c) of the Code of Civil Procedure, the judicial error is the basis for the appeal court to submit a retrial.

More extensive regulation of the way of reparation of the prejudice caused by judicial errors and criminal prosecution is provided in the *Law on the way of reparation of the prejudice caused by the illicit actions of the criminal prosecution bodies, of the Prosecutor's Office and of the courts no.1545 of 25.02.1998*. In this Law, the legislator uses the expression illicit actions of the body empowered to examine cases of offenses, the criminal investigation body or the court, as equivalent to the notion of judicial error.

Article 3 paragraph (1) of Law no.1545 of 25.02.1998 establishes the list of unlawful actions for which material and moral damage can be repaired: illegal detention, illegal application of preventive measures in the form of arrest, statement not to leave the locality or the country, illegal taking of criminal responsibility, illegal condemnation, illegal confiscation of property, illegal obedience to community service, etc.

In the system of the European Convention on Human Rights and the jurisprudence developed on its behalf, the notion of judicial error as a general rule is associated with criminal matters. It derives from the idea of a factual error committed by the court which, being called upon to rule on the basis of a criminal charge, pronounces the conviction of an innocent person.

5. Conclusions and recommendations

Generalizing the ones outlined, we come to the conclusion that:

1) Judicial error is a concept closely related to the merits of the case. In national law, judicial error has *no coherent regulation*. Both the Code of Criminal Procedure, the Code of Contraventions and the Code of Civil

[29] Furdui S. *Sinteză de soluții motivate cu privire la judecarea recursului în cazul semnalării unui viciu fundamental în cadrul procedurii precedente, ce afectează hotărârea pronunțată*. In: Revista Națională de Drept, 2012, nr.5, p.28.

Procedure are summarized in the sequential reproduction of the phrase "judicial error", but without giving that notion a proper definition.

On the other hand, Law no.1545 of 25.02.1998 lists a number of violations of fundamental rights in the criminal proceedings in connection with the application of special coercive measures (arrest, detentions, searches, etc.) and special insurance measures seizures, searches, lifting, etc.), but does not refer to violations of procedural nature, affecting the merits of the case. Consequently, we come to the conclusion that in national law there is no clear delimitation of procedural violations attributable to the category of judicial errors.

2) There are differences between the concepts of error of law and judicial error. Thus, judicial error is a grave, categorical violation that affects the merits of the case and changes the solution to the whole process of judgment. For example, the expiry of the prescription for criminal liability was not taken into account and the person was convicted.

The error of law is manifested through preliminary actions, which can influence the proper conduct of the trial but do not affect the final solution. For example, it is an error of law not to have a party to the proceedings, misapplication of a preventive measure or non-compliance with the provisions on jurisdiction. The errors of law are not so serious as to alter the final solution to the process. They can be corrected by cassation by the higher court and not always have the consequence of granting the right to reparation.

The judicial error must not be confused with the material error admitted in the content of the judicial act, the correction mechanism of which is provided by art.249 of the Civil Procedure Code.

3) We conclude that the fact of the occurrence of the judicial error is a factual circumstance, called a fundamental flaw and which, because of its gravity, can decisively influence the decision of the court. At first sight, being unknown, this flaw of a fundamental nature affects the substance of the case and can hardly be detected.

In order to unify the legal framework, *we recommend amending the provisions of the Criminal Procedure Code and the Code of Conduct* by substituting the expressions: fundamental flaw in the previous procedure, which affected the stipulated decision (Article 6 (44) of the Code of Criminal Procedure) , a fundamental flaw in the previous prosecution that affected the respective decision (art. 287 (4) of the Code of Criminal

Procedure) and the fundamental flaw that affected the decision to terminate the contravention process (art.380 of the Code of Contravention) the phrase "judicial error".

4) According to its legal nature, the institution of reparation for damage caused by judicial errors is civil law. The fact that the damage occurs in the course of criminal proceedings does not affect the legal nature of this institution. The civil legal nature of the relationships that occur in the process of repairing the damage caused to persons by judicial errors is determined by the fact that these relations are patrimonial, occur on the initiative of the injured person and are governed by norms contained in the civil law. The method of regulating social relations for reparation of the prejudice caused by judicial errors is enacting, as these relationships can only be born on the initiative of the rehabilitated person.

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DIFFICULTIES IN THE ENFORCEMENT OF THE LAW NO. 165/2013 CONCERNING THE MEASURES FOR THE COMPLETION OF THE RESTITUTION PROCESS OF THE REAL ESTATE IN ROMANIA

Vlad ZAMFIRESCU[*]

ABSTRACT

The author presents, a series of blocking may be found in the practice of the enforcement the Romanian Law no. 165.2013. In his opinion, these difficulties are generated on one hand, because some of the provisions of the legislation on restitution are not adapted as present realities, and on the other hand, by the non-compliance by the institutions of some legal provisions and deadlines.

KEYWORDS: *restitution process, inventory of lands, ownership titles, settlement of notifications, remedy/compensatory measures*

The Law no. 165/2013 on the measures for the completion of the restitution process, in kind or by equivalent, of the real estates, overtaken abusively in the period of the communist regime in Romania[1], was adopted to modify the mechanism of restitution in kind or by equivalent existing at that time (mechanism introduced by the Law no. 247/2005) in the meaning of its simplification and rendering it efficient, for ensuring a fair compensation of the entitled persons.

At the present time, after four years since the adoption of the Law no. 165/2013, *a series of blocking may be found* in the practice of the enforcement of this Law. At the level of the public administration institutions, such blocking being generated on one hand, because some of the provisions of the legislation on restitution are not adapted as present realities, and on the other hand, by the non-compliance by the institutions of some legal provisions and deadlines.

Among the provisions of the Law no. 165/2013 of which enforcement was not completed in the established terms, there should be reminded

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[1] The Law no. 165/2013/16 May 2013 on the measures on the completion of the restitution process, in kind and by equivalent, of the real estates overtaken abusively in the period of the communist regime in Romania published in the Official Gazette no. 278 of 17 May 2013.

first of all, the *art. 5 and art. 6*. According to the art. 5 and art. 6 of the Law no. 165/2013 at the level of each administrative territorial unit, a local commission was to be set up for the inventory of the lands that, the situation of the agricultural lands should have been set up within 180 days, with or without investments and also related to forestry, in the public or private state domain or, as applicable, of the territorial administrative unit, that may be the purpose of the reconstitution of the ownership title on each administrative and territorial unit. In spite of such deadlines being extended many times, *the inventory was not completed*, such fact leading to the postponement of the enforcement of other texts of the law, such as the art. 10, art. 11 and art. 20.

According to the *art. 10* of the Law no. 165/2013, the National Agency of Cadastre and Real Estate Publicity should have been that until the date of 1st of March 2014, the comparative situation of the demands and available land should be done both for each county and at national level. However, not being completed the inventory provided by the art. 6 from the Law, the comparative situation provided by the art. 10 could not be completed.

Then, according to the provisions of the *art. 11* of the Law no. 165/2013, the completion of the vesting process and release of the ownership titles for the demands of reconstitution submitted pursuant to the Law no. 18/1991 of the land fund should have been organized until the date of 1st of January 2016. This deadline was not complied with, on one hand also due to the non-completion of the inventory at the level of each administrative territorial unit, and on the other hand, on case of the agricultural lands held by the Agency of State Domains, due to the difficulties encountered within the procedure of handing over these lands by the local commission of land fund for entitling the persons in right (according to the Art. 3 para. 3 and art. 7 para (7) of the Law no. 268/2001[2], GD 626/2001[3] and art. 47 of G.D. no 890/2005- Annex

[2] The Law no. 268/2001 on the privatization of the trading companies that hold for administration lands that are public and private properties of the state with agricultural purposes and setting –up of the Agency for State Domains, published in the Official Gazette no. 299 of 7 June 2001.

[3] Romanian Government Decision no. 626/2001 on the approval of the Methodological Norms of enforcement of the Law no. 268/2001 on the privatization of the trading companies that hold for administration lands that are public and private

1[4], in the procedure of reconstitution of the ownership over agricultural lands demanded pursuant to the Law no 18/1991, in the vesting stage, the Agency of State Domains is not bound, in case that the Local Commission of Land Fund does not have available sufficient land, to hand over to it the necessary land surfaces. If A.D.S. delays the handing over of the land surfaces to the local commissions of land fund, the persons having such rights cannot be vested in right and the ownership titles cannot be released.

The term of January 1st, 2016 provided initially by the art. 11 of the Law no. 165/2013 was extended with a year by GEO no. 66/30.12.2015, but taking into account the slow rhythm in which the process of vesting and release of ownership titles based on the Law no 18/1991 is running, it is obvious that it will not be completed until the new term (January 1st, 2017) and nor can it be made an estimation concerning the time that such process will be extended with.

Another text of law that is not observed is the art. 27 of the Law no. 165/2013, that provides that, as of January 1st, 2016, the points granted by the compensation decisions can be valorised by purchasing of real estate from the National Fund. Neither such legal provisions could be observed, as the National Fund should have been set up after the completion of the process of vesting and release of the ownership titles, from the lands that are available to the local commissions of land fund that were not returned to the entitled persons. *As the process of vesting and release of ownership titles was not completed at the term provided* by the art. 11, it is obvious that the National Fund could be neither set up, and by consequence, nor the provisions of the art. 27 on the commencement of the valorisation of the points in auctions could be observed. And the term provided by the Art. 27 of the Law 165/2013 were extended by GEO no. 66/30.12.2015 was prorogued with a year, until January 1st, 2017.

properties of the state with agricultural purposes and setting –up of the Agency for State Domains, published in the Official Gazette no. 390 of 17 July 2001;

[4] Romanian Government Decision no. 890 of 4 August 2005 on the approval of the Regulation concerning the setting-up procedure, tasks and functioning of the commissions for establishing the private property rights over the land, of the model and modality of awarding of ownership titles, as well as the vesting of the owners, published in the Official Gazette no. 732 of 11 August 2005.

Art. 34 and 35 of the Law no. 165/2013 set up a deadline for the completion of the settlement of the demands submitted on the basis of the Law no. 10/2001.

According to the *art. 33*, the entities designated by the law with the settlement of notifications (City Halls and the other holding units) had the obligation to settle the demands submitted according to the Law no. 10/2001, registered and unsettled until the date of entry into force of the Law no. 165/2013 and to issue a decision of admission or rejecting them within the deadlines established depending on the number of files which they still had to settle out: 12 months for the entities designated by the law that had still to settle a number of up to 2, 500 demands; 24 months for the entities that still had to settle between 2500 and 500 demands and 36 months for the entities designated by the law that still had to settle out more than 500 demands. Such deadlines started to run as of January 1st, 2014.

For the entities that, on the entry into force of the Law no. 165/2013 still had a small number of unsettled files, there was no problem in observing the deadlines provided by the art. 33 of the Law no. 165/2013. On the other hand, for the large municipalities, that still had to settle over 500 notifications, specially Bucharest Municipality, in which Town Hall 43 000 notifications pursuant to the Law no. 10/2001[5] were recorded, obviously, with the administrative staff provided by the current organizational chart, it was not succeeded the completion of the settlement of files until January 1st, 2017 when the deadlines established by the art. 33 para (1) let ()c was reached. Because of that, on the role of the civil section of the Bucharest Court, a very big number of suits grounded on the provisions of the art. 35 para 2 and 3 of the Law were recorded. In these legal actions, the notifications will be settled also based on the main issue by the judgment court, in accordance with the art. 35 para. 3 of the Law no. 165/2013.

Art. 34 of the Law no. 165/2013 sets up a deadline of 60 months for the completion of the settlement of the files recorded by the secretariat of the National Authority for the Restitution of properties until the entry into force of the law except the files of land fund that were to be settled within 36 months. Concerning this article, it may be noticed that the

[5] Official webpage of the Bucharest Municipality Hall : *http://www4.pmb.ro/wwwt/1112jur/iapag1jur.php*

current rhythm of settlement of the National Commission for the Compensation of Real Estates within the National Authority for the Restitution of Properties of the files for granting compensatory measures for the entitled persons, the deadline of 60 months will not be complied. Thus, the files already recorded by ANRP – C.N.C.I. having as a subject matter granting of compensatory measures for the estates that make up the subject of the Law no. 10/2001 must be settled within 60 months since the entry into force of the Law no. 165/2013. Or, on the date of entry into force of the Law no. 165/2013 (20.05.2013), 53 029 files set up on the basis of the Law 10/2001 were recorded with ANRP – Secretariat of the Central Commission, of which more than 10 000 had been already settled out, *the rest of them being due to be settled entirely within 60 months*.

In November 2016, according to the data communicated on the official site by the National Commission for Compensation of Real Estates, there were 32 115 files still to be settled in a period of 1 year and 7 months, until the end of the deadline (date of 20.05.2018).

In September 2016, according to the data communicated on the official site by the National Commission for Compensation of Real Estates, there were settled 24 053 files[6] of the 53 029 files existing on the entry into force of the Law no. 165/2013 which means that, there were still 28 976 files left to be settled until the end of the deadline (date of 20.05.2018). Taking into account the current working rhythm, it would result that after the expiry of the 60-month period, about 20 000 files will remain unsettled of those that had to be settled out until the end of that deadline.

Then, it can be noticed at the level of the National Commission for Compensation of Real Estates within the National Authority for the Restitution of Properties, a big number of solutions of invalidation of the provisions with proposals of granting remedy/compensatory measures issued by Town Halls pursuant to the Law no. 10/2001. From the 7862 files settled in June 2013 – January 2016, invalidation decisions were issued for a number of 3333 files. There is therefore a percentage of

[6] Official site of the National Authority for restitution of properties:
http://www.anrp.gov.ro/comisia-nationala-pentru-compensarea-imobilelor/38-stadiul-de-solutionare-a-dosarelor/1549-stadiul-de-solu%C5A3ionare-a-dasarelor-la-data-de-11-09-2017.html.

42.40% (3.333/7.862) decisions with proposals of compensatory measures of the invalidate town halls, although they were given after a checking of the legal staff within the town halls. It should be also noticed that by the prerogative granted to the National Commission for Compensation of Real Estates by the Art.17 para 1 of the Law no. 165/2013, on the other hand, the activity of settling out the notifications for the checking out of documents is doubling but also the allocated time, and on the other hand, a hierarchy is set up by which A.N.R.P. is placed above the town halls, being able to cancel the decision taken by them. Or, normally, such an attribution should be assigned only to the trial courts.

As a proposal of law *ferenda*, the text of the Art. 17 para 1) let a) should be amended so that the invalidation of the Decisions issued by the two halls in the settlement of the notifications submitted on the basis of the Law no. 10/2001 can be made only by the trial courts.

On the other hand, there is a certain *inefficient management of human resources* (especially legal advisers) existent at the National Authority for Restitution of Proprieties. Many of the invalidation solutions given by A.N.R.P.-C.N.C.I. are challenged at the Court by the entitled persons. A.N.R.P. allocates for the defence of the respective trails a very big number of legal advisers within the institution of whose entire activity is assigned to drawing out Appeals and Statements of Defence for those suits at the "Service of contentious Law no.10/2001". These human resources could be allocated for the analysis and settling out of the files recorded by the Secretariat of the National Commission for the Compensation of Real Estates, of which number exceeded 60, 000.

Another provisions also found in the Law no. 165/2013 is the *Art.35,* providing that all the challenges against the decisions of the vested entities are submitted to the Court on the territory of which are resided those entities, which renders that, in case of the Decisions of invalidation issued by the National Commission for the Compensation of Real Estates or of the refusal of the settlement of the claims within the legal term by this institutions, challenges should be judged only by the Bucharest Court, not also by other district courts. Such fact has the effect of excessive agglomeration of the suits having as subject matters challenges to the Law no. 165/2013 on the docket of the Bucharest Courts and consequently granting of very long terms. To this, it is also added the fact that the entitled persons, regardless of the place of residence, are bound

to travel to Bucharest. As a proposal of law *ferenda*, this article should be amended in the meaning of establishing an alternative competence of the Bucharest Court with the District Court, eventually those in which are located the town halls that settled the notification submitted on the basis of the Law no.10/2001.

The aspects mentioned, as well as the in general, all the aspects related to the matters of completion of the process of restitution in kind or by equivalent of the real estates, overtaken abusively in the period of the communist regime in Romania must be analysed, following to be adopted measures both in legislative terms and administrative terms meant to render efficient and to accelerate this process.

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