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EDITION IV

THE PERSPECTIVES OF THE EUROPEAN UNION. A REVIEW OF ROMANIA A DECADE AFTER ACCESSION

BUCHAREST, 18-19 MAY 2017

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Cuprins

European And international law

The European Union's Twilight? *(Adrian Năstase)* _____ 3

The Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union – legal and procedural considerations *(Gabriel-Liviu Ispas, Daniela Panc)* _____ 10

The European Economic Constitution in the Context of Europeanization *(Andrei Tinu, Luiza Florentina Cureluşă)* _____ 21

Is there an European Union Normative System? Three Theories on Normative Systems *(Andrei-Răzvan Lupu)* _____ 28

The Lawmaking Procedure At The Level Of The European Union vs. The Lawmaking Procedure In Romanian Law *(Mihai Bădescu)* _____ 37

BREXIT and the European legal framework of data protection: implications on security cooperation and information sharing *(Daniela Bacheş)* _____ 46

Consecration, at an european level, of the information principle and public participation in environmental decision making and access to justice in environmental matters *(Lidia Lenuța Bălan, Silviu Gabriel Barbu, Adelina Maria Ciobanu)* _____ 54

Parliamentary diplomacy in international parliamentary organizations *(Titi Sultan)* _____ 61

The Right of Peoples to Self-Determination Versus the Principle of the Inviolability of Borders *(Mihai Ştefan)* _____ 70

Migration, human rights and national security *(Felicia Maxim)* _____ 76

Kosovo. Eastern and Western Insights on the Conflict *(Cristian Carleciuc)* _____ 85

Private law

The legal regime of the decision's annulment of the general meeting of the associates in commercial companies *(Smaranda Angheni)* _____ 97

Brief Considerations on the Acquirement in Advance by the Minor of the Full Capacity of Exercise *(Ramona Duminică, Andra Puran)* _____ 106

The Valences on the Notion of "Contractual Risk" *(Daniel Chifor)* _____ 113

The Relation Between the Principle of Binding Force and Imprevision in Terms of the Law No. 77/2016 *(Ioan Morariu)* _____ 118

Professional – a concept under the Civil Code and the Law no. 193/2000. Comparative approach *(Andreea-Teodora Stănescu)* 126

The Closing of the Insolvency Procedure. New Features Provided by Law No. 85/2014. Various Aspects of Jurisdudence *(Carmen Pălăcean)* 132

Types of Offshore Companies *(Roxana Chirieac)* 141

About the ascertainment decision of the employer *(Magda Volonciu)* 147

Teleworking – A Variety of the Work at Home Contract *(Melis Emin)* 155

Collective Dismissal. Applying the Criteria for Selecting the Employees Targeted by the Redundancy *(Luiza Mihai)* 162

(EU) Council Regulation no. 1259/2010 and the agreement upon the law applicable to divorce and legal separation *(Maria-Carolina Niță)* 170

The Decline and Upswing of Renvoi in the Private International Law of the European Union *(Şerban-Alexandru Stănescu)* 180

Procedural issues concerning the possessory requests *(Gabriela Răducan)* 186

The Taxonomy of Real Estate Acquisitive Prescription and Civil Procedure Matters *(Petruța-Elena Ispas)* 193

The obsolence enforcement *(Mădălina Dinu)* 202

Protection of intellectual property in the context of securing the right to information *(Alina Popescu)* 211

PUBLIC LAW

Unconstitutional Legislative Solutions in the Field of Labour Law *(Tudorel Toader, Marieta Safta)* 221

Standardization of the Structures and Administrative Procedures *(Constantin-Adrian Balaban-Grăjdan)* 233

Lost in the legal "no man's land" between judicial review and arbitration: the domestic arbitral system on disciplinary matters related to football is contrary to the public policy of Romania *(Tudor Chiuariu)* 244

Comparative study between FIDIC Dispute Adjudication and Negotiation as Alternative Dispute Resolution methods *(Oana Ruxandra Gherghina)* 252

Reflecting the Juridical Nature of Personal Autonomy within the Jurisprudence of the European Court of Human Rights (*Beatrice Berna)* 261

International legal instruments on the protection of sexual freedom of the person – essential component of the right to private life *(Andrada Nour)* 272

Freedom of conscience and the religious regime in Romania. Comparative analysis between the Romanian constitutional purviews that have been enacted in the XXth century *(Cosmin Ionuț Tudor)* 283

General Considerations of the Regulation and Guarantee of the Rights Inherent to Human Beings *(Nicoleta Ramona Predescu)* 299

Legislative Delegation and Government Accountability in the Light of Constitutional Provisions *(Mariana Oprican)* 310

Emergency ordinance between constitutionality and normality *(Constantin Sima)* 317

The Complex Offence in the New Penal Code *(Teodor Manea, Dragoş Ivan)* 324

Problems in the Legal Practice Regarding the Misfeasance in Public Office *(Petre Buneci)* 337

The Limitation of Liability in the Domain of the Criminal Law of the Orthodox Church and of the State. Comparative Aspects (*Radu Zidaru)* 343

The Offence of Blackmail: Domestic and International Legal Dimensions *(Mihai Mareş)* 352

Some Theoretical and Practical Aspects with regard to the Offence of Child Pornography *(Iulia Nistor)* 361

The national legislative perspectives in the matter of combating illicit drug trafficking and drug consumption in global and European context *(Codruț Olaru)* 368

General Considerations on the Crime of Unjust Repression *(Alexandru Porof, Gheorghe Daniel Ştefan)* 377

Organized Crime Groups *(Bogdan Buneci)* 385

The Active Subject of Embezzlement *(Bogdan Vîrjan)* 395

Some Considerations of the Non-Constitutionality of Art. 70 par. (1) of the Code of Criminal Proceedings on the Solution of Abstention or Challenge of the Prosecutor in the Course of the Criminal Trial *(Alexandru Boroi, Gina Negruț)* 403

The Evolution of the Waiver to the Criminal Proceedings in the New Criminal Procedure Code *(Maria-Georgiana Teodorescu)* 410

Some Aspects with regard to the Non-Constitutionality of Art. 220 Paragraph (1) of the Code of Criminal Proceedings on the Extension of the Preventive Measure of Judicial Control *(Stelorian Dobre, George Doca)* 420

Relevance of Polygraph Test for the Judicial Trial *(Carmen-Silvia Paraschiv)* 427

Author Index 433

EUROPEAN AND INTERNATIONAL LAW

The European Union's Twilight?

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Abstract

The European Union is in a state of recovery from recently emerging crises such as Brexit, the waves of refugees and the Greek crisis. Many illusions have already vanished. In order to achieve global power status, expansion and reunification, Europe needs, primarily, to mend its wounds. The proposed solutions – various speeds, different rhythms – highlight the West's intention to disengage itself from the European perighery. For Romania, the European project remains of tantamount importance, as long as it will not enhance its discriminatory practices (MCV, the Schengen zone are already examples). Perhaps it is also time to discuss complementary projects, including those that concern strengthenining ties with our neighbours.

Keywords: *The Juncker Plan, Brexit, European policies, Romania.*

1. Some facts about the European Union

The European Union has arrived at its most advanced state, which has started from a project that was initiated post-World War II, by only six European states. Today, the 28 (27) Member States cooperate in a customs union, a common market for goods, persons, services and capital. They share common policies in agriculture and commerce, a common currency (19 of them) and an area where the free movement of individuals is possible – Schengen – (22 of them).

Today, however, we find ourselves at crossroad in the life of this organisation. Our lives will also be greatly influenced depending on the upcoming decisions which will be taken in the following months and years. Even though the Berlin Wall has been torn apart, the construction of other walls threatens to fragment and divide Europe, thus only enabling discussions about Europe in terms of geography.

As Federica Mogherini, the EU High Representative, pointed out: "the purpose, even the existence, of our Union is being questioned", at a time when our citizens and the whole world needs a strong European Union, now more than ever. [1]

This scenario reminds me of Richard Wagner's opera "**Twilight of the Gods**". I believe that, after 60 years, the European Union has begun a process of mythological self-destruction and its "gods" have come close to extinction. We are slowly returning to uncertainties that were sparked decades ago. For instance, in the following period, will Romania continue on the playing field or will it be moved to the sidelines? Clearly, significant changes are occurring as we speak. Some are harder to notice than others. The illusion of the European Union growing from a regional power into a global superpower has been shattered once

with the restriction of its capabilities, especially after Brexit. It is simple to see that its might and ambition to play a global role are slowly vanishing.

More than a decade ago I raised this same issue: "Europe's mission is to control the incredible force of globalization. Is Europe going to remain a regional power or is it going to evolve into a global power?"[2]

2. The idea of a reunited Europe seems an illusion

The idea that Europe, after World War II, will be reunited seems to be another illusion(1), especially if we consider the Western Balkans. Europe "is starting to withdraw towards the West", regretting, at least partially, its Eastern expansion.

At the moment, the European Union faces multiple crises due to its economic growth slow-down (partly due to the economic crisis), high rates of unemployment (in some of the more economically developed Member States) and the amplification of anti-EU sentiments ("Euroscepticism" and populist movements). The "leave" vote from June 2016 in the UK adds significant pressure on top of these issues – forcing Great Britain to exit the European Union. The problems in Greece, the pressure caused by the influx of asylum seekers, the complex situations in Eastern Europe (in Ukraine, as well as the annexation of Crimea), the

(1) Throughout centuries, the idea of a united Europe was suggested by the most enlightened minds of their time. Mentions of a united Europe can be found, for instance, in **Dante Alighieri**'s "Divine Comedy", in which a united Europe could only be built under the command of a sovereign superior to all other sovereigns. Dante was of the opinion that the population of Europe shared a common language (Latin) and even a strong currency (this could be the Florin, which, due to the influence of the Florentine traders, had a large covering area in the entire Europe. During the 17thcentury, **the Duke of Sully** envisaged "a political body of all states of Europe that should be able to generate an unalterable peace and perpetual trade among them" ("Grand Design"). **The Abbey of St. Pierre** (18th century) designed a peaceful confederation based on an eternal, irreversible alliance of sovereigns, run by an assembly of their representatives, which would act both in the best interest of each Member State and in that of the confederation, also. In 1795, **Immanuel Kant** elaborates a "Project for Perpetual Peace", by proposing a federation of free states, founded upon a republican type constitution. The 19th century, although referred to as the "century of nationalisms", brought along an expression that would be often used afterwards. **Victor Hugo** said: "One day we shall see those two immense groups, the United States of America and the United States of Europe, reaching out their hands across the sea, exchanging their products, commerce, industries, their arts, their works of genius…" (Opening Address to the third Peace Congress in Paris, in 1849). Hugo's phrase, "the United States of Europe" also found a place in the political speeches of **Aristide Briand** (1929, the League of Nations) and those of **Winston Churchill** (1949, Zurich). At the Vienna Congress (1815), **Talleyrand** defined Europe as a "permanent system of common reassurance and general equilibrium". The final Vienna document is, in fact, a true political and territorial charter of Europe. The European Concert established at that time was characterized by solidarity, based on legitimacy and balance, as the most solid pillar of peace. Europe had to guarantee borders and regimes, as well as the peace of the continent. The plan of **Saint-Simon** (1814) envisaged building Europe around the alliance between England and France and this construction was to be conducted by a monarch, "a scientific and political leader". It was determined by changes undergone in the relations between nations, following the industrial revolution and the enlargement of economic interactions. This alliance was open to other states, as they became free and managed to set up representative institutions. The Romanticists thought the building of European unity was the natural step forward after the establishment of the national states for which they fought – **Mazzini**, in Italy, created, in 1834 the "Young Europe" movement, with the belief that the national unifications across the continent were anticipating "the great European federation". I will not further enumerate all these projects. They were numerous and they were aiming to replace the conflicts on the continent with a formula of unity meant to empower the European states in a new geopolitical configuration of the world. (See, in detail, Adrian Năstase, "Quo Vadis, Europe?", Official Gazette, 2003, pp.22-29.

terrorist attacks and security threats in Western capitals that have increased in frequency, are all crises that add to the heavy weight that the European Union is already carrying. [3]

Under these circumstances, a question that needs to be posed is whether the European project's process of expansion and integration are still **irreversible**. Especially since we can observe the lack of strong leadership and strategic vision at a European level. Furthermore, Europe must decipher a certain "vagueness" concerning the Trans-Atlantic security partnership and the level of further involvement of the United States in matters which concern European security. [4]

There are many other questions without answers. What political, economic and military partners will Europe have in the decades to come? What part will China play in the EU's foreign policy? How about Russia (and by Russia I am not referring to the relationship with various capitals, but that with the organization)? [(2)] Or perhaps the triangular axis US – Russia – China will lead to the total isolation of Europe and its interests? [(3)]

3. The concept regarding a two-speed Europe is a trap

The concept regarding a two-speed Europe[(4)] is a trap. Europe seems to somehow be engaged in a single speed, and that is **marche arrière**! Europe is moving backwards, heading towards geometrical formulas that only have limited variable geometry. This time Europe is withdrawing towards its moment of birth; to an isolated region where even Rome was situated in the "periphery"; to the moment when Truman sought the "containment" of the Soviet Union's expansion; to the times when, in Italy, the danger of forming or maintaining communist governments existed – just as in France. Without a doubt, substantial changes have occurred since then, but it is clear that the idea of a common destiny, of solidarity, of European unity, of polite words – all these principles have in fact been razed to the ground by the effects which the economic crisis has generated in some European countries. The globalization crisis has also left its mark on Europe's political sphere. There is also another crisis concerning leadership, be it at a European level or in its Member States – which

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[(2)] See, also, "The EU, the Eurasian Economic Union and One Belt, One Road. Can they work together?", Centre for European Reform, March, 2017.

[(3)] Europe's present status is regarded as bleak by many analysts – low economic growth, glaring inequities, and political discontent. Here is a recent example: "Even in good times, economic growth under the euro was unexceptional, but with the global financial crisis, the situation grew dire. Since 2008, inflation-adjusted GDP in the Eurozone has stagnated, compared with an expansion of more than eight percent in European countries that remain outside. **Greece's economy is more than 25 percent smaller than it was in 2008**, **Italy's** is almost **ten percent smaller**, and its financial system may be the next to melt down. The loss of European output totals about six trillion euros – a massive figure, reflected in the shattered lives of unemployed youth, bankrupt business owners, and vulnerable citizens unable to maintain their standards of living. Although losses from short recessions are often offset by higher-than-average growth thereafter, that process does not typically occur after prolonged depressions such as the current one. In this situation, **a lost decade may well become a lost generation**. **Nor has the euro reduced inequality among European countries. Since 2007, the German economy has grown by almost seven percent, whereas the economies of Belgium, France, and the Netherlands have remained stagnant, and those of Finland, Greece, Ireland, Italy and Portugal have all contracted more than they did during the Great Depression.** Inequality has also increased within countries – to a stunning degree in the worst-performing ones, such as Greece, but even in Germany, too." (Andrew Moravcsik, **"**Europe's Ugly Future. Muddling through Austerity", in Foreign Affairs, 2016, November/December Issue, pp. 2-3).

[(4)] See, in detail, Valentin Naumescu, "White Paper for 27. The Hypocrisy of the "Two Gear Europe" Project. The Ebb of the West starts. Are we left to hang high and dry?", www.contributors.ro, pp. 2-5.

has allowed the emergence of populist, xenophobe political forces. All of these crises have created the desire for Western countries to isolate themselves as a means of survival, which affects us as well. After being "used" for a quarter of a century, Eastern Europe is being sent back to the periphery. It appears that the East has stopped being interesting as soon as Eastern resources and markets have become less accessible, as soon as its labour force stopped being so cheap as as soon as national governments started raising the issue of collecting taxes where profits are made from multinational corporations. As Cristian Socol stated: "The substance has been extracted, the accounts have been filled, interests have been extracted, all that could have been privatized was privatized and profits were privatized as well. What is left is no longer profitable, or is no longer worth the effort, the outputs are constantly diminishing. And exactly when a sustainable recovery process was unfolding in Eastern countries, the club is readjusting – it is reforming."[5].

4. The importance of being realistic

I think it is important, for us, to be realistic. We can continue remaining prisoners of decisions that were valid at the beginning. However, these will not benefit us extensively at this moment in time. Now, since we are also discussing Romania's political path in the past 10 years, I would like to mention the book that I published in 2007, entitled "European Romania"[6]. In it, I outlined a plan that I had conceived at that time, meant to be an ample program to be used at the moment when Romania became a member of the European Union[7]. It is obvious that Romania has begun, on various fronts, ambitious modernization processes. Unfortunatelly, none of them have been accomplished successfully. Each and every one of them failed, as a whole. Beginning with the 1848 revolutionaries, in part with Carol I, with the political elite after World War I. Clearly, with what has happened after World War II as well, but also with what has occurred in the aftermath of the Cold War. In every one of these cases, the main issue that emerged was that of **synchronising Romania with the West**. The dynamics modernization, however, did not lead to significant results because, for us, **the modernization process reproduced, in Romanian society, the defining institutions that existed in the developed Western civilization. Consider, however, that this reproduction process already imposed a delay – it required a set-back in time for us, meaning a self-isolation from the processes that were taking place around us, in real time, in Europe and in the world**[8]. This is precisely what is happening at the moment. We are still trying to function within parameters that do not make sense anymore, taking into account the issues that Europe is currently facing. Globalization has altered very many of these things. Within the European Union, we still embark on mantra type strategies regarding ambitious and beautiful concepts such as: democracy, rule of law, so on and so forth – all of which are respectable and important. For instance, we endorse sanctions against Russia – alright – but we are witnessing the German Minister of Foreign Affairs or the American State Secretary going to Moscow, without "infringing" said sanctions against Russia. President Putin visits Budapest and this is met by no sanctions from Europe. It

[5] Cristian Socol, "Will the EU get to see its retiring pension? Causes and dilemmas of the two gear Europe", "Adevărul" newspaper Blog, March 9, 2017.

[6] Adrian Năstase, "European Romania", MondoMedia, Bucharest, 2007.

[7] See, also, Adrian Năstase, "Vision about Europe's Future – Romania's Contribution", in vol. "Romania and the Future of Europe", Bucharest, Official Gazette, 2001, pp. 7-23.

[8] Adrian Năstase, "European Romania", MondoMedia, Bucharest, 2007, pp. 67-93.

seems, to some extent and from a certain point of view, that we are more catholic than all our partners. In any case, it is clear that each new historical period has conceived a set of reforms – some of them extremely radical – but they have all ended in failure. This is a deeply regretful fact. We should probably be drawing conclusions, not only regarding what is happening in Europe but, even more concerningly about what is happening in Romania. It is humorous to see Western European nation states assuming their rights to have – may this choice of words be excused – "mistresses" in other geographical regions, while Romania has to make chastity vowes. Our lack of courage in promoting our own national interests in the real world creates, in my opinion, part of our problems[9].

5. Romania's path after 1989

Did we have an alternate path after 1989? Of course not[10]. This is the moment we must develop from. The European Union, however, has also changed during these years. First of all, it has changed its structure. It has shifted from an area of economic interest to one of political integration; followed by a return to spheres of restrictions; then a new division between the East and West had emerged, which is now becoming more and more obvious. I believe that these facts must be taken into consideration. Of course, we – and this is in fact the important issue – we cannot talk only about the European Union. We must begin understanding the dynamics of NATO, since it could also start altering parts of its policies. It cannot be an organisation that charges protection fees when it comes to ensuring the security of its members. Will the European Union allow some of the countries from the periphery to compete amongst themselves as they did 10-20 years ago – establishing bilateral relations with Western powers at different temperatures? **At this moment in time, Romania finds itself in an ingrate position, position which reminds of the isolation experienced in the 90s.** Although, at the time, the United States had a clear position regarding their foreign policy. Today, there is a great risk that many of the "communication lines" will pass beyond our reach just as the current energy supply routes do. That is why I think it ought to be observed that Europe can be characterized through the title of Balzac's novel "The Skin of Sorrow," which is continuously shrinking. We must notice that fragmentations are occurring and this will unavoidably issue problems for us as well.

6. Solutions? The reform of the European Union?

Solutions? The reform of the European Union? This reform will probably be made in the best interest of the European West. This needs to be very clear for us. This is why I believe that, beyond the holograms we are currently fighting internally – democracy, privatization, rule of law, corruption, through which foreign capital managed to "ingest"

[9] For example, our position regarding EU's discriminatory approach concerning Romania's adherence to Schengen. See, also, I.M. Anghel, "Blocking Romania's adherence to the Schengen Agreement" in vol. "European Union Regulations of Particular Interest – Sui Generis, for Romania", Universul Juridic Publishing House, Bucharest, 2017, pp. 130-145.

[10] As Prof. I.M. Anghel pointed out, "adhering to the EU, Romania has chosen the only rational way it had and which, in a substantial manner, but also in view of the future it wanted to build for itself, was in accordance with the logic of its history…" (I.M. Anghel, Argumentum, in vol. cit. "European Union Regulations of Particular Interest – *Sui Generis*, for Romania", Universul Juridic Publishing House, Bucharest, 2017, p. 10.

the local capital from the former Eastern European countries – I believe that, forsaking naivety, we should attempt to construct a larger concept, primarily regarding our foreign strategies. Ignoring Russia, China and other economic markets is a mistake. Furthermore, our geographical location also entails potential cooperation with certain neighbours such as: Hungary, Ukraine, and also taking into account by proximity through the Black Sea, Russia. Allowing ourselves to indulge in such oversights in our foreign and economic strategies – while Poland, the Visegrad Goup in general, Germany, France do not – works towards the detriment of our best interests. Also – I tend to believe – that there should be a revival of some of our diplomatic approaches, including the one regarding "good neighbourhood" – which, during the 80s has had a certain international echo. We ought to be taking a closer look towards our neighbours – although we have considered so far that the West is our only point of reference, an Euro-Atlantic formula. I do believe that important changes should be made when it comes to Romanian foreign policy. I do not wish to convey a pessimistic message. I do not believe that we should take the Juncker plan too seriously – this is a "martyr-plan." In other words, it was released to be "butchered", to be put against the wall, in order to test out reactions from various states. A sort of "Christmas tree" was forged at the European Council's reunion in Rome, through which everyone attached something to the adopted document. However, the theme, the substance of this debate should be clear to all of us – and I think that this is where the problem we have resides. That is why I consider that in parallel with Juncker's White Paper, we should launch a national plan internally which should attempt to secure internal unity – through the perspective issued through the Centenary of Great Union – before noticing that the European unity starts to experience its own issues. Of course, we are highly interested in witnessing a strong Europe that will persist – as a construct. However, it is obvious that, over the past decade, events from outside of Europe – **such as the international financial crisis and the refugee crisis** – have exposed the European Union's internal shortcomings and vast cultural and political differences. The rise of populist and Eurosceptic sentiments across the continent have forced EU members and institutions to come to terms with the fact that the **dream of a federal Europe** may never come true. Even countries such as Germany, which have placed EU integration as a centerpiece of their foreign policy, seem to have accepted that the European bloc will have to become more flexible in order to keep from breaking. **The idea of protecting the European Union by making it more flexible appears to be a reasonable choice under the current circumstances.** Depending on the kinds of reforms that the Union's members decide to introduce, it is possible that amending the European Union's governing treaties could be rationally required. But, considering the divisions among the EU's regions – and especially between Northern and Southern European countries – adjusting the treaties seems out of the question. Consequently, EU members may have no choice but to temper with their expectations and focus on **reforming the Union within the confines of its existing institutional framework. Cynically speaking, just because EU members can move at different speeds doesn't necessarily entail that they will be moving in the same direction.**

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The Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union – legal and procedural considerations

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Abstract

The date of March 29, 2017 marks the beginning of the countdown for the exit of the United Kingdom of Great Britain and Northern Ireland (United Kingdom) from the European Union. The new situation created for the Union is a political, legal and economic challenge, with unpredictable and irreversible consequences, but it also represents an impetus to relaunch the European project.

This paper proposes an examination of the main events related to the withdrawal decision from the European Union (EU), highlighting the UK perspective outlined in the Letter of Notification of Withdrawal under Art. 50 of the Treaty on European Union (TEU), addressed to the European Council. Moreover, this approach includes an analysis of the withdrawal procedure in accordance with Art. 50 TEU, as well as a critical presentation of the perspectives of European leaders on the future of the Union in 27 Member States, with emphasis on the implications for education in Romania.

Keywords: *European Union, Brexit, withdrawal, Art. 50 of the Treaty on European Union, Romania, EU-27.*

1. Introductory remarks

After decades of progress in European integration, one may undoubtedly notice that the European Union is a dynamic entity capable of developing, reforming and constantly adapting to challenges. The EU stands for common standards of peace, security, democracy and prosperity, through complex mechanisms of self-limiting the attributes of state sovereignty, in order to achieve collective objectives at supranational level.

The European Union is currently in a stalemate, facing unprecedented global and domestic challenges: regional conflicts, terrorism, increasing pressures regarding migration, protectionism and social and economic inequalities [1]. In this global and regional context, the prospects for the withdrawal of the second largest Member State are an unprecedented challenge in the history of the EU [2], from a political, legal, economic and social perspective. The loss of predictability and certainty for the business community, the loss

of European citizens' rights, and the impact on the Union's decision-making process, represent some of the problems that the withdrawal of the United Kingdom from the European Union (Brexit) brings about.

EU decision-making blockages are the result of nationalist tendencies and Eurosceptic populism spreading among political parties. In this context, the decision to withdraw the United Kingdom from the EU is fueling the fear of retreating to other member states (such as the Czech Republic, Hungary, France or the Netherlands), Brexit leaving the impression of the beginning of the end of the European dream for pro-European advocates.

2. Key data on Brexit

Analyzing the evolution of the relationship between the United Kingdom and the European Union, we appreciate that since the accession process, the United Kingdom has had a particular status vis-à-vis the EU, based in some respects on the intergovernmental method of cooperation, to the detriment of supporting the idea of European integration, of federalization. The United Kingdom's different policy orientations and priorities have been highlighted in the opt-outs of key initiatives in EU policies, among which we can mention the refusal to participate in the Schengen area in terms of internal and external borders, remaining outside the Economic and Monetary Union or the UK response to the crisis of refugees and immigrants in 2015 [3]. We anticipate that Brexit will reflect the same UK policy faithful to its traditional guidelines.

The European Union Referendum Act of 17 December 2015 [4] established the organizing details of the referendum on whether the population decides the remaining or the leave of the United Kingdom from the European Union. Organized on June 23, 2016, the result of the referendum reflects the desire of the population to leave the European Union, with 51.9% to 48.1%, in favor of the Brexit. [5]

As a result of the referendum favorable to the United Kingdom's withdrawal from the EU, on June 28, 2016, the European Parliament adopted a resolution [6] which notes the decision of the UK citizens and calls for a speedy start of the United Kingdom withdrawal procedure. At the same time, the EU Parliament calls on the Council to designate the Commission as a negotiator for Art. 50 of the TEU and calls for a roadmap for a better Union based on the full exploitation of the Lisbon Treaty, complemented by a revision of the Treaties. We highlight the fact that this EP resolution cancels the agreement concluded in February 2016 with the European Council [7], regarding the special status the EU was willing to offer to the United Kingdom in case the referendum result would have been the remain of the UK in the European Union [8].

Following the informal meeting with 27 Member States of 29 June 2016 [9], the European Council indicates the stages of the withdrawal procedure regulated by Art. 50 TEU, along with the details following the informal meeting of 15 December 2016 [10], the process being under the political control of the EU-27 European Council.

On October 2, 2016, the UK government, led by Theresa May since July 2016, announced the start of the EU withdrawal process by the end of March 2017. In this context, on January 17, 2017, the British Prime Minister launched the 12 principles [11] which will guide the government in the EU withdrawal process, integrated into a White Paper [12] to provide Parliament and UK citizens with the government's perspective on the objectives of the withdrawal negotiations. The 12 principles outlining the United Kingdom's exit strategy from the EU are aimed at: 1. providing certainty and clarity; 2. take control of their

own laws; 3. strengthening the United Kingdom unit; 4. protect the strong historical ties with Ireland and maintain the Common Travel Area; 5. immigration control; 6. ensuring the rights of EU citizens in the United Kingdom and UK citizens in the EU; 7. protecting workers' rights; 8. ensuring free trade with European markets; 9. ensuring new trade agreements with other countries; 10. ensuring that the UK remains the best place for science and innovation; 11. cooperation in the fight against crime and terrorism; and 12. ensuring an orderly exit from the EU.

In accordance with the UK Supreme Court case law [13], on 16 March 2017, the UK Parliament adopted the *European Union (Notification of Withdrawal) Act 2017*, which gives the Prime Minister the power to notify the UK withdrawal intention from the EU, in conformity with Art. 50 par. (2) TEU.

On 29 March 2017, the United Kingdom sends the European Council the *Letter of notification to the European Council on the withdrawal of the United Kingdom from the European Union* [14]. The notification of the United Kingdom's invocation of Art. 50 sets the official timetable for the EU to begin the procedures for negotiating the withdraw from the Union. From March 29, 2017, there is a two-year negotiation period ment to decide upon a formal agreement to withdraw, in accordance with Art. 50 par. (3) TEU.

The letter explains the reasons for the withdrawal decision, based in essence on the desire to restore national sovereignty. In a conciliatory approach, the Government's letter outlines the British outlook on the departure of the United Kingdom and the partnership it wishes to establish with the Union after Brexit. While agreeing to the terms of withdrawal in a comprehensive agreement, the United Kingdom proposes to accept the negotiation of a strong and special partnership agreement with the Union, focusing on economic and security cooperation issues.

The Government of the United Kingdom sets out seven principles to guide the negotiation process: sincere cooperation; prioritization of citizens' interests; setting out a comprehensive agreement; minimization of disruptions and offering certainty; attention to the relationship with Ireland, especially with regard to the peace process with Northern Ireland; the need for detailed technical discussions, prioritizing the biggest challenges, respectively, protecting common European values.

From the United Kingdom's legislative effort point of view, in order to ensure an orderly transition, on March 30, 2017, the UK Government adopted the White Paper on Legislating for the United Kingdom's withdrawal from the EU [15]. The policy paper proposes to adopt, starting from the day of the departure from the European Union, a legislative project entitled *The Great Repeal Bill*, repealing the European Communities Act of 1972. The European Communities Act 1972 is the main normative tool for the implementation of EU law and which states the pre-eminence of EU law in relation to British law. Moreover, when leaving the EU, the Great Repeal Bill will transpose the *EU acquis* into British law and will ensure national competences for the adoption of secondary national legislation so that the legal system also works well outside the EU.

In order to ensure consistent political support at national level in negotiations and withdrawal from the EU, the United Kingdom holds early elections on 8 June 2017, Prime Minister Theresa May's political mandate ending at the time of the Brexit launch. [16]

3. Article 50 of the Treaty on European Union – the withdrawal from the Union

Until the Treaty of Lisbon, the treaties establishing the European Communities did not regulate the possibility of voluntary withdrawal from this atypical form of supranational organization. The introduction of Art. 50 into the Treaty on European Union (TEU) is an element of novelty introduced by the Treaties in force, being taken over from Art. I-60 (*Voluntary Withdrawal from the Union*) of the Treaty establishing a Constitution for Europe.

In absence of these explicit withdrawal provisions, there has been a heated debate on the idea of introducing through Art. 50 TEU a new right in favour of the Member States [17]. We consider that, in the absence of explicit special provisions, the rules of the general law, the Vienna Convention on the Law of Treaties of 1969, apply within the framework of public international law, without introducing a new right. The German Constitutional Court's decision of 30 June 2009 supports this theory, mentioning the possibility of unilateral revocation of the European integration [18].

Taken from the Constitutional Treaty, Art. 50 has an important political significance that compensates for the federal vocation of the Union by transmitting a message of national sovereignty. The withdrawal clause represents the only legal basis governing the conditions and procedure for the voluntary withdrawal of a Member State of the EU, the primary value of Art. 50 TEU being of procedural nature, beyond the important political relevance. Prior to the Lisbon Treaty, the withdrawal procedure was unclear.

As from the perspective of public international law, the waiver of the right to be a member of an international intergovernmental organization is a voluntary act of the State, a formal statement made by the State with the intent to produce legal effects under public international law [19], Art. 50 does not regulate the substantive conditions for withdrawal (such as the reasons for withdrawal or the condition for approval of the decision by other Member States), but merely stipulates the procedural steps to follow.

The first paragraph of Art. 50 regulates the obligation to observe the constitutional rules of the State wishing to withdraw from the Union. With regard to the United Kingdom, the UK Supreme Court states in its judgment of 24 January 2017 [20] that the government can not trigger Art. 50 TEU without the approval of the national parliamentary authority, highlighting the need for an act of the national Parliament to initiate the withdrawal process. Par. 150 of the judgment of the Supreme Court highlights the fact that decentralized legislators in Scotland, Wales and Northern Ireland can not veto the decision to withdraw the Kingdom of the EU. In accordance with this procedure, the United Kingdom Parliament adopted *the European Union (Notification of Withdrawal) Act* on 16 March 2017 mandating the Government to initiate the withdrawal procedure from the Union.

According to Art. 50 par. (2) TEU, the first step in triggering the withdrawal process is the notification of its intention to the European Council. On 29 March 2017, the Prime Minister of the United Kingdom notified the European Council through a formal letter of the request to withdraw from the European Union. As a result of the withdrawal notice, the European Council adopts a set of guidelines reflecting the principles, positions and general interests of the EU and other Member States during the negotiations.

The extraordinary meeting of the Special European Council EU-27 (Art. 50), without the participation of the United Kingdom, was held on the 29th of April 2017. The European Council adopted by consensus the draft of the guidelines necessary to establish the negotiating

framework for Brexit, proposed by Member States on March 31 by the European Council President Donald Tusk [21].

In the European Council Guidelines of 29 April 2017 [22], the EU aims to obtain a withdrawal agreement in the interest of both parties. The Guidelines define the negotiating framework in accordance with Art. 50 and the positions and principles that the Union pursues throughout the negotiations. The European Council reiterates the EU's desire to have a close partner in the UK in the future, while establishing that the partnership must be based on a balance of rights and obligations. In order to preserve the message and position of the Union, the Guidelines contain the obligation for Member States not to conduct separate individual negotiations with the United Kingdom on matters relating to Brexit.

Four days after the adoption of the guidelines, the European Commission, in the College of Commissioners, issues a recommendation to the Council to start negotiations. At this point, the Council authorizes the start of negotiations, with the adoption of the negotiating directives, by a qualified majority (72% of the Member States, representing 65% of the EU-27 population). Once the negotiating directives have been adopted, the Council appoints a negotiator, mandated to negotiate and conclude the agreement setting out the conditions for withdrawal, taking into account the framework of its future relations with the Union [23].

In accordance with par. (3), the Treaties shall cease to apply to the State from the date of entry into force of the withdrawal agreement or, in the absence of such agreement, two years after the initiation of the withdrawal procedure by notification. The two-year period may be extended by the European Council, acting unanimously, in agreement with the Member State concerned.

At the end of the negotiation period, the Union negotiator shall submit a proposal for agreement to the Council, acting by a qualified majority, after approval by simple majority in the European Parliament (taking into account also the UK members of the European Parliament who fulfill their responsibilities until the United Kingdom effectively withdraws from EU).

In order to produce legal effects in the national legal order, the withdrawal agreement must be ratified by the United Kingdom, in accordance with its own legal provisions.

4. Perspectives of the European Union in 27 Member States

As a result of the decision to leave the EU, a political reflection has been launched on the future of the European Union, initiated by the Bratislava Declaration of September 16, 2016. The Declaration addresses also the following priority areas: migration and external borders, domestic security, external affairs and defense, respectively, economic, social and youth development.

Following the Bratislava initiative, the European Commission proposes on 1 March 2017 the *White Paper on the Future of Europe* [24], which contains five scenarios on the outlook of the EU project, ranging from the current situation, to reforming the vision of Europe's future.

The first scenario, *Carrying on* the same path, implies the maintenance of the current joint action agenda, assuming the reforms and the pursuit of the collective guidelines and priorities set out in the 2016 Bratislava Declaration and the 2014 President Juncker's Political Guidelines: *A New Start for Europe* [25]. Regarding the impact on the EU policy, this scenario involves consolidating the Internal Market; progress on the Economic and

Monetary Union (EMU); enhancing cooperation on Schengen, migration and security; developing cooperation on foreign and defense policy; and modernizing the budget. Despite the fact that this EU-27 unity scenario would bring concrete results, defined by a common feeling, it would maintain the current frustration regarding the difficulty of understanding the EU's decision-making process. We appreciate that this variant of action is unlikely to be the choice of the European leaders.

The second scenario, *Nothing but the Single Market*, proposes limiting the current capacity to act in multiple policy areas, with the Internal Market being the only foundation for the EU's existence. Restricting collective action only to the single market area involves extending the scope of bilateral cooperation between the Member States, the EU's representativeness and influence at international level being affected. Regarding the impact of this scenario on EU policies, we can highlight the benefits of strengthening the Single Market, reorienting the budget to fund policies specific to fundamental freedoms, and simplifying and understanding the decision-making process. On the other hand, the capacity for collective action is limited in terms of EMU, migration, asylum policy, foreign and defense policy, all these areas being addressed mainly bilaterally.

The third scenario, *Those Who Want More Do More*, generates a debate on an alternative where the EU-27 retains its present unity, but establishes strengthened coalitions of cooperation between states that have an interest in doing more in certain areas, such as defense, internal security or taxation. The impact of this scenario would be to significantly strengthen all EU policies, with elements of in-depth cooperation in areas of specific interest. This direction would further complicate the current decision-making process and the results obtained by the states would be different, which translates into dissatisfaction among citizens, who would have varying rights depending on where they live.

The fourth scenario, *Doing Less More Efficiently*, involves concentrating the resources on a limited number of areas the EU-27 could concentrate its efforts. The impact on policies would imply setting common minimum standards, but consolidating areas such as trade (managed exclusively at EU level), defense, the euro zone or migration and asylum policies.

The Fifth scenario, *Doing Much More Together*, proposes to deepen the cooperation between all states to an even higher level on all policies. This direction would raise debates on state sovereignty and the legitimacy of the EU.

Following the analysis of the five scenarios, we can highlight that the scenarios which offer differentiated development opportunities between states would bring greater benefits to the major economic powers in the EU and would disadvantage emerging European economies, including Romania. In our view, Romania's most advantageous scenarios would consist either in maintaining the status quo in general, by agreeing upon some institutional and decision-making reforms, or, in a longer-term perspective, adopting the scenario of deepening the EU-27 cooperation in all its areas of competence. The most challenging scenario for Romania, but which would bring the most benefits to a comprehensive engagement, is the one that would maintain unity within the EU-27 and, at the same time, would allow the enhancement of certain policies by coalitions of states with common interests.

The response of the States to the White Paper was different, depending on the national interests within the EU, ranging from opting for the first scenario (keeping the status quo), to the third scenario of the White Paper – Europe with more speeds (*A Multispeed Europe*). Thus, on the one hand, the heads of government of the Visegrad Group countries adopted the *Joint Statement "Strong Europe – Union of Action and Trust" Input to Rome*

Declaration 2017 [26], stating the belief that EU unity, regardless of the level of integration of the member states, is the basic principle of cooperation. The Visegrad Group promotes the preservation of the current Union project with the same common vision and objectives, but also with the possibility of flexibility and enhancement through *enhanced cooperation* on the non-exclusive competences of the Union, in accordance with the provisions of articles 20 TEU and articles 326-334 TFEU .

On the other hand, the leaders of the first four most populous and influential EU Member States (Germany, France, Italy and Spain), at a summit organized in Versailles on March 6, 2017, promote the strengthening of the EU unity, but within new forms of cooperation defined by the third scenario proposed by the European Commission. The four political decision-makers supported the concept of an united Europe, but not uniform, with different levels of cooperation and integration of states, depending on the interests and capacities of each Member State. The theory of a Europe with more speeds was endorsed in the speech of the leaders at the summit, through phrases such as: *differentiated cooperation* (the French President, François Hollande), *accepting that some countries could progress faster than others* (the German Chancellor Angela Merkel), *different levels of integration* (the Italian Prime Minister Paolo Gentiloni), *continuing the integration with those states that want this integration* (the Spanish Prime Minister Mariano Rajoy).

The EU-27 scenarios contained in the White Paper on the Future of Europe represented the contribution of the European Commission to the Rome summit of 25 March 2017, held on the occasion of the 60th anniversary of the Treaty establishing the European Economic Community.

The Rome Summit was an opportunity for reflection by the leaders of the Member States on the direction of the new European Union post-Brexit and a relaunch of a citizens' trust plan in the EU project. The Rome Declaration [27], illustrates the commitment of the 27 Member States regarding the future of the EU.

The Rome Declaration sends a message of unity and cohesion, with political leaders committed to make great efforts and finding the most appropriate solutions for achieving the Union's objectives: security with regard to borders and organized crime, prosperity and sustainable development, promoting diversity from a social perspective, strengthening commitments on the international scene in the areas of security and defense. It would appear that in its fullness the Declaration is a message of integration, but the declaration stipulates, among other elements, for the perspective of an *European Union à la carte* [28]: *"We will act together, at different paces and intensity where necessary, while moving in the same direction", "We want the Union to be big on big issues and small on small ones."*

4.1. Implications on Education in Romania

The White Paper on the Future of Europe provides an analysis framework to Romania in the field of education and training, in accordance with the provisions of Art. 5 TEU and Art. 2 and 6 TFEU, concerning the demarcation of competences between the European Union and the Member States.

Romania's governmental perspective envisages two main pillars: on the one hand, national education and training and, on the other hand, the recognition of professional qualifications. The analysis in the field of education concerns the impact of the adoption of a specific action line at European and national level.

Concerning the *Education and Training* pillar, we note the usefulness of Union actions to support, coordinate or complement national actions, with the delimitation of EU regulatory competences in education legislation and policies, related to national specific policies and legislation. [29]

The analysis of the *Recognition of professional qualifications* pillar would imply increasing EU integration by recognizing professional qualifications at EU level. The deepening of European integration would involve the strengthening of two dimensions through specific strategies: firstly, the extension of the list of regulated professions; and secondly, access on the labor market to these regulated professions, depending on the internal labor market demand in some Member States, as there are currently states that have simplified, through national reforms, the access to certain regulated professions.

The national perspective for the recognition of professional qualifications would involve either direct bilateral negotiation with each state in order to recognize unregulated professions or the adoption of policies and legislation aimed at increasing access to regulated professions, in line with the strategies of the states adopting the scenario based on *Those Who Want More Do More* in specific fields.

5. Final considerations

The United Kingdom decision to withdraw from the European Union should not be perceived as an inability of the EU to reform, but on the contrary, we consider Brexit a moment to initiate a reform that offers the opportunity to shape a comprehensive vision for the entire European continent, not just for the EU. Therefore, we appreciate that Brexit should be approached as an opportunity for progress, not as a vulnerability, the uniqueness of the situation generating resourceful solutions for the development and consolidation of the EU.

Despite the institutional or decisional difficulties, the EU continues to be the most promising security and prosperity project for Europe in the global dynamics. The intense and complex period of the next two years of negotiations between the EU and the United Kingdom will provide an opportunity for the Member States' governments to be actively involved. Romania can make a significant contribution to the definition of the EU's action lines, given that the Romanian Presidency of the EU Council in the first semester of 2019 coincides with several EU key events, such as the official UK exit from the EU, The European Parliament elections of June 2019 and the start of negotiations for the multiannual financial framework for the period 2021-2027.

As highlighted in this research paper, the EU's challenges in the next period are aimed, on the one hand, on reaching a withdrawal agreement for the UK, and on the other, the need for a political reflection on the future of the European Union in 27 Member States. We draw attention to the need for a rational and not emotional strategic vision, driven by the pride of political leaders. Undoubtedly, identifying the balance between rights and obligations for the Union and the United Kingdom, in order to establish a reasonable form of functional partnership, would greatly benefit both parties.

The EU-27 perspective calls on the Member States to identify the most beneficial forms of governance, maintaining the interests and expectations of European citizens at the heart of the debate. With regard to the five EU-27 scenarios proposed by the European Commission in the White Paper on the future of Europe, it can be noticed that the position

of the Member States varies from the option of a differentiated integration in the *Multispeed Europe* scenario, taken into account by France, Germany, Italy and Spain, up to the version supported by the Visegrad Group to maintain the current EU agenda. We appreciate that Romania is currently favoring scenarios that either involve maintaining the status quo or intensifying cooperation in specific areas in coalitions of Member States with common interests. Despite the fact that the tendency to choose a scenario seems to be that of a differentiated cooperation, drawn by the great European leaders at the Versailles Summit and through the Rome Declaration, European decision-makers are responsible for a constructive solution that does not jeopardize the achievements of the European Union so far.

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The European Economic Constitution in the Context of Europeanization

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Abstract

At the beginning of 2017, we celebrated 10 years since Romania's accession to the European Union, a European decade marked by continuous developments. Romania's comeback among the European democratic family led to a visible improvement of the Romanians' living standard quality, reflected in each level of the community: both economically, as the Romania's GDP is 13% higher after ten years, and juridically, as the accession implied assuming the honouring of a rights and liberties set, among which we are mentioning the most visible one, the freedom of movement on the territory of the European Union.

But what is the price to be paid by us and other partner countries? Under the mask of attuning the national legislation with the European one, is there a hidden loss in the sovereignty of the member states? In the search for these answers, the present study aims to analyze the model of a European economic Constitution, as well as the concept of Europeanization.

Keywords: *European Union, accession, constitution, globalization, Europeanization.*

1. The birth of the European Union, an economical necessity

1.1. Historical premises

After the end of the World War II, the history of Europe was marked by poverty (in less than 20 years, the Old Continent lost almost all the Afro-Asiatic colonial empires [1]) and division, "*because two Europes will live in two worlds torn from each other, that of Western Europe, increasingly prosper and advancing towards integration, and that of Eastern Europe, subject to the soviet authority and ideology, more and more revolted against these.*" [1].

The European Union was founded just after the Second World War, thus with emphasis, firstly, on a sedimentation and consolidation of the economic cooperation, taking into account an economical natured emancipation of the involved states, especially in the context

of commercial trades, exactly for avoiding conflicts of any type. Therefore, the basis of the European Economic Community (EEC) was set in 1958, its attention being focused, at first, on the economic partnership of six states: Luxembourg, Germany, Belgium, France, Italy and the Netherlands. Afterwards, what debuted as a strictly economical union took a different turn. Primarily, the change reflected in terminology, as in 1993 the European Economic Community became the European Union (EU), based on the state of law [2].

At large, the European construction was initially generated by the will of the member states in relation to a propitious collaboration environment. This interstate cooperation had, in fact, a much clearer target, respectively that of reaching certain common interests. As an entity, the EU was born under the aegis of Robert Schuman, the French minister of Foreign Affairs, who, governed by an exemplary intuition, proposed to several European countries the engagement in a major project aiming a type of thorough cooperation. The proper institutionalization of this formation was made official through the Treaty for Establishing the European Coal and Steel Community (ECSC), signed in 1951 at Paris, coming into force in 1952. As already known, the main goal invoked by this new type of interstate collaboration was the economic expansion, besides an improvement of the labour force and, implicitly, an increase of the living standard through a common coal and steel market [3].

Despite the existing differences between the member states, as well as those of the ones applying for the accession to the EU, at the core of the whole European construction was the will and determination of working together. Founded on the conviction that in some fields better results may be obtained at a European level than at a national level, common politics for all member states emerged. The existence of these politics confers uniqueness to the European Union, especially due to the fact that the member states accepted to cede a part of their sovereignty to the European institutions. Hence, the mission of the Union resides in the ability to organize the relations between the member states and their peoples, in a coherent manner, supported by the principle of solidarity, a matter reflecting also in the sphere of shaping a common economic frame, based on a custom economic constitution.

1.2. Step two, European Constitution

Regarding the definition of the "*constitution*" concept, at least from a liberal vision, it represents a set of norms and procedures meant to protect citizens' and individuals' rights, generally by virtue of the governments' will. Drawing a parallel with the sphere in which the present study is placed, it is necessary to make note of the economical particularities associated with this concept. Thus, the European Economic Constitution imposes the outline of a coherent architecture, which should trace the coordinates for a set of principles, in the same time defining the exact meaning of some concepts like: vertical and horizontal subsidiarity, the market's liberalization and monitoring, as well as the regulation of capital mobility and budgetary equilibrium [4].

In other words, the matter concerning the European Constitution does not point just to a simplification of the communautaire treaties, an exercise performed within the European Convention, more precisely in the second part of the new Treaty which was setting the basis of an European Constitution, but also to the relation between the system of the European Union and the constitutional systems of the other member states, in order to

reach a common constitutional order. A political constitution should be complementary with a pre-existing economic constitution and, implicitly, compatible with the Union's treaties, the latter setting the foundations of a common market, respectively of a monetary union.

For a clear perspective on the theme of this paper, it is mandatory to highlight the aspects which bring forth the position of the European Economic Constitution in the process of Europeanization. For this reason, a first step in this regard is defining the Europeanization process and its implications from economical and other angles. There are numerous opinions on the essence of European type government and of the European model itself, hence the Europeanization process appears as a controversial phenomenon. In this sense, the most important aspects with economical repercussions for the member states target the market share, respectively the supranational regulations [5]. Therefore, within the Europeanization process, the idea of strengthening a European economic Constitution represents the corollary of the member states' unity.

Consequently, the problematic of this matter resides in the allocation of some prerogatives concerning the elaboration of politics by national and European authorities. Accordingly, some authors state that a European Constitution should be adopted as a fundament for an eventual European Federal State. In other words, favouring such an approach, of implementing a European Economic Constitution, automatically implies the agreement for the emergence of a European federation or confederation. A states confederation does not however presume the birth of a new state, but only the association of sovereign states, while federal states, by the name itself, suggest both the existence of a state and of a federation [4].

2. European Economic Constitution

2.1. From integration to Europeanization

A fairly new concept in the European public space, the Europeanization appears as an element of real interest in the sphere of political sciences, managing to extend also to related fields, such as economy, communication, respectively European studies. From a theoretical point of view, the "*Europeanization*" concept should be carefully delimited from the "*European integration*". In this matter, an enumeration and exemplification of the particular features of each of the two notions are necessary, thus in the opinion of some authors from the specialized literature Europeanization appears as "*an internal change caused by the European integration*" [6].

Within this process, which debuted in the context of shaping the European Union, the economical integration was always seen as the most important part of a state's integration. Making a comparison with the other domains, we observe that the economic segment is located in the centre of the integration, this situation being mainly due to the functioning of the common market. Despite the fact that the economic segment and, implicitly, the market hold a series of systemic self-regulating and self-controlling mechanisms, situations are also encountered in which exterior help is needed by all means. Considering these more or less exceptional cases, it is necessary that these actions, of the actors performing their activity within the market, to be regulated and managed by the public authorities in

concordance with the Constitution and other fundamental laws, for the proper functioning of the market.

2.2. A stateless market?

Researcher Li Jingkun claims that the EU may be seen as a stateless economic market, which further complicates matters compared to the case dealing with only one state. To solve this issue, since the beginning of the Union, it was brought into discussion the fact that the law should be in the centre of the integration. Concurrently, it was mentioned that the regulation of the common market should be clearly based on a legal system. Gradually, the European Court of Justice succeeded in conferring the Constitution function to several treaties, regarded to be fundamental. These norms and laws have the goal of regulating the activities and relations of different actors (the relations between public authorities and private actors; the relations between proper private actors) on the common market, which leads us to the idea that we can speak of a European Economic Constitution. [7] Returning on the idea of a "*stateless market*", Sergio Fabbrini affirms that the internal economic actors, operating on a continental level (multinational corporations, companies which mainly focus on exports) and having a material interest in lowering or neutralizing the national constrictions related to free trade, played a fundamental role in creating a free market, alongside the European Court of Justice. The interactions between companies, National Justice Courts and the European Court of Justice led to generating pressure for the so-called "*negative integration*", integration that makes reference to the elimination of the main barriers against the formation and functioning of a unique European market. [8] A major economical problem of the European Union is highlighted in the work "*Democracy and Federalism in the European Union and the United States – Exploring post-national governance*", respectively the fact that a common market was created without the existence of a centralized state or without the existence of a strong central administration. In addition, the Union decided also to adopt a supranational coin – euro, without the existence of a supranational government which would deal with these aspects. [8]

As a consequence, "*the supporters of the national diversity agree that an economical and monetary union does not imply that the states should renounce the ability of governing their own economies in front of the irreversible pressures of market liberalization*". [8]

Robert Ladrech sees the concept of Europeanization as: "*that slow process which reorients the direction and models the politics at the level in which the political and economical dynamics of the European Community becomes part of the organizational logistics of politics and national decision*". [9] As we previously mentioned, it is absolutely necessary to differentiate between the two concepts: Europeanization, respectively European integration. That is to say, the perception of Robert Ladrech underlines the conceptual demarcation, enouncing that, on one side, Europeanization is reflected on the internal organization, producing transformations inside the structures, this fact being preponderantly due to the decisions within the European Union, while on the other hand, the European integration is nothing more than the transfer of sovereignty from the national to the European space, in its organized forms. Claudio Radaelli looks upon Europeanization in general, as a construction, diffusion and institutionalization process of the rules imposed by the European

Union, with equal impact on the internal discourse, political structures, public policies and identity. [10]

As a consequence, the Europeanization phenomenon should not be mistaken for other notions like convergence, harmonization, elaboration of public politics, respectively integration, because it should be noted that it can only determine the convergence in the context of projects that are developing in a certain state, the latter being only a result of Europeanization.

2.3. Europeanization vs. national sovereignty

Reaching equilibrium between the state and the economic market is a problematic matter for the European Union. The economic orientation of the Union is a subject that generated the researchers' interest, all the more so as much is discussed in the last period on the Single European Act and the economic and monetary Union. The debate which started follows two related aspects: the former points to the possibility that the Treaty would impose an economic paradigm specific to the member states and strictly circumscribes the role of national economical politics, respectively the extent to which EU law allows a variety of economic systems. The latter aspect brings into discussion the European Union and the way in which this political actor gives priority for market and competition principles. [11]

The problem of the economic Constitution, intensely debated recently in Germany, took a new turn along with the accession of this state to the European Union. From the German perspective, the Treaty on the European Community presents a clear contrast with the political-economical neutrality of the fundamental German law. Moreover, there is a special function of the economic Constitution, namely the fact that the nucleus of the European communautaire law constitutes the integration "*engine*", being able to use business as an initial base for creating an interstate unification. The European Court of Justice repeatedly advocated that neither the internal market, nor the competition should be regarded as goals per se, but as ways for obtaining bigger integration objectives, placed above the economy. In this concern, it can be stated that the European economic Constitution has a strong dynamic character at its base. [12]

That is to say, the term "*economic constitution*" makes its presence felt since the beginning of the 19th century in several research papers. Despite its early appearance, the concept began to be de facto used and accepted at the middle of the 20th century, the Weimar Republic being the first state to use this concept within its own Constitution. The proper definition of the economic constitution may be found in the majority of cases in a "*set of laws and institutional agreements, aiming to regulate activities of economical nature*". [7] However, this form of the definition cannot be considered complete, as it presents a generalizing character. In this case, we have to bring into discussion two distinct senses of the same term, formulated by two researchers of German origin. W. Fikentscher underlined that an economic constitution, in contemporary perspective, represents a set of constitutional and fundamental directives which regulate the relations of fundamental nature between the economy, state and citizens. [7] This definition resembles the conceptual approach of the researcher M. Linck, who stated that this type of constitution is represented by fundamental juridical norms and constitutional norms, according to which the state defines the application sphere of economic liberties, performs monitoring or economic

regulations. [7] Therefore, we may also associate these two definitions in the context of the European Union, where the economic Constitution regulates not only internal economic activities, but also transnational ones.

At the same time, the concept of "*European Economic Constitution*" draws itself the emergence of a subsequent notion, that of ordoliberalism, known as the "*constitutional economic theory*". This theoretic system was founded by the Freiburg School, taking shape after the failure of the Weimar Republic, later on contributing after World War II at the development of the market economy.

Ordoliberalism "*borrowed*" from the characteristics of classical liberalism, but gave up the idea according to which the economy should be separated from the juridical and political sciences. This type of liberalism sustains that "*a politic constitution determines an economic constitution, and the features and economical efficiency are dependent to the relations with the political segment and the legislation*". [7] Thus, ordoliberalism influenced in different ways the development of a European economic Constitution. In this regard, the Freiburg School helped in spreading some ideas in the European space and in the United States, matters which led to the acceptance of ordoliberalism as a term, the ideas promoted by this current becoming perfectly adapted to the competition for European integration by establishing a common market.

Conclusions

Although until today there is no document officially entitled "*European Economic Constitution*", we must bear in mind that base treaties like: Treaty of Rome – 1957, Single European Act – 1987, Maastricht Treaty – 1992, Amsterdam Treaty – 1997, Treaty of Nice – 2001 and Treaty of Lisbon can all be regarded as pillars of a European economic Constitution. [7] These union treaties define the European Union as a free economic market, based on free competition and social welfare. However, it is difficult to reach a type of effective coordination, as well as a convergence of economical policies, because within the treaties' objectives, both in the sphere of policies and in the context of the norms' implementation, these are not placed in a hierarchal structure. These aspects appear as an impediment in defining the objectives of the policies, the latter being considered a binder which ensured a connexion between the member states of the European Union. [13]

Nevertheless, all these treaties succeed, in one way or the other, to regulate the relations between the common market, member states and individuals. For this reason, the necessity of a European economic Constitution becomes evident, based on the principle of free competition, economical and monetary Union, and common commercial politics.

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Is there an European Union Normative System? Three Theories on Normative Systems

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Abstract

This paper aims to analyse the possibility of rules enacted by the European Union's institutions to form a normative system independent of those of the member states. Towards this purpose, three potential models of systemic structuring of rules enacted by the European Union are identified in the first part. Subsequently, the theories of normative systems advanced by J. Austin, H. Kelsen and H.L.A. Hart are analysed so that, in the end, the choice of one model of systemic structuring and the normative systems theory that could best explain the European Union's legal status to be expressed, expounding at the same time on the opportunities offered by their use.

Keywords: *normative system, European Union law, primacy doctrine, positivism, constitutional pluralism.*

1. Preliminary remarks and the significance of the research

In more than 60 years of the European construction's life, its political nature has been frequently disputed: do the European Communities or, at present, the European Union, represent a federation or only an ordinary international organization? Or is it, more probably, a confederation preparing the birth of a state? Answers have been fluctuating over time, as the arguments for each of them did not lack consistency. However, the question regarding the legal nature of the European construction, at least as important as the one mentioned before, has been constantly marginalized, its answers being presumed as positive. Is there an European Union normative system?

The proposed question could look shallow. When a judge considers the problem of a legal relation submitted to his attention being governed by a rule enacted by the European Union's institutions, it is irrelevant for him to determine to which normative system does the respective rule belong. In order to give a correct solution, it would be sufficient for the judge to check whether the direct effect or primacy doctrines are applicable. However, if we move one step backward, switching from correctly solving a case to the constitutionalism paradigm, the problem of identifying the normative system to which the rule in discussion belongs becomes essential. As Joseph Raz emphasized, "[a] British person cannot say "Polish law is my law" just because it will be followed by British courts when their conflict-of-law rules direct them to do so. The distinction between standards that the courts have to apply and those that are the law of the land is vital to our ability to identify the law as

the political institution it is" [1]. Similarly, the judge's and more so, the justice seeker's awareness that a rule belonging to either the national system, or to the eventual Union system, could have major consequences in what regards their loyalty towards different political constructs or ideas or their approach towards fundamental concepts for the modern state, such as sovereignty or nation.

2. Models of systemic structuring of the European Union's rules

Offering an answer to the above mentioned problem requires conceiving a set of models applicable to the normative reality of the European Union, the validity of each of them being verified by placing them in relation to the most important theories of normative systems. Thus, the first model conceived assumes the existence of the European Union's own normative system, distinct from the national normative systems (the 27+1 model). The second model implies assimilating the rules enacted by the European Union's institutions to the components of national normative systems (the 27 model). Finally, the third model presumes, on the contrary, the structuring of both rules enacted by member states and rules enacted by Union institutions in a sole normative system (the sole system model) [2].

In order to support each of the three models, one could easily bring forward relevant arguments, their validity being hardly contestable, at least in a first phase. The 27 model, based on integrating European rules in the member states' normative systems, has represented at the dawn of the European Communities the Court of Justice's "Trojan Horse", used in order to determine the national courts to accept the doctrines of direct effect and primacy of community law. In the Costa v. E.N.E.L. case, the Luxembourg Court showed that "[a]n interdiction so clear as that mentioned in the Treaty has came into force in the entire Community, becoming part of the legal systems of the member states" [3]. More than 10 years thereafter, the Court stated again that the European rules benefiting of direct effect "are constitutive parts (…) of the legal order applicable on each of the member states' territory (…)" [4]. Another reason for sustaining the 27 model is based on observing the essential role in applying the Union law to concrete legal relations, such a role being played by actors which are part of the judicial systems of member states: the national courts.

The 27+1 model presumes the existence of a Union normative system, distinct from the member states' normative systems. For Joseph Raz [5], the essential element which determines a normative system's existence is the birth of a claim to supremacy, demanding the subordination of all other existent rules to a rule or set of rules forming part of the new normative system. One could not question the Union meeting this criteria, Costa v. E.N.E.L. case representing only the first step of an entire European case-law on this issue. From an institutional perspective, even if the courts competent to apply Union law are the same with those competent to apply national law, the institutions involved in issuing European rules should not be left apart, as the European construction is frequently identified with its complex decisional process. Moreover, this process's perpetual reformation, by a constantly empowering the European Parliament to the Council's detriment, points towards the existence of distinct legislators between the two types of systems. Last, but not least important, the 27+1 model has been supported even by the national constitutional courts, aiming to justify their refuse to judge on the conformity between European rules and national constitutions. Thus, the German Constitutional Court showed that "[t]his court (…) subscribes to the opinion the Community law represent neither a part of the national legal systems, nor

international law, but forms an independent legal system, having an autonomous source" [6]. Similarly, the Italian Constitutional Court identified the supranational character of the Communities, to which the member states assigned part of their sovereign powers, enabling the rules enacted by the these to form "a proper legal order, separate from the national ones" [7].

Starting from the same presumptions of the 27+1 model, Neil MacCormick points that "[m]uch of the approach of most contemporary legal theorists to the concept of a legal system and to the issue of the validity of rules within a legal system makes the tacit assumption of the paradigmatic quality of the state and its law. This is inevitable distorting. After all, one of the greatest systems of all time, English law, is not, and has not for three hundred years been, the law of a sovereign state" [8]. In such conditions, as long as the link between the state and a normative system can be broken, the sole system model could be taken into consideration, the member states' systems becoming components of the European normative system. Besides, the claim to supremacy issued by the Court of Justice does not regard only the relation between the different rules enacted by the Union institutions, but even the positioning of all Union rules at the top of the hierarchy of rules applicable in each of the member states. Moreover, in what regards the agents of the sole system, "[w]ith the diffusion of the Court's doctrines of supremacy and direct effect, the national judges gradually assumed a new function: agents of the Community legal order, and thus judges and enforcers of European Community law (…)" [9].

3. Applying the proposed models to different theories of normative systems

One could advocate for each of the tree models. This is not caused by their simultaneous veracity, but by the lack of a thorough scientific approach. Thus, the current incoherence in part of the scholars' work regarding the European Union normative system is caused by absence of a complex definition of the concept of normative system, some definitions easing the contextual argumentation being preferred instead. Ascertaining this state of facts determines the following endeavors for performing a concise analysis of the most important theories of normative systems, aiming to identify their applicability and consequences in relation to the European Union law. Only after such analysis, the option for one of the models conceived in the beginning of this paper could be validly made.

3.1. The positivist theory of normative systems

The rather metaphysical character of natural law theory and its focus on human rights make impossible the endeavors of identifying positions regarding normative systems among its adepts. Thus, the problem of a unitary system of rules has been firstly raised by the positivist scholars, in their attempt to offer a rational clarification to the legal realities. Probably, the most eloquent definition of the concept is offered in the final period of positivism by John Austin, to whom the normative system represent all the rules enacted by a sole superior polity, respectively the sovereign [10] . Thus, the criterion offered for the identification of the rules which form part of a normative system is that of their issuer. However, not any issuer could create a normative system, but only the sovereign. In order to verify one rule's membership to a normative system, one should verify the identity between the rule's issuer and the sovereign of the normative system in discussion.

The suggested perspective may look simple. Yet, it becomes problematic when moving on to defining its essential element, respectively the "sovereign". Austin's precursor, Jeremy Bentham considered the sovereign to be the person or group of persons towards which "a determined number of persons are used to obey, such persons forming the political society" [11]. The definition is assumed by Austin in a similar form: "if a determined person, which is not accustomed to obey to a superior, receives the constant obedience of the greatest part of a society, such persons becomes the sovereign of the entire society" [12].

Once the essential principles of the positivist theory have been briefly presented, it is necessary to move on to verifying their applicability to each of the three models previously mentioned. The applicability of the *27 model*, implying that European rules are part of each of the member states' normative systems, seems to satisfy the positivism's claim: the European rules are enacted by the European institutions, but only as representatives of the sovereign, respectively the people of each member state. The fact that each rule simultaneously becomes part of each of the 27 normative systems does not affect such systems' autonomy. However, the detail Austin added to Bentham's definition, respectively the absence of any superior to which the sovereign should obey, leads to a different conclusion. Thus, although the positivist approach could have explained the situation of the Community law in its incipient phases, the evolution of the European construction by transferring national competences to the European Union or the Union's institutions power to enact binding rules for any member state, even against their wish, does not meet the criteria regarding the absence of any polity superior to the sovereign. One could not talk about the European institutions as agents of the member states' sovereignty as long as, in fact, the member states, although sovereign, are bound even unwillingly by the European institutions' decisions.

Consequently, as long as the member states accept the exercise by the European institutions of a superior power in certain fields, could we talk about the applicability of the *sole system model*? Unfortunately, this hypothesis raises several problems. One of these is linked to the Union's limited competences, as the states are bound by the Union's decisions only in a limited number of fields. On the contrary, a sovereign, as imagined by Bentham and Austin, should be the sole legislator. Apart from the shortage of competences, which may be solved by future evolutions of the Union, the most important problem is that of the lack of an European sovereign. Surely, the European citizenship and the direct election of the European Parliament's members have represented important steps in creating the sensation of being part to a superior polity. However, even for the most optimistic federalist, the existence of a sovereign European people remains for the moment only an objective. By understanding this situation, the European law theory has more than once tried to substitute the notion of sovereignty with other constructs which could explain the citizens' attachment to the European construction [13]. Although attractive, such constructs do not enable the positivist theory to become applicable.

The last model in discussion, respectively the *27+1 model*, is also affected by doubts regarding the existence of an European sovereign. However, this model seems to receive backing from a paradigm recently applied to European law, respectively constitutional pluralism. Thus, according to its main proponent, Neil Walker, "constitutional pluralism (…) recognizes that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of international law and now makes its own independent constitutional claims (*as is the case of the claim to supremacy – L.A.-R.*), and that these claims exist alongside the perpetual claims of states. The relationship between these orders

(…) is now horizontal rather than vertical – heterarchical rather than hierarchical" [14]. Assuming the pluralist paradigm, one could accept the coexistence of several sovereignty claims, without any of these having the purpose of being superior to the others. In such a vision, the subject of legal rules would be in the position to choose, depending on the type of legal relation, which authority it should obey. However, such a possibility would contradict Austin's definition, which involves obedience to a sole sovereign.

The positivist theory's inadaptability to any of the three mentioned models leads to the necessity to move on to Hans Kelsen's theory of normative systems, aiming to identify whether this could underlie the option for one of the three models.

3.2. Kelsen's theory of normative systems

From the start, trying to apply Hans Kelsen's theory offers a major advantage, as Kelsen was ready to move over the statocentric approach and to analyze supra-national normative system. As Kelsen showed, "the Pure Theory of Law relativizes the state. Assuming the national level as an intermediate level of law, the Pure Theory determines a continuous succession of legal structures, the superior ones subordinating the inferior ones" [15]. Also, Kelsen assumes among the objectives of his work "the theoretical dissolution of the sovereignty dogma" [16], allowing thus overcoming the barriers imposed by positivist theories.

In Kelsen's theory, the unity between the elements of a normative system is offered by the existence of a sole common rule, named by Kelsen *the basic norm* (german, *Grundnorm*), which determines the validity of all other rules of the system [17]. In most cases, constitutions have been identified as representing the basic norm of national normative systems, although the kelsenian theory involved the identification of a more limited set of rules, as would be the case for the rules regarding legislative procedures. In the European Union's case, identifying a *Grundnorm* would not cause any problems as the founding treaties, especially their rules regarding the decisional process, completely meet such conditions. A supplementary formal argument is brought by the Court of Justice's case-law, by which the founding treaty has been described as a "constitutional charter" [18]. From this point of view, applying Kelsen's criteria points towards the *27+1 model*. Once being accepted that the European law meets the necessary criteria for a normative system to exist, the *27 model* is eliminated. Also, the *sole system model* is eliminated once the existence of a basic norm, respectively the constitution, has been accepted for each member state. Thus, it should be analyzed whether the *27+1 model* also meets other criteria imposed by the kelsenian theory.

Kelsen offers an extended analysis to the interaction between different normative systems, identifying two recurrent hypotheses. The first hypothesis is founded on a total subordination of the first normative system considered in relation to a second normative system, as the former's basic norm is part of the superior system. Kelsen exemplifies this hypothesis by the example of the relation between national normative systems and the international normative system, which is based on the *pacta sunt servanda* principle. The second hypothesis suggested by Jelsen assumes a relation of coordination between two systems, as their rules are independent from one another, but both systems are subordinated to one common superior system [19]. Are any of these hypotheses applicable to the relation between an eventual European system and the member states' systems? The first hypothesis seems to satisfy the Union system claim to supremacy. However, the necessity of the basic norm (*Grundnorm*) of the subordinate systems, respectively the national constitutions, to be part

of the superior system could not be met. On the contrary, the national constitutions have preceded the European normative system and, furthermore, represent a condition precedent to the states' participation in the European Union. Similarly, the second hypothesis is contradicted by a series of particularities specific to the European Union. Thus, one could hardly speak about coordination between two systems which have issued reciprocal claims to supremacy and whose competences are simultaneously exercised towards the same legal relations [20].

Also, as an European law scholar has shown, "[w]hile Kelsen's avowedly universal theory of law throws some light on some aspects of European Communities' law as it has developed in the third quarter of the twentieth century, the answers offered to these legal questions demonstrate that this models of international law and national legal systems, drawn as they were in the first half of this century, are not adequate to explain many of the phenomena of this new kind of law. (…) Kelsen's theory simply does not allow for the emergence in the late twentieth century of a hybrid legal system, exhibiting some of the characteristics of traditional international law and some of those of traditional legal systems and some distinctively its own" [21].

3.3. The hartian theory of normative systems

In *The Concept of Law*, H.L.A. Hart assumes the existence of two types of rules: *primary rules* and *secondary rules.* In his opinion, "[r]ules of the first type impose duties; rules of the second type confer powers" [22]. Otherwise put, the primary rules represent commandments, whereas the secondary rules ensure the applicability of the primary rules. Towards this end, the secondary rules are classified in three subcategories: *rules of recognition*, establishing the criteria for identifying the sources of obligations, respectively the primary rules, offering them validity; *rules of change*, which set the means of enacting, modifying and abolishing the primary rules, offering them flexibility; and *rules of adjudication*, establishing the means of identifying and sanctioning any infringement of the primary rules, offering them efficiency. Among all secondary rules, Hart underlines the importance of the rules of recognition, which represent an evolved form of Kelsen's *Grundnorm*. For Hart, as for Kelsen, a normative system is characterized by the existence of a supreme rule, in Hart's case, such rule being one of recognition, even if several other rules of recognition could be subsequently identified.

Based on these types or rules, Hart establishes two necessary and sufficient conditions for the existence of a normative system: (i) the entire population must obey the primary rules, even though they do not accept them as just, and with no obligation regarding the secondary rules; and (ii) the system's officials accept the secondary rules as standards of official behavior [23]. Therefore, "the question whether a legal system exists is a question of fact. Furthermore, whether citizens generally obey the primary rules, and whether the legal officials effectively accept the secondary rules as critical common standards of official behavior are also matters of fact" [24]. Consequently, could one talk about the existence of an European normative system in which the two types of rules mentioned by Hart could be identified, the two necessary and sufficient conditions for the existence of a normative system being at the same time fulfilled? I will try to answer this question in the following paragraphs.

Identifying the first type of rules, respectively the primary rules regarding the commandments on the individuals' conduct, does not represent a problem. On the contrary,

the abundance of such norms has frequently been invoked in the case of the European Union. In what regards the second type of rules, the answer is less straight forward and requires identifying each of the types of secondary rules proposed by Hart. An easy solution could be found for the rules of change's case, regarding the modalities to enact, modify and abolish primary rules, as these are present in the detailed descriptions of the decisional procedures in the founding treaties. The rules of adjudication's case, regarding ensuring the observance of the primary rules and possible sanctions for non-observance, is more complex. On one hand, Art. 251-281 in the Treaty on the Functioning of the European Union include an extended set of rules attributing competences towards the Court of Justice, in order for this institution to ensure the observance of European Union law. However, without going into details regarding procedures in front of the Court, it is an established fact that the greatest part of the litigation procedures having as purpose applying European rules between individuals, and not in relation to the European institutions or the member states, will be solved by national courts. Supplementary, one must remember the lack of a mechanism to ensure the execution of the Court's decisions, as is the case for the execution procedures in the member states. Thus, one could argue for the lack of an efficient set of rules of adjudication. Trying to overcome a conservatory approach to this problem would allow, however, a favorable conclusion to be drawn. In this regard, the preliminary question procedure, offering the Court of Justice a coordinating role, creates on harmonization in the realization of justice by uniformly applying European rules. Similarly, the problem of executing the decisions by which European rules are applied could be rapidly solved in case that the decision of a national court is in discussion, whereas the European Court's decisions, most of them regarding member states and institutions, benefit from special procedures.

The last type of secondary rules, respectively the rules of recognition raise probably the most difficult problem. As previously mentioned, similarly to Kelsen, Hart suggested, without expressly mentioning such term, the existence of a supreme rule of recognition, which makes possible the identification of all other rules of recognition and, subsequently, of all other rules of a normative system. In most of the normative systems' cases, in order to identify the supreme rule of recognition, it would be sufficient to identify the rule by which the legislator is appointed (resembling John Austin's theory). In the European Union's case, the problem of identifying the legislator is a difficult one, taking into consideration the complex decisional procedures and even their alternation. Nevertheless, as the probably most important successor of the hartian theory pointed out, the condition of the existence of a supreme rule of recognition most be overcome [25].Thus, the existence of several rules of recognition, applicable depending on the field of regulation by the primary rules, could be easily imagined. Moreover, the situation following the Lisbon Treaty allows for a clearer identification of an unitary decisional procedure, even though certain fields (such is the case of foreign policy and common security) continue to represent exceptions.

As the existence of all types of rules proposed by Hart has been confirmed in the European Union's case, one should analyze, in the end, the possibilities to meet the two conditions imposed by Hart for the existence of a normative system, respectively (i) the population's obedience towards the primary rules and (ii) the system's officials' recognition, acceptance and assumption of the secondary rules as standards of official behavior. In what regards the first condition, it is not difficult to ascertain the obedience of the population living on the European Union's territory towards the European rules. Although objections

questioning the legitimacy of the Union law are frequently raised, national norms are not particularized by the absence of any contester either. Moreover, even Hart explained that, in order to validly talk about a normative system, individuals must obey "each only in what regards him, independently of his reasons" [26]. Taking into consideration the standard image of the European bureaucrats, the second condition, that of the recognition, acceptance and assumption of the secondary rules as standards of official behavior, seems to be met. In this regard, it has also been shown that "the key factor is the broad acceptance, by officials in Brussels, Luxembourg and Strasbourg at the European level, and in the national capitals and provincial government's offices and the many national courts, of European Community laws as binding *per se*" [27].

4. Conclusions

Following the entire previous demonstration and assuming a certain degree of flexibility in interpretation, H.L.A. Hart's theory permits the identification of the rules enacted by the European Union's institutions as a distinct normative system, thus excluding the *27 model*. Similarly, the *sole system model* is itself excluded, as the criteria imposed by Hart can be identified for each of the member states. Thereafter, the *27+1 model* shall become applicable.

The position thus established allows the opening of the European law and, especially, European constitutional law theory towards a new approach to the European normative system. Problems such as that of the superposition between the Union's competences and national competences or that of the conflict between the primacy of Union law and the supremacy of national constitutions will be marginalized once the hartian paradigm is assumed: the 27+1 normative systems can interact, being applicable at the same time. Eventual conflicts between national rules and Union rules would not necessarily draw the de-legitimization of one of the normative systems, by the opening of a constitutional conflict, as was the case with the *Solange* series of decisions. Even more, an approach from the theory of normative systems, as suggested by Hart, could complement the constitutional pluralism doctrine in order to better explain the future evolution of the unusual relations between the 27+1 normative systems of the European Union.

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The Lawmaking Procedure At The Level Of The European Union vs. The Lawmaking Procedure In Romanian Law

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Abstract

There is a specific social normativity attributed to each human collectivity in kind (be it of habit, moral, religious, or legal).

Legal normativity – a species of social normativity – manifests in the territory of all and any nation, of any state, including in the European Union – a modern, contemporary, atypical association of states.

The lawmaking procedure and the adoption procedure of legislative acts at the level of the EU. Although inspired by the classic models of national states, it has its own particularities, starting from the institutional structures/entities with a competence in initiating drafts for legislative projects, up until the distinct procedural rules, and some of them different from those in the law of the member states of the EU.

The present study focuses on the concrete manner of elaboration of legislative acts at the level of the EU, bringing into the analysis, as a comparison to the specific regulations in the Romanian law, the main aspects that concern the legislative initiative, the institutional clauses – seen at the level of the EU, after the coming into power of the Treaty of Lisbon, as a compromise between procedural rigidity and the need for flexibility and celerity of the European construction – the ordinary legislative procedure and the special legislative procedure.

Keywords: *European Union, legislative procedures, national law, institutional clauses, legislative act.*

1. Normativity is specific to every society; that is, the existence and imposition of certain norms, of social rules, without which life in society would not be possible; certainly safety would not be possible, and with evidence to prove it, because man, the social individual, cannot exist outside of his consecrated social habitat: the community (society) he pertains to.

Thus, we admit that at any social level – be it micro or macro – it is not possible to exist without adapting your own behavior to some rules/ social norms, be those habitual norms (norms borne out of habit), religious, moral or legal.

2. At a national level, specific lawmaking procedures are consecrated. The main artisan of lawmaking in any democratic country is the national parliament. In accordance to the specific regulations, each state establishes their own modality of regulating in the sphere of their system of hierarchy of normative acts.

3. The present study attempts to put an emphasis, to compare through the specific means at hand, two important normative dimensions anchored in the present social reality: lawmaking at the level of the European Union vs. lawmaking in the present Romanian legal context. [1]

4. The procedures of adopting E.U. legislative acts(1) [2] are provided in the TFEU, the fourth part – *"Financial and institutional provisions",* Title I "*Institutional provisions"*, Chapter 2 – *"Legal acts of the Union, adoption procedures and other provisions"*. According to the aforementioned regulations, the **ordinary legal procedure** presupposes the common adoption, by the European Parliament and the Council, of **regulations**, **directives** or **decisions**, at the proposal of the European Commission.

In the **special legal procedure** the three legal acts can be adopted (legally binding) by the European Parliament, with the participation of the Council or of the Council with the participation of the European Parliament, only in the specific cases provided in the treaties.

Regarding the adoption of **legal acts of the European Union**, three major aspects will be the object of the present study:

a) preliminary aspects (the legislative initiative, including the civic initiative and the institutional clauses: the "passerelle" clauses, the "brake" clauses, and the "accelerator" clauses);

b) the ordinary legislative procedure;

c) the special legislative procedure.

A. The legislative initiative

At the level of the E.U. **the European Commission has the right of legislative initiative**, the only institution which can initiate legislative drafts, not before consulting with the groups of interest and with experts to ensure that the interests of the citizens of the Union are promoted in a responsible way.

In formulating the legislative draft, the European Commission can consult with the *European Economic and Social Committee*, and the *Committee of the Regions* – official consultative organisms of the E.U. Their point of view is purely consultative(2).

Article 14(4) of the *Treaty on the European Union,* provides **the right of legislative initiative of the citizens of the Union**. [3] In essence, it stipulates the following:

- The institutions (of the Union) grant the citizens and the representative associates the possibility of making their opinions known and of publicly exchanging opinions,

(1) Until the Treaty of Lisbon came into force, in the E.U. there were over 50 legislative procedures, among which: the consultation procedure, th co-decision procedure, the conciliation procedure, the opinion procedure, the cooperation procedure, etc. (A. Fuerea, *Manualul Uniunii Europene (The Manal of the European Union)*, Fifth Edition, Universul Juridic Publishing House, Bucharest, 2011, p. 161).

(2) **In comparison with the national lawmaking systems** – where popular will is expressed in the Parliament – at the level of the E.U. an important legislative role is granted to the representatives of the member states in the Council. Thus presently, the Council shares the legislative competency with the European Parliament.

in all domains of action of the E.U., maintaining an open, transparent and constant dialogue with them and the civil society;
- at least a million U.E. citizens, from at least 7 member states out of the 28 (this in 2009), in these member states there being a requirement of a minimum number of signatures[3];
- for formulating such a legislative initiative, the citizens must for a *"citizens' committee",* composed out of at least 7 citizens inhabitants of at least 7 different member states, all with E.U. citizenship and at least the legal age of voting for the European Parliament[4].

The citizens' committee, before beginning to collect declarations of support from the citizens, must enlist their initiative on the site of the European Commission.

The Commission examines the initiative and if it is accepted the ordinary legislative procedure is put into action. After the adoption (if it is adopted) the citizens' legislative initiative becomes a legislative act.

In **Romanian law**, the legislative initiative of the citizens is conditioned – according to the Constitution – to the existence of at least 100.000 signatures supporting it, the citizens having to come from at least a quarter of the country's counties (5.000 signatures per county, Respectively the town of Bucharest). At the same time, the Constitution forbids any legislative initiative of the citizens with financial problems, international problems, or in the domain of amnesty and pardoning.

Regarding **institutional clauses**, it is known that, although The Treaty f Lisbon extended ordinary the legislative procedure and the qualified majority vote to a vast number of domains, there continues to be "sensitive domains" (justice, foreign politics, immigration), in which laws cannot be legislated in the context of a special legislative procedure or the procedure of the unanimous vote.

Between procedural rigidity and the need for flexibility and celerity of the functioning og the Union, the LT creates a compromise through the introduction of certain institutional clauses, such as: *the "passerelle" clauses, the "brake" clauses, and the "accelerator" clauses.*

• The *"passerelle"* clauses permit – in certain conditions – to depart from the legislative procedure initially established, as such:

– "departing" from a special legislative procedure to an ordinary one, respectively,

– "departing" from a unanimous vote to a qualified majority vote.

The "passerelle" clause is only used after a decision of the Council of of the European Council has been made, unanimously adopted and with the assent of all member states.

Even more, The TUE – through Art. 48 – introduces a *general "passerelle" clause,* applicable to all European policies.

• The *"brake"* clauses operate in three domains: *the social security of migrant workers* (Art. 48 TEU), *"judicial cooperation in criminal matters"* (Art. 82 TEU); *"common rules for certain criminal offenses"* (Art. 83 TEU).

Specifically, *the "breaking" mechanism* consists of the fact that a member state can appeal to the European Council, in the case in which it considers that the fundamental

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[3] In this regard there is a table with the minimum number of signatures for each state of the E.U. Romania – 24750 signatures.

[4] 18 years, with the exception of the citizens of Austria (16 years).

principles of its system of social security or criminal justice are being under threat by a legislative draft in the process of being adopted. In this case the procedure is suspended and the European Council can either return the draft to the Council – which can continue the procedure keeping in mind the formulated observations, or it can permanently end the procedure, requesting – if imposed – a new draft from the Commission. [4]

• The *"acceleration"* clauses facilitate/accelerate the putting into application of certain forms of *consolidated cooperation* in certain domains, through the *derogation* from the procedure of putting into motion of the forms of *consolidated cooperation*[5]. The domains aimed at by this kind of clauses are: *"judicial cooperation in criminal matters"* (Art. 82 TEU); *"common rules for certain criminal offenses"* (Art. 83 TEU), *"creating a European Public Prosecutor's Office"* (Art. 86 TFEU), *police cooperation* (Art. 87 TFEU).

B. The ordinary legislative procedure

The ordinary legislative procedure, regulated by Art. 294 of the TFEU, replaces the anterior procedure of co-decision (regulated prior to 2009, in Art. 252 of the Treaty establishing the European Community). Established as a *common law procedure,* the ordinary legislative procedure confers a plus of democratic legitimacy as on the one hand it implies the intervention of the European Parliament as the co-lawmaker alongside the Council, and on the other hand it gained power through tradition. [5]

The regulation given by Art. 294 refers to four specific distinct stages/aspects of this procedure: *first reading, second reading, conciliation, third reading.* We detail these moments as follows:

a) Thus, **the first** reading entails the following:

- receiving the legislative draft from the European Commission (who harnesses their right of legislative initiative);
- adoption, by the European Parliament, of a personal position in regard to the legislative draft, position they communicate to the Council;
- in the situation in which the Council approves the stance of the Parliament, they adopt the act "*with the wording which corresponding to the position of the European Parliament";* in the situation in which the Council does not approve the European Parliament's position the Council adopts – during **the first reading** – a position they communicate to the European Parliament.

b) **The second reading** [6] – as a stage of the ordinary legislative procedure which entails the following:

- in the case in which, within three months from the communication of the position of the Council during the first meeting, The European Parliament approves the position or has not taken a decision, the concerned act is considered adopted in the wording which corresponds to the position of the Commission;
- in the case in which the Parliament – by a majority of its component members – rejects the position of the Council, the proposed act shall be deemed not to have been adopted;

[5] a consolidated cooperation is considered stable when it reunites at least 9 member states.

- the co-legislative (the Parliament) can also have a third possibility: with a majority of its members, it can propose amendments to the position of the Council; in that case, the text thus amended shall be forwarded to the Commission and to the Council, which shall deliver an opinion on these amendments;
- within three months of receiving the European Parliament's amendments, the Council – by a qualified majority – approves all those amendments, the act in question is deemed to have been approved;
- in the situation in which the European Parliament's amendments are not approved by the Council, the President of the Council and the President of the European Parliament, within six weeks shall convene a meeting of *the Conciliation Committee.*

c) In what concerns **the conciliation:**

- *The Conciliation Committee* – convened in the conditions of the second reading – is composed of the members of the Council (of its representatives) and the same number of members from the Parliament;
- the mission of the Committee is to reach, by a qualified majority of the members, an agreement about a common draft, within 6 weeks (from its being converged);
- in the case in which within the provided time frame a joint text is not approved, the proposal act shall be deemed not to have been adopted.

The novelty brought on by the TFEU – in contrast to the previous regulations – the Commission participates in the work of the Conciliation Committee and can take any initiative it deems necessary to draw in the positions of the Parliament and of the Council.

d) **The third reading** intervenes in the case in which the Conciliation Committee approves a joint text, situation in which, The European Parliament and the Council both have 6 weeks (since the approval) to adopt the respective act.

To adopt the act a *qualified majority* vote in the council is necessary, *the majority of votes* respectively beginning at the level of the Parliament. [7]

The ordinary legislative procedure has a very vast sphere of application. [8] Selectively, the most important domains that are juridically regulated through this procedure will be presented:

- services of general economic interest;
- the procedure for right of access to documents;
- data protection;
- the principles regarding tackling discrimination based on reasons of nationality;
- the facilitation of exercising the right of the citizens to move and reside on the territory of the member states;
- citizens' initiative;
- customs' cooperation;
- joint agricultural policies;
- the free movement of workers;
- the liberalization of services in certain sectors;
- services;
- asylum;
- immigration and tackling human trafficking;
- stimulating the integration of nationals of third countries;
- judicial cooperation in civil and criminal maters;

- police cooperation;
- maritime and air transport;
- the stimulation to occupy skilled labor;
- social politics;
- the European Social Fund;
- public healthcare.

C. The special legislative procedure [9]

According to the new Treaty, the special procedures replace the previous procedures of consultation, cooperation, and counsel accordingly, their purpose being to simplify the process of decision-making, enhancing at the same time the clarity and efficacy of the process.

Being legislative procedures which derogate from the ordinary legislative procedure, they are characterized mainly by the fact that **the only legislating organ is the EU Council,** the role of the European Parliament being limited to consultation only.

The special legislative procedures are not rigorously regulated in TFEU, as is the ordinary legislative procedure, articles from the TFEU and TEU putting into application, from case to case, the rules regarding these special procedures.

We consider *consultation* and *approval* as ***main special legislative procedures,*** among others, with a narrower sphere of application: *the opinion procedure in accordance with Art. 140 TFEU, procedures regarding social dialogue, procedures regarding the examination of voluntary approvals, codification.*

• **Consultation,** according to Art. 289 of the TFEU, *is a special legislative procedure through which the Parliament is requested to give its opinion regarding the proposed legislation, before its approval by the Council.*

The European Parliament can either approve or reject a legislative proposal or it can propose amendments to it, the Council having the legal obligation to keep account of the opinion of the Parliament; all things considered, according to the jurisprudence of the Court of Justice they cannot make a decision if the opinion is missing.

The aforementioned procedure is applied in a limited number of legislative domains: *the derogation on the internal market and in competitive law.* As a non-legislative procedure, the consultation is utilized in a small amount of cases[6].

• **The approval** given by the European Parliament – in certain legislative domains – according to Art. 289 par. (2) of the TFEU, it is considered a special legislative procedure. This procedure in which the Parliament has the role of approving or rejecting the legislative proposal without any other amendments, *confers a veritable right to veto to the Parliament.*

As a legislative procedure, the approval is also utilized in the case of adoption of legislative acts in the domain of combating discrimination and in the situation in which the general legal basis applies regarding subsidiarity (Art. 352 of the TFEU).

As a non-legislative procedure, approval is also necessary in the situation in which the Council adopts certain international agreements.

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[6] Usually in the case of ratifying certain agreements negotiated by the E.U., in the cases of serious infringement of fundamental rights (according to Art. 7 of the TEU), in the case of the accession of new member states or in order to withdraw from the E.U.

• **The opinion procedure according to Art. 140 TFEU (monetary union)** is specific to the situation in which the Council, at the proposal of the Commission and after the Parliament has expressed its opinion, decides which of the member states that are the object of a derogation fulfill the necessary conditions to adopt the single currency according to the criteria imposed by Art. 140 par. (1) of the TFEU, thus ending the derogation granted to the respective member states.

During this procedure, the Parliament votes the recommendations in bloc and cannot submit any amendments. [10]

• **The procedures regarding the social dialogue** are utilized according to the E.U. objective of promoting dialogue between social partners, especially with the aim of closing an agreement or convention. According to Art. 154 TFEU, the Commission has the mission to promote consulting social partners at the level of the E.U., regarding its potential orientation, before presenting the proposal to the Parliament.

Any agreement closed by the social partners and any document elaborated in this sense by the Commission, is forwarded to the competent commission in the Parliament. In the situation in which the social partners have reached an agreement and have collectively requested that it should be put into application through a decision of the Council at the proposal of the Commission, on the basis of Art. 155 par. (2) of the TFEU, the competent commission deposes a proposal of resolution through which it is recommended that the request should either be approved or rejected. [11]

• **The procedures regarding the examination of voluntary agreements** are utilized in the situation in which the Commission informs the Parliament regarding the intention to resort to voluntary agreements as an alternative to lawmaking. In this case, the competent Parliamentary Commission can present a proposal for resolution, through which they recommend the adoption or rejection of the proposal specifying the conditions that must be fulfilled in order o either adopt it or reject it. [12]

• **The official codification** represents **the repealing procedure** for the acts that are the object of the codification and replacing them with a unique act. The consolidated version of the act includes all the modifications brought to in from the moment it took effect.

The codification facilitates the understanding of the E.U. legislation, legislation which like those of the member states of the E.U. is subjected to frequent modifications.

In short, the proposal of the Commission for codification is examined by the legal structures of the parliament and, if there are no substantive modifications, the simplified adoption procedure of a report is applied (according to Art. 46 of the Regulations).

The proposal of the Commission will be examined in its entirety, through a simplified procedure in the European Parliament and in the Council.

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There were the main aspects considered important which concern the adoption of legislative acts at the level of the E.U.

In comparison with the national legislation in the matter, a series of specific differences need to be ascertained. Some of these can be included in the following main aspects:

- as opposed to national Romanian law (and not only), in which the only lawmaker, with a restricted meaning, is the Parliament, at the level of the E.U., the lawmaking activity is in the duty of multiple entities, each with its area of legislative competence;
- in the Romanian system, the lawmaking competency the division between the two Chambers (the Lower House and the Senate)and – as it was until the modification of the Constitution in 2003 – the mediation procedure, present at the legislative level of the E.U., no longer exists;
- regarding the legislative initiative, at the level of the E.U., the European Commission is the only one entitled to initiate legislative projects. In Romanian law, the right to legislative initiative is granted to the executive authorities (through the Government), as well as to the members of the Parliament (deputies and senators), including to citizens (in the form of the peoples' legislative initiative);
- Unlike national systems (including the Romanian one), in which the citizens' will is expressed through the Parliament, in the E.U. the representatives of the member states have been granted an important legislative role in the Council.

Of course, beside these differences others can also be identified, but this study is under a certain constraint in regards to its span, and does not allow for us to expand neither upon a comparative analysis, nor upon the formulation of the *lex ferenda* law proposal. Perhaps with another occasion.

In conclusion, regardless of the more or less differentiated manner in which normative legal acts are decreed in the E.U. law as well as in national law, a fact remains the same: the necessity of adoption of normative/legislative acts in the conditions and at the level of the specific requests of a good governing, is a desideratum upon which the public good, the common good of all citizens depends substantially.

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BREXIT and the European legal framework of data protection: implications on security cooperation and information sharing

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Abstract

The article presents the current and future European legal framework of personal data protection in the context of BREXIT, and the legal implications of the leaving vote on the security cooperation and information sharing within the EU. By aiming at introducing a discussion about the legal options for both the UK and the EU with regards to the security policies and information sharing, the instrument of soft law harmonisation will be addressed as a possible option of the British Government and a reflection of a continuation choice. In the final section, political alternatives backing a position of legal difference post-BREXIT will be presented.

Keywords: *European Union, BREXIT, harmonisation, European law, security cooperation, personal data, information sharing.*

1. Introduction

In June 2016, the United Kingdom (UK) decided to return its field on the European path: if in 1975, the British people chose to confirm their support to their country's membership of the European Community/-ies (achieved on the 1st of January 1972), four decades later, through the same mechanism of the referendum, the majority of the citizens voted in favour of leaving the European Union (EU). As a result, on the 29th of March 2017, Prime Minister Theresa May triggered Art. 50 of the Treaty of the European Union (TEU), marking the official start of the leaving process that is due to end no later than April 2019.

> *Art. 50 (TEU)*
>
> *(1) "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
>
> *(2) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Art. 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*

(3) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in par. 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period." [1]

A state's decision to unilaterally withdraw from the EU is not equal to the desired outcome, the two-year period representing far more than just a series of formalities and disengagement from the decision-making process. BREXIT will represent a complex exercise of multiple negotiations, in which, among others, both the European and the British legal establishments will be at stake as the EU is moving its own domestic law at the same time as the UK is going through the Art. 50 process.

An important chapter that will mark the outcomes of the Brexit is the European legal framework of data protection and the effects on the national set of regulations regarding privacy and personal data. These consist of various directives and regulations, both regarding the communitarian space and the relation with third countries, such as the United States, that have important implications not only for the stakeholders from the economic sector, but also for government and law enforcement agencies that contribute to the security environment. The effects of BREXIT on the national law will depend and will have long-term effects on a series of policies ranging from the private sector to the country's security and foreign policy.

Asked about the future of British law after BREXIT, the UK digital minister Matt Hancock declared at the beginning of 2017 that the government is rather favourable to maintaining the *status quo* which means starting "the negotiations from a position of harmonisation, rather than from a position of difference" [2]. However, the statement was made before May's declarations of a hard BREXIT, while it should also be noted that, before the referendum, Hancock was among those in favour in the UK remaining in the EU.

Once the UK has officially left the Union, the European legal framework can technically be abandoned by the British. Yet, according to many policymakers and analysts, such a decision might not benefit any of the two parties. In this context, one of the main questions raised both by the academia and the community of jurists and policy makers is how will BREXIT affect the security cooperation, and what are the legal options for London and Brussels to continue the information sharing post-BREXIT? Without pretending to offer an evident answer, the paper looks at the current European legal framework of personal data protection, and analyses the post-BREXIT harmonization option for both the UK and the EU from the perspective of the security policies and information sharing between law enforcement agencies.

Irrespective of the amount of changes in the UK data protection law that BREXIT will determine, the process has at least a two-year runway period which means that the privacy directives from Brussels will remain the law of the land within the next few years.

2. Harmonization: a theoretical framework

The harmonisation of law in the EU is rooted in the creation of common standards along the internal market and has been considered, for decades, an instrument and an expression of Europeanisation. Yet, the harmonising instrument is not specific to the European legislation, international and regional human rights treaties providing important examples of this.

Whether we talk about it as a soft process or a formal/informal instrument, harmonisation is a process that begins at the first stage by creating a concept at the European level, followed, at the second stage by insertion of the European concept into the domestic legal orders, and at the third stage by an assimilation and development by the Member States [3]. Also, the harmonisation process is based on a twofold approach: on the one hand, the horizontal integration that provides coordination among states, while on the other hand, the vertical integration allows each national system to preserve its individuality [4]. According to Goldring, through the process of harmonization, "the effects of a type of transaction in one legal system are brought as close as possible to the effects of similar transactions under the laws of other countries."[5] Interestingly, Boodman emphasizes that "[T]he nature and level of harmonization required in a particular situation will depend entirely upon the specific circumstances of that situation."[6] This remark applies particularly to the European context in which harmonisation appears as "a conscious process that has the aim of leading to the insertion of a concept into the national legal orders, (…) to serve the objectives of the European Union"[7]. Harmonisation of laws is a multifaceted development requiring the comprehension of the broader landscape involving multiple implications.

In the aftermaths of BREXIT, various authors asserted that the British vote "will most probably facilitate the harmonisation process of the rest of the member states" [8] with regards to many legal issues addressed at EU level. However, while there are many post-Brexit scenarios, the outcome will depend on what the UK will decide to negociate with the EU an IN/OUT legal pathway. For the moment, EU law is embedded in UK law and irrespective of the 2019 outcome of the leaving process, London must "remain aligned with the EU for trading, treaty or other political reasons" [9].

3. EU legal framework regarding personal data protection

In 2012, the European Union proposed a comprehensive reform of data protection rules in the Union consisting of a Regulation ("to strengthen citizens' fundamental rights in the digital age and facilitate business by simplifying rules for companies in the Digital Single Market" [10]) and a Directive ("for the police and criminal justice sector protects citizens' fundamental right to data protection whenever personal data is used by criminal law enforcement authorities" [11]). Aiming at establishing a modern and harmonised data protection framework across the EU by 2018 [12], the reform is a key enabler of the Digital Single Market and the cross-border cooperation in the fight against crime and terrorism.

The current EU legislation on data protection is based on Directive 95/46/EC, adopted in 1995 to protect the fundamental right of data protection and to guarantee the free flow of personal data between Member States [13], and complemented by Framework Decision 2008/977/JHA to support the police and judicial cooperation in criminal matters. Since 1995, however, the emergence of the online environment and the unprecedented technological development that marked the business world, as well as the manifestation of new security challenges which can cross borders more easily than information can [14] required a more operational framework, adapted to present-day reality. While technology was allowing both private companies and public authorities to make use of personal data on an unprecedented scale to pursue their activities, the privacy of the citizens was being put at risk, creating not only an environment of uncertainty and mistrust, but also insecurity [15]. At the same time, it became obvious that the 1995 & 2008 regulation did not impact much on reducing

the gaps between conflicting national regulations throughout the Union. The 2008 Framework Decision, although meant to create a common framework to regulate and enable police cooperation and judicial cooperation in criminal matters as a response to the security challenges, allowed states to derogate "to general data protection principles at national level, thereby not harmonising them" [16].

Current data protection legislation applies to the 28 Member States, in addition to three non-EU countries: Iceland, Liechtenstein and Norway. However, most of the European data flows exit the borders of the jurisdiction it establishes. According to the Directive, personal data cannot be transferred to countries outside the EU and the EEA [17] unless adequate level of protection is guaranteed [18]. One of the most important bilateral agreements between the EU and a third country has been the international Safe Harbor Privacy Principles [19] signed with the United States, entered into force at the beginning of 2000, and aimed at preventing private organisations which store customer data from accidentally disclosing or losing personal information. The Safe Harbour Framework was declared invalid in October 2015 through a decision of the European Court of Justice (ECJ). This led to the EC launching the project of a new bilateral agreement EU-U.S. Privacy Shield, meant to provide stronger protection for transatlantic data flows. The Privacy Shield contains stronger obligations not only on private companies on both side of the Atlantic, but also on the U.S. government:

> *"The U.S. has given the EU assurance that the access of public authorities for law enforcement and national security is subject to clear limitations, safeguards and oversight mechanisms. Everyone in the EU will, also for the first time, benefit from redress mechanisms in this area. The U.S. has ruled out indiscriminate mass surveillance on personal data transferred to the U.S. under the EU-U.S. Privacy Shield arrangement. The Office of the Director of National Intelligence further clarified that bulk collection of data could only be used under specific preconditions and needs to be as targeted and focused as possible. It details the safeguards in place for the use of data under such exceptional circumstances. The U.S. Secretary of State has established a redress possibility in the area of national intelligence for Europeans through an Ombudsperson mechanism within the Department of State."* [20]

Transfer of personal data across national boundaries, both inside the Union and to third countries, is increasing every day and cannot be stopped through physical barriers, nor can it be managed by each government alone. Therefore, in the context of an increasingly complex internal market, as well as a globalised world, the EU is committed to reduce fragmentation and stregthen consistency through a more integrated framework. Nevertheless, compared to the 1995 & 2008 legal framework, the new legislation contains, besides the regulation on European business, an increasing number of aspects regarding the cooperation between law enforcement agencies. In this sense, the reform of the European legislation on data protection reflects the societal evolution and the becoming of the world we live in, being the result of a need to balance individuals' right the protection of their personal data on the one hand, and the provision of economic opportunities and security, on the other hand.

The transposition of the '95 Directive [21] in the British law led to the adoption of the Data Protection Act 1998 which became the nowdays framework for the UK's data protection regime. Although Member States have adopted the Directive in slightly different ways (as

mentioned above), the main prohibitions guaranteeing from the misuse of personal date by unauthorised entities have been adopted accordingly. As a result, under the UK Act, *"transfers of personal data to countries outside the EEA are prohibited unless either:*

- *the destination country in question ensures an "adequate" level of data protection for individuals; or*
- *one or more preconditions which allow the transfer to take place applies".* [22]

4. Legal implications on post-BREXIT security cooperation

Although EU regulation on matters concerning security and defence at the community level is limited and rather discouraging of any initiative of political integration and therefore of cooperation beyond sovereign limits clearly established by Member States, there are provisions of EU law that have been and are still likely to be transposed into UK domestic law before 2019, which affects the broader national legislation on security. Among them, the laws that impact upon the collection of personal data, as well as the management of information in multilateral formats might turn into an apple of discord, or, on the contrary, in a for cooperation between Brussels and London in the context of BREXIT.

Data protection regulation and the security-privacy have been a sensitive topic in talks engaged by the United States and the European Union, a cooperation agreement leading to more sharing being blocked for the moment on both sides of the Atlantic [23]. Both at bilateral level and within the Five Eyes context, the UK and the US enjoy a special relationship rooted in a shared culture and a common experience that has passed the test of history; yet, while the Americans have seen the UK's membership to the EU as an advantage for their dialogue with Europe, the British have often felt the political and legal constraints of their belonging to the European *raison d'* être.

The new European Data Protection regulation will apply automatically from May 2018, at least one year before the expected date when the UK will formally leave the Union, meaning that London should comply to the new legal framework. This means that a temporary refusal to transpose the EU law, followed by a disengagement of the British law system from the EU legal order on the long term might lead to considerable limitation of information sharing as a consequence of different standards and guarantees of privacy and personal data protection.

The UK (and any third party interested in having access to personal data considered relevant for law enforcement agencies) will be required to guarantee an "adequate" level of protection according to EU standards. In this case, the British options can be broadly reduced to implementing the EU's rules even after BREXIT, or trying to produce more Intelligence to cover the European loss, the last option benefiting from little support despite the proficiency of the British Intelligence community.

5. Alternative ways to "continuation"

BREXIT implies a mutual loss to Intelligence facilities and capabilities: the Union is likely to lose access to the British intelligence framework and security links, as well as to the input of the strongest and most efficient secret community on the continent, while the British security community risks to be deprived mostly by the EU's crime and intelligence datasets. Within the European Intelligence institutional network, the case of the Europol is the most germane for the becoming of the EU-UK cooperation. Europol represents by

far the security structure with the highest degree of institutional organisation and operational integration, being an important pillar for the security and safety of the European community. The UK is a key member of the agency, providing a considerable amount of information needed for the assessment of counter-terrorism, primarily because of the engagement and contribution of the national police communities, in the British case, the National Police Organisation and the Metropolitan Police and Serious Crime Agency. Concurrently, states' participation takes place in a well-established framework aimed at becoming within the next years "EU's criminal information hub, that provides information sharing capabilities to law enforcement authorities in the Member States" [24]. Many voices, both in the media and among the community of experts, have argued that the UK will lose the role and position within the agency, which translates into the impossibility to continue accessing security and intelligence databases (such as the Europol information System) that are related to trans-border and trans-jurisdictional fight against threats that are shared across the continent, irrespective of political ideologies. According to the Europol acting head of strategy, Philip Amann, in a post-BREXIT era, the UK's access to the European intelligence assets and infrastructure would certainly become limited. However, it must not be forgotten that the Europol created a framework aimed at setting-up operational level agreements with non-EU states, among which countries that are both traditional partners (like the United States or Australia), as well as with a political and security culture different from the Western tradition, but with which common concerns and perceptions of risks and threats are tightly shared (such as Columbia). Enforced through Operational Agreements, these relations have made possible the sharing of sensitive data that can serve the law enforcement agencies in their fight against organised crime and terrorism across the continent. Thus, it is difficult to imagine a scenario in which a "hard BREXIT" would fracture the security cooperation system between the UK and the EU in such a way that there would remain no place for an efficient reconfiguration and joint action between actors that know each other, have shared a common history within the same institutional establishment for decades, and which, irrespective of ideological, cultural and political differences, are driven by the democratic principles that place the wellbeing and security of their citizens on the top of list of their policy priorities.

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[18] Several exceptions (or "derogations") to this rule based on specific agreements between the EU and third countries apply. "The EU has signed bilateral **Passenger Name Record (PNR) Agreements** with the **United States, Canada and Australia.** PNR data can be used by law enforcement authorities to fight serious crime and terrorism. The use of PNR data for law enforcement purposes involves the processing of personal data. The transfer of PNR data from the EU to third countries must be governed by a bilateral agreement that provides for a high level of personal data protection." Retrieved from http://ec.europa.eu/justice/data-protection/international-transfers/pnr-tftp/pnr-and-tftp_en.htm. **Binding Corporate Rules** ("BCR") are internal rules used by multinational companies to ensure that all transfers are made within a group benefit from an adequate level of protection. Retrieved from http://ec.europa.eu/justice/data-protection/international-transfers/binding-corporate-rules/index_en.htm.

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Consecration, at an european level, of the information principle and public participation in environmental decision making and access to justice in environmental matters

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Abstract

This article is a foray into the field of international and European regulations of the main instruments that reflect the principles of information and public participation in environmental decision making and access to justice in environmental matters.

Keywords: *environment, legislation, public information, citizen.*

1. The genesis of the principle

Devoted initially, on national legislative systems(1) and subsequently on the rules of international law(2), this principle established obligations on the state regarding access and public information to carry out any actions involving the preservation and improvement of the environment(3) to achieve sustainable development thus creating a framework to

(1) Swedish Parliament, was the first parliament in the world to adopt a law regulating access to public information by 1766;

(2) International Covenant on Civil and Political Rights, which was adopted at the UN General Assembly on December 16, 1966, which established among other things, for example the art. 19 can "to seek, receive and impart information";

(3) Bălan, L.L. (2014) Environmental protection in the context of preventing and combating pollution, University Publishing House, Bucharest, pp. 123-124; Cobzaru, A. (2012) Principles of European environmental Juridical Universe Publishing House, Bucharest; Charbonneau, S. (2002) Droit communautaire de l'environnement, Paris, Harmatta.

determine human welfare and the exercise of fundamental human rights worldwide. Objective, which required internationally recognition and was started by inserting in:

– **provisions of the principles of Art. 4, Art. 19 and Art. 20 of the Declaration on Environment in Stockholm in 1972**[4]. By the text of the provisions of Art. 4 and Art. 19, are set criteria by which the public can be embedded within environmental concerns and responsibilities

– provisions of the **Declaration on the right to defend freedom of information** and participation, a statement which was adopted on the occasion of the 2 – European **Conference on Environment and Human Rights**, which was held on December 3, 1980 at Salzburg;

– provisions on the **African Human and Peoples' Rights Book**, which was held in 1981, namely on 26 June in Algeria[5];

– the provisions of **UN General Assembly Resolution no. 37/7** of 28 October 1982 on the **World Book for Nature**[6]

– the terms of the **Additional Protocol to the American Convention on Human Rights**. Convention that was held in San Salvatore, on November 17, 1988[7];

– provisions of **UN General Assembly Resolution no. 45/94** dated December 14, 1990, on the need to maintain a healthy environment for the well-being of individuals;

– the **UN Convention on Environmental Impact Assessment in a Transboundary Context,** Espoo, 1991;

– provisions of the second **Ministerial Conference** entitled **"Environment for Europe"**, which was held in **Lucerne** on **28-30 April 1993**;

– the provisions of the **World Union for Protection of Nature Resolution**. The resolution was drafted and adopted in Montreal on October 23, 1996.

2. Regulation principles at an European plan

These tools, in particular, the Documents of the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, are just part of the tools[8] that were meant to reflect the imperative of public participation in matters relating to environmental protection, to determine the creation of effective policies that improve the ambient climate worldwide.

In light of imperative public participation in environmental issues worldwide, and Access to Justice in Environmental Matters, the European perspective has agreed also to

[4] Bălan, L.L. (2014) Environmental protection in the context of preventing and combating pollution, University Publishing House, Bucharest, p. 124.

[5] African Book of Human Rights, aims to establish for all peoples of the world has a fundamental right to an environment that allows mankind needs to be carried out in appropriate conditions for their development;

[6] Point Resolution no. 23 sets everyone the opportunity to contribute collectively or individually ,to take decisions on climate and to start recovery measures in the event of damage or deterioration.

[7] Which establishes the right and ability of the individual to a healthy environment.

[8] Remember the Convention on the Transboundary Effects of Industrial Accidents, which was held in Helsinki in 1992 and ratified by Romania by Law no. 92/2003, published in the Official Gazette no. 220 of April 2, 2003.

the need to attract people in environmental issues[9], proposing clear objectives -and, crystallization regulations designed to meet the challenges of the environment.

Asserting an European policy for the segment that concerns information and public participation in environmental decision making and the access to justice in environmental matters, as noted, it was due to the emergence of a new stage regulator located under the international provisions. Once the sphere of international concerns was crystallized, the European perspective, has initiated a series of actions and targets to encourage and develop the existing ones and, at the same time, to outline new ones, necessary for this segment.

Thus, at European level, attempts to address these problems have not left unanswered, so one aspect in order to achieve objectives, which built among other major issues, was the right to access public information, as elements primary in achieving an effective policy to protect and improve the environment, and these concerns, we find them in the Recommendation of the Committee of Ministers and European Council dated November 25, 1981, on the access to information held by public authorities, adopted in Strasbourg, which recognizes the individual's right to receive information and data held by public authorities and states that informing the public is a key element for public entities and the rule of law in general. Going to the same guidelines, they were drafted other regulations in this area, such as;

– **Council of Europe Resolution no. 171**, written on the occasion of the **Standing Conference of Local and Regional Authorities of Europe on regional issues**, **participation in environmental issues**, adopted and implemented in Strasbourg on October 14, 1986;

– **European Charta on environment protection and health**, held in Frankfurt in 1989, which includes provisions such imperative establishing among other matters, that public participation is a segment essential for the remedy of environmental issues and health protection human factor;

– **OSCE Conference for the Environment** in Sofia in 1989, also sets a number of conclusions and recommendations, including the following and the capacity of individuals and organizations that have occupations in environmental issues, to manifest ideas, to reunite with other with other people and other bodies aimed at improving environmental quality and to purchase, to conduct such journalism, to disseminate data and information to prevent and combat environmental degradation ambient, without establish administrative or legal limitations in this regard.

– All amid concerns and crystallization regulations this segment in Europe emerged as secondary legislation and **Council Directive no. 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment[10],** with a major impact field, both at the level of doctrine and European law in the field of public participation in environmental decision-making and founded later development of the Aarhus Convention.

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[9] See for example, the provisions of section 5 of the chapter on science, technology and economy of the Helsinki Final Act, which was held in August 1975).

[10] The Directive was published in OJ L 175, 5.7.1985, p. 40 and subject to changes, such as Directive 97/11/EC dated 03.03.1997; Directive 2003/35//EC of the European Parliament and of the Council dated 26.03.2003; Directive 2009/31//EC of the European Parliament and of the Council dated 23.04.2009.

Other segment related acts analyzed this concern: **Regulation (EC) no. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to the European Parliament, Council and Commission**[11]**; Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters**[12]**; Regulation (EC) no. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application to Community institutions and bodies of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters**[13] and **Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an infrastructure for spatial information in the European Community,** known as INSPIRE[14].

Directive 2003/4/EC of the European Parliament and of the Council on the right of access of the public to environmental information, which repealed Directive 90/313/EEC, has known and guaranteed right of access to public information on the environment.

But a special contribution on stage crystallization of discretion conferred on the public, through the International and European, had the **Aarhus Convention**[15], held under the auspices of the **Fourth Conference of Ministers called a "Environment for Europe" in 1998**, which adopted on this occasion, the **Convention on access to information, public participation in decision-making and access to justice in environmental matters**, an instrument of force meant to provide a series of tasks participants in shaping and solving environmental problems for present and future.

The provisions of Art. 1 of the Convention has established a guarantee procedural rights, through which access to environmental information, public participation in decision making and access to justice in environmental matters had a major role to achieve the objective of protecting the right fundamental human rights, to live in an environment of prosperity, peace and health.

In terms of ensuring public participation in the activities of environmental protection, the Convention establishes that the procedure is drafting public notices for starting processes necessary decision environment, including: the nature of the proposed request for the decision, the regime of the draft decision the competent authority in the decision, mentions of national procedure applicable in the territory of cross-border environmental impact assessment elements. The decision is the result of public participation and includes regulations stipulated in the regulations in the field.

Also according to the provisions of the Convention, it enshrines the view that access to justice is a procedure guaranteeing the right to respect for environmental protection

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[11] Regulation was published in the Official Journal L 145, 31.5.2001, pp. 43-48.

[12] The decision was published in the Official Journal L 124, 05/17/2005, pp. 1-3.

[13] Regulation was published in OJ L 264, 25.9.2006, pp. 13-19.

[14] The Directive was published in OJ L 108, 25.4.2007, pp. 1-14 and was meant to reglementezecadrul generally allocated to creating a network infrastructure for information and data such spațialădin European Community policies and programs in the environmental field, policies or other activities that could negative environmental generaefecte.

[15] The Aarhus Convention, ratified by Romania by Law no. 86/2000, published in the Official Gazette no.224 of May 22, 2000.

duties and restoration of the environment, reflecting a minimum level of justice and common parties. This right, of any person having a legitimate interest on the environmental information has been compromised or the right with respect to environmental protection. Citizen's access to justice is manifested when it is dissatisfied with the information received, if the information was ignored or failed to meet the legal terms it had communicated. This allows citizens to have recourse to an appeal procedure territorial competent court or other competent body to deal with the request in this regard. Where was resorted to procedures for access to justice, there must be an improvement, an effective improvement under a court sentence which ensures that remediation is certain, objective and fair. The text of the Convention stipulates also that access to justice, environmental protection must be effective and fair, and parties – signatory undertakes nationally to promote and develop national programs with concrete actions and measures to inform the public relative to access to administrative and legal procedures relating to the environment, removing, limiting economic difficulties or any other measures to encourage and support the education of citizens in the spirit of protecting and improving the environment.

Throughout the Convention, we find also provisions which expressly establishes the obligations of each State participant, promote and develop national programs with measures to encourage and support the education of citizens in the spirit of protecting and improving the environment.

No matter what the Eurosceptics believe, one thing is clear, recognized mainly at doctrine that the appearance of the Aarhus Convention represented a new type of regulation fundamental oriented construction and an effective promotion based on an increased role of representatives of the private sector, including of ecological organizations in the policy of protecting and improving the environment for present and future generations.

The Convention did nothing but to guarantee and increase forever recognition of ecological rights of humanity to information, participation and access to justice and also, the Convention was intended to regulate the increase accountability and transparency in matters related to environmental protection.

As for the ECHR, we note that the interpretations given to Art. 8 par. (1) of the Convention, the Court came to recognize the right of information on quality and environmental hazards, if we refer to the right to information for exposures to pollution and environmental quality. This recognition was operated with the decision in the Guerra cause and others against Italy, in sense that, starting from the thesis of positive actions the Italian State should have taken, in order to ensure the effectiveness of the right to recognition of family life and private life, the Court found that the Italian State violated provisions of Art. 8 of the Convention, hence the bodies entitled, have failed to submit important data and information regarding major exposure generated by implanting, near their home, a chemical factory.

So we see, from the ECHR case, namely the study of Art. 8, that State Party to the Convention, has a moral duty not only to act on stopping or reducing pollution[16] but also to take actions to inform the public on the existence of possible major exposure to pollution. Even if the European Court of Human Rights has recognized and held a right to inform the population on the environment, however, was not confined to interpretation of the nature of stopping and limit the effects of pollution on the environment, but also expanded

[16] See to that effect, Case Lopez-Ostra against Spain www.echr.coe.int

the scope of its interpretation and about the commitment of the State for carrying out activities harmful, such as, for example, nuclear testing, which can generate negative consequences on the health of participants in these activities if there is not a set of procedures to information and relevant data to be communicated to those concerned (Case Mc Ginley Egan against Great Britain)

It was also stated, in the light reflections of Art. 10 provisions from the Convention, the express obligation of states to provide public information on the environment and to collect, compile and disseminate data and information that the population does not have a direct access and, by their nature, cannot be known without the support of public authorities.

Also, as a secondary right, do not forget the jurisprudence of the Justice Court of the European Union (CJEU) which had, over time, a major contributor in shaping the right to information, public participation and access to justice in issues concerning environment and to this a series of actions bears witness. I won't get into too much detail on the Court in this field, but I will make only a brief summary of case C-612/13P – which has been brought before the Court of Justice of the European Union analysis of the provisions of Regulation no. 1049/2001 Regulation no. 1367/2006 and the Aarhus Convention.

Regulatory framework

A – International law. Aarhus Convention, Art. 1, 3 and 4.

B – European Union law. Regulation no. 1049/2001 on the provisions of Art. 2 paragraph. (1) of Regulation no. 1049/2001 and the provisions of Art. 1 par. (1) of Regulation no. 1367/2006.

C – Facts. Client Earth is a company incorporated under English law, which carries out environmental activities, and on September 8, 2010, addressed to the Commission an application requesting access to certain documents, including 2010 Management Plan, on the site of DG Environment, in accordance with the rights laid down by the Regulation no. 1049/2001 and Regulation no. 1367/2006. Following the refusal of the Commission to grant access to documents, on October 29, 2010, arguing that this is not possible as it violates the provisions of Art. 4 par. (2) and (3) the first paragraph of Regulation no. 1049/2001, the Commission was sued by the company management against the implied decision. The court judging the case, refused an application by the company on September 13, 2013, arguing that the appellant could not prove that the Commission erred by refusing to grant access to documents requested by the company, nor It presented evidence that there is in this respect an overriding public interest to demonstrate access to the documents in question, namely Management Plan, 2010.

On appeal the Court stated that the court ruling on the merits is ungrounded and no binding, indicating as grounds of appeal: error of law in violation of Art. 4 par. (2) of the Aarhus Convention and wrongly interpreting terminology the "overriding public interest" as indicated in Art. 4 par. (2) of Regulation no. 1049/2001. The court, for the reasons stated in the appeal shows that the wording of Art. 4 par. (4) letter c) of the Aarhus Convention, it does not appear any duty conditional and sufficiently conclusive and relevant for the purposes of jeopardizing legal regimes individuals and overriding public interest must not be contrary to the principles of the Aarhus Convention, Regulation no. 1367/2006 Regulation no. 1049/2001 and main law.

3. Conclusions

In the study conducted on the principle of information and public participation in environmental decision making and access to justice in environmental issues, we found that the application of the Aarhus Convention, the transposition of European directives at national level in EU member states, created a conducive framework and operational information needed to access real-time information and environmental data between public authorities and the population as a fundamental human right to a healthy environment appropriate to it.

Although eurosceptics believe that there have been major breakthroughs on the principle of information and public participation in environmental decision making and access to justice in environmental matters, I believe that the European area, through actions of its leaders by the expert working groups established for that purpose and case law, has managed to create a surprisingly effective framework enabling to beneficially accelerate awareness on issues that damage the environment and affect human health, if we refer to the first forms of outlining the steps to protect and improve the environment, a very important chapter further on the work of European construction.

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Parliamentary diplomacy in international parliamentary organizations

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Summary

Particularly large opportunities it currently provides parliamentary diplomacy in international parliamentary organizations. If regarding bilateral contacts and groups of friendship parliamentary dealing in special relations with certain countries exert a positive influence on the overall political relations, facilitating mutual understanding, building bridges between peoples diplomacy in organizations parliamentary nature institutionalized has extra element of permanence. Regular meetings of international bodies is a welcome opportunity for knowledge and debate among the parliamentarians of different orientations, belonging to different states in scope, type of culture, national identity, traditions, religion, economic and political interests etc. The success of parliamentary diplomacy is determined, in large part, by the presence of parliamentary delegations personalities of the highest value, acting with more responsibility and patriotism, along with diplomats officials to resolve some major problems of the countries they represent. In this way, parliamentary diplomacy offers elements allowing the democratization of political-diplomatic process, while maintaining its special status in the diplomatic efforts to resolve the tense situations. All these made lately to resort increasingly to specific instruments available to parliamentary diplomacy. In addition, lawmakers who held diplomatic missions often achieved remarkable results, particularly promoting relations with the Romanian Parliament and regional parliamentary bodies worldwide and getting a favorable status as within them.

Keywords: *Parliament, foreign policy, diplomacy, treaties, European integration, parliamentary delegations.*

1. The role of international parliamentary organizations

Increasing the number of international parliamentary organizations in our age is unmistakable evidence that the Parliaments can play a leading role in facilitating highly effective rapprochement between nations, promoting great ideas of cooperation regionally and globally. Currently, portrays interparliamentary forums, either as distinct international institutions, having a profile parliamentary exclusively, such as the Interparliamentary Union, either as integral elements of the international structures. For example, mention may Parliamentary Assembly of the Council of Europe, European Parliament, the North Atlantic Assembly, the Parliamentary Assembly of Black Sea Economic Cooperation, etc. In such cases, parliamentary work mingles happily with activity state representation in political structures and mechanisms of that organization [1].

The parliamentary dimension includes a new work of international organizations, surpassing structure older are at the same time, important stands of consultation, debate, harmonization of certain positions, able to serve directly the issues that are discussed and determined by common agreement from the states. We are witnessing, therefore, even if elements of the old and extra-state entities appear in the works of such distinct bodies of international law, a weaving ever stronger parliamentary diplomacy with official diplomacy [2].

2. The main European and world interparliamentary forums

2.1. Council of Europe

Council of Europe, based in Strasbourg, is an intergovernmental organization created in 1949, which currently groups 48 pluralist democracies in Europe, plus a number of states that have observer status; Canada, Vatican, Japan, the US, Mexico and Israel.

Council acts in favor of European unity by protecting and strengthening pluralist democracy and human rights by defining and perfecting common solutions to society's problems through understanding and enhancing the European identity.

The Council of Europe, together with the Committee of Ministers, composed of 41 members-making body of the organization, functioning and the Parliamentary Assembly, composed of 630 members, including 315 full and 315 alternate members, coming from among the 48 parliaments internationally. If the Committee of Ministers, which is an older organ, composed of the Foreign Ministers of the Member States, are the organization's problems, the Assembly plays a pacemaker using the approximately 50 committees and subcommittees. Issues debated in the Parliamentary Assembly facilitate the adoption of resolutions by the Committee of Ministers.

The importance of the parliamentary dimension of the Council of Europe is highlighted by the fact that in 1989 the Parliamentary Assembly decided to create the special guest status for the countries of Central and Eastern Europe. Ten countries benefited from special guest status: Albania, Belarus, Croatia, Estonia, Lithuania, Latvia, Ukraine, Romania, Russia, Slovenia. Some states have benefited in the past from this status were subsequently became members of the Council of Europe (such as Albania, Bulgaria, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, Slovak Republic, Slovenia and Hungary).

Romania has indicated since 1990 a desire to participate in the Council of Europe and to become a member of this organization. Thus, a Romanian delegation of lawmakers participated for the first time, between days 24 to 27 September 1990 to debate the parliamentary dimension of C.S.C.E. Between September 28 and October 4, 1990 took place the work of the 42nd session of the Parliamentary Assembly of the Council of Europe, which have been authorized to assist the Romanian parliamentarians who participated in the debate on the parliamentary dimension of C.S.C.E.

In the days 16 and December 18, 1991, the Senate or the House of Representatives (House of Representatives) passed GOVERNMENT'S JUDGMENT ON THE EMPOWERMENT OF STATUS REQUEST FULL MEMBERSHIP TO COUNCIL OF EUROPE. Romania's formal application for membership of this body was lodged on 16 December 1991, the month in May 1993 Romania became a full member of the Council of Europe.

Over the years, Romania was manifested as a particularly dynamic presence and active in the work of the Parliamentary Assembly of the Council of Europe. Thus, Romanian

MPs have submitted interventions in issues such as access of persons belonging to national minorities to higher education, the consequences of the Second Summit of the Council of Europe, economic crime – a threat to Europe, the observance by Ukraine of a moratorium on executions and the abolition death penalty sustainable development in the Mediterranean and Black Sea basins, etc. In Romania and other member countries have held many events, meetings, meetings of committees, working groups that took part in Romanian parliamentarians. Among the activities organized in our country mention meetings on topics such as: "Evaluation of measures and experiences undertaken by the Member States of the Council to develop participatory democracy," "Cross-border cooperation as a factor of social cohesion and democratic stability in Europe". Following the meeting in Bucharest the Parliamentary Committee and the public since 1999, it was launched Bucharest Declaration on the principles of a future European Constitution.

2.2. European Parliament

The European Parliament is the parliamentary body of the European Union was initially composed of 142 members from the six founding member states of C.E.E. Currently, due to the enlargement of the European Community, it counts 766 MPs elected for a period of 5 years from the 27 member states. Beginning in June of 1979, MEPs are elected by universal suffrage, before the reform in 1979, they were appointed by national parliaments.

The main tasks of the European Parliament are participation in the legislative C.E., budget enactment communities after establishing its agreement with the European Communities Council, exercise overall control over the activity of Community institutions and foster political activities [3].

Parliament is headed by an office, and has 18 standing committees specialized, but in addition, within it can create temporary committees and commissions of inquiry, such as, for example, Committee on Drug Commission against the spread of fascism and racism Commission for agricultural surpluses. In the European Parliament operates a total of 12 political groups, of which the most important are the socialist group, the group's democratic and liberal group Christian democrat and reformer. The European Parliament meets once a month for a week in Strasbourg and the committees meet in Brussels on average 2-3 days per month.

Since 10 November 1990 initiated an institutionalized dialogue between Romania and the Community which led to the negotiation process of the Romanian-EUROPEAN ASSOCIATION, where it has been established among other things, the creation of a commission interparliamentary.

Currently, between Romania and the countries of the European Community is in force or the Europe Agreement gives Europe, signed on 01 February 1993. In 1993, the Copenhagen meeting concluded that all countries that have signed such agreements may become, perspective, members of the European Union.

Meeting in Luxembourg in December 1997 decided to launch the accession process for all 10 countries in Eastern Europe, although in terms of negotiations practical accession was maintained proposal made by the Commission in July 1997 known document AGENDA 2000 negotiations to proceed first with a limited group of countries: Poland, Hungary, Czech Republic, Slovenia, Estonia and Cipu.

On June 2, 1995, Romania submitted with formal application for membership to the European Union and the National Strategy for Romania's accession to the European Union.

Judgment of the European Council, held from 10 to 11 September 1999 in Helsinki, on the opening of accession negotiations with 6 candidate countries, including Romania, was received with great satisfaction by public opinion in our country is considered an event of real significance plan on economic and political developments.

Romania's EU integration is a great matter of national interest that depends to a considerable extent the country's economic development, rule of law and building ever stronger involvement of our country in international political circuit.

In December 2004, our country has completed negotiations to join the European Union. On this basis the European Council on 16-17 December 2004 held in Brussels reaffirmed January 01, 2007 as the effective date of accession of Romania to U.E.

On 25 April 2005, Romania signed in Luxembourg, together with Bulgaria and representatives of the 25 member states, the EU Accession Treaty. Treaty was preceded by assent of the European Parliament, granted on 13 April 2005 with an absolute majority of MEPs.

It should be emphasized that immediately after signing the Accession Treaty, Romania began to participate as an observer in the activities of the European Union is associated with the work of all Community institutions at political and technical level (the EU Council and its formations sectoral working groups of the Council of Europe and to European Council meetings). Also, the 35 Romanian MPs have commenced on September 26, 2005 at the European Parliament observer activity. Currently, the president is EUROPEAN PARLIAMENT ANTONIO TAJANI, elected in January 2017, when the last European elections took place.

2.3. Parliamentary Assembly of the North Atlantic

Parliamentary Assembly of the North Atlantic Alliance is the forum which was founded in July of 1955, receiving a formal structure in 1957, and the current name in 1966. He is independent from NATO, serving as a forum for consultation within which meet 257 parliamentarians from 28 countries of the Atlantic Alliance to discuss and debate matters of common interest. North Atlantic Assembly (hereinafter AN) aims at strengthening cooperation and understanding between the NATO members, promoting the views of the Alliance in formulating national policies, encouraging the development of a shared sense of solidarity Atlantic and to provide a formal link of communication between parliaments national and NATO authorities After the Cold War, the North Atlantic Assembly has assumed new tasks, including ensuring a climate of cooperation at parliamentary level between Alliance countries and the countries of Eastern Europe, finding mechanisms for cooperation between the Atlantic Alliance and other European and world.

North Atlantic Assembly has a permanent office composed of the heads of all national delegations shall meet at least three times a year, and an office itself, comprising a chairman, three vice-presidents, treasurer and secretary general. Assembly within five working committees on political, defense, economy, science and technology and civil affairs, meeting on the occasion of the two annual sessions of the North Atlantic Assembly.

The Assembly meets twice a year in plenary session, during a meeting that lasts three days of spring and autumn a meeting lasting five days. The meetings are held by rotation in national capitals, at the invitation of national parliaments.

Besides the North Atlantic Assembly, Romania held ASSOCIATED DELEGATION status, with effect from 17 April 1991 and from April 02, 2004 he became a full member of this organization.

2.4. Interparliamentary Union

Interparliamentary Union (hereinafter U.I.P.) established on June 29, 1889 is the oldest international political organization. Currently U.I.P. It brings together 162 parliamentarians from member states of the European Union.

The objectives of the IPU are encouraging contacts, coordinate the exchange of experience among parliaments and parliamentarians to examine issues of international concern, debate and adopt resolutions to promote joint actions to promote increased awareness of the functioning of representative institutions and strengthening their means of action, cooperation closely with the United Nations, governmental and nongovernmental organizations or other organizations, inter [4].

U.I.P. structure comprises interparliamentary conferences taking place biannually (spring and autumn), interparliamentary council executive committee, permanent working body, four standing committees, namely: a) political, international security and disarmament; b) Parliamentary Affairs, legal and human rights; c) economic and social problems; d) for matters of education, science, culture and environment. U.I.P General Secretariat is composed of international civil servants.

Currently, IPU comprises 162 members and 10 associate members. An important component of business delegations Romanian Group for the IPU sessions interparliamentary be the participation secretaries general of the two Chambers debates on law, parliamentary procedure and the various aspects of administration parliaments, at meetings of the Association of Secretaries General of Parliaments, advisory body U.I.P.

2.5. Western European Union

Western European Union (hereinafter U.E.O) was established on 17 March 1948 to promote European correspondence and security cooperation. From U.E.O. It consisted of a number of 9 countries (Belgium, France, Germany, Italy, Luxembourg, UK, Netherlands, Portugal, Spain). On November 20, 1992 was signed the Protocol of Accession of Greece; Turkey, Iceland and Norway had the status of associate member and observer-Denmark and Ireland.

Assembly U.E.O. It was made up of 108 parliamentarians from member countries; she would meet twice a year in plenary session at its headquarters in Paris. But it could also meet in extraordinary sessions in other capitals. Assembly was empowered to deliberate on any issues considered to be of common interest. Assembly structure include a desk, consisting of President and eight Vice-Presidents, each representing one of the nine member states; Committee Chair, composed of the Chairman of the Assembly and of former presidents as well as the eight Vice-Presidents of the Assembly and the chairpersons and six commissions

on defense, political, technical and aerospace, Budgetary Affairs and Administration, regulations and immunities public and parliamentary relations.

Assembly U.E.O. It decided that the representatives of parliaments of all countries in Central and Eastern Europe to be invited, starting in June 1991 in its sessions as an observer parliamentary status that enabled them to participate in plenary meetings with the right to speak but not with the right to vote.

After 1990, Romania has made contact with U.E.O. Assembly, most notably by exchanges of letters and visits. Romania's relations with the WEU, have now more than historical interest, because according to the protocol signed on 13 November in Marseille by representatives of member countries of this organization, its activity ceased, the powers of the WEU being taken by the European Union, according to the decisions of the in December 1999 at Helsinki.

2.6. Parliamentary Assembly of the Organization for Security and Cooperation in Europe

Organization for Security and Co-operation in Europe (hereinafter O.S.C.E.) fulfills a special role in maintaining peace and cooperation in Europe. It is the successor of the Conference on Security and Cooperation in Europe (hereinafter C.S.C.E.) after Summit in Budapest in 1994 was transformed into an international organization.

Acting President of O.S.C.E. It has political responsibility and executive O.S.C.E. overall business, which is the supreme political function within the Organization. It is held annually by Foreign Minister of one of the Member States. Acting President coordinate decision making and agenda setting activities by organizing forums for negotiation and decision. He may decide to set up monitoring groups or appoint personal representatives to deal with the various crises or conflict situations.

Permanent Council O.S.C.E. is a forum for dialogue, consult and take decisions on policy and operational issues current, which meets weekly in Vienna to ambassadorial level in plenary sessions and whenever it is needed, ad hoc meetings.

O.S.C.E. Parliamentary Assembly was established in Madrid, according to the Paris Charter and in accordance with the provisions of Resolution dated 02 to 03 April 1991. It brings together over 300 parliamentarians from 55 countries.

The main objectives of the OSCE Parliamentary Assembly are evaluating and in achieving the overall objectives of the European process, on topics covered meetings of the Committee of Foreign Ministers of the member countries of the O.S.C.E. debate interparliamentary issues concerning the development process employed by the Final Act of the Helsinki and the Charter of Paris, drafting statements, recommendations and proposals to the Council of Ministers of OSCE participating states and governments, national parliaments regularly informed on the work carried out. Secretariat of the Parliamentary Assembly of O.S.C.E. is based in Copenhagen, the annual sessions of the Assembly taking place in July.

Romania is a founding member of the Parliamentary Assembly of O.S.C.E. in which has seven votes in the plenary sessions of the Assembly (two senators and five MPs).

Over the years, Romanian lawmakers held a sustained diplomatic activity participating in many meetings during which they presented proposals and initiatives. MP Romanian Adrian Severin, Chairman of the ad-hoc deployed an estimated activity in promoting

internal dialogue and settlement of the dispute between the President and Parliament of Belarus, was chosen by agreement of all parliamentary groups in August 2000 as president Assembly Parliamentary Organization for Security and Cooperation in Europe. Currently, the Assembly O.S.C.E. It consists of 324 members from the 57 national parliaments. At its 25th annual session, which was held in Tbilisi in Geogia, between 01 to 05 July 2016, Romanian MEP Victor Paul Dobre was elected vice president of this organization. We mention the fact that during the period February 23 to 24, 2017, were held in Vienna Proceedings of the 16th Winter Meeting of the O.S.C.E.

2.7. Parliamentary Assembly of Black Sea Economic Cooperation

Parliamentary Assembly of the Economic Cooperation Black Sea (hereinafter PABSEC) has its origins in the "Declaration Summit on Economic Cooperation of the Black Sea" signed in Istanbul on 25 June 1992 11 states interested in the process of international cooperation: Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Greece, Moldova, Romania, Russia, Turkey and Ukraine.

The main objectives A.P.C.M.N. are supporting and accelerating accomplishment provisions of the acts in Istanbul, promoting democracy and parliamentarianism in member countries, amplifying relations between Member States in all fields, harmonization of legislation, initiating a close dialogue with the international and regional organizations.

The organizational structure of the Assembly itself includes a number of 70 parliamentarians from 11 countries. The Assembly has a Bureau, a standing committee made up of the heads of national delegations, three committees on economic, commercial, technological and environmental, political and legal issues and cultural issues, education and social services. The committees are created subcommittees to examine in detail certain issues.

INTERNATIONAL SECRETARIAT based in Istanbul and is headed by a director general. Assembly's plenary sessions are held twice a year, being organized by rotation in those member states that wish to host them. In the Parliamentary Assembly, Romania has the status of a founding member. Delegation to A.P.C.E.M.N. It consists of seven MPs (three senators and four deputies), our country having a member with full rights.

2.8. International Assembly of French parliamentarians

International Assembly of Parliamentarians of French Language (hereinafter AIPLF) is an organization that was established in Luxembourg in May 1967, and has among other objectives: fostering initiatives aimed at developing and knowledge through the French language, culture and civilization French expression. AIPLF also aims participation in actions aimed at ensuring respect for human rights, maintenance of permanent relations with institutions working in the field of Francophone participation in the preparation and follow up the decisions taken by executives francophone, especially the meeting of heads of states and governments share use of French.

The organizational structure behaves sections, a general assembly which meets in ordinary session in principle every 18 months, a desk and four standing committees on policy matters and general administration, cultural, Parliamentary Affairs and Cooperation and Development. Romanian parliamentary delegation contributed with both written interventions and responses to questionnaires required to compile reports on the themes

established in the four committees and through speeches during the debates in committees and plenary session.

2.9. Conclusion

Parliamentary diplomacy in international parliamentary organizations has a special significance at the present stage. Thus, "parliamentarians play a catalytic role of the dynamics of relations between two states or unlock bargaining impasses of" multilateral negotiations are more complicated as the number of issues and options increases with the number of states participating in negotiations [5].

Given the importance that presents participation in international parliamentary action, special attention is paid to national delegations present constitution, which must become a real team of negotiators. Through their work, the road to the European Union was clear to those who have integrated, assuming a European geographers, N.A.T.O. and U.E., leading inevitably to the fact that the border U.E. will become a space, a limes, geopolitical expression of each actor in the region working to defend and promote the national interest [6].

Lastly, it needs to prepare delegations, selecting them based on professional knowledge and issues in specializations.

National delegations are accredited by specific letters. Preparing delegation requires knowing in advance the objectives of the meeting and compiling a mandate to meet the interests of the country concerned. Interparliamentary meetings in reinforcing interventions oral and written interventions. Courtesy of importance meetings, gathering different signals on how they might be perceived certain ideas or initiatives, achievement of delegations meeting at least once before leaving to assess activity.

As can be seen from the examples presented above, Romania has, after 1990, carried out a rich activity on the line of parliamentary diplomacy within the international parliamentary organizations. Romanian presences have contributed to a better understanding of the realities of our country progresses on the path of democracy. At the same time, participation in interparliamentary meetings facilitated change some preconceived images and the manifestation of full availability for Romania to be able to reunite with full rights in the great family of the European peoples. It can thus be appreciated that diplomacy in parliaments proves to be an important factor in relation complementalitate state diplomacy, often advancing ideas, initiatives, state diplomacy that is called later to materialize and they play an important role legalize. It due to specific instruments at its disposal, helping to build the new architecture of international relations, as in efforts to resolve outbreaks of tension or conflict that lasts solutions proposed by classical diplomacy [7].

A particular advantage of parliamentary diplomacy to career diplomats is that they are subject to certain constraints approach from official positions, rigid. They combine also with the possibility of parliamentary diplomacy diplomats Party [8]. In this way, parliamentary diplomacy provides elements that enable the democratization process politico-diplomatic, whilst preserving a special position in efforts to regulate tense situations, which is why a significant feature of the role of parliamentarians diplomats is the multiple forms of collaboration, the main organizations now having a European character and parliamentary structures.

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The Right of Peoples to Self-Determination *Versus* the Principle of the Inviolability of Borders

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Abstract

In the current geopolitical context and given the conditions of a Europe facing centrifugal directions from several nationalist currents of opinion and entities with self-determination needs or wishing to be autonomous based on various criteria (ethnical, religious, etc.) and who start questioning the European construction and state borders, the author considers that it is of interest to provide a short analysis of two concepts, which at their first interpretation may seem contradictory – *the self-determination* and *the inviolability of borders*.

This study deals with the two concepts, *self-determination* and *inviolability of borders,* in the view of international documents.

Keywords: *self-determination; principles; international law; international documents.*

Introduction

The concept of principle means, first of all, a primordial source; primary cause; fundamental truth; a rule for action which is based on a value judgement and establishes a model, a rule or a goal; a right on which other rights are based or derive from; a general guiding rule.

As international society grew mature, in the assembly of rules of conduct there were some, limited in number, which stood out, and which due to their importance have later on been qualified as principles of international law. The principles are abstractions of a large number of rules, some of them having been for long and generally accepted, originating either in customs or in the conventional practice of states.

A common feature of principles resides in their high level of abstraction and their extreme generality. In the assembly of norms of international law, they stand out as "norms of universal application, with a maximum degree of generality and of imperative character, which provide an expression for and protect a fundamental value within the relations between the subjects of international law".

The principles of international law are stated in many international documents, such as: the Charter of the United Nations, the Declaration of the UN General Assembly on Principles of International Law concerning Friendly Relations and Co-operation among States – adopted in 1970, the Final Act of the Conference on Security and Cooperation

in Europe, made in Helsinki – August 1st 1975, the Charter of Rights and Duties adopted within OSCE in Paris, in 1990, as well as other documents with universal vocation.

This concept is used with different meanings. In declarations by states, and also in scientific works, the notion of "principle" is used for axioms or indisputable concepts, applied in the field of law and also to political relations, as well as for generally accepted norms, both in national and international law (such as, for instance, "*res inter alios acta"* – a legal document produces effects only between the contracting parties*, "non bis in idem"* – not twice for the same cause of action/for the same fault).

1. The right of peoples to self-determination

1.1. The notion of self-determination

The issue of the right to self-determination has been an object for researchers in various fields of science, mainly in the branch of international law.

The modern concept of sovereignty has its source in the Westphalia Peace; the requirement for the equality of rights of the states was formulated in the 16th – 17th centuries, in the works of the founders of international law, and the origins of peoples' right of self-determination may be identified in the demands of the 1789 French Revolution regarding the sovereignty of the people.

The concept of self-determination defines, on one hand, the right of peoples to freely determine their political status and to develop economically, socially and culturally, and on the other hand, it refers to the right of peoples to freely determine their place in the international community. Therefore, the holders of the right of self-determination are the peoples [1].

After the post-December period, two tendencies have been noted in the doctrine in re-consideration of the right of self-determination. The first tendency concerns the explicit requirements with regard to the recognition of new states – only of those which were established on a democratic basis, accepted the appropriate international obligations, observe the human rights and view the principle of self-determination as the basis for their recognition. In the second tendency, a need for classifying the types of self-determination was noticed, speaking of anti-colonial self-determination, sub-state self-determination, cross-border self-determination, the self-determination of dispersed peoples, of indigenous peoples, and representative self-determination.

The first type refers to a population found in a colonial territory or under a colonial or foreign domination which asks to become free. Sub-state self-determination describes the attempt of an ethnic group concentrated in a particular territory of an existing state to separate and form a new state or to obtain political or cultural autonomy in that state. Cross-border self-determination refers to self-determination claims involving concentrated groups of a single people in a few existing states. The self-determination requests of peoples dispersed in one or more states enjoys positive reactions in the development of a truly democratic form of government and in a general protection system of the rights of non-territorial minorities. The requests of indigenous peoples, which are characterised by distinct ethnic features and historical continuity in a pre-colonial society, may refer to independent statehood or autonomous control of the territory. The last form of self-determination, the representative

one, comes up when a population in an existing state tries to change the political structure with a representative one [1].

It should be mentioned that this classification is valuable for the doctrine and it represents an attempt of theoreticians of public international law to answer the present social reality.

"The right to (internal) self-determination belongs to the entire population of a state reflecting the principle of representative democracy", in other words, we can say there is self-determination of "peoples recognised as such".

The right of peoples to self-determination has its roots in the proclamation of the sovereignty of the people in the context of the 1879 French Revolution. In the 20th century, that right would take shape against the background of the assertion of the principle of nationalities, and then during the First World War, the principle of self-determination was established in official political documents, and today it has the value of a fundamental principle of contemporary international law [2]. As we are going to see, an essential role in the establishment of this right was played by the Charter of the United Nations, the Universal Declaration on the Rights of Peoples adopted in Algiers in 1976, and the African Charter on Human and Peoples Rights adopted in Nairobi in 1981.

1.2. The principle of self-determination in international law

Art. 1 par. (2) and Art. 55 of the Charter of the United Nations refer explicitly to the la self-determination of peoples. Although considered the foundation of international law, the concept is treated in the document rather as a principle than as a right.

Art. 1 par. (2) states: The purposes of the United Nations are ... "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".

Art. 55 states: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

The introduction of the self-determination principle in a document which places the continuity of peace and world security first among its purposes shows that the principle must be construed as a legitimacy of the *status quo,* of the map of the world as it is at a particular time, a foremost element of stability. The self-determination of peoples here mainly means the self-determination of peoples as such. It is rather a principle of conservation than of dynamics [3].

The transformation of the self-determination principle in an actor in re-drawing the world political map, in the age of decolonisation, used Chapters XI/Art. 73 and XII/Art. 76 of the Charter of the United Nations regarding the non-self-governing territories or under trusteeship [4].

The most important modification brought to the right of self-determination was the inclusion of a human rights dimension.

To that effect, the right of self-determination is explicitly established through two International Covenants of the United Nations Organisation, namely the International

Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

These two covenants also gave a definition of what the right of self-determination entails. So, Art. 1 (common) of the two covenants mentioned above provides that: "All peoples have the right of self-determination". Peoples are free to determine their political system and to pursue their economic, social and cultural development by virtue of this right [4].

The right of self-determination, a fundamental principle in matters of human rights, is a collective right to determine a particular political system of a state and a particular kind of economic, social and cultural development for a people [4].

Nevertheless, self-determination was not viewed as an absolute right, which may be exercised irrespective of competing claims and rights. The exception would be the limited context of classical colonialism. The application of this right has always been a subject for debate, some authors restricting even its scope: "The legal right to self-determination clearly applies to non-self-governing territories, to those under trusteeship or under a foreign mandate... It is not certain if it applies to other territories too" [5]. In the view of the same author, such an interpretation reflects the motivation for using the principle of self-determination for the legitimacy of the fight of oppressed peoples, and also for preventing the principle from being invoked by secessionist groups.

2. The principle of the inviolability of borders

The principle of the inviolability of the borders emanates from public international law.

This principle completes the principle of the territorial integrity of a state, forbidding to other states to attempt to violate the borders of another state.

Considering that the borders are the legal limit of the territorial area where the states exercise their sovereignty, all states were concerned with their strict definition, and most of all the neighbouring states [6].

The inviolability of borders is today a basic condition for the free development of every state and every people and, at the same time, for the continuity of international peace and security, which was consecrated in the relations between the states in a universal and imperative obligation of international law [7].

"Every State – says the Declaration of the UN General Assembly on Principles of International Law – has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States ".

At the same time, the Final Act of the Conference on Security and Cooperation in Europe, made in Helsinki and signed on August 1st 1975 by the representatives of 35 participating states (USSR, USA, Canada, the European states, except for Andorra and Albania) represented a very important step for the improvement of the relations between the European states, those of the Communist bloc and the West.

Besides other aspects concerned with various areas characteristic of the relations between countries, in Helsinki, the participating states adopted the "Declaration on Principles Guiding Relations between Participating States" (also known as "The Decalogue"), which listed the following 10 points (one of them being the inviolability of borders/frontiers):

1. Respect for the rights inherent in sovereignty
2. Refraining from the threat or use of force

3. Inviolability of frontiers
4. Territorial integrity of States
5. Peaceful settlement of disputes
6. Non-intervention in internal affairs
7. Respect for human rights and fundamental freedoms
8. Equal rights and self-determination of peoples
9. Co-operation among States
10. Fulfillment in good faith of obligations under international law [8].

In this Act (the Helsinki Decalogue) – "The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers. Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State." [8] Consequently, the territory of a state is intangible, unalienable and cannot be an object for appropriation, military occupation, any acts of force or acquirement by other state or group of states following the use of force or the threat of force, as these acts shall never be considered as licit.

The frontiers of a state may be changed only based on an agreement between states, an agreement which is concluded by peaceful means, usually by negotiations [9].

3. Conclusions

The essence of the preceding ideas is that:

– *the holders of the right of self-determination* are the peoples;

– the right of self-determination is established in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights, which are covenants of the United Nations;

– this is a collective right for the determination of a particular political system of a state and a particular economic, social and cultural development for a people;

– *the principle of the inviolability of frontiers* is one of the ten basic principles of the relations between the signatory states of the Final Act of Helsinki (1975) and it forbids a state to assault the frontiers of another state;

– the frontiers of a state may be changed only based on an agreement between states, an agreement which is concluded by peaceful means, usually by negotiations.

However, the author keeps in mind that there is a very important precedent in the European area, namely the unilateral declaration of independence of a new – Kosovo – in 2008 (changing at that time the borders of the Federal Republic of Yugoslavia). The proclamation of Kosovo's independence took place in contradiction with the United Nations Resolution 1244/1999 (which stipulated that the Province of Kosovo was a part of the Federal Republic of Yugoslavia under the interim administration of the United Nations) and benefited from a favourable advisory opinion of the Hague Court of Justice which stated on July 22nd 2010 that the "unilateral declaration of the independence of Kosovo did not violate international law", where the Court motivated that "international law has no interdictions on the proclamation of independence" [10].

The author also keeps in mind that, in the construction of the EU, at present, the principle of the inviolability of the borders continues to be guaranteed and observed.

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Migration, human rights and national security

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Abstract

A phenomenon that has existed from the oldest of times, migration constituted one of the methods humankind ensured itself a decent standard of living, a method of benefiting from security, a way to explore new territories and a method of professional training. The events produced at the level of the international society have led to an amplification of the international migration phenomenon, which led to the assertion in the specialized literature of the international law of migration. A branch of international public law, international law on migration is mainly based on rules on the protection of human rights and fundamental freedoms. The evolution of the phenomenon of international migration is a challenge for the international community to balance the interests in the field of security and migration controlled with human rights and migrant rights interests.

Keywords: *migration, migrant, emigrant, imigrant, refugee.*

1. General considerations

A phenomenon that has existed from the oldest of times, migration constituted one of the methods humankind ensured itself a decent standard of living, a method of benefiting from security, a way to explore new territories and a method of professional training. Usually, migration is an individual act, but it can also be a collective one. [1]

The process of forming states and establishing the notion of citizenship has led to the demarcation between internal migration and international migration. Internal migration is the movement of persons into the territory of a state, and international migration is the movement of persons through the crossing of the state border. According to the International Organization for Migration (IOM), migration can be defined as the movement of a person or a group of people, either over an international border or within the same state, and the migrant is the person who crosses an international border or travels inside a state, away from the place of residence or family, regardless of the following criteria: the legal status of the person, the type of movement, the causes that caused the movement. [2] The migrant is the person who has lived in a foreign country for more than one year irrespective of the causes and means used to migrate. According to those presented, those who travel for a short period of time as tourists or businessmen would not be considered migrants, although seasonal workers on farms that plant or harvest agricultural products may be included in the category of migrants. The delineation should not be relevant or should not be done because it is people who move from the territory of the state of origin to the territory of

another state, which determines their classification as migrants. What should make them different is their legal status.

International migration is manifested both through emigration and immigration, includes both legal migration and illegal migration, but also voluntary or involuntary migration.

Emigration is the departure of the territory by a person for the purpose of settling in the territory of another State. Immigration is the entry into the territory of a state of persons wishing to stay in the territory of that State for more than one year. Immigrants include non-residents, i.e. foreigners, but also citizens of that state. [3]

Legal migration includes cases of entry of persons into the territory of a state, leaving the territory of a state and staying in accordance with the legal provisions in force.

Illegal migration includes entering, staying or working in a country without the necessary authorization or documents required under immigration regulations as well as cases where a person crosses an international border without a valid passport or travel documents or does not meet the administrative requirements to leave the country. The general tendency is to narrow the term "illegal migration" to cases of smuggling of migrants and cases of trafficking in human beings.

Voluntary migration covers cases where people move to the territory of another country because of the economic conditions in the home state in order to find jobs and raise their standard of living. In principle, this category includes the highly skilled migrant worker or the medium-skilled worker. In this context, the literature focuses on two phenomena specific to the contemporary period, namely: brain drain and brain gain. The term "involuntary migrants" refers to those categories of people who have been forced to leave their country of origin for natural or man-made causes such as natural or ecological disasters, chemical or nuclear disasters, famines, or development projects. Involuntary migration is designated in the literature by the term forced migration. This category may include refugees and asylum seekers. [4]

2. International migration law and human rights

The events produced at the level of the international society have led to an amplification of the phenomenon of international migration, which led to the assertion in the specialized literature of the international law of migration. [5] The international law of migration is based on rules specific to the protection of human rights, international labor law, international refugee law, international criminal law, international humanitarian law and consular law. The invocation of normative provisions specific to the protection of fundamental human rights and freedoms is necessary in order to invoke a solid foundation of migrants' rights and to differentiate between aspects pertaining to public international law and those governed by the internal law of a state.

As is known, states exercise their sovereignty over the territory and the population that is in that territory. In order to ensure security, states establish by internal law the rules to be observed when foreigners enter their territory, as well as the rules to be observed during the stay of aliens on the territory of the states, and the conditions for their expulsion. However, although it may be a matter for the state reserved for states, there are international regulations that they must take into account, in particular, human rights regulations. Thus, the rules of non-discrimination, freedom of movement, the right to asylum, the principle of non-refoulement, family unity, the guarantees of expulsion or extradition, the obligation

of States to accept the return of their own citizens are the expression of the supremacy of international law in this matter. They are also subject to the obligation of states to provide foreigners with access to diplomatic protection of the state of origin, the freedom to provide services on the basis of international agreements, and the rules on the prohibition of trafficking in human beings. [6]

Promoting the protection of migrants, the General Assembly of the UNO reaffirms the provisions of the Universal Declaration of Human Rights, stating that: all human beings are born free and equal in dignity and rights; no one shall be held in slavery; all men are equal before the law; everyone has the right to move freely and to choose their residence within the borders of a state, as well as the right to leave any country, including his own, and to return to his country; any person has the right to seek asylum and to seek asylum in other countries; any person has the right to a nationality; men and women have the right to marry and to found a family; everyone has the right to work; everyone has the right to a standard of living adequate for the health and welfare of their families and themselves.[7] Although it was initially a legal instrument with recommendation value, the Universal Declaration of Human Rights has gained its authority in a habitual way, becoming a landmark for states both in terms of human rights and in terms of derived domains Such as migrants' rights.

The rights evoked in the Universal Declaration of Human Rights are governed by the two Pacts[8] adopted by the O.N.U. In 1966, documents with mandatory legal force. According to the Pacts, Member States are committed to respecting and guaranteeing all recognized rights to all individuals, namely the right to life, free movement and choice of domicile, the right to work, the right to enjoy good working conditions, the right to education, etc. The aforementioned rights are also the legal basis for migrants' rights. These provisions are complemented by a number of special rules [9], as well as by regional rules.

Considered from this point of view, migrants' rights are an area of international interest, therefore, in the relationship between international law and national law, international law of migrants is considered superior to domestic law. However, massive movements of people over the last period of time put the focus on the relationship between the protection of human rights and fundamental freedoms and the sovereignty of states, sovereignty which, among other things, ensures the protection of citizens of a state, protection based on fundamental rights and freedoms of man.

Although the importance of migration is being promoted internationally, arguing that labor migration contributes to completing labor shortages in developed countries, mitigating the effects of demographic aging, can lead to economic growth and the accumulation of new knowledge and experiences [10], however the events that have taken place at an international level and, in particular, at a European level contradict the arguments that were put forward. Therefore, a balance should be ensured between migrants' rights and the rights of people who are not subjects of migration, between migrant rights and state sovereignty. In this respect, the provisions of the Universal Declaration of Human Rights, which state that every person has the right to seek asylum, can be invoked, but this right can not be invoked in the case of prosecution resulting from a crime of common law or from actions contrary to the purposes and principles of the United Nations. At the same time, every person has duties towards the community, and in exercising his rights and freedoms, it is necessary to ensure the recognition and observance of the rights and freedoms of others and the satisfaction of the requirements of morality, public order and general well-being.

According to the two Covenants adopted by the General Assembly of the UNO, all peoples have the right to dispose of themselves, of their natural wealth and resources and can not be deprived of their livelihood. The Covenant on Civil and Political Rights states that if an exceptional public threat threatens the existence of a nation, derogations from the obligations under the Covenant may be taken, provided that such measures are not incompatible with the other obligations in accordance with international law, and that they do not result in discrimination based on race, color, sex, language, religion or social origin, provided that the State concerned immediately notifies the other States Parties of the provisions from which they derogate, As well as the reasons for this derogation. [11] Exceptionally, the exercise of certain rights or freedoms may have limitations established by law in situations relating to the defense of national security, of public order, public health, public morality or the rights and freedoms of others, such as the right to peaceful assembly, the right of association, the freedom of expression.

The International Covenant on Economic, Social and Cultural Rights states that states can not subdue the rights enshrined in the pact, save for within the limitations set by law.

The international convention on the protection of the rights of all migrant workers and their family members since 1990 is a complex instrument which helps Member States to define their migration policies. The Convention regulates a series of rights and freedoms which are in fact a reconfirmation of human rights in the sphere of migration, such as the right to life, the right to leave any state and to enter and remain in their home state regardless of their status, freedom of opinion, conscience and religion, the right to have and express opinions, etc. However, states have criticized the convention, arguing that it would limit the sovereign rights of states to decide who enters their territory and how long they may remain, although according to Art. 79 the provisions of the Convention are without prejudice to the right of each State to lay down the criteria governing the admission of migrant workers and members of their families. Recognizing the principle of non-discrimination and equal treatment in migration leads to a series of reservations from high-unemployment states that are unable to provide a standard of living for migrants, as they can not ensure the adequate living standards of their own citizens. [12]

The application of these regulations of a general and special nature is reinforced by the adoption of regional rules. However, the adoption of rules at regional level is influenced by the specificity of each region, culture, religion and traditions. Thus, the provisions of international instruments adopted under the auspices of the United Nations have been complemented by regional instruments in the field of human rights protection, such as: The 1950 European Convention on Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights of 1981, the 1969 American Convention on Human Rights and the 2004 Human Rights Charter adopted by the Arab League. At the same time, the states have adopted specific regional legal instruments, which have regulated the multiple aspects of migration.

3. European Migration Law

At European level, the actions of the Organization for Security and Cooperation in Europe (OSCE), the Organization for Economic Cooperation and Development (OECD), the Council of Europe and the European Union (EU), can be highlighted.

Within the Organization for Security and Co-operation in Europe, respect for human rights and fundamental freedoms is essential to promoting the organization's security concept. In this context, the OSCE is committed to addressing the phenomenon of migration through a multi-faceted approach, given its geographical reach and diversity, provided by a large number of Member States, as well as cooperation with the Mediterranean and Asian partners. The main areas addressed in the field of migration are the facilitation of legal migration but also the fight against illegal migration. Thus, measures on freedom of movement, tolerance, non-discrimination and integration are complemented by measures in border management, travel document security, cross-border threats and in human trafficking. The central objective of the organization is to ensure the security of states in the context of increased migration and States' commitments to respect human rights and fundamental freedoms. At the OSCE Meeting on Security Days of 2016, the link between security and migration was analyzed, emphasizing the need to adopt efficient migration management policies.

Analyzing the phenomenon of migration across the Member States, the Organization for Economic Cooperation and Development shows that international migration has grown rapidly and diversified, prompting Member States to pay a closer attention to the determining factors. According to reports produced by the aforementioned organization, migration influences the labor market, agriculture, education, investment, financial services and social protection and healthcare, while migration is influenced by the policies applied in the listed sectors. States must maximize the benefits of migration both for host countries and for migrants. The phenomenon of migration can have positive effects but also negative effects. Migration can contribute to the economic development of the destination countries by increasing the working age population, securing the workforce for all sectors of activity, paying taxes and social contributions, etc. However, migration can affect countries that have an unstable economy and a high unemployment rate, with emigration likely to lead to a shortage of workforce in some sectors of activity. Negative effects could be eliminated through rigorous control of the phenomenon by directing migrant waves to developing regions. Thus, states could adequately ensure the respect and guarantee for the migrants' rights, as well as national safety, national security, public order and the interests of their own citizens.

Approximately seven decades after its adoption, the European Convention on Human Rights and Fundamental Freedoms ensures, together with other regional instruments, the protection of human beings and, implicitly, the protection of migrants. Thus, its provisions are complemented by the provisions of the following documents adopted at the Council of Europe level: the European Social Charter adopted in 1961 and revised in 1996, the European Convention on the Legal Status of Migrant Workers of 1977, the European Convention on Social Security and others. Through the listed documents, the member states of the Council of Europe have established a series of rights and obligations regarding the application of equal treatment, employment, working conditions, social security, family reunification, as well as cooperation between government agencies in the countries of origin and destination. Protection of human rights, especially vulnerable categories such as migrants, strengthening social cohesion and integration of migrants, developing an integrated approach to all aspects of migration and promoting cooperation between home and destination institutions are the main coordinates of the Council of Europe in the field of migration.

The European Convention on Human Rights and Fundamental Freedoms guarantees the protection of the human being, implicitly of migrants, by protecting the right to life under any circumstances, the right to liberty and security, the protection of the right to respect for private and family life, the prohibition of discrimination, the prohibition of slavery and forced labor, freedom of expression, freedom of assembly and association, etc. However, the Convention also includes a number of derogatory provisions, such as the public danger threatening the life of the nation. Exceptional situations that cause the displacement of persons in the countries of origin constitute a legal basis for the integration of these persons into the countries of destination, but not a way to affect national security, the security and public order of states that make every effort to ensure an adequate standard of living for the migrants.

Under the revised European Social Charter, migrant workers who are nationals of States Parties and their families are entitled to protection and assistance in the territory of the Member States. The provision in Part I of the revised European Social Charter is supplemented by the provisions of Art. 19 of Part II which regulates the content of the right to protection and assistance of migrant workers and their families. States Parties undertake to uphold the principles and rights set out in the Charter insofar as they guarantee respect for the rights and freedoms of others or with a view of protecting national security, public health, public order and good morals.

Considering it necessary to regulate the working and living conditions of migrant workers, citizens of the member states of the Council of Europe, the states have adopted the European Convention on the Legal Status of Migrant Workers. In addition, the European Convention on Social Security includes a coordination mechanism covering all branches of social insurance but also the principles of coordination. [13]

Migration issues, refugees and displaced persons are priority objectives of the Parliamentary Assembly of the Council of Europe. Thus, it operates under the Human Rights Committee and the Committee on Migration, Refugees and Displaced Persons. Their work is complemented by the work carried out by the Commissioner for Human Rights.

By Resolution 2147 (2017), the Parliamentary Assembly adopted a series of measures on the need to reform European migration policies. Being concerned by the failure of migration and refugee measures, which led to a loss of public confidence in the ability of governments and European institutions to cope with the crisis, systemic deficiencies have been emphasized in existing legal instruments and mechanisms, as well as the absence of a global and comprehensive approach to managing migration flows and sustainable solutions and lack of a serious debate at the European level. The Parliamentary Assembly called on the member states of the Council of Europe to engage in a meaningful dialogue with all international actors on the interpretation of the 1951 United Nations Convention Relating to the Status of Refugees; to step up their efforts to find constructive solutions to a fair negotiation on the relocation and resettlement of refugees; to promote initiatives to support the strengthening of institutional and regulatory capacities of countries of origin and transit; to take into account the emerging challenges faced by integration policies, including threats to security and radicalization; to ensure the effectiveness of external border controls; to increase the effectiveness of return policies by mandating new European institutions; to harmonize return practices throughout Europe and to consider possible cost allocation, etc. [14]

At the level of the European Union, according to the provisions of the Treaty on the Functioning of the European Union, it is established that the Union constitutes an area of freedom, security and justice, respecting fundamental rights. It ensures the absence of controls on persons at internal borders, develops a common policy on asylum, immigration and external border control. At the same time, the Union is acting to ensure a high level of security and the Member States have the responsibility of maintaining public order and defending internal security. Therefore, the protection of fundamental rights is a priority and the defense of internal security is a responsibility of both the European Union and the Member States.

In keeping with its policies, the Union has been a gateway to migration since its inception, constantly adapting its regulations to emerging needs. However, the Union has not acted preventively and it has not created a solid system of protection for Member States through efficiently securing external borders. Although it aimed to achieve a superior form of supranational organization between Member States, today some of them focus their attention on the provisions of Art. 50 of the Treaty on European Union, the decision to withdraw being more of a solution for those who assume the leadership of states, but not necessarily an optimal one for the citizens of the Member States. The economic and social disruption, the decrease in the security and the protection of the citizens of the Member States have not been determined by ensuring the realization of the four freedoms at the level of the European Union but by a low security of the external borders. It is true that, in line with the provisions of international legal instruments, the European Union was obliged to ensure the protection and safeguarding of human rights, but in the same context measures had to be taken to protect the citizens of the Member States and to promote limited measures in what concerned rights-granting to the citizens of third countries. However, measures to improve border control and proper management of work at the external borders are complemented by sectoral provisions on immigration, in particular on the rights of third-country nationals. Assuming the responsibility of the management of the large wave of emigrants was a major challenge, although responsibility should have been shared fairly between all states, not only between the Member States of the European Union. Responsibility for preventing such occurrences, as well as responsibility for removing the root causes and restoring order, rests upon all states in accordance with international legal instruments. In 2015, the European Commission adopted the European Migration Agenda setting out four pillars for better migration management, namely: reducing the incentives for irregular migration; border management; a strong common asylum policy and a new policy on legal migration.[15]

Conclusions

In the last period of time, massive population movements have prompted the proliferation of migration as a collective act, a phenomenon that was not taken into consideration by states, which are forced to adapt in a relatively short time to the emerging situations, but not always successfully. In an attempt to fulfill their obligations in the field of human rights and fundamental freedoms, states have paid little attention to national security. States have the right to determine the conditions of entry of aliens into their territory and expulsion on the basis of sovereignty. National security is a priority of states since ancient times. Therefore, there must be a balance between migrants' rights and the need of security of

states. Achieving a balance between security and migration interests, controlled by human rights and migrant rights interests, is a challenge for contemporary international society.

From the point of view of migration as an individual act, cooperation between states should be strengthened in order to reduce or eliminate illegal migration and, and from the point of view of migration as a collective act, states should prevent these phenomena or adopt and apply effective methods in order to eliminate the causes of these phenomena, to restore order in conflict zones, and to promote measures that lead to the raise in the standard of living.

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[8] The International Covenant on Civil and Political Rights entered into force on 23 March 1976; The International Covenant on Economic, Social and Cultural Rights, entered into force on 23 March 1976, Romania ratified the two Pacts on the 31st October 1974 by Decree no. 212, published in the "Official Bulletin of Romania", part I, no. 146 of November 20, 1974.

[9] The Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the Additional Protocols, the Convention on the Rights of Persons with Disabilities, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families, etc.

[10] coord. Iulian Oneașcă, Mădălina Popa, Dragoș Ungureanu, (2013). *Politica de migrație a Uniunii Europene-implicații pentru piața muncii* (European Union migration policy – implications for the labor market), Alpha MDM Publishing House, Bucharest, p. 5.

[11] The provision does not authorize any derogation from the provisions of Art. 6, 7, 8 [par. (1) şi (2)], 11, 15, 16 şi 18 of the Covenant.

[12] International Steering Committee for the Ratification Campaign of the Convention on the Rights of Migrants, Guide to the Ratification of the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families, p. 32.
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Kosovo. Eastern and Western Insights on the Conflict

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Abstract

The apparition of new entities on the international scene oftentimes makes us face the methods through which the changes were possible from a legal standpoint. The events in Kosovo, besides the alignment of the *great powers* for the purpose of bringing the armed conflict to an end, was such that it also placed them on opposite sides when it came to defining and supporting certain points of view referring to sensitive terms. Thus, when there were discussions about sovereignty, a fundamental concept of international law, a political and legal concept for that matter, opinions were divided; a question arose: how far can this sovereignty go? Some hoisted the flag of an intangible sovereignty, an impossible thing. Is it possible to have a humanitarian intervention, beyond sovereignty, without violating the provisions of the Charter? The answer to this question became the object of the argument pertaining to the opposition. In the present case, the situation is much more complex, there also being divided opinions about the legal methods through which the national minorities were seen as subjects of external self-determination. Not even now is the Kosovo dispute clear, as well as the situations in the former Soviet territory, especially in Abkhazia and South Ossetia, the unilateral declaration and the recognition of independence being again expressions of disagreement at an international level. We consider that the practice of international law needs uniformization, in what concerns sensitive matters that lead to territorial modifications.

Keywords: *Kosovo, sovereignty, self-determination, independence.*

1. Preliminary considerations

The collapse of bipolarity after 1989 was an essential factor of the growth of independence and collaboration, but it also created a new context which favored the reevaluation of the situations in different pools of civilizations. Bipolarity having destroyed *the logic of blocs* it was replaced by a state that tends towards the multipolarity of the international society. This led to the decentralization of power, at that time unequally distributed between the power centers, between states, but it also brought new actors of the international scene, such as some communities in the process of affirming themselves. The beginning of the 90's rather resembles the period of time after the First World War, because it brings back into the international foreground ethnic issues of the minorities, but also national ideas meant to give shape to the aspirations of the respective communities. The timepiece of history

indicates a historical time that resembles Europe at the beginning of the 20th century, because the territories and the boundaries of the nations are irreversibly overlapping. The differences coexist and evolve together inside groups and collectives that yearn for a defined unitary identity for themselves [1], relying on the right of force more often than not. After 1989 we find a phenomenon of disintegration of some states, especially in Eastern and Central Europe, like the former USSR, the former Czechoslovakia, but also the former Yugoslavia, which triggered the rethinking of important institutions of international law, such as the succession of states but also their recognition. These institutions were adapted to the new conditions determined by the crises in South Eastern Europe (mainly) of the last decade of the 20th century. The events were characterized by conflict, the category of internal conflict that takes place inside a state and include civil wars, religious wars and of secession, that appeared as a result of a divergence between the forces of the Government and the organized rebel forces. It must be mentioned that after 1990, the latter kind of conflict, of secession, arises in the international sphere, the central authority having major difficulties, being unable to deal with the situations. In this sense the West privileged the need to cooperate with the Russian Federation, in rapport with the important principles of international law, such as territorial integrity regarding Yugoslavia or the new republics in the former Soviet territory. Among these aforementioned states is the Yugoslavia of the 90's, a republic separated from the Federation, with the peculiarity named Kosovo.

2. Short political history the sequence of events in Kosovo

First of all, the situation of the crisis in Kosovo comes in the wake of the dissolution of the USSR and of the communist regimes in Central and Eastern Europe, Yugolavia being a particularity in the heart of Europe. Moreover, the signing of the The Charter of Paris for a New Europe (1990), but also the desire to bring back together, reconcile and reconstruct a Europe defined by De Gaulle as being delimited by the Atlantic and the Ural Mountains, wouldn't have permitted the deviation from certain fundamental rules and principles of international law. Internally, Yugoslavia or *the central power (*Serbia) was confronted with a situation that came as a continuation of the spirit of the times. From it Slovenia, Croatia, Bosnia and Herzegovina and Macedonia gradually detach, action which was followed by interventions and violent military clashes. Certainly, after 1989 in the international law doctrine, talks were escalating on the topic of a so-called *right to interfere, right of intervention, of intervention/humanitarian assistance* [2] the action of a single state not being legitimate, but only an international action, a collective one, because no state has the right to interfere in any way to impose human rights in another state [3]. In this sense, of course, the United Nations Security Council was the one who attempted to limit the conflict between *the central power* and the secessionist Republics, first through establishing an embargo on weapons and military equipment. For failing to accomplish obligations provided in a subsequent resolution (ceasefire and withdrawal of weapons – Resolution 752/05.15.1992), the Council declares economic sanctions against the Federal Republic of Yugoslavia [4], sanctions followed by the military presence of the UNPROFOR in the *hot* spots of former Yugoslavia. However, the international community launched the idea of a conference regarding the situation in Yugoslavia, materialized through a gathering with this purpose, which took place at the Hague in September 1991, the first collective international initiative with the purpose of putting an end to a conflict. It later became a

gathering with a wider scope (International Conference on the Former Yugoslavia- ICFY), the UNO joining these steps and negotiations that concerned reaching a peace agreement. Figures such as Peter Carrington (former British foreign affairs minister and former general secretary of NATO), as well as Lord Owen, who from August 1992 (26-28th of August, London) coordinated the common UNO-EC gatherings regarding the peace process, stated that their term concerns putting an end to the armed violence in Croatia and Bosnia and Herzegovina, and not resolving all the problems of Yugoslavia [5]. Thus, Kosovo became less targeted by the London discussions. Still, during the reunions in the capital of Great Britain, a delegation representing Kosovo was allowed to enter, but only with the role of observers. Despite all this, there were voices that supported the idea of the necessity of international involvement in Kosovo [6], like that of John Major, but also that of the Albanian Minister of foreign affairs, Alfred Serreqi, who stated that the region of Kosovo was a part of the Yugoslavian Federation and not of Serbia, underlining that the problems of Kosovo do not involve an issue of minority [7]. Despite all this, a consequence of the Conference of London was the constitution of a working commission regarding the ethnic groups and national minorities In the first report of this commission (November 1992) it was very clearly shown that there was a need to find a solution in what concerned reaching an agreement between the Kosovo Albanians and the Serbian Government. Lord Owen requested the exclusion of the Kosovo situation, thinking that a future agreement concerning Bosnia will be put in danger if Kosovo would also be considered as *an issue* by the westerners [8]. In Kosovo there began the so-called task force the National Liberation Army (KLA), with obvious reference to the principle of self-determination of the peoples. The KLA troops engaged in a conflict with the Serbian Government, undermining its authority, in great part through guerrilla military actions, in the conditions in which in 1998 the Government of Belgrade considered it an ever-growing threat for national security. The National Liberation Army activity in Kosovo moved significant military forces in the province. Troop action triggered a major humanitarian crisis, especially in terms of the refugee problem; an estimated 250.000 Albanians in the province fled their homes, out of which about 80.000 left the country. The escalation of the conflict the humanitarian consequences and the risk of extending the conflict to other countries, caused great concern in the international community. In the autumn of 1998, the NATO Council authorized activation orders for air strikes. This measure was designed to support the diplomatic efforts meant to determine Serbia to withdraw troops from Kosovo, to work towards the cessation of violence and to facilitate the return of the refugees. At the last moment, following diplomatic initiatives of NATO and US officials, Serbia agreed to cooperate and the air strikes were canceled. But the situation changed in early 1999, following acts of provocation coming from both sides, and the use of excessive and disproportionate force. Some of these incidents were defused through the mediation efforts of the OSCE inspectors, but in mid-January the situation worsened after the escalation of the Serbian offensive against Kosovo Albanians. US Ambassador Richard Holbrooke went to Belgrade in a final attempt to convince Milošević to stop attacks on Albanians to avoid airstrikes by NATO. Milošević refused. Thus, withdrawal of federal forces and return of the refugees were denied and negotiations appeared to stagnate, including attempts to find a solution and to sign an agreement at Rambouillet failed, the Serbians finding the conditions unacceptable, so that NATO decided in the spring of 1999 to commence bombing in order to force Belgrade to comply with those decisions. On March 24, 1999, air attacks on Serbia began. The United

States bombed a country where Russia felt it had its own interests and its own influence. Moreover, the Russians saw a sinister analogy in Kosovo to Chechnya: a mainly Muslim province located on the southern border of a mainly Orthodox country. Both Chechnya and Kosovo boiled with secessionist fervor [9]. In early June they reached a consensus so that on June 10th, 1999, after an air campaign lasting 77 days, NATO Secretary General Javier Solana announced the termination of military air operations undertaken by NATO.

3. Understandings of the concept of sovereignty regarding the Kosovo intervention

We can extract two broad ideas on positions taken regarding the NATO action against Yugoslavia in Kosovo: a direction that sacked the Alliance's intervention, justifying it through the dramatic deterioration in the respect of human rights in that area, and the other direction that condemned the bombing caused by the failure to respect the sovereignty of the Yugoslavian state, a morally questionable action, lacking the legality that only the UN Security Council could give. So, defining the position towards Kosovo, there was a significant gap between the members of the Alliance and Russia. If NATO countries involved the Alliance in a war against Belgrade in the name of of defending human rights, Russia was more attached to the idea of the sovereignty of Yugoslavia and especially the need for Security Council sanctions where it had the right of veto. In other words, the NATO operation against Yugoslavia had the gift to divide the international society members, Russia and China protesting against the action. Once again, we face two different ways of relating to international politics; to a point of view corresponds an intangible sovereignty, according to which an outside intervention cannot be justified by the way in which this sovereignty is exercised in its internal affairs, which can be opposed by a second point of view, based on the universality of human rights, the value placed over other principles that the international community has a duty to try and monitor their implementation. The involvement of the Alliance in Kosovo without an explicit mandate from the Security Council provoked lively debate on the legality of the action. On the one hand, it stated that the so-called doctrine of humanitarian intervention can lead to an escalation of international violence, discord and disorder, reducing the protection of human rights worldwide. On the other hand, the conflict was defined as an international crisis and a threat to regional peace and security rather than a simple matter of national interest in the Security Council. The action of the Alliance was based on the doctrine of humanitarian intervention, the intervention being made out of the need of imperatively imposing the humanitarian norms, a part of the doctrine stating that it accepted that a group of countries can, at the expense of the sovereignty of a state, intervene by force in the cases in which there is a violation of the human rights [10]. The Russian side considered that, in breach of Art. 2 (4) of the Charter, the way to abuse will be opened. In the interpretation of this article and enhancing the context, Russia stated that the use of force is prohibited in cases where it is applied to UN member states, when it violates political independence and when it is against the purpose of the existence of the Charter. In the vision of Russia humanitarian intervention must not lead to armed intervention. While Russia has relied in supporting its argument on the principle non-interference in internal affairs or the principle of non-recourse to force or threat of force, NATO supported its intervention on the principle adopted in '75 at Helsinki, the principle of the protection of human rights and fundamental freedoms, moment in

which the idea of *responsibility to protect* was materializing, theory adopted and accepted a few years later (2005). Russia's position towards the events in Kosovo, leaving aside the East-West collaboration in terms of conflict, continued to be that of supporting a view that says that outside intervention can not be justified by how this sovereignty is exercised in internal affairs. It was said that a serious injury was brought to international legal order by the NATO action against Yugoslavia, undertaken without the approval of the UN Security Council, in violation of fundamental principles of the UN Charter. The Russian side also said that attempts to assign a quasi-legal base to this *flagrant violation* of international legality in the form of concepts of *humanitarian intervention* and *limited sovereignty*, would only deepen the damage [11]. The intervention was labeled as aggression. Regarding a personal opinion on the armed intervention in Kosovo, the exercise of sovereignty must be done rationally, through self-limitation in accordance with the provisions of international law, according to the requirements of international law, in this case referring to the humanitarian sphere, the states being obliged to respect the treaty they are a part of. Exercising sovereignty must not violate international norms in the exercise of this right, sovereignty being misunderstood and disproportionate in this case, the precursory actions with the purpose of not reaching the point of armed intervention, this unfortunate action being a result of the misunderstanding of the concept of sovereignty.

4. The use of the principle of self-determination in the Kosovo issue

An important aspect of this discussion is the issue of self-determination, the legal notion of self-determination involving two kinds of it: *external self-determination* and i*nternal self-determination.* In this section we refer to external self-determination. In the UN Charter the concept of the right to self-determination of the peoples is discussed, the holder of this right being the peoples, the nation, being unable to be exercised by a national minority [12]. National minorities can not exercise self-determination externally, that right being reserved only to the peoples. The concept of the *rights of national minorities* must be understood as referring to individual rights of those who make up that minority grouped around common values, such as race, religion, language and traditions, united by their identity in a sense of solidarity. It is about individual rights, not collective ones [13]. However, the basis on which the formation of the Kosovar identity was founded on was precisely the principle of the right of the peoples to freely decide for themselves. As the respective ethnic minority were Kosovo Albanians, they were not able to create another Albanian state other than the one already existing. In this sense the *Kosovar people* phrase was coined, which created a legal framework for the legality of the state identity of Kosovo. Thus, when there was a need for a legal arrangement which is legitimate under international law, the Albanian ethnic minority has never been appointed as Albanians, but as Kosovars. We can easily see the same construction in the Caucasus, where there are the Abkhaz people, the Ossetian people, and recently on the Black Sea, the Crimean nation. It has formulated an opinion that the Albanian Kosovars were entitled to external self-determination *a priori* to the beginning and the unfolding of the aerial bombing campaign by NATO because of the denial and the prohibition of manifestations of internal self-determination and of the repression coming from the Serbian government administration [14]. Repression seemed to be a hard case to ignore, the very Alliance justifying their military intervention in the region on these facts, in order to stop an imminent humanitarian catastrophe, a situation

characterized by serious and systematic violations of human rights. We do not deny the profound violation of human rights or the fact that the imminence of the humanitarian catastrophe that could have been stopped in a different way, leading to military intervention only as a last resort. My own opinion questions the right of a human community, the ethnic Albanians, of resorting to the principle of the right of the peoples to self-determination in the case in which the subject is a minority, *the Kin-State,* the related state (the former mother-state, a retrograde concept) being Albania, thus there being a state entity for which the Albanian people, the Albanian nation, have exercised their right to self-determination. As a complementary history of international law already in 1920, during the dispute between Sweden and Finland concerning ownership of the Åland Islands, inhabited mostly by Swedes, but under the jurisdiction of Finland, Rapporteur Commission of the League of Nations reached the conclusion that national minorities should not be regarded as subjects to external self-determination [15].

5. The independence of Kosovo. Estimates of the advisory opinion of the International Court of Justice (I.C.J.) given on the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo

When we talk about recognition by the international community of the young states, born in the wake of the events that took place in the 90's, we must consider the legal method by which these entities were able to benefit from recognition. Mainly, we need to mention the attitude of the European Community, which in reference to the necessity of regulating the ongoing cases on the basis of international law, adopted two declarations on the 16th of December 1991: *Declaration On Yugoslavia* And O*n The Guidelines On The Recognition Of New States In Eastern Europe and in the Soviet Union,* through these documents, the European Community, confirming its adherence to the Final Act of Helsinki in 1975 and to the Paris Charter for the New Europe in 1990, expressed its willingness to recognize the states that met the standards established in the international practice, based on democratic principles and which fulfill their international obligations [16]. Although (South) Ossetian independence from the Georgian state was unilaterally declared on 28 November 1991 and that of Abkhazia on July 23, 1992, after conflicts similar to those from the former Yugoslavia, the important difference being the proximity of Russia and existence of the ethnic Russian element, the independence of Kosovo resembles those situations, despite the delay with which it occurred. Kosovo unilaterally declared independence on 17 February 2008. By February 4, 2011, the Republic of Kosovo had 98 official diplomatic recognitions as an independent state. Specifically, 98 of the 193 UN member states, 22 of 27 EU countries and 24 of 28 NATO member states. Several States having expressed concerns over the unilateral nature of the Kosovo declaration. The UN Security Council remains divided on this dispute, the US, Britain and France recognizing Kosovo's independence, while China expressed concern, and Russia rejected the statement and considered it illegal. The position of Russia is very interesting, a Russia that in that same year, 2008, at the end of August, rushed to recognize the independence of Abkhazia and South Ossetia, states recognized only by Venezuela, Nicaragua and Nauru. It is understandable why the caucasian states are practically unrecognized internationally, the conflict in the former Yugoslavia coalescing forces whose actions are justified through the recognition of the independence of the state

of Kosovo. Lack of international recognition of statehood of Abkhazia and South Ossetia does not bother the state existence of these entities, the establishment of a state order, a state has the right and not the obligation to recognize another state [17]. Recognition of The Georgian republics that had detached from the state left room for interpretation, being considered an as an indirect recognition of Kosovo, a heavy blow applied to the traditional ally, Serbia. Comparing analysis on both the Kosovo and Abkhazia and South Ossetia, one can say that they are self-proclaimed, or type state formations created after a secessionist rebellion, Kosovo featuring political and international legal aid. From other points of view, Kosovo is a *sui generis* case, the unusual combination of factors found in Kosovo, including the context of the unraveling of Yugoslavia, the history of ethnic cleansing, crimes against civilians in Kosovo, UN involvement as well, however they found themselves in no further outbreaks of separatist conflict, such as Abkhazia or South Ossetia. But it remains to be seen what the effect on international law of the Kosovo particularity will be, in this view, my personal belief being that the states shouldn't have to recognize a new state if the recognition will lead to a perpetuation of *breaches* in international law. In light of the discussion, the Kosovo crisis is one of the clearest examples to claim that sovereignty is a term whose significance is subject to the variations in the political field. As for the independence of the Kosovar *state*, we can say that it is not a closed issue, some states recognize this independence, others not without any decision from the I.C.J., being on the matter, to firm rule on the issue. Basically, the Court's opinion does not answer the real legal issue, leaving the possibility of sustaining the conflicting views. On May 15, 2008 Russia, India and China made a joint statement in which they asked for new talks to be launched between Belgrade and Priština. On October 8, 2008, the UN General Assembly supported Serbia's request to seek an advisory opinion from the ICJ on the legality of unilaterally proclaimed independence of Kosovo. On July 22, 2010, the I.C.J. presented its advisory opinions on *the compliance with international law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo.* The general conclusion of the opinion is that the declaration of independence of February 17, 2008 does not violate general international law or Security Council resolution 1244 (1999). The I.C.J. opinion avoids involving assessments on the issue of the matter, the opinion referring to the legality of the gesture of making a declaration of independence, and not to the legality of independence as such. The opinion does not consider Kosovo's right to secede from Serbia, just a procedural question – the declaration of independence in itself. Thus, the fact that the court considers that the declaration of independence did not violate international law does not mean that Kosovo's secession from Serbia is legal. The key element underlying the Court's opinion is the restrictive wording of the question put to the Court and the Court's interpretation of the question. Thus, the Court emphasizes that the question is *narrow and specific*. While acknowledging that the previous case-law allows the Court to interpret or rephrase the question when it is unclear in this case the I.C.J. concluded that this was not necessary. It differentiates between the concepts of *declaration of independence* and *obtaining statehood*. Thus, the Court stated that the question does not refer to the legal consequences of the declaration. In particular it does not refer to whether or not Kosovo has achieved statehood. Also, the opinion states that it was not asked of the Court through the question whether international law conferred a positive right for Kosovo to declare independence or, *a fortiori*, whether international law generally confers a right to the entities within a State to detach from it unilaterally. The Court also said that it can not

examine the issue of self-determination, arguing that the General Assembly has requested the Court's opinion on whether or not the declaration of independence is in accordance with international law. Thus, the I.C.J. analyzes the possibility of an option of issuing declarations of independence in relation to the rules of the customary international law, with Resolution no. 1244 (1999) of the Security Council and the Constitutional Self-Government in Kosovo in which the conclusion was reached that these rules of international law do not prohibit a statement of independence. The Court also identifies that State practice leading to the formation of customary international law does not prohibit declarations of independence. Analyzing the principle of territorial integrity, the Court also comes to the conclusion that in this case it does not prohibit declarations of independence. From the point of view of international law, the Court left open the legal debate on the legality of Kosovo's constitution as a state entity [18], ruling on the right of Kosovo to solemnly proclaim its independence and not on the legality of independence as such. It's not hard to see that no matter how different the points of view of the states on the future global order, it is clear that any development of international relations can be safe only if it rests on a proper foundation of international law.

6. Conclusions

As international law practice shows, situations affecting the smooth functioning of the international organization are unavoidable. Situations which by their characteristics, rarely resemble each other, given the context, the shape and strength of events. In the present case, the conflict in Kosovo and its aftermath, gathered around itself the whole international community, important actors engaging with interest. A common view has not been reached, a consensus in terms of international law, terms such as *sovereignty*, *recognition*, or even the very principle of self-determination in areas that meet diverse opinions. As shown in the above text, we rally demanding an opinion clarifying the contradictory aspects, considering that the flexibility of principles and norms of international law should not be promoted. In the practice of certain international organizations the impression was given that out of the need for justification, it is possible to create a lawful legal construction to fit within the limits of a rule of law. We believe that the sovereignty of a State should not be taken with an absolute sense, the Kosovo issue showing a misunderstanding of the term, is not desirable to use sovereignty for the benefit of brutal nationalist impulses, and the same goes for self-determination which, on the other hand, should not be used discretionary or disproportionately.

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PRIVATE LAW

The legal regime of the decision's annulment of the general meeting of the associates in commercial companies

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Abstract

At present, the legal provisions regarding the nullity or annulment of the decision of the general meeting of the associates are in the Civil Code (Art. 216-218) and, obviously, in Law no. 31/1990, republished with the subsequent amendments and completions.

By comparing the provisions of the Civil Code with those of Law no. 31/1990, republished, with the subsequent amendments and completions[(1)], we observe that the idea is the same, namely *the binding of the general meeting*, the shareholders or the shareholders, in applying the "pacta sunt servanda" principle.

Keywords: *general assembly, ruling, society, cancellation, opposition.*

Introduction

The legal institution of the nullity of the legal act constituted a constant concern of doctrine [1] and judicial practice, starting from the legal regulations in the field, regulations which, by "**lex lata**", are not included in a single normative act.

The Civil Code provides for a more detailed regulation of the invalidity institution, both in terms of the formation of the contract (Art. 1216-1217) and regarding the conditions of its validity (Art. 1218-1296 – vices of consent); (Art. 1238 – subject of the contract); (Art. 1250 – lack of cause); (Art. 1254-1255 – written form) and, as a novelty, the 4th section on the nullity of the contract (Art. 1259-1278), where "nullity is a civil penalty that lacks the legal act of the effects of the legal norms Edited for its valid conclusion".

1. The legal framework for the nullity of the decision of the general meeting of the associates

At present, the legal provisions regarding the nullity or annulment of the decision of the general meeting of the associates are in the Civil Code (Art. 216-218) and, obviously, in Law no. 31/1990, republished with the subsequent amendments and completions.

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(1) Art. 132 par. (1) of the Law no. 31/1990, the decisions taken by the general meeting within the limits of the law and of the constitutive act are mandatory even for the shareholders who did not take part in the meeting or voted against "

By comparing the provisions of the Civil Code with those of Law no. 31/1990, republished, with the subsequent amendments and completions[2], we observe that the idea is the same, namely ***the binding of the general meeting***, the shareholders or the shareholders, in applying the "pacta sunt servanda" principle.

The text in Art. 132 par. (1) of the Law no. 31/1990 contains ***a provision in principle***, but in the content of the same normative act ***there are also exceptions*** such as Art. 134 par. (1) which empowers shareholders to withdraw from the company if the purpose of the decision is to change the principal object of activity; Relocation of the company's headquarters abroad; Changing the form of society; Merger or division of the company; Or in the case provided by Art. 231 par. (1) if the dissolution of the company is decided, the associates may return, with the majority required for the amendment of the constitutive act, to the decision taken, as long as no distribution of assets has been made.

The "pacta sunt servanda" principle, which enshrines the binding force of each contract, also includes exceptions that naturally should apply, and the principle of symmetry on which the formation and termination of the contract is based is a decisive argument in support of these exceptions[3].

At the same time, it is important to underline that the action for annulment of the decision of the general meeting of shareholders/shareholders, action brought by associates / shareholders must be circumscribed to ***the principle of good faith***, expressly stipulated by the legislator in Art. 136^1 of the Law no. 31/1990, republished, as subsequently amended and supplemented[4].

2. The legal nature of the decisions of the general meeting of the shareholders/shareholders

In the specialized doctrine, various theories have been formulated over time. Thus, in the interwar period it was considered that the decision adopted by the general meeting of shareholders is ***a complex legal act*** specific to commercial law in the content of which there are ***two categories of legal acts*** (the act of majority of shareholders adopted at the meeting and the unilateral act of irrevocability of the company that is in the execution phase of the decision).

Another opinion [2] enshrines ***the contractual theory*** of the decision of the general meeting of the associates/shareholders [3] by bringing together, in one will, independent of the individual wills, unilateral legal acts of will.

It is expressed in the specialized doctrine and the opinion that the decision of the general assembly is a ***sui generis act***, being neither a unilateral legal act, as it is revocable as long as it has not produced legal effects to third parties, nor a contract.

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[2] Art. 132 par. (1) of the Law no. 31/1990.

[3] Regarding the mandatory force of the decision of the general meeting of shareholders, see, R.N. Catană, Company law. Current Issues Concerning Joint Stock Companies, Sfera SRL Publishing House, Cluj Napoca, 2007, p. 62, the author considers that similarity can be achieved with the provisions of Article 969 of the Civil Code on Contractual Matters.

[4] "Shareholders must exercise their rights in good faith, respecting the legitimate rights and interests of society and other shareholders".

In our opinion, we consider that the decision of the general meeting of the shareholders/ shareholders is of a legal nature based on the two concepts of the concept of society: society in the sense of "contract" and society in the sense of "legal person" The legal act being at the same time an act of will of the associates/shareholders that applies to those who did not participate in the meeting, even if it was adopted under the law and the constitutive act. On the other hand, it cannot be ignored that the general meeting is the collective management body of the company, the provisions for the annulment of its decisions being similar to the decisions taken by other management and management bodies such as the board of directors, except for When its decisions are due to the delegation of powers by the general assembly.

3. The legal status of the action for annulment of the decisions of the general meeting of the associates

Nullity of common law such as legal capacity, consent applies to companies only in respect of shareholders/shareholders. The finding of the grounds for invalidity does not in all cases lead to the annulment of the decision adopted. Thus, if the will of a cooperative partner/shareholder was vitiated by a defect of consent, the adopted decision will not be annulled, inasmuch as even without the vote of those associates/shareholders the majority required by the law or by the constitutive act was obtained. This conclusion is based on the idea that for the formation of the social will, it is not necessary to have all the votes of the shareholders, but only the quorum and the majority required by the law, and if this majority subsists, it is indifferent whether the votes of some shareholders are valid or not valid. [4]

What is specific to societies in general ***is that the legislator protects a social public*** order that ensures ***the formation of social will*** in the general assembly, protection aimed at convening the general meeting, the way in which the sittings are held and the adoption of judgments, including the enforceability of judgments against third parties. By way of example, the enforceability of the judgment against third parties is ensured by the company's obligation to file a decision within 15 days of its adoption, at the Trade Register Office to be listed in the Trade Register and published in the Official Gazette.

Regarding the social order regarding the organization of the general assemblies, first of all, the convening of the general assembly's must be in accordance with the law and, obviously, with the constitutive act[5].

Therefore, if there are defects or violations of the legal texts and of the constitutive act on convocation of the general meeting, the decision adopted is absolutely nullity[6].

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[5] I.C.C.J., the commercial department, the Decision no. 1143 of March 14, 2007, in the commercial companies, the provision in Art. 117 par. (4) has a device character. See also St.D. Cărpenaru, S. David, Gh. Piperea, *in the cited work,* p. 352 (author S. David considers that the decision adopted is null and void if the convict has been signed by persons other than those entitled under the law or order of the court, Due to breach of the rules of competence).

[6] I.C.C.J., Commercial Section, decision no. 3241 of 2009, in the Jurisprudence Bulletin, 2009 Collection of Decisions, C.H. Beck Publishing House, Bucharest, 2010, p. 438 et seq. In principle, the rules on the convening of the AGM and its advertising are imperative in the sense that they must exist in accordance with the legal provisions; However, not all of the provisions of this article (Art. 117) are imperative, some

Regarding the holding of the general meeting, even in the absence of convening, in Law no. 31/1990, the legislator provides for the possibility of meeting the general meeting if the present shareholders represent the entire share capital and the decision is adopted by unanimity of votes (art. 121)[7].

In French law, there are express provisions regarding the nullity of the decision of the general meeting of the shareholders if the convocation has not been carried out in compliance with the legal provisions. At the same time, the decisions taken in violation of the provisions regarding the competence of the general meeting, the quorum or the majority of the votes provided by the law are annulled. [5]

In the judicial practice, actions have been registered for the nullity of the decision of the general meeting of the shareholders if the convocation does not contain the obligatory stipulations stipulated by the law (place and date of holding the meeting, agenda and full text of the amendment of the constitutive act, if applicable)[8].

At the same time, it was considered an amendment to the constitutive act if on the agenda of the meeting the sale of an asset from the patrimony of the company was discussed, in this case a real estate, in which case the convocation should have complied with the legal provisions[9].

The abusive exercise of the right to vote by the majority or the minority is another aspect upon which the doctrine and the judicial practice have pronounced in the sense of ***applying the sanction of the absolute nullity*** of the adopted[10] decision, including the liability of the shareholders under the conditions of the common law.

The competence of the general assembly is another issue which, in case of breach of the legal provisions on the powers of the general meetings, could lead to actions for annulment of the adopted decision.

The essential distinctions between the two categories of ordinary and extraordinary meetings mainly concern the ***attributions*** determining their ***competence***, the ***quorum required*** for the adoption of the decisions and ***the majority of the shareholders' votes***.

Given that the extraordinary general meeting decides to amend the constitutive act with a quorum and a majority of votes higher than those provided for the general meeting, ***we consider that the sanction of absolute nullity of the decision adopted by the ordinary general meeting is to be applied. On the other hand, if the extraordinary general meeting***

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of which are of a constructive nature, leaving the shareholders the possibility to derogate from them by the constitutive act or by the decision of the general meeting.

[7] See also I.C.C.J., Commercial Section, Decision no. 3124/12 October 2007, unpublished.

[8] C.S.J., Commercial Section, Decision no. 797/28 May 1996, in Law no. 3/1997, p. 129.

[9] I.C.C.J., Commercial Section, Decision no. 549/6 February 2006, in the Judicial Practice of the Commercial Section of the High Court of Cassation and Justice for 2007, Ed. Hamangiu, 2008.

[10] According to Art. 36 par. (1) of the Law no. 1/2005, at the first convocation, the ordinary general meeting is legally constituted in the presence of one half, plus one of the co-operative members and can take valid decisions by a majority of the co-operative members present and the extraordinary general meeting is legal Constituted in the presence of the valid decision by a majority of the votes of the co-operating members present; M. Lungănoiu, The prohibition of abusive use of the position held by the shareholders in the society. Abuse most, Judicial Courier no. 11/2011, p. 577; Prohibition of abusive use of the position held by shareholders in a trading company. Abuse of the minority. Effects. Applicable Penalty, Judicial Clerk, no. 12/2011, p. 633.

also decides on matters within the competence of the ordinary meeting, the decision adopted is valid, due to the quorum and the larger majority existing in this case[11].

Apart from the causes of nullity of the decision of the general meeting of the shareholders regarding the procedure for convening, organizing and adopting it, in practice, there may be nullity grounds on the ***substantive issues*** discussed in the general meeting and adopted by the decision. ***Thus, whenever a legal provision of public order stipulated in the Law no. 31/1990, republished, with the subsequent modifications and completions, or in the constitutive act, the sanction will be the absolute nullity of the adopted decision. By way of example, it is not possible to decide on the increase of the share capital with contributions in debts, expressly forbidden by Art. 16 par. (3) of the Act,*** or with labor inputs (industry).

As regards the legal nature of the action for a declaration of absolute nullity of the decision of the general meeting of the shareholders/shareholders and the action for annulment, it must be stated at the outset that the action for a declaration of invalidity and for annulment cannot be regarded as appeals, not being directed against court decisions.

In the specialized doctrine it was stated that the action for annulment has the character of an action in accomplishment, which seeks to remove the effects of the legal act that will be retroactively [6] disbanded.

At the same time, in another opinion, it was considered that "the act of nullity is an act of accomplishment by itself, the realization being precisely the finding or the nullity of the legal act, or of a part of it". [7]

With regard to the action for annulment, I consider that this is the procedural means by which the person whose private interests have been infringed requests the removal of the effects of the legal act by which a subjective right to the conclusion of the legal act has been violated or violated.

4. Aspects of procedural order

4.1. Active procedural quality

According to Art. 132 par. (2) of the Law no. 31/1990, republished, as subsequently amended and supplemented "Decisions of the general assembly contrary to the law or the constitutive act may be appealed against within 15 days from the date of publication in the Official Gazette of Romania, Part a IV, by any of the shareholders who did not take part in the general meeting or who voted against and asked to insert it in the minutes of the meeting".

From the "economy" of the law it results that the shareholders who participated in the meeting or who voted "against" ***have the active quality of action***, which means that those who voted "for" and those who did not have the right to this action "Abstained", the latter being assimilated to others[12].

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[11] For details on the relationship between the ordinary and the extraordinary general assembly, see St.D. Carpenaru, S. David, C. Predoiu, Gh. Piperea, *in the cited work*, p. 388 and the literature cited therein.

[12] In the practice of the commercial courts, it was considered that the shareholder who participated in the general meeting did not qualify as an active lawyer and abstained from voting. See, in this regard, C.A. Bucharest, Section VI commercial decision no. 1290/2003, in the Commercial Judicial Practices Collection, 2003, Brilliance Publishing House, Bucharest, p. 230.

If an absolute nullity is invoked, the request may be made by any interested person [Art. 132 par. (3)] [13].

At the same time, the legislator stipulates in Art. 132 par. (4) that "The members of the board of directors and of the supervisory board can not appeal against the decision of the general assembly to revoke them". Thus, these persons do not have an active procedural capacity.

The decisive argument is that the directors perform their duties as agents of the company, a society that can revoke their mandate ***"intuitu personae"*** based on mutual trust between the parties[14].

In the case of abusive revocation, administrators have opened the way for damages (damages) for the damage they have suffered.

Although they do not have the procedural capacity to act for the AGA's decision to dismiss them, however, administrators may appeal the decision of the general meeting for other reasons. This conclusion is obvious, given that the legislator provides, in Art. 132 par. (6) that "if the judgment is appealed by all the members of the board of directors, the company will be represented by the person appointed by the president of the court among its shareholders who will carry out the mandate with which he was charged until the general meeting convened in This goal, will appoint a representative".

"If the decision is appealed by all members of the directorate, the company will be represented by the supervisory board" [Art. 132 par. (7)].

4.2. The passive quality in the action for annulment of the decision of the general meeting of the shareholders is ***the commercial company*** represented by the sole administrator or through the board of directors, respectively the directorate.

As mentioned above, if the judgment is appealed by all members of the board of directors, the company will be represented in court by the person designated by the president of the court, and if attacked by all members of the board, the company will be represented by the supervisory board.

4.3. The term of the action for annulment of the decision of the general meeting of the shareholders is regulated by Art. 132 par. (2) which provides that the judgment may be appealed against ***within 15 days of its publication in the Official Gazette***[15].

If there are grounds for absolute nullity, action is impressible.

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[13] See also I.C.C.J., Commercial Section, Decision no. 1109 of March 13, 2007, in the Commercial Section Jurisprudence for 2007, Hamangiu Publishing House, Bucharest, 2008, pp. 26-29.

[14] I.C.C.J., Sect. Decision no. 1029/26 March 2009. In the Jurisprudence Bulletin, Collection of Decisions for 2009, C.H. Beck Publishing House, p. 430 et seq. "The commercial company can not invoke the appointment of a third person to a third person as regards the appointment Was not published in the Official Gazette ".

[15] Art. 132 par. (2) of Law no. 31/1990 "The decisions of the general assembly against the law or the constitutive act may be appealed in court within 15 days from the date of its publication in the Official Gazette of Romania, Part IV...".

As to the legal nature of the 15 days period, I consider that this is ***a special limitation period, not a setback***, a term which can be interrupted or suspended in the cases and under the conditions laid down by common law[16].

The issue that has been theoretically and practically presented in the commercial companies is the possibility of initiating the action for annulment of the decision before its publication in the Official Gazette.

Although in practice there have been solutions to the dismissal of the action as prematurely introduced[17], there is a unitary practice in the sense of the admissibility of the action being brought before the 15-day time limit, with the reason that the law only sets the maximum period for challenging judgments That all shareholders can get acquainted with the decision[18].

4.4. The jurisdiction to resolve the action for annulment of the decision of the general meeting of shareholders lies with the tribunal in whose territorial jurisdiction the seat of the company is located (Art. 631), a text according to which "The appeals and appeals provided by the present law, in the jurisdiction of the courts, are solved By the tribunal in whose constituency the company has its headquarters".

Thus, material jurisdiction, "***ratione materiae***", belongs to the court and the territorial jurisdiction "***ratione teritorii***" is due to the tribunal in whose territorial jurisdiction the company is located.

If several actions have been brought in the annulment of the same judgment, they may be joined [Art. 132 par. (8)].

From the procedural point of view, the law provides that the request will be judged in the council room and the irrevocable or final decision, according to the New Civil Procedure Code, of cancellation will be mentioned in the trade register and will be published in the Official Gazette, Part VII, From which the decision is opposed to all shareholders [Art. 132 par. (9) and (10)].

4.5. Suspension of the contested judgments

In accordance with the provisions of Art. 133 of Law no. 31/1990, republished, as subsequently amended and supplemented, the applicant may request the court to order suspension of enforcement of the judgment under appeal by way of a presidential order. The President, by allowing the suspension, may oblige the plaintiff to a bail. An appeal may be lodged against the suspension order (The appeal is replaced by the appeal by the New Civil Procedure Code) within 5 days of pronouncement. As the legislator considered only the situation of admitting the application for suspension, I.C.C.J. In an appeal in the

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[16] C.A. Bucharest, the commercial department, the decision no. 1979/2000, in the collection of Commercial Judicial Practice 2000/2001, Rosetti, Bucharest Publishing House, p. 193. Conversely, C.A. Buşureşti, the commercial department, the decision no. 3486/2000 in the 2000/2001 Judicial Commercial Practices Collection, Rosetti Publishing House, Bucharest, 2002, p. 177; D.M. Tăbâltoc, Theoretical and practical aspects regarding the organization and functioning of commercial companies. General Adoption of Shareholders. Legal status. Control of legality of decisions, in DRC no. 1/2000, p. 49.

[17] C.S.J., Commercial Section, Decision no. 3946/2002, in R.R.D.A. no. 7-8/2003, p. 152; C.S.J., commercial department, decision no. 4418/2001, in C.J. no. 12/2002, p 72.

[18] C.S.J., Commercial Section, Decision no. 4086/2002, in the R.R.D.A. no. 10/2003, p. 84; R.M. Catană, *in the cited work*, p. 99.

interest of law that the legal provision also applies if the application for suspension of the decision of the general meeting which has been appealed is rejected[19].

5. Opposition against the decision of the general meeting of the shareholders/shareholders, pursuant to Art. 61-63 of the Law no. 31/1990[20], republished, as subsequently amended and supplemented

In accordance with Art. 61 of the Law "Social creditors and any other persons injured by the decisions of the associates regarding the amendment of the constitutive act may file an application for opposition by requiring the court to oblige the company or associations, as the case may be, to compensate for the damage caused ...". The opposition shall be made within 30 days from the date of publication of the decision of the associates or of the amending act, unless the law provides otherwise.

By comparing the action directed against the decision of the general assembly based on the provisions of Art. 132 of Law no. 31/1990 and the request for opposition formulated on the basis of Art. 61-63 of the same law, the following can be deduced:

(A) the opposition may be exercised by the social ***creditors and any other persons harmed by the association's decision*** to amend the instrument of incorporation, to which must be added proof of a legitimate interest, such as the decision to reduce the share capital or to reduce or To prolong the duration of the company;

B) ***the shareholders/associations do not have active procedural legitimacy***, although in the broad sense they are social creditors because they have a special action "based on the provisions of Art. 132 of Law no. 31/1990 republished, as subsequently amended and supplemented;

C) ***the existence of damage*** to the property of creditors or other persons, which must obviously be proved[21].

Although both the doctrine and the judicial practice have attempted to assimilate the request for opposition to the tort action, however, there are notable differences between them especially that it is possible that the prejudice is not the result of an unlawful act committed with guilt. [8]

The request for objection with a patrimonial character and therefore an evaluation is applicable the provisions of Art. 720 Code of Civil Procedure, according to which "in petitions and claims in commercial matters which can be valued in money, before the filing of the petition, the plaintiff will try to resolve the dispute by direct conciliation with the other party. "

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[19] By Decision no. LXII/2007, published in the Official Gazette no. 276 of April 8, 2008, the High Court of Cassation and Justice on appeal in the interest of the law decided that if the application for suspension of execution of the decision of the general meeting of shareholders was rejected, it may be appealed against.

[20] C.A. Bucharest, the 6th commercial section, Decision no. 1299/2002, in the Commercial Judicial Practices Collection, 2002, Brilliance, 2004, p. 152; C.A. Craiova, commercial department, decision no. 1391 of November 11, 2009, no. 2/2011, in the Curierul Judiciar, pp. 76-78.

[21] The author considers that the spouse of a partner who decides to increase the share capital of the company with a good from a third party may be included in the category of third parties, The goods community, or the real owner of the asset to be contributed to the social capital.

Conclusions

In conclusion, the annulment of the decision of the general meeting of the members of the commercial companies has a derogatory legal regime from the common law, while at the same time distinguishing the opposition to which the shareholders or the shareholders have no right to formulate.

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[2] Gh. Piperea, Commercial Companies. Capital Market. Community Acquisition, All Beck Publishing House, 2005, pp. 116-117.

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[4] I.L. Georgescu, Romanian Commercial Law, vol. II, All Beck Publishing House, Bucharest, p. 364.

[5] Ph. Merle, Droit commercial. Societes commerciales, 8th ed., Dallaz, Paris, pp. 505-506, 522-525, 530.

[6] G. Răducan, *in the cited work*, p. 414.

[7] I. Forest, Principles and Institutions of Civil Procedure Law, vol II, Lumina Lex Publishing House, Bucharest, 1999, p. 277.

[8] St.D. Cărpenaru, S. David, C. Predoiu, The Law of Companies – commentary on articles, C.H. Beck Publishing House, Bucharest, 2006, p. 208; I. Schiau, T. Prescure, Law on Commercial Companies, *in the cited work*, p. 193; I.C.C.J., Commercial Section, Decision no. 1214 of February 28, 2003.

Brief Considerations on the Acquirement in Advance by the Minor of the Full Capacity of Exercise

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Abstract

The current paper debates an exception from the principle according to which the full capacity of exercise shall be acquired at the age of 18, namely its acquisition in advance using the legal means by the minor who has turned the age of 16. Because a legal institution can only be completely understood if the starting point are its fundaments, the study initiates an excursion in the history of the private law, showing that the exception regarding the anticipated capacity of exercise of the minor in the current law originates in the Roman law, but also in the Civil Code of 1864 which stated the "emancipation of the minor". Thus, starting from the historical fundaments of this institution, the study aims to identify and clarify the conditions in which the exception stated by Art. 40 of the current Civil Code operates.

Keywords: *minor, full capacity of exercise, guardianship authority.*

1. Brief historical perspective on the institution of the emancipation of the minor

Etiologically, the term "emancipation" originates from the Latin word *e-máncipo*, –áre which referred to the removal from the parental power. Thus, the emancipation of the minor is not a new phrase, but has its fundaments in the Roman private law. Initially, this legal institution was shaped as a sanction, referring to the process by which a child came out from under the protection of the family (*patria potestas*) which belonged to the head of the family (*pater familias*). This was equivalent with his banishment from the family.

The procedure of the emancipation consisted in a wash sale in two steps. According to the Law of the Twelve Tables, in a first step, *pater familias* loosed its parental power over his son, whom he sold by emancipation, three times in a row. For daughters, nephews or other relatives a single sale was enough. For the second phase, the third party buyer separated the son from the family, by releasing him. In 502 AD the emperor Anastasius

has removed this form of emancipation and has inserted a new one which was performed by an imperial decision (par rescriptum), being enough a simple declaration from the head of the family in front of the magistrate. Subsequently, under the pressure of the growth of the economic and social life in Rome, the emancipation has become a necessity and was transformed in an institution completely in favor of the child [1].

In the Romanian law, the emancipation of the minor was stated by Art. 421-433 of the Civil Code of 1864 (repealed by the Decree no. 185/30 April 1949 for the modification and repealing of certain provisions regarding the full age, the capacity in the area of labor contracts and emancipation). According to these provisions, the emancipation of the minor was accomplished, in fact, by marriage. Even the unmarried minor could have been emancipated by his father, or in his absence, by his mother, at the age of 18, the full age being acquired at 21 [2]. As an effect of the emancipation, the minor could have concluded certain acts and could have taken responsibility before the age of majority.

Starting from these provisions, in the doctrine of that time, the emancipation has been defined as "an act by which the minor receives, before the age of majority, the right to administer all by himself his assets, by releasing him from his parental power or guardianship" [3] or as "a solemn act or a legal benefit, which has the effect of abolishing the dissolution of the parental power or guardianship, offering the minor the right to conclude alone his personal acts and to manage his patrimony within a limited capacity" [4].

2. The acquisition of the capacity of exercise by the natural person in the current legislation. The rule and exceptions

Currently, the civil capacity of exercise of the natural person enjoys both a legal definition, as well as different definitions offered by the literature over time.

The legal definition of the capacity of exercise of the natural person given by Art. 5 par. (3) of the Decree no. 31/1954, according to which "the capacity of exercise is the capacity of the person to perform the rights and take obligations by concluding legal acts" is maintained by the legislator of the current Civil Code which defines it in a similar manner by Art. 37 as being "the ability of the person to conclude civil legal acts". Thus, the definition stated by the literature according to which the capacity of exercise is "part of the person's civil capacity consisting in his ability to perform his civil rights and to assume and perform civil obligations by concluding civil legal acts" [5] remains in force.

At the grounds of this element of the civil capacity two conditions are to be found, namely the existence of the capacity of use of the natural person and the existence of the discernment. Regarding the first condition, no supplementary comments are needed because all natural persons have the capacity to use. In exchange, regarding the discernment seen as "the ability of the natural person to have a correct representation of the judicial effects of his will" [6] it is necessary to state that its existence is conditioned by the age and mental health of the person. Therefore, if for the capacity of use the only necessary requirement is represented by the very existence of the human being, for the acquirement of the capacity of exercise it is necessary the existence of the ability of the person to have the representation of his actions or inactions. Given the fact that the discernment is formed as the person reaches a certain physical and psychical development, the legislator has presumed that the person reaches the psychical majority at the age of 18 and has stated as

rule, according to Art. 38 of the Civil Code, that the moment of acquiring the full capacity of exercise coincides with the date at which the person reaches the majority, namely the age of 18. Obviously, the presumption of the existence of the discernment is relative, being overturned if proven otherwise. As an effect, if it is proven that the person suffers from a psychical disease able to annihilate his discernment, he may be deprived of legal capacity due to his placement under judicial interdiction. But, until the date of the placement under judicial interdiction, the psychical ill person has capacity of exercise.

As an exception, according to the Civil Code, the married minor shall also enjoy a full capacity of exercise (Art. 39 of the Civil Code), as well as the minor who has acquired in advance the capacity of exercise (Art. 40 of the Civil Code).

According to Art. 39 par. (1) of the Civil Code, "the minor acquires, by marriage, the full capacity of exercise". In addition, Art. 272 par. (2) of the Civil Code states that, exceptionally, the minor who has turned the age of 16, regardless of his sex, can marry.

As it has already been shown, this first exception has its reasoning in the very purpose of the marriage, which, according to Art. 259 par. (2) of the Civil Code is the fundament of the family. It would seem abnormal that the members of a family, which are likely to become parents, thus the legal protectors of the future children to be, in their turn, under the protection of their own parents. Therewith, by stating this exception the principle of the equality between spouses is respected. In the case in which one of them is major, and the other one a minor, the principle would be violated if one of the spouses would have full capacity of exercise, and the other one not [7].

3. The conditions for the acquirement in advance by the minor of the full capacity of exercise

According to Art. 40 of the Civil Code, "For grounded reasons, the guardianship court may acknowledge for the minor who has turned the age of 16 the full capacity of exercise. For this purpose, the parents or the minor's legal guardian shall also be heard, being taken into consideration, when necessary, the opinion of the family council".

From the legal provisions results the following requirements for a minor to acquire in advance the full capacity of exercise:

- the minor to have turned the age of 16;
- the existence of grounded reasons for an anticipated acknowledgement;
- hearing the legal guardian (the parents or the legal guardian) and, if necessary, the existence of the opinion expressed by the family council;
- to have a court decision in this meaning issued by a guardianship court.

Regarding the "solid reasons", the legislator did not considered as necessary to enlist them as examples, but has left the guardianship court in charge of establishing their fundament. In exchange, the literature [8] has stated that it can be considered as a necessary and sufficient reason to recognize for the minor his full capacity of exercise, the fact that he supports himself and lives separated from his parents, being an employee or the owner of a business and the parents, from solid reasons related to the training, age or religion etc. cannot offer him the appropriate protection. Also, from our perspective, it may represent a solid ground, in the context of the current Romanian society, and the fact that the minor's parents left to work abroad or are not in contact with the first one, in order to approve his legal acts,

and the minor proves he is able to support himself. At the same time, for a minor found in placement who employs himself and proves that he lives alone and is able to support himself and wishes to leave the protection system can also be considered as solid ground.

Regarding the third condition, we must say that the legal guardians – the parents or the minor's guardian, where appropriate – shall be heard by the court, with their opinion having a facultative feature. For the case of the minor protected by guardianship, the court shall also ask for the opinion of the family council, to the extent to which it has been established. Its opinion also has a facultative feature.

Under a procedural aspect, the competence of solving the request for the acquirement in advance of the full capacity of exercise belongs to the guardianship court in whose jurisdiction is located the minor's domicile. According to Art. 229 of the Law No. 71/2011 for the application of the Civil Code until the legal statement of the organization and functioning of the guardianship court, its attributions shall be fulfilled by the courts, sections or panels specialized in minors and family issues.

Because the regulations does not state if we are in the presence of a contentious or an administrative procedure, it has been shown that, in the main, considering the fact that by requesting the acknowledgement in advance of the minor's capacity of exercise it is not aimed the establishment of a right opposed to another person, the request may be solved using the non-contentious procedure [9].

Though from the content of Art. 40 of the Civil Code it results that the minor may address the court independently, two opinions were expressed by the legal literature regarding this case. One opinion [10] stated that it is necessary for the minor to be assisted by his legal guardian, the parent or tutor, and the legal guardian opposes it, shall have the possibility to ask for a curator. The second opinion [11] considers that the minor is the only person entitled to submit the request for the legal acquirement of the full capacity of exercise, thus avoiding the situations in which the legal guardians could aim to free themselves from obligations originating from the parental authority, namely the guardianship.

To what concern us, starting from the form in which the legislator stated the text and corroborating these provisions with the ones referring to the principle of the child's superior interest, we consider that the minor could personally submit the request, either assisted or not by his legal guardians. In supporting our statement, we also emphasize the fact that the opinions of the legal guardians, and where appropriate, the opinion of the family council, have a facultative feature.

4. The consequences of the acquirement in advance by the minor of the full capacity of exercise by a decision of the guardianship court

The consequences of the emancipation aims both the person, as well as the minor's assets. As an effect of the acquirement of the full capacity of exercise, as it is stated by Art. 40 of the Civil Code, the minor has the ability to acquire and perform civil rights, namely to engage and perform civil obligations. Thus, he may conclude independently and personally legal acts which are not forbidden by the law, may perform actions, but also shall be liable for the actions and acts concluded.

Therefore, the emancipated minor shall no longer be subjected to the rules regarding the marriage and adoption applicable for the minor without full capacity of exercise regarding

the consent of the parents or legal guardian, but the other rules shall continue to be applied. Also, he has the right to decide all by himself, taking his own decisions, for instance, including his physical body during life, as well as after his death.

According to Art. 13 of the Labor Code, the natural person shall acquire the capacity for labor at the age of 16, and the employment in hard, harmful or dangerous jobs shall be made at the age of 18, the minor may conclude legal acts concerning labor, artistic or sportive pursuits or regarding his profession, without the consent of his parents or guardian. In this case, the minor shall perform the rights and obligations arising from these acts and may use his incomes.

Regarding the legal obligation for maintenance between parents and children [12], we consider that the minor who has acquired the full capacity of exercise does not longer enjoy the quality as creditor of the maintenance, only under the conditions mentioned by Art. 499 par. (3) of the Civil Code, namely if he is continuing his studies and until the graduation, without exceeding the age of 26. Because the legislator does not differentiate, shall enjoy the right to maintenance until the age stated by the law both the major who attends the classes of a state education institution, as well as the one studying at an authorized or not private education institution [13] and regardless of his results or if the attendance is mandatory or just partially mandatory. Though, if because of the studies the minor is attending he has the possibility of obtaining incomes, attending extramural classes, not being compelled to go to school every day, the legal practice has decided that he is not entitled to alimony. Unlike the regulation of the Family Code according to which it was not necessary for the minors to be in a state of need determined by the incapacity to work in order to enjoy the maintenance of their parents, but their state of need being presumed by the simple fact of their minority, the current regulation grants the minor the right to maintenance only to the extent to which he is unable to support himself from his labor, as stated by Art. 525 par. (1) of the Civil Code: "The minor demanding maintenance from his parents is found in a state of need if he cannot support himself from his labor, even if there are assets in his possession". Also, the legislator expressly states in Art. 499 par. (1) of the Civil Code that "the father and mother are compelled, in solidarity, to offer maintenance for their minor child, by providing what is necessary for living, as well as education and professional training", while par. (2) states that "if the minor has an independent income which is not suffice, the parents have the obligation to provide for him the conditions necessary for his development, education and professional training". Hence, if the minor has sufficient personal incomes, his parents shall be exempted from the obligation to provide him maintenance. But, if the minor's incomes are not sufficient, then the parents are compelled to contribute to his maintenance. In such case, the minor must prove the state of need resulted from the insufficiency of his own incomes.

Finally, regarding the possibility of the "emancipated" minor to perform acts of trade, the recent doctrine has shown that "though Art. 40 of the Romanian Civil Code does not state conditions in this regard, and the Law no. 31/1990 on trading companies does not set an age limit for the quality as professional, it is not known to what extent the limited life experience of the minor and his knowledge allows him to perform a profitable trade" [14].

Conclusions

Synthetizing, we mention that the acquirement in advance of the full capacity of exercise by the minor does not equates with an anticipated recognition of a "civil majority", having a series of limitations, but also offering him the exercise of certain civil subjective rights and the performance of his obligations by concluding legal acts. Though we salute the rebirth of the "minor's emancipation" in our legislation, we consider, together with other doctrinaires, that there are some gaps of this regulation and it can be improved. Thus, we agree with those who have stated that "a mistake of the current provisions is represented by the lack of a clear provision for publicity, by which the third parties acknowledge the transformation of the capacity of exercise of the emancipated minor, which has the nature to generate difficulties for the third party contractors who, in order to conclude acts with the emancipated minor shall have to ask him for the proof of his emancipation and shall not always feel secured" [15]. Not least, we consider as opportune, that in case of an amendment of the legislation, to be taken into consideration the regulation of the possibility for the guardianship court to reassess the decision which granted in advance the full capacity of exercise for the minor [16], by applying the principle of the superior interest of the child.

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The Valences on the Notion of "Contractual Risk"

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Abstract

The New Civil Code imposes a new angle regarding the subject of the contractual risk. The law-maker did not made a legal definition of risk, limiting itself to only indicating its rules of attribution and the effects from bearing a risk in certain situations. The risk represents an occurrence which produces a contractual imbalance, disrupting the initial balance determined by the parties, unanticipated by the parties, originated from an external source, independent from the will of the parties, under an aleatoric effect, predictable but uncertain, situation after which damages are produced.

Keywords: *risk, definition, random, contract, tort.*

1. Introductory elements

The contractual **risk** "*has the reputation of being one of the toughest subjects in the Civil Code*" [1].

Even though the New Civil Code imposes a new angle regarding the subject of the contractual risk, in some places even offering clarification regarding the party that bears the risk, the law-maker did not offer a definition of it.

The reluctance of the law-maker in defining the risk circumscribes with the traditional practices in the Roman law by the law expert Lucius Iavolenus Priscus: "*Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset*", in free translation the addition highlighting that *definitions in the Civil Law are periculous because the cases when they cannot be combated are rare.*

Thus the chameleonic nature of the risk was preserved and emphasized, the risk being a variable and dynamic notion depending on the governing material of the legal relationship analysed *in concreto*.

Establishing that the risk is hard to be framed in a specific typology even when it targets the same type of contract, situation caused by its flexibility and diverse character, each contract regulating distinct juridical relations.

Therefore, before starting the analysis we will try to give a more complete definition for the notion of risk.

2. The notion of risk

As said before, the law-maker did not made a legal definition of risk, limiting itself to only indicating its rules of attribution and the effects from bearing a risk in certain situations.

In the absence of a legal definition we are forced to move towards the definition offered by D.E.X. [2] which highlights the risk as *"posibilitatea de a ajunge într-o primejdie, de a avea de înfruntat un necaz sau de suportat o pagubă; pericol posibil."* (eng. "*the possibility of reaching a peril, having to face trouble or to bear a loss; possible danger*.") From the explication offered by D.E.X. we can observe a few essential and defining characters for understanding the notion of risk.

Thus, it appears that the risk represents a *"possibility*" which emphasises its predictable but doubtful character. Although at the moment of signing the contract, the party, by consenting, it assumes the possibility of not fulfilling the objective of the contract, it does not provide with the extent of the damage produced by consequence of not fulfilling the obligations.

Therefore, even though the party states that it might suffer damages or a loss as a consequence of unfulfilling the contractual obligations, it cannot estimate the effects of these failures.

It should be noted that the risk is an external factor outside of the parties' will and occurs as a result of an event that unilaterally alters the execution of rights and obligations assumed when signing the contract. Furthermore, between the risk and the events that lead to it, a distinction must be made since the risk requires the management of accidental effects over the convention and it's not the factor causing the detriment.

Being an external factor it's clear that it will cause an imbalance in the order established by the parties at the time of concluding the contract.

Also, reiterating the definition offered by D.E.X. we remember that the risk represents a possibility, therefore, it's a factor that depends on the occurrence of an "*alea*" event, therefore an aleatory event, aleatory in the current sense being synonymous with "*by chance*".

Regarding the etymology of the term "*alea*" we highlight that it's a term originated from Latin, where it had the meaning of *dice game* or even *dice*.

Caius Julius Caesar's famous line "*Alea iacta est"*, found in the chronicles of Suetonius, pronounced by the Roman Emperor in the year 49 B.C. in the moment when the Empire's troops crossed the river Rubicon, the moment when the war against Pompey started, translates with the expression "*dices have been thrown*" resulting that, both in its traditional and figurative sense, the term "*alea*" means risk and implicit assumption of danger.

Aleatory, derived from the term "*alea*", has the meaning of a random event, a fortuitous event respectively. The term *aleatory*, in the juridical medium, is used to tabulate all the events that occurred, caused by a major force, from fortuitous cases as well as risk constitutive events.

Therefore, from the exposition we can condense the definition of risk to: the risk represents an occurrence which produces a contractual imbalance, disrupting the initial balance determined by the parties, unanticipated by the parties, originated from an external source, independent from the will of the parties, under an aleatoric effect, predictable but uncertain, situation after which damages are produced.

Even though, at first glance, it seems like a notion that doesn't arise any controversies, the local doctrine restrained itself from coming forth with a definition, precisely because of its variable character, specific to each contract's typology.

Still, there are a few definitions offered by the doctrine that attempts to embrace the whole meaning of the notion risk. For the purpose we remember the definition proposed by professor Paul Vasilescu for the risk as being: "*a dangerous hazard with damaging consequences, which impose the assumption of its negative consequences by a person which doesn't necessarily create the costful danger but can be taken advantage of it or attempt to rein it"* [3]. Furthermore, the doctrine governed by the norms of the old Civil Code attempted to deliver a slightly incomplete definition which created confusion saying that: "*the contract's risk appears as a consequence for the non-performance of the mutual contract as a result of fortuitous impossibility so the cause that is independent of the guilt of either of the parties*." [4]

The appearance of the risk has to be as a result of an objective impossibility for executing the contract, impossibility which must "*be independent of any guilt attributable towards any of the parties.*" [5]

Finishing, we affirm, as a definition, that the risk is an external factor under an aleatoric effect, predictable but uncertain that disrupts the contractual balance, the scope of which is unanticipated by the parties.

3. Bearing the contractual risk does not equate with the acceptance of uncertainty

Following the definition stated before, the risk is an external factor, provided by the parties but uncertain, that causes contractual balances.

Stating the contractual risk in the legal norms is only one way of distributing the effects of the contractual risk, not representing either the occurred loss nor the effect of the event.

Baring the contractual risk, either conventional or legal, reflects only the way of distributing the effects produced by the events that created the risk, being that element situated between the moment of the contractual balance and the moment when the imbalance appeared. Thus the party that takes the contractual risk arrogate only the way of distributing the effects produced by the event that caused the imbalance and does not represent the engagement of the party in order to repair the damage because it is not determined and even determinable lacking its certitude.

The source of the risk is situated outside the contractual scope nevertheless it produces negative effects inside the contract and the impact of these effects can be diminished or eliminated by implementing an effective risk management system, a coherent and efficient system that is regulated by the parties with the introduction of a specific contractual clause and in a suppletive form, when there are not any contractual clauses, in a standard, abstract way by the Law Maker.

Starting from the motion exposed, we concur that taking the contractual risk does not equate with assuming the uncertainty because this targets only the way of efficiently and coherently distributing and diminishing the negative effects and not only assuming an uncertainty because the risk mechanisms and the extent of those are clearly bounded, the damage later being able to be quantified. The risk has the designation of disrupting the contractual balance, thus it is a necessity to establish clear rules for attributing it.

Therefore, the risk does not represent the compensation of any kind of damage but a simple management of the effects of fortune over the contract.

4. Organising risk mechanisms (risk management)

Often, in the legal doctrine and the legislation, the problem found in the highlighted subtitle is called, in a generic way, "rules of attributing the risk" or "rules of reproaching risk".

We consider that is necessary to dismiss these notions because they do not clearly reflect the substance of the issue, respectively the distribution of the effect and the mechanisms with which the negative effects of the contractual balance are eliminated or diminished.

Referring to the phrase: "rules of reproaching risk" we highlight that the verb "*a imputa*" (English: reproach) according to D.E.X. means the action of making someone responsible for a loss ("*a face pe cineva raspunzator de o paguba*"), resulting that "*a imputa*" means assigning to a person an event, just like that person is the cause of that action. However, just like we revealed, the risk has an exterior but also a damaging character in addition to an **involuntary** character. Therefore, the involuntary characteristics of the risk is the element that contradicts and also eliminates from utilization the title "reguli de imputare a riscului" ("rules of reproaching risk"), the risk being an event that pertains to the haphazard and that does not have a determined author in either of the contractual parties.

Also, regarding the phrase "reguli de atribuire a riscului" (rules of attributing the risk) we consider that it is not an element that objectively defines the substance of the issue. According to D.E.X "*atribuire*" (originated from the verb "*a atribui*") means a pune in sarcina cuiva (*to charge someone)* so there must be a superior decisional factor that can establish the author of the risk however the risk has an involuntary and extraneous character compared to the contract.

We consider that using the syntagm "organising risk mechanisms" is advantageous because the verb "*to organis*e" demeans a collective action – that involves the parties in distributing the effects and the mechanisms of the risk.

5. Conclusions

We finish by affirming that the risk being, a variable and dynamic notion according with the governing matters of the legal relationship, analysed *in concreto* it is difficult to fit in a typology even when it targets the same type of contract, situation provoked by the its flexible and diverse character, each contract regulating distinct legal relationships.

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The Relation Between the Principle of Binding Force and Imprevision in Terms of the Law No. 77/2016

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Abstract

There are situations when the interference between one and another legal institution or their overlapping may create effects with a greater or smaller legal impact, but in any case with some social resonance. One of these cases was created by the Law no. 77/2016 on the give in payment of certain immovable goods in order to extinguish the obligations undertaken by credits, which introduced to the internal legal landscape a new legal institution, particular and derogatory from the common law, a form of give in payment, applicable to situations, categories of beneficiaries and strictly determined objects.

Or, the give in payment procedure regulated by the Law no. 77/2016 has as grounds and functional mechanism the institution of imprevision, as particular, derogatory from the common law, and the debtor's possibility to choose to opt out of the contract relation through the give in payment is generated by this particular form of imprevision.

Keywords: *give in payment, principle, legal relations, contract, legal act, imprevision.*

I. Aspects of Common Law

1.1. The pacta sunt servanda principle in the common law

The requirements of a specific legal relation by civil contract, as well as its end, however altogether subject to ensuring the security of the legal civil circuit, both statically, and dynamically.

As one of the defining elements of the legal relation by civil contract is given by its volitional nature, in the context and in the legal track of this specific element, one must look for the key of analysis of its effects.

Or, the principle of binding force, as fundamental principle of the effects of the civil legal act and, in an ultimate analysis, of the civil law itself, is the primary element of defining the legal system and the requirements of the legal relation by civil contract.

According to this principle, once a contract was validly signed, it must be executed in full compliance with its contents, its provisions being binding both to the parties and to the successors in rights, and to the courts and judicial authorities, with power of law.

In doctrine, the principle of binding force was defined, from an analytical point of view, as the "***rule of law according to which the concluded civil legal act, as agreement of will*** (*as regards contracts*) ***or as solitary manifestation of will*** (*as regards unilateral legal acts*)*,* ***is imposed on the authors or on the author precisely like the law"*** [1], and in a synthetic variant, as "that rule of the effects of the civil legal act according to which the concluded civil legal act is binding for the authorities or for the author of the act, precisely like the law" [2].

The legal significance of this principle is obvious, consisting in the fact that the civil legal act is binding for the parties, not elective, but the practical significance is a distinct one, according to the type of legal act taken into consideration.

Thus, as regards the unilateral act, its author, after manifesting his/her will, may no longer withdraw it, being held by his/her manifestation of will. As regards a contract, its parties, once legally committed by their agreement of will, have the obligation to respect the contract clauses like they would respect the law.

Traditionally, in the legal literature, the principle of binding force was grounded on the theory of autonomy of will, in accordance with which any obligation is a limitation of the man's freedom and as such it may be only the result of its will, which is the ground of the obligation to comply with the contract.

This solely volitional perspective circumscribes the scope of the principle of a sphere of pure consensualism and links it directly to the subtle psychological aspects of the process of formation and manifestation of human will in terms of contract. This also fatally limits the sphere of exceptions from the principle of binding force, placing it in the same context of the parties' manifestations of will.

This autonomist volitional conception results from, and is a reflection, at legal contract level, of the economic liberalism and of the principle of individual freedom of every person, in which context the idea was born that "*each contractor is the best judge, therefore the best legislator of their own interests*" [3]. Or, this being said, as freedom implies and requires the idea of responsibility, on the one hand, any subject of law is free to end or not to end a contract, but once the contract has ended, it is binding, directly and immediately, on the parties, that cannot refuse or avoid the application of its provisions, nor claim the need for intervention of another regulation or procedure authorizing the occurrence of effects.

According to the Civil Code of 1864, this principle found its legislative materialization in Art. 969 of this normative act, and stated that "*The covenants that are legally made have power of law between the contract parties. They may be revoked by mutual consent or by reasons authorized by the law*".

In the New Civil Code, the principle of binding force is regulated by par. (1) of Art.1.270, called "*Binding Force*", text which states that: "*The validly signed contract has a power of law between the contract parties*" [4].

1.2. Imprevision in the common law

Although the parties to a contract must execute their obligations, regardless whether their execution has become burdening, this rule has never been made absolute, and it has been constantly believed that there are situations justifying the derogation from its strict

application, situations when the effects of the contract "are not produced as the parties wished for when they signed it, and they are either more restrained, or more extended, independent on the will of the parties or of one party" [5].

These situations also include those legal situations demanding the revision of the effects of the civil legal act because of the breaking of the contract balance following the change in the circumstances considered by the parties on the signing of the deed, situations believed to materialize the institution known as imprevision and the legal theory of imprevision (*rebus sic stantibus*) [6].

The origin of the theory of imprevision (rebus sic stantibus) and of the idea of imprevision is lost in the mist of the legal history of mankind, and is found, of an extralegal nature, in the canonic doctrine of the western church in the medieval era, more precisely in the work of the theologist Saint Thomas of Aquinas, and in the European legislation and in the attention of the legal doctrine, this theory found its real application barely in the period between wars, on the background of the great financial crisis affecting the western society [7].

In Romania, under the regime of the Civil Code of 1864, the theory of imprevision was not established *in terminis* from the normative point of view, and in terms of doctrine and case-law, it was believed that it resulted from a regulation of principle related to contracts, more precisely from the provisions of Art. 970, that stipulated: "*Covenants must be executed in good faith. They are binding not only by what they expressly include, but also by all their consequences, that the equity, customs or the law award to the obligation according to its nature"*. As such, in this normative context, the imprevision was grounded on the precise elements of equity and good faith that must characterize, according to the law, any contract.

Therefore, subject to the Civil Code of 1864, although the theory of imprevision did not find a legislative materialization in the corpus of the code, this theory found a fertile ground in the doctrine and in the case-law, put into theory as a legal concept [8], and towards the end of this legislative phase, it was materialized in disparate normative acts, regulating punctual fields or institutions [9].

With the appearance of the New Civil Code, the imprevision found its regulation in the contents of this normative act, being regulated for the first time, in an express manner and of a general character, in the Romanian legislative landscape.

The legal headquarters of the theory of imprevision in the New civil code is found in Art. 1.271 par. (2) of this article, stipulating that" *...if the execution of the contract has become excessively onerous due to an exceptional change of the circumstances making it obviously unfair to order the debtor to execute the obligation, the court may order:*

a) to adapt the contract, to distribute in a fair manner between the parties the losses and benefits resulting from the change of circumstances;

b) to terminate the contract, at the time and in the conditions that it establishes".

Par. (3) of Art. 1.271 adds and explains the circumstances of the actual conditions of application of imprevision [10], and the analysis and systematic interpretation of the provisions of the two paragraphs lead to the conditions demanded for the existence and operation of imprevision, and, obviously, for the application of the theory on imprevision:

– the execution of the contract would have become excessively onerous, on the one hand

– *the excessively onerous character would be caused by an exceptional change in circumstances*

– *the exceptional change in circumstances would make it obviously unfair for the parties to be ordered to execute the obligation*;

– *the exceptional* change in circumstances occurred after the contract was signed.

– the change in circumstances, as well as the extension of the obligation, have not been and could not have been considered by the debtor, in a reasonable manner, on the signing of the contract.

– the debtor has not taken the risk to change the circumstances, nor could he be reasonably believed to have taken such risk.

II. The principle pacta sunt servanda and imprevision according to the Law no. 77/2016

Law no. 77/2016 on the give in payment of immovable goods in order to extinguish the obligations undertaken by credits introduced into the internal legal landscape a new legal institution, particular and derogatory from the common law, a form of give in payment, applicable to situations, categories of beneficiaries and strictly determined objects.

In this context and in the specified order, the Law no. 77/2016 is a lex specialia as regards the provisions of the Civil Code, which remain the common law in the matter.

As shown in a previous paper as well [11], considering the provisions of the Law no. 77/2016, by reference to the legal framework concerning credit contracts and the general normative picture, the situation generating the debtor's possibility to opt out from the contract through give in payment is, as legal nature, a particular form of imprevision.

The analysis of this particular form of imprevision and of the report with the principle pacta sunt servanda has different perspectives, depending on the considered legal moment, respectively the initial form of the Law no. 77/2016 or the form of the same law related to the post-ordering and motivation of the Decision made by the Constitutional Court no. 623 of October 25, 2016 regarding the exception of non-constitutionality of the provisions of Art. 1 par. (3), Art. 3, Art. 4, Art. 5 para. (2), Art. 6-8, especially Art. 8 para. (1), (3) and (5), Art. 10 and of Art. 11 of the Law no. 77/2016 on the give in payment of immovable goods in order to extinguish the obligations undertaken by credits, as well as of the law on the whole [12].

An important particularity of the imprevision applicable according to the Law no. 77/2016 in its initial form consists in the fact that, in this case, there used to be objective conditions expressly provided, when the law presumed both the existence of an exceptional change in circumstances, that was making obviously unfair the debtor's obligation, and the fact that the execution of the contract had become excessively onerous.

Therefore, in the initial conception of the law, the debtor was not held accountable for the existence of the two elements, moreover, the creditor was not allowed to be presented with evidence proving their inexistence, and the analysis of the court was limited to the existence of the objective conditions and to the parties' classification in the categories specified by the law.

This conception of the law was radically changed by the Decision of the Constitutional Court no. 623 of 25 October 2016, which "overturned" the legal perspective related to this institution, ordering the debtor to prove that the exceptional change in circumstances has indeed occurred, which would make it obviously unfair to execute the obligation and which would prove its excessively onerous character.

Technically, the aforementioned decision of the Constitutional Court has brought back the form of imprevision stipulated by the Law no. 77/2016 into the "womb" of the common law, respectively the one outlined by the Civil Code, both in terms of operating conditions, and in terms of produced effects.

Essentially, the Court holds that the imprevision intervenes when, in the execution of the contract, an exceptional, exterior event occurred, which could not have been reasonably foreseen on the signing of the contract, in terms of amplitude and effects, an event which makes excessively onerous the execution of the obligations foreseen therein; in this case, should a risk occur, circumscribed to the idea of imprevision, the contract clauses with successive execution must be properly adapted to the new reality.

Likewise, the Court holds that the determination of the circumstances justifying the application of imprevision must take into account the idea of risk of the contract; as regards this concept, the Court states that "*This should be analyzed from a bivalent point of view when it is materialized; thus, the contract per se supposes an inherent risk willingly undertaken by both parties to the contract, based on their autonomy of will, a principle which characterizes the subject matter of the contract; and an over-added one, which could not make the object in concreto of a prevision by any of them, a risk that goes beyond the power of prevision of the co-contractors and which is related to the interference of elements that could not have been considered a quo"* [13].

In the analysis made in the specified decision, the Constitutional Court introduces a distinction between the notion of normal contract risk and the notion of over-added risk, showing that the imprevision targets only the over-added risk; and, once it has occurred, the part played by imprevision consists in rearranging the provisions that the parties were bound to render in accordance with the conditions of the new economic/legal reality. As shown in the specified decision, *"... imprevision is not meant to resume the provisions of the a quo moment of the signing of the credit contract or the risk accepted by the parties on that same moment, as it is exterior to them, but it offers the legal grounds to adapt or terminate the contract. Adaptation happens when the social usefulness of the contract may be maintained, while its termination happens when, in case of interference of new conditions, the contract loses its social usefulness. Consequently, the Court holds that the parties are, first of all, bound to renegotiate the contract, and, secondly, renegotiation must be effective by reference to the new reality*" [14].

As regards strictly the over-added risk, in the analysis of the Court, the evaluation of the occurrence of this risk must be regarded and executed on the whole, but by analyzing certain actual elements, respectively at least the quality and economic or legal knowledge of the co-contractors, of the value of the provisions set by contract, of the risk that was already materialized and incurred throughout the credit contract, as well as of the new conditions and economic realities that no longer comply with the parties' initial will, the constitutional court stating in this regard that "*This overall evaluation allows to determine, on the one hand, the limit between the two categories of risks previously mentioned, and,*

on the other hand, according to the result, the decision to be made about what it is to become of the contract" [15] .

The need for the court's intervention in analyzing whether the conditions for imprevision have been satisfied does not turn this analysis into a mere analysis of opportunity, namely, once the occurrence of the over-added risk is ascertained, the intervention upon it becomes mandatory and must be effective, either that it must cease, or that it must adapt to the new conditions; the intervention produces legal effects for the future, while the provisions that have already been executed remain won for the contract.

Linking together the rule and the institution of imprevision to the principle *pacta sunt servanda,* the Court introduces into the legal analysis the concepts of **good-faith** and **equity,** considering that the principle under discussion supposes that these elements should also be taken into account**,** as regards the fundamental changes in the contract execution conditions.

As regards the concept of equity, it is analyzed out of a dynamic perspective of its manifestation according to two aspects: *objective* – designating the principle of exact compensation with the implication of equality of treatment – and *subjective* – meaning that a particular situation must be taken into account, which usually is the weakness of a contract party.

As regards good faith, the Court analyzes it in direct relation to the principle of binding force, appraising that the two principles (binding force and execution in good faith) mutually condition each other, and the execution of a civil contract is legitimate as long as it is the result of the cumulative satisfaction of both principles.

As held by the Court, "*The theory of imprevision, grounded on the two principles, attenuates the binding character of the contract, to the extent to which, throughout its execution, an unpredictable situation occurs, but none of the contract parties abdicates from its obligations assigned to them according to the execution in good faith of the contract*" [16] .

Finally, considering all the above, the Court comes to the conclusion that imprevision constitutes only an apparent exception to the principle of the parties' autonomy of will, a conclusion which, however, we cannot share [17].

At a first sight, this conclusion is purely expositive, as it is not effectively argued by a logical and transparent argumentative mechanism, but only by reference to the previous theoretical developments.

On the other hand, even the legal analysis made in the contents of the Decision no. 623 of 25.10.2016 leads precisely to supporting the idea of imprevision as exception to the principle of binding force of the contract and implicitly to the principle of the parties' autonomy of will.

Thus, if we accept the fact that the binding force of the contract results from its volitional character, which is reflected in the principle of their autonomy of will, which characterizes the subject matter of the contract, and if the binding force means the execution of obligations in precise compliance with the contract provisions, then the situation when the obligations are no longer executed according to the contract provisions is a precise exception to the principle of binding force of the contract, and, consequently, to the principle of the parties' autonomy of will.

As regards the consequences of imprevision, the same normative text, amended by the Constitutional Court by Decision no. 623 of 25.10.2016 sets as manner to remedy the contract relation, in case of occurrence of an alternative imprevision act, either the cessation of the contract, or the adaptation of the contract in the sense of equally sharing among the parties of the consequences resulting from the change in circumstances.

III. Final considerations

Considering all the above, we may conclude that the give in payment procedure regulated by the Law no. 77/2016 is grounded and operates upon the institution of imprevision, as particular form, derogatory from the common law.

Even though the text of the law does not make a direct reference, expresis verbis to the institution of imprevision, the application of this institution results indirectly both from the intrinsic contents of the normative act, more precisely from the provisions of Art.11, first thesis, referring to the risks born out of the credit contract, and from the *recitals of reasons* of the law, which uses to justify the need to adopt the act, the expression "*contract crisis*".

The law-maker has aimed at rebalancing the provisions, as, throughout the execution of the contract, separately from the natural risk joining a credit contract, an over-added risk interfered, and none of the parties is guilty of the occurrence of said event.

If, in the initial form of the law, this form of imprevision was conceived as presuming its main elements, respectively the existence of an exceptional change in circumstances, making it obviously unfair to bind the debtor, and the excessively onerous character of the contract execution, the Decision made by the Constitutional Court no. 623 of 25 October 2016 changed the vision over this institution, ordering that the debtor must prove the existence of all the elements of imprevision.

The extent to which the Decision made by the Constitutional Court no. 623 of 25 October 2016 is to be capitalized in terms of evidence, respectively what exactly must the party claiming imprevision prove, and implicitly the right to apply the give in payment, are to be ruled by the courts of law, and the case-law is still under development.

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[8] Please see note no. 5.

[9] Law no. 8/1996 on copyrights and related rights, respectively Law no. 195/2001 on volunteering.

[10] Para. (3) of Art. 1.271 of the New civil code stipulates that: "*The provisions of par. (2) are applicable only if:*
a) the change in circumstances occurred after the contract was signed;
b) the change in circumstances, as well as its extension, could not have been considered by the debtor, in a reasonable manner, on the signing of the contract;
c) the debtor has not taken the risk to change the circumstances, nor could he be reasonably believed to have taken such risk;
d) the debtor tried, in a reasonable term and in good faith, to negotiate the reasonable and fair adaptation of the contract".

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[13] Decision of the Constitutional Court no. 623 of 25.10.2016, paragraph 96.

[14] Decision of the Constitutional Court no. 623 of 25.10.2016, paragraph 97.

[15] Idem, paragraph 98.

[16] Idem, paragraph 99.

[17] Idem, paragraph 101.

Professional – a concept under the Civil Code and the Law no. 193/2000. Comparative approach

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Abstract

The Civil Code has regulated the concept of "professional" in Art. 3. Following its entry into force, through a legal act amending its detailed rules, the concept of "professional" has replaced the concept of "trader" in the consumer protection field. Subsequently, regarding one of the legal acts in the field of the consumer protection, i.e. Law no. 193/2000, an express amendment has been operated, the concept of "trader" being replaced with that of "professional". The replacement however, cannot be reasonably justified given that the Civil Code definition and the definition existing in Law no. 193/2000 are not identical. Thus while according to the Civil Code, acquiring the status of professional implies the fulfilment of 3 conditions: (1) pursuing a business; (2) the systematic nature of the business; and (3) the organized nature of the business, according to Law no. 193/2000, acquiring the status of professional only implies the pursuit of a business. This condition may even not be fulfilled concerning those acting in the name of or on behalf of a person pursuing a business.

Keywords: *professional, undertaking, unfair terms, Law no. 193/2000.*

1. General considerations

1.1. The premise and the purpose of the research

This study takes as its premise ***the existence of two definitions of the concept of "professional",*** one in the Civil Code (Law no. 287/2009) [1], and the other in Law no. 193/2000 [2] and has the purpose of establishing ***whether the two concepts are identical.***

The analysis has been generated by Law no. 60/2012 [3], a legal act amending the detailed rules of the Civil Code (Law no. 71/20011) [4]. According to par. (3) Art. III in the Law no. 60/2012, "in the legislation concerning the protection of the consumers' rights, the concept of "trader" shall be replaced with "professional"". Being a terminological amendment operated by a legal act amending the detailed rules of the Civil Code, it might appear that the replacement of the concept of "trader" with that of "professional" is due to the identity between the definitions of the concept "trader", in the legislation in the field of the consumer protection and the definition of the term "professional", in the Civil Code.

When the Law no. 60/2012 entered into force, i.e. 20th of April 2012, Law no. 193/2000 included the term "trader". The term was associated to a legal definition, i.e. "trader means

any authorized natural or legal person who acts under a contract falling within the scope of this Law, in the course of his/her commercial, industrial or production, crafts or liberal activity, as well as any person acting on account or in the name of that person. As a legal act in the field of the consumer protection, Law no. 193/2000 has been implicitly amended by Law no. 60/2012, the above mentioned definition configuring the concept of professional. Thus, starting from the 20th of April 2012, according to Law no. 193/2012, "professional means any authorized natural or legal person who, acts under a contract falling within the scope of this Law, in the course of his/her commercial, industrial or production, crafts or liberal activity, as well as any person acting on account or in the name of that person and with the same purpose".

Subsequently, starting with the 1st of September 2012, the Law no. 76/2012 [5] has explicitly amended Law no. 193/2000. Thus, according to Art. 38 point 3 of this legal act, "throughout the law, the term "trader" shall be replaced with the term "professional"". The definition of the concept remains the same.

In conclusion, the concept of "professional" is presently regulated by the Civil Code on one hand (Art. 3), and by Law no. 193/2000 [Art. 2 par. (2)], on the other hand.

According to Art. 3 of the ***Civil Code*** "all those operating a business *are to be considered* ***professionals****. The operation of a business is the systematic performance by one or more persons, of an organized activity consisting in the production, management or the disposal of goods, or in the supply of services, irrespective of whether it is profit-making or not*."

According to Art. 2 par. (2) in ***Law no. 193/2000***, "***professional*** *means any authorized natural or legal person who, acts under a contract falling within the scope of this Law, in the course of his/her commercial, industrial or production, crafts or liberal activity, as well as any person acting on account or in the name of that person*."

1.2. Methodological issues

Given the purpose of this research as it was mentioned above, the study shall use the comparative method, the following being analysed under the Civil Code and under Law no. 193/2000:

a) what a person needs to do in order to be qualified as a professional
b) which are the types of activities that can be exercised in order to be qualified as a professional
c) which is the way of exercising the activity in order to be qualified as a professional.

Finally, conclusions shall be drawn regarding the relationship between the concept of professional in the Civil Code and that of the Law no. 193/2000 (for doctrinal analysis of the concept of professional, see [6, p. 512], [7, p. 79]. [8, p. 3242]. [9, p. 1548]. [10, p. 1]. [11, p. 1924], [12, p. 4-6, 24-25].

2. What a person needs to do in order to be qualified as a professional?

2.1. What a person needs to do in order to be qualified as a professional according to the Civil Code?

According to Art. 3 of the Civil Code, the operation of an undertaking implies the ***exercise of an*** which the chosen activity cannot be considered to take place. The single performance of such operations cannot amount to "exercise of an activity", the exercise

or the ***activity.*** The exercise of an activity involves the repetition of certain material and/or legal operations without performance of an activity necessarily requiring the repeatability of the constitutive operations of the chosen activity.

2.2. What a person needs to do in order to be qualified as a professional according to Law no. 193/2000?

According to Art. 2 in Law no. 193/2000, the qualification as professional is acquired by a person acting in the course of his/her activity. It can be noted that Law no. 193/2000 also regulates the professional as a person acting in the course of an activity, that is to say, as ***a person exercising an activity***, respectively performing repeatedly, the constitutive operations of the chosen activity.

Furthermore, it can be noted that Law no. 193/2000 attaches the qualification as professional ***even to persons not exercising an activity***, but only acting in the name or on the account of a persona exercising an activity.

Following the existence of these two situations, academics have shown that Law no. 193/2000 operates with ***two criteria for qualifying a person as a professional***: an objective criterion and a subjective one. ***The objective criterion*** is the "*exercise/performance of an activity*". This criterion constitutes the qualification criterion applicable whenever the contracts falling under the scope of Law no. 193/2000 are concluded directly, i.e. not through the intermediation mechanism. ***The subjective criterion*** is represented by the fact of "*acting in the name or on the account of a professional*". Thus, the existence of the qualification as professional of the person in whose name or on whose account actions are being carried out confers to the agent the qualification as professional as well.

3. Which are the types of activities that can be exercised in order to be qualified as a professional?

3.1. Types of activities regulated by the Civil Code

According to Art. 3 of the Civil Code, the operation of an undertaking involves the exercise of an activity consisting in the production, management or the disposal of goods or in the supply of services.

Looking at the legal text mentioned in the light of the NACE Code [13], it follows that as a rule ***any activity included in the NACE Code*** (designated by the term economic activity) can be exercised with a view to being qualified as a professional.

3.2. Types of activities regulated by Law no. 193/2000

According to Art. 2 of Law no. 193/2000, the qualification as professional is acquired by a person acting in the course of its commercial, industrial or production, crafts or liberal activity.

Looking at the legal text mentioned in the light of the NACE Code, it follows that as a rule ***any activity included in the NACE Code*** (designated by the term economic activity) can be exercised with a view to being qualified as a professional.

4. Which is the way of exercising an activity in order to be qualified as a professional?

4.1. The way of exercising the activity regulated by the Civil Code

According to the explicit provisions of Art. 3 of the Civil Code, the operation of an undertaking involves the exercise of an activity ***in a systematic and organized way.*** However, the concepts systematic and organized are not defined by the legal text. In order to interpret them, the usual meaning of the terms is to be considered.

Concerning the systematic nature the usual meaning of the word must be noted. From this point of view, systematic means repeatedly and orderly. It follows thus that the systematic exercise of an activity involves the repetition of those material and/or legal operations without which the chosen activity cannot be considered to take place. The repetition of the operations specific to the activity is equally a characteristic for the "exercise of the activity", as we showed above. Thus, the operations specific to an activity must be repeated in order to perform an activity. The repetition can be random, creating an appearance of uncertainty concerning the performance of the operations specific to the activity, at a certain moment, or it can be orderly, creating the appearance of certainty regarding the performance of the activity at a certain moment. A random repeating of the operations reflects the exercise of an activity, but a discontinuous activity. Such an exercise of the activity does not fulfil the systematic nature requirement. An orderly repetition of the operations reflects the exercise of an activity on a continuing basis. Such an exercise of the activity fulfils the systematic nature requirement.

Concerning the organized nature, the usual meaning of the word must be considered. From this point of view, to organize means to establish the resources necessary and how to use them. As for the systematic nature, it can be noted that the exercise of an activity necessarily involves taking some organizational measures. Thus, in order to perform the operations specific to the activity, the necessary resources and their use must be established. The organization operation may aim at identifying the necessary and sufficient minimum for the performance of the activity or it can envisage exceeding this minimum. If the organization operations aim to identify only the resources without which the activity cannot effectively be performed and to establish the way to use them, then the organization only configure the exercise of the activity. However, such an exercise of the activity does not fulfil the organized nature requirement stipulated by the Civil Code for being qualified as a professional, as a distinct and additional element beside the exercise of an activity. If the organization operations aim at identifying more than the resources without which the activity cannot effectively be performed and establishing the way to use them, then the organization configures not only the exercise of the activity, but also the existence of the organized nature. The activity performed in this way has a complex nature.

4.2. The way of exercising an activity regulated by Law no. 193/2000

Art. 2 par. (2) of Law no. 193/2000 ***does not make any reference to any way of exercising an activity***, which justifies the conclusion that the sole performance of the

activity can confer the quality of professional, even in the absence of the systematic and organized nature.

Furthermore, it can be noted that Law no. 193/2000 confers the quality of professional also to persons not exercising any activity, but merely acting in the name or on the account of a person exercising an activity.

5. Conclusions

Analyzing the definition of the professional stipulated in Law no. 193/2000 against the background of the concept regulated by the Civil Code, three conclusions can be drawn.

First, the ***professionals under the Civil Code are equally professionals under Law no. 193/2000***. This is because Law no. 193/2000 does not set the condition of operating an undertaking in order to be qualified as a professional; it only requires the exercise of one of the listed activities or the representation of a person exercising such an activity. Thus, according to the Civil Code, the quality of professional requires the exercise of one of the listed activities (1), systematically (2) and orderly (3), whereas Law no. 193/2000 sets only the first condition, sometimes lacking even this one (i.e. when the quality of professional is conferred by the representation of a professional).

Second, the opposite is not however valid. ***Professionals under Law no. 193/200 are not always professionals under the Civil Code***. Thus, professionals under Law no. 193/2000 do not necessarily fulfil the condition of the systematic and organized nature in the performance of the activity.

Third, given that the definitions of the term "professional" in the Civil Code and Law no. 193/2000 are different, ***the legislative amendment operated by Law no. 60/2012 (implicitly) and by Law no. 76/2012 (explicitly) replacing the term "trader" from the regulations in the field of consumer protection (by Law no. 60/2012) and from Law no. 193/2000 (by Law no. 76/2012) with the term "professional" appears unjustified.***

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The Closing of the Insolvency Procedure. New Features Provided by Law No. 85/2014. Various Aspects of Jurisdudence

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Abstract

The closure of insolvency proceedings, as regulated by Law no. 85/2014, gives rise to different situations, depending on the legal basis on which it relies, as well as on the concrete situation arising from the application of that basis.

The closure of the procedure is done by the syndic judge by sentence, and may intervene during the observation period, during the reorganization period and in the bankruptcy period.

The effects of the closure of the proceedings concern the obligation of the syndic judge to notify the decision of closing the proceedings to the persons and institutions provided for by the law in order to make this statement, the unloading of the obligations of the bodies that have applied the procedure and the parties and the discharge of the debtor from the obligations they had before bankruptcy, but provided they were not found guilty of fraudulent bankruptcy or payments or fraudulent transfers. In this latter situation, the individual debtor will be discharged from the obligations only to the extent that they have been paid in the procedure.

Keywords: *insolvency, syndic judge, debtor, creditors, debtor's assets, administrative expenses, closure of insolvency proceedings.*

As any judicial procedure, which is open and subsequently, upon the completion of all the stages stipulated by law, closed by a court order and the insolvency procedure, following the insolvency proceedings, is to be closed by a decision of the syndic judge.

The lack of assets, the insufficiency of funds to cover administrative expenses, the success of a reorganization plan or, on the contrary, the conversion of a reorganization into bankruptcy, the completion of a bankruptcy procedure, with the full capitalization of assets and the satisfaction or lack thereof of creditors, inevitably lead to the final stage of an insolvency procedure, namely the closure of the procedure.

Apart from the problems raised by each stage in an insolvency procedure, the closure of the procedure may raise other difficulties, such as litigations or appeals made by the participants in the proceeding, which are often the creditors dissatisfied with the fact that they have not recovered their claims or that no action has been taken to obtain liability or that these actions have not been resolved.

If in the previous law, Law no. 85/2006 [1], the cases of closure of the proceedings were provided in Section 8 of *the Closure of Procedure*, in Chapter III entitled *the Procedure*, articles from Art. 131 to Art. 137, at present, the cases of closure of proceedings are regulated in Section 9 *the Closure of the procedure*, of Title II *Insolvency Procedure*, Chapter I *Common Provisions*, articles from Art. 174 to Art. 182, of Law no. 85/2014 [2].

Depending on the type of insolvency procedure that has been triggered, we can classify closing cases in three categories:

a) General cases of closure of the insolvency procedure;
b) Special cases of closure of the judicial reorganization procedure;
c) Special cases of closure of the bankruptcy procedure [3].

CASES OF CLOSURE OF THE INSOLVENCY PROCEDURE

I. General cases of closure of the insolvency procedure:

- The lack/insufficiency of assets in the debtor's property – Art. 174 of Law no. 85/2014;
- Absence of any request for admission of claims – Art. 177 of Law no. 85/2014;
- Payment of claims during the observation period – Art. 178 of Law no. 85/2014.

1. The lack/insufficiency of property in the debtor's property – Art. 174 of Law no. 85/2014 (the correspondent of Art. 131 of Law no. 85/2006)

According to **Art. 131 par. (1) of Law no. 85/2006**: "*At any stage of the procedure provided by this law, if it is found that there are no assets in the debtor's assets or that they are insufficient to cover administrative expenses and no creditor offers to advance the corresponding amounts, the syndic judge will issue a closure sentence Of the procedure, which also orders the erasure of the debtor from the register in which he is registered."*

The closure of the proceeding on this ground could be ordered in two stages of the proceedings: the observation period or the bankruptcy period, and it regards two situations:

- A first situation where the debtor's assets did not contain any goods or sums of money, or
- A second situation where the debtor's assets were so small that it was not enough to cover the costs of administering the procedure.

In both cases, the reason was the same: the procedure could not continue to be useful on the liquidation fund, because there was no probability of extinguishing the liability.

According to **Art. 174 par. (1) of Law no. 85/2014:** "*At any stage of the procedure provided by this law, if it is found that there are no assets in the debtor's assets or that they are insufficient to cover administrative expenses and no creditor offers to advance the corresponding amounts, **the syndic judge will immediately hear the creditors in a meeting,** and in the case of their refusal to advance the necessary sums or if they fail to appear, even if the IPB summoning procedure is fulfilled, it will issue a closure sentence of the proceedings by which the debtor is also removed from the register in which he is registered".*

Thus, at any stage of the procedure, if it is found that there are no assets in the debtor's property or that they are insufficient to cover administrative expenses and no creditor offers to advance the corresponding amounts, the syndic judge is obliged to to have an urgent hearing with the creditors.

În the situation in which the creditors refuse to advance the necessary sums or if they do not appear at the meeting, although the IPB summoning procedure has been completed, the court will issue an order closing the insolvency proceedings, which will also dispose of the debtor from the register in which he is enrolled.

The case regulated by Art. 174 concerns only the observation period and the bankruptcy procedure. In the case of a debtor who is in judicial reorganization, the procedure will be closed on the basis of the provisions of Art. 175 par. (1) the final sentence, which regulates the closure of the procedure in case of reorganization or bankruptcy. And, in the situation of a debtor who goes bankrupt, at the stage of judicial reorganization, the procedure will be closed under the provisions of Art. 167 of the Law no. 85/2014, entitled *Final Report* [4].

The closure of proceedings on this basis does not need to be preceded by a final dissolution report but must be preceded by a report showing the lack of assets and the refusal of creditors to advance those amounts.

The novelty elements brought by the new regulation:

The novelty of the regulation consists in the fact that the syndic judge, who has been notified by the insolvency practitioner for the closure of the proceedings, is obliged to hear the creditors in a meeting, after summoning them through the Insolvency Proceedings Bulletin on the willingness to advance the necessary sums, Before giving a closure sentence.

Problems encountered in judicial practice:

In the judicial practice, it was noted that, if all the stages stipulated by the law were followed, and the lack of assets in the patrimony of bankruptcy, along with the non-payment of the sums by the creditors, the insolvency proceedings can be closed because the omission of the formulation of the action for the involvement of the patrimonial liability of the management bodies can not determine the rejection of the request for closing the insolvency proceedings as long as those entitled to bring the action did not opt for its promotion (Oradea Court of Appeal com. s., adm. fisc. lit., dec. no. 353/2007 [5]) [6].

A common occurrence in judicial practice relates to the way in which actions are brought to justice after the company that was the subject of insolvency proceedings has been removed. The unanimous view is that all actions as well as appeals must be dismissed on the basis of the exception to the lack of capacity of the debtor company, unless the subject of the dispute was transferred, through the liquidation procedure, to the associates or the shareholders [7].

2. Non-submission of any request for admission of claims – Art. 177 of Law no. 85/2014 (correspondent Art. 134 of Law no. 85/2006)

According to **Art. 134 par. (1) of Law no. 85/2006:** *"(1) In the case of the procedure initiated following the* ***filing of the application by the debtor****, under the conditions of Art. 32, if the syndic judge finds at the expiry of the time limit for the registration of the request for admission of claims* ***that no application has been filed, they shall pronounce a decision closing the procedure and revoking the decision to open the procedure.*** *In the case provided for in par. (1), the closure of the procedure does not produce the effects provided in Art. 137. However, the statutory management of the debtor's assets will have its effects and the rights acquired until the revocation remain untouched*.".

According to **Art. 177 of Law no. 85/2014**: "(1) In the case of the procedure opened ***following the filing of the application by the debtor,*** *under the conditions of Art. 71, if the syndic judge ascertains that* ***no request has been filed within the time limit*** *for the registration of requests for admission of claims, it shall pronounce* ***a decision closing the proceedings***. (2) In the case provided for in par. (1), the closure of the procedure does not produce the effects provided in Art. 176. However, administration operations, legally made on the debtor's property, shall take effect, and the rights acquired until the closure procedure remain untouched".

This case of closure of the insolvency proceedings may occur both **during the observation period, in the general procedure** as well as **in the simplified procedure, but only if the application belongs to the debtor.**

Since in this case there is no actual course of insolvency proceedings, the legislator provided that the closure of the procedure does not produce the effects foreseen in Art. 181, namely the discharging of the individual debtor from his obligations prior to bankruptcy, but subject to the condition that he was not found guilty of fraudulent bankruptcy or of fraudulent payments or transfers, situations in which he will be discharged of obligations only to the extent that they have been paid in the proceedings. In order to ensure the security of the civil legal relationships, it is provided that the legal administration of the debtor's assets will have its effects, and the rights acquired until the closure of the procedure remain untouched.

The novelty elements brought by the new regulation:

Text is retrieved without modification. It should be noted that the text stipulates that the closure of the procedure does not produce the effects provided in Art. 176. We believe that **the closure of the procedure does not have the effect of the erasure the debtor from the register in which it is registered, nor of assigning their assets to the associates.** The debtor will be reintegrated into commercial life as if the procedure was not open, with the observation that the legally-routine administration of the debtor's assets will have its effects, and the rights acquired until the closure of the procedure remain untouched.

3. Payment of claims during the observation period – Art. 178 of the Law no. 85/2014

According to **Art. 178 of the Law no. 85/2014**: *"(1) If all creditors enrolled in the final table of claims receive the sums owed to them during the observation period or quit the trial during the observation period, the syndic judge shall order the closure of the proceedings, without requesting the erasure of the debtor from the register where it is registered".*

Thus, if all the creditors enrolled in the final table of receivables receive the sums due to them during the observation period or give up the trial during this period, the syndic judge will close the insolvency proceedings without ordering the debtor's deletion from the register in which he is registered.

This new case of closure was **introduced by Law no. 85/2014** as a result of the need to regulate the syndic judge to order the closure of the insolvency proceedings, **without the erasure of the debtor**, in those situations in which, either as a result of the efforts of the management bodies or because of the crediting by the associates or as a result of the

negotiations With the creditors, the borrower succeeded in the observation period [I.e. no more than one year after the opening of insolvency proceedings, according to Art. 112 par. (3)], to pay the creditors who participated in the insolvency proceedings the sums with which they were enrolled at the creditor's table, or the creditors who have declared their entitlements renounced the judgment [8].

Basically, this is the second case, alongside the one regulated by par. (1) of Art. 175 of Law no. 85/2014, where the insolvency proceedings are closed without the debtor being withdrawn from the register in which he is registered, **the case provided by Art. 177 being rather a revocation of the opening decision**, although Law no. 85/2014 does not express that point.

In the case provided by Art. 178 it was considered that the purpose of the law was reached, the debts being settled or settled in agreement with the creditors, which is why the insolvency procedure can be closed and the debtor left to continue functioning on the market on which he operates, thus ensuring, the reintegration into commercial life.

The novelty elements brought by the new regulation:

In this article, the legislator introduces a new case closure procedure specific to the procedure under observation. It seems that, in this hypothesis, the debtor was not in a real state of insolvency, but in a momentary insolvency.

Previously, under the old regulation, in this hypothesis, the procedure closed with the argument that the purpose of the procedure, as defined by Art. 2 of Law no. 85/2006: *"The purpose of this law is to establish a collective procedure for covering the debtor's liability in insolvency"*, no longer exists, the liability being fully covered.

II. Special cases of closure of insolvency proceedings:

- The achievement of the reorganization plan – Art. 175 par. (1) of Law no. 85/2014;
- Conversion of the judicial reorganization into bankruptcy – Art. 175 par. (1) the final sentence of Law no. 85/2014.

1. The achievement of the reorganization plan – Art. 175 par. (1) of Law no. 85/2014 [the correspondent of Art. 132 par. (1) of Law no. 85/2006]

According to **Art. 132 par. (1) of Law no. 85/2006:** *"A reorganization procedure through business continuity or a planned liquidation procedure will be closed by judgment following the fulfillment of all the payment obligations assumed in the confirmed plan"*.

According to **Art. 175 par. (1) of Law no. 85/2014:** "*A reorganization procedure through business continuity or a planned liquidation procedure will be closed by judgment on the basis of a rep**ort by the judicial administrator confirming that all the payment obligations assumed under the approved plan have been fulfilled, as well as the payment of current receivables due".***

Thus, a reorganization procedure through the continuation of the activity or the liquidation on a plan will be closed by the syndic judge by sentence, on the basis of a report by the judicial administrator confirming the fulfillment of all the obligations assumed under the confirmed plan, as well as the payment of the current receivables due.

The novelty elements brought by the new regulation:

The novelty of the regulation in Art. 175 par. (1) of Law no. 85/144, unlike the old regulation, consists in the fact that, a**t the basis of the request to close the reorganization procedure, there must be a mandatory a report by the judicial administrator**, which establishes the fulfillment of all the payment obligations assumed under the confirmed plan, as well as the payment of the current receivables that have become due.

The law does not stipulate and who has the capacity to propose the closure of the judicial reorganization procedure, we consider that this quality is both the debtor by the special administrator, the proposer of the reorganization plan or the judicial administrator. However, mandatory the filing of the report by the judicial administrator is mandatory.

2. The conversion of the judicial reorganization procedure into bankruptcy – Art. 175 par. (1) the final sentence of Law no. 85/2014 [the correspondent of Art. 132 par. (1) the final sentence of Law no. 85/2006]

According **to Art. 132 par. (1) the final sentence of Law no. 85/2006:** *"If a procedure starts as a reorganization but then becomes a bankruptcy, it will be closed in accordance with the provisions of par. (2)".*

According **to Art. 175 par. (1) the final sentence of Law no. 85/2014**: "*If a procedure begins as a reorganization but then becomes a bankruptcy, it will be closed under the provisions of Art. 167".*

As a result, it is necessary for the court to approve the final liquidation report, followed by the distribution to the creditors of all the funds or assets of the debtor's assets, as well as the recording of any unclaimed amounts to a bank unit.

According to opinions expressed in doctrine [9], the reference made to Art. 167 is erroneous, as this text does not regulate a case of closing the procedure but only the conditions for drawing up, challenging and endorsing the final report drawn up by the judicial liquidator. Thus, the referral should have been made to the provisions of par. (2) of Art. 175 of Law no. 85/2014.

III. The special cases of closure of the bankruptcy proceedings:

- Liquidation of all assets and distribution of funds – Art. 175 par. (2) of Law no. 85/2014;
- Payment with the debtors' assets – Art. 175 par. (3) of the Law no. 85/2014;
- Payment to creditors before the liquidation of all the debtor's assets – Art. 176 of Law no. 85/2014.

1. The liquidation of all goods and the distribution of funds – Art. 175 par. (2) of Law no. 85/2014 [the correspondent of Art. 132 par. (2) the final sentence of Law no. 85/2006]

According to **Art. 132 par. (2) of Law no. 85/2006:** *"A bankruptcy procedure will be closed when the syndic judge approves the final report when all the funds or assets of the debtor's assets have been distributed and the unclaimed funds have been deposited with*

the bank. At the request of the liquidator, the syndic judge shall pronounce a sentence, closing the procedure, and in the case of the legal persons also ordering their erasure ".

According to **Art. 175 par. (2) of Law no. 85/2014:** "*A bankruptcy procedure will be closed when the syndic judge approves the final report when all the funds or assets of the debtor's assets have been distributed and the unclaimed funds have been deposited with the bank."*

Thus, according to this latest law, a bankruptcy procedure will be closed when the syndic judge approves the final report when all the funds or assets of the debtor's assets have been distributed and the unclaimed funds have been deposited with the bank.

2. Payment with the debtor's assets – Art. 175 par. (3) of the Law no. 85/2014

According to **Art. 175 par. (3) of the Law no. 85/2014:** *"The assets may be distributed to creditors on account of their claims against the debtor's property following a creditor's proposal, with the obligation to pay all the sums owed to the creditors on previous priority orders, as well as those on the same order of priority, according to the provisions of Art. 159 and Art. 161, in the situation where the asset would have been sold to a third party. If there are more proposals, the asset will be distributed to the highest bidder, in which case the creditor's claim will fall from the due price. In all cases, the price of the assets distributed to creditors in the accounts of receivables shall not be less than the value determined in the evaluation report".*

Par. (3) of Art. 175 regulates **a new case of closure of the bankruptcy proceeding, by paying the assets of the bankrupt individual in the account of debts.**

The assets of the debtor's assets may be distributed to creditors on account of the claims they hold, following a creditor's proposal, with the obligation to pay all the sums owed to the creditors on previous priority orders and to those on the same order of priority, in the situation where the good was sold to a third party.

If there are several proposals, the asset will be distributed to the highest bidder, in which case the creditor's claim will fall from the due price.

However, in all cases, the price of the assets distributed to creditors in the accounts of receivables shall not be less than the value established in the evaluation report.

3. The payment of creditors before the liquidation of all the assets of the debtor – Art. 176 of Law no. 85/2014 [the correspondent of Art. 133 of Law no. 85/2006]

According to **Art. 133 of Law no. 85/2006**: *"If the claims were fully covered by the distributions made, the syndic judge shall pronounce a sentence closing the bankruptcy procedure and the erasure the debtor from the register in which he is registered:*

a) Even before the assets of the debtor's property have been wholly liquidated, if all the associates of the legal entity or the individual, as the case may be, request this within 30 days of the notification of the liquidator to the special administrator, the goods passing in the individual property of the associates/shareholders, corresponding to the shares of the share capital;

b) In all other cases, the procedure is closed only after the complete liquidation of the asset, any residual amounts of the last distribution being deposited in an account at the disposal of the associates or the natural person, as the case may be".

According to Art. 176 of Law no. 85/2014: *"If the claims were fully covered by the distributions made, the syndic judge shall pronounce a sentence closing the bankruptcy procedure and erasing the debtor from the registry in which it is registered:*

a) Even before the assets of the debtor's assets have been wholly liquidated, if all the associates of the legal entity or the individual, as the case may be, request this within 30 days of the notification of the liquidator to the special administrator, and the goods passing into the co-ownership of associates/shareholders, corresponding to the shares of the share capital;

b) In all other cases, the procedure closes only after the complete liquidation of the assets, any residual amounts of the last distribution being deposited in an account at the disposal of the associates or the natural person, as the case may be;

c) If after covering all claims, the closure of the procedure and the removal of the debtor from the registers in which it was registered, assets in the patrimony that were not known during the insolvency proceedings were identified, they would rightly enter the patrimony of the associates. "

A **special case of closing the bankruptcy procedure** is regulated when the liability has been extinguished before the liquidation of all the assets of the debtor's property, with the effect of the debtor's erasure from the register in which he is registered.

As novelty, it is provided that if, after covering all the claims, the closure of the procedure and the erasure of the debtor from the register in which it was registered, assets in the patrimony that were not known during the insolvency proceedings were identified, they would rightfully belong to the patrimony of the associates.

The novelty elements brought by the new regulation:

A novelty element, provided by Art. 176 of Law no. 85/2014, as compared to the provisions contained in Art. 133 of Law no. 85/2006, refers to the provision that if, after covering all claims, the closure of the proceedings and the erasure of the debtor from the register in which it was registered, assets were identified in the patrimony that were not known during the procedure insolvency, they will enter lawfully in the patrimony of the associates.

4. Conclusions

The closure of the insolvency procedure has the consequence in most cases of erasing the debtor from the Registry of Commerce in which he was enrolled, but there are also some exceptions, for example when no applications for enrollment have been made, the claims have been fully paid or requests for waiving the right claimed during the observation period were made. Another situation where the closing of the procedure does not have the effect of erasing the debtor occurs when the reorganization plan is implemented and the debtor can resume activity, being reintegrated into the business environment.

Regarding the latter, judicial practice has shown that the number of files in which the reorganization plan has been successfully completed is infinitely lower than the number of cases in which the proceedings were closed as a result of the debtor's bankruptcy.

In other words, the closure of the proceedings is an important step in insolvency proceedings, marking either the success of a reorganization or the completion of a bankruptcy procedure.

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Types of Offshore Companies

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Abstract

The offshore company type will always depend on the needs of the person who establishes it – may his purpose be the concealing of his true identity, or the concealing of funds or even tax avoidance or tax planning, a company structure will always be provided for it to serve the needs of its ultimate beneficiary owner. The present regulations of tax havens and offshore financial centres evolve in the same time as the regulations of the wealthy states and adapt so they can provide physical and moral persons the possibility to guard their wealth fare intact. The main offshore structures that have endured the passing of time and regulatory changes are the holding company, the trust, the base companies, the sham companies, the captive insurance companies or the shell companies.

Keywords: *offshore commercial companies, trusts, holding companies, base companies.*

Introduction

Offshore commercial companies have represented throughout time a possibility for wealthy people to hide parts of their fortunes or to avoid payment of substantial taxes in their country of residence. Also, they were used in committing crimes (such as money laundering, tax evasion) or to hide the benefits that resulted from such infractions (drugs or arms trafficking).

Offshore companies have always been located either in offshore financial centres or in tax havens, but the company's' structures have always varied according to the needs of the solicitants, the legislation of the country of residence of the solicitant (we shall establish differences between the common law system and the continental law system) and the purpose pursued by the latter – if the establishment is about concealing the real identity of the ultimate beneficiary owner or if it is about tax avoidance.

In the following study we shall try and define some of the most commonly used types of offshore financial companies and try and study their particularities.

1. Types of structures that can be used to establish offshore companies – sorts of offshore companies

When an offshore company is being set up, it needs a legal basis, a sort of company from which it can start; of course this will not determine or alter the purpose of the offshore, but this concerns the company's structure on which the offshore, may it be a holding or a captive insurance company is established.

Thus, the same as in the Romanian legislation, the main types of companies used in the establishment of offshore structures are Private Company Limited – LTD, in British law system or Limited Liability Company – LLC in the US system (Company with Limited Liability – SRL in the Romanian system), the Corporations in American system or Public Limited Companies – PLC in British law system (Shares Company in Romanian system) and the foundations which administrate funds or trusts. In the European law system, certain countries even if they do not regulate the trusts in the common-law system, allow fiducias or allow the establishment of similar structures by the means of a persons company (such as the Collective Name Company in the Romanian law system). [1]

The LLCs are, similar to the Romanian regulation, associations of physical or moral persons in which the partners are considered associates and have their liability limited to their shares in the registered capital; the differences are established when it comes to tax paying, where the main principle that stands at the base of this type of company is that the companies profit is considered by the authorities a personal revenue and as a consequence the company doesn't owe taxes, but the persons who own it do. [2] For the LLC to owe as little tax as possible, in most cases, it is recommended that it be established and have its head office in a tax haven where the tax fares are low or even 0; also, the vast majority of tax havens impose two conditions upon the constitutors: the physical persons that are associated must not have the nationality of the state where the offshore is established and that the activities of economical substance will not deploy on the territory of the state where the LLC has its head offices. Prior to establishing such structures, it is of course recommended to the constitutors to verify the existence of a treaty to avoid double taxation in between the state where the LLC has its head offices and the state of residence of the constitutor.

A lot of European states have tried to abridge this "migration" towards states with a more relaxed fiscal legislation, imposing even in the case of existing bilateral treaties to avoid double taxation, a progressive taxation, that develops into a first taxation in the state where the income is generated, and then it is taxed in the country of residence of the beneficiary. For instance, in Belgium, a Belgian citizen that has an income of 40.000 euros in Malta, shall primarily pay there 35% tax on the total of income (this without considering the possibility of the non resident to have a Maltese citizenship, without residing in Malta), which will bring to the latter roughly 26.000 euros. When declaring such income in Belgium, where the taxation for this income is 50%, he shall be taxed with another 15%, even if there is a treaty to avoid double taxation in place in between these two states.

LTDs are similar with the American LLCs and the Romanian SRLs, their shares belonging to a relatively small number of persons or even to NGOs. The associates' liability shall be limited to their contribution to the registered capital. We are mentioning that this company form is among the most commonly used in the UK. [3]

Regarding Shares Companies, these are called Corporations or PLCs and require a minimum registered capital that may very depending on the legislation, and shares may or may not be listed in the stock exchange. Similar to Romanian law, this type of company offers the advantage to transfer shares outside the company without the approval of all of the associates.

A trust company is a legal entity that acts as a fiduciary, agent or trustee (a trusted third part, administrator) on behalf of a person or business entity for the purpose of administration, management and the eventual transfer of assets to a beneficial party. The entity acts as a custodian for trusts, estates, custodial arrangements, asset management, stock transfer,

beneficial ownership registration and other related arrangements. [4] In the classic structure of a trust, the latter will be created by a Settlor, whom will transfer the proprieties he wishes in the hands of a Trustee, in order for him to guard the said proprieties for a Beneficiary. Although the trust can be created by a simple verbal agreement, it is recommended that it be drafted in writing. Overtime trusts have evolved attaining a real company structure that allows alongside the management of money and proprieties a large fiscal protection and even a judiciary protection against creditors – when establishing a trust, the property transfers from the settlors patrimony in the trust's patrimony, so the creditors of the first can not pursue him. We emphasize that the settlor may be a physical or a moral person.

Trusts show numerous advantages, like: [5]

(i) the concealing of the parties – generally, there are specialized law firms, or even banks that administer such structures, but their identity can be disclosed, but the identity of the settlor and the beneficiary remain unknown to the public since their registration;

(ii) avoiding taxes imposed upon the protected assets – each legislation that allows the establishment of trusts has a different policy, and their taxation depends on the purpose of the trust (pension trust, children's trust, trust for a non-profit organization), but the taxation is more advantageous than if the assets were to remain in the patrimony of the settlor;

(iii) they are an alternative to prenuptial contracts;

(iv) avoidance of taxes upon inheritance and the distribution of assets according to the legal procedure, without a testament – taxes upon inheritance are generally elevated in Europe and the USA, but such a structure solves these problems because the propriety was already transferred in the moment of the establishment of the trust.

This form of bequeath by will is very commonly used in the common law system and it was transposed in the continental law system by the fiduciary institution that, unfortunately, is still very differently regulated in the European continental system. The fiducia does not show the same fiscal advantages and nor the same juridical protection of the patrimony as does the trust.

2. The most wide spread types of offshore companies

The offshore company types have adapted through time in order to offer the investors anonymity and the possibilities to fiscally optimize in the same time.

Nicolae Hoanta, in his work "Fiscal Evasion" [6], enumerates three principal types of offshore commercial corporate societies: holdings, base companies and sham companies, which we will be described below. Withholding the pretention of offering an exhaustive view of the different types of offshore companies, we shall try to also define captive insurance companies and shell companies, regarding how we consider them relevant in the key structure of a large corporate company.

All these types of companies can be owned either by individuals or companies, either trusts or non-profit companies. Regardless of who they are owned by, they mostly keep in the world legislation, same characteristics.

The holding company type is the company type that can own participation titles in other companies (usually more than half of the specific company) without actually exercising economic activity. The notion of control is often used, and it differs from one legislation to

another – commonly this type of company is also called "the mother company" yet without having the same juridical connotations. [7] The holdings manage the real estate portfolios for the group company, get participants, procure the financing sources through the launch of international loans, receives royalties, fees and commissions. [8]

An important asset of the holdings is that of being easily dissolved and moved to a different jurisdiction in the event of the tightening of fiscal or legal conditions, in general and in the initial state. The grand majority of authors recommend the establishment of such a company in tax havens, although we consider that the most important aspects in these cases are: the existence of a favorable fiscal legislation and the existence of certain treaties in order to avoid the double taxation between the state where the holding is and the states in which the companies owned by the holdings are.

There are three main ways in which a holding can be established: through the contribution of shares, the acquisition of social shares or corporate division activities. The establishment through the contribution of shares is relatively simple and it represents the juridical method through which a person brings their contribution of social shares which they own in other different companies, thus establishing the holding. Regarding the purchase of social shares, this is done through the acquisition of newly created holding of shares of the companies that are already existent. The last method targets the possibility in which a bigger company divides its scope of activity, creating a bigger number of smaller companies to which it will own their social securities. [9]

The holdings will receive and eventually keep all the profits obtained by the companies that are part of the group. Once established a sufficiently big capital of the mother company, it can grant the companies owned non-refundable or refundable loans without interest, can grant them more advantageous financing compared to the banks or, can rent them different equipment necessary for their functioning, can allow them the use of invention patents or of franchises in exchange for royalties, which will appear as an expense in the subsidiary company, although they will be significantly less taxable in the state where the holding has its headquarters.

In other words, the holdings will own and manage other companies, as foreign investors, or it could own and administrate properties, copyrights, brands, patents or inventions, however they will not be exercising economic activities which produce goods or services.

The base companies are the companies situated in the countries with low taxes or no taxes used for the protection of the benefits or used to reduce taxes payable by the contributors in the country of origin. The base companies perform activities in the name of the companies from the same group which are registered in countries where the taxes are removed (for example management services) or are used to provide a certain profit, like the dividends, interests, copyrights or fees. [10] In other words, the base companies don't perform economic activities of supplying goods or services, however they act as "treasurers" of the group within which they are part of.

Screen companies and sham companies are those fictitious companies, registered in tax havens, without actually performing any economic activity. They do not have a physical headquarter and they resume to simply using a mail box, having the role of attracting capital fluxes from other jurisdictions and to complicate the mission of the fiscal authorities in the inspections they run within the company groups. [11]

The captive insurance companies are generally defined as companies fully owned by the persons which they insure – it offers risk reduction for the mother company or for a

tied group of companies. The captive insurance companies are generally formed if the mother company can't find a third company to ensure a certain part of their business, or if the mother company establishes that the prime they pay the captive insurance company can create fiscal advantages or if the captive insurance company offers a better coverage for the risks of the mother company. [12] To better understand how the captive insurance company works we will try and give an example: A company in Romania has an annual profit of 50.000 euros, to which it has to pay taxes and profit taxes in Romania, or to contract an insurance prime in our country, which can be higher in accordance to the area of activity of the company. The company in Romania decides to insure itself at a company situated in a tax haven for a bigger or equal value with the profit made, which is 50.000 euros. The company situated in the tax havens collects an insurance prime, and further on it makes insurance for the company in Romania, at an insurance company in Romania, for a considerable smaller amount. This scheme allows on one side the company from Romania to diminish their profits (since the insurance prime will show up in the expenses) and on the other side it allows to keep the difference between the insurance policy initially payed and the one payed to the reinsurer, in the accounts of the offshore company, which are accessible at any moment.

The shell company type is a company that doesn't perform any economic activity and doesn't own any significant assets. This type of company is not necessary illegal, although it is mainly used unlawfully, for example to hide the shareholders from the authorities or the public. Legal grounds for the establishment of such a company include the financing of a start-up, using the company as a vehicle to raise funds, to takeover another company in a hostile manner or to address the public regarding a subscription. Often this type of company is listed on an international stock exchange, even so the control of the company in most cases remains in the hands of the same person. [13]

The great advantage of this type of company is that which the stakeholders remain unknown, anonymous – at the establishment of the company, the registering formalities are minimal, with the possibility of naming "nominal" shareholders, or "nominal" directors which have never been in contact with the real owners, although act in conformity with the instructions received fromthe latter [14]. Currently, this type of company is offered only in certain tax havens, and their number is decreasing. From the economic crisis beginning in 2008, the countries offered the repatriation of the funds and fortunes, even offering the possibility to those repatriating the money of not investigating their provenience and to tax them by a fixed percentage. The pressure from the fiscal authorities of the states has increased when one company situated in a fiscal haven performs operations in the countries mentioned.

Moreover, the major economic powers have forced multiple states considered tax havens to sign bilateral treaties for revealing the identity of the ultimate beneficiary of these types of companies. Culminating with the leaking of information from banks and law firms (eg. Panama case) we consider that these types of companies will be in the shortest time possible reinvented.

3. Conclusions

As seen above, there are numerous types of offshore companies that suit the needs and demands of a large variety of investors. Generally, when establishing a company structure,

it will be integrated with another that shall respond to other needs (for instance, we could associate a *base company* to a *holding*).

The worldwide corporations of the world in the field of Internet or informatics (for instance Google, Microsoft, Apple or even Facebook) act throughout offshore companies in all counties in which they undertake business in order to legally avoid taxes. This shouldn't make us think that only the IT companies could put in place such financial schemes – fast food restaurants, such as KFC or McDonalds operate throughout the world only using such structures, that they combine differently in order to obtain a better fiscal optimization.

Thus, we would like to draw attention to the fact that offshores can be used for legal tax avoidance in all fields of activity, but we cannot apply the same financial schemes for different fields.

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About the ascertainment decision of the employer

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Abstract

Labour Law offers substance to the legal researcher through the multitude of unilateral acts the employer can take in the exercise of his authority as established by the law. To ensure the employee is protected from abuse, a strict, rigid law intervenes. Most of the times, decisions producing legal effects are analyzed. Labour Law, directly or indirectly, talks about a series of decisions that ascertain the appearance of effects on the working relationships, effects that occur naturally. What is the purpose of such decisions? Are they welcomed? Are they necessary in the realm of labour law, or are they good management tools? This analyses does not propose to answer these questions, but to raise other ones.

Keywords: *individual employment contract, employment relationships, legal effects, termination of the right.*

1. The decisional act of the employer. Dispositions with a decisional character and dispositions with an ascertainment character

Starting with the dispositions present in Art. 10 Labour Code, the ones that define the individual labour agreement, we can observe the specificity of the contract, respectively the atypical authority the employer has over the employee.

Such a authority is crystallized as well in the decisional will that the employer can exercise over the employee, which after signing the individual labour agreement, becomes subordinate to the employer, and as a consequence, is obliged to submit to his decisions within the confines of the law. A simple analysis of the Labour Code leads to the idea that a employer can emit dispositions through which he/she can make decisions regarding the drafting, execution, modification, suspension or termination of the individual labour agreement, as well as dispositions through which it is ascertained that situations have arisen which lead to the coming into force, execution, modification, suspension or termination of a individual labour agreement.

As such, in the first category we need to look out for: the decisions emitted for the suspension of the individual labour agreement determined by Art. 52 Labour Code, or the decision to initiate disciplinary sanctions on an employee, enshrined in Art. 248 Labour Code. In the same category we can find any employment dismissal decisions, since Art. 58 Labour Code defines employee dismissal as being the termination of the individual labour agreement from the employers initiative, **this being disposed by the employer,** for reasons

related to the employee (Art. 61 Labour Code) or reasons not related to the employee (Art. 65 Labour Code). In both situations, it is essential to remember that the decisional act, which produces legal effects, comes from the employer.

In the second category, the will of the employer does not produce legal effects toward the employment relationship, but, possibly, is of the nature to impose on some of the administrative, operational, issues.

2. Contesting the legal modifications of the individual labour agreement

In the category of decisions in which the employer notices the intervention of certain situations that can create legal effects to the work relationship, we can analyze decisions regarding the legal modifications of the individual labour agreement [1]. For example, Government Decisions (GD) no. 1/2017 [2], raised the national minimum base wage. In these conditions, should an employee have a base salary lower than what is established in Art. 1 GD no. 1/2017, then the employer must automatically raise his wage to at least the minimum prescribed by law.

In such a situation, a modification of the individual labor agreement occurs, but this modification is imposed by the law. Even though there is no express regulation in the Labour Code regarding legal modifications to the individual labour agreement, such a modification exists and works. Also, Art. 17 par. (5) Labour Code regulate the necessity to establish an addendum to the individual work agreement, with the exception of the situations when the modifications are required by law. Since Art. 163 par. (2) and (3) Labour Code expressly impose on the employer to guarantee his own employees the minimum gross national salary, regardless of the will of the employer, the employee having the right to that salary even without an addendum to his individual labour agreement, since this situation imposes a legal modification to his individual labour agreement. In consequence, the employer shall emit a decision by which he will find the intervention of such a legal modification to the individual labour agreement, working towards the required modification to implement the legal modification required. It is true that the effects of the salary increase coming from GD no. 1/2017 will be felt by the employee, but these were determined by the unilateral decision of the employer, but by the law.

How will the employer implement the legal modifications of the base salary for those employees affected by GD no. 1/2017? By a decision by which he will find the intervention of such a legal modification to the individual labour agreement, as in finding that the current salary is below the legal limit. In the contents of the decision which finds this aspect. the employer shall explain the concrete method to implement the solution imposed by law. Such a decision is not individual. The employees can be subsequently individually notified regarding the fact that their salaries were legally modified, this being determined by GD no. 1/2017, bringing their base gross salary to at least 1.450 Lei. There is no need for a decisional act, the notification being sufficient.

3. The ascertainment decision to terminate a individual labour agreement

The same solution comes also in the case of the individual labour agreement being terminated for a reason espoused in Art. 56 Labour Code. In such a hypothesis, the situation

itself, as prescribed by law, is the reason for the termination of the contract, not the will of the parties. Even so, Art. 56 par. (2) Labour Code clearly establishes that "*For the situations provided at par. (1) letters c)-j) the finding of a situation which leads to the legal automatic termination of the individual labour agreement must be done in writing in a formal document labeled "decision" in maximum 5 working days from the moment it occurred, and communicated to the employees affected in maximum 5 working days after the decision was taken."* So, the law makes an express reference to the ascertainment of the reason for the legal termination of the individual work agreement. Furthermore, the law establishes an obligation for the employer by requiring him/her to communicate in maximum 5 working days the decision by which he ascertains the legal termination of the individual labour agreement to the affected employee. Also, the lawmaker makes reference to 2 deadlines, one by which the employer is obliged to ascertain the intervention of a situation that leads to the legal termination of the individual labour agreement and one by which he must communicate what he ascertained to his affected employee.

The text from Art. 56 par. (2) Labour Code appears to be one of the more interpretable ones from the Labour Code.

As such. in its preamble, Art. 56 establishes that: *"The individual labour agreement in existence is legally terminated…"* further on the lawmaker mentioning each case for which the individual labour agreement is legally terminated. Being a legal termination, the ending of work relationships occurs automatically without there being the need for the will of one of the parties. With all this, the lawmaker felt the need of an intervention of the type found in the contents of Art. 56 par. (2) Labour Code [3]. Can it be admitted that an individual labour agreement established for a determined amount of time would be terminated after the determined time elapsed [taken into account in Art. 56 par. (1) letter i) Labour Code]? The answer is no. With all this, the employer is obliged to ascertain in maximum 5 working days from the moment the situation occurred that the individual labour agreement has been terminated (When? – in the past), such ascertainment taking the form of a written decision. This time, there is no need for procedural dispositions to implement such an ascertainment, since the termination of the contract already happened in the past. More so, the employer has 5 days to communicate to his employee that his individual labour agreement has been terminated. We ask a common sense question: what will the employee do in these 10 working days, from the moment his individual labour agreement has been legally terminated until the moment that his employer communicates to him that the employer has ascertained the termination of the individual labour agreement? If the employee does not go to work from the moment his individual labour agreement has been legally terminated, there is no problem. But what happens of the employee does come to work, giving his labour to the benefit of the employer, without the employer stopping him? The solutions are diverse, depending on the reason for the legal termination of the individual labour agreement.

If that individual labour agreement has finished because the employee had the standard conditions to qualify for pension [Art. 56 par. (1) letter c) Labour Code], can we admit that the individual labour agreement has been prolonged until the effective moment the employer stopped providing his work? At first glance such a solution would be allowed, considering that once the standard requirements regarding age and contribution are reached, they stay accomplished for each day. Also, in social practice, there is almost a tradition

for the rules outlined in Art. 56 par. (1) letter c) Labour Code to be applied long after the employer meets the conditions [4].

Also baffling is the solution the lawmaker reaches when he analyses the case for legal termination regulated by Art. 56 par. (1) letter d) Labour Code, when the individual labour contract faces nullity. Once such nullity is ascertained, if the individual labour agreement is continued, working relations would continue based off of a null contract, which is impossible. Scholars affirm that:" *If the employer goes over the term limits set forth in Art. 56 par. (2), then work is performed (in the cases where it is possible), the work being paid for (from the moment the reason for a legal termination of contract occurs until the moment the employee is notified) based off of a null individual labour agreement* [5]. Therefore, the author claims, the existence of a work relationship subsequent to the legal termination of an individual labour contract finds its source in a null individual labour agreement. Such a solution probably finds its origin in the specifics of nullity in labour law, as is regulated by Art. 57 Labour Code [6]. Nullity works only in the future, the employee having all his rights, even when he performs his work based off of a null or annullable individual labour agreement. When did such a contract come to be? As an example, we look at Art. 56 letter d) Labour Code which states that if the dissolution of the individual labour agreement occurs based off of a cause that could attract the annulment of the individual labour agreement; we can talk about the continuation of that contract. However, if the contract is ascertained as being null, it is inadmissible to continue it after the intervention of the cause which brought it absolute nullity. The principal effect of ascertaining the nullity of a individual labour agreement is the dissolution of said contract. But, if a contract is legally terminated at the moment that nullity is ascertained, how can it continue producing its effects (performance of the work and payment of the salary) for another 10 days? If we admit that the parties perform their duties after the legal termination of the individual labour agreement on the basis of a nullified contract, that means that either the parties admit that the contract did not expire, contradicting the dispositions in Art. 56 par. (1) letter d) Labour Code, either a new individual labour agreement was formed for the 10 days before the nullity was communicated to the employee, based off of a tacit agreement which operates in labour law, a individual labour agreement which does not respect any of the specific requirements.

If we would analyze other causes for legally terminating a individual labour agreement, we would find other such paradoxes.

Therefore, it is undoubtedly, as the law also clearly states, that the individual labour agreement is legally terminated exactly at the moment a reason for the legal termination occurs, not at the moment the decision for of ascertainment is communicated to the employee.

What would represent, from a legal point of view, the period when a person has his individual labour agreement terminated for any reason regulated in Art. 56 par. (1) Labour Code and that person continues to do the work until he is informed by his employer about the legal termination? It's considered that, after the legal termination of the individual labour agreement, the fact that the parties continued to have working obligations to each other would equal to a new period in which the parties have working relationships. But such a rapport has no legal source from the individual labour agreement because the contract has been legally terminated at the moment a reason appears as is regulated by Art. 56

par. (1) Labour Code. Can it be said that a new individual labour agreement was formed, this time for a pre-determined time? Theoretically, no, because after the intervention of Law no. 40/2011 which modified the Labour Code, the individual labour agreement has become a formal contract, its written form being a condition *ad validitatem*. Also, as mentioned above, not only the lack of form would impede us from making a new individual labour agreement for those 10 work days. Can we consider, as is expressed in the specialist literature, that we find ourselves, in all the cases outlined in Art. 56 par. (1) Labour Code, in front of a individual labour agreement struck by nullity?

We believe that the solution should be found by analogy with the hypothesis that an employee has his contract terminated via dismissal, the court of first instance annuls the decision of dismissal, the employer rehires, and subsequently the appeals court cancels the court of first instance's decision and rejects the appeal. In such a situation, the employee provided his labour and received payment for the duration between the court of firsts instance's decision and the appeals court's decision based off of a individual labour agreement which does not exist. His individual labour agreement ceased to exist from the moment of dismissal, as long as the dismissal was revalidated by the appeals court. Even so, the employee offered his labour and should receive a salary! On what basis? Could we talk about and apparent contract? Could the theory of appereances work in Labour Law as well? It is discussable, and worth further analysis in the future!

We would rather consider that the wording in Art. 56 par. (2) Labour Code is a sad one! Most of the times, the employer is vigilant and prevents such situation. However, since weare talking about the ascertainment of a situation, the decision cannot come until the situation commences. According to Art. 56 par. (2) Labour Code, the decision by which the legal termination of the individual labour agreement is ascertained must be done in a written form. And if this condition is not met, what would be the penalty? Possibly and administrative fine for the employer. However, it can't be considered that the lack of a written form for such a decision would produce effects toward the legal termination of the individual labour agreement. The lack of such a decision could not affect the legal termination of a individual labour agreement as long as the situation invoked by the lawmaker in Art. 56 par. (1) intervenes [7].

The fact that the form as well as the presence itself of a decision to ascertain the legal termination of an individual labour agreement has no relevance is present in practice as well. The courts have considered that during the trial of a case which has the object of appealing to a dismissal decision, a reason appears for the legal termination of the individual labour agreement, then rehiring is no longer possible, since the individual labour agreement has been legally terminated at the moment the reason intervened. [8]

4. Can the decision of ascertaining the legal termination of an individual labour agreement be appealed?

Finally, we ask ourselves: if the employer emits the decision by which he ascertains the legal termination of the individual labour agreement, can such a decision be appealed by the employee? We believe so, without a doubt. It's true that formal or procedural aspects would permit the employee to make such an appeal (for example, the fact that the employer did not respect the 5 day working day deadline to emit the ascertainment decision for the

legal termination of the contract, or the 5 working day deadline to communicate the decision). According to legal scholars, these terms are not necessarily obligatory [9]. The fact that the terms were not respected, or within the decision there cannot be found the sacrosanct formulae, specific to the formalism in labour law, cannot lead to the maintaining of a individual labour agreement, since the cause leading to its legal termination happened. The only aspect an employee can appeal to is whether or not a cause regulated by Art. 56 Labour Code has occurred or not.

What is the term by which the legal termination of the individual labour agreement can be appealed? Although Art. 211 letter a) Labour Code makes reference only to unilateral methods of terminating the individual labour agreement, meaning firing or quitting we consider that they are incidental to conventional or legal terminations as well. Therefore the term being 45 days from the moment the employee was informed about the decision. At first glance, it can be seen that there is an active role for the communication of the decision from the employer to the employee: the 45 day term begins when the employer, under the conditions of Art. 56 par. (2), communicates to his employee the decision by which he ascertains the legal termination of the individual labour agreement. However, even here the role of the decision is questionable. A situation of fact, beyond the will of the parties, determines the termination. This situation is known, usually, by both the employer and the employee, without there being necessary a communication (the employee knows when he should be pensioned, or knows when he is jailed). According to Art. 211 letter a) Law no. 62/2011, the appeal in court against the decision of termination can be introduced up to 45 days after the employee has learned of this. But the employee knows that a reason intervened for the legal termination of his contract. The employee cannot make an appeal to a cause that caused his legal termination. What he appeals to is the decision of the employer when such a cause does not intervene, according to the employee. If there is no such reason for legal termination, then the employers decision can be seen as a individual, unilateral one, in which case the analysis of the decision is seen through a different lens (is the unilateral act a legal one?). And, in such a situation, we come back to the dispositions of Art. 211 letter a) Law no. 62/2011, observing the legal term by which such a decision can be contested, as in 45 days. [10]

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[2] *H.G. no. 1/2017 for establishing the minimum gross salary at the national level, published in the Official Monitor no. 987 from 31 December 2016*. According to this, Art. 1: *"Starting from February 1 2017, the minimum guaranteed gross salary at the national level, sum which does not include bonuses or other supplements, is 1.450 Lei per month, for a complete work schedule of an average of 16.600 hours per month, representing 8.735 Lei/hour.*" The way the text is formulated deserves a thorough

analysis, which can lead to multiple interpretations, since, for the first time in our ample history of legislation which establishes a minimum salary at the national level, the value of minimum national wage is expressed without taking supplements into consideration. Why did the lawmaker feel like taking this stance? Was it necessary? What is a minimum salary which does not include supplements or bonuses? Can a base salary include wage increase, or in other words, can an entity be entitled to keep the wage increases already included in the base salary? From our point of view, supported by a comprehensive legal practice, the answer is no: once included, wage increases, they cannot then be extracted and quantified. Practically, once a employee agrees directly or via a representative for his wage increases, apart from the base salary, but which, based on Art. 160 of the Labour Code, composed his gross salary, to be included in the base salary, those wage increases merge into his base wage. As such these wage increases disappear, as well as the right to a wage increase. Such a solution does not lead to a diminishing of the employee's salary rights, removing the possibility of incidence of Art. 38 Labour Code. The employee does not renounce on one of his rights, on the one side because such a right does not have a legal basis, and on the other hand, as long as the inclusion of wage increases presumed the direct or indirect will of the employee, such a will cannot be considered injurious, the employee being interested in creating a larger base for reference, to which other increases and bonuses can be calculated, be them random or permanent.

[3] Some authors make reference to a "procedure to legally terminate the individual labour agreement". See, Monica Gheorghe, *Individual labor law, university course*, Universul Juridic Publishing House, Bucharest 2015, p. 239.

[4] It's no less true that social practice is determined by reality. Therefore, the right to pension belongs to the employee. He is the one who must make the procedures to pension. According to Art. 103 par. (2) Law no. 263/2010 regarding the public pension system: *"The pension request, together with the documentation that prove the legal conditions are met, are submitted to the competent teritorial pension agency situated where the person lives."* So, the conditions must be met before a request of pension be submitted. But, at the moment the conditions for pensioning are met, according to Art. 56 par. (1) letter c) Labour Code, the individual labour agreement becomes legally terminated. This means that from the moment of legal termination until the person receives pension, that person has no income! It is true that pension is given according to Art. 104 par. (3) letter d) Law no. 263/2010: *"from the moment conditions are met for pensioning, if the request was registered within 30 days from that date",* but this does not eliminate the fact that a person must wait 45 days for a response to his request for pensioning, benefiting retroactively from payment, but only after a favorable decision is given. The problem stems from unconstitutional dispositions, from our point of view, regulated in Art. 56 par. (1) letter c) Labour Code which infringes on a person's right to work. The right to pension is a right not an obligation. On the other hand, the employee did not lose his capacity to work at a certain age, as would be in the case for medical pensions. Even so, reaching a certain age leads to the legal termination of a individual labour agreement according to Art. 56 par. (1) letter c) Labour Code. We appreciated the solution given by the Romanian lawmakers for such

a hypothesis in the period in which the employee reaches the standard pensioning age, the employer being allowed to fire the employee for reasons pertaining to the employee's person, regulated by Art. 61 letter e) Labour Code, the employer having the right to fire with no formalities the employer that did not understand to exercise his right to pension, although such a right became active.

[5] Ion Traian Ştefănescu, *Theoretical and Practical Treatise of Labor Law*, ed. III rev. and add., Universul Juridic Publishing House, Bucharest 2014, p. 423.

[6] Monica Gheorghe, *in the cited work*, p. 240.

[7] Scholars note that: "Communication in cause signifies not only the ascertainment of legal termination of the individual labour agreement as seen in Art. 56 letters c)-j), but also the refusal of the employer to continue work relationships (in the cases where possible)". (I.T. Ştefănescu, *in the cited work*, p. 423). It is obvious that the employer would no longer want to continue the working relationship since he emits the communication ascertaining the legal termination of the contract. But as long as we talk about legal termination, which occurs automatically, is it up to the employer to decide if he still wants to continue working relations with the employer? Normally, no, the contract ends regardless of the opinion, will or interests of any of the parties. We could only talk about extending the individual labour agreement which was done for a limited amount of time. We consider that even here, the decision of ascertaining the legal termination of the individual labour agreement cannot equal a refusal to prolong the contract past its due. Prolonging the individual labour agreement is legally possible [Art. 82 par. (3) Labour Code]. But for this to be possible, the individual labour agreement done for a limited time must exist. But in our case, first come the legal termination of the individual labour agreement, subsequently coming the decision by which the employer ascertains this. At the moment of the decision of the employer, prolonging the contract would be impossible, since it previously ceased to exist.

[8] In one case, the appellant which did not reach the legal pensioning age of 65 benefited from the rights to pension for reaching the legal age by lowering the required age by 4 years, because of the work he did in jobs from category I and II, conforming with Art. 56 par. (1) letter c) Labour Code which states that the individual labour agreement is legally terminated the moment the decision to pension is communicated in cases where the standard pension age is reduced." (C.Ap. Constanța s. I civ., dec. no. 97 from 18 March 2014).

[9] Ion Traian Ştefănescu, *in the cited work,* p. 423

[10] Bucharest Court, Civil sentence no. 675/01.02.2017.

Teleworking – A Variety of the Work at Home Contract

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Abstract

The physical movement of employees in order to perform specific activities under an individual employment contract is no longer necessary in the sense of new trends.

The development of new types of employment contracts allow work to be carried out remotely in specific coordinates of what is called teleworking or telework. Teleworking is a form of organizing and carrying out the work using information technologies under an employment contract, where the work could be carried out regularly and outside of premises of the employer, a variety of this type of work being the work home analyzed in this paper.

Work at home is a flexible form of work which has gained increasingly more notoriety and to which the specific legal framework was adapted accordingly.

Information technology enables teleworking using telecommunications, thus achieving a transfer of work to the worker/employee. Working from home is that work performed by a person at his/her home or in another place of his/her choosing, subject to remuneration from the employer in order to achieve a good or a service, given that the economic independence and autonomy owned by the one working at home is not reaching the threshold of an independent worker, as he/she is called in the national legislation.

Keywords: *work at home, teleworking, information technology, remote work, telework.*

1. Introduction

ILO Convention no. 177/1996 on the work at home [1] is the original norm in the field internationally which offers in the wording of Art. 1 letter a) the definition of the work at home. It follows from the definition that it is a work performed under an employment contract and not independently.

ILO Convention no. 177/1996 on the work at home [1] although it has not been ratified by Romania includes provisions developed by the International Labour Organization through Recommendation no. 184/1996 on work at home [2].

Commission's Recommendation of May 27, 1998 on the ratification of the Convention no. 177/1996 [3] is the one that promoted the Convention within the Community.

All these acts have supported the subject of ILO Convention as being that of promoting a balance between labor market flexibility and the safety of workers, aiming to promote

the collaboration of Member States of the European Union on social level, focusing on the right to employment and working conditions. [4]

Tehnolgical, scientific and informational development as well as the globalization trend have paved the emergence of a flexible and actual variety of work performance, the category of which includes the work at home – variety of teleworking [5]

Labour Code [6] Government Decision no. 679/2003 on conditions for holding the attestation and attestation procedures foster family status [7], and Law no. 448/2006 on the Protection and Promotion of the Rights of Persons with Disabilities [8] are regulations in effect in Romania regarding the employment contract at home.

Under the Labour Code, the foundation that allows work to be performed at home is the agreement of the Parties. The special laws abovementioned in a contrary manner include the legislator's will on the provision of such work. [9]

The manner of performing the work at home, though it was not expressly regulated prior to the occurrence of the acts mentioned above, the possibility of its provision result from the principle of free labor.

People who work on the basis of an individual employment contract at home benefit from the quality of employee related rights only if the volume of production achieved is equal to that established for the employees who work at the premises of the employer.

The employee who works from home, in the sense of Art. 105 par. (1) of the Labour Code [6] is the one who meets at his/her residence, the tasks specific to the provision he/she holds under the individual employment contract. Such a definition was taken over by the doctrine, the laws in force in Romania containing no definitions of the conract for work at home.

2. Work at Home in the sense of the Labour Code

Both before the start of the work relation and during its execution, as an effect of contractual freedom, the will of the Parties (employer and employee) for the provision of work at home may materialize by concluding an individual employment contract or an addendum to target this object.

The contract for the work at home may be concluded both on a temporary or permanent basis, full-time or part-time, with unequal schedule or work standard, with or without the existence of a probationary period.

Work at home can even graft on the cooperatist legal relations or temporary employment contracts, characterized by the essential feature of execution of job duties at the domicile of the employee or at the place chosen by him/her different from the employer's place of business.

As a legal natre, the contract for work at home is also an individual employment contract, but of a special type as the employee performs the work for the benefit of the person who has hired him/her or for the benefit of a third party in terms of technological and information flexibility. Of course, due to its specificity the work at home cannot be performed in case of all contracts of employment, such as the apprenticeship contract.

The activities covered by this type of work are either manual activities or activities involving intellectual resources, or mixed overlapping activities. The teleworking contract and the mobile teleworking contract or performed in telecentres can even coexist, the

teleworking at home appearing as a form of evolution of the work at home, being a genre-species relationship.

The work at home contract must include in addition to the terms mandatory and common to any individual contract of employment special and essential clauses. The general rules of the common law on the ability of the Parties, the purpose cause and valid manifestation of consent are applicable by similarity as special regulations are not governed.

The essential element that characterizes a work at home contract in any of its forms aims that the provision of activity takes place mainly in that place. Consequently, the occasional provision of home working is incompatible with the existence of such a contract. Any rule or will of the parties should not prohibit the employee to show up at different times at the employer's premises in order to develop a primary working relationship. The presence from time to time at the employer's premises facilitates the establishment of a direct link with those who collaborate in the exercise of duties. One of the obligations of the employer should be to take steps to prevent the isolation of the employee under a work at home contract.

Work at home is a voluntary choice for those who provide it, as well as a choice accepted by the one in the benefit of which it is effected. The opportunity of transforming a typical individual employment depends only on the conventional character of the contract reviewed. Thus, the refusal of the worker to provide, namely to continue such work at home cannot be a reason to amend the employment contract, or grounds for dismissal. The cancellation of the convention on the work at home, the concrete manner in which it is achieved and in which its effects are produced, must be necessarily established by means of the collective agreement or by the individual applicable one.

The forms of reorganization of an employer legal entity may entail the transfer of an employee from a work at home contract to a regular one and vice versa. The same effects may occur along with the final change of the employer.

A typical common contract can be turned into a work at home contract by simply inserting a clause whereby the Parties agree for the major part of the workload to be held at the residence of the employee and the other at the employer's premises. In the same conditions one may introduce clauses that would solve the problem that from the employer's disposal, its premises to be replaced by the premises of another employer.

The introduction of such clauses may be detained only for the same working time because the exceeding of statutory limits might lead to overlapping of functions.

Expressions of the standard working time should be performed as standards of time, as in the case of online tele-worker or as a standard of time combined with other forms of allowed by law (rules of personal, sphere of responsibilities, scope of production).

Standards of time are essential since for example in the part-time work at home contract overtime cannot be carried out.

The possibility of participation of people from the employee's environment, either within the family or a third party with a certain subjective relation to him/her is not prohibited or excluded. Even in other countries such as France, the possibility of participation of the employee's family or of another third party to achieve labor is not excluded, and this does not represent only an exception. Expressly regulated, this possibility is encountered in countries like Italy, Germany, Spain [10], Belgium, Switzerland, Russia, Ukraine, the relevant provisions stating that the employee can perform the work either alone or aided by the spouse or the children who are dependents or by a third party.

The change of the work place or the one performed at home can represent either a business organizational strategy or a strategy of economic efficiency and can even take the form of a social protection measure. Often such a social protection can be found in case of the category of invalids, people who grow and care for children, people with medical problems, as well as among youth and adults who continue their studies. Within an employer that has a union, the latter could have responsibilities on the defense of social and professional interests of its members, resulting in the possibility of negotiating work at home contracts.

If the domicile element is not suitable in case of the conclusion of an individual employment contract we appreciate that it is presumed that it is a relatively a normal contract of employment. This, however, could be overturned if the Parties prove that all the other special conditions are met by other means that proves mainly the will of the parties. Thus, the research literature stated that a penalty towards transforming automatically the work at home contracts into typical working contract could not occur, given the assumption that from all evidence it would result unequivocally the express wish of the parties that the work be carried out mostly at home.

Thus, we appreciate that the precise individualization of the place of provision is certainly an essential element in the formation of such agreement of will of the contracting parties. The domicile clearly constitutes a basis for performing the work, being considered an identifier of the employee exactly as the premises or the domicile have the same value for the employer which in turn can be physical or legal person.

Of an essential nature is that the performance of work shall be performed at home constantly and not occasionally, and this idea is strengthened by the provision in Art. 1 letter b) of the ILO Convention no. 177/1996 [1] that states that a person-employed r does not become automatically a worker at home simply because he/she states that he/she occasionally carries out the work of an employee at his/her home and not at a place of worked determined by the employer.

In this way we consider that teleworking may be mainly the purpose of an individual contract called for work at home or of an individual work at home convention or secondarily of a work at home clause in a standard individual employment contract or in an individual work at home convention.

The difference between the situations mentioned in the previous paragraph is made by the preponderance of provision of the activity at home in relation to the work standard agreed in the individual employment contract or in the individual employment convention. Thus if the work that the employee performs at home is performed at least three days a week from home or at any place of his choice or if we are in a situation where more than half the time of work is performed at home we are in the presence of an individual work at home contract /convention. Assuming the contrary, we are in the presence of a mobility clause from the contents of a standard contract or with the institution of delegation or posting because in these situations the mobility is the result of the work organization by the employer, the employee not being the one who chooses the locations where he/she has to go.

In this way, the literature shows that the homeworker has a stationary job. But this place is not created by the employer, but by the employee.

We should also distinguish that although the domicile is an essential factor, it is not yet prohibited to the employee to appear from time to time at the employer to establish a

direct link with it. Moreover, we consider that in this way a link can be created with those who work with the employer for the exercise of their duties.

Another element that holds particular importance is the working schedule and its establishment exclusively by the employee creates certain problems. It seems to us that it is closely linked to the achievement of the workload, and in this way remuneration is established accordingly mostly because work is mainly based on the result. Moreover, if we analyze the legislation in Hungary for example, this work is performed at home only if employees carry out activities that can be standardized and carried out independently, the worked at home being paid employee in relation to the results of his/her work. This result is materialized either in a product, or in relation to the time worked.

Work at home and the production activity can be folded uniformly with the framing of the freedom of will of the parties. Such a variety of the employment contract, under common law, can be deployed in all forms compatible with a specific activity.

The work at home contract will bear special attention in terms of safety and health. The employer must ensure that prior to the commencement of such activity, the employee is familiar with the rules of labor protection task-specific and that in his/her area of residence appropriate medical care may be given. Often, employers opt to conclude contracts as medical insurance with the servicre provider that has branches in the town where the employees work at home, ensuring that the employee will allow access to his/her location in case of need, some work being considered dangerous even to be carried out at home. [11]

The typology of the employer is not standard and employers can be of public or private law. In some states, the conclusion of work at home contracts is stimulated by private institutions. They may even grant incentives, exemptions, rescheduling or reduction of the single tax payment, especially if the employees targeted live in rural areas.

In terms of facilities of the domicile of the employee it is required to have an adequate endownment and the nature of the activity developed has to show some degree of professional independence or autonomy. Cooperation defines the employer-employee relationship, subordination being made secondary.

It can easily take place at the residence of the employee or at the place of his/her choice specific activities involving processing and dissemination of information, telecommunications technology. We talk in this regard about programmers, analysts, web designers, people in charge of e-commerce, adviser, consultants, translators, managers etc.

Home teleworking can be either offline or online. Online requires permanent connection to a work network and a work controlled by technology and also a reduced flexibility regarding the organization of the working schedule. Offline tele-workers can organize their working schedule simpler and more concise as it is necessary for them to connect to the work network only when they are forced to check their email, upload or transmit files.

The Romanian private market is not charged with supply and demand relating to work at home. However, the videoconference systems used primarily in the corporate environment are adopted by the Romanian society increasingly more.

The inexperience, fear or other retentions block the popularization of home working both where these obstacles come from employees and where they come from the employer. For the young unemployed people, less social people or people with special needs, a work at home contract can identify their concrete needs and can be folded in order to streamline and such activities.

The positive potential of homeworking both socially and economically requires appropriate rules and tools to ensure a concrete administration that allows the functional use of such a form of flexibility of work and to provide the employee the choice of different ways to provide work. Personal and collective relations must maintain effectively the choice of the employees declared available for working at home, this being made taking into account the characteristics and professional skills of each employee. One can even use selection criteria such as situations of deficiencies that do not allow movement at work, situations of maintenance of a child of early age, situations of time or distance between the employee's premises and the employer's home.

The overall number of hours provided in the schedule of an employee working at home remains valid being the same as the one provided for the staff who works at the employer's premises.

Work at home can be judged in an experimental manner by the employer, as it can resort to such an activity for the verification of labout efficiency projects.

Conclusion

The flexibilty of labor relations and the alignment of international legislation to community regulations was also highlighted by concluding work at home contracts.

Although sometimes the provisions of the labour legislation are rigid and sometimes even against the interests of parties, regulations designed to liberalize labour relations were taken or derived. Work at home proved to be an echo of the practice that imposed thanks to the parties' will the improvement of those regulations that were difficult to apply in certain circumstances.

The boosting of economic activity led to the specific manner of execution of the individual employment contract, due to the fact that the place of provision of work is not necessarily the premises of the employer but the home or another location chosen by the employee.

Informatics applied in the work process, especially in the developed countries or developing frecventizarea led to an increase of the work at home process. The employees who work from home are considered as those who fulfill the tasks specific to their position from their home under an individual contract of employment and who independently determine their working schedule.

The specific contractual terms of such a contract allow the employer to verify the activity of the employee who works at home.

To the mandatory elements for the ordinary employment contract specific elements are added, namely the explicit provision that the employee works at home and the specification that the employer has the right to control the activity of the employee, outlining the schedule and concrete ways in which it performs the control. Concluded only in writing, the work at home contract must include clauses on transport to and from the domicile of the employee of the products obtained after delivery if materials used in the activity are needed

The collective employment contracts applicable to employees whose employment is at the employer's premises may establish other specific conditions regarding work at home, but however, the employee who works benefits from all rights recognized by them and by the law applicable.

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Collective Dismissal. Applying the Criteria for Selecting the Employees Targeted by the Redundancy

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Abstract

During the reorganization of an employer it is likely that after the elimination of the positions which were deemed redundant or whose maintenance was considered too expensive for the company, it is a concern of applying the procedural provisions of collective dismissal. This is not to overlook the fact that any company can be found at similar positions in terms of specific activity undertaken. In these cases, when the collective redundancies are caused by the abolition of posts that are no longer needed in the structure of society, when the posts of the same kind, for determining the order of priority to dismissal must take place the selection of the employees occupying the positions concerned to be eliminated from the complany's structure, and the termination is based on a criteria.

The criteria considered by the employer to prioritize dismissal if applicable for employees who hold positions posts are identical or similar dismiss only some of these positions. This raises the question of which criteria is determined for choosing which employees will have priority to dismissal.

Unfortunately at this moment the Romanian legislation, namely Law no. 53/2003 – Labour Code, republished, does not regulate the definition of that concept but no clear procedure to be followed for employers who are in this situation, there are some general principles in doctrine followed in such cases.

Keywords: *Dismissal; Collective; Selection; Criteria.*

1. The selection of employees targeted for layoff. The criteria considered by the employer to prioritize dismissal

The legislation in force at national level, namely Art. 69 par. (3) of the Labour Code establishes that the criteria envisaged by law and/or collective agreements, for prioritizing dismissal tie, applies to employees after assessing the achievement of performance targets. We thus regard during the course of this procedure, professional criteria with priority and only secondarily social ones.

1.1. The results obtained in performance targets

Thus, Art. 17 par. (3) of Law no. 53/2003 Labour Code stipulates the content elements of the individual employment contract and evaluation criteria for the professional activity of the employee, criteria that are applicable to the employer. Also Art. 40 of the same Labour Code par. (1) f establish an employer's obligation to establish individual performance goals and achieve them criteriiile assessment.

When it comes to collective redundancies, even regulating Art. 69 of the Labour Code provides that for prioritizing the criteria set out in par. (2) letter d) of the Labour Code applies to employees tie after evaluation of the achievement of performance targets. Also note that throughout collective dismissal, the employer must communicate to employees in consultations that we did talk above criteria considered for prioritizing dismissal.

In the individual performance goals for all employees, they may be established by the employer either collectively or individually, if at all. However, it should be noted that the law clearly states that social criteria apply only after their application performance. Thus, it is preferable to conduct a professional assessment based on criteria established especially for this process to dismiss. But if, after this assessment, two or more employees are on the same place with the same score, they can apply social criteria, thus respecting Art. 69 par. (3) of the Labour Code.

We mention that, when dissolved an entire department, a whole unit or all items of the same kind, it is understood that the application is no longer required selection criteria in this regard. However, if stored in the structure of society if only one item of the same kind or similar to those covered by decay, then all employees occupants of that position have to pass this assessment for the remainig position. Those who get the worst results will be affected by the collective dismissal.

1.2. Social Criteria

Unfortunately, on the matter of social criteria applied it is clear that the labor legislation of our country does not include any rules on their application in collective redundancies.

Considering only provision in Art. 69 par. (2) letter d) of the Labor Code, we can deduce that they are established by law and/or collective agreements at unit level, group or unit level sector or through collective agreements concluded under the provisions of Law no. 62/2011 social dialogue.

As noted above, the national legal provisions argues that it is applicable only after the performance targets related to employees, after assessment in this regard. Because current law no longer provides social criteria such employer is encouraged to consider your own.

But these criteria derived from the applicable collective labor contract at national level 2007-2010, today repealed. Among the criteria laid down by them are:

a) a combination of two or more functions and overlapping salaries and pensions;

b) persons who meet the age and length of service standard and did not ask for retirement under the law;

c) persons eligible for retirement at their request

d) whether the measure could affect spouses working in the same unit, terminate the employment of the spouse who has the lowest income, without thereby be able to terminate employment of a person occupying a post-target reduction;

e) the extent to affect, first of all, people who have no dependent children;

f) the extent to affect only lastly on women in childcare, widowers or divorced men who take care of children, the Enablers sole family as well as employees, male or female, who have more than 3 years up retirement at their request.

2. Application of criteria in the selection procedure to collective redundancies

Indeed, the provisions of the Labour Code expressly provide for applying professional criteria as a way shootout between employees affected by the dismissal only assuming collective dismissal, because in that case, producing more layoffs, sufficient in number to be subsumed hypothesis collective dismissal, the legislature felt the need for additional clarification to provide protection of the employees concerned by the measure concederii collective and contribute to the selection on objective criteria that, ultimately, the employees best prepare to keep activity at the end unrolling the collective dismissal.

This does not mean that if some individual dismissals, the circumstances in which the ‚selection' staff affected by the measure of layoffs reduced in number so that it reaches the assumption of collective redundancies, more closely regulated by the legislature, should not subsist the Internal Regulation, the Collective Bargaining Agreement applicable to the society/company, objective criteria by which to operate the "selection" in view of dismissal. [1]

Where it is alleged by the employer that the measure itself is to look at reducing the number of stations identical or similar (in terms of functions performed, and not just on the names formal identical or not, their times of their spread through various structures the organizational employer) must subsist objective criteria by which employees occupying positions affected by the reduction can be objectively comparee and saved only those who, after applying the criteria, fulfill or meet most of those criteria.

To survive such an obligation on the employer, nor is it absolutely necessary to be allocated a time to do so in the Code of Labour, while in this act are found provisions of Art. 65 par. (2) defining what is meant by dismissal for reasons "not related to the employee."

Thus, it is apparent that there is an intrinsic connection between dismissal for reasons not related to the employee and applying the selection criteria for collective redundancies. To not "relate to the employee" or to lie beyond this boundary demarcation very delicate between dismissal generated by the decision of the employer to reduce staff costs, to reorganize, streamline activity or maximize profit rate, ie a "dismissal not related to the employee" hypothesis of dismissal aimed in reality, the employee occupying the target of "close down", dismissal, unless it is supported in terms of history disciplinary or if It requires professional inadequacies can not be considered to be within the limits of the principle of good faith which must govern relations between an employer and its employees.

The employer, under no circumstances can not "dispense" employees uncomfortable or perceived as such by inventing "reorganization", "discounts" positions (indicating the precise position held by the employee in question perceived as uncomfortable, though, in the

same employer subsisted even in the same department/section/division/branch/workstation more posts identical or similar occupied by other employees who fulfilled, in turn, powers identical or similar to those performed by the employee whose post was proposed for dissolution), in reality, all these are nothing but measures ordered with a well targeted, namely the removal of the employer, type of employee mentioned above.

To not reach the situation where decisions that were aimed (as stated goal and assumed by the employer) reduction of positions or, where appropriate, the reorganization of society, to be able to give such an interpretation, the employer must be able to achieve reorganization, reduction of posts on the basis of clear, objective and which result from the content of some acts (by way of example, the provisions of the internal Regulations, Statutes, Collective Bargaining or any other internal procedure transparent, known times which could have been known by the employees concerned by the extent of individual dismissals) and made applicable to the employer after the station decided to reduce the natural consequence of which is the emergence of individual dismissals.

In order to talk about the hypothesis of an individual dismissals not related to the employee as a result of redundancy, if subsists by the employer multiple positions of the same (identical or similar in terms of duties, even if these positions would wear, formal, other names or titles, essentially remaining the nature of the powers, duties revealed by job descriptions for the establishment, or on the contrary neconstatarea identity or similarity between several positions), and the employees occupying those positions operate the same department/section/division/branch/place of business is necessary for selection to exist, to operate and can be demonstrated by the employer reality of this fact among the employees who occupy posts identical or, where appropriate, similar.

Because when abolishes a job, the employer abolishes a sum of atributions therefore something abstract, which does not have or, more accurately, should not be directly related to the employee who comes to be fired, except that decision abolition/reduction/restructuring envisages a single post (in the absence of another similar or identical in the same department/section/division/branch/place of business or even in some cases in the general structure of the employer), case that this shortcut, for objective reasons, is inherent.

In all other cases, if there are two employees occupying or performing a job with identical or similar responsibilities, the job description, rescinding a job remains a decision which relates to an abstract aspect, it will occur that person who would meet the criteria least it could save the imminent prospect of individual dismissals.

It is necessary to make this distinction between assumptions outlined above just for measuring the individual dismissal that occurs due to the reduction of a position or more identical positions or, where appropriate, similar (regardless of their title formula) is not in reality a action to lead to termination of employment "because of" employee, but without going through legal procedures related to disciplinary proceedings or proceedings professional nonconformity.

In other words, the dismissal should not be disguised under the appearance of dismissal "unrelated to the employee ,dismissal – sanction, dismissal for which the employer knows that he has items to browse and complete in the desired disciplinary proceedings or the verification of compliance professional, precisely because the employee can not be attributed to any deviation from a hypothetical labor discipline or professional inadequacy.

The legislature has regulated more thoroughly procedure collective redundancies, including in terms of the criteria applied were attract a certain order of priority to dismissal because hypothesis collective dismissal involves social consequences outstanding, affecting tens, hundreds or even thousands of employees in a single collective dismissal, in which the legislator felt the need to regulate in detail the procedure.

This requirement can not be analyzed formally only in terms of verifying that (understood) as a measure of dismissal to be targeted precisely position held by the fired, because if you proceed in such a manner is reached and accepted, not restructuring "job" that is, in the abstract, a set of tasks, service tasks, but "restructuring" the employee himself "elected" on a discretionary and non-transparent by the employer of several employees occupying positions/functions similar or identical in terms of duties listed in the job description.

Besides, this choice is left to the employer, given that it applied a set of criteria, conditions objective, clear and transparent that everything he set out above, only that in this case, we can not talk about choice discretionary targeted on a particular employee, but an option undertaken following a transparent selection process that features at least until proven otherwise, objectivity layout measure dismissal.

This method of selection, the choice of the employee that far dismissal will target between several employees occupying positions/functions identical or similar in terms of duties fulfilled is applicable both public institutions, companies, firms with majority or fully state contribution and companies owned partially or fully private because some other must conduct likely to respect not only the formal provisions of the Labour Code, but also take into account and be guided by the purpose for which the legislature established the distinction between situations that lead to the dismissal of employees without regard to their person and where dismissal occurs because the individual employee or closely related to the employee fired, namely the establishment of adequate protection, that is efficient and effective, the employee should not to get him fired for reasons relating subjective and intrinsic person when such reasons do not qualify to be elements trigger a disciplinary investigation or verification of his professional correspondence.

Thus, the family relationship is a matter of social criteria and not by preference to dismissal. In other words, if both husband and wife would be redundant to the extent that a reduction in operating positions, only one of them can be fired or lower the salary. It is true that husbands are not related to each other, so that under the law or collective agreement at the unit does not prohibit, might as far as they are subject to reduction of occupied and people relatives (eg brothers), both stations are so low.

Regarding social criteria, we consider the people who have care of a child. But there may be situations where the employee is the only breadwinner of the family, given that no dependents and minors (eg, is the breadwinner parents or spouse). To be considered breadwinner, must prove in this regard and has maintained that the corresponding income to support themselves alone. Basically, it is considered the breadwinners for operating personal deductions from income tax under the Tax Code for dependents.

It is also noticeable that not imperatively prohibiting discharge of persons who meet certain social criteria, but only if there has been a reduction of positions the same way. In other words, if a certain position is abolished by social criteria no longer working because there is no position of the same type for the employee protected by social criteria.

May exist in the collective agreement at the unit and other protected category, ie those who have less than 3 years until their retirement.

Given that, pursuant to Art. 69 par. (2) d) of the Labour Code, as amended, between the relevant information to be transmitted union and subject of consultations with it can be found and on the criteria considered for dismissal would consider the notifications submitted should and this information is contained on the applicable criteria for determining priority oridinii dismissal.

Application criteria and sanctioning redundancies would not comply, only make sense to prioritize the dismissal, not to occupy another post existing or newly formed for a possible challenge in court the decision to dismiss does not tend to occupy another post, but canceling dismissal and reintegration accessory. As we stated, the application criteria only makes sense considering the fact that several posts of the same kind in the same structure, which gives expression to a field unit, only some of which are dismantled. So the "identity" of a position is given not only the name and Code of the occupation, but the place it occupies in the territorial structure of the organization and functioning of society, hierarchy specialty consequences in terms of the duties incumbent upon persons in employment, even with the same basic training. [2]

Consequently, we can not talk about jobs the same way that the priority should be established between Tosi those engaged in the same branch, or between certain positions, for example an engineer, the whole society, regardless of the location of physical or functional workplace.

This is because, due to dismissal should be the abolition of the job inopportunity always maintain the organization of the company and not the employee's position in the order of priorities. Or, if we appreciate the valid view in the doctrine in that order of priority were established between the specialties of the same kind in the whole of society would reach or subversion of posts deemed useful further but filled by people preferred to dismiss or the dismissal of the latter on the remaining posts with the sole purpose of being employed persons in whose favor keeping operating criteria, which is inadmissible because the dismissal can be only reflex abolition station.

By declaring as unconstitutional the provisions of Art. 86 par. (6) of Law no. 85/2006 on insolvency, court opinions on the selection process in collective redundancy varied.

Thus, some consider that when layoffs carried out under the rule of the special procedure of insolvency law derogating from the common rules of the labor code, the lack of criteria expressly mentioned in the decision to dismiss being taken into account when selecting the employee for redundancy, it may not be an element that attracts the nullity of the dismissal decision, if we consider the provisions of the Labour code that establish the obligation on the employer to establish the order of dismissal. [3]

However, the legal doctrine held that in the case of dismissals carried out under the provisions of the Labour Code, the absence of the order for redundancy selection criteria can not void the decision to dismiss, thus any decision, or measure will not be null if the employer proves that it complied with the criteria for determining the order of priority to dismissal if the employer had the obligation under the law, even if the criteria were not provided in the order for dismissal.

On the other hand, there is case law which has not been agreed in principle with the idea that the legislature intended that approves the Art. 86 par. (6) of Law no. 85/2006 of common law procedure to circumvent the collective dismissal selection spans and the need for an order of priorities, and the latter would be a matter directly measure the justness and correctness consideration of criteria, criteria which are predetermined by law or applicable collective agreement. This is because the act that would give them effective application of these criteria should be of a rational, intellectual and while no one deployable material with the potential to delay the reorganization of the company. More briefly, the pursued opinion is that the law exempting these courts at the time of covering the proceedings as a whole that does not justify the measure, so in conditions that exclude the arbitrary choice of several employees occupying positions identical, only some dispensable on motivation in personal circumstances, whether in respect of professional competence, whether they are social in nature. [4]

Finally, another practice of the courts has shown that there is a reason for revocation of dismissal that the contested decision did not mention whether or not applied selection criteria, as long as the employer has proven that took into account effectively such criteria, namely those of a professional, as required by Art. 69 par. (3). From the perspective of formal requirements, dismissal decision must indeed be covered and the criteria used, but aspects of form can not prevail against the background otherwise and rulings given princinii as a formal, superficial, and therefore unfair. Good – faith required by Art. 8 of the Labour Code must work both ways, for and on both sides of the individual employment contract, so the court held that the employer can not claim that he has not fulfilled its duty to select staff affected by redundancy, imperative criteria established by law. Accordingly, the court did not apply sanctions stipulated in Art. 79 of the Labour Code because that bugbear, the employer has not relied on other grounds of law or fact, than those specified by the decision to dismiss just showed in court concrete criteria used to prioritize dismissal. (Namely that the employee had the lowest score of the evaluation of the previous year – targets dismissal). [5]

However the problem was solved by the entry into force of Law no. 85/2014 on procedures to prevent insolvency and insolvency in the sense that the legal provisions of the collective redundancy procedure (Art. 69 of the Labour Code) relating to the applicability of the selection criteria and mention them in the decision to dismiss its effects even when a collective dismissal from the employer in financial difficulty. Even so, we believe that failing to criteria in the decision to dismiss, probate but in court regarding their actual application, can not lead to the nullity of the dismissal decision, so keep this solution provided by case law is correct and dining regard by the courts.

3. Conclusions

Thus, we conclude by showing that if any reorganization followed by collective redundancies by which are affected occupants of a postitions of the same kind, and requires maintenance of a position of that kind in the structure of society, it is clear that using the procedure of selection of staff to establish priority dismissal order.

I considered to be imperative that all such proceedings to be carried out with close involvement of trade unions or employee representatives information and consultation

under specific collective dismissal procedure. We appreciate that such control authorities in the procedure and constant liaison and consultation with employee representatives prints an objective of the procedure.

On the other hand, with review by the courts in determining the legality of the collective dismissal procedure with analyzing the decision to dismiss contested concerned, it is clear that it will review and selection procedure held societal view determining the order of priority for redundancy but, as we have shown, we believe that the practice is not uniform on the provision of those criteria disputed dismissal decision in question, as long as they comply with the normal dismissal procedure.

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(EU) Council Regulation no. 1259/2010 and the agreement upon the law applicable to divorce and legal separation

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Abstract

The (EU) Council Regulation no. 1259/2010 of 20 December 2010 [1] establishes a necessary legal framework for regulating the law applicable to divorce and legal separation in the Member States participating in this enhanced form of cooperation. The normative act offers the spouses the freedom to choose the law applicable to divorce and legal separation, from the laws expressly provided by the regulation. In the absence of spouses expressed will, the Regulation establishes a series of connecting factors in a hierarchical subsidiarity relation, in order to designate as the law applicable to divorce or legal separation, the law closest to marriage. The adoption of the Regulation is an important step in harmonizing the conflict-of-laws rules of the European law in the field of family relations and aims to establish a clear and comprehensive legal framework applicable to divorce and legal separation in the participating Member States.

Keywords: *divorce, legal separation, applicable law, free will of the parties, choice of applicable law agreement, validity and formal issues of the agreement related to the choice of the applicable law.*

1. Subject matter of the Regulation

The subject matter of the Regulation is to establish for all participating Member States a clear and comprehensive legal framework for the law applicable to the divorce and legal separation procedure, where they involve spouses of different nationalities, living in states other than the state of citizenship or who no longer live in the same EU state. The newly created regulatory framework has the role of "*guaranteeing appropriate solutions for citizens in terms of legal certainty, predictability and flexibility*" (recital 9).

In the application of Art. 81 of the TFEU, the enhanced cooperation process involves the EU adoption of measures designed to ensure the compatibility of rules applicable in the Member States on conflict of laws and conflict of competence. In this context, the (EU) Regulation No. 1259/2010 has been added to (EC) Regulation no. 2201/2003 in the process of European legislative framework standardization of the participating Member States on the issue of conflict of jurisdiction and conflict of laws concerning divorce and legal separation.

Prior to the adoption of the Regulation, the free will of parties in matrimonial matters was extremely limited. The criterion of the parties' free will was regulated only in a few

participating Member States (e.g. Germany, Belgium and the Netherlands), while the vast majority of them served other factors such as: citizenship, domicile or habitual residence, or, as the case may be, systematically applied the law of the forum. *Lex Fori* was particularly applicable to legal systems favoring a liberal approach to divorce, granting it more easily.

The (EU) Regulation no. 1259/2010 provides the more flexibility to the legal framework by giving the spouses greater freedom, offering them the choice of the law that will apply to divorce or separation procedures. Freedom of will, however, is not a complete one. Spouses can choose only from the laws strictly related to marriage, in order to avoid situations where a law unrelated or poorly related to spouses. The connection criteria are determined by the place where the spouses have their residence or the place where they had their last common residence if one of them still lives there or on the basis of the nationality of one of the spouses or of the law of the forum.

The choice of applicable law must be informed, as a fundamental principle of the Regulation (recital 18). Each spouse must know exactly the legal and social consequences of the agreement concluded. At the same time, the choice cannot affect the rights and equal opportunities of both spouses.

Although the choice allowed by the (EU) Regulation no. 1259/2010 provides for a clearer legal framework in the EU participating Member States on the law applicable to divorce and separation, there are still uneven rules in the legal systems of non-participating Member States. In order to highlight this aspect, we consider the situation of two Romanian spouses with a common habitual residence in Romania. Suppose one of them moves to Ireland, having the opportunity to get a better paid job. If difficulties arise in their marriage and one of the spouses decides to initiate the divorce proceedings, this may be done either in the Romanian court (the place where the last common habitual residence is located) or in Ireland (the place where the defendant is resident). The Romanian court will give effect to the provisions of the Regulation, since Romania is a Member State participating in this form of enhanced cooperation. Consequently, if the spouses have agreed upon an applicable law, the court will give effect to this law, and if no agreement on the law applicable to divorce has been reached, then the court will determine it by applying the criteria of Art. 8 lett. b)-d), depending on the actual circumstances of this case. For the example provided, all the criteria lead to the application of the Romanian law. On the other hand, if the action were brought before the Irish courts, the applicable law would be determined by applying the Irish conflict-of-laws rules, since Ireland is not a country participating in this Regulation. The Irish law provides that once an Irish court is competent in a divorce proceeding, will apply its own law (*lex fori*) to both the divorce proceedings and to additional or related matters. It is noted that, depending on the choice of the competent court, the applicable law will be different, allowing the spouse initiating the divorce to strategically choose one of the competent courts (operation known as *forum shopping*).

2. Scope of the Regulation

The Regulation stipulates in Art. 1 par. (1) that it applies to divorce and legal separation when there is a conflict of laws, without further clarification as to what is meant by divorce or legal separation. This makes it more difficult to determine the material scope of the Regulation, especially since the institution of marriage is not understood in a uniform manner throughout all Member States, in particular with reference to the possibility of

such a relation being concluded between same sex persons (possibility provided by some Member States). The use of the phrase "*this regulation should apply only to the dissolution or non-observance of the matrimonial relationship*" (recital 10) doesn't clarify whether it refers only to heterosexual couples or also includes homosexual couples. In the absence of any clarification, it might seem that the solution adopted by the legislator allows for a broad interpretation of the "marriage", which can also include the same-sex marriages. The broad concept of marriage also appears to be confirmed by the contents of Art. 13, according to which the provisions of the Regulation do not oblige the courts of a participating Member State whose law does not consider that marriage to be valid, to pronounce the divorce as a result of the Regulation application.

The lack of a marriage definition, at least theoretically, might also be a problem with regard to the application of the Regulation on a procedure for the termination of a registered partnership. Regarding partnerships, states have uneven rules even in the presence of the common element, that of giving the couple an intermediate "status" between the marriage and the freely consented union. Generally, the legal rules on the personal and patrimonial effects of international couples are complex and difficult to construe. For example, in some legislative systems, partnerships have a legal nature much closer to that of marriage, in which partners lose the freedom to unite with a third party in marriage or in a new partnership and the rules specific to the marriage regime are, at least in part, applicable. At the same time, in other states, partnerships are either purely contractual (autonomous forms of will expressed by the parties) or are treated as *sui generis* institutions. However, we appreciate that the Regulation does not apply to registered partnerships, which arises from the fact that whenever the Union legislator intended to refer to registered partnerships, did it either expressly or by using the expression "*relations with effects comparable to marriage*", carefully avoiding the inclusion of unions of this kind in the sphere of the term "marriage".

Therefore, considering the differences between national laws as regards the definitions of marriage and divorce, the national courts should take into account the meaning of such concepts according to the national law. For example, the Romanian courts will reject the divorce claims in case of a same-sex marriage concluded abroad and also will not be able to rule on the request for a civil partnership dissolution.

The Regulation applies only to those situations where one or more elements are foreign to the social domestic life of a state and are capable of involving two or more systems of law. These are those situations that have "cross-border implications", according to Art. 81 par. (3) of TFEU, such as the situation of spouses with different citizenships or living in different Member States or in a Member State, at least one of them not being a national of that Member State. The element of internationality, which is a precondition for the application of the Regulation, must exist at the time of submitting the application and must be examined ex officio by the judge. The Regulation is not applicable to internal situations without the existence of any transnational element.

Some clarifications on the scope of the Regulation are made in its preamble, which states that the Regulation only applies to the dissolution or non-observance of a matrimonial relationship, and the law thus determined by the conflict-of-laws rules would apply only to the grounds for divorce and legal separation.

The law designated by the Regulation shall be applied irrespective of being the law of a participating Member State (Art. 4) or not. Under this rule, the courts of a participating Member State, in case these are referred with divorce or legal separation claims, will

determine the law applicable under the provisions of the Regulation and will apply that law for settling the case, even if it is the law of a Member State Which does not participate in the form of enhanced cooperation or of a non-member state of the European Union. For example, two spouses, out of which one is Romanian and the other French, having their habitual residence in Romania, may refer the divorce to the Romanian court and may designate the French law as the applicable one (the State of one of the spouses at the date of the agreement). However, the provisions of the Regulation would also apply if, in the present case, one of the spouses were Swedish and the other Romanian and would have chosen Swedish law as applicable to divorce, although this State did not participate in the enhanced cooperation established by the Regulation.

The Regulation does not include in its scope the annulment of marriage, the preliminary issues such as the legal capacity and validity of marriage, as well as the patrimonial effects of divorce or of the legal separation, effects on the name, parental responsibility, maintenance obligations or other accessories, fiduciary and succession. All these are going to be settled in accordance with the European Union law or the private international law of each Member State, as the case may be.

For example, in our legal system, the nullity of marriage and its effects are governed by the same law that applies to legal requirements for marriage [Art. 2.588 par. (1) of the Civil Code].

The legal capacity of the persons concluding the marriage is regulated by Art. 2.572 of the Civil Code, which refers to the national law of the individual.

For the validity of the marriage, the rules of Romanian private international law refer the substantive conditions for marriage to the national law of each of the future spouses at the time of marriage [Art. 2.586 par. (1) Civil Code], and for the formal issues related to marriage, the law of the state where it is concluded is the applicable law [Art. 2.587 Civil Code]. Thus, if the marriage was concluded on the territory of Romania, the provisions of Art. 278 and following of the Civil Code, shall be taken into account in order to verify the formal issues of the marriage.

The patrimonial effects of divorce are regulated by the law governing spouses' matrimonial status (Art. 2.593 of the Civil Code). The conflict-of-laws rules of the Romanian international law offer the spouses the freedom to choose the law applicable to the matrimonial status, which may be one of the following laws: the law of the state in the territory where one of the spouses has the habitual residence at the date of choice; the law of the State of which any of the spouses is a national at the time of choice or the law of the State where they have established their common habitual residence after the marriage. In the absence of choice, the matrimonial status will be governed by the law governing the general effects of marriage. According to Art. 2.589 par. (1) of the Civil Code, this law is that of the common habitual residence of the spouses, and in the absence of the law, of the common citizenship of the spouses. In the absence of common citizenship, the law of the State where the marriage was concluded shall apply.

The spouse's name is subject to the law governing the non-patrimonial effects of marriage and is one of the laws listed in Art. 2.589 par. (1) of the Civil Code.

The parental responsibility is governed by the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for for the protection of children [2]. The conflict-of-law rules of Romanian private international law on parental authority, state that in this respect the applicable law is

determined by the Convention on applicable law, recognition, enforcement and co-operation on parental responsibility and measures for the protection of children adopted in Hague on 19 October 1996 and ratified by Romania through Law no. 361/2007 [3].

The law applicable to the maintenance obligation between spouses or regarding their minor children shall be determined in accordance with (EC) Council Regulation no. 4/2009 on jurisdiction, applicable law, recognition and enforcement of judgments and cooperation in matters relating to maintenance obligations [4]. According to Art. 15 of this Regulation, the law applicable to the maintenance obligation is the one provided by the 2007 Hague Protocol on the law applicable to maintenance obligations. All Member States of the European Union except for Denmark and Great Britain are parties to the 2007 Hague Protocol. The Protocol is in force since 01 August 2013.

The internal conflict-of-laws rules also refer to EU law regulations for determining the law applicable to the maintenance obligation. Art. 2612 of the Civil Code states that in order to determine the law applicable to the maintenance obligation, the Romanian courts shall apply the provisions of The Hague Protocol in relation to any State, whether or not it is a member of the European Union or whether or not it is a party to the Protocol. However, the application of these provisions is different: EU law for the Member States participating in the Protocol, the Private International Law Conference in Hague for the States which have acceded to the Protocol in the system of this Convention or the Romanian international law for the other states.

The scope of the Regulation is limited to conflict resolution in the area of divorce and legal separation, without rules on conflicts of jurisdiction. The jurisdiction of the courts of the Member States in the settlement of divorce or legal separation claims, falls within the scope of Regulation no. 2201/2003 on the jurisdiction, recognition and enforcement of judgments in matrimonial matters and parental responsibility. Therefore, in a divorce or separation claim, the court is required to first verify its jurisdiction by applying the conflict-of-laws rules of (EC) Regulation no. 2201/2003 and only subsequently, to the extent that it will declare itself competent, will determine the law applicable to the substantive settlement of the divorce or separation claim, based on Regulation no. 1259/2010.

From a temporal perspective, Regulation 1259/2010 applies to legal actions brought after 21 June 2012. The Regulation also applies to conventions concluded by spouses with regard to the law applicable to divorce concluded before 21 June 2012, if such agreements meet the substantive and formal conditions provided by its dispositions [Art. 18 par. (2)].

According to the Regulation [Art.18 par. (3)], it is without prejudice to agreements on applicable law concluded under the law of the participating Member State where the court is referred before 21 June 2012.

From the corroboration of the above provisions it results that if the court was referred to after 21 June 2012 and the agreement of spouses before that date meets the conditions imposed by the Regulation, its provisions will apply. If the agreement does not meet the conditions set out in the Regulation and the court has been notified after 21 June 2013, either the spouses conclude another convention that complies with the provisions of the Regulation, or the applicable law will be determined objectively by the court, under Art. 8 of the Regulation.

From a territorial point of view, the Regulation only applies in the Member States participating in the enhanced cooperation on divorce and legal separation: Belgium, Bulgaria,

Germany, Spain, France Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia, Lithuania.

The Regulation is *universal*, which means that its uniform conflict-of-law rules may designate the legislation of a participating Member State, the legislation of a non-participating Member State or the law of a non-EU country. It also contains safeguard rules aimed at preventing the application of foreign legislation on divorce and separation, incompatible with the common values of the European Union.

As regards the relationship with other legal instruments, the Regulation provides that it does not affect the application of international conventions to which one or more participating Member States are parties. However, to the extent that such conventions are concluded exclusively between two or more participating States and concern matters governed by the Regulation, this shall prevail (Art. 19).

It should also be pointed out that the Regulation applies irrespective of the nature of the court referred to (recital 13). According to Art. 3 pct. 2 of the Regulation, a court means all the authorities of the participating Member States, competent in matters falling within the scope of the Regulation. Therefore, the Regulation also applies when divorce takes place with a notary or state registrar, in accordance with the provisions of Art. 375 and subsequent, of the Civil Code.

3. Choice of law applicable by the parties

Innovatively for many of the laws of the participating Member States, the Regulation introduces the possibility for spouses to designate the law applicable to divorce and separation, thereby enhancing the free will of the parties. The choice of applicable law by the parties is one of the principles we find in other instruments of judicial cooperation in civil matters as regards the law applicable to substantive or procedural laws [5].

The choice of spouses is limited to those laws strictly related to marriage, in order to avoid the application of a law completed unrelated or poorly related to the spouses. To substantiate this idea, the Recital 16 of the Regulation states that spouses should be able to choose as law applicable to divorce and separation, *the law of a state with which they have a special relation or the law of the forum*. Such a law chosen by spouses must comply with the fundamental rights recognized in the Treaties and the Charter of Fundamental Rights of the European Union. Art. 5 of the Regulation expressly and restrictively establishes, as *alternatives*, the laws that spouses can designate as applicable to divorce or separation. These may be: a) *the law of the State where the spouses have the habitual residence at the date of conclusion of the agreement*; or b) *the law of the State where they had the last habitual residence, provided that one of them still resides there at the date of conclusion of the agreement*; or c) *the law of the State of nationality of one of the spouses at the date of conclusion of the agreement*; or d) *the law of the forum*.

Items a) and b) of Art. 5 use as a connecting criterion the habitual residence. In this case, it is the habitual residence of the spouses in the same State and not their common habitual residence. Therefore, if spouses are separated in fact but are habitually resident in the same state, nothing prevents them from designating the law of that state as a law applicable to their divorce or legal separation.

The notion of habitual residence is not defined in the Regulation, the qualification being to be carried out according to the rules of autonomous and uniform interpretation

specific to EU law, taking into account the context of the provision and the objective pursued by the legislation in question [7]. Thus, the national courts will not be able to take into account the meaning of the notion of "habitual residence" given by domestic law, such as, for example, the definition given to the habitual residence by Art. 2.570 of the Romanian Civil Code. The concept of "habitual residence" has been developed in some EU regulations [the (EC) Regulation no. 2201/2003, (EC) Regulation no. 593/2008] as well as in the case of the European Court of Justice of the European Union, but not in matters of divorce and separation. For example, in the Decision stated in C-90/97 *Robin Swaddling vs. the Adjudication Officer* [8] in the matter of the right to free movement, the Court held that the habitual residence of a natural person is the "*habitual center of his/her interests*", which should have been determined by taking into account "*the family situation of the natural person employed, the reasons for the journey, the length and continuity of the residence, the fact (if any) that he/she is in stable employment and his/her intention to establish lasting connections with the Member State of residence, as results from all the circumstances*". The Court suggested that this definition would have a general meaning at Union level, a reason for which it could also be considered valid for divorce and separation. The Court of Justice has also stated that a fair assessment of whether or not a person is a resident of a State must not be based on a single factor but on a set of elements which, taken together, allow the assessment and qualification of the individual's situation as a resident or non-resident.

The residence does not impose a constant physical presence of the person on the territory of a single Member State, but the predominant presence in the State of residence and significant relations with it are relevant elements to be taken into consideration. The stay must have a certain length ("habitual"). Generally, a period of approximately 6 months is considered. The habitual stay may start on the first day of residence in a Member State, to the extent that the effective center of the person's life is in that Member State [9].

Item c) of Art. 5 uses as a connecting factor the *nationality* of one of the spouses at the date of the concluding the agreement. It is noted that the Regulation does not refer to the notion of common citizenship, not even for the cases where the spouses would have such a common citizenship at the date of the agreement. The Regulation also has no provision for spouses with multiple citizenship or stateless. In terms of multiple citizenship, however, recital 22 states that "*when, in determining the applicable law, the Regulation refers to citizenship as a connection factor, the approaches for addressing multiple citizenship cases should be governed by national law with full compliance with the EU's general principles*". This consideration is useful for situations where states do not accept multiple citizenships, but not Romania, where, according to Law no. 211/1991 [10], dual or multiple citizenship is accepted. At the same time, it is worth noting that Recital 22 uses the term "*connection factor*" not by reference to nationality but to freedom of choice. Concerning the freedom of choice, Recital 16 states that the possibility for spouses to choose a law applicable to divorce and separation should be directed to the law of that State with which spouses have a special connection. Or, not even the nationality of a spouse ensures, in all cases, the special connection of both spouses with that State. However, in the presence of such an agreement, the free will of spouses prevails, with no possibility of being overridden by the court referred to, for the settlement of divorce or separation, even if, in all the circumstances of the case, there is no special connection between the spouses and the state whose law has been designated as applicable. Such a law can only be overridden in situations where

it does not comply with the fundamental rights recognized by Treaties and the Charter of Fundamental Rights of the EU.

The last criterion is the law of the forum (*lex fori*). In this case, the legislator's choice was based on a number of elements, including better law enforcement, starting from the fact that the court referred to for divorce or separation, best knows and applies its own law. Another important element in the adoption of this criterion was the purpose envisaged at the time of the legislative proposal. Initially, the rules of the Regulation were drafted in the form of an amendment to (EC) Regulation no. 2201/2001. In this context, the proposal for completing the Regulation aimed to ensure consistency between the provisions on divorce and the separation and those on the competent court provided for in Art. 3 of (EC) Regulation no. 2201/2003.

4. Choice of law applicable by the parties

4.1. Date of the choice agreement on the applicable law and its modification

The choice agreement on the competent court may be concluded by the parties or amended, any time, until the date of referral to the court [Art. 5 par. (2)]. Thus, a convention concluded after the date of the court's referral for divorce or separation will no longer be considered by the court.

By way of derogation from these provisions, the Regulation provides for the possibility of the parties to designate the applicable law before the court in the course of proceedings, if such a possibility is conferred by the law of the forum. In this situation, the court will take note of the consent of the spouses, according to the law of the forum. The provisions of Art. 2598 of the Romanian Civil Code, gives the court the possibility to take note of the consent of the spouses, at the latest by the first hearing where the parties are legally summoned. Therefore, in our domestic law, the spouses have the opportunity to submit their agreement on the law applicable to divorce also after the date of the court's referral, however at the latest by the first hearing of the legally summoned parties.

4.1. Consent and substantive validity of the agreement regarding the choice o of applicable law

The existence and validity of the spouse's expression of will or of any clause thereof, are settled by the law which governs it if the agreement or clause is valid. Therefore, the conditions of validity are governed by the law which the agreement refers to.

By way of exception, Art. 6 par. (2) of the Regulation provides that, in order to establish that one of the spouses has not consented, he/she may invoke the law of the country of his/her habitual residence at the time of the referral to the court, if, from the circumstances of the cause, results that it would not be reasonable to determine the effect of his/her conduct in accordance with the law designated by the parties. The application of the law of habitual residence is subject to certain requirements which must be cumulatively met: *the spouse invokes exclusively the lack of consent, the vice of consent is based on the law of the country where the plaintiff is habitually resident, only the habitual residence at the date of referral is considered, out of the circumstances results that it would be unreasonable to determine the effects of the spouse conduct in accordance with the law designated by the agreement*. The court is responsible for assessing the "reasonable" nature of the exception,

depending on the circumstances. In this case, the court referred to determines whether the provisions of the law designated by the parties or of the law of the habitual residence of the spouse claiming the invalidity of the agreement will be applied for the verification of consent. In all cases, these provisions cannot be invoked by the court ex officio, but only at the request of one of the spouses.

4.2. Formal conditions of the agreement regarding the choice of applicable law

Art. 7 of the Regulation regulates the formal validity conditions of the agreement concerning the choice of applicable law. As a rule, the agreement must be concluded in writing, dated and signed by both spouses. It is noted that the Regulation does not impose a certain form of agreement, so it is sufficient to even take the form of the act under private signature. At the same time, any communication in electronic format that allows the durable recording of the agreement is considered to be a written form [Art.7 par. (1), second sentence].

By way of exception, if the law of the participating Member State in which both spouses have their habitual residence at the date of conclusion of the agreement provides for additional formalities for such agreements, those conditions shall apply. For example, if a clause on the designation of applicable law is inserted in a matrimonial convention concluded under Romanian law, then the special formal conditions provided by Art. 330 of the Civil Code shall be applicable.

If, at the time of the agreement, the spouses are habitually resident in different participating Member States and if the laws of those States provide different formal conditions, the agreement is valid if it satisfies the conditions provided by any of those laws. This gives the spouses the opportunity to follow the formal conditions they consider more favorable.

If, at the date of conclusion of the agreement, only one of the spouses is habitually resident in a participating Member State, and this State provides for additional formal conditions for this type of agreement, these conditions apply. The regulation refers to "participating Member States", i.e. those taking part in the enhanced cooperation form represented by the Regulation.

Conclusions

In the attempts to harmonize the private international law, the European legislator's orientation towards the institution of the parties' autonomy as the main connection factor can be observed. In this context, in the various branches of law, the parties increasingly enjoy the possibility to designate, according to their will, the law regulating their legal relations. However, in some matters, such as divorce and separation, this freedom of the will of parties is limited in the sense that the designated law has to be related to the situation of persons or their marriage relationship. By limiting the parties' freedom of will, the European legislator seeks to protect their interests and to provide them with adequate protection. Although the Regulation entered into force as early as June 21, 2012, it remains to be seen whether this protection is appropriate and also if the parties will use the choice of law applicable to their divorce or legal separation.

REFERENCES

[1] (EU) Regulation no. 1259/2010 of 20 December 2010 for implementing an enhanced cooperation in the area of the law applicable to divorce and legal separation, published OJ L 343, 29.12.2010, pp. 10-16.

[2] See the Council Decision 2008/431/EC authorizing certain Member States to ratify or accede to the 1996 Hague Convention on the Protection of Children in the interests of the European Community, OJ L 151, 11.06.2008, p. 36.

[3] Law no. 361/2007 on the ratification of the Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, adopted at The Hague on 19 October 1996, published in the Official Gazette, Part I, no. 895 of 28.12.2007.

[4] Published in OJ L 7, 10.01.2009, p. 1.

[5] The freedom of will of parties in determining the applicable law is also provided by the EC Regulation no. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), EC Regulation no. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), the 2007 Hague Protocol on the law applicable to maintenance obligations etc.

[6] See the Decision of 2 April 2009, Korkein hallinto-oikeus – Finland, C-523/07, Rec. 2009 I-02805, point 34, Decision of 18 January 1984, Ekro, C-327/82, Rec. p. 107, point 11, and Decision of 6 March 2008, Nordania Finans and BG Factoring, C-98/07, Rep., p. I-1281, point 17.

[7] Decision of the Court of 25 February 1999, Robin Swaddling vs. Adjudication Officer, C-90/97, Rec. 1999 I-01075

[8] See Decision of 12 March 2014, O. vs. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel vs. B, C-456/12, published in the Electronic Repertoire.

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The Decline and Upswing of Renvoi in the Private International Law of the European Union

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Abstract

A traditional notion of the private international law, renvoi has currently reached a turning point, without finding, however, a definite direction to follow. Although theoretical arguments are in favor of maintaining it, as a tool for coordinating legal systems liable to apply to a cross-border legal relationship, practical reasoning is against it: renvoi may delay the judgment of a case, increasing the number of prior approaches before establishing the governing law and, moreover, may lead to uncertainty in this regard. Given these circumstances, this study aims at investigating the current status of regulation of renvoi in the European Union law, in an attempt to identify its future direction of development.

Keywords: *conflicting legal rule,* lex fori*, renvoi, governing law.*

1. Introductive Considerations

1.1. The Theoretical Basis of Renvoi in Private International Law

As generally acknowledged, the law of a referred court (*lex fori*) cannot be applied directly to a cross-border private law relationship. The reason is that the law aforementioned does not seem to be more entitled to govern the legal relationship than the foreign law that governs the cross-border element. The equality of such legal systems in light of their liability to apply [1] justifies the existence of private international law, as an "instrumental" law, meant to provide an objective criterion (the conflicting legal rule), deciding *inter pares*, respectively establishing the law governing the relevant legal relationship (*lex causae*).

Once the need for the conflicting legal rule is acknowledged, the question is: whose legal system this should belong to, in order to comply with the principle of equality of existing legal systems. The correct answer, from a theoretical point of view, would be: to none. Any other answer would contradict the equality previously asserted. Ideally, the conflicting legal rule should be placed at a higher level (under an international agreement, the states with the existing legal systems are parties to or within the European Union law, if speaking about member states). Such a solution, although fulfilling the requirements of the theoretical reasoning, would be difficult to adjust to the current actual rules (at present, the process of making conflicting legal rules uniform at an international level or at the European Union level is relatively incipient). That is why, unavoidably, the conflicting legal rule should be placed in the national law.

In the context described, the pragmatic solution is to include the conflicting legal rule in the legal system of the court referred, which, at least, has the advantage of being known by the court of law. The disequilibrium created by forcefully applying the conflicting legal rule of *lex fori* (which transforms the law of court referred into *primus inter pares*) is compensated by the notion of renvoi**.**

Renvoi is, therefore, the legal situation arising when a conflicting legal rule in the legal system of the court referred (*lex fori*) regards a foreign legal system as a whole (thus, inclusively its conflicting legal rules), and the latter, by its conflicting legal rule in such matters, does not admit the referral, but refers back to the law of the court referred or to the law of a third party [2], [3], [4], [5].

In other words, renvoi is a legal tool, aiming at restoring the equilibrium between the existing legal systems, creating the premise for applying not only the conflicting legal rule of the court referred, but also of the foreign conflicting legal rule.

1.2. Forms of Renvoi

In private international law, renvoi takes the following forms:

a) first degree renvoi (simple renvoi or referral back), when the foreign conflicting legal rule refers back to the law of the court referred;
b) second degree renvoi (complex renvoi or further referral), when the foreign conflicting legal rule refers to the law of a third state.

In support of admitting first degree renvoi, specialist literature comes, in general, with the argument of coordination of existing legal systems [6]. Thus, renvoi provides for the application of both the forum conflicting legal rule and the foreign conflicting legal rule, restoring the equality of the two legal systems. In this light, to dismiss renvoi would mean to preserve the inequality created by the initial imposition of the conflicting legal rule in *lex fori*. The Romanian law admits, with certain exceptions, the first degree renvoi. For these purposes, pursuant to Art. 2559 par. (2) in the Civil Code, "if the foreign law refers to the Romanian law (…), then the Romanian law shall apply, unless expressly provided otherwise".

The theoretical grounds justifying the admission of first degree renvoi lose, usually, their strength when speaking about second degree renvoi, the practical argument prevailing in the latter case. Thus, given that the admission of second degree renvoi might make significantly more difficult the judgment of the case upon successive referrals (requiring thus repeated operations of establishing the content of the foreign conflicting legal rule), the pragmatic argument (namely ensuring the application of the principle of expeditious judgment of the case) pleads against it. In principle, second degree renvoi is not admitted in the Romanian law. Thus, pursuant to Art. 2559 par. (2) in the Civil Code, "should the foreign law refer (…) to the law of another state, the Romanian law shall govern, unless expressly provided otherwise".

2, Exclusion of Renvoi in the European Union Law. Rule

Pursuant to Art. 20 in Regulation (EC) no. 593/2008 on the law applicable to contractual obligations [7] (Rome I Regulation), "The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation".

Pursuant to the dispositions under Art. 24 in the Regulation (EC) no. 864/2007 on the law applicable to non-contractual obligations [8] (Rome II Regulation), "The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law".

Finally, pursuant to Art. 11 in the Regulation (EU) no. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [9] (Rome III Regulation) " Where this Regulation provides for the application of the law of a State, it refers to the rules of law in force in that State other than its rules of private international law".

Thus, as noticeable, the solution adopted by the European legislator is to completely exclude renvoi (therefore, inclusively first degree renvoi), avoiding in any situations the possibility of applying the foreign conflicting legal rule. Is this an additional harm to the equality between legal systems in existence, or only a normal consequence of the unification of the conflict of laws at the level of the European Union? The answer should be a nuanced one, depending on the meaning of foreign law – namely the law of a member state or of a third state.

If the legal systems considered belong to some European Union member states, the application of the regulations mentioned shall lead to the unification of the conflicting legal rules, making renvoi useless. For example, pursuant to Art. 4 par. (1) letter a) in Rome I Regulation, unless the party chooses the law applicable to the contract, the sale-purchase contract shall be governed by the law of the country where the seller has their habitual residence. Assuming that the court referred is the Romanian court, and the seller's habitual residence is on the territory of another member state (for example, in Italy), both *lex fori* (the Romanian law), and the foreign law (the Italian law) shall contain the same conflicting legal rule (the conflicting legal rule set forth in Art. 4 par. (1) letter a) in Rome I Regulation). In the situation described, the notion of renvoi seems to be thus useless, *de plano,* the application of the conflicting legal rule in *lex fori* being at the same time the application of the foreign conflicting legal rule.

On the other hand, if the foreign law is not that of a member state, renvoi does not seem any longer useless, the possible incidental conflicting legal rules not being necessarily identical. Thus, in an example similar to the one previously described, the referred Romanian court would apply indeed the conflicting legal rule set forth under Art. 4 par. (1) letter a) in the Rome I Regulation, but the foreign conflicting legal rule would be different. Let us assume that the seller's habitual residence would not be in Italy, but in Morocco. In such a case, obviously, the foreign conflicting legal rule would not be included any longer in the Rome I Regulation, but in the Moroccan regulation regarding private international law relationships, having as such, possibly, another point of connection than the seller's habitual residence. It results, therefore, that the renvoi mechanism would be liable to allow the application not only of the Romanian conflicting legal rule (more precisely the one included in the Rome I Regulation), but also of the Moroccan one, ensuring the restoration of equality between the legal systems considered. However, such an approach is prohibited by Art. 20 in the Rome I Regulation, which excludes renvoi, without distinguishing whether the foreign law belongs to a member state, or to a third state, or whether the potential renvoi would be a first degree or second degree renvoi.

Without reiterating the arguments supporting the dismissal of second degree renvoi, we should review why the European legislator preferred to eliminate even the first degree renvoi. If this was not considered useless (at least when the foreign law belonged to a third

state), the solution adopted may be justified only by arguments related to appropriateness. The previously cited legal dispositions show that, in the opinion of the European legislator, a foreseeable solution regarding the law governing the legal relationship with a cross-border element is preferable, and its foreseeable character is certain, when the conflicting legal rule of *lex fori* (the same, notwithstanding which court in a member state is referred) indicates directly the governing law (*lex causae*), without any potential "ricochet" caused by renvoi. Last but not least, the exclusion of renvoi of any degree meets the need for ensuring the expeditious judgment of cases with a cross-border element, by removing a stage in the conflicting reasoning (the stage of evidencing the foreign conflicting legal rule).

3. Admission of Renvoi in the European Union Law. Exception

Pursuant to the dispositions under Art. 34 par. (1) in Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [10]: "The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a renvoi:

(a) to the law of a Member State; or

(b) to the law of another third State which would apply its own law."

The second paragraph under Art. 34 sets forth some derogations from renvoi.

Further, according to the consideration (57) in the Preamble to the (EU) Regulation no. 650/2012: "The conflict-of-laws rules laid down in this Regulation may lead to the application of the law of a third State. In such cases regard should be had to the private international law rules of that State. If those rules provide for renvoi either to the law of a Member State or to the law of a third State which would apply its own law to the succession, such renvoi should be accepted in order to ensure international consistency".

As noticeable, the solution adopted by the Regulation no. 650/2012 is different from the ones previously reviewed, which excluded renvoi *de plano*. Although, at present, an isolate regulation, Art. 34 in (EU) Regulation no. 650/2012 may be the sign of a new stage in the European Union law, reconsidering the importance of renvoi as a guarantee of equality between existing legal systems. For these purposes, we consider relevant the justification of admission of renvoi, as retained in the consideration (57), previously cited, namely "in order to ensure international consistency". I consider that such consistency may be ensured only by creating a mechanism allowing the application not only of the conflicting legal rule of the court referred, but also of the foreign one in the legal system the conflicting legal rule in *lex fori* referred to.

As regards the dispositions under Art. 34 par. (1) in (EU) Regulation no. 650/2012, we should make some comments:

Firstly, according to the legal provision mentioned, renvoi is effective only when the conflicting legal rule of the referred court refers to the law of a third state. The solution is normal, given that, should the referral be made to the legal system of a member state, the latter's conflicting legal rule would have been identical, being the same as the one set forth in the (EU) Regulation no. 650/2012 [11]. Therefore, when the conflicting legal rule in the two legal systems in existence has the same connection point, renvoi is useless.

Secondly, Art. 34 par. (1) states, actually, that not only first degree renvoi is admitted, but, in certain conditions, second degree renvoi, too, an aspect that is in favor of the opinion stated above as regards reconsidering the role of renvoi in the private international law of the European Union. I shall review further the two situations in which Art. 34 par. (1) admits renvoi, whether first degree or second degree one.

Pursuant to the dispositions under Art. 34 par. (1) letter a), renvoi is admitted, first of all, when the conflicting legal rule of the foreign law refers to the law of a member state. Such hypothesis includes both first degree renvoi, when the law of a member state the reviewed text refers to is exactly the law of the court referred (*lex fori*), and second degree renvoi, in all the other situations (namely when the law of the member state mentioned by the foreign conflicting legal rule is not *lex fori*). An example may prove useful: pursuant to Art. 21 par. (1) din the (EU) Regulation no. 650/2012, succession as a whole is subject, as a rule, to the law of the state in which the deceased had their habitual residence at the time of death; therefore, if their habitual residence was in Tunisia, but the Romanian court was referred with a succession action, the conflicting legal rule previously mentioned would have referred to the Tunisian law; in such a situation, the Romanian court should have checked the Tunisian conflicting legal rule and, depending on its connection point (for example, the deceased's citizenship [12]), apply, as the case may be, the Romanian law (first degree renvoi), if the deceased was a Romanian citizen, or the law of another member state, for instance, the Bulgarian law (second degree renvoi), if the deceased was a citizen of that state. We should mention that, in the example above, second degree renvoi (to the Bulgarian law) is not liable to generate a renvoi in chain, the Bulgarian conflicting legal rule being identical to the conflicting legal rule of the court referred [namely, Art. 21 par. (1) in the (EU) Regulation no. 650/2012, applicable both to Bulgaria and to Romania].

Pursuant to Art. 34 par. (1) letter b), renvoi is admitted also if the foreign conflicting legal rule of the third state (namely the Tunisian one in the example above) refers to "the law of another third state applying its own law." In other words, this last law, through its conflicting legal rule, preserves the referral made by the Tunisian law (for example, has the same connection point, the deceased' citizenship). Second degree renvoi is, therefore, limited according to the will of the European legislator, so that to avoid successive referrals, which would be an obstacle for the expeditious judgment of the case. Insofar as the legal system of the third state Art. 34 par. (1) letter b) refers to would not apply its own law, the sanction would be the failure to apply the conflicting legal rule of the first third state legal system (the Tunisian one, in the example aforementioned), but the direct application of its material rules (the Tunisian law would become *lex causae* in the case). The solution results exactly from the dispositions under Art. 34 par. (1) according to which "The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a renvoi:

(a) to the law of a Member State;

or

(b) to the law of another third State which would apply its own law."

Per a contrario, if the requirement under letter b) is not fulfilled, given that the law of such third state does not apply its own law, the rules of law in force in the first third state shall be applied, but not also its rules of private international law, whose incidence was

conditioned by the fulfillment of the requirement aforementioned (namely to refer to a third state legal system applying its own law).

4. Conclusions

The decline of renvoi in the European Union law is not caused mainly by the trend of unification of conflicting legal rules, which should have resulted only in a limitation of its scope, but especially by the preference for the foreseeable and expeditious character, to the detriment of consistency of the scientific reasoning.

At the same time, however, the (EU) Regulation no. 650/2012 indicates a possible reconsidering of the role played by renvoi in the European Union law, when this is useful (namely when the conflicting legal rule of the referred court refers to the legal system of another third state). The solution retained – the admission of renvoi (inclusively of the limited second degree renvoi) – is meant to ensure the equilibrium between two principles of law, the one of equality between legal systems in existence (a fundamental principle of the private international law) and the principle of an expeditious judgment of the case (a fundamental principle of civil procedural law).

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Procedural issues concerning the possessory requests

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Abstract

The regulated possessory actions are the general possessory action (complaint for an action for possession) and the special possessory action (complaint to recover possession). The exertion of the possessory actions requires the accomplishment of special conditions of processual and substantial law, that must be concurrently fulfilled. The active and the passive capacity to sue are the ones raising some problems, regarding certain categories of rights (the situation of the person having the beneficial interest, of the precarious holder, of the joint tenancy of common ownership, of common property of spouses or when the possessory action is exerted against third parties). Being regulated as special procedures, the possessory actions are judged with emergency and priority, the statement of defence is mandatory and the ruling is subject only to appeal. A feature of the judgments issued on the possessory requests is given by the res judicata characterizing them only in relation to another possessory action (unless there are new elements) and not in relation to another judgment pronounced on the merits in an petitory action (the latter having, however, res judicata on a subsequent possessory action).

Keywords: *possession, disturbance of possession, dispossession, complaint for an action for possession, complaint to recover possession, special conditions for the exertion of actions, conservation measures, res judicata.*

1. Some introductory aspects

The possessory actions are those lawsuits through which the possession is defended as status quo against any disorder, they are exerted either to maintain this status quo or to regain possession if it was lost [2]. Therefore, the goal of the possessory actions lies both in the direct defence of the possession of a good (the status quo) as well as in indirectly defending the ownership or any other right in rem. The possessory actions are regulated both by Art. 949-952 Civil Code (as an institution of substantive law), and by Art. 1003-1005 from the Code for civil procedure (as an institution of procedural law), the rules completing each other.

A person who has been dispossessed or his/her possession was just disturbed can get the defendant to immediately cease all acts of possession disturbance or recovery thereof by means of a judgment characterized by increased celerity, since the lawmaker created a special procedure derogating from the common law.

Regarding its legal nature, the possessory action is an injunction, a patrimonial action, a real action for the defence of real assets or, where applicable, movable assets.

The classification of the possessory actions (requests) is made starting from the provisions in the Art. 949 Civil Code, as the disturbance of the possession or the dispossession were done without or with violence, namely:

– general possessory action (*complaint for an action for possession);*

– special possessory action *(complaint to recover possession).*

The general possessory action (complaint for an action for possession) is the action through which *the person who possessed the good at least for a year* requires the court to prevent or to remove any disturbance of his/her possession or, where appropriate, the restitution of the property.

The special possessory action (complaint to recover possession) is the action through which the plaintiff asks the court to *restore the previous situation* where *a disturbance* occurred *in the exertion of the possession or a dispossession* was made *with violence.*

2. The conditions for the exertion of the possessory actions

2.1. Preliminary remarks

Regarding the conditions for the exertion of the possessory actions, we mention that besides the general conditions for the exertion of any concrete form entering the contents of a civil action *(the wording of a claim, the interest, the processual capacity and the capacity to sue), some* admissibility *special conditions* are required to be met under Art. 949-951 form the Civil Code, depending on the type of the possessory action (*complaint for an action for possession* or *complaint to recover possession*).

2.1.2. The general possessory action (complaint for an action for possession)

For the general possessory action (*complaint for an action for possession*) to be admissible *three special conditions* set by the provisions of Art. 949 and Art. 951 from the Civil Code must be observed, as follows:

a) less than a year must pass since the peaceful disturbance or dispossession. The passivity of the holder being disturbed in the exertion of its possession or being dispossessed is sanctioned, so that, if *from the moment when the disturbance or the dispossession took place a longer period than a year has passed,* the *complaint for an action for possession* a is considered *prescribed* and the judicial protection of possession passes to the new holder. The Art. 951 par. (1) from the Civil Code expressly states that the term of one year is a *limitation period,* which commences from the date of disturbance or dispossession. If there are continuous acts of possession's disturbance, the limitation period starts to run from the date of the first act of disturbance (the beginning of the possession's disturbance) and not from the last act of disturbance [3];

b) the plaintiff must have been possessed the asset for at least a year before its disturbance or dispossession. A possession lasting less than one year does not enjoy the judicial protection in a general possessory action [4], the plaintiff being requested to prove that he exerted possession of the asset for at least one year before its disturbance or dispossession. In determining the duration of the possession being exerted, the reference point is the date when the disturbance or dispossession were produced, going back to the date when the possession started. Setting the time when the disturbance or the dispossession occurred is

of interest both for calculating the period in which the possessory request may be filed in, as well as for calculating the minimum period of the plaintiff's possession.

The evidence of the minimum possession of one year can be made by *any evidence, including testimonies,* as it is a factual situation. We mention that it is sufficient for the applicant to prove the *material element of the possession* (corpus) for the mentioned period, since, regarding the psychological element of possession, the presumption instituted through Art. 919 par. (1) from the Civil Code is incident, per which, until proven otherwise, *the person possessing the asset is deemed as possessor*.

By applying, through analogy, the Art. 933 par. (2) from the Civil Code, in the literature [5] it is admitted that this requirement is met also when the plaintiff relies on the junction of his/her possession with the possession previously exerted by his/her author [6].

c) the possession of the plaintiff must be useful. This results from the *per a contrario* interpretation of the provisions of the Art. 951 par. (2) from the Civil Code (while the special possessory action can be filed by a person who has exerted a vitiated possession, the exertion of the general possessory action requires a clear possession; moreover, *in principle,* only a useful possession may produce legal effects, per Art. 922 from the Civil Code). This condition is verified by reference to the defects of the possession, the possession being *useful* when *continuous, undisturbed* and *public.* In evidencing this condition of the general possessory action, the applicant will rely on the relative presumption established by the Art. 922 par. (2), second thesis, from the Civil Code *(*contrary evidence *the possession is presumed to be useful),* so that the person against which the possessory action is exerted has the *task of proving the contrary.*

2.1.3. The special possessory action (complaint to recover possession)

When the disturbance of the possession or the dispossession were done by violence there is the possibility to protect the possession through the special possessory action *(complaint to recover possession).* The concept of *violence* represents those *material or moral acts* against the possessor of the asset, which are likely to generate a rational fear.

The only condition of admissibility imposed by the law in this case is that *less than a year should have passed since the disturbance or the dispossession.* Therefore, *the statute of limitation of one year* applies whether the disturbance or, where appropriate, the dispossession was peaceful or done with violence, this requirement being common for both possessory actions.

The special possessory action may be initiated also by *the person exerting a vitiated possession* and *regardless of the duration of the possession exerted previously to the disturbance or the dispossession* [Art.951 par. (2) from the Civil Code.].

2.2. The capacity to stand trial (to sue)

If the *active capacity to sue* belongs to *the possessor,* any person can have the *passive quality to sue* anyone who disturbs the exertion of the possession or who dispossessed the possessor of the asset or even if this person would be owner of the asset, the only exception being the person(s) towards which there is *an obligation to return the asset.* So usually, the plaintiff in the possessory request is the *possessor*, meaning the person exerting the possession (in case of disturbance) or that exerted the possession (in case of the dispossession) over

the asset, but often the possessor is the actual owner of the asset (even though, in some cases, he/she may exert the possession either with another title, or as a simple status quo).

Also, we appreciate [7] as well that the owners of the *dismemberments of the right of ownership* [the right of superficies, the right of beneficial interest (usufruct), the right of use and enjoyment, the homestead right, the easement right (right of way)] may require the legal protection of the corresponding possession. Likewise, the law recognizes the active capacity to sue of the *precarious holder,* but *not in the cases where the latter has an obligation to return the asset* [Art. 949 par. (2) from the Civil Code and Art. 950 par. (2) from the Civil Code.]. When the possession's disturbance of the one detaining the asset based on a precarious title comes from exact person towards which he has the obligation to return the asset, the holder has the possibility to use a *personal action,* meaning an action arising from the contract through which the possession of the asset was transmitted, but he should prove the title based on which he possesses the asset.

It is necessary, however, that we make the following *nuances:*

Referring to *the right of beneficial interest (usufruct),* given that the relations between the pure owner and the usufructuary, the latter is only a precarious holder obliged to return the asset upon the termination of the usufruct, the usufructuary doesn't have access to possessory actions against the owner of the asset for the legal protection of its possession. However, as to third parties, given the fact that the usufructuary has the quality of possessor, then possessory actions are admissible [8].

Regarding *the joint tenancy of common ownership* (common ownership) *the possessory action cannot be used between co-owners,* the reason for that being that each owner exerts the possession both for himself/herself as for the others. But should an outer manifestation intervene that would cause the holder that exerted the material possession to turn the common possession into an exclusive one, we appreciate that possessory action may be used against the other co-possessors (co-owners) [9]. Possessory action may be used between co-owners also, also when a voluntary or by court partition occurred for the asset(s) commonly owned, when one of the owners disturbs the use granted to the other co-owner [10]. Also, per Art. 642 par. (2) from the Civil Code, the co-owner injured by an act concluded with the breach of the rules laid down in Art. 641 from the Civil Code will have the right that, before any partition, to exert possessory actions against the third party who would have gain possession of the common asset as result of the conclusion of the act. In this case, the refund will be made for the benefit of all co-owners, with the possibility to dispose the payment of damages by those who attended the conclusion of the act.

Regarding the exertion of the possessory actions *against third* parties, each co-owner may bring alone such an action for the entire asset jointly owned (Art. 643 from the Civil Code), given that it has the legal nature of an *act of administration* and to carry it out it is not necessary to have the consent of all co-owners.

Regarding *the common property of spouses,* they cannot file a possessory action against each other on the goods acquired within the legal matrimonial system of joint tenancy of assets, but when the disturbance of the possession is the consequence of a third party, only one spouse can file the possessory request based on the mutual, tacit presumed mandate.

The passive capacity to sue belongs to the author of the disturbance or dispossession, which can be the owner of the asset [Art. 950 par. (1) from the Civil Code], whether it is a disturbance or dispossession in fact or in law. Also, considering the legal nature of a patrimonial actions, the possessory action, either for an action or for recovery, may be also

exerted against the successors of the author of the disturbance or the dispossession (universal, by universal title or by particular title).

3. Competence and procedure of courts

Since the special rules have no disposition regarding the competence in solving the possessory actions, the general rules apply. Therefore, from the *subject-matter* point of view, per Art. 94 point 1 letter g) from the Code for civil procedure, the competence to hear as court of first instance belongs to the district court, regardless of the value of the possessed asset.

In terms of *territorial* jurisdiction, the competence is different, as the possessed asset is *movable* or *immovable*. Thus, when the asset in question is a movable asset, the competence to solve the possessory request will belong to the court from the defendant's domicile. If the asset is a building, the solution of the request shall fall under the exclusive competence of the court in whose jurisdiction the property is situated, or if the property is situated in the jurisdictions of several courts, the action will be resolved by the court from the defendant's place or residence if the defendant resides in one of those jurisdictions or, otherwise, by any of the courts with jurisdiction over the place where the property is situated (Art. 117 from the Code for civil procedure).

Regarding the judicial stamp fee applicable to possessory requests, per Art. 4 par. (1) of the Emergency Government Ordinance (EGO) no. 80/2013, it is set at 20% of the value of the asset whose possession is protected.

Possessory requests are judged with *emergency and priority,* which means that the judge has the possibility of shortening certain hearings, but anyway they will be short and with priority.

In the field of possessory request, *the statement of defence is mandatory,* failing to lodge it resulting in the defendant to decay from the right to submit evidence in his defence and to invoke any exception. We mention that the obligation to submit the statement of defence arises from the general provisions, as current regulation no longer provides for a derogation in this respect [As it was done by Art. 674 par. (4) in the Code for civil procedure from 1865].

Starting from the idea that through the possessory requests legal protection is offered to the *possession* as status quo, by the provisions of Art. 1004 par. (2) from the Code for civil procedure the law *excludes the possibility for the defendant to file a counterclaim and any other requests for the protection of a right in relation to the property in dispute.* This legislative solution is justified because the formulation of a *counterclaim* or of other requests such as *non-ancillary voluntary request for intervention, the identification of the owner of the right, claim against a third party* through which the defendant would entre debate upon the existence of a right over an asset that has been possessed, within a possessory action, would only result in transforming it into a petitory action [11]. Or, in the possessory proceedings, the court may only check the specific conditions provided by law for their admission, *and not the existence or absence of a real right over the property in question*, issues that may be requested by the concerned person separately [12]. However, *an ancillary voluntary request for intervention*, in favour of any of the initial parties *shall be admissible.*

Finally, we mention that in the judgment of the possessory requests, the plaintiff has the possibility to submit a *claim for damages* (as ancillary to the main claim) arising due

to the disturbance or the dispossession, which will acquire the legal nature of an ancillary request.

In terms of *evidence,* there are no special provisions. The disturbance and the dispossession, as legal facts *stricto sensu,* may be proven throughout any means, including witnesses and assumptions.

4. The judgement pronounced in possessory actions

On the matter of possessory actions, the court pronounces a judgment ***enforceable in law,*** but only in terms of possession [Art. 448 par. (1) point 8 form the Code for civil procedure]. Whereas the ancillary requests (eg ancillary claim for damages), the enforceability is not applicable and the judgement shall be enforced only after the judgment remains definitive.

Per Art. 1004 par. (3) from the Code for civil procedure, the judgment issued on a possessory request is subjected *only* to ***appeal*****,** therefore as far as the possessory actions are concerned the second appeal is suppressed.

A feature of judgments pronounced on the matter of possessory actions is given by the ***res judicata*** characterizing them. Thus, per Art. 1005 par. (1) 1st thesis from the Code for civil procedure, *the judgment through which a possessory action was solved has res judicata only in relation to another possessory request and only if the factual circumstances considered when rendering the solution remained unchanged.* Subsequently, it is mentioned that *such a decision does not,* however, *have res judicata on the merits of* the *case in an petitory action.* Therefore, the one lost in the possessory proceedings may file a request to claim the ownership over the respective asset, or where appropriate, an *action confessoria* (an affirmative petitory action for the recognition and enforcement of a servitude) or an *action negatoria* (an action, brought to repel a claim of the defendant to a servitude in the plaintiff's land).

Nevertheless, by the par. (2) of Art. 1005 from the Code for civil procedure, the legislator establishes that *the judgment through which was solved an action on its merits is res judicata in a subsequent possessory action relating to the same asset.* Thus, the one who lost in an action for the recovery of possession may not require, through a subsequent possessory request, the protection of the possession of that respective asset.

5. Taking the measures to preserve the asset on which possession is exerted

In terms of Art. 952 from the Civil Code, it is recognized for the holder (possessor) the right to bring an action to ask the court *to take measures to preserve the asset on which possession is exerted.* As presented in the recent doctrine [13] this procedure was regulated also for the protection of the possession, but it does not imply a disturbance or a dispossession made by a third party (who would deny the plaintiff's possession), but the risk of damage or destruction [14]. Therefore, these measures may be taken separately and are not to be confused with possessory actions (either for an action or for recovery).

Until the settlement of the claim, the possessor or, where appropriate, the other person may be forced to pay *a guarantee* (at the discretion of the court), only in the following situations:

a) if the court decides with provisional character, the displacement of the asset or the cessation of works, the guarantee shall lie on the possessor, so that he could repair the damage caused to the defendant by this measure;

b) if the court approves the maintaining of the asset in its current state or the continuation of the works, the guarantee shall lie on the *defendant,* to ensure the possessor the necessary amounts needed to restore the previous situation.

It has been shown [15] that the application through which the possessor request those measure to be taken, under the Art. 952 par. (1) from the Civil Code, is a procedure which is solved in accordance with the *common law,* and the claim grounded on the provisions of par. (2) of the same article shall be settled in accordance with the provisions regulating *the presidential ordinance* procedure, since it is a measure provisionally taken by the court vested with the judgement of the main claim (situation in which, according to Art. 952 par. (2) from the Civil Code, the court may order the parties to pay guarantees in the amount appreciated by the court).

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The Taxonomy of Real Estate Acquisitive Prescription and Civil Procedure Matters

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Abstract

Real estate acquisitive prescription or acquisitive prescription represents one of the primary means of obtaining the right of private property. In our current legislation, the real estate acquisitive prescription knows important modifications by comparing it with the past civil legislation, reason that led us to strive to present it in the current legislation, without lapsing the transient norms of the Law no. 71/2011 and the civil procedure norms that cover this topic.

Keywords: *real estate acquisitive prescription, acquisitive prescription, real estate acquisitive prescription without public record registration, real estate acquisitive prescription with public record registration.*

1. Introduction

By contrast with the bygone legislation, The Civil Code[(1)], provides both for real estate acquisitive prescription, through Art. 930 to Art. 934, as well as for personal asset acquisitive prescription in Art. 939. Thus, in considering the importance of public record registration in regards to voluntary conveyance or of obtaining principal real property right under the obligation for public record registration, the present day Civil Code follows the conception of estate acquisitive prescription under the obligation for public record registration existent in the Law Decree no. 115/1938, with a constituent effect, with the sole observation that the time limit is reduced by the contemporary legislator. Consequently, the present provision modifies in a substantial manner the conditions and nature of the real estate acquisitive prescription, the conditions of the substantive law being completed with the provisions represented by the procedural law, present in Art. 1049 and the next, of the Code of Civil Procedure[(2)]. The current Civil Code provides for two types of real estate acquisitive prescription: without public record registration and with public record registration [1].

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(1) Law no. 287/2009 concerning the Civil Code, republished in the Official Gazette no. 505/15 July 2011, as subsequently modified.

(2) Law no. 134/2010 concerning the Civil Code, republished in the Official Gazette no. 247/10 April 2015, as subsequently modified.

2. Real estate acquisitive prescription without public record registration

Real estate acquisitive prescription without public record registration is provided for by Art. 930 of the Civil Code. This article stipulates that the real estate right of property and to its dismembered rights can be written down in the real estate register, on grounds of real estate acquisitive prescription under the name of the person that over the course of 10 years. This can be achieved on condition that the owner already named in the real estate register is deceased or stopped existing, or a declaration renouncing the property right already has been written in the real estate register or the real estate was never present in the real estate register. Under alin. (2) of the same article, in these situations, the person that exercised the property right can gain the right of property only on condition he notes down his right on the real estate register before another person registered its personal claim for registering the right of property, based on a legitimate cause, within the course of time needed for the realization of real estate acquisitive prescription or even once this time limit is surpass [2].

By use of real estate acquisitive prescription without public record registration one can gain the property rights to real estate that represents private property as well as to its dismembered rights under certain conditions. Regarding the easement right, under Art. 763 of the New Civil Code, positive easement rights can be gained by real estate acquisitive prescription without public record registration, but not negative easement rights, which function under the legal absolute presumption that the abstinence of the locked owner from exercising some of the rights in nexus with the right of property represents the result of normal relations of good contiguity, and not the expression of an animus domini of the dominant owner that constitutes into possession over the asset right [2].

On a similar note, we have to remark the fact that the beneficial interest**,** the use and the right of occupation**,** as life-long rights, disappear with the death of the owner, with the effect of "returning to a state of full integrity" the property right of the bare owner, which results into the conclusion that these rights cannot be obtained through real estate acquisitive prescription without public record registration [3].

By analysing this article, we note that the real estate acquisitive prescription without public record involves the existence of the following cases: the owner of the property right that has been written down in the real estate register is deceased, or, as the case may be, has ceased to exist, or, although the asset has been written down in the real estate register, the owner of the property right has renounced it and the declaration to this fact has been written down in the real estate register, or the asset has never been written down in the real estate register [4].

Likewise, in order to fulfil the conditions demanded by the law for real estate acquisitive prescription without public record registration and consequently gain the private property right or the other real rights associated with it considering the presence of real estate acquisitive prescription, we need to observe the presence of the following circumstances: the person claiming the right has exercised useful possession, possession has been exercised over a period of 10 years, a time limit that cannot begin before the date of the death or cease of existence of the owner of the property right already written down in the real estate register or before the date in which the declaration of renouncing the property right has been written down in the real estate register; before the person submits its claim to the property right no other person has registered its own claim to the property right, based on a legitimate cause, pending or upon completion of the time limit for the real estate acquisitive prescription

(this condition is valid only in the first two cases that we have discussed in this paragraph because in the eventuality the asset is not registered in the real estate register this condition is left without object; the person that benefits from real estate acquisitive prescription has made this request and his request is approved. We notice through analysing the conditions discussed in the previous paragraph that none of the conditions make reference to the fact that possession has to be exercised in good-faith, as it is mentioned in the case of the real estate acquisitive prescription with public record registration, which translates into the fact that the acquirer even in ill-faith can gain the property right through real estate acquisitive prescription without real public record registration, as long as his possession is without vice [5].

In the next section of the article, we shall analyse the cases that we debated previously. Thus, in what concerns the first case, the legislator took notice not only of cases that involved the natural person, but, just as well of the cases in which the legal person is involved, unlike the provisions present in the Law Decree no. 115/1938. Within this hypothesis, it is relevant to notice the moment in which the owner natural person dies or the moment in which the owner, a legal person, ceases to exist [6].

Regarding the death of the natural person, the heirs that gain the right without being written down in the real estate register or the administrative units are not decayed from the property right of the asset or of the right to demand that their right be written down in the real estate register by the simple fulfilment of the time limit provided for the real estate acquisitive prescription, but through the effect of writing down the right in the real estate register [6]. As a consequence, real estate acquisitive prescription without public record registration could be stopped as a result of writing the right of the heir. In this case, the content of the real estate register would overlap with the actual judicial situation of the estate which would make impossible the acquisition of the real property right as an effect of real estate acquisitive prescription. In the eventuality there are no heirs, the administrative territorial unit can collect the inheritance that is vacant based on Art. 1138 of the Civil Code. In case the administrative territorial unit does not fulfil the formalities needed to gain the property right it will have the passive quality in a court proceedings that is intended to give away the property right as a result of real estate acquisitive prescription. We point out at this moment that the disappearance of the natural person would have to be followed by a court decision on the death of the person in order for the provisions of the real estate acquisitive prescription to take effect. The simple disappearance of the natural person would not constitute in the sense of the civil law the fulfilment of the condition provided for by Law [7].

In the eventuality of the hypothesis in which the death of the owner covers both the situation in which death occurs naturally as well as the court decision on the death of the person, the cases that cover the disappearance of the legal person are covered by law. Thus, according to Art. 244 of the Civil Code, the legal person ceases to exist either by witnessing or declaration of nullity, through reorganization, dissolution or voidance for any reason, or as a result of any other reason provided for by the law or by the constitutive act.

In case that the moral person that is to be found in the position of continuing the legal personality that was terminated does not commit to writing down its property right it can lose the right, gaining the passive quality in a court proceeding that is meant to grant the property right through real estate acquisitive prescription without public record registration [7].

Analysing the second situation that refers to the renouncing of the property right, which according to Art. 889 of the Civil Code has to be done under the form of an authentic notarized declaration that has to be registered at the Land Registry Office – the territorial administrative unit gains the right as a result of this abdication, without having to go through the procedure of writing down is right, but in order to protect itself against an action based on real estate acquisitive prescription it is necessary to request the writing down of the property right under its name. It presents no importance the right invoked by the possessor, being sufficient and necessary that the owner to be registered in the renunciation declaration, while the territorial administrative unit is forbidden from completing the formalities needed for writing down the right in the real estate registration, according to the law, before the time limit of 10 years is completed [7].

The last debated hypothesis is constituted by the reality in which the asset has never been written down in the real estate registrar while the term limit unfolds and even beyond the completion of it and it represents an innovation of the present Civil Code, when considering the provisions of the Law Decree no. 115/1938, but its applicability is under question as it contradicts the final thesis of the transitory provision of Art. 82 of Law no. 71/2011. According to Art. 82 of Law no. 72/2011the assets that are not written down in the real estate registrar continue to be influenced by the provisions present in the Civil Code of 1864. Considering this particular case, the property right or even the dismembered right to it can be gained by way of real estate acquisitive prescription even without considering the existence of a proprietary that has a title of the asset that continues to be alive. This hypothesis that discusses the application of the real estate acquisitive prescription resembles the case of the one operates in the previous Civil Code that provided for a time limit of 30 years. The only condition that needs to be fulfilled, provided that the condition of non-registration of the asset in the real estate registrar is that possession has to be useful during the time limit demanded for real estate acquisitive prescription to take place [6].

Debating the duration of possession we note that it has to be equal to 10 years and that this time limit cannot begin before the death of the owner, before the legal person ceases to exist or before the declaration of renouncing the property right is written down in the real estate registrar. The moment in which one could objectively invoke the real estate acquisitive prescription in the present day Civil Code would be at an interval of 10 years from the moment in which this new code has started to function, respectively at the moment of 1st of October 2021. Unlike the previous Civil Code, when it was considered that once the time limit was accomplished and the person gained the property right retroactively from the moment the possession started, the present Civil Code provides that the person benefiting from this procedure gains the right only through writing it down in the real estate registrar [1].

3. Real estate acquisitive prescription with public record registration

Unlike real estate acquisitive prescription without public record registration, real estate acquisitive prescription with public record registration operates in favour of a person that has written down in the real estate registrar his property right, but the registration was done without a legitimate cause, as a result any person with a reason could be in the position of contesting the registration [1]. In order to avoid such situations, Art. 931 alin. (1) of the Civil Code provides that “the rights of the person that has written down in the real

estate registrar without a legitimate cause in regards to a real estate right or to another real right, cannot be contested by none in case the person has possessed it in good-faith for a period of 5 years, as long as the possession was not influenced by any vice". Alin. (2) of the same article provides that it is sufficient for the good-faith to exist in the moment of the registration and in the moment in which the person took actual possession of the asset.

As a consequence, in order for real estate acquisitive prescription with public record registration to take place it must follow the conditions stipulated by law as it follows: a writing down of a real asset right or of another real right in favour of a natural person or of a legal person must exist, the writing down of the right must have been done without legitimate cause, the own that is written down with that right must have exercised possession upon the real estate for 5 years and in good-faith.

Concerning the existence of recorded right in the use of a natural person or of a legal person, in accordance with the factual reality, the real estate acquisition prescription with public record registration has as object a real estate right that is written down in a real estate registrar, that covers assets that are part of the civil circuit, that can be subject of possession, in order for the provision of Art. 931 to take effect, the person benefiting from these norms has to register his property right or any other real right (superficies, the beneficial interest, use and right of occupation, the right of usage and the easement right) for his own personal interest [8].

In order for the real estate acquisition prescription with public record registration to take place, the registration has to be conducted without legitimate cause because in case the registration has been conducted based on a legitimate cause, such as an act or deed of a judicial nature that is valid or fully effective from a judicial point of view, the disposition of Art. 931 would be without object, being impossible for a person to gain his own right of property through registration in the real estate registration without a "legitimate cause". This sentence represents the concrete idea that the registration of the right in the real estate registrar has been conducted without obeying the norms prescribed by the law [3].

Consequently, in relation to the norms of Art. 931 of the Civil Code currently in force, there are cases of registration without proper cause all the cases of registration that are done without judicial grounds, be it in the absence of act or deed that constitutes a justifiable judicial expression, through a simple request for registration, either on grounds of a judicial deed which is invalid – absolutely void or voidable [3], or in the conditions of the existence of an document that comes from a non dominus (from the previous registered owner, the apparent owner, or, as the case may be, from a person that estranges a real estate that was unregistered to that moment in the real estate registrar and we are dealing with a new registration in accordance with the provisions present in the Law no. 7/1996, Art. 581 [8].

The possession demanded by the law in order for the process of real estate acquisitive prescription with public record registration must fulfil the same specifications as it is demanded for the one without public record registration, namely to be usable.

The last condition for it focused on the good-will of the person. Good-faith is not precisely defined by law, but, applying through analogy the legal dispositions that define good-faith in other circumstances [8], we note that it is necessary for the person to have not known and to not being obliged to know, in the given circumstances, both at the moment in which he forwards the request for registration and at the moment in which he takes possession, the cause of inefficacity that affects his deed [5].

The one that has gained in good-faith a right and the right has been registered will have to consider the fact that under certain circumstances it is more profitable to take advantage of the special dispositions in terms of real estate registrar, for example in the eventuality in which the acquirer could invoke the dispositions of Art. 909 of the New Civil Code. These dispositions refer to the possibility of rectifying what is written down in the real estate registrar, in the sense of rejecting the rectification action filed against him, because, in case he obtained it by donation or through transfer by particular title, although the term limit continues to be of 5 years he does not have to prove the existence of a useful possession. Similarly, in the eventuality the acquirer has gained the property by way of an onerous judicial act, the time limit is of 3 years from the date in which the acquirer has registered the right or a year from the date in which he has communicated the fact that he has registered his right, still the need for demonstrating useful possession lacking in these situations [5].

Moving forward we discuss the actual possession which should be of 5 years in the case of the acquirer that has registered the right in the real estate registrar as the owner or as a legal holder of the right to register the right. The time limit starts once the request for registration is filed, namely from the date in which the request for registration has been filled, if possession has started at the latest from this date (in case the asset has been passed into possession at a later date, than the starting point would be that moment) or from the date in which the person actually entered possession (in the case in which the taken in possession has followed the date in which the request for registration has been filled) [5]. From this example we draw the conclusion that the courts will have to judge cases in which assets have been gained as a result of the provisions of the New Civil Code in the earliest starting with 5 years from the 1st of October 2011 (the date in which the New Civil Code came to effect), resulting in the date of the 1st of October 2016.

4. Invocation of acquisitive prescription

Considering that the acquisitive effect of the real estate acquisitive prescription does not intervene by law, it is necessary to be invoked by the person that has the interest. In relation to the types of real estate acquisitive prescription the manner in which it can be invoked is different.

First of all, analysing the real estate acquisitive prescripton without public record registration, the invocation of this natural way of gaining the property right shall be done by respecting the provisions of Art. 1050-1053 of the Civil Procedure Code. In accordance with the dispozition present in Art. 1050 of the Civil Procedural Code “the dispositions present in this title can be applied to any request to register in the real estate registrar real estate rights gained as a result of real estate acquisitive prescription. Considering the way in which the legislator has formulated the content of the procedure provisioned for by Art. 1050 of the Civil procedure code one might tend to believe that it applies to all situations, but it only applies to real estate acquisitive prescription without public record registration. Only in this case it has a constitutive effect. We feel oblige to point out this reality as a result of the fact that in the other type of gaining the property right the registration already exists and the real estate acquisitive prescription once it come to its time limit only consolidates the registered right. As a result the procedure prenseted in the Civil Procedure Code provides only for one of the situations discussed in this article [5]. Not considering the natural person and the legal peron that can invoke it we would like to point out that

real estate acquisition prescription without public record registration can be invoked by the co-debtors of the acquiring possesor (in the eventuality the obligation is solidary or indivizible), his fidejussors, the creditors of the possesor and other persons that present an interest, category in which we can also include universal successors and successors with an universal title, as well as those that acquire through a particular title [6].

Next we shall discuss the passive quality during the court proceedings. In case the owner that has his right written down in the real estate registrar but who died or ceased to exist the passive quality will be passed to the heirs of the deceased person or to the legal successors of the natural person that ceased to exist [9]. For the purpose of clarifying things the owner of the assets that result from vacant inheritans or assets that are without owner is the state, the assets being part of the private domain of the state, and, in exceptional cases, on the grounds of the Art. 5 alin. (2) of the Law no. 213/1998, the territorial administrative units gain this quality [10]. Without consideration of the value of the asset, the competence for settling the case representing the demand for registering in the real estate registrar of the real property right gained through real estate acquisitive prescription without public record registration belongs to the first instance court that covers the area in which it is located the asset [5]. According to Art. 1051 alin. (2) "the plaintiff shall stipulate in the request to register the date from which he holds the possession of the asset as owner, the grounds for real estate acquisitive prescription, the fact that the asset is or is not registered in the real estate register, as well as the name or the designation of the previous owner or of its successor, if he knows this information". Likewise, the request shall be accompanied by the evidence mentioned at the level of alin. (3) of the same article. The first court, receiving the request, shall decide through conclusion the summoning of the rightful owner registered in the real estate register or of the succesor, if they are known, as well as the fulfilment of the formalities of notification regarding the real estate acquisitive prescription that are provided for by Art. 1.052 alin. (1) and (2) that allow those that hold an interest to register within a time limit of 6 months from the publication of the formality of notification opossitions to the request. If there is no opposition the request shall be judged in court procedures, the first court of instance offering a conclusion, after it will search whether or not the conditions for real estate acquisitive prescription are met. In case there are oppositions, the procedure shall be given a solution in court. The opposition is comprised out of defenses against the request of real estate acquisitive prescription. Evidence are administered in order to prove the presence of the necessary conditions, as well as in the sense of proving the opposite considering the general rules of the procedure [6].

The second stage of the procedure consists in the writting down in the real estate registrar of the right of the person benefiting from the procedure. This is done through the use of the court's conclusion on the case. The request is addressed to the Land Registry office that covers the area in which the asset is located, respecting the conditions provided for by Art. 28 of the Law no. 7/1996. The writting down of the right shall be done with the date that is on the request to register the right in the real estate registrar. The conclusion of the court in which it recognises the property right gained via real estate acquisitive prescription represents a just cause for this task. It has a constitutive character, and not an announcing character. The constitutive effect is produced at the date in which the the request to register is filed. Out of this situation we deduct that even a registration of the right into the benefit of another person, filed after the request based on real estate acquisitive prescription and

even after the court's conclusion or decision in which it states the fulfilment of the necessary conditions can and will prevent the entire procedure [6].

The real estate acquisitive prescription cannot be invoked through a defense used in the backgroud court because on one hand the special procedure to which the New Civil Procedure Code that refers exclusively to the real estate acquisitive prescription has a mandatory nature, and on the other hand, in practice, verus dominus will never have the interest to call into court the acquisitor, offering him the opportunity to invoke it as a defense, but he will most likely write down his right in the real estate registrator through the gratious procedure blocking the acquirer's possibility of benefiting from the real estate acquisitive procedure [6]. Considering the aspects that are related to the request for recognising the effects of real estate acquisitive prescription it is worth mentioning the recent decision of the I.C.C.J. no. 19/2015 [11], that expresively stipulates that these provisions shall not be applied to possessions already running at the time of entering into action the norms of the New Civil Code. For situations in which the possession has began previously, the norms that are present in the Civil Code together with the cour proceedings, not the special procedure shall be enforced according to the law in Art. 1.050-1.053 the Civil Procedure Code. Unlike the real estate acquisitive prescription without public record registration, real estate acquisitive prescription with public record registration shall be invoked through the an exception, precisely, as a type of defense, in a dispute in which the acquiror, from his position of defendant shall take use of the dispositions present in Art. 931 of the Civil Code to create a defence in a action for the recovery of possession filed by another person [5]. It should not be excluded the possibility for the person benefiting from the procedure to invoke real estate acquisitive prescription with public record registration, as a means of gaining the asset, in a court proceedings in which he holds the position of the plaintiff, for example, once he has had useful possesion upon an asset for the duration of the 5 year time limit, the person can direct an action to recovery against another person that disturbs the right to property. Likewise, this type of acquisitive prescription could be invoked through a declaratory action, if the admisibility conditions are met, including the need for interest to exist [5]. The court that solves the main request shall have the competency to solve this request as well. The request and the defence shall be directed against the person that holds the main action regarding the written down right in the real estate registrar. In order to establish the person that has the right to invoke the acquisitive prescription the norms present in Art. 934 regarding the extinctive prescription. As a result, based on Art. 2.512, it can be invoked by the person in whos favour it exists, as well as the possessor that has his right written down in real estate registrar, personally or through representation, while in accordance with Art. 2.514, it can also be invoked by co-debtors of the possessor that benefits from acquisitive prescription (in the eventuality the obligation is either indivisiable or solidary), his fidejussors, the creditors of the one holding possession, as well as other persons, categories, in which there are universal successors, successors with an universal title and acquirers with a particular title [6]. When debating the passive quality we notice that in such a situation we are not dealing with a judicial action of acquisitive prescription. By the will of the law the real right that is written down in the real estate registrar is consolidated without a legitimate cause. As a result, while we do not consider the case of process of acquisitive prescription we take out of the equation the existence of a passive subject [9]. Forasmuch as the possessor is the one written down in the real estate registrar as the owner of the right of the right that is the object of the acquisitive prescription there

is no necessity for the special procedure of writting down the right. Considering that the litigation, namely the decree upon the acquisitive prescription are in nexus with the defence of a real right written down in the real estate registrar, these notes shall be introduced in the real estate registrar in order to be opposable for third parties [9].

Conclusions

Acquisitive prescription is a traditional method for gaining the right of private property provisioned for in our internal law. Nevertheless, the current norms present in the present day Civil Code represent a novelty, thus, we considered that there is true novelty in debating a "traditional" theme but which was given special treatment, especially through the introduction of a special procedure in the Civil Procedure Code for invoking real estate acquisitive prescription without public record registration. We manifest our interest in continuing to research the topic, especially once these provisions shall start to see practical use in the courts, resulting in decisions and awards based on these norms concerning real estate acquisitive prescription without public record registration.

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The obsolence enforcement

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Abstract

The obsolete, as is defined in the doctrine, is the procedural sanction consisting in the extinction of forced execution at the stage in which it is found due to the long-term lack of diligence of the creditor in attempting to capitalize on the right recognized by a court order or Another entry which, according to the law, is an enforceable title [1].

Keywords: *the obsolete, sanction, forced execution, creditor, debtor, act of execution*

1. Notice and conditions

By virtue of the provisions of Art. 697 C.proc.civ., "(1) If the creditor, by his fault, has allowed to go for 6 months without performing an act or requesting the forced execution requested thereof, In writing, by the bailiff, the execution is lawful. (2) In the case of suspension of execution, the period of time shall run from the suspension. The overtime is not suspended as long as forced execution is suspended at the creditor's request".

Article 697 C.proc.civ. establishes the cumulative conditions that are required to be fulfilled in order to operate the enforcement of the forced execution, respectively [2]:

- the existence of an enforcement request whereby the creditor invests the bailiff in forced execution;

- failure to execute an act of enforcement or an action for a period of 6 months from the date when the bailiff has requested the creditor to do so; In this respect, the court practice has ruled in the present case that "for the purposes of ascertaining the lawfulness of enforcement, it is not sufficient merely to pass a period of six months after this act of execution, but not to execute the act of execution to be caused by Lack of diligence on the part of the creditor" [3].

- the default in default is to belong to the creditor, ie not to be in the presence of an act of execution to be performed by the bailiff ex officio or by bodies or authorities.

The passing of a 6-month period does not always cause interference to the perimeter, but only when the bailiff has requested in writing the creditor to execute an act or request for enforced enforcement, while he did not comply with this request for 6 months. Thus, "as opposed to the old regulation of enforcement, the new regulation imposes an additional and essential condition that the bailiff has asked the creditor in writing to make an act or request. As this condition is not fulfilled, the perimeter could not operate. However, even accepting the old perimeter operating mechanism, it could not have been the incident in

question, since the alleged inaction of the creditor and the bailiff for a period of 6 months is not based on their fault, but is the respite granted by O.G. no. 22/2002 to the public institutions for budget forecasting of the amounts necessary for the execution of the title. The incidence of this normative act was taken into account by the executor, who also specified this in the summons issued to the debtor" [4].

Therefore, in order to intervene, the new regulation establishes the obligation of the bailiff to communicate in writing to the creditor the necessity to carry out the act or the action necessary for the continuation of the forced execution, and if he fails to do so, after the lapse of 6 months, Forced execution, conditional, of course, by the debtor's fault. If the debtor proves that, although the 6-month period since the last act of execution was performed, he was not at fault, the obsolete will not operate.

Through the drafting of Art. 697 C.proc.civ. It follows that the 6-month period runs from the date when the bailiff communicates the request to perform an act or request for enforced enforcement.

In this respect, the enforcement of forced execution can also occur if the creditor has failed to fulfill the obligation to advance the enforcement costs, including the amount thereof, although the bailiff has notified the creditor in writing that he has not complied with this obligation [5].

The legal text does not condition the form's claim, except for the written form, to the bailiff's request. This may take the form of an address, a record, a report that requires proof of communication to take effect.

The provisions of art. 697 par. (1) C.proc.civ. Were the subject of an objection of unconstitutionality, so that, invested with the examination of the abovementioned provisions, by decision no. 416/2016 of June 16, 2016, published in the Official Gazette, Part I, no. 876 of November 2, 2016, the Constitutional Court held that they are in accordance with the fundamental law, with the following arguments: "In substantiating the exception of unconstitutionality, it is argued in essence that the legal provisions are unconstitutional as to the moment when the perimate period Of forced execution, respectively "from the bailiff in writing".

It is appreciated that through the legal regulation criticized the legislator left to the appreciation of a participant in the forced execution, respectively the bailiff, the prerogative to determine the incidence of the institution of obsolete and its effects, in the forced execution that it performs. In the absence of any written request, the institution of obsolete can not operate by being formally conditioned by the written request of the bailiff who may or may not issue it.

By establishing this subjective criterion of assessing the incidence of an institution by the personal action of a participant in forced execution, the legislator gave rise to the possibility of exercising sufficiently dangerous actions that would affect the parties' rights to equality before the courts and to a fair trial. (...) Examining the objection of unconstitutionality, the Court notes that the legal provision criticized regulates the circumstance of enforced enforcement in the event of the culpability of the creditor who, despite having been requested in writing by the bailiff, has left a 6 Months without fulfilling the act or the necessary action required by the executor. The Court observes that the period in which the perimeter operates is also 6 months, as in the regulation contained in Art. 389 par. (1) of the Code

of Civil Procedure of 1865, however, according to Art. 697 par. (1) of the Code of Civil Procedure, it shall not run from the date of the last instrument of execution but from the date on which the executor communicated in writing to the creditor the request for the execution of an act or the execution of a request for enforced execution. The old civil procedural law did not provide for the requirement that the act or request be made in writing by the bailiff.

The criticized regulation was adopted by the legislator within the scope of his duties conferred by Art. 126 par. (2) of the Constitution, according to which "The jurisdiction of the courts and the procedure for the trial are provided only by law", the reason given in the edict of the criticized norm is to determine the creditor to take all necessary steps to assert the rights acquired through the enforceable title obtained.

The establishment of the new conditions in which the perpetuation of the forced execution occurs is in accordance with the positive obligation of the state, which results from the provisions of Art. 626 of the Code of Civil Procedure, to promptly and effectively ensure the enforcement of judgments and other enforceable titles, as well as the active role of the bailiff in forced execution expressly enshrined in Art. 627 of the Code of Civil Procedure. The judicial executors are invested in the performance of a service of public interest and their activity is carried out under the law, in compliance with the legitimate rights and interests of the parties and other interested persons, irrespective of race, nationality, ethnic origin, language, Religion, sex, political affiliation, wealth or social origin. In the exercise of his/her active role, the bailiff uses all the means provided by the law in order to achieve the full and speedy fulfillment of the obligation stipulated in the enforceable title.

The reason for the objection of unconstitutionality is that its author is dissatisfied with the fact that, as to the debtor, he can not ask himself as a debtor to find out the circumstance of forced execution, since the Code of Civil Procedure makes the intervention of this institution subject to the written request of the executor To the creditor. As to this criticism, the Court notes that the debtor must voluntarily execute his obligation established by the judgment of a court or by another enforceable title, according to Art. 622 of the Code of Civil Procedure. Otherwise, this is done through forced execution. In the event of the opening of the proceedings, the debtor usually does not have an interest in completing the forced execution against him, the only interested party in the execution being the creditor.

Therefore, the Court observes that, through the legal regulation criticized, the intervention of enforced enforcement is circumscribed to the attitude of the creditor, who, by failing to fulfill the obligations in writing by the bailiff, leaves the forced execution for failure to work for six months. The term "obsolescence" begins to run from the moment when the bailiff requests it.

With regard to the claim that the legislature had the power to determine the incidence of the institution of obsolote and its effects in the assessment of a participant in forced execution, namely the bailiff, in the context of its enforced enforcement, the Court notes that the legal provision criticized Gives expression to the active role of the bailiff, as outlined in par. 18 of this decision. If the bailiff has the obligation to endure by all means provided for by the law in order to achieve the interest of the creditor, the parties to this procedure must also fulfill their obligations under the law. As regards the creditor, the Court notes that, according to Art. 647 par. (1), the first sentence of the Code of Civil

Procedure, the latter has the obligation to grant to the bailiff, at his request, effective support for the good execution of the forced execution, by providing him with the means necessary for this purpose, and in respect of the debtor, he must comply with the enforceable title. In conclusion, overtime operates as a sanction for the inertia or negligence of the creditor who has been notified in writing of his obligations by the bailiff.

Moreover, once it has been legally notified, the bailiff has to execute the acts of execution in the order and within the deadlines set by the law. In this respect, Law no. 188/2000 regarding the bailiffs, republished in the Official Gazette of Romania, Part I, no. 738 of October 20, 2011, stipulates in Art. 56 that the bailiff must justify his refusal to perform the duties provided by the law, if the parties persist in their fulfillment. In the case of unjustified refusal, the interested party may file a complaint with the court in whose territorial jurisdiction the bailiff's office is located, which will be judged by the parties. The bailiff will be obliged to comply with the final court ruling. Law no. 188/2000 further provides that systematic delay and negligence in the performance of the work entails disciplinary liability of the bailiff.

Therefore, the non-fulfillment of the obligation stipulated in the enforceable title resulted in the enforcement of the forced execution, the author of the unconstitutionality exception, debtor of the obligation, being dissatisfied with the fact that he can not benefit from the institution of obsolete because of the existence of the stipulations stipulated by the legally criticized text. As stated in par. 19 of this decision, the party concerned in the performance of the obligation is the creditor, and the debtor is more interested in the extinction of the enforcement procedure through the intervention of the perimeter. So, what is important is the execution of the obligation, not the enforcement of the forced execution, given that the civil proceedings have been completed and the creditor has turned to the forced execution procedure for the recovery of his claim. The criticized legislative measure comes to support the execution of the enforcement obligation, as well as a penalty for the creditor for lack of diligence, as well as a coercive measure of the debtor who has not voluntarily executed his obligation. Consequently, conditioning the interference of forced execution limits the debtor's freedom of action. The creditor has the possibility of effectively fulfilling the obligations incumbent on the debtor, realizing his claim at his will, but observing the legal obligations as outlined in par. 21 of this decision.

The Court then observes that the legal provisions criticized are clear, precise and predictable, the addressee of the legal norm being able to adapt its conduct according to its content, so that violation of art. 1 par. (5) of the Constitution.

In its jurisprudence (for example, Decision No. 1 of January 11, 2012, published in the Official Gazette of Romania, Part I, No. 53 of 23 January 2012), the Court held that, in principle, any normative act must fulfill certain conditions Qualitative ones, including predictability, which means that it must be sufficiently precise and clear to be applicable; Thus, the formulation of the normative act with sufficient precision allows the persons concerned – who may, if necessary, seek the advice of a specialist – to reasonably foresee, in the circumstances of the case, the consequences which may result from a particular act. Of course, it may be difficult to draft laws of absolute precision, and some flexibility may even prove desirable, supplements that do not have to affect the foreseeability of the law (see, to that effect, the Constitutional Court's Decision No. 903 of 6 July 2010, published

in the Official Gazette of Romania, Part I, No. 584 of 17 August 2010, and the Decision of the Constitutional Court No. 743 of 2 June 2011, published in the Official Gazette of Romania, Part I, no. 579 of 16 August 2011 and the case-law of the European Court of Human Rights, for example, Case Cantoni v. France, par. 9; Judgment in Wingrove, Against the United Kingdom, par. 40, judgment of 4 May 2000 in Rotaru v. Romania, par. 55; Judgment of 9 November 2006 in Case C-For Leempoel & S.A. ED, Ciné Revue v. Belgium, par. 59).

Next, as regards the alleged breach of the principle of equality of rights and the right to a fair trial, the Court notes that the criticized legal provision applies equally to all parties having the same procedural position in achieving the same categories of rights, so that Can not hold violation of Art. 16 and Art. 21 par. (3) of the Constitution, in its component of arms equality.

2. Cases of Interruption and Suspension of the Performance Course

Although the text of Art. 697 par. (1) C.proc.civ. cases do not expressly provide for the interruption of the course, however, this period is susceptible to interruption if, within 6 months, the creditor fulfills the obligation imposed on him by the bailiff (or at least proves the undertaking The necessary actions [6] to carry out the acts or requests requested by the executor). In the case of the applicability of art. 697 par. (1), therefore, not any act of the creditor in the sense of the continuation of the forced execution has an interruptive effect on the term of perimetry. On the other hand, in the hypothesis provided by Art. 697 par. (2) C.proc.civ. When the 6-month period for overtime runs from the date when the suspension of the forced execution ceased (any legal or judicial suspension, not the voluntary one), any act made by the creditor with the undeniable intention to continue the execution interrupts the period of obsolescence.

With regard to the suspension, the term of overtime shall be suspended according to Art. 697 par. (2) C. proc.civ. In the event of suspension of enforcement until the date of cessation of the cause of the suspension. Suspension of the overtime, in this situation, occurs in case of legal suspension, not in case of voluntary suspension, granted at the creditor's request, aspect resulting from the final sentence of Art. 697 par. (2) C.proc.civ. Code, which expressly states that "the term of perimation shall not be suspended as long as enforcement is suspended at the creditor's request".

3. Contribution and Processing of Performance by the Court

According to the provisions of Art. 698 C.proc.civ., "(1) Perimation shall be established by the enforcement instance, at the request of the bailiff or the interested party, by conclusion with the short-term quote of the parties. (2) Termination of enforcement shall lead to the abolition of all acts of execution, except those which have resulted in the partial performance of the claim contained in the enforceable title and the accessories".

Although the legal text stipulates that perimity operates lawfully, however, the fulfillment of the term is not sufficient for it to operate, it being necessary for it to be ascertained and pronounced by the court.

The finding of obsolence is carried out by the enforcement instance at the request of the interested party or of the bailiff. In this respect, the court will order the parties to quote in the short term. As regards the merits of the party concerned, the practice stated that "The interest of the appellant-challenger in the substantive settlement of the contestation of execution is the possibility of relying on and ascertaining the circumstance of enforced enforcement against him as a debtor. The practical consequence of enforcing forced execution is the cessation of forced execution and the ineffectiveness of the enforced enforcement acts. The fact that forced execution in enforcement files (...) is suspended is not equivalent to the fact that enforcement acts could not be resumed when the suspension ceased, so that the examination of the conditions required for the enforcement of enforcement is of practical interest to the debtor company – recurring Cause" [7].

The enforcement body shall rule on the overtime by means of a termination which may be appealed only on appeal within 10 days of the communication.

Termination, once found by the enforcement court, will have the effect of dismantling all the enforcement acts drawn up. They are exempted from this effect of the perimeter, the acts that led to the partial enforcement of the claim contained in the enforceable title and the accessories, which will not be abolished, but will be preserved.

4. The effects of public order provisions under which the performance is regulated

Termination as a procedural sanction is gover ned by public policy provisions. However, in line with another opinion [8] expressed in doctrine, we believe that the incidence of obsolence can not be invoked by the court of its own motion, as to the way in which Art. 698 par. (1) C.proc.civ. limit the scope of the persons who may request the establishment of the perimeter – the bailiff or the interested party. Also limited is the sphere of the authorities who can see the perimeter, being represented by the courts. The executor can not ascertain perimation. However, the executor may refuse to continue (or resume) the forced execution after the lapse of the term, even if the court has no evidence of circumvention. Such a refusal, motivated as such by the executor (we believe in this case to issue an order), can not be sanctioned by the court on the appeal filed under Art. 712 par. (1) second thesis C.proc.civ.

5. Modality which may send the institution to conscious period

The finding of perimation can be accomplished by means of a separate request, formulated on the basis of Art. 698 par. (1) C.proc.civ. As well as in an appeal against enforcement against acts of execution performed after the outbreak. However, we emphasize that the invocation of the perpetuation by the contestant, as a ground for nullity, can only take place within the term of formulating the contestation of the first acts communicated to him after the perimation. The invocation of overtime in an appeal against further acts may not be received by the court, in accordance with the provisions of Art. 713 par. (3) C.proc.civ.

According to the same doctrinal opinion [9], which we support, we believe that circumvention can not work before the enforcement of enforced enforcement, even if between the moment when the application for enforcement and the delivery of the court

is filed, the executor will request the creditor in writing to complete an act or proceedings Necessary for execution.

Another aspect of correctly interpreted interpretation in the doctrine [10] is that in concluding the finding of perimation, to the provisions of Art. 698 par. (2) second thesis C.proc.civ. The court must expressly state the acts it maintains and the amount recovered (or the part of the obligation executed) so that a subsequent resumption of the execution does not lead to a double execution, even in part.

In any case, as in the case of court rulings, perimity operates in block, throughout the execution, even if it is started in several forms. First of all, the Civil Procedure Code speaks of the perpetuation of enforcement, and secondly, the contrary interpretation would run counter to the nature of the penalty, which occurs if the creditor no longer shows interest in the continuation of the execution and no longer supports the executor, Although he asks him [Art. 697 par. (1) C.proc.civ.] or no further execution after suspension [Art. 697 par. (2) C.proc.civ.].

6. Active processing quality

Both the executor and other interested parties have the procedural quality necessary to promote this request. The interested person can understand either the debtor or the creditor (in some cases) or the third party who was injured by the acts of execution. Therefore, not every person who justifies a general interest can make this claim, but the interest required by law is the one established according to the provisions of Art. 33 C.proc.civ.

The creditor may have an interest in obtaining the perimate finding. Thus, if the executor acted abusively, contrary to the creditor's interests, even only by means of documents or requests requested in writing and which led to the incidence of the outbreak, without the creditor having been able to act for his or her replacement or replacement before the lapse of six months, We believe that it is not out of the question of promoting the demand by the creditor.

If the bailiff was not the one requesting the enforcement of the enforced execution, his right to appeal against the court ruling is questionable. If we admit that the bailiff will not be summoned in the proceedings (he is not a party within the meaning of Art. 698 of the Civil Procedure Code, corroborated with Article 644 of the Civil Procedure Act, but only a participant), then he can not formulate either The appeal against the judgment, especially in relation to the provisions of art. 458 C.proc.civ., which makes this right conditional upon an express legal provision.

As regards quoting the interested parties, in principle, we consider that the bailiff will not be summoned to resolve the application for perimate finding, even if he has promoted it, since solving this request does not imply the exercise of his personal rights, but only an obligation imposed by law. Therefore, the creditor and the debtor and, where appropriate, the interested party (other than the one) who made the request will be quoted.

7. The creditor's right to formulate a new request for strict execution

The sanction of overtime does not affect the creditor's right to file a new enforcement request. Therefore, the creditor whose forced execution has become obsolete may file a

new application for forced execution as long as he is in the prescription period of the right to demand forced execution.

The wording of a new enforcement request shall be made in compliance with the provisions of Art. 665 and Art. 666 C.proc.civ., and after the enforcement of the forced execution, the executor shall notify the debtor of the conclusion of the court, as well as a new notice, to which the title to be executed will no longer be joined.

Thus, according to the provisions of Art. 699 C.proc.civ., "(1) In the case of overlapping of the execution, a new application for forced execution may be made within the prescription period, the provisions of Art. 665 and 666 are applicable accordingly. (2) After the enforcement of the forced execution, the executor shall inform the debtor of the conclusion of the court, as well as a new summons, to which the title to be executed will no longer be joined".

The institution of obsolence is distinct from that of the limitation of the right to obtain forced execution, so that "the obsolence which has operated in respect of the first execution does not have the same effect, the perimetry, and the subsequent execution, as claimed by the contestant, regarding The latter running a new 6 month period from the date of the application for enforcement, which was obviously not fulfilled at the date of the appeal. As regards the limitation of the right to enforce the enforceable title, the court finds that the first instance court has made use of the principle of law that the application of the limitation period is based on the passive nature of the creditor who does not take steps to fulfill his claim and has fairly removed The complainant's assertions that the intimate creditor, in relation to the injurious passivity of the debtor challenger, had to promote the oblique action by which he requested the debate of the succession after the debtor's parents, with the purpose of bringing a good into his patrimony (...) It is possible to carry out the forced execution during the whole process of the extinctive prescription being suspended because the debtor has stolen his goods and the proceeds from the pursuit (...). Naturally, in the ruling on obsolence, no account was taken of the suspensive effect of prescribing the inheritance debate for the good reason that the perimeter institution is distinct from the limitation of the right to enforce forced execution, being governed by different legal regimes, including the causes of suspension and interruption of time limits" [11].

Conclusions

The obsolence, as a sanction that may become incident in the forced execution phase, has the effect of extinguishing the forced execution at the stage when it is found at the time of the obsolence finding, as a result of the creditor's lack of diligence in attempting to capitalize on the right recognized by a judgment Court or other writ, which, according to the law, is an enforceable title, the blocking of the entire operation, even if it is executed in several forms.

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[5] For example, if the bailiff requests the creditor in writing to indicate further follow-up assets of the debtor, the creditor will lodge evidence within 6 months of the receipt of inquiries from different bodies or institutions (tax authorities, institutions Banking systems, real estate or real estate registration systems), even if they are not answered by a response (usually, the term of state institutions' response of 30 days) is capable of interrupting, however, the term "obsolence", in our opinion.

[6] Tribe. Bucharest, 4th civilian s., Dec. Civ. no. 152 / R of January 16, 2015, in M. Dinu, R. Stanciu, *op. cit.,* pp. 243-244.

[7] P. Pop, *Some theoretical and practical aspects of the perimeter of forced execution*, in R.R.E.S. no. 1/2015, p. 59.

[8] *Idem*, p. 60.

[9] *Idem*, p. 73.

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Protection of intellectual property in the context of securing the right to information

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Abstract

The adherence of Romania to the European Union has assumed, among other conditions, the harmonization of the national legislative framework with the European one, which would certify that our country has the ability to be part of the European project and fulfill its obligations as such.

The removal of restrictions concerning the free movement of goods and services, paved the way for access to technological development, innovation and the free flow of information in any field. European Union member states are concerned to protect intellectual property while guaranteeing freedom of expression, unfettered circulation of information (in the broad sense of the acceptation, meaning works, ideas, know how, etc.) and protection of personal data.

With regards to human rights, it is important that exerting a right does not affect the free exertion of the rights of others. Therefore, I believe that in matters of intellectual property and the right to information, it is important to achieve, both from a legislative and practical point of view, a harmonization of the two rights, with express and exhaustive guarantees and limitations so that the social values sheltered by the protection of the two rights are consistent and interdependent.

At international and European level, there are still disparities in terms of the legislative approach of the issue of ensuring the two rights, which leads to difficulties in enforcement of the legislation, to the disparities in the functioning of internal markets, to an impact on real and honest competition as well as to an impossibility of achieving a common goal of sustainable development.

Keywords: *Right to information, copyright, related rights, intellectual property,*

1. General considerations

In 1997, the European Council in Luxembourg decided that periodical reports shall be drafted on the progress the candidate countries have made in preparation for adhering to the European Union as well as the recommendations it deems necessary in order to successfully complete the process. The evaluation would be presented to the European Council, on the basis of which the decisions to continue the adherence process would be based. The criteria these reports had in view were "the Copenhagen accession criteria", especially the extent to which the acquis of the Union was adopted". [1]

The 2004 Regular Report on the progress made by Romania to join the EU, "examines Romania's ability to assume the obligations of membership, namely the acquis as expressed in the Treaties, the secondary legislation and the policies of the Community" [1]. In the assessment, a Particular attention was granted to intellectual property law, the Commission mentioning in the report that, notwithstanding the adoption of legislative and administrative measures necessary and progress being made in the cooperation between the agencies of law enforcement, yet "piracy and counterfeiting is still pervasive in Romania ", which led to the conclusion that the protection of intellectual property and intellectual rights must remain a concern.

Romanian authorities in the country report conclusions, decided amending and supplementing Law no. 8/1996 on copyright and related rights in the sense of broadening powers in combating piracy. By Background note [2] GEO no. 123/01.09.2005, for amending and supplementing Law no. 8/1996 initiators show that the normative act aims at "transposing the acquis communautaire into force on 1 May 2005, notably the European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights."

On the other hand, we must take into consideration the right to information of individuals in a broad sense, i.e. removing the restrictions on the free movement of ideas, access to the latest technology, innovation and progress towards sustainable development of society. In this regard, there must be a constant concern in legal matters, to ensure a balance between the right to information, freedom of expression and protection of intellectual property.

The development of information technology, communications and the increasing access to Internet creates the premises for intellectual property infringement, promoting the dissemination of creations, works, innovations, without fulfilling the legal requirements on the protection of authors' rights.

In the case of Internet piracy, it is known that it may cause significant damages, in economic terms, sometimes even entering the sphere of organized crime, actual networks for the supply of materials being organized without respecting the provisions of the law. However, an excessive regulation of the sector, for example with sanctions that affect freedom or with the possibility that the state has the right to stop connections or close sites may be considered disproportionate, capable of affecting the right to information and freedom of expression, being a form of censorship.

2. Intellectual Property

Intellectual property protection is circumscribed, in the matter of European law, to the general concept of protection of property rights, highly regulated and guaranteed by the convention for the protection of human rights and fundamental freedoms and additional protocols.

"The definition of intellectual property included all the rights over creations of human genius related to literary, artistic, scientific works, inventions in all fields, scientific discoveries and rights related to intellectual activity in the industrial, scientific, literary and artistic fields." [3] as can be observed, the concept of intellectual property is more extensive than that of copyright and related rights, including industrial property rights.

Following the expansion of information technology and the diversification of the channels through which it can disseminate information, for example, in France, in practice, the

question of how to address the principle of territoriality of an international dispute of cyber – counterfeiting was posed, the conclusion being that if it were treated as a simple issue of defamation through the press, it would lead to "trivializing disputes regarding intellectual property." the French doctrine is of the opinion that in the case of copyright, unlike in that of industrial property, conflicts of jurisdiction are not as "strongly subject to coercion" in terms of territoriality, the common law being applicable in the matter. [4]

The measures and procedures to be adopted for the protection of intellectual property should not become obstacles to the free flow of information or hinder technological development, which underpins a sustainable development of states and individuals. "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of those generating and using technological knowledge and in a manner that leads to social and economic welfare, to a balance of rights and obligations." [5]

It is necessary for states to adopt appropriate measures to prevent the abuse of rights in this case of intellectual property right, by holders thereof or the use of practices likely to affect other rights: the right to information, right to free movement of goods, services and technology.

Also in order to ensure a balance between the exercise of various rights, it is important that the exclusive right of use and exploitation of the copyright holder is not subject to limitations or exceptions, that may affect the normal exploitation of the work and prejudice the legitimate interests of the copyright holder. And in this matter, as in all cases where we are discussing the guarantee of individual rights and freedoms, any limitation on the exercise of the right must be expressly and exhaustively set out in the law.

Generically, "the subject of the copyright is represented by the works of intellectual creation in the literary, artistic or scientific field, namely the form in which ideas are expressed not so much the content of ideas or their supporting documents.", and the protection of copyrights and related rights include technical protection measures, public administrative law means, civil law and criminal law means. [6]

The moral aspect of copyright is characterized in that it is a right which is "inalienable during the life of the author, non-transferable to heirs and imprescriptible" [7], and the patrimonial side of intellectual property rights vests in the author being exclusive and limited in time. [7] Although intellectual property rights are considered exclusive "monopoly rights", we must bear in mind that this is not an absolute monopoly, allowing for the use of information by third parties, with the consent of the holder of the right.

There were opinions according to which the "property of the authors should not only take in their lives" [7], but the current legislation makes a distinction between the moral, non-transferable aspect (except as provided by Art. 11 par. (2) of Law No . 8 of 1996 on copyright and related rights) and the heritage side, which lasts for the lifetime of the author, and after his death, the economic rights shall be transferred by inheritance, according to civil legislation, for a period of 70 years (art. 25 of Law No. 8/1996).

Directive 2004/48/EC of the European Parliament and Council of 29 April 2004 on the enforcement of intellectual property rights [8] is based on the declared objective of "gathering closer the laws" of Member States, for an effective protection of intellectual property, in order to ensure a fair and competitive market and to encourage innovation and creation. The joint efforts of the Member States should be directed towards "the effective compliance" with intellectual property rights, given that, at present, the failure to comply

with these rights enters increasingly into the sphere of organized crime (cybercrime, digital piracy, counterfeiting and trademarks, failure to comply with geographical indications etc.)

To protect and guarantee the fundamental rights and freedoms of individuals, it is necessary for the legislature to ensure fairness between the rights and obligations of each so that the exercise of a right must not impede exploitation of another right. This principle is taken into account by the text of Law No. 8/1996, which at Art. 33 establishes certain limitations on the exercise of the copyright, but such limitations must have a well-defined foundation respectively not prejudice the author, not be in conflict with normal exploitation and comply with fair practice.

In judicial practice, courts have correctly interpreted the text of the law in that it did not allow that under the guise of ensuring the right to information, the right of the author be prejudiced. I would like to illustrate in this respect, the situation in which the author of a work related to the Geography of Romania, which he created under the aegis of a certain University (in the form of lecture notes), asked the court to defend his copyright before another professor of the same university, who used his lecture notes to edit a book, which he published and sold as his own work. The defendant invoked that the applicant's work is not original either and that his reproduction is subject to the dispositions of Art. 33 par. (1) let. d) and g) of Law no. 8/1996, which would exonerate him of any liability. The first instance court concluded that "the reproduction of the work of the applicant did not have as purpose information and research", "did not have as object short excerpts from the work of the applicant, being taken over entirely", "the reproduction not being made in the archives of public or scientific institutions that operate without a lucrative purpose, the work being edited for distribution", the requirements have not been met with regards to permitting reproduction, distribution, broadcasting or communication to the public without a direct or indirect, commercial or economic advantage, when used exclusively for illustration in teaching or scientific research. "Thus the first court declared it an infringement of the plaintiff's copyright, the court of appeal assessing that "the first court correctly interpreted and applied the provisions of Art. 33 par. (1) let. d) and g) of Law no. 8/1996 "and the court of appeal declared that" the claims of the appellant cannot be received in that legal requirements are satisfied by the fact that reproduction of the work was done for information purposes." [9]

The courts have recognized in this way the superior interests of protecting the copyright, in this case, not being any justification related to guaranteeing the right to information.

3. The right to information

In legal literature, a view was expressed that guaranteeing the right to information, freedom of movement thereof, while respecting certain fundamental principles and human rights are "precedent and superior above all political and social organizations, nationally and internationally" . [10]

The right to information and freedom of expression in any way and by any channel of dissemination must remain a fundamental principle, and setting limits and responsibilities in this field should be complementary to exercise them and not contradictory or liable to hinder the exercise . "The public debate of opinions is a sure way to nurture the truth, and this method is probably the only one". [11]

From the point of view of the citizen's right to information, it is important to have access to the latest results of scientific research (state of the art technology, know how, etc.), only in this way can we discuss social progress and sustainable development.

The basic principle of operation of the Internet is the free flow of information, freedom of expression in this environment being recognized in international law. Implementation of the principles of international law (both in terms of freedom of expression and its limits), is an obligation of the states, who have yet to enact national mechanisms to implement them.

The opportunity new technology offers in terms of communication and free flow of information has allowed for an easier access to work and the ability to be used by a large number of users, leading to the need for an international approach to copyright and for a harmonization of national laws.

In the case of responsibility for the information published on the Internet certain particularities should be considered, namely the preservation of evidence, determining the date on which the deed attracting liability was committed, the date from which limitation periods flow, determining who the persons responsible are (the person who created and manages the website, the web hosting service provider – if not a dedicated service, etc.), determining the territorial jurisdiction etc.

The fact that national laws are not uniform in terms of responsibilities may affect, on the one hand the intellectual property rights, and on the other the right to information and freedom of expression. The rules must be flexible and the conduct one of voluntary compliance.

The main concern of specialists focused on the economic approach to regulations in the field of copyright, meaning that they must ensure compatibility between concern about free trade and free competition and copyright compliance, but the same consideration should be held and respect for the individual right to information, which must be in accordance with the enforcement of copyright and related rights. So, we should bear in mind that creative intellectual activity is to be used in the social benefit, for the intellectual development of the individual, the economic development of society, in conjunction with non-property rights protection, but also property rights of authors.

Professor Derieux [10] in the context of analysing the international regulations concerning the Internet and copyright, stated that the issue of protection of these rights in cyberspace, is especially of importance for the copyright of journalists. I believe, however, that the issue of copyright protection is important for all works as well as for industrial property, trademarks, patents, etc., because the expansion of information technology did not only make possible but also necessary, the movement of these "products of the creativity and of the human mind" [6], this free circulation in the internet promoting access for all citizens to the newest ideas, but raising more acutely the question of protection of author copyrights, both as moral right and as a financial law.

In 1967, the World Intellectual Property Organization (WIPO) [12], was founded, which is defined as a global forum for services, policies, information and cooperation in the field of intellectual property. The body aims to maintain a balance between intellectual property protection and the possibility of using innovation and creativity for the benefit of all, for economic, social and cultural development. Information should be made available to be used and to be put in value. Efficient use of new information in the field of technological innovation, and new literary or artistic creations generates at its turn progress by fostering

innovation and design, creating new jobs, concern for the development and implementation of new technologies.

Romanian legislation also considers respecting the right to information by imposing limits on the exercise of copyright. Thus, Art. 33 of Law no. 8 of 1996 establishes the conditions under which it is permissible to use a work without the author's consent and without payment of remuneration. These exceptions are strictly defined and limitative and their invocation is permitted only if use of the work complies with the copyright law, and is not contrary to a normal exploitation of the work and does not prejudice the author or the holders of the rights to use.

One of the exceptional situations stipulated in Art. 33 par. (1) let. a) of Law no. 8/1996 is "reproduction of a work in court proceedings, parliamentary or administrative purposes or for public safety." In my opinion, when establishing this exception, the legislative body had in mind precisely the best interest of society to have free access to information. Besides, legal practice has also established the social utility of reproducing certain passages of a work in parliamentary procedures and regulations. In this regard, in a case where C.F. sued the Romanian Government, requesting protection of its copyright law, meaning that, in the explanatory memorandum to Law no. 287/2009, on the new Civil Code, certain passages were taken from one of his works, in violation of his rights. The first instance, the appeal and the re-appeal courts [13], considered that: "The reproduction of texts in the explanatory memorandum represents a permissible limitation of the copyright ... falling ... in the exception in Art. 33 par. (1) let. a) of Law no. 8/1996 and Art. 5 par. (3) let. e) of Directive 2001/29/EC on the limitation of copyright by using texts in the administrative and parliamentary procedure. "The first instance court considered that no prejudice was brought to the copyright" the purposes of the copyright being of public interest, of informing the recipient of the law on the need for legislative changes brought by the new Civil Code without pursuing a direct or indirect, commercial or economic advantage" and "the purpose of the citation was exclusively the information of the public". The court of re-appeal also considered that "it was correctly decided in the first court, the regulation of the limitation in question being imposed by the necessity to protect general interests, of a public nature such as the one on informing the public about the importance and relevance of legislative intervention in the matter of the Civil Code".

As noted there should be a balance between the values upheld by the legislation, so as to succeed both in guaranteeing the right to information and intellectual property protection.

4. Conclusions

In legal literature [6] the issue of an inter-conditioning was raised in the sense that the legal rules that regulate and guarantee intellectual property rights have evolved along with the development of means and multiplying channels of information dissemination.

A uniform regulatory framework at international, European and national intellectual property protection helps implement the free flow of information, the effective realization of the right to information of the individual, as a pillar of a democratic society. Professor Derieux states that in the field of Internet and copyright "the disparity of laws is an obstacle to the free flow of information." [10]

Given that both regionally and globally, there is an increasing concern of all states to improve the degree of welfare by providing innovative products and services, and by

protecting the environment, it is very important to ensure an efficient balance between the protection of intellectual property in all its forms and the individual's right to information, right, useful and appropriate.

In order to harmonize the information needs of individuals and of society with the need to protect intellectual property it is necessary that the legislative instruments in the field be flexible and adaptable, be harmonized with the internal legislation of each state and be easily applied to all the bearings of this sphere activity: copyright, related rights, industrial property etc.

Worldwide dissemination of the latest information in the field of scientific research, innovation is essential, they must be accessible to all, and the protection of intellectual property rights should take into account the needs of potential users, especially where the funding of research – innovation activities was made from public funds.

In specialized literature [14] it is considered that the development of creative activity brings into question not only the protection of intellectual property, but also correlated issues, such as "social relationships, division of labour, the status of creators, remuneration, conditions of distribution, internationalization of trades and competition policies ". Economic evolution is closely connected with the protection of intellectual property, because innovation and creativity generate economic growth. The interdependence of the two concepts is given also by the approach of intellectual property protection, namely social (moral aspect of the right) and economic (the patrimonial side of the right) and in practice, in my opinion, it is important to address the management of these two issues, so that protection of the rights does not impede economic development.

There is also a strictly economic approach to intellectual property in the specialized literature [15] namely the attribute of monopoly conferred by the copyright, which can be approached from two angles: on the one hand monopoly entails additional costs for users of information, which would could lead to restricting the access to the latest scientific and cultural process and to disparities regarding the progress and the social welfare associated with these processes. On the other hand, the privilege of monopoly, is a guarantee for the protection of intellectual property and may stimulate the creative act.

I believe that new information, knowledge, innovation should lead to a widening of the boundaries of social knowledge, while generating economic growth and accumulation of social welfare, by maintaining a balance between social and economic aspects of the right to information and intellectual property rights in all its forms.

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PUBLIC LAW

Unconstitutional Legislative Solutions in the Field of Labour Law

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Abstract

Taking into account the evolution of the terminology used by the Constitutional Court of Romania upon drafting its decisions, in the sense that it specifically declares as unconstitutional, in the actual operative part of decisions, the legislative solution set out in the legislation subject to constitutional review, a development which we have highlighted also on other occasion, we will continue in this study our endeavour to structure the case-law of the Romanian Constitutional Court in respect of legislative solutions found to be unconstitutional, this time in the field of labour law. The purpose of this paper is, on the one hand, to bring to attention the admission decisions handed down by the Constitutional Court in the aforementioned field, in order to prevent future adoption of provisions with the same legislative content, and, on the other hand, to highlight the influence that the reception of relevant international benchmarks has had in this field.

Keywords: *unconstitutional legislative solutions; constitutional review; labour law; constitutionalisation of law.*

1. Introduction

The study sets out the case-law of the Constitutional Court, this time in the field of labour law, addressed in terms of legislative solutions found to be unconstitutional. We have pointed out also on other occasions [1] that such an approach offers a vision which goes beyond the strict framework of the limits of appeals to the Court, revealing the valences of the constitutional review, i.e. the removal from the legislative system of those provisions which repeat legislative solutions found to be unconstitutional. Thus, one can note both the sanctioning effect on the rule which was the subject of the exception of unconstitutionality, and also the preventive effect of the review of constitutionality, i.e. the impossibility on the part of the legislature to resume a legislative solution declared unconstitutional, unless there is a change in the socio-economic context. Where, in disregard of that latter effect, enshrined in Art. 147 of the Constitution relating to the general binding nature of the decisions issued by the Constitutional Court, the legislature resumes in a new legislative act a legislative solution found to be unconstitutional, also the new regulation will be found

unconstitutional both on the grounds retained in the precedent of the Constitutional Court (when it sanctioned the unconstitutional legislative solution), and for the infringement of Art. 147 of the Constitution.

It is thus continued the research effort the aim of which is to create a Codex of unconstitutional legislative solutions [2] for the purpose to reveal the consistency and continuity of the constitutional case-law as concrete applications of the constitutional duty of loyalty of public authorities and all subjects of law, but also of what one might call 'negative work' of the legislature, written for each regulation which infringed the constitutional principles and provisions. Addressing this issue in the context of the 10 year "balance sheet" since the accession to the European Union, this study reveals another aspect of the review of constitutionality, namely that of "appropriation" of European values and standards of protection of fundamental rights and freedoms, and "settlement" of legislation on coordinates common to the Member States of the European Union. The labour law field provides good examples in this regard.

2. The unconstitutionality of the measures consisting of removal from the courts' jurisdiction of appeals relating to the imposition of a disciplinary penalty, the termination of employment contracts of certain categories of employees or the redeployment of staff, upon reduction of management or production staff, the granting of pay grades and increments, the reduction of tariff salary for failing to fulfil all of the tasks of service, or against the award of prizes and ex gratia, of complaints against disciplinary penalties for infringement of the principle of free access to justice and the constitutional provisions on the achievement of justice through the High Court of Cassation and Justice and the other courts established by law.

We would point out, first of all, that the labour law legislative solutions found unconstitutional because they excluded from the courts' jurisdiction those appeals relating to various specific measures, can be addressed, and we have dealt with them accordingly, in the context of the analysis of a broader principle, which is in line with the case-law in different areas, namely that of ensuring free access to justice.

In this respect, on several occasions, the Constitutional Court has been called upon to give a ruling on whether the imposition of an administrative or administrative-jurisdictional procedure constitutes a violation of free access to justice or may have the effect of limiting such access. The position of principle of the Court was expressed by Decision of the Plenary no. 1 of 8 February 1994, in which it held that it is the exclusive competence of the legislature to establish such procedures which, in general, are designed to ensure faster handling of certain categories of disputes, to relieve the courts of the cases that can be resolved on this route, to avoid court costs, whereas the administrative-jurisdictional procedure constitutes a protection measure which may not have the objective of limiting the access to justice. With regard to the provisions of Art. 126 of the Constitution, pursuant to which justice is administered by the High Court of Cassation and Justice and the other

courts provided for by law, the existence of certain administrative bodies of jurisdiction is not likely to eliminate the jurisdiction of ordinary courts, under the conditions laid down by law, a consequence which follows from the requirements of the principle of separation of powers, which, with respect to the relationship between the public administration and judicial authority, excludes the possibility of a public administration body, whether or not of a judicial nature, to substitute itself to the judicial authority. As a result, "the decision of the administrative jurisdiction body is subject to the judicial review of the administrative litigations court or of another competent court, under the law, and the parties' access to this right enshrined in the Constitution cannot be restricted". Also the European Court of Human Right has reached a similar conclusion, i.e. that "demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies [...] which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system (case "Le Compte, Van Leuven and De Meyere v. Belgium", 1981).

These were the reasons substantiating, in essence, also a series of decisions in the field of labour law [3], which have had as subject matter Articles 175 (1) (a), (b), (c) and (d) of the Labour Code adopted by Law no. 10 of 23 November 1972, and which established that the hierarchically superior administrative body or the collective management body shall have jurisdiction, according to the law, over: "*a) appeals against disciplinary sanctions, which have not been placed, under the present code or another legal provison, under the jurisdiction of the trial court or other bodies; b) appeals against the termination of the employment contract, and disputes concerning the reinstatement of managers appointed by hierarchically superior bodies, as well as of directors, directors general and the staff assimilated to them in the central bodies; c) appeals against the redeployment of staff during reduction of administration or production staff; d) appeals lodged in connection with the granting of pay grades and increments, or against the reduction of tariff salary for failing to fulfil all of the tasks of service, or against the award of prizes and ex gratia*".

Similarly, the Court has declared[4] the unconstitutionality of the provisions of Art. 18 (2) (a), (b) and (c) of Law no. 1/1970, noting that they need to be deemed as repealed, in the light of the provisions of Art. 150 of the Constitution of 1991. We would point out that, Art. 18 (1) of Law no. 1/1970 states that "*the sanctioned person may lodge a written complaint against the disciplinary penalty within 15 days of the notification of the penalty*", whilst Art. 18 (2) states that the complaint "*shall be resolved within 30 days by the: a) the person who is the immediate hierarchical superior of the person who has imposed the sanction; b) the collective management body in case of penalty imposed by the head of unit; c) the next higher hierarchical body in case of penalty imposed by the collective management body of the unit*". The Court has also held, inter alia, that such jurisdiction of administrative bodies cannot be assimilated to an administrative-jurisdictional procedure, since it offers no guarantee of a procedure in compliance with the requirements in Art. 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, pursuant to which everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This international

convention on human rights is given priority, pursuant to Art. 20 (2) of the Constitution, compared to the domestic legislation in question.

Moreover, similar considerations have underlined the admission decisions of certain exceptions of unconstitutionality which concerned both provisions of the Labour Code, cited above, and also the provisions of the Criminal Procedure Code (Decision 486/1997, published in the Official Gazette of Romania, Part I, no. 105 of 6 March 1998), the provisions of Law no. 128/1997 on the statute of the teaching personnel (Decision no. 1614/2010, published in the Official Gazette of Romania, Part I, no. 118 of 16 February 2011), whereby **the Court found unconstitutional the legal provision which excluded the jurisdiction of the courts in the settlement of certain categories of dispute, thereby hindering the free access to justice**. Art. 21 of the Constitution has been amended and supplemented, following the revision of the Constitution; thus, par. (4) was added and states that "*special administrative jurisdictions are optional and free of charge*". With regard to the application of that constitutional text, the Constitutional Court has distinguished between '*special administrative jurisdictions*' (the words of the constitutional text), and the prior administrative procedure, by pointing out that "*the constitutional provision has removed the precondition only for the judicial administrative procedure. No constitutional provision prohibits the institution, by law, of a prior administrative, non-judicial, procedure, such as, for example the hierarchical or administrative appeal procedure*" (e.g. Decision no. 220/2004, published in Official Gazette of Romania no. 539 of 16 June 2004, followed by a well-established line of case law).

3. The limitation of the amount of compensation paid to the employee to an amount calculated on the basis of the average salary earned by the employee for a period determined arbitrarily is unconstitutional.

The Court found [5] unconstitutional the provisions of the final sentence of Art. 136 (1) of the Labour Code, relating to the limitation of the compensation owed to the employee to an amount calculated based on the average salary earned during the last three months prior to termination of the labour contract. This is because the limitation of the compensation granted to a re-instated person whose labour contract has been unduly terminated, to an amount calculated based on whatever artificial criteria constitutes, infringes the equal rights principle, enshrined in Art. 16 of the Constitution, through the derogation from the general rule under labour law, laid down by Art. 111 (1) of the Labour Code, according to which: "*The employer is, under the terms of the law, bound to indemnify the employee wherever he/she, due to the employer's accountable fault, suffered prejudice during fulfilling his/her working duties or in connection with the job*." This because employees prejudiced by unlawful termination of the labour contract, due to their employer's fault, which means those covered by the hypothesis regulated under Art. 136 (1) final thesis of the Labour Code stand on an equal footing with the employees prejudiced due to their employer's fault other than the unlawful termination of the labour contract, which means employees whose situation is covered by the hypothesis under Art. 111 (1) of the Labour Code. For this reason, with a view to observing the constitutional principle enshrined by Art. 16 (1) of the Basic Law, it is necessary to ensure, in all such situations, a non-discriminating legal

treatment, which implies the application of the general rule enshrined in Art. 111 (1) of the Labour Code.

We would point out that, by analysing and finding the infringement, by the rules criticised, of Art. 38 (1), first sentence, [now Art. 41 (1)] of the Constitution, "*The right to work may not be restricted*", the aforementioned decision has also taken into due account the relevant EU/international law, based on Art. 20 (1) of the Constitution: The International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966 [Article 6 (1) and 7] ratified by Decree no. 212 of 31 October 1974, published in the Official Gazette, Part I, no. 146 of 20 November 1974; the Revised European Social Charter, adopted in Strasbourg on 3 May 1996, ratified by Law no. 74 of 3 May 1999, published in the Official Gazette of Romania, Part I, no. 193 of 4 May 1999. Pursuant to Art. 1 (2) of the revised European Social Charter, "*With a view to ensuring the effective exercise of the right to work, the Parties undertake: [...] 2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon".*

4. The transfer of an employee from one unit (place of work) to another, without his/her consent, is unconstitutional.

The Court found that the transfer in the interest of the service, necessarily involving the need to change the unit with which the individual employment contract was signed, solely as result of the employer's own will, constitutes a breach of the principle enshrined in Art. 38 (1) [After revision Art. 41 (1)] of the Constitution, which states that: "*The right to work may not be restricted. Everyone has a free choice of his profession, trade or occupation, as well as place of work*", in relation to Art. 49 (after revision Art. 53), according to which exercise of certain rights of freedoms may only be restricted by law and only if necessary for the reasons expressly and exhaustively listed in par. (2) of Art. 49 of the Constitution [6].

5. Arbitrary suspension of the individual employment agreement, at the discretion of the employer, or under conditions which are not proportionate to the aimed to be achieved, is unconstitutional. The legislation on causes of suspension cannot leave open the possibility of arbitrary or unsound decisions, because the protection of the right to work requires, inter alia, that the restriction on the exercise of that right respect the constitutional requirements imposed by Art. 53 (2) on proportionality, and not just ensure restorative measures or alternative solutions.

In essence, based on that reasoning, the Court found unconstitutional Art. 52 (1) (b), first sentence, of Law no. 53/2003, which had in view a unique situation in all the regulations concerning the measure of suspension, namely that of *suspension as result of submission by the employer of a prior complaint against an employee*. The Court noted that the initiative of suspension of the individual employment contract is left entirety to the employer, i.e. the person that acts as complainant and, at the same time, orders the suspension of the employment relationship. As a result, the Court held that, although it is not possible to

speak of a denial of the right to work, in the sense of prevention of the person to choose a profession or another job, it should not be disregarded the fact that the measure of suspension of the individual employment contract is a restriction on the exercise of the right to the work, left by the provisions of Art. 52 (1) (b) first sentence of Law no. 53/2003 at the disposal of the employer. [7]

Similarly, the Court found that *suspension of the individual employment contract as a result of a criminal complaint filed by the employer against the employee does not meet the proportionality requirement, as the measure is excessive in relation to the aim pursued, and, therefore, the provisions of Art. 52 (1) (b) first sentence of Law no. 53/2003 are unconstitutional* in relation to constitutional provisions of Art. 53 on the restrictions on the exercise of rights and freedoms, in terms of the fundamental rights referred to in Art. 41 (1) and Art. 21 of the Constitution concerning the right to work and free access to justice, respectively. Given the lack of objective criteria circumscribing the circumstances in which the employer may order the suspension under Art. 52 (1) (a) of Law no. 53/2003, as well as the fact that, in the absence of such legal criteria, the assessment of the suspension grounds is left entirely at the disposal of the employer, the Court held that the provisions of the impugned legal text, read in conjunction with other provisions of the Labour Code applicable to the suspension of the individual employment contract on the initiative of the employer and in matters of disciplinary liability, do not offer sufficient safeguards for this measure to be ordered whilst keeping an appropriate balance between the need to protect the interests of the employer, on the one hand, and that of the entitlements of the employee, on the other hand [8].

Moreover, there is the trend on the part of the legislature to enhance the safeguards accompanying the suspension of employment relationships or the suspension from office, to ensure not only the objective nature of this measure with far-reaching consequences for the person to whom it applies, but also the fact that it occurs in duly substantiated cases, subjected to a lesser extent to uncertainties. In particular, the Court has had regard to the amendments brought by Art. 71 (4) of Law no. 255/2013 implementing Law no. 135/2010 on the Code of Criminal Procedure and amending certain legislative acts covering criminal procedure provisions, published in the Official Gazette of Romania, Part I, no. 515 of 14 August 2013, with regard to the provisions of Art. 62 (1) (a) of Law no. 303/2004, which had the effect of *changing the time when suspension of the magistrate was to be ordered, from the time of initiation of criminal proceedings – according to previous legislation, to the time of indictment* – according to the current regulation. In the context of the aforementioned legislative amendments, the Court found unconstitutional the provisions of Art. 48 (1) (a) of Law no. 567/2004 on the statute of the auxiliary specialised staff of courts and public prosecutor's offices and staff in the National Institute of Forensic Expertise, finding, in essence, that this legal text regulating *the suspension from office of ancillary staff in the justice system at the time of initiation of criminal proceedings against them* was unconstitutional, and, in that case, the suspension should take place at the time of indictment [9].

6. Any prohibition to dismiss officials holding eligible positions within a trade union body is unconstitutional as long as the measure of dismissal is not related to the trade union activities carried out. Special protection of trade union leaders against dismissal must operate exclusively in relation to the trade union activities effectively carried out, and only during their term of office.

The protection of persons in senior positions in the trade union body shall operate exclusively in relation to the trade union activity actually carried out [As provided for by Art. 220 (2) of the Labour Code], and not also in relation to the professional activity – basic activity – of the employee. An opposite solution is capable of infringing both the provisions of Art. 16 of the Constitution which enshrine the equal rights principle, and the provisions of Art. 44 relating to the right to private property, as long as it obliges the employer to pay a remuneration that does not take into account the concrete and objective situation of the employee in respect of whom it was found that he/she is not professionally fit to occupy the position or whose position was removed from the organisational chart. In the absence of work performed, the employer may not be required to pay remuneration in disregard of these specific and objective situations. The prohibition of dismissal both for reasons relating to the employee (i.e. the physical and/or mental unfitness of the employee, which do not allow him/her to perform the duties corresponding to the job held; the professional unfitness to the job) and for reasons unrelated to the employee (i.e. elimination of his/her position from the organisational chart), limits the employer's right to organise the work internally, by limiting its right to dismiss the employees – even under the strict conditions laid down by law. Thus, the inability of the employer to dismiss persons who occupy eligible positions within a trade union body under the given conditions is a restriction on the economic activity of the employer, limiting the latter's power to decide on the organisation of its activities in the unit, limitation evident, for example, in the case of removal of the position from the organisational chart.[10]

Also that case-law contains a consistent use of the international reference documents, that is to say, the European Union law. The Court thus relied on Art. 1 of the International Labour Organisation's Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking no. 135/1971, ratified by Romania by Decree no. 83/1975, published in the Official Gazette, Part I, no. 86 of 2 August 1975, and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, published in the Official Journal L series, no. 80/2002, judgment of 11 February 2010, in Case C-405/08, Ingeniørforeningen i Danmark v. Dansk Arbejdsgiverforening, in which the Court of Justice of the European Union, replying to a question referred for a preliminary ruling, stated that Art. 7 of Directive 2002/14/EC must be interpreted as not requiring that employees' representatives be granted more extensive protection against dismissal, but has made it clear that any measure taken to transpose that directive, whether provided for by legislation or by collective agreement, must comply with the minimum protection threshold laid down in Art. 7 of Directive 2002/14/EC. It was also pointed out, in the recitals, that the Directive refers to a general framework setting out minimum requirements

that, "as regards the protection measures and the guarantees to be granted to workers' representatives, the European Union legislature left a broad discretion to the Member States subject to the obligation to ensure that they achieve the results imposed by this Directive".

7. Removal of employees' right to information and consultation in case of collective redundancies is unconstitutional since it related to any collective redundancy procedure, regardless of the particularities of the domain in which it occurs. The legislature cannot match the configuration of the right with the compliance of the principle of proportionality according to special features; however, it cannot deny this right either.

The Court held that the legislature, by the way in which it regulated the procedure of collective redundancy for companies in insolvency proceedings has denied the right to information and consultation of employees, which is equivalent to overriding the provisions of Art. 41 (2) of the Constitution. The Court therefore found that the provisions of Art. 86 (6) first sentence of Law no. 85/2006 on the insolvency procedure, under which "*By way of derogation from the provisions of Law no. 53/2003 — the Labour Code, as amended, after the time of the opening of proceedings, the termination of the individual contracts of employment of the debtor's employees will be carried out as a matter of urgency by the bankruptcy administrator/liquidator, without the need to go through the collective redundancy procedure. The bankruptcy administrator/liquidator will give the staff made redundant only a prior notice of 15 working days"*, are unconstitutional, being contrary to Art. 41 (2) of the Constitution, as interpreted, on the grounds Art. 20 (1) of the Constitution, in light of Part I paragraphs 21 and 29 of the revised European Social Charter.

We mention this decision also due to the fact that it crystallises a case-law development in terms of reception of European Union law by means of the review of constitutionality. Thus, the decision refers to the implicit clause of compliance of national laws with the European Union acts[11] contained in Art. 148 (2) of the Constitution and make distinctions by reference to the concept of national constitutional identity, including with regard to the competence of the Constitutional Court to sanction the infringement of that clause in case of European Union acts with the constitutional relevance. The lack of agreement between the provisions of national laws and the European Union's binding acts with the constitutional relevance constitutes a breach of Art. 148 (4) of the Constitution[12].

Specifically, with regard to the claims made by the authors of the exception of unconstitutionality relating to ***infringements of acts of the European Union***, the Court held that Art. 27 of the Charter of Fundamental Rights of the European Union, bearing the title *Workers' right to information and consultation within the undertaking* states that "*Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices*". Furthermore, Art. 153 (1) (e) of the Treaty on the Functioning of the European Union provides that "*In order to achieve the objectives referred to in Art. 151* [promotion of employment, improved living and working conditions, proper social protection, social dialogue, development of human resources and combating exclusion — A/N]*, the Union shall support and complement the activities of the Member States in*

the following fields: [...] (e) the information and consultation of workers". In order to implement the generous principles evoked, Art. 2, bearing the title *Information and consultation,* of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, published in the Official Journal of the European Union, L series, no. 225 of 12 August 1998, provides that, where an employer is contemplating collective redundancies, he would begin in good time consultations with the workers' representatives in order to reach an agreement, and the consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant. In order to achieve the aim pursued, the employer is obliged to provide all the information necessary to enable workers' representatives to make constructive proposals. In this respect, the Court has also held that, by its judgment of 3 March 2011 in Case C-235/2010, David Claes and Others v. Landsbanki Luxembourg SA, the Court of Justice of the European Union has stated that "*the consultations provided for in Art. 2 of Directive 98/59 are to cover not only ways and means of avoiding collective redundancies or reducing the number of workers affected, but also to mitigate the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant*" (paragraph 56). By the same judgment, the Luxembourg Court ruled that "*until the legal personality of an establishment whose dissolution and winding up have been ordered has ceased to exist, the obligations under Articles 2 and 3 of Directive 98/59 must be fulfilled. The employer's obligations pursuant to those provisions must be carried out by the management of the establishment in question, where it is still in place, even with limited powers of management over that establishment, or by its liquidator, where that establishment's management has been taken over in its entirety by the liquidator*" (paragraph 2 of the operative part of the judgment). Therefore, the obligations of information and consultation set out in this Directive must be respected regardless of whether the procedure for judicial reorganisation or liquidation was initiated or not against the company.

Regarding the ***applicability of the Charter of Fundamental Rights of the European Union in the review of constitutionality*** and the application of binding acts of the European Union in the review of constitutionality according to the considerations of principle which we have already examined, the Court further found that **the first conditionality is fulfilled**, whereas Art. 153 (1) (e) of the Treaty on the Functioning of the European Union, Art. 27 of the Charter of Fundamental Rights of the European Union and Articles 2 and 3 of that Directive are sufficiently clear, precise and unequivocal, especially in the light of the interpretation given by the Court of Justice of the European Union by the aforementioned judgement. **With regard to the second conditionality**, the Court found that, by their legislative content, the instruments of the European Union protect the right to "*information and consultation of workers*", supporting and supplementing the action of Member States, thus addressing directly the fundamental right to social protection of labour provided by Art. 41 (2) of the Constitution as interpreted by this decision, a constitutional text which ensures a level of protection equivalent to that resulting from the instruments of the European Union. It appears, therefore, that **the aforementioned instruments of the European Union have a clear constitutional relevance**, which means, on the one hand, that they

are within and in line with the Art. 41 (2) of the Constitution, by meeting the double conditionality referred to above, without infringing the national constitutional identity, and, on the other hand, that **it is for the Constitutional Court to ascertain the existence of this regulatory discrepancy between the instruments of the European Union referred to above and the domestic provisions, namely Art. 86 (6), first sentence, of Law no. 85/2006**. On the latter point, the Court held that the regulatory inconsistency thus ascertained cannot be resolved solely by recourse to the constitutional principle of the priority of application of European Union instruments, but also by finding the violation of Art. 148 (2) of the Constitution, a text which includes, by default, a clause of compliance of national laws with the European Union instruments (with the distinctions referred to in Decision no. 80 of 16 February 2014, published in Official Gazette of Romania Part I no. 246 of 7 April 2014, paragraph 455) and the violation thereof, in terms of European Union instruments with constitutional relevance, must be sanctioned as such by the Constitutional Court. It is true that, in regard to acts of the European Union which do not have constitutional relevance, the power to address the regulatory inconsistency lies with the legislature or the courts, as appropriate (see Decision no. 668 of 18 May 2011).

The Court found that, since the legal text criticised was repealed and, therefore, removed from the active legislation, the legislature can no longer bring it into agreement with acts of the European Union, whereas only the courts have jurisdiction to settle the conflict between the European and the national rule. Failure to bring into agreement the provisions of Art. 86 (6), first sentence, of Law no. 85/2006 with the European Union binding acts of constitutional relevance during the period of application of Law no. 85/2006 constitutes *eo ipso* a breach of the provisions of Art. 148 (4) of the Constitution, since the legislature has allowed that the legal relationship of employment be governed by these national provisions, departing from its constitutional obligation to ensure, on a legislative level, at least the same level of protection of the right to social protection measures as the one set out in the relevant binding acts of the European Union, as well as to continuously and permanently bring into agreement the infraconstitutional national legislation with the relevant binding acts of the European Union. Moreover, the ordinary legislature has noticed these regulatory failures and changed the legal solution by Law no. 85/2014 on insolvency prevention procedures and insolvency procedure.

8. Conclusions

The case-law itself confirms the idea of review of constitutionality of the legislative solutions, specifically clarifying, in one of the decisions given as an example, and which basically sanctions the infringement by the legislature of Art. 147 of the Constitution, the fact that "in this way, **a legislative solution** set out in a legal text found to be unconstitutional [Article 60 (1) (g) of the Labour Code] is resumed in another text, contained in another legal regulation (The Social Dialogue Law). However, in its case-law, the Court has held that **the adoption by the legislature of rules contrary to a decision issued by the Constitutional Court, which tend to retain legislative solutions affected by defects of unconstitutionality, is in breach of the Basic Law. In a state governed by the rule of law as Romania was proclaimed in Art. 1 (3) of the Constitution, the public authorities do not enjoy any autonomy over the law, the Constitution setting out in Art. 16 (2)**

that nobody is above the law and in Art. 1 (5) that compliance with the Constitution, its supremacy and the laws shall be mandatory [13].

Such behaviour violates also the principle of constitutional loyalty, a principle which was itself shaped by means of case-law, whereas the Court has underlined, in this regard, "the importance of the general constitutional principle of loyal behaviour and determined that is primarily the responsibility of the public authorities to apply it and respect it in relation to the constitutional values and principles, including the principle laid down by Art. 147 (4) of the Constitution on the generally binding nature of the Constitutional Court's decisions [14]. By infringing the *erga omnes* effects of the decision declaring the unconstitutionality, the legislature proceeds in a manner contrary to constitutional loyal behaviour it must show towards the Constitutional Court and its case law".

Similarly, "whereas compliance with the case-law of the Constitutional Court is one of the values underpinning the rule of law, the Court found that constitutional obligations resulting from its case-law circumscribe the framework of the future legislative work; accordingly, **by adopting a legislative solution similar to that previously found as contrary to the provisions of the Constitution, the legislature has acted *ultra vires*, in breach of its constitutional obligation arising from Art. 147 (4)**."

What we would like to add in this context is the fact that, by the consistent reception and reliance upon international law in the field of human rights, in general, and that of the European Union in particular, in the recitals of the decisions by which it found unconstitutional certain legislative solutions, the constitutional judge has also been "shaping" the national legislative system in line with European regulatory architecture, becoming a partner of the European judge in the accomplishment of the latter's mission to ensure the uniformity of the law at the level of the Member States (in particular, by means of judgments on questions referred for a preliminary ruling).

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Standardization of the Structures and Administrative Procedures

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Abstract

The work reveals the massive need for simplification of the standardization of administrative structures and procedures within the Romanian public administration, in close correlation with the following draft regulatory acts relevant to the field, which will also need to be harmonized: *the Administrative Code, the Code of administrative procedures and the Code of country panning, city planning and construction.*

In the current paper we present mainly the need of standardization of the administrative structures and procedures, as well as the hypotheses to be considered in the standardization process, the methods and steps necessary for standardizing the structures and administrative procedures, focal points concerning the standardization structures of the central and local administration, and the obligation to implement realistic public policies to ensure the success of standardization of the Romanian public administration.

Keywords: *standardization, harmonization, code, coding, administration, structures, procedures.*

Introduction

Ever since the first attempts to join the European Union, the decision makers in Romania could already see clearly that there was a need for a thorough reform of the administrative structures, both at the level of the central public and autonomous authorities, as well as at the level of the local public authorities.

At that time, the activity of transforming a public administration based particularly on centralizing decisions was subject to obvious reluctance from the decision-making personnel within each governmental entity, the main concern of policy makers and workers being that they would not be able to find work in the context of the new organization structure changes.

The premises for transformation and reform of the central and local administrative structures were based first of all on the unanimous decision of policy makers to take the necessary steps for Romania to join NATO and the European Union, everybody supporting wholeheartedly these goals that used to have and still have the support of more than 60% of the population.

The armed forces, in particular the forces of the Ministry of Defence were in a way privileged by opening a sustained cooperation with the forces of foreign armies, a cooperation that was initiated after 1989 by Romania's participation in missions under the aegis of the UNO, as well as the Partnership for peace initiated by NATO, which has provided constant

support given by foreign partners for the modernization of military structures and procedures, and their standardization at both the strategic and the tactical and operational levels.

The result was particularly important because, from a staff of 300,000 military personnel until 1996, the Romanian Army has reduced its effectives to 95.000 personnel until the accession to NATO in 2004. The decrease in the number of personnel took place without any social syncope and was done through measures that ensured the professional reconversion of a significant number of military personnel fired.

After 2000, the desire of joining the European Union brought together the political class as a whole and therefore, due to their strong desire to reduce disparities in all areas of the social, economic and cultural life, policy makers tried to skip the accession stages undergone by Poland and Hungary, two countries that received consistent support through the PHARE program originally created in 1989 to assist only them, and being later expanded to the EU relations with other accessing countries.

In other words, the public administration reform in Romania was accelerated without being supported by an appropriate reform of the personnel involved, which was lacking adaptability, flexibility, independence, self-confidence and, last but not least, a strategic and reforming vision.

In reality, policy and management decision-makers were forced to reform themselves, a situation that resulted in building structures for people and not administrative structures corresponding to the real needs specific for each field, for the entire central public administration in Romania.

Therefore, ministries and bodies of the central and autonomous government were reorganized without considering the decision-making and management cycles consisting of: planning, decision making, implementation, monitoring, control and evaluation.

We developed basically an increased bureaucratic capability able to develop strategies, policies, plans, etc., all this without an ability to set priorities and to ensure implementation, monitoring, control and evaluation, most decisions being based mainly on short and medium-term objectives, typical for an objective-based management.

The lessons learned during the process of restructuring the armed forces between 1996-2004 and after the country's accession to NATO provided the Romanian Army with a solid foundation for achieving interoperability of own actions with those of allies, particularly interoperability based on standardization structures and procedures required by the NATO rules and regulations that, in some areas were imposed also on other structures of the central government, such as regulations concerning the *job-related secrets* and *state secrets* classified information that have been standardized according to the regulations from NATO and thereafter from the E.U.

Unfortunately, the lessons learned during the process of restructuring the Romanian Armed Forces regarding the standardization structures and procedures did not represent the basis for a public administration reform, which resulted in a clear disruption between the organizational structures and procedures within the force ministries, and the ones applied to other ministries and public authorities.

1. The need of standardization

While standardization structures and procedures is a constant concern within each military structures to ensure efficiency and interoperability actions, in civil society need for such action was not evident because at least apparently, political actors and social leaders had no vision for unifying, planning, implementation, operability, controlling and streamlining of administrative structures.

Accession period to the European Union, in its administrative Strategy for 2001-2004, the Romanian Government highlight the restructuring process in ministries and specialized bodies under the Government and specify that the restructuring process is were considering following (Government strategy-2001, page 49):

"• improving internal organizational structures;
- design administrative procedures by eliminating overlaps and discrepancies;
- shortening of the decision-making process;
- increase the efficiency in institutional structures specific to each activity;
- restricting the number of management positions in order to improve efficiency and quality of decision;
- reducing and optimizing regulations to become effective service taxpayers and entrepreneurs;
- outsourcing in terms of efficiency and operability;
- drastic reduction of public administration costs by stopping wastage resources and through efficient work of civil servants;
- promoting performance criteria for civil servants;
- focusing attention on the citizen in his dual quality as taxpayer and a beneficiary of the public services."

However, after 15 years of reform it appears that objectives have remained the same and I am inclined to say that in reality the central government has constantly distanced compared to the target above objectives, and even accelerated remoteness from them after Romania EU from 2007, the principle of sincere cooperation within the European Union being brutally defeated after Romania became a member state of the European Union with full rights.

As a result of discrepancies between the declared objectives and concrete achievements in the central public administration reform we appreciate the imperative for strong initiative, determined, fast and efficient, based on accountability by policymakers to determine the measures funded, standardization structures and procedures in public administration activity that would ensure the elimination of duplication, reduce levels of decision, accountability, cost reduction and, not least, ensure citizen satisfaction.

2. European union's concerns to encourage better regulations[(1)]

Jean-Claude Juncker, President of the European Commission, has been concerned since his investment in a high responsibility for ensuring better regulation in the European Union and respecting the principles of subsidiarity and proportionality in the work of the Commission, Mr Frans Timmermans, the first Vice-President of the Commission, to

[(1)] https://ec.europa.eu/commission/priorities/democratic-change/better-regulation_en#documents

coordinate the Commission's regulatory work "without Union intervention when the area can be dealt with more effectively by member countries" and "not to go beyond what Is necessary to achieve the objectives of "the European Union.

Ever since the investment, Jean-Claude Juncker has stated the following: "I want a European Union to be bigger and more ambitious on big things and smaller and more modest on small things."

As a result, the work co-ordinated by Mr Frans Timmermans, First Vice-President of the Commission, was intense, implemented and structured to make it more efficient by following the ways of action that ensured the participation of citizens and stakeholders in the entire regulatory process as well Reviewing and simplifying EU regulations in force. [6]

Also, in 2016, the three basic structures in the European Union, the Commission, the Parliament and the Council decided to cooperate more intensively to improve the regulatory process, for which reason they also signed a protocol, and the Commission set up a specialized body to Ensure in the regulatory process the quality control of the impact and the evaluation of the effects of the new regulations, respectively the Quality Control Board. [6]

Since the investment date, June 15, 2014, the work of the European Commission has been stepped up to ensure a more efficient, flexible regulation that provides for increased efficiency of European Union structures while reducing costs, as evidenced by 11 (eleven) official documents Which aimed at setting important goals for regulatory activity such as strengthening the European Union, regulating a structure to ensure the collection of information and suggestions for reducing bureaucracy and providing strong foundations for new regulations, namely the REFIT platform, as well as signing Cooperation agreements between the different institutions within the European Union which have attributions in the process of regulation and harmonization with the provisions in force. [6]

3. Proposals on the elements to be taken into account for standardization of public administration structures

A political will of political partnership in the medium and long powerful organization structures and administrative procedures identical in ministries and other central public authorities or independent, organization structures and administrative procedures identical to the inter-ministerial councils or eliminate these structures, and standardization IT structures and working procedures in the field are some elements that should be considered for standardization structures of central and local public administration.

3.1 . Political determination & political partnership

It is obvious and does not need to demonstrate that any standardizing structures and procedures at central government level must be supported by strong political will at governmental level as to ensure efficient activity by reducing human and material resources to ensure better conditions of specific statutory powers of central government structures necessary first of all appointment of a coordinator decider to support innovative changes to ensure mainly resource efficiency and decrease bureaucracy to growth citizen satisfaction.

In our opinion, at this point, a delegate minister for reform to imagine and to coordinate a swift reform as a solution capable of providing as much hope for the success of a government initiative to standardize structures and procedures in administration central government.

The challenge is to ensure standardization of conditions for designing, implementing and improving structures and administrative procedures similar functionally and in terms of decision-making procedures within each central public authorities, in order to achieve:

– long-term stability and predictability;
– reducing the levels of decision and increase the efficiency in performance of duties;
– significantly reducing human and material resources;
– satisfaction of every citizen which should be viewed like the most important person in the community.

3.2. Administrative Arrangements For Standardisation Of Structures

Standard structures that must be organized under the authority of the minister or the head of another specialized body subordinated to the Government or Ministries or the manager of an autonomous administrative authority, according to the law of general application must fulfil the duties set out below.

At the management level, will be the standardized regulate the following:

1. **Executive** – the minister/central or autonomous public authority manager;
2. **Leadership/collective** coordination – council.

Under the minister or the head of the institution central/autonomous will be:

1. **Two or more departments –** decision level higher than a Directorate General – led by a head of department that may have and the rank of Secretary of state;
2. **Established structures to work properly under the ministry or under the head of the central/autonomous institutions,** respectively:
   – Dignitary cabinet – organized at central directorate level;
   – Internal managerial control – organized at central directorate level;
   – Legislation and the relation with the Parliament, with NGOs and with other public authorities – organized at central directorate level;
   – Contentious and personnel – organized at central directorate level;
   – Internal public audit – organized at central directorate level;
   – Special issues – organized at office level;
   – Complaints, petitions and public relations – organized at office level;
   – Information and public relation – organized at office level;
   – Administration control – organized at office level.

Organizational activities department – will perform the following specific attributions for any public institution:

– Secretariat and archive relation;
– Economic and payroll systems;
– Information technologies;
– Public procurement;
– Administrative and coordination their own units;
– Coordination, implementation and monitoring the activity of inter-ministerial councils;

– Inter-ministerial coordination of working groups for social dialogue, social issues and so on.

Specialized departments – under the leadership of the department shall fulfil the duties imposed on the ministry or central/autonomous authority by documents for setting-up, laws or regulations and decisions of the Romanian Government.

3.3. Administrative arrangement for standardization of administrative procedures

The main ways of standardizing administrative procedures consist in achieving as much as possible of the organization and operation regulations and internal regulations almost identical structures autonomous central and local government.

Also not be neglected standardization of tools for development, endorsement, approval, implementation and improvement of public policies in Romania.

3.3.1. Standardization of regulations for organization and functioning

Regulations on organization and functioning of each ministry will be standardized primarily through unification and sequencing of chapters regulated within each regulation.

On the other hand, the rules of organization and operation will standardize the rules of allocation of material, human and salaries at their disposal, and mechanisms necessary to ensure flexibility aforementioned resource use between the structures of the Ministry and the central government/autonomous subordination or coordination.

3.3.2. Standardization of internal regulations of departments for activities' organization

Within all ministries and central public authority/autonomous knowledge will ensure easy, public duties of organization departments through standardization will become almost identical for the whole public administration.

In addition to these tasks easy knowing the whole administrative apparatus, their standardization and collaboration will establish effective institutional structures between ministries, government and the central government/autonomous.

Last but not least, by standardizing the interface will be easier for everybody to manage relations with public authorities in areas of common interest, and will allow an easier understanding of their citizens.

3.3.3. Standardization of internal regulations of specialized departments

Standardization of internal regulations of specialized departments will ensure a more efficient and flexible resource department heads to be directly responsible for fulfilling the legal duties set by legal documents approved.

Organization of activity within departments will more efficient applying the principles of project management, the project manager may receive extra salaries depending on financial resources allocated to each department and will represent only one management positions within the department.

Competence of moving an employee for a project to another or moving of resources from one project to another department head rests within the department, and Competence

of moving between different departments projects will be in the competence of the Minister or the chief of central public authority/autonomous.

3.3.4. Standardization of work procedures at the ministry level and the specialist bodies of the central government/autonomous

Even if at this moment are regulated properly most tasks structures in the direct subordination or coordination of ministries or specialized structures of the central government /autonomous, ie legal, personnel, information and public relation, public relations, complaints and referrals, internal management control, relations with non-governmental organizations, relations with trade unions and so on, work procedures on the circuit of documents, decisions and information management within these structures is different from one public authority to another and there is no Government initiative to their uniform.

Standardization work procedures at the ministry level and the specialist bodies of the central government/autonomous structures will improve cooperation between ministries, government and the central government/autonomous and resolved more quickly and efficiently legitimate interests of citizens.

3.3.5. Standardizing the automated data processing and exploitation of their ministries and structures of specialized central government/autonomous

Although the need for standardization and unification of procedures and information communication equipment, automatic data processing and procedures for the use of computer equipment urgently result of the provisions of Art. 2 [(2)] of Government Decision no. 13 of 16/01/2009 Published in the Official Gazette, Part I no. 100 of 19/02/2009 on the establishment of the Inter-ministerial Council *"Council for promoting the information society in Romania"*, in reality the work of the Council members, governed by the provisions of Art. 3 *Government Decision no. 13/2009*, allowed huge fraud from folder named "Microsoft".

In other words, lack of activity, disclaimer and *'protection of criminal crime'* for the members of *Council for promoting the information society in Romania*, stayed and are now the basis of this fragmented situation endowments, regulations and procedures of the I.T. from the Romanian Government, ministries and specialized bodies of the central government/ autonomous.

Moreover, on 5 August 2013, as if to lose track and responsibilities of its members, the Council for promoting the information society in Romania was abolished by the provisions of Government Decision no. 548 of 07/30/2013, although the provisions of Art. 2 letter b) and i) of Decision No. 319 of 23/03/2011 Published in the Official Gazette, Part I no. 276 of 20/04/2011 on the establishment of the Coordination Board Interministerial coordination of common electronic communications infrastructure of the Romanian State and centres of services, the composition of the Council entered and Director of Special Telecommunications Service as Vice President and Deputy Service Director Romanian Intelligence as a member.

[(2)] The responsibilities of the Council for promoting the information society in Romania undercurrents and "approval and coordination of projects exceeding 100,000 Euros in communications, information technology and information society, public institutions," "project approval more than 100.000 Euros in communications, information technology and information society, which benefits companies/national companies or companies where the state is the sole or majority shareholder "and" guiding approval strategies and projects for computerization of ministries ".

On that occasion it was removed and the threshold[3] of 100,000 Euros from the Council was to ensure coordination at least formally.

We consider that at this time is mandatory reestablishment of the "Council for promoting the information society in Romania" and a decision in this regard would be evidence relevant to the accountability of good governance and accountability Romanian Government to resources and sustainable development of the country, regardless of its composition, political or non-political.

3.3.6. Standardization of procedures at level of permanent inter-ministerial councils

Established on 28.07.2005 under the provisions of Government Decision no. 750/2005 on the establishment of councils permanent inter-ministerial councils updated at this time are:

a) Inter-ministerial Council for Home Affairs and Justice;
b) Inter-ministerial Council for External Relations and European Affairs;
c) Inter-ministerial Council for European Integration;
d) Inter-ministerial Council for economic, fiscal and trade policy, the internal market, competitiveness, business environment;
e) Council for Administration and Public Service, decentralization, local communities;
f) Council for social affairs, health, consumer protection;
g) Inter-ministerial Council for education, culture, research, youth and minorities;
h) Inter-ministerial Council for Agriculture, Rural Development and Environment;
i) Inter-ministerial Council for Regional Development, Infrastructure, Planning and Tourism;
j) Inter-ministerial Council for crisis situations;
k) Council for strategic planning;
m) Council of for the implementation of State aid policy;
n) Inter-ministerial Council for the completion of negotiations on the EU's multiannual financial framework for 2014-2020.

The role of councils covered above is advisory and its own rules of organization and operation regulated by the provisions of Art. 6 Decision no. 750/2005, could have levelled structures and technical secretariats and, on the other hand working procedures can be standardized within each council.

At the same time we think it is important to stress the importance of decisions taken by the inter-ministerial councils to shift the advisory role of these decisions to their obligation to ensure consistency, stability and predictability of public policies in Romania.

3.3.7. Standardization of tools for development, endorsement, approval, implementation and improvement of public policies in Romania

Starting from the definition that *"Public policy is a network of interrelated decisions concerning the choice of objectives, means and resources used to achieve their specific situations."* (Miroiu, 2001, p. 19) and their role to meet requests degree of generality of citizens, we are entitled to conclude that in recent years the theoretical, design and planning

[3] In other words, all IT projects had to be approved by the Council, regardless of the amount allocated to the project.

of public policies in Romania was fruitful and even inflation but elaboration, approval and endorsement was highly bureaucratic character being transformed into a bureaucracy even exacerbated and the existence of a document entitled "public policy in the field ..." realization actually being assimilated to a public action policy as defined above.

In other words, in elaborating development strategies and normative acts for their implementation, "public policies" were developed, endorsed and approved for which the necessary resources were not provided for ensuring their sustainability, which is why they had more Formal character.

Improving public policies adopted and implemented should eventually be based on monitoring and evaluation, steps that in fact are lacking even if covered by the provisions of *Government Decision no. 775 of 14 July 2005* approving the Regulation on procedures for developing, monitoring and evaluation of public policies at the central level, because, as I said, you cannot monitor and evaluate what you have not implemented.

In other words, the process of making public policy, defined as "the process of forming and carrying out public policies" (Miroiu 2001, p. 19), was limited mostly to only some of the stages of training namely the development, approval and approval stage to ensure resources are missing or seemingly insignificant to ensure completion of the formation of public policy.

4. Public policy priority for the adoption and implementation of the Administrative Code and the Administrative Procedure Code – "Standardizing processes and administrative structures"

Having regard the preoccupation and the current interest in the adoption and implementation of *the Administrative Code* and *the Code of Administrative Procedure* it is imperative that public policies that will be planned for implementation should take into account the issues developed in this paper about the necessity of standardization structures and procedures administrative at central government level and even at local government level.

Even if at a county level and cities standardization of administrative structures is easy and can be imposed from the centre readily situation that does not requires additional resources, the transformation of these structures being possible in a short time, standardization of administrative structures in communes will certainly be more difficult and a transitional arrangement could be acceptable by all policymakers in order to be implemented by adopting an appropriate reform and implementation of the administrative Code and the Code of administrative procedure.

However, citizens' interests are often different from those of the political class and sometimes divergent, which is why, in addition to the need for food, the need for housing has turned the man over the ages into being dominant, which is why standardization of structures and procedures across government cannot be achieved without taking into account future harmonization of regulations of law, the administrative Code and the Code of administrative procedure, the future we hope Cod town planning, urban planning and construction.

In other words, we hold that beneficiaries of law on country planning, city planning and construction, the coding is of particular importance and correlation with the planned reform of public administration is urgently needed to eliminate disturbances of relations officials with citizens in the areas mentioned in paragraph previous.

The adoption *Administrative Code* and the *Administrative Procedure Code* simultaneously with a code of laws in the fields of country planning, city planning and construction should facilitate the use of a uniform terminology for the same legal realities, institutions, principles and legal concepts, reducing the risks of misinterpretation or even contrary to their and stimulate initiative policymakers to ensure improving of regulations also from other related fields with the legislation of the above-mentioned fields should be harmonized, creating the premises for a reform which gives stability of the regulatory framework and to ensure simplification of further normative acts that a law of this magnitude is expected to relate.

Conclusion

Standardization of procedures and administrative structures at the level of central government and local authorities must be correlated with future *Cod of country planning, city planning and construction*, as these structures will be involved in the mechanisms of establishing rules on national territory for planning and layout of the building, the rules of city planning and building, considering the multitude of public authorities with responsibilities at different times of the stages of logic developed for building a construction namely: location, design, licensing, construction, mining, processing and control.

Standardization of procedures and administrative structures at central and local government level represents a formidable challenge for the Romanian society without which the bureaucracy established and rooted will be difficult to remove, the legislative solutions to be proposed and policies appropriate will rely on X-rays and diagnoses full, fair and to treat and remove the causes and not the effects, and to simplify procedures and reduce response time of makers to requests and needs of citizens.

Prior consultation with those responsible for the implementation of administrative decisions is mandatory so that new standardized structure to become operational in the short, fast reaction time factor in solving the problems of citizens is also essential and determinant for meeting the needs of society.

Ensuring human, material and financial resources necessary of reform organized to standardize the administrative structures and procedures in administrative, planning, urbanism and construction is easier if the purpose of that takes into account the aims to will be to reduce budget resources, bureaucracy and staff.

The proposed standardization should be linked properly with the regulations in the field of personnel management to ensure greater flexibility of labour, assuring salary corresponding responsibility and the importance of hard work and a high adaptability to the realities of social life.

For contract staff Labour Code is the legal basis for employment and the institution delegation and the posting governed by this act of core labour, are important instruments to ensure labour flexibility on the medium and long term, in new standardized structures.

For comparison, Law no. 188/1999 regarding the statute of civil servants regulated more rigid work place, type of work and the salary of civil servants which caused a heavy of structures adaptability to specific criteria to be met by civil servants who were to occupy.

Therefore, we consider that the standardization of administrative structures that will be occupied by civil servants will be big challenge in the standardization work of the public administration to be applied the principles of responsibility and accountability at

the flexibility of place and type of work and the decrease levels of a decision under the new administrative structure.

In the last quarter of a century, central public administration structures have been reformed by themselves, a situation that has led to an unjustified increase in the number of administrative structures, the increase of decision-making levels and workers within these structures, bureaucracy Has turned into an exacerbated bureaucracy and has significantly increased the imbalance between the financial resources allocated from the state budget to some areas to the detriment of others.

Therefore, to be successful, the proposed standardization of the content of this work should be conducted and coordinated centrally by the Government of Romania and regularly evaluated and in time to be corrected and supported by most of the political class.

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Lost in the legal "no man's land" between judicial review and arbitration: the domestic arbitral system on disciplinary matters related to football is contrary to the public policy of Romania

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Abstract

The starting point of the article is the controversial regulation setting the jurisdictional system in disciplinary matters related to football activity in Romania. Although the disciplinary sanctions affect fundamental rights, the jurisdictional control on these sanctions is taken out from the competence of public courts and placed under the exclusive competence of a multi-level system self-declared as being constituted by arbitral tribunals. The course of our arguments will shift from the analysis of the legal basis and regulatory design of the arbitration system to the identification of the breached public policy rules, corresponding to three legal domains: judicial review of administrative acts (*contentieux administratif*), arbitration and fundamental rights.

Keywords: *football disciplinary cases, judicial review of administrative acts (contentieux administratif), non-arbitrability, fundamental rights in sports activity, public policy.*

1. Introduction

According to the Constitution of Romania – Art. 126 par. (6), the judicial review on the administrative acts enacted by the public authorities, performed by the courts specialized in administrative matters (*contentieux administratif*), is guaranteed, except for those regarding the relations with the Parliament, as well as the military command acts.

Based on this constitutional guarantee, which is a fundamental right, the current article analyzes the disciplinary system related to football activity in Romania, which extracts the jurisdictional control upon the disciplinary sanctions restricting fundamental rights, enacted by private legal persons assimilated to the public authorities, as such the Romanian Football Federation (hereinafter "RFF" or "the Federation"), from the general competence of public courts and places these cases under the exclusive competence of an arbitration system, composed from two domestic arbitration committees, organised in house, within the Federation, and an international arbitration institution, the Court of Arbitration for Sport – CAS/TAS, based in Lausanne, Switzerland.

The article will approach first the analysis of the legal and regulatory configuration of the system, then the identification of the breached public policy rules, corresponding to three legal domains: *contentieux administratif*, arbitration and fundamental rights.

2. The disciplinary dispute resolution system related to football activities in Romania

The national sports federations exercise disciplinary power based on and under the conditions set in the Law on Physical Education and Sport no. 69/2000 (hereinafter also referred to as "the Law") and, subsequently, according to the statutes and internal regulations (Article 37.1.e of the Law).

Thus, according to Art. 46.1.b of the Law, the disciplinary authority is exercised in sport in full and legitimately according to the statutes and regulations of the national sports federations. The disciplinary power gives these legitimate holders the power to investigate and sanction the guilty persons and institutions.

The exercise of the disciplinary authority is achieved by (Article 47 of the Law):

a) a coherent system of sanctions corresponding to the respective areas, gradually, depending on seriousness of acts;
b) gradual differentiation of fact, imposing sanctions, excluding the possibility of double penalties for the same offense, excluding the retroactive implementation of sanctions and prohibition to apply sanctions for acts committed prior to the time of the offense concerned (sic);
c) causes or circumstances which exempt, mitigate or aggravate perpetrator's liability and requirements for the extinction or suspension of the sanction;
d) competences on act research, determination and imposing the sanction;
e) the guarantee of the right of defense, providing the means of appeal against the sanctions imposed.

In conclusion, the Law does not impose a specific method of exercising disciplinary authority by sports federations, only establishing basic principles that they must follow.

Consequently, the Romanian Football Federation (hereinafter also referred to as "*RFF*") has the right to organize their internal system for the exercise of disciplinary authority, in compliance with the guiding principles laid down in Art. 47 of Law no. 69/2000 [1] and, *nota bene*, in compliance with public policy rules and mandatory rules of the law.

According to Art. 57 of the Statute of the RFF, the RFF jurisdictional committees, including Disciplinary and Ethics Committee and Recourse Committee are "*independent and impartial arbitral tribunals*". The powers to settle disciplinary cases belong to RFF's committees having jurisdiction as follows:

a) in first instance: Disciplinary and Ethics Committee of RFF;
b) judgments delivered at first instance may be appealed, as appropriate, to:
   – Recourse Committee of RFF, as national ultimate court, for decisions of the Disciplinary and Ethics Committees;
   – Court of Arbitration for Sport in Lausanne, as international ultimate court, for appeals against the decisions of the Recourse Committee of the RFF.

The decisions of the Recourse Committee of RFF are final and binding on the domestic level for all RFF affiliates, players and their officials, for the officials of RFF and its local branches and for agents of matches and players' agents.

The decisions delivered by the Recourse Committee of RFF can only be appealed at the Court of Arbitration for Sport in Lausanne, under the conditions of the law (*sic*).

The RFF Disciplinary Regulation [2] contains similar provisions in Art. 91 entitled "*Decision-making body in disciplinary matters*". Thus, the decision-making bodies of the RFF in disciplinary matters are:

a) Disciplinary Committee of RFF, in first instance;
b) Recourse Committee of RFF, regarding the recourses against the judgments of the Disciplinary Committee of RFF.

The decisions delivered by the Recourse Committee of RFF can be appealed to the Court of Arbitration for Sport within 21 days after their notification.

In conclusion, the RFF Statute establishes an arbitration system for resolving disciplinary cases, set on three levels of jurisdiction (first instance, recourse, appeal) while exercising disciplinary authority conferred by Law no. 69/2000 through two arbitral tribunals organized internally within its structure – Disciplinary and Ethics Committee and Recourse Committee – and delegating this authority, in last instance, to a permanent arbitral institution abroad – the Court of Arbitration for Sport.

Arbitration, as a form of private jurisdiction and as an alternative to state justice, can only be deployed in Romania by observing the law, namely the rules of public policy and the imperative legal provisions.

In order for the recourse to arbitration to be allowed, it must refer to a dispute for which the Romanian law does not provide for the exclusive jurisdiction of the state courts, it should have as an object rights that the parties may dispose of, and the parties to the litigation must have entered into a valid arbitration convention.

3. The legal nature of the Romanian Football Federation and its acts

According to Art. 1 par. (1) of Law on Administrative Litigation (*loi sur le contentieux administratif*) no. 554/2004, any person who considers himself harmed in its right or a legitimate interest, by a public authority, through an *administrative act*, may address the *relevant administrative court* to annul the act, recognition of the right claimed or legitimate interest and for repair of the damage that was caused. The Organic Law of Administrative Litigation details the enshrined constitutional right of the person harmed by a public authority (Article 52).

The legal doctrine is unanimous when considering that administrative litigations are not subject to arbitration, the law establishing an exclusive jurisdiction of administrative courts in this matter [3].

According to Art. 2.1.b of Law on Administrative Litigation, private legal persons which, in accordance with the law, have obtained the status of public utility or they are authorized to provide a public service, under public authority regime, are assimilated to public authorities, for the purposes of this law. Consequently, the administrative acts issued by these private legal persons are subject to the judicial review, falling under the scope of the constitutional warranty enshrined in Art. 126 par. (6).

In accordance with Law on Physical Education and Sport no. 69/2000 [Art. 35 par. (2)], national sports federations are private legal persons, of public utility.

The administrative act is defined, for the purposes of the Law on Administrative Litigation, as the unilateral act, of individual or normative nature, enacted by a public authority, under a public power regime, with the scope of organising the application of law or the concrete application of the law, which initiates, modifies or ends legal relations (Article 2.1.c. of Law on Administrative Litigation).

Regarding the application of the football disciplinary sanctions, the sanctioning acts are individual acts, enacted by a private legal person assimilated to a public authority, under a public power regime (due to the fact it disposes unilaterally, compulsory and enforceably for restricting the rights of the person sanctioned) for the concrete application of the law which regulates the sports activity, specifically the exercise of the disciplinary power, and therefore initiates legal relations between the sanctioning authority and the sanctioned person.

To conclude, for the scope of the constitutional guarantee of judicial review of the administrative acts, the Romanian Football Federation is assimilated to a public authority and its acts through which is applied in concrete the disciplinary power are administrative acts subject to judicial review exclusively by the administrative courts [4].

4. Non-arbitrability of the football disciplinary cases under the legislation of Romania

Given the public policy nature of the exclusive jurisdiction established for the acts issued by RFF in favor of administrative court, disputes regarding such documents may not be subject to an arbitrationagreement. As noted by the Supreme Court of Romania, non-arbitrability of administrative disputes is a matter of public policy, because public policy and mandatory provisions of law require that certain disputes may not be extracted from the jurisdiction of state justice [5].

The Law on Physical Education and Sport no. 69/2000 does not stipulate that the part of the disciplinary authority, which is the most important – jurisdictional activity after which disciplinary sanctions are applied, become definitive and enforceable – should be entrusted to arbitral tribunals. It is also important to note that Law no. 69/2000 is an ordinary law and therefore could not establish an exception in matters of *contentieux administratif*, any such exception can be only regulated by an organic law [According to Art. 52 par. (2) and Art. 73 par. (3) letter k) of the Constitution]. Even if the Law no. 69/2000 would have prescribed such a possibility, it would have raise an issue of constitutionality, especially with regard to the guarantee provided for by the Art. 126 par. (2) of the Fundamental Law.

As currently provided for by the Statute and Regulations of RFF, the arbitration system for settlement of disciplinary proceedings seriously infringe the public policy rules in Romania. I analyzed above the interdiction to extract this category of cases from the jurisdiction of state courts. Further, the lack of adequate guarantees of impartiality and independence of arbitral tribunals raise the question of infringement of the constitutional right to a fair trial. Additionally, it raises the issue if a system of arbitration in which the last remedy is an appeal submitted to an arbitration institution situated abroad, in a different national jurisdiction – the Court of Arbitration for Sport in Lausanne, Switzerland – and

which therefore excludes the right to action for annulment of arbitral judgment in front of the courts in Romania, can meet the requirements of free access to justice guaranteed by Art. 21 of the Romanian Constitution.

Even on a superficial further consideration on method of appointment of the members of the Recourse Committee, we can see that this is a discretionary one, at the discretion of RFF. According to Art. 92 of the Disciplinary Regulations of RFF, RFF's disciplinary courts (i.e. FRF Disciplinary Committee and Recourse Committee of FRF) consist of a chairman, a deputy chairman and three members, plus a secretary.

The President, the Vice-President, the members of the disciplinary bodies and the secretary are appointed by the RFF Executive Committee for a term of one year. The term can be renewed.

In the disciplinary cases, RFF is a party to the proceedings, as the holder of the disciplinary power.

In these circumstances, in the disciplinary cases in which the other party to the arbitration procedure is RFF itself, the Recourse Committee cannot be an impartial and independent tribunal for the person sanctioned. The short duration of the mandate and the possibility of renewal can be used as a measure of constraint of "*stick and carrot*"-type to influence decisions. The renewal of the mandate ("*the carrot*") can be used as a reward for the delivery of favorable decisions to RFF, party that appoints and re-appoints them, or can be at least just perceived as such, by the members of the Committees or the person sanctioned, and this last hypothesis would be enough to affect tribunal's impartiality. In the same way, the refusal of renewal of the mandate ("*the stick*") could be used/perceived as a sanction in case of delivery of decisions unfavorable to RFF[6].

Further, relating to the procedural mean of the challenge to the members of the Recourse Committee due to an impartiality or independence concern, Art. 95.3 RFF's Disciplinary Regulation contains the provision according to which it cannot be challenged more than one member of the Committee, subject to refusal of the challenge request as inadmissible. However, as the Recourse Committee consists of five members, in some cases of incompatibility affects all members, such as the structural problem identified regarding the method of appointment and length of the mandate of Committee' members. Therefore, the RFF's Disciplinary Regulation does not contain effective guarantees of impartiality and independence of the Recourse Committee. The same structural flaws affect the functioning of the Disciplinary Committee and Ethics of RFF.

The RFF Disciplinary Regulation establishes a system of disciplinary sanctions consisting both of "*sports sanctions"* such as (Article 24) prohibition to participate in any (administrative, sports or otherwise) activity related to football for a period of one month to 24 months, or the exclusion from competitive or football activity, finally prohibit the concerned person to participate in official games or friendly games (except for the capacity of spectator if he/she was not imposed the exclusion from stadiums) or to hold any position within a sport structure affiliated to RFF, and of so-called "*sports penalties*", pecuniary sanctions which "applies for sanctioning any offense under this Regulation and cannot be less than 15 lei and not more than 1,000,000 lei" (Article 20).

The Regulation also provides for complementary sanctions such as (Article 60.6.) that of the confiscation of material or financial goods involved in committing offense, which

may be ordered by "jurisdictional authority" (i.e. by Disciplinary and Ethics Committees of RFF, by Recourse Committee of RFF or by Court of Arbitration for Sport in Lausanne). The confiscation of the material or financial values related to the offence is beyond the constitutional framework designed by the Art. 48 par. (9), at least on the aspect that this measure can be disposed only "under the conditions set in the law", or in this case the measure of confiscation is not provided by the law.

The question is whether the restrictions to the rights of the sanctioned person subject to disciplinary cases – the right to work, the right to freely exercise a profession, the right to private property – can be "*rights which the person can freely dispose*" under Art. 542 of the Civil Procedure Code and consequently can be settled through arbitration.

The right to work and the right to freely exercise a profession is guaranteed by Art. 41 of the Constitution. Prohibiting any football-related activities of a football player or football coach for a period of two years is a serious restriction of this right.

At the same time, the imposition of monetary penalties up to such a high rate – 1.000.000 lei [7] – represents a serious restriction to the right to private property of the sanctioned person.

These restrictions on fundamental rights must meet the conditions of Art. 53 of the Constitution. Clearly, it does not meet the requirement to be provided for by the law, being enacted by way of an administrative act, the Disciplinary Regulation of the Romanian Football Federation. Further, it doesn't appear they are necessary for fulfilling any of the purposes referred to in Art. 53 par. (2) of the Constitution: the defense of national security, public order, health or morals, rights and freedoms of citizens; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe, or that is necessary in a democratic society.

Finally, while proportionality to the situation that required the restriction must be analyzed only related to the concrete case, one should also notice that the maximum sanctions jeopardize the very existence of the targeted rights, both in case of prohibition of any activity related to football of the footballer or a football coach for two years, and the pecuniary sanction of 1,000,000 lei.

5. Conclusions

The Romanian Football Federation, in order to organize the exercising of disciplinary authority conferred by Law no. 69/2000, opted to establish an arbitration system for disciplinary cases, set on three levels of jurisdiction (first instance, recourse, appeal) through two arbitral tribunals organized internally within its structure – Disciplinary and Ethics Committee and Recourse Committee – and delegating this authority, in last instance, to a permanent arbitral institution abroad – the Court of Arbitration for Sport – CAS/TAS.

The arbitral system for disciplinary matters in football breaches the public policy rules of Romania from a triple perspective: of the constitutional guarantee regarding judicial review of administrative acts by administrative courts, of the arbitration' public policy rules and of the protection of fundamental rights. Three lines of argumentation, corresponding to three different areas of law, converge to the same conclusion, that the system is breaching the public policy framework, and this convergence enhances the conclusion.

From the point of view of *contentieux administratif*, the arbitration system in disciplinary football matters breaches the constitutional guarantee regarding the judicial review of the administrative acts by the administrative courts, as this guarantee is detailed by the law on administrative litigation. In this domain, the judicial review is guaranteed and the disciplinary cases cannot be removed from the jurisdiction of the public courts.

As described above, for the scope of *contentieux administratif*, the Romanian Football Federation is assimilated to a public authority and its acts which are the concrete from of exercising the disciplinary power are administrative acts subject to judicial review performed exclusively by state specialized courts.

From the perspective of the regulation on arbitration, for the recourse to this alternative dispute resolution method to be allowed, it has to refer to a litigation for which the laws of Romania doesn't impose the exclusive jurisdiction of state courts, then, it has to refer to rights which the parties can dispose of, and, finally, the parties of the litigation have to conclude a valid arbitration agreement.

Under the objective arbitrability criteria, on the rights in dispute, we can observe that in the disciplinary cases the rights at stake are fundamental rights of constitutional ranking: the right to work, to right to freely exercise a profession and the right to private property. The legal doctrine has constantly retained that, regarding the individual labour litigations, these cannot be settled through arbitration, due to the fact that the rights at stake cannot be renounced of the holder (see, in the same sense, the Art. 38 from the Labour Code [8].

At the same time, due to the fact that the football-related disciplinary sanctions are restrictions on fundamental rights, it must meet the requirements of Art. 53 of the Constitution, or it can be easily observed that: it is not provided for by the law, being enacted by way of an administrative act, the Disciplinary Regulation of the Romanian Football Federation; it doesn't appear they are necessary for fulfilling any of the purposes referred to in Art. 53 par. (2) of the Constitution: the defence of national security, public order, health or morals, rights and freedoms of citizens; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe, or that is necessary in a democratic society; under the proportionality test, the maximum sanctions jeopardize the very existence of the targeted rights, on both the sports sanctions and the sports penalties.

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Comparative study between FIDIC Dispute Adjudication and Negotiation as Alternative Dispute Resolution methods

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Abstract

Increasing foreign investments in Romania has encouraged new participants to enter the Romanian Construction Market. Given the internationalization of the Romanian Construction Market, the increasing size and value of projects, and the intensive use of FIDIC contracts, it is questionable whether the traditional dispute resolution methods remain apposite. This paper discusses the FIDIC (Federation Internationale des Inginers Consultants) specific adjudication of disputes by the Dispute Adjudication Board (DAB) in comparison with negotiation. Adjudication of disputes by (DAB) represents a hybrid method of dispute resolution, which was originally specific to this type of standardized construction contracts. This method, containing a complex and mostly interdisciplinary mechanism, harmoniously blends common features with several alternative methods of dispute resolution already established. The paper discusses some of the similarities and differences between FIDIC adjudication method and negotiation, in order to determine whether adjudication has earned a distinct and independent place among ADR methods or is just a variation of the traditional negotiation method. The advantages and disadvantages of using the FIDIC Contracts in Romania are also considered. The paper concludes that FIDIC contracts are appropriate for projects in Romania and the adjudication of disputes by the Dispute Adjudication Boards is compatible with the Romanian legislative system the author advising the use of Romanian adjudicators, members of the Romanian Adjudicators Association [1].

Keywords: *FIDIC, Alternative Dispute Resolution, DAB, Dispute Adjudication Board, negotiation.*

1. Overview of the concept of alternative dispute resolution

Alternative systems of resolving disputes outside the courts, known as ADR (Alternative Dispute Resolution) has been validated as an effective means by which parties can resolve their differences between themselves through various methods regulated or unregulated.

This alternative perspective appeared as a viable option to crowded state judicial systems, slow and expensive. In this context, the parties can reach an amicable settlement to solve the problems they face, or turn to a specialist that they trust, who can resolve the dispute in confidence, efficiency and low cost, totally excluding in this process the nationalized jurisdiction.

These alternative methods have emerged as a reaction to the moderate effectiveness of traditional methods of conflict resolution. Basically, by ADR we understand all alternative ways of resolving conflicts outside the courtroom. The experience of the European Union revels [2] that, subject to certain basic rules, alternative dispute resolution systems may have advantages for both households and businesses and for the judiciary system.

This paper aims to realize a non-exhaustive comparison of two alternative dispute resolution methods, one being negotiation, the best known, the oldest and the most commonly used method, and the other being adjudication, a relatively new, tailored to a specific industry and a specialised type of standardised international contract method.

1.1. ADR methods in the United States of America

In the US the use of alternative dispute resolution (ADR) is implemented successfully for many years and works steadily and consistently, benefiting both the parties that no longer face all the inconvenience caused by a process in court and the judicial system, receiving relief of the courts and better management of justice. Today using ADR methods is already mandatory in the USA, each Federal Court is bound by the law to authorise local use of at least one ADR method in all civil actions. Moreover, *"in cases initially assigned to a Magistrate Judge, even prior to the filing of consents by all parties to jurisdiction by a Magistrate Judge under 28 U.S.C. § 636(c), the Magistrate Judge shall have the authority to refer cases to ADR programs and to grant relief from the requirements of these ADR local rules"* [3].

American judges encourage litigants, courts advisers and lawyers to contact and consult with trust units of alternative dispute resolution (ADR) under their jurisdiction, in order to analyse the options for each individual case. Alternative dispute resolution is accomplished by a plurality of procedures, including negotiation, supervised by a specially appointed ADR magistrate. *"The Court shall designate one of its magistrate judges as the ADR Magistrate Judge. The ADR Magistrate Judge is responsible for overseeing the ADR Unit, consulting with the ADR Director and legal staff on matters of policy, program design and evaluation, education, training and administration."* [3].

After a thorough study of how overlapping jurisdiction of state and alternative methods for the administration of justice works in US, the author believes that the successful blending of methods was possible due to two essential considerations. The first reason is that the process of assimilation by the society of the main information about the existence and functioning of ADR methods was achieved progressively, legislature allowing sufficient time for the society to experience these methods and to establish efficacy before introducing them as mandatory by law.

The second reason is the sustained efforts of the central federal authorities, academia and professional organizations to spread awareness on the advantages and disadvantages of these methods, creating the premises of absorbing these methods in the collective mind.

1.2. ADR methods in the European Union

Following the American model already established in terms of application of alternative methods, first important steps in strengthening European justice beliefs about the effectiveness of these means was made around 1998-2000, when the Council of Europe started an organized promotion of alternative dispute resolution in various subjects through a series of recommendations made by the Committee of Ministers. In the European Union, the onset

was made in 2002 with the publication by the European Commission of "Green Paper on alternative dispute resolution in civil and commercial law" [4].

Minimum standards leading towards alternative dispute resolution are the Commission Recommendation 98/257/EC regarding the rules applied by the authorities in charge of alternative dispute resolution and Commission Recommendation 2001/310/EC referring to the rules applied by the extra judiciary institutions for the amicable settlement of disputes.

Following these trends, mediation and mediator profession were even covered by Directive 2008/52/EC [5] , and the Directive is transposed into national legislation of the Member States of the European Union to regulate certain aspects of mediation in civil and commercial matters.

In Romania, the idea of conflict resolution excluding the jurisdiction of the courts, is found in close connection with the idea of tolerance and mutual understanding, both concepts with deep roots in the very cultural identity of the Romanian people. For this reason the concept of adjudication of disputes, which subscribes to the same ideas as other alternative methods do not face any obstacle to cultural integration process in the Romanian legal system. This is the explanation that, although it has a novelty in the Romanian law, these modern alternative systems of dispute resolution were relied upon by individuals who understand how these mechanisms work, even if not enough time passed yet for society to adapt totally to this profound change in mentality. A constant and consistent public information on the advantages and disadvantages of alternative methods of dispute resolution is required and awareness shall be spread by law artisans like teachers, lawyers, judges, government officials and relevant organizations. John Sopinka, (March 19, 1933 – November 24, 1997), member of the Supreme Court of Canada and also the first Ukrainian-Canadian has ever reached this position stated that *"...modern legal education often produces lawyers trained in a confrontational spirit which undermines and ultimately ignores innovations aimed at the early settlement of disputes. The primary goal of winning the case often blinds lawyers to the financial and emotional cost to the client."* [6].

1.3. ADR methods in Romania

In Romania the oldest and best known alternative dispute resolution method is commercial arbitration. This traditional method is applicable when both parties agree to overpass the state judicial competence and to defer the dispute to the judgement of the arbitrators. This legal institution is regulated by national legislation in and rooted deep in the Romanian law system. The organization of commercial arbitration was established by the Civil Procedure Code adopted in 1865, which under Book IV, coherently and systematically regulated arbitration. As an alternative procedure "*Unlike the state justice system, in which the number of judges called to resolve a dispute is predetermined by law and vary according to the court stage and procedure, in arbitration all depends on consensus between the parties concerned*." [7].

These provisions have been implemented until the communist regime was instituted, when liberal principles of regulation have clashed socialist principles so that by 1993, the arbitration provisions were not applied, although they have never been formally rescinded.

After 2000 on the ADR Romanian market other methods are now gaining ground in front of the Romanian state jurisdiction, tangled and expensive. Among them distinguish mediation, conciliation [8], adjudication of disputes by specific DAB under FIDIC contracts and consumer litigation by ADR entities [9].

Although the Romanian society is in the process of assimilation of new alternative methods implemented in Europe, the Romanian government has failed so far to shape a centralized implementation policy of these increasingly crowded courts relief mechanisms. The steps taken by the central authorities for the purpose of public awareness faction of ADR methods were so far only timid and not sustained attempts, which has not yet reached the goal because, in the author's opinion this process of increased awareness of ADR methods can only be achieved through a constant and lasting effort of all members with relevant expertise to society. The fact that by some means ADR methods are not limited to strict rules of procedure, constitutes an advantage only if the society clearly understands how these methods work, otherwise the parties could interpret this flexibility as a lack of organization, as a superficial and arbitrary character with uneven and unpredictable end.

2. Disputes adjudication versus negotiation

Negotiation is the first method of dispute resolution, the oldest and best known worldwide. From this particular method derived all other current alternative dispute resolution methods including adjudication. Negotiation was defined as any form of direct or indirect communication by which the parties having opposing interests discuss the form of any joint action that could follow to manage and ultimately resolve the dispute between them. The negotiation procedure has an unitary character, negotiations can be used to solve an existing problem or to lay the foundations for future relations between two or more parties. Negotiation was also characterized as "predominant mode of dispute resolution." [10]

This is not surprising given the presence negotiations in almost all aspects of daily, either at the individual, institutional, national or global.

In terms of uniqueness of the procedures, there is a first resemblance between adjudication and negotiation, both procedures are unique, because they differ in terms of participating subjects, the method used and the results obtained. In terms of regulation, we identify a second similarity, both procedures being optional and having unregulated character.

From a procedure perspective, the adjudication of disputes by DAB represents a pre-arbitration procedure prior and binding representing by outcome the opposite of negotiation. After deliberating upon evidences, the procedure is finalised by the adjudicators issuing a decision, which not contested within a period of time (28 days), transforms into a final and binding arbitration award.

Unlike the unitary character of negotiation, adjudication of disputes is a "dualistic" litigation procedure specific to FIDIC contracts, which enjoys wide acceptance throughout the world and has the prerequisites to a certain extent, to become the international standard in construction industry especially in terms of major investment projects.

In order to make a comparison between negotiation and adjudication the author will conduct an analysis of the specific elements of both procedures:

2.1. Voluntary Character

In general, neither party is required by law to participate in negotiations or to resolve disputes by adjudication, so that both methods are identical from the same perspective, having both a purely voluntary nature. There is an obvious resemblance between both methods regarding the participation of parties in the procedure, because the parties can

participate directly, or choose to be represented by a person they trust, both in negotiations and before the Dispute Adjudication Board.

However, there are important differences between the two methods. If in the negotiation process parties are free to accept or reject the outcome and may withdraw at any time during the process, for adjudication of disputes parties who started the procedure must finish it and in the end they can reject the result only by means of a special procedure regulated in the contract against DAB decision and within a fixed period of time (notice of dissatisfaction within 28 days).

2.2. Bilateral Character

Negotiations may involve at least two competing parties but the number is not limited to situations where there are negotiations attended by dozens of parties. Such statements may vary from negotiation worn by two individuals seeking to agree on the withdrawal from sale of a house to recover a debt to "negotiations involving diplomats from dozens of countries, for example, the World Trade" [11].

In FIDIC contracts negotiations have a constant character throughout the contract, not a few are the situations where minor issues of the project are left unresolved even when signing the contract, in order to be "finalized through negotiation" [12] during the course of the project. This means that during the execution of the contract the parties may use multiple alternative dispute resolution methods in the same time because there is no legal provision prohibiting that.

In terms of number of participants the FIDIC negotiations are usually multilateral meetings, along with both parties, consultants, financing banks representatives, architects and sometimes sub-contractors attending the meetings.

There on the legal qualification of participants in both procedures is an important distinction between negotiation and adjudication of disputes arising from the constructive elements of procedures themselves. Thus, if when negotiating procedures are conducted directly between the parties without the intervention of an independent third party, for adjudication of disputes the essence of the procedure is precisely the intervention of a third party acting impartially throughout the entire execution of contract period, both in the phase of prevention of disputes and in phase of resolution of disputes.

2.3. Consensual Character

Negotiation involves only parties with opposing interests and the favourable outcome is essentially achieved by the parties through mutual concessions, without recourse to a neutral third party. Being purely consensual, the outcome of negotiations is easily accepted and implemented by the parties as it accurately reflects their will freely expressed, so that disputes resolved by the parties through negotiations are off permanently by mutual agreements, transactions, memoranda or verbal agreement (gentleman's agreements).

Regarding adjudication of disputes in relation to the dual nature of this procedure, dispute settlement can be achieved on several layers The first phase of adjudication is the prevention of disputes, a linear phase maintained throughout the entire contract period. Thus, a dispute arising between the Contractor and the Beneficiary can be easily removed by DAB, just by exercising its active role of prevention, without issuing a decision. DAB members can help the parties to reach an agreement by sending recommendations on an optional basis, so important for the parties in order to achieve a correct assessment of

potential conflict situations or for a better understanding and interpretation of contractual provisions.

All DAB activities during the prevention phase have a consensual and optional character and are intended to lead the parties to avoid litigation. However, in the phase of settling disputes, when the methods of prevention have already failed, the adjudication process is detached from any consensual nature, acquiring a judicial character very similar in terms of procedure and outcome to ad-hoc arbitration.

2.4. Informal Character

There are no set rules in both negotiation or adjudication of disputes related to the prevention phase, which involves many similar items with negotiation. Parties are free to adopt any rules considered in relation to the subject of the dispute and the number of stakeholders and the rules of place if necessary

Generally, parties succeed to finalise an initial agreement on material aspects of a general nature like subject, time and place of negotiations, and after that they start substantiating on topics of subjective nature like confidentiality, the number of sessions of negotiations, documents that can be used, etc.

2.5. Confidential Character

The parties may decide to negotiate in public or in private. If private negotiations are conducted, all the elements of negotiation and the negotiation itself along with any and all issues discussed during negotiations, regardless of the result is confidential and may be disclosed publicly only by mutual consent of parties.

Confidentiality is vital because otherwise important values like reputation, public image or even the existence of negotiating partners could be damaged. In case of government or institutional negotiations, confidentiality is limited by a legal obligation [13] of public authorities to disclose all information regarding public interest. Courts in Romania have ruled on cases covering the communication of information of public interest under Law 544/2001 on free access to information of public interest, that [14] free and unhindered access of everyone to information of public interest, constitutes a basic principle of relations between persons and public authorities, protected by the Constitution and international documents ratified by the Romanian Parliament.

The adjudication of disputes in its entirety and all the elements involved in this complex process, including without limitation all submissions made by the parties during the course of proceedings, whatever stage they are in or the result, is confidential and may be disclosed to the public only by agreement of both parties. Nevertheless if the adjudication of disputes is conducted between parties that include a public authority with the legal obligations of disclosure mentioned above, the parties will limit the disclosure to the minimum public mandatory information as provided by the law, all private aspects remaining confidential.

2.6. Flexible Character

The scope of a negotiation depends on the choice of the parties. The parties may determine not only the subject or subjects to be negotiated, but also whether they will adopt an approach based on positional bargaining or interest-based approach. By negotiation each party tries to obtain a benefit for himself, while trying to convince the opposing party

to act according to his own beliefs, to achieve their objective with material and/or moral costs acceptable. For the success of negotiations both parties are forced to accept the idea of compromise, knowing from the beginning that in order to achieve their own objectives they will invariably create an advantage to the adverse party. The idea of compromise can be identified also in some phases of the adjudication of disputes, adopting the method itself being the result of a compromise made by the parties in order to enjoy the benefits of flexibility, specialization and independence of DAB members.

3. Advantages and disadvantages

3.1. Advantages of Negotiation

From a procedural standpoint, negotiation is probably the most flexible form of dispute resolution because it involves only those parties with an interest in the case, the parties are free to shape the negotiations in accordance with their own needs. Many specialists show that negotiations have a higher rate of success when the parties adopted an approach based on mutual interests and needs, as opposed to an approach based on contractual position often unbalanced. The fact that in negotiations the intervention of a neutral third party is not necessary, is important when either party does not want to involve outside people into the sensitive issues of the business. Agreement terminating negotiations accurately reflects the interests of the parties, which can reach even in a position to strengthen the relationship and build greater mutual trust by respecting bargaining agreement. During negotiations parties are not limited by laws or by rules of procedure, resolution of the dispute can be based on morality, legitimacy, fairness or mere economic interest of the parties involved, which ensures flexibility of this method. By choosing to settle the dispute through negotiation parties save considerable financial and human resources, while reducing time to settle the dispute and to reposition the parties in trade agreements. If negotiation occurs when there is already a case before the courts, the parties showing their transaction to the judge, may request the court to issue a decision to legalize the content of the transaction.

3.2. Disadvantages of Negotiation

The simple meeting of the parties to conduct negotiations does not guarantee their success, especially where one party seeks to exploit a possible disadvantaged situation of the other party in order to gain an advantage. Negotiation can fail and where, even in good faith, parties don't have a clear understanding of controversial issues or the limits of the negotiating mandate conferred.

In the negotiation process, there is no guarantee of good faith of the parties nor the real intentions of negotiation. It is merely possible that one of the parties continues negotiations only in order to delay legal proceedings or to postpone the settlement of the dispute by a third party.

In terms of the legal force of the solution the author envisages that the solution reached by the parties mutual compromises can not be imposed on the parties, compliance being guaranteed by their good faith and by the principle of binding force of the contract. However, if the parties choose to formalize their understanding through a document, it will have legal value of a contract having binding power between the parties without having the state contest for putting it into execution.

3.3. Advantages of using FIDIC Adjudication in Romania

The adjudication of disputes by DAB is an alternative jurisdiction of dispute resolution with a quick and inexpensive and staged character of resolving the disputes between parties in FIDIC contracts.

The essential difference between consensual alternative methods where the solution is not imposed on the parties such as negotiation, and judicial alternative methods such as adjudication, where the solution is imposed on the parties, refers to the role conferred to independent third party in the proceedings and the character of legal proceedings. The advantages of using adjudication are in close relationship with the advantages of using the FIDIC Contracts entirely for major projects in Romania. The first advantage is effectiveness, this method being carried out in a timely and cost effective manner.

Romania has developed a national infrastructure for dispute adjudication . For example, in order to ensure a balanced, unbiased and fair treatment under the contract, the parties may agree that the appointment of the members of DAB to be ensured free of charge by the Romanian Association of Adjudicators (AAR) as an independent and impartial body that holds the functions of the Nomination Authority. AAR brings together the National List of Adjudicators, specialists from technical, legal and economic field of activity, that have experience in major projects and can settle important disputes with significantly lower costs than foreign adjudicators.

The Romanian legislation encourages alternative procedures for resolving disputes. Disputes settled by DAB as proposed by FIDIC contract represents a form of ad hoc arbitration provided by Art. 545 of the Code of Civil Procedure – "The parties may agree that arbitration will be held of a permanent arbitration institution under Title VII of this book, or by other entity or an individual". According to Art. 615 of the Code of Civil Procedure – "An award is enforceable and forcefully executed as a judgment." The Romanian legislator is ensuring parties the legal framework to settle their disputes impartially and independently, in a confidential, low cost and timely manner.

3.4. Disadvantages of using FIDIC Adjudication in Romania

The first disadvantage is unusualness. The Romanian contractors are not yet familiar with FIDIC contracts and with adjudication as a specific FIDIC legal institution, and it may discourage them from tendering, reducing local competition and increase their bid time and costs. This may also advantage international contractors over Romanian contractors. The second disadvantage is the lack of jurisprudence. FIDIC contracts provide for arbitration and there is little guidance from the courts as to the intended operation of particular clauses or precedent to follow. This compares to local construction contracts, as regulated by the Romanian Civil Code, where there are significantly more decisions about the operation of various clauses. And last but not least, Romania has limited experience with Dispute Adjudication Boards, although interest in and possibly experience of Romanians being appointed to DABs, is increasing every day due to the sustained efforts of the Romanian Association of Adjudicators, the national institution specialized in FIDIC adjudication.

4. Conclusions

The FIDIC Contracts are drafted for use on major projects and have been successfully used on thousands of projects across the world. Major projects in Romania are already

executed under FIDIC contracts for over a decade by national and foreign contractors. These facts lead one to the logical conclusion that the FIDIC Contracts should become the standard starting point for construction contracts in Romania for every major project developed. For a safer and more economical execution of the contract, the institution of disputes adjudication by the DAB should be entrusted to local adjudicators, members of the Romanian Association of Adjudicators, who are more familiar with both national legislation and also important aspects related to the local culture and traditions in the development projects.

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Reflecting the Juridical Nature of Personal Autonomy within the Jurisprudence of the European Court of Human Rights

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Abstract

At the European level, the values of human rights were reafirmed and consolidated by means of the Lisbon Treaty, the latter establishing the premises of achieving a real juridical convergence between the system of human rights protection that was enabled under the auspices of the European Union and the juridical system of human rights protection created by the Council of Europe. Art. 6 of the consolidated version of the Treaty of Lisbon establishes the juridical relations between the two European systems of human rights protection, by introducing in this matter, two essential principles: (1) the European Union adheres to the European Convention of Human Rights and Fundamental Freedoms; (2) fundamental rights, as they are guaranteed by means of the European Convention on Human Rights and Fundamental Freedoms and as they spring from the constitutional traditions that are commune to all member States, represent general principles of the law of the Union.

Taking into consideration the previously evoked principles, the scientific objective of our paper resides in presenting the peculiarities of the juridical value of *personal autonomy* and placing it within some possible analytical patterns oriented towards reflecting the connection between personal autonomy and the right to life, respectively, the right of the individual to decide with regard to his own destiny. We have undertaken our research having the conscience that the implications that personal autonomy brings may be extended upon the whole content of the European Convention taking into consideration the fact that personal autonomy synthesizes the democratical-individualist conception concerning human rights, being the corollary of liberty and human dignity. The issues advanced hereinafter are manifold: (1) identifying the peculiarities of the Western conception upon human rights (the classical form of individualism or a peculiar form of individualism translated through the respect towards the norms of the community conjugated with the respect for human rights); (2) identifying the peculiarities of personal autonomy – as a secondary juridical value for the rights contained in the European Convention; (3) establishing the application of personal autonomy as a juridical argument in exerting the content of the right to life and of the right to death.

Keywords: *The European Court of Human Rights, the conceptualization paradigm of human rights, personal autonomy, the right to life, the right to death.*

Personal autonomy and the individualistic conception on human rights

The recognition of the principle of universal human rights has encompassed the juridical platform for adopting the individualism thesis in the field of human rights. The latter advances the idea according to which in the process of guaranteeing human rights the individual has the main role and rights are granted by virtue of ensuring wellbeing. By contrast to the individualism thesis is observed the community-thesis – based on cultural relativism – that denies the universality of human rights and replaces individual interests with group interests. The process of guaranteing human rights will be oriented, within the community, towards protecting the interests of the community thus subordinating the interests of the individual.

Within the system of human rights protection created under the auspices of the European Convention on Human Rights and Fundamental Freedoms [1], the relation between individualism and communitarianism inclines in favour of the individualistic perspective of human rights. The individualistic doctrine is characterized through the preeminence of the individual– as the individual presents itself as an entity that is independent in relation to the membership-community although, at same time, the individual is characterized by means of the relations individual-community. As it is independent in regard to society, the individual may autonomously refer to his membership-community and thus establish connections that are framed around his own interests. [2] We feel that, the individualism of human rights is the juridical expression of *personal autonomy.* The latter entails exerting, at the social level, the individualist prerogatives that are integrated in a juridical framework of rights and duties. As remarked in doctrinaire studies [3], human rights imply first the duties of the State and second, individual prerogatives. In other words, the State must configurate a juridical system that is able to provide human rights and the individual has the possibility of using human rights *within the limits and within the conditions prescribed by the provider of the rights.* In juridical studies, personal autonomy implies the application of individual decisions (that are adopted in an independent manner) which concern the manner of orienting his own life. Doctrinaire studies formulated the definition of personal autonomy within the terms of *recognizing the right that a person has to be loyal to certain beliefs, to choose and act according to personal values and beliefs; on the other hand, the State must respect, in a non discriminatory manner, the options of the individuals, if otherwise, the result would be represented as qualifying as "superior" or "inferior" some values/conceptions/perspectives concerning life.* [4] Personal autonomy is the expression of recognizing in favour of every human being the prerogative of deciding in regard to him/her self and also the prerogative of exerting, according to his/her own beliefs and values, the rights given to the individual. Nevertheless, personal autonomy does not give legitimacy to actions contrarious to the rights and interests of other individuals or actions that are contrarious to the State, as it is submitted to the same limitations applied to other human rights consecrated within the European Convention. In the given context, we can afirm that, although personal autonomy acknowledges the individualist conception in the field of human rights, it does not totally deny the comunitarianism thesis. As we have previously stated, the rights enshrined in the European Convention of Human Rights are not absolute as they are submitted to State limitations (protecting public order, public health, public morals, individual rights and freedoms). In other words, we cannot deny the fact that, *the*

individual's ability of deciding the manner of exerting his rights is influenced by social norms and by the duty of the individual of complying to them. The protection of individual interest exists *only* and *if* State's prerogatives regarding maintaining oder, security, public health are not annihilated. In this point we refer to a peculiar form of communitarianism that subsists in the Western space. The respect for the rule of coexistence is imposed within society under the form of *negative liberty* so that no individual manifestation would prove damaging for other members of society or for society in its whole. This peculiar form of communitarianism is identified as one of the main requests of the rule of law and is distinguished from *cultural communitarianism* upheld by the States that have experimented authoritarian forms of Government. The distinction between the two forms of communitarianism is simple: within Western States, State's intervention in the sphere of individual autonomy is legitimized through the concept of negative liberty and in the endeavour of achieving human rights the State is the actor that will take responsability; for developing countries, the thesis of cultural communitarianism places State interests above individual interests. In the latter case, the endevour of guaranteeing human rights imposes obligations upon the individual and individual rights have a subsidiary position in relation to cultural values promoted by the membership-community.

The notion of *personal autonomy* is distinguished through flexibility. If at the juridical level, personal autonomy evoques the individual's prerogative of using (in a free and independent manner!) the rights that are granted by virtue of human dignity, at the social level, personal autonomy implies the existence of a framework of human qualities. According to doctrinaire studies, personal autonomy signifies the existence of individual freedom, of the individual right to afirm uniqueness and creativity. [5] As we have a comprehensive framework it is just to state that, although the concept of personal autonomy is not correlated to a universal and clear qualification, it may be interpreted as a *fundamental value* which is present within the exercise of all rights enshrined in the Convention, hence being that legal instrument that protects human rights in an abstract manner. [6]

Juridical difficulties in assessing personal autonomy

Within the catalogue of rights offered by the European Convention, personal autonomy is not regulated *in expresis* and is not recognized as an autonomous individual right. The limit identified through legal means is not insurmontable. As we have stated in the previous section of our paper, personal autonomy was recognized by the European Court of Human Rights as an indeniable human value in the process of guaranteeing human rights. Appraising personal autonomy as a socio-juridical value is validated through the general theory of human rights. Doctrinaire studies recognize human rights as requests that individuals invoque one against other – requests that have either legal or moral status. [7] By strictly refering to the category of human rights, the previously cited opinion observes that the foundation to which we relate has an ideological, moral nature although it has a legal form.

By means of case-law, personal autonomy was presented in connection to the provisions of Art. 8 of the European Convention of Human Rights that regulates the right to respect for private and family life. At a first glance, the content of Art. 8 of the European Convention is circumscribed to the aspects refering to the individual's inner forum (*forum intern);* according to the text of Art. 8, its dispositions are applied with the purpose of protecting

private, family life, the domicile and correspondence of the individual. If we take into account exclusively the letter of the provisions of Art. 8 results the idea according to which the respect for private and family life concerns exclusively the inner, intimate aspects of the individual, without implying aspects of external nature. In light of the observation of the European Court of Human Rights, the respect for private and family life takes over both the inner and the external forum of the individual, thus regulating coordinated aspects. In the case *Pfeifer vs. Austria* [8] the European Court has explained the signification of private life and its connection to individual personality in the following terms: *private life extends upon all the features that are related to personal identity (...). There is a zone of inter-personal interaction inclusively in the public context that may be regarded as the object of action of private life.* The notion of personal autonomy was directly included within the explanations offered by the Court in the field of private life in the cause *Tysiąc vs. Poland* [9]*: private life is a large term that includes, inter alia (...) the right to personal autonomy (...).* We upheld the jurisprudential qualification of personal autonomy as *right* included in the content of private and family life, thus being covered the juridical void concerning granting the right to personal autonomy. In the same sense, we observe personal autonomy as an *autonomous rights* in the interpretation of Art. 8 advanced by the Court in the cause *A, B and C against Irland* [10]*;* in solving the cause mentioned above, personal autonomy and personal development are rights included in the content of the right to private life. The ambiguity adopted by the European Court in the matter of qualifying personal autonomy is underlined through the lack of choerence reflected in the opinions expressed by the Court when undertaking the case-law analysis of the concept. *Exempli gratia,* if in the above mentioned cause personal autonomy is qualified as a rights, in the cause *Pretty vs. United Kigdom* [11]*,* personal autonomy is assessed as *an important principle that represents the foundation of the guarantees established in Art. 8 of the Convention.* As was retained in doctrinaire studies [12], resuming personal autonomy to the main principle of the guarantees enshrined in Art. 8 of the Convention does not coincide with its flexible character. Consequently, in the case *Sorensen and Rasmussen vs. Denmark* [13] personal autonomy is construed as a guiding principle of all legal guarantees.

The application of personal autonomy to the analysis of the right to die

Personal autonomy ensures the achievment of the rights enshrined within the Convention so that if we deny the possibility of the individual to act acording to his own values the result would be that the rights enshrined within the Convention have an abstract character. On the other hand, the right to life is construed in doctrinaire studies [14] as a voucher of all the rights enshrined within the European Convention because, in the absence of ensuring the protection of life all the other prerogatives of the individual become futile. Likewise, the connection between personal autonomy and the right to life results from the fact that, by acting in favour of protecting all the rights comprized in the European Convention, both prerogatives are inter-related, thus being unable to exist separately. Hence, the right to life implies personal autonomy and personal autonomy is the instrument applied in the manifestation of the right to life.

Being the first right guaranteed amongst the prerogatives of the European Convention, the right to life is not properly explained within the text of the Convention, the latter

being limited to mentioning, in the first paragraph of Art. 2, the first thesis, the fact that *everyone's right to life shall be protected by law.* In the following paragraph, the right to life is presented in relation to death, being exposed the situations that are derogatory from the previosuly expressed rule, by virtue of which, although death may occur, it is not construed as a violation of the right to life guaranteed within the content of the Convention. Peculiarly, we refer to death caused by a necessary recourse to force: *(a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

The implications of personal autonomy concerning the right to life causes burdesome ethical-juridical problems that will be answeared by means of the jurisprudence of the European Court of Human Rights and through doctrinal reasoning. First, we must acknowledge the fact that, the right to life stipulated in Art. 2 of the Convention comprizes in its content the possibility of the individual to decide his own death. In other words, the main ethical-juridical dilemma derives from the following rationale: if personal autonomy guarantees all of the rights of the Convention (including the right to life) and personal autonomy supposes the possibility of the individual to act according to its own values, then we may interpret the content of Art. 2 of the Convention in the sense of ensuring the right to die? Or, more clearly, may one interpret the right to life against the individual's will to live?

The wording utilised in formulating Art. 2 of the European Convention *(the absolutley necessary recourse to force)* determines the interpretation acording to which the importance of the right to life implies the need to protect it through legal means resorting, in this manner, to much stricter standards than the standards applied to the realm of protecting human rights. [15] In the case *Pretty vs. United Kingdom* [16] the European Court explains the right to life in correlation to the right to die and also in relation to personal autonomy establishing that the text of Art. 2 cannot represent a legal support for the recognition of the right to death. Nevertheless, the Court's interpretation concerning a possible right to death is opened and flexible so that it is not denied the *ipso factum acknowledgement* of the right to death of some States. This aspect equates to including, in the sphere of the margin of appreciation of the States, the possibility of recognizing the right to die even if this right has a different sphere of application from the right to life, being circumscribed within domestic law. Within these coordinates, the protential recognition of the right to die does not represent a juridical problem that is based upon the content of the right to life as it is defined in Art. 2 of the European Convention but rather a juridical problem that is founded upon national legislation that is molded in a peculiar pattern, configurated according to the legal culture and the legal tradition of the respective State. The method of the States' margin of appreciation (the selection of commune legal values shared by the signatory States of the Convention in view of imposing a commun minimum standard in the field of human rights protection) is remarked in doctrinaire studies as a juridical instrument that ensures the legitimacy of the Court. [17] The reaction of the European Court – that of contesting the lineage of the right to die from the right to life is consecrated in Art. 2 of the Convention and resides in *the State's interest of preserving life as a supreme social value.* [18] The possibility of transforming Art. 2 of the European Convention in a juridical justification of the right to die would determine a disfunctional interpretation of personal autonomy thus creating the premises of abuse in this sense.

We are bound to mention the fact that, in order to have juridical relevancy, the discussion concerning the right to die is limited by the situation according to which the health of the individual is irreversably damaged and the only option in favour of the individual consists in ensuring a decent death by means of medical means that are disputed from a juridical point of view like *assisted suicide, the refusal of administrating medical treatment, euthanasia.* In the following, we will proceed to presenting the theoretical distinctions between the previously mentioned notions. From a medical point of view [19], *euthanasia* designates the action followed by a third person (usually a doctor) by means of which is ended the life of an individual through active or passive means. Euthanasia may have a *passive* character if the death of the pacient is determined by stoping or restricting medical interventions that have the purpose of preserving the life of the individual. On the contrary, euthanasia is *active* if the attending physician undertakes actions that may lead to the death of the pacient. [20] We are bound to mention the fact that, in case of euthanasia, the decision of ending the pacient's life doesn't belong to him. Contrastingly, *assisted suicide* is equal to active euthanasia in the sense in which the attending, *at the request of the pacient,* obtains, in favour of the latter, the medical means through which the pacient may commit suicide. We retain as main differences between *active euthanasia* and *assisted suicide* consist in (1) *the (in)existence of the pacient's consent* (in case of active euthanasia the pacient doesn't express the will to die meanwhile, in case of assisted suicide, is present the will of the pacient to die) and in (2) the quality of the person that puts and end to the life of the individual (the attendant– in the case of active euthanasia and the pacient himself in the case of assisted suicide). [21]

In its turn, assisted suicide is differentiate from the *refusal of medical treatment* due to the fact that, in the latter situation, the pacient requests the doctor to accept the passive attitude of the pacient-who does not want to receive medical treatment. Although both assisted suicide and the refusal of medical treatment start from the premise of acknowlegding the discernment of the pacient and, implicitly, the pacient's possibility of validly expressing his consent, some commentaries are necessary. First, *the expressed consent refers to different problems:* in case *of refusing medical treatment, the pacient accepts death as a natural consequence of his existence that is affected by an incurable disease and is susceptible of improvement through the administration of medical treatment;* in the case of *assisted suicide,* the pacient abuses the concept of personal autonomy and undertakes actions *directly oriented against the pacient's health and life.* [22] We cannot deny the fact that, in both cases, the consent expressed by the pacient is oriented against his life and, from a psychological point of view, we distinguish two different attitudes upon death: (1) death as a natural stage of life (in case of refusing medical treatment) and (2) death as a manner of stoping life through aggressive actions (in case of assisted suicide).

The conceptual distinctions undertaken within the lines above have a technical, peculiar character and are dimmed in some doctrinal works, the terms *euthanasia* and *assisted suicide* being used in an inter-changeable manner. [23] In all cases, the previously analyzed terms designate social realities that express *the right to die.* From the point of view of *personal autonomy,* the main point of interest is related to *the existence/inexistence of the pacient's consent* and *the conjuncture that has determined the pacient to opt in favour of exerting the right to death.* From the undertaken analysis, *passive/active euthanasia* has the main point the will of the attendant that deems as ethic and human the act of *putting*

an end to the life of the pacient's life that is confronted with incurable disease/irreversible damaged health state. If we refer to assisted suicide – as in the case of refusing medical treatment – , the exercise of the right to death is achieved *by the pacient himself by virtue of his personal autonomy.* Upon the aspects connected to the *conjucture* in which was found the subject that is submitted to euthanasia or that decide in favour of assisted suicide or in favour of medical treatment, we mention the fact that the common element is represented by a *irreversible medical state producted weather as a result of an accident, weather on the background of a disease.*

The case-law analysis of the relation between personal autonomy and the right to die

In the cause *Pretty vs. United Kingdom* [24] the European Court of Human Rights correlates personal autonomy to the right to life thus reaching the conclusion according to which the right to life does not imply its opposite – the right to death. In the cited cause, the factual situation is presented in the following manner: Mrs. Pretty suffers from a a neuro-degenerative condition which affects in a irreversible manner the quality of life, being paralyzed, without any possibility of recovery; Mrs. Pretty wants her husband to assist her to accomplish her desire to put an end to her life (she maintained intact her mental abilities despite her medical condition but cannot perform herself the act of suicide because her physical condition); likewise, Mrs. Pretty requests to the British authorities not to initiate legal actions against her husband after her death. The previously described case represents *a peculiar form of assisted suicide* because Mrs. Pretty is in the condition in which she can express in a valid manner her consent for achieving suicide but, for this purpose, she requires the support of her husband because her medical condition doesn't allow her to act concerning this aspect. Failling in obtaining satisfaction from the British authorities, Mrs. Pretty has introduced an action to the European Court sustaining, in essence, that Art. 2 of the Convention, ensurses in favour of the individual the right to die. As we have previously mentioned, the opinion of the Court is not in accord with Mrs. Pretty's request, Art. 2 being construed in the sense in which it does not grant the right to death in favor of the individual nor does it allow the use of self-determination so that the individual can exert the option of *choosing death over life.* [25] Furthermore, the European Court restricts the right of the individual of choosing death regardless the person designated to help the individual to commit suicide (public authority or private person). [26] Likewise, Mrs. Pretty invoques the legal foundation of Art. 8 of the Convention thus assessing that the right to decide upon the manner of puting an end to her own life constitutes one of the main prerogatives of personal autonomy. Observing this legal foundation, the European Court of Human Rights has ofered an ambiguous explanation regarding the manner in which personal autonomy is involved in guaranteing the right to life, hence using the rationale of *the quality of life.* Thus, the European Court has mentioned that it *does not exclude* the fact that Mrs. Pretty's request of opting for suicide through her husband is linked to the right of avoiding an unworthy and disturbing end to her life– aspects that are connected to Art. 8 of the Convention and not to Art. 2. The Court admits the fact that in Mrs. Pretty's case, the request of resorting to assisted suicide puts into discussion a juridical problem that is related to *personal autonomy* and not to the right to life *per se.* Hereinafter, we

deduce the fact that assisted suicide makes the connection between the right to die and personal autonomy so that the individual's possibility of independently electing the end of one's life (dignified and non-disturbing) constitues a prerogative that is *not excluded* by the European Court from the content of the right to private life. The Court does not recognize the individual's prerogative to decide with regard to the end of his/her own life as *being one of the most intimate aspects included in the sphere of private life.* Correlating this aspect with the idea according to which the individual's prerogative of deciding upon the circumstances in which his life is ended (the possibility of pursuing a dignified and non-disturbing end to his life), we reach the conclusion according to which *the European Court does not adopt a coherent paradigm upon the subject of assisted suicide.*

On the other hand, Mrs. Pretty's arguments are coherent: she invokes personal autonomy as the foundation that is necessary to decide with regard to her death (and, especially, as the foundation that is requested in order to choose *the circumstances of a dignified and non-disturbing death)*. Up to a point, Mrs. Pretty's paradigm regarding personal autonomy and the right to life coincides with the Court's vision if we take into consideration the fact that, in the given example, the European Court has defined individual autonomy as *the ability of the individual to conduct his life in a self-elected manner which may also include the opportunity to achieve activities that are conceived as being damaging from a moral point of view or as being of dangerous nature for the respective individual.* [27] Both conceptualizations regarding autonomy determine, in the first place, the individual's possibility of disposing of his body and of his own life. Richard Epstein, in his work *The Erosion of Individual Autonomy in Medical Decisionmaking: Of the FDA and IRBs* [28] presents personal autonomy as a principle that enables each individual to dispose of his own self. Thus, the limit of personal autonomy (as remarked by the Court) resides in the protection of other individuals. Although autonomy refers to the individual's right concerning his own body and his own life, this power may be lawfully or unjustly exerted only upon himself and not upon other individuals. In the Pretty case, the limit of personal autonomy may be construed as deriving from the protection of the rights and interests of Mrs. Pretty's husband (as the latter is liable of juridical punishments if he helps Mrs. Pretty in commiting suicide) and also from the protection of social rights and interests (we especially refer to abusively exerting the right to death).

By relating to the subject-matter of forbiding assisted suicide, it is invoked the *ambiguous argument (slippery slope argument).* The latter is, at some form, in accordance with the rationale of the European Court of Human Rights because, in this respect, the European Court presents within the rationale concerning assisted suicide some inconsistencies. First, it is established that the right to die is not a consequence of the right to life but, at the same time, it is recognized the fact that, by virtue of Art. 8, every person may exert the right to choose for terminating his life in a dignified and non-traumatic manner. Second, on one hand, the Court establishes that personal autonomy signifies the individual's ability of conducting his life according to his own desire, including undertaking activities that are damaging for the individual from a physical and from a moral point of view but, on the other hand, the Court denies the fact that assisted suicide (an act that is inscribed within the previously mentioned definition) may be qualified as *an aspect that is intimately connected to the individual's private life.* Returning to the *slippery slope argument* we may observe the establishment of an extensive logic (of analogues nature) starting from the idea according

to which *the legal prohibition of assisted suicide must be imposed in all circumstances* because if assisted suicide would be permitted by virtue of personal autonomy (we take into consideration the situations in which the pacient suffers from incurable diseases so that his discernment is not affected) than it could not be forbidden in the circumstances in which the pacients are not ill. [29] In States like Holland and Switzerland assisted suicide is accepted as long as the pacient may freely and consciently express his will in all cases in which pacients suffer from incurable diseases. Furthermore, Swiss Courts have accepted assisted suicide inclusively in those cases in which the applicants are suffering from psychiatric diseases which affect their perception upon life making it impossible to bear meanwhile the discernment is maintained intact.

From our point of view, the valability of the *slippery slope* argument musn't be appraised through the inclusion of the hypothesis *according to which pacients are not suffering;* on the contrary, the real difficulty of the argument resides in the situation according to which *the pacients are suffering but are found in the impossibility to manifest their will.* The problem does not resides in the fact that allowing assisted suicide in the case of ill individuals may conduce to allowing it in the case of healthy individuals. On the contrary, allowing assisted suicide in the case of ill individuals may be challenged from the perspective of applying it to those individuals who (from motives that are correlated to diseases) cannot validly express their consent. In this sense, within legal confines would be included assisted suicide and euthanasia. In this point, *the slippery slope argument against assisted suicide* becomes *a clear argument for excluding euthanasia and assisted suicide.*

Conclusions

Personal autonomy constitues the axiologic foundation of all the rights enshrined within the European Convention on Human Rights, being the juridical value that is reiterated when exerting each right. By means of interpretation, the European Court inserts personal autonomy as an inner component of each right enshrined within the convention thus stating the *individualist conception upon human rights*– drafted in opposition to the thesis of cultural relativism, specific to cultural communities. By acknowledging the inserting of personal autonomy as an inherent component of exerting the rights contained within the Convention, it is implicitly recognized *negative freedom* as a limit of applying the content of the Convention. By virtue of negative liberty, the limits of exerting human rights are derived from the demands of a democratic society concerning the respect for public order, national security, morals and rights and freedoms of individuals. In this sense, the rights that are circumscribed to the inner forum of the individual, guaranteed within the Convention in Art. 8 – the right to respect for private and family life, Art. 9– freedom of thought, conscience and religion, Art. 10-freedom of expression encounter, in their exercise, all the restrictions derived from the concept of negative freedom. The analysis of personal autonomy in relation to the exercise of the right to life and of its opposite (the possibility of the individual to decide regarding his own death) entails the correlated application of the content of the rights previously mentioned and of the limitation imposed upon them through the European Convention.

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International legal instruments on the protection of sexual freedom of the person – essential component of the right to private life

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Abstract

Our our scientific approach covers the legal european and interntional framework that grant to the person the protection of the right to private life underlining its evolution over time, also noticing regulatory differences and the vision of the legislator in accordance with the evolution of society. Obviously, in the same time with the progress of the society, the interest in order to protect the right to private life has grown and the ways to look at this issue have changed radically.

Keywords: *private life, sexual freedom, sexual orientation freedom, European Union, legal internationally documents, human rights.*

1. Legal instruments on the protection of sexual freedom worldwide

The concept of sexual freedom of the person, essential component of the right to private life, is closely related to the notion of sexual orientation, which is based on two fundamental principles, namely the principles of equality and non-discrimination. in order to consecrate these principles, important international structures like the United Nations Organization, Organization of American States, The African Union have developed a series of legal documents on the recognition and guarantee of human rights, that also contain provisions for ensuring the protection of sexual minorities, that lesbian, gay, bisexual and transgender.

1.1. Universal Declaration of Human Rights

In the context of human atrocities committed during the Second World War by Nazi Germany, internationally the intention was that "the new organization of the United Nations to promote human rights and fundamental freedoms"[1] and thus it was adopted in 1948 the Universal Declaration of Human Rights[2], document which,although originally it was not regarded as a treaty or agreement with legal force, but as some "basic principles"[3], still it is to be found in the constitutions of many countries.

Although it is not a treaty or an international agreement with legally value, the Universal Declaration of Human Rights has acquired the status of customary international law and a number of international documents such as the International Pact on Civil and Political

Rights (December 19, 1966)[4] , the International Pact on Economic , Social and Cultural Rights (December 16, 1966), the International Convention on the Elimination of All Forms of Racial Discrimination (March 7, 1966)[5], the Convention on the Elimination of All Forms of Discrimination against Women (December 18, 1979)[6], the Convention Against Torture and Cruel, Inhuman or Degrading Treatments and Punishments (December 10, 1984)[7], the Convention on the Rights of the Child (November 20, 1989)[8], the Convention for the Protection of Human Rights and Fundamental Freedoms (November 4, 1950)[9], American Convention on Human Rights (November 22, 1969)[10], which were adopted subsequently, all took Declaration principles or made direct reference to its provisions.

The statement says that all people "are free and equal in rights"[11] and that "everyone can enjoy all the rights and freedoms set forth in this Declaration, without distinction of race, color, sex, language, religion, political affiliation, national and social origin, property, etc."[12] We express our opinion that by this statement, included sexual minorities with different sexual orientations, of course, without claiming that this social group have protection expressly mentioned.

International Lesbian and Gay Association (ILGA) is the first organization of its kind that has acquired the role of an advisory body in the United Nations Economic and Social Council (ECOSOC)[13].

Worldwide there are countries where justice has recognized homosexuals as a protected category and, in this regard, recall the cause In Re Marcelo Tenorio, where Court for immigrants in the United States ruled that homosexuals are a "social group", based by "The Act on Citizenship and Foreigners", which states that people who" because of persecution or fear they will be persecuted for reasons of race, religion, nationality, membership of a particular social group or political conviction "could enjoy asylum in US.[14] This it was the moment when the U.S. homosexuals were regarded as "social group" in line with the provisions of the Act.[15]

Restatement of US legislation on international relations (1986), Section 702 states that "a State violates customary international law if, for reasons of state policy, practice or encourage the violation of major human rights violation which were internationally recognized ... The major violation includes interference in private life". therefore, of that provision, we see that were considered Art. 12 of the Universal Declaration of Human Rights.[16]

Also U.S. ratified the International Covenant on Civil and Political Rights[17], which in article. 17 repeats provisions contained in Art. 12 of the Universal Declaration. In fact, most of the rights contained in the Universal Declaration are taken into the Pact on Civil and Political Rights, while benefiting and a legal explanation. In line with the reformulation of legislation on international relations of the United States, the International Pact on Civil and Political Rights "protects the rights recognized by the Universal Declaration" and, consequently, we have an identity of interpretation for civil and political rights which are included both in the Pact and in the Declaration.

In Australia, federal state like the US, it is up to every federate state the criminalization or the decriminalization of homosexual sodomy. In 1994, only Tasmania still criminalize consensual homosexual acts, a situation which has continued until 1997, when the Australian Parliament annulled act, homosexuality was decriminalized.[18]

1.2. ILO Convention no. 111 on Discrimination in the field of employment and occupation (1958)[19] *– Art. 1*

This document although it does not prohibit discrimination based on sexual orientation to the person, yet allow signatory countries to introduce additional provisions. Australia is among the Signatory States and after rallying domestic legislation with the Convention since 1992, sexual minorities are allowed to employment in the armed forces.

1.3. International Covenant on Civil and Political Rights (1966) – Art. 2 and Art. 26

The document can be considered the most important international treaty on civil and political rights, under which the Human Rights Committee decided[20] that references to 'sex' in Art. 2 par. (1) (regarding non-discrimination) and the content of Art. 26 (regarding equality before the law) should be considered and on sexual orientation of a person.

Judgment of the Human Rights Committee resulted in abrogation of rule criminalizing consensual sexual acts between males in Tasmania last federate Australian state that criminalized them, creating also a precedent in the United Nations on human rights, specifically in cases of discrimination against lesbians, gays and bisexuals.

1.4. The Convention Against Torture and Cruel, Inhuman or Degrading Treatments and Punishments (1984)[21]

Treaty does not envisage only the states as subjects of international law, the intention that emerges from the content of Art. 1 being that it is necessary solving also of the cases where a state is not involved in the research and prevention of such situations.

Thus, Art. 1 defines torture broadly as "any act by which is caused intentionally to a person severe suffering, whether physical or mental, in order to obtain from him or from a third person information or confession, punishing her for an act that he or a third person has committed or is suspected of having committed, or intimidating her or forcing her on it or on third person, or for any reason based on any kind of sexual discrimination, when such pain is caused or determined by or with the consent of a public official or other person with this status. "

1.5. Convention on the Rights of the Child (1989)[22] *– Art. 2*

Treaty is particularly important in cases involving discrimination against sexual minorities on the grounds of sexual orientation, Art. 2 being that which prohibits discrimination and also which requests from states parties the establishment of measures that ensure protection against this form of abuse.

1.6. Convention on the Elimination of All Forms of Discrimination against Women – CEDAW (1981)[23]

The document is treated with importance and applicability in all cases of discrimination against lesbians and females bisexual or transgender.

1.7. African Charter on Protection of Human Rights (1986)

Treaty is a regional instrument of recognition and guarantee of human rights, adopted by the Organization of African Unity (now the African Union) and ratified by more than 50 states, which provides certain rights and opposes discrimination.

But unfortunately, so far, African Commission on Human Rights, responsible for monitoring and implementing the treaty, did not show concern regarding the issue of sexual orientation.

1.8. Declaration of Ottawa (1995)

The document was adopted by the Parliamentary Assembly of the Organization for Security and Cooperation in Europe (OSCE)[24] and it is an act that requires Member States to grant protection against all forms of discrimination, including sexual orientation which is expressly mentioned.

2. Legal Instruments for the Protection of Sexual Freedom at European Level

They are also considered to be a benchmark for legal instruments protecting human rights: Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the Treaty of Amsterdam and the European Union Charter on Fundamental Rights.

2.1. Convention for the Protection of Human Rights and Fundamental Freedoms (1950)[25] – Art. 8 and Art. 14

Developed within the Council of Europe and adopted on November 4, 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms (known under simplified name as the European Convention on Human Rights) has become one of the most important and effective legal instruments in the world in the field of protecting human rights, not only through its many rights and freedoms recognized and guaranteed, but also through its established procedure. The Preamble of the European Convention states that adoption and its purpose are to enforce certain rights from the Universal Declaration. Our country has ratified the document on June 20, 1994, thus recognizing the compulsory jurisdiction of the European Court of Human Rights and engaging at the same time, in order to apply the case law of this court. Rightholders set out in the European Convention are individuals and the rights may become the subject to an international or even national judicial control. One of the fundamental rights recognized and guaranteed by the Convention is the "right to respect for private and family life", which is found in Art. 8 (Title I), as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference of a public authority with the exercise of this right except only if this right is provided by law and only if, in a democratic society, it is a necessary measure for national security, public safety or economic well-being of the country , prevention of disorder or crime, for the protection of health or morals, or protecting the rights and freedoms of others".

We note that the concept of "private life" that is speaking about in Art. 8 is imprecisely defined. In the concept of the European Court, this Notion includes a person's right to intimate private life, personal, her right to social private life and the individual's right to a healthy environment.[26]

Article 14 of the Convention prohibits discrimination like Art. 2 of the Universal Declaration, stipulating That "the exercise of the rights and freedoms set forth in this Convention shall be secured without discrimination on ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

Although, the article does not indicate if there are also included sexual minorities, the European Court accepted that the Convention protects the right to private life for the homosexuals[27] too, issue which confirms that homosexuals enjoy all the rights and freedoms set out in Universal Declaration, whether or not they are listed in the text of Art. 2. Customary law includes a decision of the European Commission on Human Rights pronounced in 1997, which says that are older age required for the existence of a valid consent expressed by a man who wants to maintain homosexual relations, compared with age required for valid consent expressed to relations heterosexual constitute discriminatory treatment.

As we have seen above, the prohibition of discrimination laid down in Art. 14 of the European Convention on Human Rights regulates equal treatment in the exercise of all the rights stipulated in the Convention. Protocol No. 12 of the European Convention on Human Rights extended the limits of non-discrimination by ensuring equal treatment in the exercise of all rights, even of those stipulated in existing national legislation.

Since Art. 14 of the European Convention on Human Rights provides equal treatment only regarding the exercise of material rights guaranteed by the Convention, we find that, if they exceed the limits of those guaranteed by the Convention, examination of complaints concerning discrimination goes beyond the jurisdiction of the European Court of Human Rights.

However, we have to highlight two particularly important aspects of the position adopted by the European Court of Human Rights when it comes to the application of Art. 14 of the European Convention on Human Rights, namely: that the ECHR has unequivocally stated that it will analyze the complaints formulated under this article in conjunction with a material right even without having violated the substantive right in question, and that the Convention's applicability will find expression beyond the letter of the law in order to interpret the protected rights, provided that the situation in litigation to have at least a general connection with the issues guaranteed by the Convention.

Although the European Convention on Human Rights lists a number of rights that fall into the category of those civil and political, we see that the document also protects economic and social rights. Among the material rights recognized and guaranteed by the Convention are the right to life, the right to respect private and family life, the right to freedom of thought and religion, etc.

The ECHR has established that sexual identity, sexual orientation are components of a person's private life and, as a consequence, should not be subject to any government interference. That's why, in the hypothesis of discrimination on this criterion, violation of

Art. 8 of the Convention relating to private life may be invoked without any justification for the existence of discriminatory treatment.

2.2. The Treaty of Amsterdam (Art. 13)[28]

The Treaty of Amsterdam (Art. 13) Parliament and Commission have the ability to initiate actions for recognition of sexual relations between persons of the same sex in the European Union and the Council may complete this process. The Amsterdam Treaty, which entered into force on May 1, 1999, granting the European Union permission to fight against discrimination based on sexual orientation, the art.13 representing the first regulation stipulated ever in an international treaty which expressly mentions and protects orientation sexual: "the Council, acting unanimously, on a proposal from the Commission, after having consulted the European Parliament, will take appropriate action to combat discrimination based on sex, ethnic origin, religion, disability, age or sexual orientation".

Although Art. 13 does not directly prohibit discriminatory acts[29] on the grounds of sexual orientation, giving the European Council the right to decide on action against discrimination.

Also in 1999, the EU Commission proposed a series of measures against discrimination[30], measures that were formulated to complement the implementation of Art. 13 in a proposal for a directive.[31] The directive was approved[32] by the Council in October 2000, and in its contents are prohibited all forms of discrimination in taking up employment on grounds of sex, race, ethnic origin, religion or belief, age, sexual orientation.[33] However, the discrimination acts are permitted only by reason of "public safety, public order and prevent crime, protection of health and the rights and freedoms of others".[34] In the preamble is stated that "this Directive is without prejudice to national law/domestic regarding civil status nor diminish the benefits of this law."[35] Although the effects of implementing this directive have generated some controversy in the area Central and Eastern Europe, however it can be considered a success because it allowed "Europeanization of anti-discrimination legislation and policies."[36]

2.3. The European Union Charter of Fundamental Rights and Lisbon Treaty

The EU Charter of Fundamental Rights was proclaimed in Nice in 2000, the aim being that it should be a true code of the Union for Fundamental Rights. The importance of this document is because it presents the EU vision on human rights, although by this act, Member States are not obliged in any possible way.

Being the inspiration from the constitutional rights of the Member States as well as from the European Convention on Human Rights and the treaties on human rights worldwide, the European Union and the Member States promulgated in Nice in 2000, the EU Charter of Fundamental Rights, Wanting it This is a true code of the Union for Fundamental Rights, although the document only takes the form of a "statement" and is not endowed with a binding legal force. The importance of this document is due to the fact that it presents the European Union's vision of human rights, although this does not impose any obligation on the Member States. Even though the European Commission has stated that the provisions of the Charter will still comply, it is only in 2009 that, with the entry into force of the

Lisbon Treaty, compliance with the Charter has become mandatory subject to the application of EU law.

In Art. 21 (1), the Charter contains an express provision prohibiting discrimination "any act of discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion, political or otherwise, membership of an organization or minority group, disability, age or sexual orientation shall be prohibited".

Although the Charter of Fundamental Rights of the European Union obliges the EU not to harm human rights through its adopted measures, the provisions of the Charter are applicable to the Member States only if they apply EU law.

In our opinion, if the Union had its own administrative structures in the territory of the Member States to implement EU law without EU law being applied by their own administrations, the Charter would also have effects in areas where Member States did not delegate EU prerogatives.

From the comparative analysis of the regulations stipulated in the Charter of Fundamental Rights with those stipulated in the European Convention on Human Rights, we observe that the provisions of the latter are also found in the Charter, but not limited to them. Although EU law is to a very large extent in line with the European Convention on Human Rights, unfortunately, the EU is not a member of this Convention, which, in our opinion, is manifested in a negative way among the citizens, in the sense that , if a person intends to file a complaint against the EU, it can not bring the EU directly to the ECHR, but only indirectly, formulating an action against a Member State.

On the basis of a provision in the Treaty of Lisbon, the EU gains the right to accede to the European Convention on Human Rights as a distinct entity, and by Protocol No. 14 amends the European Convention on Human Rights so that EU membership becomes possible. However, with regard to the draft agreement EU accession to the ECHR, the EU Court of Justice has identified a number of issues regarding compatibility with EU law, concluding that the draft is incompatible with EU law. The Court noted that although the lack of the legal basis was resolved by the Treaty of Lisbon, however, since the Union can not be considered as a state, adhesion must take into account the particular characteristics of the Union, which is precisely what they impose the conditions that the treaties themselves provided for membership.

If the Court had given a favorable opinion to the adhering, we were of the opinion that the accession negotiations would have been lengthy, the effects in practice would have been difficult to say, but at least adherence would have allowed any person having a legitimate interest to bring an action directly to ECHR against the EU for failure to comply with the European Convention on Human Rights.

3. Conclusions

The right to privacy is a complex right, consecrated and recognized by most international legal instruments,a right belonging to all, in accordance with the national laws governing the exercise thereof. Although it is subject to national laws, the limitations that would result from these can not and should not restrict or reduce the right in question so as to impair the substance of.

Public authorities must be prohibited in order to exert all interference in the right to privacy, unless the mixture is provided by law and only if it could be a measure impetuous necessary in a democratic society to maintain national security, public safety, defense law order, prevention of crime, protection of health, morals or the rights and freedoms of others.

Also, respect for private life has considered several issues, including access to personal data, protection from abuse and sexual violence, name change, homosexuality or transsexuality etc. Recognition and protection of the right of every person to privacy is a constant concern and common to all legal systems. In any social system, modernizing our society has led development of both: positive side and flourishing of the crime phenomenon, forcing both state authorities but also international institutions to take appropriate measures to counteract these phenomena, in order to protect and guarantee the right to privacy.

These legal instruments of international application presented in this scientific approach have a crucial role both by signaling problems facing states nationwide but also because they traces the lines of criminal policy and prevention regulations to be introduced at national level to implement effective conventions and commitments adopted and assumed by signature.

Although the prohibition of discrimination is protected at European level by both EU law and the European Convention on Human Rights, we can not observe that, however, EU directives in this area can only be applied to the 27 Member States, unlike the Convention whose jurisdiction covers all 47 signatory states. Art. 14 of the European Convention on Human Rights prohibits discrimination only as regards the exercise of another right guaranteed by the Treaty, while, in conformity with EU law, the prohibition of discrimination, which has become self-evident under Protocol No. 12, is restricted to certain categories, such as employment. Both the EU institutions and the member countries have the obligation to comply with the provisions of the EU Charter of Fundamental Rights.

We must make it clear that national courts and individuals and institutions involved in administering justice when determining the law applicable in a particular case have the obligation to apply and comply both with the provisions of the European Convention on Human Rights and with those contained in Union directives European regarding non-discrimination, whether or not these provisions are invoked by the parties. This effectively highlights the direct effect of European Union law in the 27 Member States and the direct applicability of the European Convention on Human Rights at the level of the EU Member States and the Council of Europe. Therefore, when applicable, practitioners may also invoke those provisions at the level of the national courts and in the matter of non-discrimination.

As I have noted, unlike the Art. 14 which refers only to the rights guaranteed by the European Convention on Human Rights, since the entry into force of Protocol 12 to the European Convention on Human Rights, in fact since 2005, the prohibition of discrimination included also all the rights guaranteed in the national legislation in the matter, even if they are not included in the provisions of the Convention. Unfortunately, only 17 of the 47 member states of the European Union have adhered to Protocol 12 and, considering that only six of those who have joined are members of the EU, we find that there are considerably discrepancies among the member countries of the Union with regard to the application of European law on the prohibition of discrimination.

European non-discrimination directives prohibit gender-based inequality of treatment (Directive on the implementation of the principle of equal treatment for men and women on access to goods and services and the supply of goods and services, the Directive on the implementation of the principle of equal opportunities, and on equal treatment for men and women in matters of employment and occupation (recast), sexual orientation, disability, age or religion or belief (Directive creating a general framework for equal treatment in matters of employment and ocupation), racial or ethnic origin (Directive on equal treatment between persons irrespective of racial or ethnic origin). Therefore, we observe that there is a fixed and limited list of protected criteria at the level of EU law on non-discrimination, unlike the European Convention on Human Rights, whose list of criteria is open, overlaps with those existing in the directives, but goes beyond their limits.

Article 14 states that there must be no discrimination "based in particular on gender, race, color, language, religion, political opinion or any other opinion, national or social origin, membership of a national minority, wealth, Birth or any other situation". In the "any other situation" category, the ECHR included, among other things, the criteria explicitly stated in the prohibition of discrimination: disability, age and sexual orientation. As we have seen before, including Art. 21 of the EU Charter of Fundamental Rights includes a non-discrimination provision, a provision that is a combination of EU non-discrimination directives and protected criteria in the Convention. Unfortunately, however, the Charter has binding legal force only for EU institutions, and applies to Member States only to the extent that they interpret and apply EU law.

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Freedom of conscience and the religious regime in Romania. Comparative analysis between the Romanian constitutional purviews that have been enacted in the XXth century

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Abstract

In a democratic society, the freedom of conscience and the religious affairs organization are two of the most important coordinates that the Constitution of a country must regulate. In 20thcentury, Romanian society reflected a political and ideological instability. This instability was translated into Romanian legislation and also regarding freedom of religion and conscience.

In the present study, we identify three major periods which reflected the religious freedom and regime regulating religious affairs. First is the political regime of monarchy, when the freedom of religion and cults organization began to take shape in Romanian legislative mentality. Secondly, we identify the communist regime period, which was identified by restriction and limitation of religion freedom. This was a period of regression for Romanian democratic affirmation of freedom of conscience and religion. Finally, beginning with 1990, we talk about a third historical period, which is identified with a recovery in terms of freedom of religion and the cults affairs.

Keywords: *Freedom of religions, democratic society, Constitution, Romanian freedom of conscience, Church organisation.*

Introduction

In scholarly literature, the idea that has been emphasized is that "the Constitutional system is a defining feature of the rule of law" [1]. Without dwelling on this subject, it should be mentioned that, in Romania, the Constitutional rule has made its presence felt during the reign of Cuza, a period which, legislatively speaking, has distinguished itself by the enactment of the first Romanian Constitution, that of July 1, 1866. In the document's preamble it was noted that the text of the normative act was modelled after the Constitution of February 25th, 1835 of the Belgian kingdom.

As a result, starting from 1866, constitutionalism [2] was enforced in Romanian legislation, which emphasized and developed the democratic principles invoked by the French Revolution [3] that took place almost a century ago.

As a matter of course, during nearly one century and a half from the time of the enactment of the text of the first Romanian law, the political regime deeply influenced the text of law and constitutional regulations. The period preceding and succeeding the year 1918, that of royal dictatorship, followed by the totalitarian one and, last but not least, the post-revolutionary one, have left behind in the history of Romanian constitutional law several constitutional texts [4], each with its particularities.

In large, the Constitutional principles have remained the same and the legislature's objective primarily focused on guaranteeing and protecting the fundamental rights and freedoms of citizens [5], the latter issues being consecrated in the past centuries by an international and national law tradition.

After a more detailed research, however, each of the aforementioned periods have asserted their particular way of understanding and enforcing democracy and in this case constitutionality.

In the present study, we seek to observe the manner in which freedom of conscience and religion have been understood and reflected, hence, the general religious regime, in the texts of the fundamental normative acts adopted in Romania in the XXth century. It is no less than seven constitutional texts which regulated the legislative framework in Romania during this period. Of course, as mentioned and as will be seen from the analysis that we made in the following chapters, freedom of conscience and religion has known different approaches depending on the political regime in power and the principles on which this regime was substantiated on is a limitation of 4/6 pages. All pages size should be A4 (21 x 29,7cm). The top, bottom, right, and left margins should be 2,5 cm. All the text must be in one column and Arial font, including figures and tables, with single-spaced 10-point interline spacing. [Times New Roman, 10 point, normal, justified alignment]

1. The text of the Constitution enacted in 1923

Shortly after the event of the Great Union (December 1st, 1918), under King Ferdinand's rule, on March 29th, 1923, for the first time in the twentieth century a new Constitution of Romania [6] was enacted, the latter was based on the original text developed in 1866. The Constitution from 1923 was in effect from 1923 to 1938 and from 1944 to 1947. As a particularity of this study we would like to bring to mind that shortly after the enactment and coming into effect of this fundamental law, namely in 1925 (on 25th of April), the Romanian Orthodox Church was recognized as a Patriarchate. The promulgation of the law for Organization of the Romanian Orthodox Church in the spring of 1925, contributed to the completion of a legal framework concerning religious denominations. Alternately, we are of the opinion that the outlining itself, the drafting and enactment of such a legal support concerning the activity of religious denominations in Romania implies the existence in the Constitutional text of precise regulations regarding religious freedom.

In the text of the Constitution from 1923, freedom of conscience and religion are set to rights in the following law sections:

– Art. 5 [7] states that religious freedom is mentioned among a number of other liberties, among which are freedom of the press and education. There are no detailed explanations on freedom of conscience. The list from the contests of the article is general in nature and not restrictive.

– Art. 7 [8] resumes the issue of religious freedom and, in this instance, the legislator insisted on the fact that religious affiliation does not constitute a means of discrimination in regard to rights and civil liberties. In other words, the religious norm is not a criterion of discrimination. This view is reiterated in several articles in the contents of the present normative act: Articles 7, 28, 29 and 119.

– Art. 22 [9] is the one that develops the issue of freedom, conscience and religion. From the text of this article, we point out some defining aspects that have influenced the issue of acknowledged religious affiliations in our country. Thus, as it is shown in the second sentence of the article, the recognition of religious freedom is conditioned by the obligation of it not contravening public order. The fourth sentence of the article gives credit to the Romanian Orthodox Church of being the religion of to the majority, and also acknowledges the pre-eminence of the Greek Catholic Church over other faiths. Likewise, from the content of the article we are interested in the fact that the legislator has established that a special law will institute the fundamental principles of unitary organization of the Orthodox Christian Church and that the relationship between the state and religions will be resolved by law (last sentence of the article). Note that these last details of the fundamental act constitute the premises that have underlined the genesis and completion of an individualized legislation on religious matters in Romania. The legislation consists of a particular religious denomination law, respectively from different normative acts that looked at each and every denomination separately.

– from the aforementioned constitutional text there are 2 more articles that capture our attention. Art. 23, the second sentence, which brings under regulation the fact that "the completion of the marital status paperwork must precede all religious blessings", in the sense that people have a deep rooted tradition concerning important events in one's life, such as: birth, marriage, burial. Moreover, we are also interested in the last sentence of Art. 77 which brings under regulation the following: "descendants of His Majesty are to be raised in the Eastern Orthodox religion". This latter constitutional stipulation confirms, in part, the Orthodox historical past of Romania and the role that the Orthodox religion has played in the life of the Romanian people.

As a conclusion, we mention that in the Constitution of the year 1923 one can see clearly the intention of the legislator to make conform the freedom of religion and conscience. It pays special attention to the Orthodox and Greek Catholic Churches. The Orthodox Church is the dominant religion of the Romanians declared and is independent of the Ecumenical Patriarchate of Constantinople. The organization of the Romanian Orthodox Church mentioned in the Constitution will be regulated by law. The Greek Catholic Church is being given special attention because was due to, at that time, this Church was influent and popular, being an active part in the 1918 Great Union.

Consequently, we consider that the importance of this first piece of legislative text enacted in the twentieth century comes from the fact that it has laid the foundation for the appearance and development of a legislative framework concerning recognized religious denominations in our country. Starting with the premises formulated in the Constitution of 1923, the Romanian government admitted that there was a need of recognizing the freedom of conscience and religion, as well as securing modern principle of religious denominations known in our country and there was a necessity to draw up and enact a particular legal framework, separate from the general provisions of constitutional law which regulate and organize in detail this important area and, equally, modern Romanian history of social life.

2. Freedom of conscience and religious regime in the 1938 Constitution [10]

Concerning freedom of conscience, the text of the fundamental law established in 1938, Art. 10, set the following regulations: "Romanians enjoy freedom of conscience, freedom of work..."[11].

This freedom of conscience and religion is resumed and developed in detail by the same law, in Art. 19, which establishes the following aspects of the before mentioned problem: "Freedom of conscience is absolute. The state guarantees all religious denominations both freedom and protection, as long as their practice does not intervene with the public order, morality and State Security. The Christian Orthodox and Greek Catholic Churches are both Romanian. Orthodox Christianity is the religion of the majority of Romanians and the Orthodox Church is the dominant church in the Romanian State, and the Greek Catholic Church takes precedence over other faiths. The Romanian Orthodox Church is and will remain autonomous from any foreign kyriarchy, whilst remaining unitary, and as for the dogma it is in accord with the Eastern ecumenical Church. The spiritual and canonical issues of the Romanian Orthodox Church are linked to one central synod authority. The relationship between different religious denominations and the state are left to special laws".

The two constitutional articles are quite clear regarding, on one hand, the manifestation of freedom of conscience, and on the other hand, the general regime of religious denominations and/or the relationship between the state and the documented religions. In Art. 5 of the Constitution it was mentioned that: "all Romanian citizens, irrespective of ethnicity and religion, are equal before the law, owing to it respect and obedience; no one can be unbound from his civil or military duties, public or private, on account of his religious belief or any other".

We notice that between the articles aforementioned and the Constitution of 1923, which we have discussed above, there are no significant differences.

In both fundamental texts the democratic nature of the Romanian society was emphasized, which manifests itself through a strong focus on individual rights and freedoms, as well as the principle of separation of the Church from the state.

In the latter context, we see that the Constitution of 1939 followed the European model of relationships between religious denominations and political power structures [12] , resulted in recognized religious regime. This regime of recognized religious denominations, that we encounter in the texts of previous Romanian Constitutions (including the Constitution of 1866 and the one reviewed previously) had the purpose of replacing the Byzantine model of symphony between the Church and state that was present on the Romanian territory before the reign of Cuza. The latter model stipulated that the Church and the political authority were in close connection [13], and that the civil legislation was rooted in canonical church law.

Therefore, in the text of the Constitution of 1939 freedom of conscience and religious regime kept the main ideas that were stipulated in the Constitution of 1923, thus, reflecting the democratic principle of human rights and freedoms, namely that of the recognized religions.

The state guaranteed freedom of conscience for the citizens and recognized the social role played by religious denominations, as long as they did not contravene to public order. Moreover, the role of the Orthodox Church and Greek Catholic Church were also

acknowledged, such as the autonomy and the synod principle that reflected the inactivity of the Orthodox Church.

However, the present Constitution established special laws that were intended to govern relations between the state and Church [14]. We have encountered all these details in the constitutional text of 1929.

Worth mentioning is that freedom of conscience and autonomy of religious denominations were not absolute. The Constitution of 1939, although guarantees the freedom of conscience and religion, however limits this freedom, as it was observed, to the activities that would undermine public order. Also, another limitation of this freedom is included in Art. 8 of the Constitution and refers to the prohibition to conduct political propaganda [15].

Anyway, the overall conclusion that emerges is that, in terms of freedom of conscience and religious regime the text of the Constitution of 1939 is permissive which reflects the European thought patterns regarding this issue. It is modelled after previous constitutions, from 1866 and 1923, and tries to update to modern time the social and political provisions from the reality they were created in.

3. Religious freedom in the constitution of 1948

The Constitution of 1938, drafted by Istrate Micescu and enacted during the reign of Charles II, followed in on the footsteps of the 1948 Constitution [16], the first fundamental law enacted by the communist regime, immediately after its instalment in Romania.

As mentioned above, the fundamental legislative acts enacted in the twentieth century legislature maintain the legislator's view that was profoundly influenced by the dominant political regime in one time or another. In this sense, we consider that with the enactment of the constitutional act of 1948 we are dealing with a new period in the constitutional history of Romania.

If the first period [17], namely from 1918 to 1943, can be characterized as a period of pioneering regarding outlining the legal framework on freedom of religion in Romania, the period between 1948 and 1989 is characterized, as we shall see, as a period of regress in this area.

The 1948 Constitution is a socialist Constitution, in which is specified very vaguely the issue of religious freedom, and there are few clear regulations on the right to manifest religion in the communist state. From the 105 articles that are included in this law, the issue of religion and freedom of conscience appear only in two articles:

– Art. 6 [18] referred to the prohibition of discrimination on religious grounds. In the context of the totalitarian regime we are of the opinion that the regulations of Art. 6 of the present normative act have had only a superficial purpose and not a real background. Religious discrimination characterized many acts and measures taken by the communist regime, not recognizing the Greek Catholic Church represents, by far, one of these examples.

– Art. 27 [19] regulated in its contents the issue of religious freedom and freedom of religious denominations. In comparison with the constitutional texts from above (the 1923 or 1938), during the Communist period the attitude of the legislator regarding the activity of religious cults is more restrictive and limited. Thus, from the article in question, we see that freedom of conscience and religion was granted, such as the right of the religious denominations to be organized and operate freely. However, historically speaking, these freedoms and rights have not been respected. Also, in the same article the autocephaly of

the Orthodox Church, and also the fact that the manner of organization and functioning of the religious denominations would be determined by a special law. A particularity of these laws was that the religious denominations were banned from establishing schools, the exception was that the staff of the religious denomination could be educated there. Restricting religious education was the first tool used by the communist regime in order to limit the activities of the religious cults. This was another addition to a broader spectrum of restrictions, to which the totalitarian regime agreed to, among which was the freedom of conscience.

Thus, the Constitution enacted on April 13th, 1948 marked the legislative beginning of a phase of political limitation of the activity of religious denominations. It regulated religious freedom and the right to religious organization, it promised independence to the Romanian Orthodox Church and prohibited any form of education under the tutelage of the religious cults. Although the provisions on religious freedom contained in the Constitution seemed to be tolerant, reality has shown the opposite, many clerics ended up in jail or suffered with the instalment of the communist regime.

The Constitution that was enacted was actually a Constitution that "copied the Soviet one" [20], and the regulations stipulated by the communist legislator were based on an ideology that put in the centre of society the proletarian individual, i.e. the atheist, desacralised, void individual that is separated from any transcendental [21] remnants. The idea that was being imposed was that of the homo sovieticus, that is translated to the individual loyal to communism who is also devoid of moral [22] standards.

4. Freedom of conscience and religious regime in 1952 constitution [23]

The instauration of the totalitarian regime towards the middle of the twentieth century brought along with it a new direction (this time rooted in Marxism) regarding the rights and freedoms of the individual. Inevitably, this new perspective has left its mark in terms of freedom of conscience and religious regime.

Thus, the 1952 Constitution is complementary to the 1948 one, which represents the first fundamental law adopted under the totalitarian regime. As seen before, in 1948, the Communist Party finalized a socialist type Constitution, which vaguely discussed religious freedom and clear set of laws were not made on the right to manifest religious beliefs in the communist state.

The Marxist-Soviet disposition of the act enacted in 1948, was maintained in the constitutional text adopted in 1952.

In what concerns freedom of conscience the Constitution of 1952 established in Art. 84 that: "Freedom of conscience is guaranteed to all citizens of the Romanian People's Republic. All religion denominations are free to be organized and operate freely. The freedom of exercising religion is guaranteed to all citizens of the Romanian People's Republic. The school is separated from church. No confession, congregation or religious community can open or maintain general education institutions, but only special schools for staff training cult. The organization and functioning of religious denominations shall be regulated by law".

This is the only text of the Constitution which refers both to freedom of conscience and the religious regimes.

Compared to the constitutional text from 1939, the fundamental law of 1952 guaranteed, in its turn, freedom of conscience. Moreover, it also set measures for the principle of

autonomy and the relationship between the state and religious denominations through special laws [24].

The novelty in the 1952 Constitution concerning the idea of manifestation of freedom of conscience was that the Church was separate from school. In fact, it cannot even be considered a novelty because, a few years before, in 1948, the legislator set the same rules as to the limitation of religious confessional education.

If the constitutional text of 1939 made no reference to this, the text enacted in 1952 clearly establishes that "no confession, congregation or religious community can open or maintain general education institutions". Also, unlike the text from 1939, the one in 1952 does not make any reference to any religious majority, instead a more concrete stipulation is made concerning the respecting of religious freedoms.

5. Communist constitutions enacted in 1965 and 1986

Atheistic ideology and fundamentalism that were promoted by the totalitarian regime were reflected in the legislative instability that characterized the period of the totalitarian government. This instability was characterized by the enactment of no less than 4 constitutional texts in 1948, 1952, 1965 and 1986. About the fundamental acts adopted in 1965 and 1986 we will be discussing in the following lines.

The third Communist Constitution [25] dates from August 21, 1965 and has the distinctiveness of making conform the following: "category of privileged citizens, members of the Communist Party", "considered on a constitutional level as most advanced and aware of society citizens ", as shown in the text of Art. 26 [26].

On freedom of conscience, the present Constitution resumes the principle of religious non-discrimination [27], also that of freedom of conscience, freedom of religious regimes and the regulation of the religious activity thereof, as well as the separation of education from Church [28]. The Constitution in question appears to be very explicit in terms of achieving Marxist ideals, by stating the right to have or not have a religion. Stating the principles that prohibit discrimination on certain criteria are only theoretical because, as mentioned, history offers numerous episodes in which the communist regime was guilty of discrimination based on ethnic, religious, political and social motives.

With regard to the 1986 Constitution [29], it broadly reiterates the principles outlined by the legislative text in the Constitution of 1965. Thus, Art. 30 proclaimed that freedom of religion is guaranteed to all citizens of Socialist Romania, noting that "anyone is free to share or not religious beliefs" [30]. Furthermore, religious denominations were organized and operated freely, and the manner of organization and functioning was regulated by law. So, in the past, freedom of worship and freedom of religion were more or less recognized.

The overall conclusion that emerges after the analysis of the last constitutional text enacted during the totalitarian regime is that the communist ideology constituted a factor that hindered the shaping of a legal framework to reflect democratic principles in our country. Although this framework began to be contoured and grew successfully until 1945, the communist regime in Eastern Europe led to a decline of the legislation system regarding freedom of conscience and, conversely, made impossible the development of a legislation in this field that would concord to the legislative framework concerning religious regimes existing in Western Europe. In other words, the communist regime slowed down the process

of Westernization of the Romanian democracy by almost 50 years the and improvement of the religious sphere.

6. The Constitution of 1991 and freedom of conscience

The year 1991 is an important moment in the constitutional history of Romania. Taking advantage of the situation created after the revolution, when society escaped from under the rule of the totalitarian grasp, the legislator got orientated towards the affirmation of human rights and freedoms, using an existent model in the West. Among these rights and freedoms were that of freedom of conscience and recognized religious denominations. After December 1989, following the initiative of the religious denomination, believers, state institutions and political parties there were developed ways of thinking that got set up spontaneously, and also deliberately, ways that ensured a promising start concerning religious freedom.

The Constitution of 1991 [31] was enacted by the Constituent Assembly on November 21st, 1991 in a meeting of the Parliament, and on the 8th of December on the same year it was voted by referendum. It is the final constitutional text enacted in Romania, in the twentieth century.

Regarding freedom of conscience and the general status of denominations, this constitution reminds in Art. 4 par. (2) that "Romania is the common and indivisible homeland of all its citizens, irrespective of race, nationality, ethnic origin, language, sex, opinion, political affiliation, wealth or social origin". It can be found in this article's content the principle of non-discrimination on account of religious considerations.

Further, in Art. 7 the aforementioned constitutional text declares that "the state supports the strengthening of the bonds with Romanians living abroad and is working to preserve, develop and express their ethnical, cultural, linguistic and religious identities, whilst respecting the state of whose citizens they are". It is a new measure in the constitutional traditions of Romania. We are not focusing now on the link with Romanians living abroad as much as interested on the responsibility the state has taken upon it in promoting national religious beliefs. We are dealing, therefore, with an acceptance of the Romanian legislator towards the Western democratic vision.

In Art. 29 [32] we find the issue of freedom of conscience. The text of this article puts together the principles of religious freedom in Romania and of recognized religions. In addition, unlike the previous constitutional text, the criteria for religious freedom is identified by the legislator as being symbolized by tolerance and mutual respect. The sphere of freedom of worship was extended much more, making it an important element in social life in Romania, especially in the domain of welfare and confessional education.

The text of Art. 32, par. (7) said that: "The state shall guarantee the freedom of religious education, according to the specific requirements of each religious cult. In public schools, religious education is organized and guaranteed by law".

An important aspect was regulated in the text of Art. 39, par. (2), under letter a), where it was stated that: "military service or the activities performed in exchange by those who, by law, do not perform compulsory military service on religious grounds are not punished with forced labour". Therefore, religious orientation was recognized as an disparate element to military service.

Last but not least, Art. 44 par. (2) of the Constitution stated that: "The conditions for concluding, deployment and invalidity of marriage is established by law. Religious wedding may be celebrated only after civil marriage. " This regulation took over rules that have been encountered in the constitutional texts from the beginning of the century (1923 and 1938).

As a significant fact regarding religious freedom, the Constitution of 1991 regulated that, in the case of people chosen to occupy functions or public offices, they have take an oath of allegiance, oath in the conduct and content of which are found numerous items that refer both to religious tradition of the Romanian people also the history and traditions concerning religious conscience in that the Romanian people have preserved.

It can be affirmed that the Constitution text of 1991, on whose foundation the Constitution of 2003 will be based on, the first constitutional text of the XXIst century, represents a revival of the religious freedom and conscience affirmation, and for the activity of religious denominations acknowledged by law. Through this constitutional text, much needed to Romanian democracy society, it was possible to resume, after nearly 50 years, the regulatory process and guarantee of religious freedom, which is a fundamental coordinate of the contemporary democratic society.

Certainly, in the legal context outlined by the legislator of the Constitution of 1991, a series of normative laws were intended to detail the conditions under which religious rights can be exercised. These legislative acts, of which the most important being Law on Religious Regimes and religious freedoms, which put and resolved many fundamental issues regarding the certification and exercise of religious freedom. With the direct participation of legally recognized religions, the draft of this law was elaborated which was approved by the concerned ministries.

However, the new constitutional legal framework has also led to the adoption of several normative and administrative acts designed to remove many obstacles standing in the way of the exercise of religious freedom.

Conclusions

Constructing in Romania a legal, political and administrative framework necessary for granting extensive rights and religious freedom is a process that cannot end in a few years and especially in the unfavourable conditions of economic, social and political transition.

This process began at the commencement of the twentieth century, with the consolidation of monarchy in our country. However it was slowed by half a century, period during which the communist ideology imposed itself by continuous destruction of democracy and freedoms of the individual. Of course, as a result of this totalitarian fundamentalism the religious denominations in Romania suffered greatly.

The affirmation and rediscovery of the values of religious freedom were resumed after the event of 1989, when, through the Constitution of 1991 the position of the religious coordinate was reaffirmed and its importance was acknowledged. In this context, the political governmental powers have shown a favourable attitude toward religion and Christianity, affirming their confessional neutrality and the availability of awarding religious rights and freedoms. In such circumstances, it is clear that in the past years important steps have been made towards guarantying religious freedom and, above all, it is sure that the premises for doing so in the future have been created in order to consolidate this process.

Currently, the faithful, clerics, religious denominations and associations are awarded and guaranteed rights and freedoms that are important from a democratic point of view, such as:

– the freedom to establish religious denominations or associations which are recognized as having a legal personality status. By way of example, we recall that after 1989, the State Secretariat for Religious Affairs approved the establishment of approximately 150 associations who have received legal personality;

– freedom to practice a religion, to hold meetings related to religion and to build and maintain places for these purposes. Religious denominations and religious associations are free to build churches or prayer houses, to buy buildings and give them a religious use and maintain places of worship that they own. Since 1990, the Government granted quite significant funds to support repair or construction of places of worship;

– the freedom to establish and uphold charitable and humanitarian institutions. Thus, religious denominations and religious associations, as well as other civil society organizations are free to conduct directly or to create associations specialized in this task;

– the right to manufacture, to acquire and use objects and materials required by the rites or practices of a religion. We recall in this regard, Law no. 103/12 September 1992, on the exclusive right of religious groups to produce and sell religious items.

– the right to write, to print and disseminate publications with religious subjects. Romanian State, through the relevant public institutions grant approval for all religious denominations and associations who wish to have printings, publishing houses, their own newspapers and magazines, in which they can publish material that are not subject to any censorship;

– freedom of religious education. The State Secretariat for Religious Affairs and the Ministry of Education adopted several protocols that establish the conditions in which the moral and religious education in public education can be done: teaching religion classes is done by clergy or people authorized by denominations; the pay of those who teach religion classes is supported by the state; if parents and clergy want to hold religion classes in public schools authorities are obliged to provide for those courses the same conditions as other school subjects etc .;

– the right to seek and receive voluntary contributions, financial contributions and others from private individuals and institutions. The religious denominations and religious associations are free to seek financial support from believers or legal persons. By order of the Government from August 1993 formal criteria has been established which states that the state contributes to clergy salaries and other employees of religious denominations;

– freedom to form, appoint, vote and to designate by succession appropriate leaders in accordance with the needs and rules of each denomination or religious association. Religious denominations and religious associations are free to elect or appoint priests and pastors, deans, heads of administrative bodies, bishops and heads of churches, without any interference from the state. The Romanian President issues decrees of recognition of bishops and metropolitans only at the request of the respective denominations;

– freedom to establish days of rest and to celebrate holidays and religious ceremonies of major religions and religious denominations;

– the freedom to establish and maintain contacts with national or international individuals and communities in respect to religion. The clerics, hierarchical people and representative heads of the denominations and religious associations are free to correspond and maintain any contacts with superiors and their followers, believers and clergy of other denominations and religious associations abroad, without the need for any approval or control of state bodies.

The few points presented above reinforce the statement made at the beginning of this study, and that is, in respective to the manifestation of constitutionality in Romania, the political regime had a decisive influence. This can be seen from the comparative analysis made above about how constitutions adopted in the twentieth century have regulated the expression of freedom of conscience and religious regime.

If in the case of the fundamental laws of 1923 and 1939, we can see transparency, affordability and an encouraging of the manifestation of freedom of conscience, on the other hand, in the constitutional texts from 1948, 1952, 1865 and 1986, taking as examples the concepts of communist origin [33], it has been revealed that there are a number of restrictions and limitations of this freedom. We note that the system of recognized religious denominations is of Napoleonic origin and it is present in the Constitution of 1939. The latter system was taken over by the communist authorities, which added new elements of Soviet origin. This proved decisive because, between 1949-1989, a period when the Communist Party was in power, the regime of religious freedom suffered a real hiatus, something which can be seen from the above presentation.

Finally, through the enactment of the fundamental normative act of 1991, the legislature returned to the religious field and showed his intent for development and rallying to Western democracy by the laws concerning this field.

REFERENCES

[1] Popescu, S., (2009), The political and Constitutional regime in Romania, in Romanian law studies, XXI (54), no. 2, p. 140.

[2] In legal terms, the Frenchman Michel Troper gave three meanings to constitutionalism: 1. *lato-sensu* – every state requires a Constitution, the objective of the latter being that of preventing despotism; 2. *stricto-sensu* – it is imperative for the Constitution to be based on principles capable of producing effects such as the impossibility of the existence of despotism or political freedom; 3. *strictissimo sense* – between the fundamental principles enshrined in the Constitution there should appear tthe judicial control of the constitutionality of laws. Michel Troper, M. (1994). Pour une théorie juridique de l'État, Presses Universsitaires de France, Paris, pp. 203-204.

Moroianu I., (2008). "Human rights" – an evolving system, Romanian Institute for Human Rights, Bucharest, p. 10. Also see: Jacques Le Goff (2006), The Middle Ages and the birth of Europe, trans. G. Sfichi, Roman M., Polirom Publishing House, Iaşi; Raluca Tomi, R. (2009). Romanian abolitionism 1848. Influence, features, in *The Historical Magazine*, tom XX, no. 1-2, pp. 47-61.

[3] We know no more than nine forms of the Romanian Constitution, enacted in the period 1866-2016.

[4] I Historically, in the affirmation of fundamental human rights (established international as the human rights) an important contribution was held by English philosopher John Locke (1632-1704), who in one of his works. (Concerning Civil Government – About Governance) noted the need for rules at the state level, to ensure equality and personal freedom. Alma Kadragic, (2006), Globalization and Human rights, Chelsea House Publishers, 2006, pp. 14-16; Daniel E. Lee, Elizabeth J. Lee (2011). Human Rights and the Ethics of Globalization, Cambridge University Press, p. 264.

Locke's theory first materialized in the law of the United States, where the Declaration of the Rights of Virginia (1776) established the principle that "all men are by nature equally free and independent and have certain rights innate" and, then in July 14, 1776, the US Declaration of independence, stated that "men are created equal, they are endowed by their Creator with certain unalienable rights; among these rights are life, liberty and the pursuit of happiness".

Gradually, Locke's theory was developed within European legislation, The Declaration of the Rights of Man and of the Citizen (France, 1789), in the first article "men are born and remain free and equal in rights. Social distinctions may be based only on equality policy".

Also remember that the term/concept of the fundamental human rights, enshrined in particular in the socio-juridical domains, refears to the category of rights and freedoms subjective and universal – set (usually) in the text of the constitutional laws or declarations of rights (documents international character) – recognized as essential and indispensable for the free development of individuals within a given society. Regarding the phrase fundamental freedoms, The European Convention on Human Rights (known as the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th of November 1950 and entered into force on September 3, 1953) notes, in the preamble, that "fundamental freedom constitutes the very foundation of justice and peace in the world and the maintenance of which is based essentially on one hand, a political regime really democratic, and on the other hand, the conception common and common respect human rights as they arise".

However, to understand the role that fundamental rights play in modern society, it is necessary to distinguish between this category of rights, between absolute and natural rights.

The category of absolute rights is especially familiar to the civil law doctrine and is used for classification of subjective civil rights (in absolute and reale). In this respect, it is considered that that right is absolut if it is opposed to ergaomnes, for the exercise of which the holder does not need competition of another person. Included in these rights in non-property rights (right to a name, honour, etc.) and real rights (right of ownership, use etc.). See in this respect: Boroi, G. (1999). Civil Law. General Part, II ed., All Beck Publishing House, Bucharest, p. 54; Lupan, E. (2003), Introduction to civil law, Argonaut Publishing House, Cluj-Napoca, p. 99; Campbell, H. (1968). Black, Black's law Dictionary, 4th ed., West Publishing Co., pp. 22-23; Ellis Wild, S. (2006), Websters's law dictionary, Wiley Publishing, Inc., p. 5. In the literature, acquiring the absolut is employed also in fundamental rights, emphasizing, through this, the idea that in exercising of those rights the holder is not subject to contribution/ intervention of another person. See: Campbell, H., Black's law Dictionary, p. 23; Elizabeth A., Martin A. (2002), Dictionary of law, 5th ed., Oxford University Press, p. 3.

By natural right (jus naturale), legal philosophy calls the rights of a person the quality of being a human being. In the centre of natural rights doctrine stands the idea that, from birth, men enjoy rights simply because they are men. Natural rights are mandatory for all mankind in every time and place, and any legal system, compliance of these

rights are based on ontological identity of the people and not the cultural or social. Natural law is perfect, immutable and universal, non-state and bases its origin in human nature. See in this respect: Alain, G., Ch. Le Bihan (2000), Thesaurus philosophy, trans. Elena Bond European Institute, pp. 32-33; Reinhard B., (1986). Sachwörterbuchder Politik, Kroner Verlag, Stuttgart, p. 637; Robertson, D. (2004). Dictionary of human rights, Europa Publications Limited, pp. 121-122; Derşidan, E. (2006), Dictionary of Legal Terms, Proteus Publishing House, Bucharest, p. 150. Amid considerations presented, it appears that fundamental rights have their origin in natural, in other words, fundamental rights are materialized (in law) in natural rights. The ratio of these two categories of rights, fundamental and natural is also transparent to the German philosopher Georg Wilhelm Friedrich Hegel, who remembers the following: "There are two kinds of laws: laws of nature and the law; the laws of nature are self-contained and are available as; they do not suffer any deterioration, whether in particular cases, we can misinterpret. The measure of these laws is outside our grasp and does not add anything to our knowledge [...] copyright laws are established and come from people. Man does not stop at what is actually, but affirms that he has foundin himself the measure of what is right; it can be subordinated to necessity and external work force, but never as a necessity of nature, because inside it always tells him how to be and inside he finds confirmation or denial of what is real. In nature there is the highest truth, the fact that a law exists is in fact not real in the rules of law, but because each claim should meet its own criteria". Hegel, G.W.F. (1998). Hegel's philosophy of law or principles of natural law and science Compendium of State, trans. I. Ungureanu, Paideia Publishing House, Bucharest, 1998, p.11. In conclusion, the importance and role of fundamental rights in society are given by their dependency relationship with natural rights and the absolute character, and also the absolut character the legislator has admitted to the latter. For this subject, see also: Flew, A. (1989), In liberty and Justice Equality, Routledge, pp. 28-35; Taliaferro, Ch., Marty E.J. (2010), A Dictionary of Philosophy of Religion, Continuum, p. 186. Also in this regard, see also: Filimon, D.G. (2016). "Ownership of monks the Romanian Orthodox Church. Canonical and statutory provisions and their relation to civil law in force", in vol. Church property – yesterday and today, Basilica Publishing House, Bucharest, pp. 456-459, notes 1 and 3.

[5] The Constitution of March 29, 1923 was published in the Official Gazette no. 282 of March 29, 1923, the date on which it came into force.

[6] Art. 5: "Romanians, irrespective of ethnic origin, language or religion, enjoy freedom of conscience, freedom of education, freedom of the press, freedom of assembly, freedom of association and all freedoms and rights established by law".

[7] Art. 7: "The difference of religious creeds and denominations, ethnic origin, language, does not constitute, in Romania, an obstacle to acquiring civil and political rights and to exercise them.

[8] Art. 22: "Freedom of conscience is absolute. The state guarantees freedom of all religions alike and protection as long as they are exercised without prejudice to public order, morality and the laws of the State organization. Christian-Orthodox and Greek Catholic churches are Romanian. Romanian Orthodox Church is the religion of the vast majority of Romanians and is the dominant church in the Romanian State and

also the Greek Catholic Church takes precedence over other faiths. Romanian Orthodox Church is and remains autonomous from any foreign kyriarchy, but keeping ecumenical unit with the Church of the Eastern concerning dogmatic beliefs. In all the kingdom of Romania, the Orthodox Christian Church will have an unitary organization with the participation of all its constituent elements: clergy and laity. A special law will establish the fundamental principles of this organization unity and the method by which the Church will regulate, manage and administer through its own staff and under the control of the State, its religious, cultural, fundamental and vestry issues. Spiritual and canonical issues of the Romanian Orthodox Church will be adjusted after one central synodal authority. Metropolitans and bishops Romanian Orthodox Church will choose according to their own special laws. Relationships between denominations and the State shall be established by law".

[9] The Constitution enacted in 1938 was composed of VIII titles and 100 articles. It was published in the Official Gazette no. 48 of February 27, 1938.

[10] The full text of Art. 10 is as follows: "Romanians enjoy freedom of conscience, freedom of work, freedom of education, freedom of the press, freedom of assembly, freedom of association and freedom of all rights settled by law".

[11] George Grigoriță, G. (2007). "Law no. 489/2006 and the Romanian Orthodox Church", in Theological Studies, series III, III, no. 2, p. 170.

[12] George Grigoriță, G. (2007). "Law no. 489/2006 and the Romanian Orthodox Church", p. 177.

[13] In the Romanian teritory, the first Law for general religious regime was enacted on 22 April 1928. See: Ştirban, M. (2002). "Issue of regulating the general regime of denominations (1922-1928). Stages. Projects. Issues" in Dispute in the Yearbook of the Institute of History "George Barițiu" in Cluj-Napoca, Series Historica, Romanian Academy Publishing House, XLI; Ruşeț, C. (2015). "First religion law in Romania. Regulatory issues, canonical and ecclesiastical discipline" in Banat Altar no. 10-12, pp. 25-36.

[14] The text for Art. 8 is as follows: "It is forbidden for priests of any rite and religion, to put their spiritual authority in the service of political propaganda, both in religious places and places for official functions, and anything in addition to them. Political propaganda in prayer areas are not permitted to anyone. Any political association on religious grounds or pretexts is forbidden. Apart from individuals, the conditions and forms provided for in law, no one can give or provide vows of faith."

[15] The Romanian People's Republic Constitution of 1948 was published in the Official Gazette no. 87bis of April 13, 1948.

[16] In the context of our theme, we will limit ourselves to the first period to the 1923 Constitution, the reason of this delimitation being that, up until this year, freedom of conscience was governed by special laws. Since this law, we can talk about a legal specific framework for religious freedom and freedom of conscience. In addition, we took into account that only the 1923 Constitution can talk about a fundamental act legally valid for the entire Romania, if we consider that the Great Union was achieved in 1918 and, to date, in some provinces Romanian legislation still dominates and is imposed by the occupying foreign political forces.

[17] Art. 6: "All citizens of the Romanian People, irrespective of sex, nationality, race, religion or culture degree are equal before the law".

[18] Art. 27: "Freedom of conscience and freedom of religion is guaranteed by the State. All religions are free to be organized and operate freely if their ritual and practice are not contrary to the Constitution, public security and morality. No confession, congregation or religious community can open or maintain general education institutions, but only special schools for staff training under state control. Romanian Orthodox Church is autocephalous in its organization. The organization and functioning of religious denominations will be regulated by law.

[19] Boia, L. (1997). History and Myth in Romanian Consciousness Humanitas Publishing House, Bucharest, p. 194.

[20] Kołakowski, L. (2010). Main current Marxism, vol. III, trans. S.G. Dragan, Bucharest, p. 56.

[21] Panu, M. (2015). "Investigating crimes of communism" in Lecturn, 3rd year, no. 2 (10), Timisoara, p. 21.

[22] The Constitution adopted in 1952 was comprised of X chapters and 105 articles. It was published in the Official Gazette no. 1 of September 27, 1952.

[23] In this sense, Decree no. 177/1948 was enacted for the general status of religious denominations (published in the Official Gazette no. 204 of September 3, 1948).

[24] The Constitution of the Socialist Republic of Romania of 1965 was republished in the Official Gazette no. 65 of October 29, 1986.

[25] Art. 26: " The most advanced and aware citizens among workers, peasants, intellectuals and other categories of working people unite in the Romanian Communist Party, the highest form of organization of the working class, it is detached from avant-garde. The Romanian Communist Party expresses and serves faithfully the aspirations and vital interests of the people, leads the activities of mass organizations of the socialist construction in all fields of state bodies".

[26] Art. 17: "Citizens of the Socialist Republic of Romania, irrespective of nationality, race, sex or religion have equal rights in all economic, political, legal, social and cultural areas. The state guarantees the equal rights of citizens. No restriction of these rights are permitted and there will be no difference in their exercise on the grounds of nationality, race, sex or religion".

[27] Art. 30: "Freedom of conscience is guaranteed to all citizens of Socialist Romania. Anyone is free to share or not religious beliefs. Free exercise of religious worship is guaranteed. All religions are organized and operate freely. The organization and functioning of religious denominations is regulated by law. The school is separated from church. No confession, congregation or religious community can not open or maintain other educational institutions than schools for training the clergy".

[28] The Constitution of the Socialist Republic of Romania of 1986 was published in the Official Gazette no. 65 of October 29, 1986.

[29] Art. 30: "Freedom of conscience is guaranteed to all citizens of Socialist Romania. Anyone is free to share or not religious beliefs. Free exercise of religious worship is guaranteed. All religions are organized and operate freely. The organization and functioning of religious denominations is regulated by law. The school is separated

from church. No confession, congregation or religious community can open or maintain other educational institutions other than schools for training the clergy".

[30] The Constitution of 1991 was republished in the Official Gazette no. 767 of October 31, 2003.

[31] Art. 29: "Freedom of thought, opinion, and religious beliefs shall not be restricted in any way. No one may be compelled to adopt an opinion or to adhere to a religion contrary to his own convictions. Freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect. All religions are free and are organized according to their own statutes under the law. In the relations between religions it forbidden any form, means, acts or actions of religious enmity. Religious denominations are autonomous from the State and enjoy support from it, including the facilitation of religious assistance in the army, hospitals, prisons, homes and orphanages. Parents or guardians have the right to ensure, accodring to their convictions, the education of minor children whose responsibility devolves on them".

[32] Focşeneanu, E. (1998). Romania's Constitutional History (1859-1991), 2nd ed., Humanitas Publishing House, Bucharest, p. 136.

General Considerations of the Regulation and Guarantee of the Rights Inherent to Human Beings

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Abstract

This article is about the regulation of the personality rights in the Civil Code in relation to fundamental human rights and freedoms and the application of biology and medicine to these rights. The article analyses the relation between the personality rights and the rights inherent to human beings, and it also gives opinions about their systematisation in the Civil Code and the connection existing between the content of these rights and the bioethics. Several concrete aspects are analysed with regard to the concept of human dignity and its regulation in international documents, as well as the "the right to decide for oneself" correlated with the "inviolability of the human body" and the "right to physical and psychical integrity".

Keywords: *bioethics, personality rights, human rights, human dignity, right to physical integrity, right to moral integrity, right to a private life, right to life, right to health, biomedicine.*

1. The personality rights in a bioethical context

1.1. Today's progress of technology and its implications in contemporary society, especially in the medical field, raise many controversial questions having at their centre the human being – viewed not only in capacity of natural person holding rights and obligations, but also in a biological perspective. **The specific nature of man** as a sociable being whose destiny is to evolve in an organised society **is given by the existence and recognition** of the rights inherent to human beings, such as the right to life, to physical and psychical integrity, to health or to respect for private life, which are based on the essential principle of man's dignity as belonging to humanity and of the manifestation of his freedom within legal regulations. These are rights which were added up for the first time under the name of "personality rights" and were for the first time legally established in our country in the provisions of Art. 58 – Art. 81 of the Civil Code. The provisions of the Civil Code in the matter of personality rights establish, equally, the general framework for some biomedical activities, such as the research of genetic characteristics, medical interventions on genetic characters, the eugenic practice, and aspects referring to the transplant of organs, tissues and cells or other aspects related to medically assisted human reproduction. Such activities

in the area of biology or medicine are the object of bioethics research, a science which has the mission to answer moral and ethical questions arising in relation with the application of biomedical activities on humans, in order to protect and observe their inherent rights, placing the interest and the wellbeing of the human being above the interest of society or science [Article 61 par. (2) of the Civil Code].

1.2. If at first sight the bioethics and the personality rights seem to be two different concepts, it is necessary to note their close connection given that both areas have a common element for object of research and regulation, namely the human being.

The bioethics, a relatively new science, pursues to discern the ethical and moral implications which arise with the application of new discoveries in the field of medicine and biology on human beings, for the main purpose of providing protection to humans and implicitly to their inherent rights.

The bioethics [1] presents itself as a multidisciplinary science, having for scientific object the study of areas of interest from medical sciences, biology or philosophy and which, according to one of the heralds of bioethics, Professor Van Resselaer Potter, *"manages to combine biological knowledge with knowledge about the human value system"* [2]. From an etymologic point of view, bioethics is the ethics of life, just as signified by the two Greek words: "bios" means life, and "ethos" ethics. As noted by the specialised dictionaries, the bioethics is a subject dealing with ethical issues raised by progress in biological sciences which make it necessary to assess the risks linked to the impact of the new technologies on the human body within the framework of some legal rules and of their application which regulate biological research in terms of knowledge of the role and influence of its results on the quality of life. The debates in the area of bioethics raise many questions at the level of conscience and reason, formulated by scientists, doctors or jurists, and they equally concern the theoreticians or the practitioners in the field of medicine and that of law, and the potential suppliers of biotechnologies [3].

1.3. Moreover, the bioethics is concerned with the knowledge of some medical and legal aspects, such as those linked to the beginning and the end of life, and also the social consequences of the decisions assumed by those involved theoretically and practically in relation to these essential moments, with regard to the ethics and the righteousness of some acts as: the abortion, the euthanasia, organ procurement, and also in relation to aspects regarding the scientific research carried out on people in scientific areas of interest such as genetic engineering and research on human cells and the issue of medically assisted human reproduction, the latter including, without limitation, aspects referring to the donation of gametes or human embryos, in vitro fertilisation, medically assisted reproduction with a surrogate mother or the selection of the genetic traits of the future child.

1.4. Just as stated by the literature[4], the universality of bioethics comes from the universality of human rights. In order to highlight the constant and complex link between the scientific binomial "bioethics-law", we can note, among other aspects, our legislator's concern for the regulation of the ethical and legal relation which becomes established between the doctor and the patient, founded on the informed consent of the patient or in the letter of the law [5] on the "patient's informed agreement" with regard to the medical act itself.

The provisions of the law regarding the exercise of the medical act in the framework of a legal relation established and based and the agreement of the parties [6], and also the special requirement with regard to the exercise and the exteriorization of the patient's informed consent required by law *ad validitatem*, are an important legal instrument for the protection of the patient in the consideration and guarantee of some essential values, namely the individual freedom, self-determination and the autonomy of the person.

Therefore, as stated by Art. 660 par. (1) the final sentence of Law no. 95/2006, "the patient is asked for his written consent" is an exceptional circumstance, which valorises the content and the importance of the patient's consent in relation to the duty of the doctor to provide sufficient data and information for understanding the treatment, the risks and the consequences of the proposed treatment, the possible treatment alternatives, as well as their risks, using a kind of language that is accessible to the patient, so that he can fully understand the medical information delivered and analyse the advantages and disadvantages of the future procedure and make a decision for that purpose, a decision which unequivocally leads to the conclusion that a fully informed consent was given. It is therefore obvious that the main goal of the informed consent obtained in writing is to protect the statute of natural person through the observance of the principle of autonomy and the rights inherent to human beings. In close connection with the principle of autonomy and the expression of the informed consent there is also the "the right to decide for oneself", brought under regulation in the contents of Art. 60 of the Civil Code, a right which appears as a necessary component for the protection of a person's private life, which will be further elaborated in this article.

2. General aspects regarding the regulation of the personality rights

2.1. The concept of "personality rights", of a German origin, was taken over by the French doctrine and it was introduced for the first time in the regulatory scope of Romanian civil law at the same time with the entry into force of the Civil Code on 1 October 2011 [7]. It is also necessary to specify that the term of "personality" in the Romanian legal context does not envisage the meaning of "subject" of rights and obligations with "legal personality", but the fact that the rights belong to a human "for being human" and possessing in this capacity the entirety of rights inherent to his nature of human being. And moreover, the concept of "personality" does not refer to a prominent or well known character in the social arena [8].

2.2. The personality rights are subjective, personally non-patrimonial rights, which concern the existence and the integrity of the person just as stated in the literature, meaning they are "rights belonging to any individual for the very fact of being human" [9]. They refer to the protection given to human beings, both with regard to the human body, physically analysed, and the ethical values specific to human life founded on the legally established principles of dignity and freedom, such as the right to life, to health, to physical and psychical integrity, honour and reputation, private life.

With regard to the specific legal characters of the personality rights, although in the contents of Art. 58 par. (2) of the Civil Code there is reference only to the non-transmissible character of these rights, it is necessary to add that the personality rights, as absolute rights, are *intangible*, *indefeasible* and *opposable erga omnes* [10].

2.3. The legislative establishment included in a unitary structure in the Civil Code [11] with regard to the respect owed to human beings and to their inherent rights basically reflects the constant concern in a democratic society for finding solutions and efficient legal instruments in order to ensure the legal protection of a category of rights considered to be in close connection to our being, inherent to man's existence in society and inseparable from the essential values of humanity founded on dignity and freedom, which are named in Art. 58 of the Civil Code "personality rights", also known in the doctrine as "primordial rights of the human person" [12]. It is incontestable that the legislative solution which came to our country through the French route is a considerable advance in harmonising our legislation with the European legislation and ensuring respect for and guarantee of the rights inherent to human beings.

2.4. Beyond the non-unitary terminology used in international documents [13], in the European Convention on Human Rights [14], in the Charter of Fundamental Rights of the European Union [15], or in the national legislation [16] with regard to "human rights", or the fundamental human rights and freedoms [17], to the relation between "human rights" and "public freedoms", and beyond the opinions given and the existing controversies in the doctrine [18] regarding the name, content, identity, description or the historical evolution of some rights classified in the Civil Code as personality rights, this article is limited to a few aspects of legislative structure, and then it analyses the connection and the interaction between bioethics and the legal norms emerging from the statements formulated by the civil legislator about the personality rights.

2.5. The first observation refers to the formulation of the statement "personality rights" (in Romanian "drepturi ale personalității" – rights of the personality) and not "the personality rights" (in Romanian "drepturile personalității" – the rights of the personality), a formulation which would have been more explicit and exempted from possible interpretations. Under the statement in Art. 58 par. (1) of the Civil Code, the legislator expressly provides for the right to life, to health, to physical and psychical integrity, to dignity, to one's image, to respect for private life, as well as to other such rights recognised by law [19]. In the author's opinion, the text of the Civil Code as drafted and structured in the second chapter named "The respect owed to human beings and their inherent rights" raises some questions to which the doctrine would provide the answers, such as: Is there a conceptual difference between the "inherent rights" and the "personality rights"? Or whether the two concepts can be equalled? Or which concept includes the other? In other words, the statement "the rights inherent to human beings" includes the statement "personality rights" or the other way, meaning that the statement "personality rights" is broader than that of inherent rights?

In a systemic interpretation, the rights inherent to human beings include: the personality rights provided as examples in Art. 58 par. (1) of the Civil Code to which other "such" rights recognised by law are added, meaning other personality rights [20], the identification attributes listed in the provisions of Art. 59 of the Civil Code and the right to decide for oneself regulated in the contents of Art. 60 of the Civil Code.

However, there are at least two arguments pleading for another solution. First, the identification attributes are taken again in the third chapter named "The identification of the natural person" and they are developed over three separate sections: the name; the domicile and residence, as well as the civil status papers, and second, Art. 61 par. (1) of

the Civil Code with the subtitle "Guaranteeing the rights of human beings" expressly and restrictedly refers to the "life, health and physical and psychical integrity" of the person and not to other rights [21].

3. Human dignity. The right to decide for oneself

Going back to the connection between the personality rights and bioethics, the intention is here and now to briefly analyse some of the aspects pursued and brought under regulation by the Romanian legislator with regard to the respect owed to the human being and the inherent rights of human beings, especially those aspects aimed at human dignity in relation to biomedical activities, in the Romanian legislation and the regulatory documents adopted at international level.

3.1. In the perspective of international law, **human dignity** is the foundation lying at the basis of human rights. The Universal Declaration of Human Rights [22] states in its Preamble that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". In order to reinforce this statement, Art. 1 of the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights". Moreover, human dignity appears to be like the fundamental essence of all human rights, both in the perspective of the Universal Declaration of Human Rights, and in the perspective of other legal documents adopted at international level, such as the International Covenant on Civil and Political Rights [23] which refers to "the inherent dignity of the human person" or the Charter of Fundamental Rights of the European Union which states in its Preamble that "the Union is founded on the indivisible, universal values of human dignity [...]", and at the same time Art. 1 of the Charter provides that "human dignity is inviolable".

These international provisions were the starting point underlying the regulation in Art. 72 of the Civil Code on the right to dignity [24], according to which "anyone has the right to respect for his dignity". The provisions of Art. 72 par. (2) of the Civil Code reveal that the content of the right to dignity includes both an individual's honour, and his reputation [25].

The author finds that the structuring created by the legislator with regard to the regulation of the right to dignity is scarce, so: the provision referring to the right of free expression (Article 70 of the Civil Code), the right to one's image (Article 73 of the Civil Code) and the right to dignity (Article 72 of the Civil Code) should have been regulated in a distinct way, in the author's opinion. To that point, the author considers that the regulation of the right to dignity in the section dedicated to "common provisions" would have been much more appropriate if we consider the fact that human dignity appears to be rather **a principle of law**, which underlies such rights as: the right to life; the right to health; the right to physical and psychical integrity. Moreover, in the literature, there was a statement that "human dignity is not included in the list of human rights as a distinct right, but it presumes the right to have rights" [26].

Human dignity holds an important position in bioethics [27], this is why the Universal Declaration on Bioethics and Human Rights (UNESCO 2005) places the principle of human dignity first in the list of principles that should guide the biomedical activity. So, Art. 3 of the UNESCO Declaration states that "human dignity, human rights and fundamental freedoms" shall be fully respected. Moreover, par. (2) of the same article enunciates the

well-known idea in the democratic society that the interest and the wellbeing of the individual must have priority over the single interest of the society and science [28], representing at the same time a corollary of the principle of respect for human dignity. Even if the 2005 UNESCO Declaration is not an obligatory regulatory instrument, its value is unquestionable, especially with regard to the concept of "human dignity" in relation to bioethics. It is also worth mentioning that in the Barcelona Declaration on basic ethical principles in bioethics and European bio-law [29], the four formulated principles – autonomy, dignity, integrity and vulnerability – are dimensions of the human being who needs to be respected and protected [30].

3.2. The legislative establishment of the right to decide for oneself in Art. 60 of the Civil Code is founded on the constitutional regulation [Article 26 par. (2) Constitution] according to which "the natural person has the right to decide for oneself", provided that the person does not violate the rights and freedoms of others, the public order or the morality. About the regulation of this right, we can see in the fundamental law that, on one hand, "the right to decide for oneself" is included in Art. 26 with the subtitle "Personal, Family and Private Life", and on the other hand, the holder of the right is the physical person who is entitled to decide for oneself as long as he or she does not violate the rights and freedoms of others, the public order or the morality. The civil law regulates this right as a fundamental right of the human being and an inherent right to the human being, which is placed in Section 1 named "Common Provisions", underlining the idea that **it is a personality right, inherent to human beings**, which seems to be a new vision of the nature and content of the right to decide for oneself. Nevertheless and similar to the Constitution, the text of the civil law also refers to the natural person, understood, as a general rule, as a subject of rights and obligations in the legal relations, meaning a holder of rights and obligations coming from the ability of exercise, although the author thinks that the phrase "natural person" should be replaced with "man/human – human being", precisely because the legal value of the right to decide for oneself exceeds the limits of the ability of exercise which concerns the natural person as a subject of legal relations being regulated **in consideration of the dignity of man as a human being**. To motivate this statement, in the opinion which the author supports, the author shows that the **content** of the right to decide for oneself is **taken again** by the legislator in Art. 64 of the Civil Code which expressly regulated **the inviolability of the human body**, immediately adding the right of the person to physical and psychical integrity, a circumstance which changes essentially the very nature of the right of the human being to decide for oneself.

In strict connection with the right to decide for oneself, the inviolability of the human body and the right to physical and psychical integrity, there are the other provisions of the Civil Code concerning the prohibition of eugenic practices (Article 62 of the Civil Code), the ban of medical interventions on genetic characters (Article 63 of the Civil Code), the examination of genetic characteristics (Article 65 of the Civil Code), the patrimonial acts with regard to the human body (Article 66 of the Civil Code), the medical interventions on a person for therapeutic or research purposes (Article 67 of the Civil Code) or the procurement or transplant of organs, cells or tissues (Article 68 of the Civil Code).

The author thinks that the aspects regarding the description of the right to life, the right to health and the right to integrity of the natural person, regulated in Section 2, also refer to the right to decide for oneself, although the latter is regulated in a distinct section.

Analysing the rights inherent to human beings, in consideration of the biological and medical applications, the legal texts also establish some exceptions according to which, under the conditions expressly and restrictedly provided by law, the physical and psychical integrity may be impinged on (Article 64 paragraph of the Civil Code) and some particular interventions on the genetic characters regarding the prevention and treatment of genetic diseases are allowed [31].

The development of biomedical technologies which allow the use of cloning for reproduction purposes or of stem cells raise new ethical, moral and legal issues with regard to medically assisted human reproduction, as the use of the technique of in vitro fertilisation to that end can inevitably lead to negative consequences for people and society. With the provisions of Art. 63 par. (2) of the Civil Code, any interventions which aim to create a human being genetically identical to another human being, dead or alive, as well as the creation of human embryos for research purposes are prohibited. The issues raised by cloning, both the ethical and moral ones, and the social and legal issues determined the adoption, at European level, of the Additional Protocol to the Convention on Human Rights and Biomedicine, referring to the prohibition of cloning human beings, signed in Paris on 12 January 1998 [32]. The Protocol pursues and reinforces the aim of the Convention presented in Art. 1 thereof, the protection of the dignity and identity of human beings, and also the guarantee of and respect for fundamental rights and freedoms referring to the application of biology and medicine. The provisions of the Convention (Article 13) prohibit any intervention intended to modify the human genome, except for those for preventive, diagnosis or therapeutic purposes, with the condition that such interventions do not aim to introduce a change in the genome of descendants. Moreover, the provisions of Art. 18 of the Convention prohibit the creation of human embryos for research purposes. The provisions of Art. 1 of the Protocol lead to the conclusion that any intervention aimed at the creation of a human being genetically identical to another human being, dead or alive, is prohibited. The same article also defines the expression of "human being genetically identical to another human being" as a human being which has in common with another human being the aggregate of nuclear genes. The purpose of these regulations is to protect the identity and dignity of all human beings [33].

According to the provisions of Art. 12 of the Convention on Human Rights and Biomedicine [34], the tests which are predictive of genetic diseases or serve either to identify the subject as a carrier of a gene responsible for a disease or to detect a genetic predisposition or a genetic susceptibility to a disease may be performed only for health purposes or for scientific research in connection with health purposes, and only if appropriate genetic counselling is provided [35]. Scanning and testing of embryos, of new-borns and even of adults is quite spread in medicine, and the results obtained are mostly used for determining a treatment plan or to avoid the transmission of an hereditary disease, as with the pre-implantation diagnosis or to avoid the birth of a child with development deficiencies through the interruption of pregnancy. The standards established by the Convention on Human Rights and Biomedicine create clear barriers against the inappropriate use of embryos so that their protection is ensured, and their creation for research purposes is prohibited by Art. 18 of the Convention.

4. Conclusions

The field of bioethics correlated with that of the rights inherent to human beings is a fascinating one, with many unpredictable theoretical and practical aspects which will be considered both by medical sciences and the science of law in order to know and study the positive aspects to the quality of life and to avoid possible disasters on human existence.

Over time, researchers will discover new techniques to manipulate the human genome and implicitly new techniques to create human life, probably much more efficient than the present ones which will certainly have a positive influence on social relations and health, and human existence in general. In the field of medical and biological technologies we are still at the beginning, and this is why it is necessary to understand first of all what they are and which is their purpose in society in order to become aware of their possible implications.

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[3] To that effect, see: the term "bioethics" – *Dicționar Medical Ilustrat* (2014). (Illustrated Medical Dictionary), Litera Publishing House.

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[5] Article 660 of Law no. 95/2006 on the Health Reform (republished) states that: *(1) In order to be subjected to methods of prevention, diagnosis and treatment, with a risk potential for the patient, after they have been explained by the doctor, the dentist, nurse/midwife, according to the provisions of paragraphs (2) and (3), the patient is asked to give his written consent. (2) In obtaining the written consent of the patient, the doctor, the dentist, the nurse/midwife have the duty to present to the patient information at a reasonable scientific level for the patient's power of understanding. (3) The information must include: the diagnosis, the nature and the purpose of the treatment, the risks and the consequences of the proposed treatment, viable treatment alternatives, the risks and their consequences, the prognostic of the disease without the application of the treatment.* The concern of our legislator for obtaining the informed consent in order to diminish some subsequent risks was the object for regulation purposes of the Government Extraordinary Decree no. 79 of 22 November 2016 for changing Law no. 95/2006 on Health Reform.

[6] The consent of the doctor is implicit in the provisions of Art. 663 of Law no. 95/2006 pursuant to which: "the doctor [...] have the obligation to medical assistance/ health care to a person only if they have first accepted that person as a patient [...]".

[7] For a more detailed analysis regarding the history of the personality rights, see: Cercel S., Olteanu E.G. (2009), *Consideraţii privind drepturile personalităţii* (Conside-

rations of the Personality Rights), Revista de ştiinţe Juridice – University of Craiova, no. 4.

[8] It is also worth mentioning that in English law or in common-law the concept of "personality rights" is only used to describe the right to private life and the right to publicity which confer to an individual the right to control the use of his name, image or other aspects of his identity for commercial purposes, being in close connection with the intellectual property right. See more: https://www.lawteacher.net/free-law-essays/criminology/personality-rights.php.

[9] To that effect, O. Ungureanu, O., Munteanu, C. (2013), *Drept civil. Persoanele* (Civil Law. The Persons), Hamangiu Publishing House, Bucharest, p. 44.

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[11] *Codul Civil Cartea I "Despre persoane", Titlul al II-lea "Persoana fizică", Capitolul al II-lea "Respectul datorat fiinţei umane şi drepturilor ei inerente"* (The Civil Code Book I "About Persons", Title 2 "The Natural Person", Chapter 2 "The Respect Owed to the Human Being and to Its Inherent Rights").

[12] Cornu G. (2005). *Droit civil. Introduction. Les personnes. Les biens* (Civil Law. Introduction. The Persons. The Goods), 12th ed., Montchrestien, Paris, cited by Fl.A. Baias and others, *in the cited work*, p. 62.

[13] For instance, the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights use the term "human rights"; at the same time, the Charter of the United Nations, and other documents refer to "fundamental human rights or fundamental rights of the human person", so as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights are also about "fundamental human rights and freedoms".

[14] The European Convention on Human Rights, with the exact name "Convention for the Protection of Human Rights and Fundamental Freedoms", refers to "human rights and freedoms" – Council of Europe (1950). European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by the Protocols Nos. 11 and 14, ETS no. 5.

[15] The EU Charter of Fundamental Rights refers to "fundamental rights" or "essential rights" – European Union (2012). Charter of Fundamental Rights of the European Union, 2012/C 362/02.

[16] The Constitution of Romania uses the term "fundamental rights and freedoms" in the contents of Art. 22 or the term "rights and freedoms".

[17] The fundamental rights are subjective rights provided for by legal norms that are essential for the citizens, and to that end there is also the statement of the famous philosopher Jean Jacques Rousseau in "Discourse on the Origin and Basis of Inequality among Men", which leads to the idea that human rights are essential gifts of nature

which cannot be harmed in any way by anyone. The Constitution is the document embedding in its contents the fundamental rights of the human being and guaranteeing in itself and with legal norms the observance of the rights and freedoms of the human being, in accordance, of course, with the Universal Declaration of Human Rights, with the treaties, covenants or conventions which Romania is a part thereof, exactly as provided by Art. 20 of the Constitution. See to that effect: Iancu, Gh. (2010), *Drept constituțional şi instituții politice* (Constitutional Law and Political Institutions), C.H. Beck Publishing House, Bucharest, p. 165 and the following.

[18] See: C Bîrsan, C. (2005). *Convenția Europeană a drepturilor omului* (The European Convention on Human Rights), vol. I, All Beck Publishing House, Bucharest, pp. 4-34, especially with regard to terminology, the relation between rights and freedoms, the description and classification of rights and the evolution of their regulation in international and regional documents (America, Europe, Africa Muraru, I., Tănăsescu, E.S. (2003), *Drept constituțional şi instituții politice* (Constitutional Law and Political Institutions), vol. I, 11th ed., All Beck Publishing House, Bucharest, p. 141, who consider that legally "the right is a freedom, and freedom is a right".

[19] It was noted that Art. 22 of the Constitution enshrines the right to life and the right to physical and psychical integrity as a fundamental right , and in Art. 33 the right to the protection of health; moreover, Art. 2 of the European Convention on Human Rights provides that "everyone's right to life shall be protected by law", while Art. 8 states that "everyone has the right to respect for his private life [...]", without reference to the right to health; similarly, the Charter of Fundamental Rights of the European Union, in Art. 35, refers to "the right of access to preventive health care [...]".

[20] Such as some of the fundamental freedoms like: freedom of thought, of conscience, of expression (named either "right to freedom", or "freedom" in Articles 9 and 10 of the European Convention on Human Rights; for a distinction between the concept of "right" and that of "freedom", see: Dabu V., Guşanu A.M. (2013), *Drept şi libertate. Inconsecvențe legislative. Importanța diferențierii între drept şi liberate* (Right and Freedom. Legislative Inconsistencies. The Importance of Distinguishing between Right and Freedom), Acta Universitatis George Bacovia, Juridica, vol. 2.

[21] Article 61 of the Civil Code comes under the second section of Chapter 2 of Title II of Book I and is named: "*Drepturile la viață, la sănătate ți la integritate ale persoanei fizice*" (The rights to life, health and integrity of the physical person).

[22] UN General Assembly (1948). Universal Declaration of Human Rights, 217 A (III).

[23] UN General Assembly (1996). International Covenant on Civil and Political Rights.

[24] In international doctrine, there was an opinion that there is not a proper right to dignity, because dignity is the principle which lay at the basis of the formation of all human rights and it is equally an inherent characteristic of human beings; to that effect: O'Mahony, C. (2012). There is no such thing as a right to dignity. Int J Const Law; 10(2):551-574.doi:10.1093/icon/mos010.

[25] Baias, Fl.A. and others, in the cited work, p.73.

[26] See: Ciucă A. (2009), *Conceptul de "demnitate" a ființei umane în bioetică şi drept* (The Concept of "Dignity" of the Human Being in Bioethics and in Law), in Revista română de bioetică (Romanian Magazine of Bioethics), vol. 7, no. 2; Enders Ch. (2010).

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[27] See more: Andorno R. (2009). Human dignity and human rights as a common ground for a global bioethics, in Journal of Medicine and Philosophy.

[28] Article 61 par. (2) of the Civil Code establishes for the same purpose that "the interest and the wellbeing of the human being must prevail over the single interest of society and science".

[29] Biomed II Project (1998). Barcelona Declaration on basic ethical principles in bioethics and European bio-law.

[30] With reference to the application of the principles, the Barcelona Declaration states that the concrete context of biomedicine and of medical practices needs to be also considered. In addition, it mentions that the principles have an essential role in the relation doctor-patient, representing an authentic source of informed consent. With regard to biomedical research, the principles provide protection to people who participate in studies or other types of research. The use of assisted reproductive technology must be in accordance with the principle of dignity, integrity and vulnerability, and in the area of human genetics, the interventions on the human genome must be done with the observance of the integrity of the human being.

[31] The modification of the genetic characters takes place through genetic engineering. To that effect: Uliescu, M. and others (2012). *Noul Cod civil. Studii şi comentarii* (The New Civil Code. Studies and Commentaries), vol. I, Universul Juridic Publishing House, Bucharest, p. 248.

[32] See: Council of Europe (1998). Additional Protocol to the Convention for the Protection of Human Rights and Dignity with regard to the Application of Biology and Medicine, on the Prohibition on Cloning Human Being, ETS no. 168, Paris.

[33] See more: Furrow, B.R., Greaney, T.L., Johnson, S.H., Jost, T.S., Scwartz, R.L. (2013), Bioethics: Health Care Law and Ethics, 7th ed., West, p. 207 and the following.

[34] Council of Europe (1997). Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, ETS no. 164, Oviedo.

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Legislative Delegation and Government Accountability in the Light of Constitutional Provisions

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Abstract

Both legislative delegation (regulated by Art. 115 of the Constitution) and the accountability of the Government (provided for in Art. 114 of the Constitution) are both procedures that allow the Government to tap into the sphere of enactment established by the Basic Law to the Parliament as the sole legislative authority of the country. Often, in practice, the Government has acted with abuse of power in using these procedures. We aimed in this article to clarify exactly the legal regime applicable to this case and to establish the distinction between the two procedures, through a comparative study, focusing also on some lex ferenda proposals.

Keywords: *Government, Parliament, delegated legislation, Constitution, Constitutional Court.*

1. Legislative delegation and Government accountability – legal regime

The legislative delegation institution is regulated in Art. 115 of the Constitution and enshrines the right of the Government to pass – in certain limits and subject to conditions – legislative instruments acting as laws, collectively referred to as ordinances.

As a constitutional jurislator, the **Constitutional Court stated the conditions under which the Government may pass an emergency ordinance**, conditions which must be cumulatively met: to be an extraordinary situation; its regulation cannot be postponed; the urgency be motivated in the content of the ordinance [1]. Also, the doctrine considers that "*extraordinary situation*" must consist in a state of absolute urgency, which must combine two elements, namely the impossibility of using alternative methods of regulation, the measures ordered by their material content, to have a necessity and absolute urgency nature [2].

In practice, however, the Government repeatedly violated the constitutional provisions by passing emergency ordinances at its sole discretion, creating a true unconstitutional custom in this regard [3]. By adhering to the opinions of the specialists in this field, we believe that the concept and practice of government in this case should be reconsidered, in order to restrict the use of that procedure by the Government, in "*its personal interest and outside extraordinary situations*." [4].

Another amendment to the constitutional text, following the revision of the Fundamental Law, refers to the **obligation to motivate the urgency in the contents of the ordinance**. Extraordinary situation and the urgency imposed by it must be fully motivated, as expressly required by the constitutional text [5]. The Government should make a general reasoning of the legislative act to be passed by a substantiation note and in addition to this, it must justify the urgency in the contents of the ordinance. In practice, however, the Government treats this aspect superficially. "*Most often, the way the urgency is reasoned is contradicted by the content of the regulation itself, in the sense that the effects of the regulation are opposite to the purpose which is revealed in the grounds of urgency*" [6].

Also, **the legislative delegation institution (referring to the entry into force of the emergency ordinance)** as currently regulated in Art. 115 of the Basic Law, have legislative deficiencies. According to the constitutional text, the moment of the effective date is determined by that of submission for debate in Parliament in an emergency procedure, after publication in the Official Gazette. Submission is made to the Chamber initially notified, which must approve it within 30 days after filing. If, regarding the Chamber notified, the Constitution imposes a term of approval of the ordinance, Art. 115 par. (4) of the Basic Law makes no reference to the period in which the second Chamber of Parliament, the decisional chamber, may take in debate and approve an emergency ordinance. This may result in a large number of emergency ordinances, they remaining in force until the decisional Chamber rejects them. There were instances when emergency ordinances remained in force even two years before being debated by the decisional Chamber. Therefore, it is necessary **to review Art. 115 par. (5) of the Constitution** for the purposes of **determining the exact time period in which the decisional Chamber decide on the emergency ordinance under discussion** [7]**.**

Government accountability procedure, regulated in Art. 114 of the Constitution of Romania, is **the expression of the discretion power granted to the executive** i.e. to the Government as central government authority, by the Basic Law itself [8]. According to Art. 114 of the Constitution, republished, the Government may assume responsibility before Parliament for "*a programme, a general policy statement or a draft* law". In practice, special problems are raised by Government accountability for a draft law. The way this institution is governed by Art. 114 of the Basic Law gives rise to multiple interpretations and creates for the executive power exorbitant prerogatives and the ability to replace the legislative authority. Thus, according to current regulations, the Government may assume responsibility at any time and in any field, as the phrase "*draft law*" does not define precisely the regulatory scope, size and content of the draft law. It has been considered that through the phrase "***draft law***" made in the singular should be considered that **it cannot be about a "*package of laws*" but a single law**, with a specific object of regulation. In practice, however, the Government has assumed often responsibility for complex draft laws, for packages of laws with different regulatory objectives, even for a code of laws or an emergency ordinance involving special enactment procedure very different from that of Government accountability. In the absence of express provisions, the **Constitutional Court ruled** in its decisions, that the draft law on which the Government may assume responsibility may be of organic, ordinary laws nature, may involve the approval of an emergency ordinance, but cannot be of constitutional laws nature. Also, the draft law on which the Government assumes responsibility may be complex, may regulate many areas of activity if there is a single general purpose or interest [9]. In this context, the Constitutional

Court states, in its decision [10], the possibility of Government to assume responsibility for more draft laws on the same day or in the same parliamentary session. Consequently we note that **in over 20 years that have passed since the adoption of the Constitution, the Government took responsibility for a large number of draft laws**, making use of such a procedure on grounds of regulation urgency. We consider it necessary **to review Art. 114 of the Constitution, expressly enshrining the limits in which the Government may assume responsibility for a draft law**, **both in terms of the area subject to the regulation– now being a very varied and atypical one – and in terms of the period in which the executive power may assume responsibility, it should be limited to no more than once per parliamentary session and for a single draft law**.

In our view the two constitutional institutions are of particular interest, namely the legislative delegation and the Government accountability for a draft law through which the constituent legislator allowed the executive to get into the competence sphere of Parliament in certain limits and under certain conditions, but insufficiently described. Often, because of the generality of constitutional rules, the Government interpreted these provisions in its sole discretion, making use of power in law-making practice.

2. Legislative delegation and Government accountability – comparative analysis

Although at first glance, both institutions are ways through which the executive is involved in the law-making work, **the legislative delegation should not be confused with Government accountability**. In the literature it is assessed that vote of confidence through which the Government survives following the acceptance by Parliament of a specific policy, resembles legislative delegation, but cannot be confused with it as the vote of confidence is forcing a choice between new alternatives – a new policy or a new Government – and excludes the maintaining of the status quo – the current Government, the current policy [11].

Legislative delegation **does not involve the passing of laws, but of government documents, called ordinances on which the legislative forum can intervene subsequently, by a law of their approval or rejection**. Unlike institution provided for in Art. 115 of the Constitution, the liability of the Government for a draft law is the procedure by which the executive, relying on the support of the parliamentary majority, determines Parliament **to pass in the first place a law which, once in force takes legal effects until it will be changed by another law or ordinance**. By using the procedure provided by Art. 114 of the Constitution, the Government virtually obtains a law the draft law not being debated in Parliament, in other words "*without the Parliament being enacted*." [12].

The institution of legislative delegation, as it is regulated by the constitutional text appears rather as an **expression of cooperation between the executive and the legislature** than as a form of parliamentary control. Ordinances are executive acts organically and legislative acts materially, i.e. they are acts belonging to the executive authority, but which relate to matters that are normally legislative. From this distortion between the author and their content, ordinances become hybrid affecting their entire legal existence [13]. Compared with the institution of legislative delegation, the **procedure of Government accountability for a draft law** falls along the li**nes of parliamentary control over the executive activity**, by deputies and senators' right, enshrined in par. (2) of Art. 114 of the Constitution, to

initiate a no-confidence motion whenever the Government assumes responsibility, a motion which, once passed, results in dismissal of the executive.

Could we regard the procedure of Government accountability as an exception, given the views expressed in literature? In comparison with the emergency ordinances involved **in exceptional cases**, the regulation of which cannot be delayed, in case of Government accountability procedure, **the constituent legislator did not make the accountability dependent on extraordinary circumstances, out of the executive's will**. Also, the constituent legislator did not consider it necessary **to impose the condition of regulation urgency for situations where the Government assumes responsibility**, which leaves it up to it to appreciate the limits imposed on the time and area which may be subject to regulation. In practice, however, the cabinets that have succeeded, especially since 1996 and so far **have all raised the urgency of regulation** to promote draft laws by simplified procedure of enactment provided for by Art. 114 of the Constitution. The Constitutional Court ruled through its jurisprudence that "(...) *even if at first glance the possibility of Government accountability cannot be subject to any conditions, the opportuneness and content of the initiative remaining virtually at the sole discretion of the Government, it cannot be absolute, because the exclusivity of Government is enforceable only against Parliament, and not the Constitutional Court as a guarantor of the rule of the Basic Law*." [14]. Through the same decision, the Constitutional Court ruled that *"(...) Government accountability on a draft law intends it be passed under maximum celerity, the content of regulation aiming at establishing emergency measures in an area of utmost importance and their application must be immediate*".

Conclusions and proposals of lex ferenda

As we mentioned before the two constitutional institutions i.e. the legislative delegation and Government accountability for a draft law are of particular interest, in our view, as the constituent legislator hereby allowed the executive to go into the sphere of competence of Parliament, within certain limits and under certain conditions, but insufficiently described. Often, because of the generality of constitutional rules, the Government interpreted these provisions in its sole discretion, making use of power in law-making practice.

With regard to the constitutional reform, we propose the following text of Art. 114 of the Basic Law:

– par. (1) The Government may assume responsibility before the Chamber of Deputies and of the Senate, in joint session, upon a programme or on a draft law once per parliamentary session;

– par. (2) The programme must have a unitary character and a specific object circumscribed to the objectives set by the government programme approved by Parliament;

– par. (3) The draft law on which the Government will assume responsibility must have a consistent content, covering one area of social life. Complex laws, a code of laws or an emergency ordinance, the draft laws which are under discussion in one of the chambers of Parliament, or draft laws the contents of which are identical to those in parliamentary debate may not be the subject of accountability;

– par. (4) The Government shall be dismissed if a motion of censure, filed within three days from the submission of the programme or the draft law, has been passed in accordance with Art. 113;

– par. (5) If the Government has not been dismissed in accordance with par. (4), the draft law submitted, amended or supplemented, where appropriate, with amendments accepted by the Government shall be deemed as passed and the implementation of the programme becomes binding on the Government;

– par. (6) If the President of Romania demands reconsideration of the law passed according to par. (5) its debate shall be carried in the joint session of both Chambers.

Regarding the emergency ordinance, one of the legal issues raised by this procedure regards the **term in which the decisional Chamber may take in debate and approve an emergency ordinance**. The endorsement no. 685/2012 of the Venice Commission states that "*Constitution itself provides incentives to use emergency ordinances because they remain in force, unless the decisional Chamber explicitly rejects the drafts*." There were instances when emergency ordinances remained in force even for two years before being debated by the decisional Chamber.

In conclusion, in our opinion, it is necessary **to revise par. (5) of Art. 115 of the Constitution,** for the purpose of establishing clear rules **on the period within which the decisional Chamber must pass or reject an emergency ordinance. In our view, the text of par. (5) of Art. 115 should be worded as follows**:

(...) If within thirty days after filing, the notified Chamber does not pronounce on the ordinance, it is considered as passed and sent to the other Chamber which must decide **within thirty days**.

Also, in order to understand more accurately the powers that the Government has, in this regard, we propose amending and supplementing Law no. 90/2001, on the organization and functioning of the Romanian Government and ministries. Thus, an entire chapter should be dedicated to its "law-making" power, a chapter covering two sections:

a). **a section for ordinances**. In Law no. 90/2001, provisions regarding ordinances are contained in Art. 11 c, which enshrines the right of Government to take decisions for the application of laws, ordinances under a special enabling law and emergency ordinance, according to the Constitution. The regulation itself is brief and unable to enlighten us regarding the legal status of acts passed by the executive, especially the ordinances, which are subject to special legal regime governed by the Basic Law.

b). the second section should refer to **the passing by the Government of draft laws by the procedure of accountability of the executive** to Parliament, enshrined in the provisions of Art. 114 of the Romanian Constitution, as revised.

Regarding the first section, on ordinances, with regard to emergency ordinances it is necessary **to specifically define, the phrase "extraordinary circumstances"** by reference to the text of the Constitution and the Constitutional Court case law in order to eliminate any confusion regarding the circumstances in which the Government may pass such laws and the idea of limiting the tendency of the executive to misuse this procedure.

Regarding the procedure of Government accountability for a draft law, Law no. 90/2001 does not make any reference to it. Thus, it is necessary:

– mainly to **explicitly enshrine the procedure of Government accountability in the text of law** as one of the means available to the executive, according to constitutional provisions, to exercise powers of law-making;

– on the other hand, this section **should include explicit and detailed provisions concerning the exercise of this procedure, the limits of its exercise**, limits that are either imposed by the constituent legislator or enshrined in the Constitutional Court case law. These limits can regard **areas of activity that may be the object of that accountability, specifying the meaning of the phrase "draft law", the frequency of use of this procedure**.

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Emergency ordinance between constitutionality and normality

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Abstract

There has been much talk lately if it is possible to regulate by emergency ordinance for criminal law. In the following we will try to answer this question: can it be legislated on criminal matters through emergency ordinances and if so, in what circumstances?

Keywords: emergency *ordinance, criminal law*

1. Preliminary remarks

Noting that a number of criminal and criminal procedure texts, declared unconstitutional, were not brought into line with the Fundamental Law within the 45 days term mentioned in Art. 147 par. (1) of the Constitution, which could cause different interpretations of these rules by the courts, the Romanian Government decided to adopt an emergency ordinance to solve all these problems.

In taking this decision the Government considered the existence of several infringement procedures, some in advanced stages, which could lead to the conviction of Romania by the Court of Justice of the European Union, with the consequence of applying financial penalties likely to affect the state budget and objectives undertaken by the Romanian Government [1].

All these have led the Government to consider that we are facing an extraordinary situation, the regulation of which cannot be postponed, as mentioned by Art. 115 par. (4) of the Constitution and urgent enactment is therefore required.

In the following we will try to answer the question whether the conditions for legislative delegation were met as regulated by Art. 115 of the Constitution and we will review the main provisions of the emergency ordinance.

2. Legislative delegation

This legislative process was designed as a "substitute" of legislative work in critical periods, especially war [2]. The Government is able to issue ordinances as an extension of its general competence by virtue of a law enabling [3].

Legislative delegation is a transfer of legislative powers in the restrictive conditions mentioned in the Constitution [4].

Although the doctrine recognizes that legislative delegation compromises some principles such as the principle of legality, the principle of separation between legislature and the executive, the principle of legislating monopoly, the principle of delegation in public law and the principle of control executed *a priori* in the case of regulations of the law, it is accepted however that ordinances are a necessary evil, which restores the unity of split legislative process through an exclusive domain of legislation and a legislated domain [5].

Emergency ordinances are required to meet some specific conditions: the existence of extraordinary circumstances; the inability to postpone the regulation; motivating the urgency in the content of the ordinance; submitting it for debate in an emergency procedure to the competent chamber of Parliament as a requirement of its coming into force; compliance with substantive grounds for issuing ordinances, excluding the field of constitutional laws, the regime of fundamental state institutions, rights, freedoms and fundamental duties, electoral rights, the prohibition of forced rights of public property [6].

Though the doctrine generally agrees in regard to the conditions and material limits of emergency ordinances, opinions are different on the limits of emergency ordinances regulating rights, freedoms and constitutional duties.

In one opinion it is stated categorically that classic domains, in which the government has intervened so far without hesitations by emergency ordinance, such as penalties, criminal proceedings and civil proceedings affecting fundamental rights, education, health, taxation, circulation abroad, work, social protection and living standards, the property – are, unquestionably, prohibited to emergency ordinances modifications, without distinguishing whether matters affecting the rights, freedoms and fundamental duties are within the scope of ordinary law or organic law [7].

In another opinion it is appreciated that provisions of Art. 115 par. (6) according to which the emergency ordinances can not affect the status of fundamental state institutions, rights, freedoms and duties under the Constitution must be interpreted according to the legal context. By that interpretation, the prohibition of regulation regards the worsening of legal status of fundamental institutions and not improving their organization and operation [8].

As for rights, freedoms and duties stipulated by the Constitution, their exercise may be restricted by law, proportionally and temporary if the measure is necessary in a democratic society, without prejudice to the existence of the right or freedom, as derived from the provisions of Art. 53 par. (2) of the Constitution.

As emergency ordinances have legal force of law, in the terms and limits laid down by Art. 53 par. (1) and (2) of the Fundamental Law, they can be adopted in this area, although in the situations envisaged by the constitutional text – safeguarding national security, public order, health or morals, rights and freedoms, conducting a criminal instruction – have inevitable negative consequences for citizens, but have an exceptional and temporary character [9].

Regarding the extraordinary situations in which emergency ordinances can be adopted, the doctrine stated that they have the meaning of unforeseeable circumstances that deviate from the rules or expectations able to maintain and promote endangering the public interest implicitly, another reason, urgent measures to prevent or remove the danger, applicable immediately, at least in part [10].

Analyzing the constitutional regulation of the emergency ordinance everybody concludes that it must be expressly limited to certain domains, which, because of their importance to the citizens must be left exclusively to the legislature [11].

3. Ordinance content

The initiator justifies the condition of urgency by the accumulation of a large number of decisions of the Constitutional Court and an important number of directives that have created an extraordinary situation whose regulation can no longer be postponed.

The argument is questionable as long as the Legal Commission of the Chamber of Deputies had invited representatives of the Judicial Authority in March this year to amend and supplement criminal legislation taking into account the 25 Constitutional Court decisions, which relate to criminal law and criminal procedure.

Government adoption of this bill, which is a solution to the current criminal legislation, highlights the lack of correlation between the program of the Executive Authority and the Legislative Authority.

The initiator of this Emergency ordinance intended to correlate criminal law and criminal procedure to the 13 decisions of the Constitutional Court and the 5 directives of the European Parliament and Council regarding the involvement of the prosecutor or other parties in some stages of the criminal procedure, the solving of the complaints against the prosecutor's solutions, the plea bargain procedure, regulating means of appeal to allow the disputation of precautionary measures taken by the preliminary chamber judge and by the court as well as clarifying competences.

In principle we agree with legislative solutions and therefore the decisions of the Constitutional Court, with a sole exception: dropping criminal charges.

This institution was specifically designed to reduce the workload of the courts but requiring the drop of criminal charges to be confirmed by the preliminary chamber judge with the participation of the prosecutor and the parties keeps the court workload almost the same.

The Constitutional Court has not considered that this institution operates for more than 50 years now in France where the prosecutor has an undeniable right of "*classement sans suite*" without having his solution to drop criminal charges verified by any court.

The initiator considers that this law contributes to legislative stability, brings added value to both codes, increases protection of some categories of vulnerable persons and strengthens the fairness of criminal proceedings by providing procedural safeguards.

We are in full agreement with these assessments, provided that the Romanian Parliament adopts as soon as possible following the debate the text of the emergency ordinance thus giving it the endorsement of the legislative authority.

The adoption of important laws by the legislature is a feature of stable democratic regimes, states that promote and apply the rule of law.

4. The exceptional nature of the emergency ordinance

In practice, interesting issues arose related to the adoption of the no. 13/2017 Emergency Ordinance by the Romanian Government regarding the modification and completion of

the Law no. 286/2009 regarding the Criminal Code and Law no. 135/2010 regarding the Code of Criminal Procedure [12].

Thus, the Ombudsman submitted to the Constitutional Court the exception of unconstitutionality of the provisions of the aforementioned normative act, for reasons of both intrinsic and extrinsic nature.

Regarding the unconstitutionality criticisms of extrinsic nature, it was shown that Government Emergency Ordinance no. 13/2017 is contrary to Art. 115 par. (4) of the Constitution. The Ombudsman pointed out that the Government motivated the extraordinary situation and the urgency through the need to correlate the Criminal Procedure Code with the provisions of Art. 8 par. (4) of Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 regarding the reinforcement of certain aspects of the presumption of innocence and the right to attend the trial during criminal proceedings.

However, according to the jurisprudence of the Constitutional Court, the Ombudsman further stated mentioning the decisions no. 15 of 25 January 2000, 802 of 19 May 2009, 1599 of 9 December 2010, binding acts of the European Union may be transposed by emergency ordinances only under restrictive conditions, i.e. the imminence of the infringement procedure.

Concerning the criticisms of intrinsic unconstitutionality it was shown that Art. 1 point 3 of the Emergency Ordinance does not take into account the interpretation given it by the Constitutional Court through the decision no. 405 of June 15, 2016 and is contrary to Art. 1 par. (3) and (5) and Art. 147 par. (4) of the Romanian Constitution. It has been argued that the limitation of the normative content of Art. 297 of the Criminal Code to the hypothesis in which the civil servant carries out an act in breach of express provisions of a law, ordinance or emergency ordinance is contrary to the cited decision, as well as to the decision no. 799 of 17 June 2011 of the Constitutional Court, which by law broadly understands the law, decree, order, ordinance, regulation or order of the minister, decision or order of the local public administration.

Unfortunately, the Constitutional Court was obliged to reject the objection of unconstitutionality as inadmissible as the Emergency Ordinance no. 13/2017 was no longer in force at the time the exception was judged.

However, we need to make a few points. The Government's ability to exercise legislative powers does not exist only in Romania.

The Government's empowerment to adopt acts that have legal force from the start also exists in Spain and Italy.

In some countries, the normative acts adopted by the Government are subject to subsequent parliamentary scrutiny, such as the UK, while in others like Germany or Greece, no such control is exercised.

In France and Portugal, the exercise of regulatory power is subject to subsequent ratification by the Parliament. This means that the acts that have not been ratified have no more than a regulatory value [13].

Regarding the exceptional situations in which the Government can legislate through emergency ordinances the doctrine considered that such a phrase is not sufficiently explicit, the term being susceptible to multiple interpretations. It does not even specify the criteria

on the basis of which it can be appreciated which exceptional situation justifies the Government to legislate by means of emergency ordinances [14].

The Constitutional Court decided that there is a need for cumulative existence of two elements: the urgency of regulating a situation requiring an immediate solution and avoiding serious prejudice to the public interest (CCC No. 65/1995)

In another decision it was considered that an exceptional case has an objective character in the sense that its existence does not depend on the will of the Government, which under such circumstances is compelled to react promptly in the defense of a public interest. (CCC No. 83/1998) [15].

So the Government has the freedom to appreciate the exceptional situation in which it has to legislate.

In regard to the criminalization of abuse of office, the Constitutional Court's decision no. 405/2016 is very clear and is based on the Venice Commission Report which is cited in the recitals of the decision.

5. The constitutional legal conflict

The same Emergency Ordinance no. 13/2017 was the subject of a criminal case to the DNA which considered it appropriate to investigate the circumstances in which the Emergency Ordinance for amending the Penal Code and the Criminal Procedure Code was drafted. As a result, legal specialists assimilated to magistrates from the Ministry of Justice, state secretaries, the Secretary General of the Government and ministers were subpoenaed to the DNA and heard.

By application no. 630 of February 8, 2017, the President of the Senate asked the Constitutional Court to rule on the existence of a constitutional conflict between the Romanian Government and the Public Ministry – the National Anticorruption Directorate.

The author of the notification revealed that the Government's observance of the specific norms of the law-making work can only be verified by Parliament, a legislative body that enjoys the legitimacy of popular vote and on this basis can verify the legality and constitutionality of the normative acts issued by the Government. The other authorities, including the judiciary, can express points of view, they can and should be consulted, but they can not have the power to interfere with Parliament's structures or Government structures.

The President of the Senate requested the Constitutional Court to rule on the existence of a legal conflict of a constitutional nature between the Government of Romania, on the one hand, and the Public Ministry, through the National Anticorruption Directorate, on the other hand, generated by the prosecutors' action of verifying the opportunity and circumstances of the draft normative act.

He also asked the Court to decide on the release of this conflict, stating that in the future the criminal investigation bodies should not be able to investigate the opportunity of drafting the normative acts.

By accepting the notification, the Court stated that the adoption of an emergency ordinance with regard to the decision of lawmaking is an exclusive attribute of the delegated legislator, who can be censored only under the conditions expressly provided by the

Constitution, i.e. by the parliamentary control exercised according to Art. 115 par. (5) of the Constitution.

The Court found that any other public authority, belonging to a power other than the legislative one, can not control the normative act of the Government from the point of view of the opportunity of the act of lawmaking.

The Court considered relevant the recitals in the Report on the Relationship between political accountability and criminal accountability in the activity of members of the Government, adopted by the Venice Commission, 8-9 March 2013 [CDL-AD (2013) 001].

The Venice Commission considers that criminal proceedings should not be used to sanction political differences and that in a functional democracy, ministers are held accountable for political decisions, not resorting to criminal law.

In conclusion, the Court has held that the Constitutional Court is the only one empowered to carry out the legality and constitutionality review of the Government's simple or emergency ordinances [16].

Conclusions

The way of cooperation between the Parliament and the Government, under which the Government is invested with the execution of a part of the legislative function, under certain conditions, is called legislative delegation. The act by which the Government exercises its delegated competence is an ordinance [17].

The doctrine concludes that the legislative delegation entrusted to the Government involves the temporary exercise of legislative powers by the executive power through forms and methods specific to the administrative activity, by producing legal effects valid as the Parliament recognizes and acquires these acts [18].

The legislative delegation expresses a contemporary reality that can not be ignored, through the possibility granted by the Parliament to the Government that, within certain limits and subject to certain conditions, it adopts acts that contain norms by law.

The ordinances therefore arise as a result of a collaboration between the legislative and executive powers, a collaboration that is absolutely necessary in the modern state [19].

Legislation by the Government is obviously done in exceptional situations, but the appreciation of these situations should not be done in any case with rigidity.

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The Complex Offence in the New Penal Code

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Abstract

The quiddity of the legal plurality represents the will of the legislator in reuniting within the content of a sole infraction multiple feats which in themselves hold the content of an infraction that can both be regarded as well as punished once localized in an individual and separate manner. The complex offence is meant to capture the true facts pertaining to the reality of a person's particular social danger within a specific set of circumstances which differ from the basic type infraction. Likewise, it is meant to offer a vivid image of a particular way of breaking the law. Our analysis upon the complex offence revealed the fact that although we identified elements of novelty, we were unable to discover a major substantial rift in the conditions needed for a complex offence, but just as well we discovered through our fruitfull research the posibility of disclosing and debating new issues left outside the interest of the community till now and we managed to place this topic in a better position for future research.

Keywords: *complex offence, the new penal code, judicial object, the sanctions law regime.*

1. Introduction

According to a division that has been for a long time now classical in both dogma and legislation, within the penal law the provisions surrounding the complex offence are considered related to an apparent plurality of offences. The main criteria for this division is represented by the type of unity employed to create the offence and as a result the complex offence falls into the category of a legal unity infraction because. This stands to be true as a result of the fact that we witness the existence of a single infraction, but in the presence of an apparent plurality. On these grounds the complex offence has been provisioned for in Chapter V, entitled Plurality of offences, Title II, Art. 35 of the Penal Code which finds its correspondent in Art. 41 alin. (3) of the 1969 Penal Code. The chapter covers both the infractions that fall under the category of real plurality, as well as the infractions that are considered to be of an apparent plurality.

The architecture of the complex offence, as it is presented in Art. 35 of the Penal code underlines the necessity for it to have as an element part of its content an action or omission which is regarded by the penal law as an infraction in itself. As a result of this state of facts we notice the possibility for this action or omission to be not only an

infraction of the basic type, but just as well an infraction of the complex offence type. As a result, even by placing the complex offence in that particular part of the Penal Code, the legislator underlines the impossibility for it to be considered a plurality of offences. Thus, underlining its character, Art. 35 of the Penal Code states that the complex infraction maintains within its content an action or an omission which constitutes in itself an infraction according to the penal law, but which within the content of the complex offence plays the part of a constitutive element or of an aggravating circumstantial element. The nature of the complex offence has to be considered starting from the viewpoint of the legislator who sees it as a single infraction, placing us in the presence of a unity of infraction while placing responsibility upon the offender for the complex offence, not for the basic type infraction or for the complex type infraction that is part of its content. The infraction that is being absorbed has a powerful subsidiary character revealed by through the example of the infraction of robbery, where the legislator does not punish the offender by applying the norms for the plurality of offences of theft and violence, when the asset has been gained by use of violence, but the legal provisions that ensure the punishment of the offender via the existence of the complex offence of the robbery. We are dealing with a selective viewpoint from the part of the legislator who chooses to apply the norms of the robbery although all the conditions are met for both the infraction that absorbs and the infraction that is absorbed. The vision of the legislator is that it is inevitably better to leave out those actions that are better punished within the provisions of the complex offence than when one applies the provisions for them regarded as autonomous and individual. Thus, the penal law considers the complex offence. As a direct consequence of the manner in which the complex offence is regarded by the legislator through Art. 35 it exists in the shape of two types, a basic type and an aggravated type.

Thus, considering the importance of the complex offence, the current Penal Code has maintained its conception upon it allowing for it to be identified under the same conditions, with the sole observation that the legislator has modified the normative content by direct intervention upon the place occupied by the absorbed infraction. According to the provisions present in Art. 35 alin. (2) of the New Penal Code the relevant absorbed deed can either be a constitutive element of the complex offence or an aggravating circumstantial element. Besides this sole element of discrepancy in comparison with the 1969 Penal Code the legislator has opted to preserve the elements that facilitate the identification of this type of infraction as well as the necessary character of the absorption, together with the need for the discrepancy in social danger between the infraction that is absorbed and the infraction which absorbs. Likewise, the present day legislation does not modify in a substantial manner the conditions needed for the complex offence, underlining the necessity for the absorbed infraction to be determined or determinable.

2. Modalities of the complex offence

Usually, the clue for the existence of a complex offence is represented by noticing within the actual content of the offence of an action or omission already provisioned for by the criminal law but which in the given context plays the part of a constitutive element or the part of an aggravating circumstantial element. Debating this conception we concur that the legislator intends to refer to the action or omission that is absorbed in the complex offence. The complex offence represents the result of an *ope legis* creation by the legislator.

The Romanian criminal law, through the Penal Code, stipulates for two types of complex offences. On one hand we have the basic complex offence, while on the other hand we notice the aggravated complex offence type.

Our analysis revealed the fact that considering the role played by the absorbed offence in the complex offence we can establish the existence of two types of such infractions, namely the basic complex offence and the aggravated complex offence. The basic complex offence takes shape as a result of the fact that it contains as a constitutive element a material element which represents in itself an offence for which the Romanian criminal law already provisions for, such as is the case with the offence of robbery discussed in Art. 233 of the Penal Code, the abusive conduct regulated by the norms present in Art. 296 of the Penal code, the diversionary acts present in Art. 403 of the Penal Code. Unlike this first category of complex offences, the second type which is known under the name of an aggravated complex offence becomes complex not in its basic type, but in the aggravated form which determines a basic offence or even another basic offence but which is in fact formed under the type of a complex offence such as deprivation of freedom regulated by Art. 295 of the Penal Code, the crime of rape followed by the death of the victim discussed in Art. 218 alin. (4) of the Penal Code, sexual act with an underage person regulated by Art. 220 of the Penal Code, aggravated theft present in Art. 229 of the Penal Code, aggravated robbery regulated by Art. 234 of the Penal Code, piracy detailed in Art. 235 alin. (2) and (3) of the Penal Code. After carefully considering the last two examples of such infractions we can conclude that an aggravated complex offence can stand not only to determine a basic offence, but also a basic offence that is simultaneously a complex offence. An aggravated complex offence type absorbs within the basic shape of an offence an aggravated circumstantial element made out of an action or of an omission which is also viewed by the legislator as an offence in itself [1]. Despite this apparent separation it is our scientific duty to note the fact that the complex offence as a basic offence can be accompanied by yet another aggravated type. As a consequence, the complex offence, as a basic offence exits in the Romanian criminal law just as well in its aggravated type. Both of these two types can be the result of reunification or of absorption. For example, consider the example of the infraction of robbery which is a complex offence that resulted from reuniting other offences through the process of legal unification under the rule of law as the legislator considered being necessary. The legislator has created the infraction of robbery by uniting the infraction of theft with that of violence or the infraction of threat. It continues to be considered the infraction of theft even in the eventuality in which the offender has directed the violence towards an object property of the victim, with the deliberate purpose of determining the person to abandon the object in order to acquire it for themselves. At this point in our discussion it is important to note the fact that we are not concerned with the direction in which the violence is directed, be it towards the person or towards the object, as long as the aim of the perpetrator was to take possession of the object we will be in the presence of a robbery type infraction. For example, it will be considered to be robbery in the eventuality in which the robber might spray the object with a flammable substance in order to create fear in the heart of the victim or in case the robber even attacked another property of the victim, such as the guard dog, as long as the exercised violence which constitutes the material element of the robbery infraction is meant and capable of creating a state of fear in the mind of the person and the final aim of the robber is to gain the possession of the asset by depriving the true owner of it. After a closer look at the infractions that construct the complex offence we notice

that these infractions are devoid of autonomy while existing in a close tight relationship. Continuing our line of discussion upon our topic we would like to provide an example of an infraction that has been created through absorption noticing the infraction provided for by Art. 401 of the Penal Code, the terrorist attack that jeopardizes the national security.

From a dogma point of view we have constructed our hypothesis and the entire discussion around the definition of the complex offence as an offence that presents within its content, as a constitutive element or as an aggravating circumstantial element, an action or an omission that represents in itself an infraction provided for by the Romanian Penal Law.

Upon further analysis we notice the presence of express norms in relation to the complex offence not only in the New Penal Code, but also in special laws. Terminologically speaking we found there are no outstanding items that could create a corpus that can be considered to be a special terminology corpus that refers to the content of the complex offence. Nevertheless, the legislator underlines the presence of a complex offence by underlining the need for absorption of one infraction by another. Usually, by norm, the complex offence also presents to the reader the infraction that is being absorbed. For your consideration, take notice of Art. 239 alin. (1) of the Penal Code that underlines the need for infractions such as threatening in the content of the infraction of assault of a public official. In a similar manner, Art. 250 alin. (2) of the Penal Code stipulates that within the aggravated type of the abusive conduct infraction it needs to be recognised the presence of the acts of hitting or of similar violent acts that correspond to the offence discussed in Art. 180 of the Penal Code. As a consequence, in case an infraction of severe bodily harm or of bodily harm that is separated from the complex offence by resolution, time and purpose, this infraction shall be considered in a situation of plurality of offences with abusive conduct. Absorption continues to remain one of the main clues on the existence of a complex offence. There are cases in which the legislator chooses to preserve the complex offence even though the infraction that is being absorbed cannot be accurately identified by comparing it with a legal criminal text. In such eventualities the legal text that refers to the action or omission that is being absorbed tend to be rather general than specific. Further discussing this peculiar aspect we note the fact that when we and the legislator refer to general terms, we meant the fact that such terms refer both to activities that have a specific criminal meaning, as well as activities which independently are devoid of such an obvious character. The object of absorption is a deed in its materiality. The process of absorption does not operate dependently of the existence of a judicial characterization. The general principle which also serves as a guiding principle is the one that underlines the need for the absorbing infraction to present a higher degree of social danger than the infraction that is being absorbed. Another specific feature of a complex offence is the fact that the absorption must take place *in abstracto*. Although the principal infraction transmits the judicial character to the offence it cannot be constituted without the commission of the action or omission that is the object of the absorption.

At this point in our discussion it is paramount to invoke the importance of the manner in which the absorption takes place as a result of the fact that the action or omission that we are referring to, penalized by the penal law, becomes a constitutive element or an aggravated circumstantial element within the complex offence. It could be argued that the legislator desired through this process to consider the action or omission as a material element of the infraction, being regarded as a part of the objective structure of the offence, but in fact, the legislator desired to underline the fact that the action or omission is in fact a deed within

this relationship. The presence of this relationship underlines the fact that the legislator has viewed the action or the omission in a complex and total manner which is followed by notions such as deed, immediate result, the essential demands of the law, as well as the causality relationship between the deed and the immediate result. Only in the circumstance in which the constitutive element or the aggravating circumstantial element is penalized individually by the law can we remark the presence of a complex offence. Considering this modality of reasoning it would be hardly needed to mention that both the absorbing infraction and the absorbed infraction are committed in the presence of a unity of active subject. Nevertheless, despite this obvious appearance the only conclusion that can be drawn is that there are times when the complex offence is committed by several persons. In such a scenario, there is an author for the infraction that absorbs and an author for the infraction that is absorbed. Conceptually talking, it is obvious that both authors shall be penalized for committing the entire complex offence, although it shall be acknowledged the fact that each has committed a different action or omission.

Considering this theoretical discussion we considered the practical example in which a robbery is committed with prior understanding between the parties involved for one author to actually steal the asset, while the other author should proceed to stopping the victim from putting up a fight by use of violence. Although the acts are separate, all of them are meant to ensure the success of the infraction viewed by the authors as a total action towards achieving the same goal. In this case, both authors shall be held accountable for committing the entire infraction which is a complex offence. The fact that the acts are committed separately is the result of a prior understanding between the authors, but based on the same aim and the same anticipated result. The presence of a legal unity is the consequence of the intervention of the legislator, outside the will of the author of the infraction who has no saying in the legal norms or in the special norms that take into consideration the will of the legislator and consider all the acts as a unitary infraction, not as separate events. Recognising the increase in social danger that accompanies a complex offence in which there is a powerful relationship between instrument of achieving the goal and the actual goal, especially when considering the severity and the gravity of an infraction such as a robbery, the legislator has constructed the legal unity of this infraction in order to allow for the creation of a harsher penalty when compared with the simple infraction. Upon professional as well as logic analysis we can notice a profound nexus between the aim and the instrument in the case of a complex offence which justifies the direct intervention of the legislator in regulating this severe situation that presents an increased social danger to all those concerned. The desire of the legislator to intervene could also be the result of the fact that such combinations and relationships between instrument and aim are often real cases that put a powerful strain on the lives of people. Furthermore, considering their occurrence, we understand why the legislator would try to create a punishment not surpassing the very severe situation of a plurality of offences, but surpassing the highly encountered simple infraction. Considering and comparing the constitutive elements of a complex offence and the existence of a plurality of offence we notice that the last one presents a high degree of social danger.

It is paramount to notice the fact that the duality established by the existence of a deed that absorbs and a deed that is absorbed is maintained at the level of incrimination as well as the level of the judicial object. Considering the presence of this duality we can conclude that the incrimination for the deed that absorbs exists in order to protect the

principal judicial value, while the incrimination for the deed that is absorbed exists in order to protect the secondary judicial value. This fact could not have been omitted from the definition of a complex offence as long as the infraction is classified considering the principal judicial object. Continuing our argument, it is interesting to notice the fact that the infraction of robbery is considered as being an offence directed against the assets of a person, not against the person, although it involves aggression directed towards the life and bodily integrity of the person. Considering and defining the principal judicial object, both the Romanian legislation as well as the international legislation considers the offence of robbery an infraction that is directed against the asset of an individual. We shall discuss a couple of situations. On one instance we find that the infraction of theft is reunited with that of bodily harm in order to create the infraction of robbery. On another instance we find that the infraction of bodily harm is reunited with a special condition, that of being directed against a public servant during the exercise of the state's authority in order to create the infraction of assault of a public official. In this last instance the legislator creates a complex offence by focusing upon the judicial object represented by the need for the state administration to function properly by protecting the activity of the public servant.

3. The judicial nature of the complex offence and comments on the sanctions law regime

Determining the judicial nature of the complex offence represents an essential element in both criminal praxis as well as in the penal dogma. We would like to start our discussion in this section with a few remarks on the active subject of the complex offence. In practice a person can be found guilty of comitting a complex offence either as the author or as a participant, such as a co-author, an accomplice or as an instigator. A complex offence is susceptible in general to be committed in a form of unhomogenous co-authorship as a result of the fact that it represents participation as an author the situation in which one of the authors puts into execution only one action or a part of an action remaining for the material element of the infraction to be completed by another author in the form of a contribution consisting in either an action or the rest of an action [2]. This statements is considered to be true as long as the authors have directly cooperated towards the accomplishment of the infraction aiming towards the same objective and the same result characteristic for that offence and specified by the penal norm. Homogenous authorship is the case whenever the material element is realized by one or more authors directly. It is important to remember that in both of these cases, the infraction that absorbs and the infraction that is absorbed represent an integral unit in nexus with the unity of the will of the offenders that accompanied the execution acts that were the result of their combine unified desire to obtain a certain result from their criminal activity. Further continuing our argument, focusing upon the active subject, the complex offence is realized in the presence of a unity of active subject. It is indeed important to realize the importance of the subjective stance of the participants towards a complex offence characterized by oblique intent. Only on condition the accomplice and the instigator share the same resolution towards the accomplishment of the complex offence the law that incriminates the offence would be able to be applied to them in case the worst case result obtained through the executipn of the complex offence is reached. For example, in order for the accomplice and the instigator to be held accountable in front of the law to the same extend to which the author is held resposible they must share the same

perspective and subjective attitude towards the complex offence. Consider the example of a rape, which resulted in the death of the victim, in a case in which the violence exerted upon the victim was exerted but the rape was not possible as a result of the fact that the violence resulted in the death of the victim before the sexual act could be committed, the penalty shall be that presented in Art. 218 alin. (4) Penal Code without being subject of the reduction by half characteristic for the attempt version. The process of absorption shall function as long as the author shall execute the act under oblique intent [3]. Another important aspect to consider is the potentiality for a plurality of offences. In the eventuality that during the investigation the presence of an intentional infraction of bodily harm occur during the infraction of the rape we shall have to recognise the presence of a plurality of offences. The plurality of offences shall be between the simple type infraction of rape, the basic type, with the simple type infraction of bodily harm, the basic type. Whenever the offender desires or accepts the infraction used, in our case the bodily harm, we are in the presence of a plurality of offences.

At this point in our scientific discussion we believe it to be necessary to point out the fact that the complex offence is regulated in terms of penalty in the Special Part of the Penal code, where we can find the sanction permitted by law for each infraction, including complex offences [1]. In order for the complex offence to be punishable it must be either consumed or in an attempt form, but an attempt that is punishable by law explicitly. It is the case of the rape infraction presented in Art. 197 of the Penal Code which is punishable both in when it is consumed and when it is under the form of an attempt [3]. On the other hand, comparing the General Part of the Penal Code and the Special Part of the Penal Code we notice the fact that in the general part we are unable to find special norms that discuss the way in which the complex offence is punished, but it is mentioned in Art. 36 alin. (2) of the Penal Code that the law prescribes the punishment for the complex offence. Another important aspect is the fact that in the General part there are regulations that allow for the institution of recalculation upon a final judgement upon a complex offence. According to Art. 37 of the Penal Code, in the eventuality a person upon which it has been issued a final judgement for a complex offence comes before a court for an action or an omission that is part of that specific complex offence the institution of recalculating the initial judgement can be enforced. Under these circumstance, as long as the action or omission is part of the content of the complex offence the person can receive another punishment that is in accordance with the new circumstances, without being possible for the new penalty to be less harsh than the one provided for by the first final judgement.

Considering the type of active subject demande by the law, we consider in full syncronization with the opinion expressed in both praxis and dogma that a complex offence is committed in the condition of an unified criminal resolution. The complex offence has been introduce as an element part of the legal unity chapter also in consideration of the characteristics of the active subject and of the criminal resolution that depicts best this type of infraction. Furthermore, we would like to point out that in the case of the complex offence there is no condition of continuity of its execution over a period of time. In other words, the complex offence does not have to present a material element represented by an action or omission that spans over a course of time. This should not be present in the case of the resulf of the offence in order for it to exist [4]. The criminal activity should not be spanned over the course of time as a result of the fact that a complex offence is an unique infraction. In the eventuality that we have criminal participation, a person shall be

considered author even when that person commits only one act that is an integral part of the material element of the infraction. Although we shall continue to be in the presence of a single unitary criminal resolution, this criminal resolution will be visible more complex by comparison with other types of infractions. As a result of the fact that the complex offence presents both a principal judicial value and a secondary judicial value, the person committing the infraction shall have the representation of both immediate results that correspond to the dual judicial object. Consequntly, as a result of the fact that we have more than one action or omission we will be in the presence of several imediate results corresponding to the acts of execution. The situation shall remain the same even in the eventuality the offender shall lauch the acts after the asset has been stolen in an attempt to maintain possession of the stolen asset, for example by exercising act of violence against the owner in order to keep the asset while struggling to deter the real owner from recovering the asset. In sucha situation, the offeder has a clear representation of the acts he launches, acts that are considered necessary in order to maintain possession over the asset that has been dishonestly acquired.

Moving on to the passive subject we notice the fact that the complex offence knows a flexible nature because it allows to be executed both in the presence of a single and a multiple passive subject. At this point in our scientific endeavor it is important to note the fact that there is a powerful nexus between the judicial object of the complex offence and the passive subject. In the eventuality the judicial object shall be constructed around two identical social values we will always be in the presence of a multiple passive subject. In order to better understand this theoretical concept we submit towards your consideration the example in which a murder is committed with basic intent and in its aggravated type results in the murder of multiple victims. Although when discussing complex offences we consider the existence of a principal passive subject and one or multiple secondary passive subjects, this is not a condition for the existence of a complex offence. Likewise, we are unable to state that this case represents a general, almost overwhelming presence in praxis and in dogma. Of equal importance is the fact that the principal passive subject has to be unique, while the secondary passive subject can be represented by one or multiple individuals without inflicting change upon the unitary character of the complex offence. The integrity and unity of the complex offence is given by the singularity of the principal passive subject and of the singularity and unity of the criminal resolution, such a powerful link resisting the presence of multiple secondary passive subjects.

This statement presents great importance especially when considered real cases such as the situation in which after completing the main action, that of taking possession of an asset, the offender exerts violent acts against the employees of the company from which the asset was stolen. Such a situation shall not result in a plurlity of offences equal with the number of employees against which the offender exerted the violence in order to maintain the possession of the asset as a result of the fact that the plurality does not involve the main action that targeted the principal passive subject. The principal passive subject has been the target of the criminal resolution that was represented by the wish to take possession of the asset [5]. As long as the plurality characterises only the secondary passive subjects, the circumstance is of no influence upon the criminal perspective of the infraction. In this example, in order for the infraction of robbery to be consumed it needs for the action that represents the theft to be consumed.

The next conclusion results directly from the legal texts and it concernes the fact that the complex offence presents a complex juridicial object as a result of the multitude of social relationships it protects. Practically, although through the presence of the absorption process the reunited offences are left without their autonomy, being stripped of their entire criminal autonomy, they continue to exist within the infraction through the presence of the judicial objects which are transmitted to the resulting complex offence from the process of reunification or absorption. The judicial object of the infractions which undergo the process of unification or absorption live on as part of the judicial object of the complex offence defining it. Thus, we can say that the infractions that are reunited or absorbed do not produce separate judicial effects, but create the complexity of the judicial object that lies behind the complex offence. In the case of the complex offence, as a result of the living on of the judicial object beyond the process of unification or absorption we notice the first element of continuation even beyond this legal process of natural unity. The judicial objects are to be discovered within the complex offence, being integral parts of the judicial object of the complex offence. Nevertheless, these social values shall not be treated in a similar manner. On one hand we will have a social value that will emerge as the principal one, and on the other hand we will have a social value that will emerge as the secondary one. This hierarchy shall be relevant in the process of placing of the infraction within the categories of the Penal Code. Furthermore, this element shall be very useful in establishing the existence of an attempt. For example, the infraction of robbery which is stipulated in Art. 233 of the Penal Code shall be placed in Title II. Infractions against the patrimony as a result of the fact that the principal judicial objects protects the social value refering to the asset. This is a direct result of the fact that the principal social value that receives protection is the one refering to property, possession and legitimate custody and it will be considered consumed the moment in which the patrimony of the person shall be affected by the infraction. Analysing the nature of the judicial object we shall notice the possibility for the social values to be of the same nature, as well as the likelihood for them to be of a different nature. Supposing we are analysing the infraction of aggravated murder directed against two or more persons [1] we shall notice the presence of social values that are of the same nature resulting in the conclusion that although it is kept the dual nature of the judicial object it becomes homogenous.

Analysing the infractions that represent the group of complex offences we notice that the material element will be represented by the material element of the infraction that is absorbed or reunited within the content of the complex offence. A careful glance upon the complex offence lets us understand that it can be the result of both action or omission. A first difference between a plurality of offences with relationships between the composing infractions and the complex offence. This difference lies in the fact that for a complex offence to exist it does not need an etiological or a consequential relationship between the acts of execution. Similarly, we notice the fact that the legislator desires to sanction certain types of behaviour that result from the reunification of a series of actions or omissions. The material element of the infraction that absorbs merges with the material element of the infraction that is being absorbed creating a common structure. This results in the conclusion that the lack of one of the constitutive elements is equal with the dissapearance of the entire infraction. At this point in our discussion is paramount to underline the fact that at no moment in time is there the possibility of existence for a complex offence in the lack the material element of the infraction that is being absorbed or that absorbs.

The execution acts of the offender come to form the objective side of the infraction which can exist under two types. Under the first hypothesis the objective side of the offence can present two or more components, but components that have to absorb and be absorbed. The action that absorbs must be always constituted by an action, never an omission. Under the second hypothesis, the complex offence displays an objective side which is constituted only by one action. One action is present in cases such as the murder directed against two or more persons. In case the offender uses identical actions we shall be in the presence of an homogenous action. Thus, the robbery constructed by two actions, one of theft and one out of violent acts are unhomogenous acts, while the murder against two or more persons has a character detailed by homogenous acts of execution.

The immediate result has also a dual nature because it is directly in nexus with the duality of the judicial object. As a consequence of this dual nature we shall be in the presence of an immedite result corresponded to the principal judicial object and an immediate result corresponded to the secondary judicial object [6]. The infraction of abusive conduct provisioned for by Art. 296 of the Penal Code has a judicial object that protects the normal progress of work relationships, placing it among the infractions that are concerned with the work environment, but it also presents a secondary judicial objects that is built around the dignity, physical integrity and general well being of a person. In case the infraction is realized through violence, this offence comes to sanction the inadequate behaviour of the public servant towards the citizens with whom he comes into contact during the period of time in which he exercises the attributes of state representation. In this care the coresponding immediate result shall be represented by the state of danger directed against the normal development of worlk relationships, as well as an immediate result that translates into the breach that has been brought about to the health and integrity of the citizen that has been negatively influenced by the behaviour of the public servant that can be represented by offensive language, threats or even physical violence.

Despite this discussion we can not conclude that the existence of the complex offence depends on the existence of a multiple immediate result because it can also be an unique immediate result. Nevertheless, it is essential to have an immidiate result that corresponds to the principal judicial object because it is this social value that enjoys full protection from the legislator. Although the immediate result is connected with only the principal judicial object and to the principal deed, another condition for the existence of the complex offence is that in the moment in which it is consumed or prior to this moment the absorbed action or omission has to be consumed as well. Although we are not interested in the immediate result corresponded to the absorbed infraction the existence of the complex offence depends on the proper execution of the action or omission of the deed that is being absorbed.

Analysing the implementation of other penal law institutions we notice no changes in vision in the New Penal Code as a result of the fact that these institutions are to be applied in consideration of the legal unity that continues to hover over the complex offence although it reunites within its own content the content of more than just one infraction. The complex offence is considered to be consumed the moment in which the material element that represents the objective side of the infraction is consumed and the expected and anticipated by the penal law is produced. There are situations when the objective side of the complex offence does not come to fruition. To further discuss this situation we submit for your consideration the case of a robbery where the action of threatening a person occurs, but the act of taking possession of the belongings of that person does not. In such an event we will

be dealing with an attepte robbery, not a consumed infraction of robbery. In the likelihood in which all but the objective side of the elements that represent the the constitutive content of the infraction do not occur we will be in the presence of a dissapearance of the legal unity imposed by the legislator, all of the infractions that built the complex offence shall be emerging as autonomous and regain their criminal individuality. For example, we submit for your attention the case of a public servant that is put under pressure through the use of threats outside the time of performing his work related duties and not in connection with the job of a public servant. In this case the infraction of threatening a person regaings its criminal autonomy because it is directed towards the person, not against the authority of the state, as it is the case with the complex offence.

In the likelihood that during the execution of the material element of the infraction an unexpected occurence interupts it, without the will of the offender, the existence of an attempt shall be established in accordance with the actual circumstances. We can conclude that an attempt occurs when the offender has completed the action that represents the absorbed infraction [7]. In the case of a robbery we can conclude that we are dealing with an attempt in the event the offender has hit the victim but was not capable of gaining possession of the asset because the victim's cry or the public cry has stopped him from completing the robbery. In this case it is vital to note the fact that whenever the offender has been interupted from completing the absorbed infraction of theft for reasons that were independent of his personal will, without actually completing the action or omission that represented the absorbed infraction we shall consider that an attempt to the infraction of theft has occured. This solution continues to exist even in the case in which the offender intended to hit the victim or to exert violence upon the person in order to gain unlawfull possesion of the asset. It is trully important to remark the presence of the deeds that represent the infraction that is being absorbed. These acts need to be present not only at the level of the consumed complex offence, but also at the level of an attempt, in order for the legal norms concerning the complex infraction to take effect. In the absence of the absorbed infraction the offendar shall be held responsible only for the infraction that absorbs. In this eventuality this infraction shall regain its criminal autonomy within the legal norms and the person shall be held responsible for it, no matter what was the criminal rezolution that started the criminal activity. In such a situation the legislator shall focus upon the existence or inexistence of the acts that belong to the infraction that shoud be absorbed and not on the actual will of the offender.

The institution of withdrawl functions in relation to the principal deed. On logical grounds, in case withdrawl happens once the absorbed infraction already occured, the offender shall be held responsible for this infraction, not for an attempt at the complex offence. This is the case in which the offender shall be held responsible for the absorbed infraction which in the case of actually committing the absorbant infraction would have been punished as an internal part of the principal deed.

The subjective side of the complex offence shall be constructed around the existance of direct intent, respectively, the existence of direct and indirect intent. Naturally we also include among the possibilities the qualified intent, the premeditated intent and the intent that occured during the execution of the infraction. A special place in our discussion is occupied by the oblique intent. Both praxis and dogma have established that whenever in the case of a complex infraction with oblique intent the worst case result of the secondary action has occured, the penalty shall be established in accordance with the consumed complex

offence. At this point we remind our reader that the complex offence presents a principal judicial object and a principal act of execution. By analysing these two elements we can establishe accurately the moment in which the infraction was committed. Considering these arguments we note that the complex offence is consumed when the immediate result that is strictly in nexus with the principal deed occurs.

The progressive infraction can be found under the type of a complex offence. Nevertheless, it is important to note the fact that the existence of intent does not necessarily overlap with the existence of a unity of criminal resolution. Regarding all the other cases that may occur involving the complex offence the legislator has established the proper way of punishing it through the provisions present in Art. 36 alin. (2) and (3) of the Penal Code. Likewise, it is important to underline the fact that the complex offences in their aggravated type are committed most of the time with oblique intent, such as the infractions provisioned for in Art. 236 of the Penal Code and in the 218 Art. alin. (4) of the Penal Code.

Conclusions

The existence of the complex offence is the result of the desire of the legislator to reunite in the content of a single infraction multiple deeds that each in its own right constitute the content of an infraction that is also provisioned for as a single and separate infraction that could be punishable and investigated in full accordance with the law. The existence of these elements that pertain to plurality rely on the will of the legislator not so much on the actual facts. Whenever we may encounter a statement that underlines the fact that we are not in the presence of real facts determining the infraction we should picture in our minds the existence of a subjective or objective nexus between the aim and the instruments used. We conclude that it is necessary for one infraction to happen in order for the other to happen as well. This translates into the necessity for the absorbed infraction to happen in order for the infraction that is doing the absorbing to exist and be punishable in accordance with the law. The condition is met whenever there is a legal norm that punishes the infraction used for the execution of the infraction that absorbs. The complex offence is meant to capture in a more precise manner the level of social danger targeting society through the acts of the offender under those certain circumstances. Also, its creation is meant to offer a complete vision upon the way in which the offender operates in the execution of the offence. The complex offence lies in the paradigm of complexity, not in the paradigm of relationships and connectivity. The complex relationship that is being established between the infraction that is absorbed and the infraction that does the absorbing is a relationship of perfect connectivity. This perfect connectivity tranlates into the fact that the execution acts merge among themselves to the point in which each becomes essential for the existence of the other, but especially for the existence of the ensemble. If there is a relationship of connectivity we shall be in the presence of a plurality of offences, but when we stand in the presence of a complex relationship we shall be in the presence of a complex offence. The line separating the plurality of offences and the complex offence is represented also by the way in which the constitutive elements interact. In the case of a plurality of offences, the constitutive elements present a similar degree of social danger, while in the case of a complex infraction we should not overlook the fact that the infraction which is a constitutive element is never on equal grounds with the complex offence.

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Problems in the Legal Practice Regarding the Misfeasance in Public Office

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Abstract

In criminal matters, the principle of legality of incrimination "*nullum crimen sine lege, nulla poena sine lege*", requires that only the Parliament can determine the conduct the primary recipient of the law has the obligation to observe and under no circumstances other authorities in the adoption of secondary regulatory acts.

In connection with the offense of malfeasance in office, the Constitutional Court of Romania has decided by Decision No. 405/2016 that the provisions of Art. 246 of the 1969 Criminal Code and Art. 297 of the current Criminal Code violate the provisions of Art. 1 par. (4) and (5) of the Constitution by allowing the configuration of material component of the objective side of the offense of offense of malfeasance by the activity of other authorities, other than the parliament or the government by adopting ordinances and emergency ordinances.

Therefore, it was ascertained that it occurred a change of the elements of the offense of malfeasance in office in terms of the objective side, the applicability of this crime being limited by excluding all the cases where the alleged regulation broken by an active participant to the offense, is not a law, an order or an emergency ordinance.

As the recent practice of the courts of law showed different interpretations regarding the existence of the constituent elements of the offense malfeasance in office, this article will analyse the legal issues involved and practical solutions in the light of the above-mentioned decision.

Keywords: *principle of legality, malfeasance in office, official duties, law, emergency ordinance.*

The introduction of the New Penal Code (adopted by Law no. 286/2009 Official Gazette 510/24/2009 and implemented by Law no. 187/2012, Official Gazette. 757/11.12.2012) entered into force on February 1st, 2014 amended also the offenses of malfeasance in office against personal interests, against the public interest and by the restriction of some rights provided under the previous Criminal Code Art. 246-248, merging them in a single article referring to malfeasance in office – Art. 297 Criminal Code, in a standard version of the offence – par. (1) and an assimilated version – par. , and under Art. 308 we have attenuated version and under Art. 309 the aggravated one mentioned in the previous 248 article of the Criminal Code.

In the standard version, the legal content of the offense malfeasance in office refers to "*the act of the official that in his/her line of duty, does not perform or improperly performs an act thereby causing damage or harming the legitimate rights or interests of a natural or a legal person*".

This standard type caused a series of confusions regarding the protected social value therefore some constitutional challenge were raised on the dockets of the courts regarding both the provisions of Art. 297 of the current Criminal Code as well as the provisions of the former Criminal Code under Art. 246-248 because, regardless of the previous or current provisions, this offense was considered to include provisions lacking predictability and accessibility because the definition cannot exactly determine the phrase "*does not perform or improperly performs"* for the conduct that defines the material element of the offense, nor the phrase "*harming the rights or interests of a person*" which would be the consequence of the alleged criminal activity.

Compared to the previous regulation it was eliminated the phrase "significant disturbance to the smooth functioning of an authority or a state institution or of another institution of the ones referred to under Art. 145 (former Art. 248), being left only the situation when "it is caused a damage or harm to the rights or interests of an individual or a legal person".

Regarding the *legal object* of the crime that is the social relations that ensure a good performance of the office duties, and in case of a prejudice the legal matter refers to the social relations on heritage protection.

We believe together with other authors that the offense of malfeasance in office has no material object and it exists only when it is reflecting on certain assets.

Regarding the *crime subjects,* we can prove that the *active subject* of the offense of malfeasance in office under Art. 297 Criminal Code is a public servant as defined in the Art. 175 par. (1) and (2) of the Criminal Code. As some authors expressed [2], for criminal liability is required existence of a work relationship, as this offense as described by the law can be committed only while exercising the line of duty.

We agree with this perspective, but under the circumstances when we have an extension mentioned under Art. 308 Criminal Code showing that the provisions on civil servants apply to "*properly and the offenses committed by or in respect of persons exercising permanent or temporary, with or without remuneration, a commission of any kind in the service of individuals of those referred to in Art. 175 par. (2) or under any legal person.*" we cannot talk necessarily about a breach of duties, when a person executes an activity without remuneration or commission of any kind, the criminal law extending unduly in these situations the application area, meaning that any person should be liable for malfeasance in office even in an attenuated form prescribed by the law.

Criminal partaking is possible in all forms, but for complicity the above-mentioned requirements need to be met.

The *passive subject* of the offense may be a public authority, public institution, the legal entity under which the active subject operates or when under the circumstances mentioned by Art. 308 when the active subject harms the interests of natural or legal persons.

The problems arising in the practice of law relates in particular to the objective side of the offense and the content that is the *material element.*

According to the content of a crime an act represents the operation to be carried out by an active subject, according to its office attributions, of a legal assignment received or when requested by a person.

The phrase "*does not meet the act*" means to neglect to act, to fail to act, an act that is the responsibility of civil servants or the persons mentioned by Art. 308 Criminal Code. It is irrelevant whether the active subject has violated one or more duties or the failure to act is partial.

Also, the phrase "*performs badly*" when referring to the act provides that the active subject performs the act under other circumstances than required by law.

The material element of the crime mentioned in the reading equated to Art. 297 par. (2) consists either in restricting the right of any person or creates for that person a situation of inferiority based on race, nationality, ethnic origin, language, religion, sex, sexual orientation, political affiliation, wealth, age, disability, non-contagious disease or HIV/AIDS.

The *essential requirement* for the offense of malfeasance in office is however that the public official to be in the exercise of his duties, and in the circumstances described by Art. 308 Criminal Code to have a commission of any kind for serving one of the legal person mentioned under Art. 175 par. (2) Criminal Code.

Since on the dockets of the courts there were files regarding this offense of malfeasance in office, as mentioned above, it was raised an exception of unconstitutionality regarding the phrase "*poor performance*" due to the unpredictability and lack of clarity of the criminal provision under Art. 297 of the Criminal Code, thereby breaching the provisions of Art. 1 par. (5), Art. 21 par. (3) of the Constitution, Art. 6 of the Convention for the Protection of Human and Fundamental Freedoms and the United Nations Convention against Corruption adopted in New York and thus Art. 11 par. (1) and (2) and Art. 20 of the Constitution. The motivation for this exception states that the official knows the ideal conduct that must be follow and which should abide being held responsible for a crime punished very severely.

By Decision no. 405 of June 15th, 2016, published in the Official Gazette of Romania, Part I, no. 517 of 07.08.2016, the Constitutional Court decided that the provisions of Art. 246 par. (1) of the Criminal Code of 1969 and Art. 297 par. (1) of the Criminal Code are constitutional insofar as the phrase "*performs badly*" is read "*performs violating the law*".

The motivation for the decision, in par. (60) states that "*the failure or improper performance of an act must be assessed only by reference to office responsabilitiesexpressly regulated by primary laws – laws and ordinances of the Government*", this is because adopting secondary regulatory acts to detail primary laws is done solely within the limits and according to regulations that require them.

The Court also notes that if the failure or improper performance of an act would not relate to the office responsibilities mentioned in the law or similar decree, this would lead to a situation when the material element of the offense of malfeasance in office to be described both by the legislator, Parliament or Government as well as other institutions, including private legal persons, in the situation of a job description, fact not acceptable in the legal system of criminal law. The Court concludes that the regulations issued for the execution of the laws and ordinances of the Government shall be issued only within the limits and according to rules they subordinate to.

On the active subjects of malfeasance in office, the Court noted in paragraph 76 of the motivation of the decision "*that currently any act or omission of the person who falls within the required features of the active subject, regardless of the seriousness of the offense, may be included in the scope of incrimination. This ascertainment led the Court to be reluctant in appreciating that this was the intention of the legislature when incriminating the offence of malfeasance in offic*e. *This is particularly true since the Court ascertains that the legislature identified and regulated at the legislative, non-criminal level, the necessary levers to eliminate the consequences of acts that, although according to the current rules can fall under the offense of malfeasance in office, there is no degree of intensity set, necessary to implement criminal penalties".*

To this reasoning of the Court, we think that the facts that do not meet the elements of the offense of malfeasance in office listed under Art. 297 par. (2) Criminal Code will be contraventionally sanctioned pursuant Art. 2 and Art. 5-15 of Government's Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination.

Furthermore we discuss the non-application of Art. 297 par. (1) of the Criminal Code when the alleged violations of law committed by the active subject, are an offense with regards to the compliance by local authorities with some provisions of Law no. 446/2006.

When is considered that these facts meet the elements of the offense of malfeasance in office this seriously violates the principle of legality of incrimination mentioned in Art. 1 Criminal Code and Art. 23 par. (12) of the Constitution because the number of actions and omissions committed for the same unique criminal offence is not important, as long as the three essential features are fulfilled in accordance with Art. 1 of Ordinance no. 2/2001 and the illegal nature concerns only certain social values protected by distinctive legal liability.

After the decision of the Constitutional Court the Parliament or Government have the obligation within 45 days of its publishing to determine according to Art. 147 par. (1) of the Constitution the provisions declared unconstitutional in order to bring them in line with the Constitution because otherwise they cease their legal effects

Similarly, the provisions of Art. 31 par. (3) of Law no. 47/1992 on the organization and functioning of the Constitutional Court stipulate that "provisions of laws and ordinances in force declared unconstitutional cease their legal effects within 45 days from publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as appropriate, do not line up the unconstitutional provisions with the Constitution. During this time the provisions declared unconstitutional shall be suspended de jure".

Some authors [3] consider that failure to take legislative measures on time in accordance with Decision 405/2016, leads to the conclusion that the offense of malfeasance in office is abolished and some people may be responsible, possibly for some subsidiary various offenses or for different acts committed in addition to the malfeasance in office.

Incidentally, in the legal literature [2] it has been proved that because the material element of the offense is subsidiary, it will be considered only if the constituent elements of other crime are not fulfilled.

Recent judicial practice [4] in several cases marked that, pursuant to Decision no. 405/2016 of the Constitutional Court of Romania, the offense of malfeasance in office mentioned by Art. 297 of the Criminal Code doe not subsist if the office responsibilities broken are

not covered by laws or government ordinances, which leads to the discharge of accusations under Art. 16 letter b) Criminal Procedure Code.

The *immediate result* of the offence of malfeasance in office is considering two alternatives, namely causing a damage or harming the rights or interests of a person.

Because there are situations in practice when the acts of abuse are committed under the previous laws and there is a question of applying the more favourable law, given that new regulation does no longer include the phrase "*important disturbance*" on the dockets of the Constitutional Court is again an exception of unconstitutionality of Art. 248 par. (1) sentence II of 1969 Criminal Code as this phrase contradicts the constitutional provisions contained in Art. 1 par. (5), Art. 21 par. (3) of the Constitution and Art. 6 of the ECHR according to which parties have the right to a fair trial.

By Decision No 390/July 2nd, 2014, the Constitutional Court stated essentially that a legal concept can have a different meaning and content from one law to another, provided that the law using the term defines it. Otherwise, the recipient of the regulation is the one who will set the meaning of that notion, interpretation that can only be subjective, and therefore discretionary. Although Art. 297 removed this provision for significant disorder, the Constitutional Court will need to rule for the situations where application of more favourable criminal law refers to the former Criminal Code, where the phrase *significant disorder* exists.

It needs to be proved the *causality* between the *material element* through the action or lack of action of the active subject and the immediate consequences.

In terms of the subjective side, the specific offense of malfeasance in office, and here we refer to the standard option, is direct or indirect intention.

As with other types of crimes, the existence of an intention implies to prove that the person committing the offence foreseen the actions or lack of actions which are either causing a prejudice or harm the rights or interests of a person. The word "knowingly" present in the old regulation was removed because otherwise the meaning would have been that the offence could occur only with direct intention.

For the situations mentioned in the version equated to par. (2), most authors consider that the intention is only direct because the subjective aspect of an offence has an essential requirement for a certain *reason* that justifies the guilt.

For the offense of malfeasance in office the attempt is not sanctioned and only the immediate consequence is considered as contravention. If the effects are prolonged in time in the sense that multiple material acts take place, the offence is considered recurrent.

If the acts committed are both in the standard form and in the assimilated one they will not be considered as multiple offences and it will be considered only the offence of malfeasance in office depending on the actual circumstances and in some situations the provisions of Art. 308 or Art. 309 of the Criminal Code or Art. 132 of Law no. 78/2000 may apply.

As stated in the legal practice, we believe that the existence of the malfeasance in office mentioned under Art. 297 par. (1) is partially abolished and applies only to the law provisions or governmental ordinances that are violated by the public officers while exercising their duties and not other legal regulations implementing the law or government's ordinances with law effects.

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The Limitation of Liability in the Domain of the Criminal Law of the Orthodox Church and of the State. Comparative Aspects

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Abstract

The present study is a bit unusual for the legal publishing world, due to the fact that the subject of the limitation for the criminal liability of the Church was almost never approached, let alone compared to that from the state law. This article has as the aim to bring into the attention of the readers *the beauty of the Church law institutions*, their specifics, but also to point out the capacity of the ecclesiastical institutions of cooperating with those of the state. Although there are doctrinal theories[1] *that aim for a total separation between church law and state law*[2], the two areas of law continue to interact and influence each other.

Limitation is a legal institution very often encountered in the most important domains of law, such as civil law, criminal law but also church criminal law. In this sense, the constitutional Court itself stated in a rule that *the institution of limitation is inherent to every system of law, answering to an objective need for legal discipline in social life*[3]. We can point out the universal or common nature that this institution has. In the present study I will analyze and compare certain legal aspects of the limitation of criminal liability both in the ecclesial, church sphere, as well as in the state. As main sources I wish to mention *The Regulation of the Canonical Disciplinary Authorities and of the Courts ofLaw of the Romanian Orthodox Church*[4], The New Penal Code[5], but also *professional works* done in the two fields.

Keywords: *limitation of criminal liability, Romanian Orthodox Church, Criminal Code.*

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[1] *The anti-canonical Theory of Spiritualism* in an example in this sence. L.-M. Harosa, *Drept canonic (Canonical Law)*, Universul Juridic Publishing House, Bucharest, 2013, pp. 19-20.

[2] Considering that the Church is a divine, spiritual reality (gr. πνεωμα) and manifests itself only in the internal forum (which concerns only the spirits) the conclusion some reach is that The Church and the law should be in contradiction with each other. L.-M. Harosa, *in the cited work*, p. 19.

[3] This is regarding the Decision of the Constitutional Court of Romania no. 287 of November 2001, regarding the unconstitutionality exception of the provisions of Art. 11 par. (2) let. b) and those of Art. 10 let. g) of the Criminal Procedure Code, as well as those of Art. 121 par. (1) and art 124 of the Penal Code, decision published in the Official Gazette of Romania, Part I, no. 14, of January 2002.

[4] Which we will name in the present article *The Regulation of the Canonical Authorities*.

[5] Adopted through Law no. 286 of 2009, published in the Official Gazette of Romania, no. 510 of the 24th of july 2009, in force since the 1st of February 2014.

1. The Definition and the Characteristics of the Limitation of Criminal Liability in the two domains

The Dictionary of criminal law and criminal procedure defines the term limitation in the general sense as being *a cause for the removal of criminal liability or of the execution of the sentence due to a period of time provided by the law having passed*. [1] A different sentence defines criminal limitation as being *extinctively applicable to actions borne out of* crimes [2].

The definition of the institution, contained within church and state criminal law presents both distinctive elements (of separation) and common elements. Thus, at the level ofchurch regulation the limitations is consecrated in Art. 177 par. (1), having the following text: *Limitation of liability represents a discharge from the right of the canonical Church authorities of holding accountable one of the persons to whom the provisions of the present Code of Conduct apply, after a certain amount of time has passed since the transgression was committed* [3]. In the New Penal Code the lawmaker of the state stipulates in Art. 153 par. (1) only that *Limitation eliminates criminal liability*[(6)]. Faced with this incomplete statement we can say that *prescription of criminal liability constitutes a discharge*[(7)] *of the right of the state to hold the criminal offender accountable due to the long passage of time that has elapsed since the crime has been committed*.

Although *Regulation of the Canonical Authorities* and *the New Penal Code* have different names, they are in essence, *organic laws, with the same legal value in their own fields of expertise.* But the complete opposite can also be remarked, in which legal normative acts have the same name, both in Church law as well as in the State law, but they express different values. An example in this sense we evoke Regulations, which in the State law have the role of putting the law into application, while in Church law they are organic laws.

It is interesting to observe that in the Orthodox Church criminal law the definition of the of limitations has as source legal rules exclusively[(8)], while in the domain of the State criminal law the definition is contained in the specialty doctrine. We can qualify this situation we encounter in the two domains of law as *a symmetrical evolution in antagonistic plane.* Why we make this statement? Because the church lawmaker did not analyzed and apply much of the institution in cause, thus feeling the need to define it in its entirety at a normative level.

In the case of the state lawmaker, due to the repeated application of the limitation, he preferred a much more succinct consecration at a normative level[(9)] the doctrine proceeding to a more ample development of the definition at a theoretical level.

[(6)] Art. 153 par. (1) of the New Penal Code.

[(7)] In our vision, we consider that the expression *discharge of the right of the state* better reflects its quality as a subject of rights and obligations within the legal system. The expression *act of Renouncement of the state,* encountered in the doctrine as well, can induce the belief that the state is somewhat discretionary in employing criminal liability. It is the very limited nature of the limitation of liability of the action that shows the incapacity and the obedience of the state to the law.

[(8)] Referring to Art. 177 par. (1) of the Regulation of the Canonical Authorities.

[(9)] Through Art. 153 par. (1) of the New Penal Code.

In conclusion, regarding the definition of the term of liability prescription in the two domanins I wish to point out the following:

a) The prevalence of the normative element in rapport with the doctrinary one, in the case of orthodox church criminal law;
b) The prevalence of the doctrinal element in relation with the normative one in the case of state criminal law.

Regarding the essential characteristics of the limitation of liability, both forms of the institution reveal two common elements, *the extinctive element* and *the temporal element,* but also an *objective element* that separates them fundamentally. The extinctive element implies the fact that both the canonical church authorities and the state authorities encounter *a discharge from the right to hold the offender accountable*. The temporal element concerns the fact that in both cases the limitation of liability operates through *the simple passage of time*, without having to accomplish other procedures. However, we must state that this simple passage of time gains legal force exclusively *ope legis,* meaning on the basis of a text of law.

Thus, if in the New Penal Code it is stipulated in Art. 153 par. (1) that *Limitation eliminates criminal liability,* in art 154 par. (1) let. a)-e) the very statute of criminal limitation terms are provided:

a) 15 years, when the penalty provided by the law for the offense committed is life imprisonment or a term of imprisonment exceeding 20 years;
b) 10 years, when the penalty provided by the law for the offense committed is a term of imprisonment exceeding 10 years, but no more than 20 years;
c) 8 years, when the penalty provided by the law for the offense committed is a term of imprisonment exceeding 5 years, but no more than 10 years;
d) 5 years, when the penalty provided by the law for the offense committed is a term of imprisonment exceeding one year, but no more than 5 years;
e) 3 years, when the penalty provided by the law for the offense committed is a term of imprisonment not exceeding one year or a fine

In The Regulation of the Canonical Authorities the limitation of liability terms are only two. So, Art. 177 par. (3) state the fact that *pastoral – liturgical transgressions, regarding the accidentally committed religious services is limited to three years from when they were committed, if it is not a continued offense*. *Church services* represent acts or services done by a priest, through which the blessing and grace of the Lord is transmitted to the members of the Church (e.g. burials, preaching, etc.) *Per a contrario* violations that damage the religious services and to which the limitation of criminal liability of the church apply are the following: the refusal of the clergy to provide funeral services for people from poor families, on financial grounds, Art. 31; refusal of preaching or catechesis, Art. 33; etc.

The second term of limitation of criminal liability of the Church is contained in Art. 177 par. (4), which provides that *all offenses mentioned in the Regulation, except the ones mentioned in Art. 177 par. (2) and (3) have a term of limitation of liability of 5 years from their being conducted, if they are not constant offenses*[10].

Regarding the objective element of the limitation of liability, which separates the state authority from the canonical church authority, I mention the following:

[10] *The Regulation of the Canonical Authorities*..., p. 124.

a) In the case of the state, it limits itself, in the sense that it accepts that through law to discharge itself from the right of coercion. This fact brings us to the conclusion that *the state cannot exist outside the law*, [4] but instead is integrated as part of the law. Moreover, this auto – limitation of the state is exactly an *in concreto* application of the principle that states *the power that limit power*.
b) As far as the canonical Church authorities are concerned, even if their right to hold an offender accountable is discharged, according to the canonical doctrine, *the essence of these authorities is divine in nature*[11]. The state authority is purely human, built by the will of people, while the church authority is based on the will of the Son of God who, through sacrificing Himself on the Cross, built the Church and endowed it with *infallibility*[12]. In this sense dogmatic theology specifies that *The Church is infallible in its entirety, because Christ the Infallible is part of it*. [5]

2. Incidental Subjects of the Limitation of Criminal Liability in the two domains

Both in the case of the ecclesial criminal report as well as in that of the state we identify two categories of subjects. Within the Church a main subject to whom the institution of the limitation of liability is addressed is *the canonical church authority*[13], which, according to Art. 1 par. (1) of *The Regulation of the Canonical Authorities* [3] is the *bishop and council of bishops (Metropolitan and Patriarchal)*.

In state criminal law a main subject upon which the extinctive effect of the limitation of liability is applied is invariably the state. [6] The fact that both the state and the canonical church authority suffer the effect of the discharge from the right of coercion entitles us to point out *the burdensome nature of limitation for criminal liability*[14] for society.

In the branch of criminal Orthodox Church law the second category of incidental subjects of limitation of liability are represented by *the persons to which the present regulation applies*[15]. As a consequence, we extract from Art. 2 of the Regulation that these persons can be *clerics, monks and lay people from the church units and church administration in Romania and abroad, found in theological education and university professors of religion, the clergy from public or private institutions, retired clerics and monastic, students of the Orthodox Faculty of Theology, theology graduates and other people working in custody and blessing (written approval) of the canonical church authorities* [3]. It is required to specify that, in order for the criminal ecclesial limitation of liability to apply to a private

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[11] The nature and method of formation of the ecclesiastical authority essentially differs by the nature and the constitution of the secular authority or state. The canonical Church authority is essentially divine, because the factor upon which it is based is the element with which Christ Himself empowered His Church, with power from His power (*Matthew* 10, 40; *Luke* 10, 16; *John* 10, 20; *Romani* 1, 16; etc.).
[12] Lat. *Infallo – fallere* = to not fail, to remain loyal. The Church is a *pillar and the foundation of truth* (1 Tim. 3,15), guarded from mistake by the assistance of the Holy Spirit. Pr. Ion BRIA, *Dicţionar de teologie ortodoxă (Orthodox Theological Dictionary)*, Institutului Biblic şi de Misiune al Bisericii Ortodoxe Române Publishing House, Bucharest, 1981, p. 218.
[13] Definition given by Art. 177 par. (1) of the Regulation, p. 124.
[14] We have in mind the meaning given by *The Romanian Dictionary*, as a burden or encumbrance.
[15] Art. 177 par. (1) of the Regulation, p. 124.

person, she must possess both *church citizenship*[16] as well as the *blessing of the Church*[17] for a well – defined activity (e.g. obtaining the blessing to enroll in the Faculty of Theology, obtaining the blessing for teaching Religion in class, etc.). In conclusion, church citizenship and the blessing of the Church represent both *sources of legal rights and ecclesial obligations, as well as cumulative conditions for applying the criminal church limitation of liability*.

In state criminal laws the second category of incidental subjects of the limitation of liability is *the private or legal person author of the felony* [6], regardless of whether or not she has Romanian citizenship. Regarding this aspect, we must take notice of a thing. In the state law, the discharge from criminal liability also applies to offenders that are not Romanian citizens, on the basis of the legal coercion rapport. So, even if there is no link in citizenship between the state and the offender, the institution is applicable to the latter. Moreover, the foreign offender can successfully request the limitation of the criminal liability of the state in the court of law.

In church criminal law the institution of the limitation of liability is not applicable to private persons that do not belong to the church and do not have its blessing, even if they have brought damages to the ecclesial institution. This situation is due to *the specialty of the subjects of church law*. Hence, for these persons the following is mentioned:

a) To the subject that has brought damages to the Church and that has no bond of legal citizenship with it and does not have its blessing, the institution of limitation of criminal liability of the church cannot be applied. However, the institution of limitation of criminal liability of the state can be applied to the subject offender in the case in which he has committed felony against the Church;
b) The offended subject itself cannot call for the limitation of criminal liability of the Church, being inapplicable to him due to the fact that he does not have church citizenship and its blessing. However, he can call for the limitation of felony liability of the state.

As a consequence, in state criminal law we can talk about the practicability and efficacy of the limitation of criminal liability for offenders that are not citizens of the Romanian state as *a rule.* In contrast, church criminal law speaks of, *as a rule,* of not practicability and ineffectiveness of the limitation of criminal liability for the subjects that brings damages to the Church and do not possess church citizenship and its blessing.

Moreover, the New Penal Code stipulates the application of limitation of criminal liability *expressis verbis* in the case of legal entities as well, *the dispositions of Art. 153-156* – with reference to the private person (our note) – *being applied accordingly*[18]*, The Regulation of Canonical Authorities* does not reserve the institution of liability and implicitly the limitation of liability to ecclesial legal entities, being applied to the private person

[16] The institution appoints a legal and spiritual bond of a person to the Church. The Church citizenship is gained through the *Sacrament of Baptism*.
[17] In the case in which a person in possession of ecclesial citizenship and the blessing of the Church for a determined activity commits a transgression, the applied sanction will expressly target the committed transgression which brought damages to the activity for which blessing was granted.
[18] Art. 148 of The New Penal Code.

exclusively. This is due to the strong focus on the human person in the church space, through what is called *the theology of the person*[19].

But another problem arises regarding the enforceability of the limitation of criminal liability in the two domains of law. If in state criminal law things are simple and to the subject, the Romanian citizen, either the limitation of liability of the Romanian state law, or that of the state on which he committed the felony, is applied, when it comes to the Orthodox Church criminal law there is a different situation. In the hypothesis in which the offender is a member of the Church and he commits an act that is incriminated as a transgression but also as a felony (e.g.: a person causes disorder and uses a language unbecoming at the Easter sermon), the following are remarked:

a) The act incriminated as a transgression is stated in Art. 30 of the *Regulation of canonical authorities* through the phrase *Causing disturbances, fighting and using unbecoming language*; [3]
b) The act classified as a felony is stated by Art. 381 of the New Penal Code, where it is stipulated that *preventing or disturbing the free exercise of a ritual of a religious cult [...] is punishable with from 3 months to 2 years in jail or with a fine*.

In consequence, keeping in consideration that the terms of limitation of criminal liability of the church and of the state are equal, the perpetrator will be freed by the discharge from his obligation *after 5 years*[20] since having committed the *felony-transgression*. Of course, in the hypothesis in which The Regulation of the canonical authorities and the New Penal Code provide different terms for the limitation of liability, in this situation the offender (member of the Church) will have in his interest that the longest term of discharge from the right and the correlative obligation should be reached, so that he can no longer be criminally liable.

3. The Effects of the Limitation of Liability in the Two Domains. Considerations

We must state *ab initio* that *the legal criminal rapport is not borne between the author of the offense and the judicial bodies* [6] of the state or the *church consistories*[21]. This rapport is borne exclusively between the offender and the state, or between the author of the transgression and the Church.

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[19] In Orthodox theology the person is the image and uncovering or reflection of the Holy Trinity, and man is Its image on Earth. This belief is very deeply reflected in the ecclesiastical legal sphere and represents a *sine qua non* condition of understanding church law.

[20] According to Art. 177 par. (4) of The Regulation of Canonical Authorities and Art. 154 let. d) of the New Penal Code.

[21] In latin *consistorium*, from the verb *consistere* (to stay together), indicated in the Roman Empire the Emperor's Council. In the Romanian Orthodox Church the term 'consistoriu' defines either a collegial body of law in the aid of the bishop, or a superior collegial body composed of bishops (Episcopal consistory). In the *Regulation of the Canonical Disciplinary Authorities and of the Courts of Law of the Romanian Orthodox Church* consistories are represented as disciplinary courts and courts of church law (art. 59-76). Today, according to Art. 148 par. (2) of the *Statute for the Organization and Functioning of the Romanian Orthodox Church*, the Holy Synod is the court of law for the hierarchs while clergy, monks and the lay staff have the following consistories: the Deanery Consistory, the Eparchial Consistory, the Eparchial – Monachal Consistory (for monks), the Metropolitan Consistory, the Monachal – Metropolitan Consistory, the Superior Church Consistory and the Superior – Monachal Church Consistory.

Both in Church law and in the state law the limitation of liability produces a *double legal effect.* On one side, the right of the canonical church authority and of the state to prosecute the offender is discharged from, and on the other hand the obligation of the offender to suffer the punishment is discharged as well[22].

It is interesting to notice an intermediary situation in criminal church law, with the existence of two types of *coercive institutions*[23] as *epithimies*[24] *and sanctions*. The epithimies are given to the believers during the Holy Confession, and the sanctions are applied by the canonical authorities[25]. We remark the following regarding this double coercive regime: in the case of the applied epithimia, the limitation of criminal liability does not operate extinctively being mainly *the spiritual effect of repentance*[26], while in the case of unenforced sanctions *the extinctive legal effect of the limitation of liability prevails*, the effect of the repentance being incorporated in it[27].

The extinctive effect of bringing to account and, correlatively, suffering the sanction is produced:

a) *After the passage of a certain amount of time since the transgression was committed*[28], in the case of church criminal law;
b) *After the passage of a certain amount of time, following certain conditions, since the felony was committed*…[7], in case o state law.

So, in both law domains even if no condition needs to be fulfilled in order for the limitation of liability to take effect, it is still necessary that it should have legal force exclusively on the basis of a text of law *(ope legis).* In this sense, professor Traian Dima specifies that, *seen for a legal standpoint, the limitation of liability is a de facto situation that produces legal consequences*. [8]

For the sanctioning legal rapport to be born or discharged from, in the two fields of criminal law it is necessary that the *transgression*[29] (for church law) and the *felony (for state law)*[30] to take place. They are very important in relation to the effect of the limitation

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[22] Both the doctrine of state criminal law and the doctrine of the Church criminal law are unitary when it comes to this belief.

[23] Although legally we use this expression, we keep in mind the fact that the Church wants to redeem the sinner, and not to punish him for vindication. In the ecclesial space punishment is seen as a *medicine for a disease* adapted for the abilities or lack thereof of each and everyone.

[24] (gr. επιθυμίες).

[25] In the Regulation of Canonical Autorities there are specified only the sanctions applicable in the Romanian Orthodox Church by the Canonical church authorities – *the bishop or the synod of bishops*. The epithimies are contained in the religious book called *Euchologion*.

[26] The Institution of repentance is of spiritual nature and involves remorse for the offense committed, not repeating it and the practice of virtue – (gr. άρετή).

[27] Although for the state law doctrine it is difficult to understand this thing, in church criminal law we can speak about *the incorporation the spiritual effect to the legal effect*, as in Mystical Theology we speak about the *transfiguration of substance by divine grace* (please consult in this matter the works of specialty of Rev. Prof. Dumitru Stăniloae and Rev. prof. acad. dr. Dumitru Popescu).

[28] Art. 177 par. (1) of the *Regulation*, p. 124.

[29] Father Ioan Floca tells us that the Romanian term *abatere* (*En: transgression*) signifies *the breach of provisions of a disciplinary nature (e.g.*transgressions from the discipline of work). Father Archdeacon Ioan FLOCA, *Drept Canonic Ortodox. Legislație și administrație bisericească (Canonical Orthodox Law. Law and Administration)*, vol. II, Institutului Biblic și de Misiune al Bisericii Ortodoxe Române Publishing House, Bucharest, 1990, p. 239.

[30] The word *felony* means breaking the law and it comes from the Latin word *infractio*.

of liability, because after the transgression or felonyis committed, time begins to pass until it's completion. Likewise, if there is no crime outside of the law – according to the *nullum crimen sine lege* [9], principle, even more so – *a fortiori* – there cannot be a limitation of liability without being a felony or a transgression. As a consequence, both types of illicit acts represent *the objective basis of the limitation of criminal liability* for the two domains of law.

It must also be added that *the limitation of liability does not eliminate the criminal aspect of the act* [7], whether we speak about church criminal law or state criminal law. Even if the limitation of liability puts an end to the legal rapport of sanction between the canonical authority or the state authority and the author of the act, the act will continue to be incriminated by both laws. Moreover, state limitation of criminal liability strengthens indirectly the *principle of legality of incrimination*[31], in the sense that, *if the criminal law provides the acts that are felonies*, the limitation of liability cannot operate extinctively on them.

Both criminal church law and state law consecrate that certain transgressions and felonies that cannot be subject to the statute of limitations. Thus, in Art. 177, Art. (2) of the Regulation of the Canonical Authorities it is stipulated that *dogmatic and moral transgressions, such as murder, divorce, disclosure of secret of confession, remarriage of the secular clergy, theft, cheating in any form and the destruction of church property, forgery of documents*...[32], are not subject to the limitation of liability, due to their high degree of danger these acts create for the members of the Church. Following the same reason of protecting its citizens, the state provides in Art. 153 par. (2) of the New Penal Code that *Limitation of liability does not remove criminal liability in case of genocide, offenses against humanity and war offenses, irrespective of the date when they were committed.* Thus, both the canonical church authority and the state authority can at any time hold the author of these acts liable, regardless of the amount of time that has passed from when they where was committed. The right of the subjects cannot be discharged and is continuous. If *the rule* is represented by the stature of limitations of the transgressions and felonies, *the exception*is precisely the fact that the above acts cannot be subject to the statute of limitations, situation which imposes a strict interpretation and application of the criminal church or state rules. We can point out in this sense *the limits of the extinctive limitation of criminal liability.*

Regarding the institution of not subjecting to the statute of limitation it is imperative that we take notice of a very important aspect in both branches of law. Although the canonical authority and the state have a *right of coercion over the author of the act* [6], this right is in a position of correlativity to the obligation that these subjects have of protecting the members of their two types of society[33]. In this sense although the right of coercion of the ecclesial authorities or of the state authorities can be subject to the statute of limitation, in the express and limitative cases provided by the law, the obligation of these authorities to the members of the two societies cannot, absolutely, be subject to the statute of limitation, in the sense of defense and protection, both of values as well as the

[31] According to Art. 1 par. (1) of the New Penal Code.
[32] Art. 177 par. (2) of the Regulation, p. 124.
[33] The Church is seen from an institutional standpoint as a well organized structured society.

society. We remark, definitely, that *the correlative coercion right* that can be subject to the statute of limitations, but also the *absolute obligation* of protection which cannot be subject to the statute of limitation of liability.

4. Conclusions

This is the resemblance between church criminal law and state law, resemblance which greatly supports the positive double influence of the analyzed branches of law. There is within the doctrine of the canonical orthodox law the concept of *canonizing civil laws.* This concept evokes the introduction of the secular (the state) institutions in the ecclesial sphere, which can be of a real benefit to the Orthodox Church law. Likewise, a positive influence that ecclesial criminal law can bring to the state law is materialized in the *balance and mercy* that the Church shows for its members. Balance and mercy have made it such that in the state law concepts such as *the humanism of the criminal law* have cropped up, expressed through Art. 5 and 6 of the New Penal Code which evoke *the use of the more favorable criminal law* for the offender. It is as wee extraordinary for the canonical theology what the criminal state doctrine has come to understand and theorize, and that it that *behind every committed offense, the offender is and remains a human being*.

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The Offence of Blackmail: Domestic and International Legal Dimensions

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Abstract

The present paper aims at providing an outline of the incrimination of blackmail within the Romanian legislation, supported by relevant national case-law and scholarly opinions, as well as in the more comprehensive context of judicial cooperation in criminal matters, with a special focus on the European Union legal framework. The historical perspective lays the emphasis on the evolution of the national regulation pertaining to this offence, both under the successive criminal codes and some special laws, which culminates with the necessity to tackle new forms of blackmail, such as cyber-extortion, as reflected in the EU instruments. Where appropriate, reference has been made to the norms of incrimination of other European states, for comparative purposes.

Keywords: *blackmail, liberty, constraint, material and non-material benefit, cyber-extortion.*

1. The Incrimination of Blackmail in the Romanian Criminal Law. A Diachronic Approach

1.1. Incipient Forms of Incrimination under the Criminal Codes of 1864 and 1936

The blackmail offence has been inserted within the Romanian Criminal Code of 1864 (also known as the "Cuza Code")[1] by a law dating from May 4, 1865, which was inspired from Art. 400 of the French Criminal Code and a French law dating from 1863, which specifically incriminated blackmail. Under the Criminal Code of 1864, the newly-inserted offence was deemed a new type of fraudulent misrepresentation.

The legal content of the blackmail offence pursuant to this act referred to the act of extorting or the attempt of extorting money, securities, signatures or remittal of documents containing or operating an obligation, liberation or disposal, by means of using verbal or written threats with defamatory revelations or imputations.

[1] As per the version published in the Official Journal of October 22, 1912.

In terms of its position within the Code, it has been placed as the third paragraph under Art. 334, which was part of Chapter II entitled "Crimes and Offences against Property", Section V referring to fraudulent misrepresentation or swindling. The main punishment provided for by law for blackmail was the same as for fraudulent misrepresentation, namely imprisonment of between 6 months and 2 years and a fine in the amount of between Lei 26 and 1000. An interdiction for a limited time could also be applied to the culpable person.

In the Romanian Criminal Code of 1936 (also known as the "Carol II Code")[2], the blackmail offence has been distinctly provided under Art. 495, as follows: the first paragraph provided that the perpetrator who, unjustly aiming to acquire a material benefit, for themselves or for another, constraints a person, through violence or threat, to do, not to do or suffer something, unless the act constitutes a more serious offence, committed the offence of blackmail, which was punishable by correctional imprisonment of between 6 months and 2 years. The punishment was more severe, namely correctional imprisonment of between 1 year and 3 years, under the form incriminated under the second paragraph of Art. 495, if the threat consisted in the disclosure of facts, real or imaginary, that are compromising for the threatened person or for a relative thereof or for a person to which they are bound by a profound affection. As opposed to the contemporary domestic incriminations of the offence, the attempt also remained punishable, as per the third paragraph of the same legal text.

As compared to the Cuza Code, which, as shown above, viewed blackmail as an illicit act brought against property, the incrimination text under the Carol II Code placed blackmail among the offences against individual liberty, making up, next to the offence of threat, Section II of Chapter II ("Offences against Individual Liberty") of Title XIII ("Crimes and Offences against Persons"). This latter regulatory typology has been maintained hitherto.

1.2. The Present-Day Incrimination

1.2.1. The Criminal Code of 1968

Pursuant to the first paragraph of Art. 194 of the Romanian Criminal Code of 1968[3], constraining a person, by means of violence or threat, to give, do, not to do or suffer something, if the act is committed in order to unjustly obtain a benefit, for themselves or for another, was punishable by imprisonment of between 6 months and 5 years.

According to the second paragraph of Art. 194, if the constraint consisted in threatening to disclose a real or imaginary fact that is compromising for the threatened person, for the spouse or a close relative thereof, the punishment was of between 2 and 7 years' imprisonment. This constituted an aggravated version of the offence.

As far as the legal object is concerned, the literature [1] distinguished between a main legal object, represented by the social relations with respect to the moral liberty of the individual, and a secondary legal object, that may comprise the social relations of an economic nature, when a material benefit is pursued, or another rights or interest, when a non-material benefit is envisaged. Thus, it can be observed that this perspective is actually a merger of the two previous concepts of the 1864 and 1936 lawmakers, respectively.

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[2] As per the version published in the Official Journal no. 48 of February 2, 1948.

[3] Published in the Official Bulletin no. 79-79 bis of June 21, 1968, with subsequent amendments and supplements.

This distinction has proven essential in the relevant case-law in the context of determining the correct legal classification. For instance, in one of the cases settled by the former Romanian Supreme Court of Justice, the defendant's plea to change the legal classification from robbery to blackmail has been dismissed as unfounded. According to the court's reasoning, blackmail is an offence primarily directed towards the moral liberty of a person, whereas, in the case of a robbery, the social relations that are mainly affected are the ones relating to property. When committing blackmail, the perpetrator makes use of violence and threat with the purpose of subsequently obtaining a sum of money or other valuables, whereas robbery is generally characterised by using violence or threat simultaneously with the victim's act of giving away their asset [2].

1.2.2. The New Criminal Code. Elements of Comparative Law

As explained under sub-section 2.48 of the Explanatory Memorandum to the New Criminal Code, Chapter VI ("Offences against the Personal Liberty") of Title I ("Offences against the Person") of the Special Part thereof only comprises the incriminations that directly safeguard the physical and mental liberty of the person.

The Criminal Code in force[4] incriminates blackmail under Art. 207, with the following structure [3]:

Paragraph (1) regulates *the basic form* of the offence, which consists in constraining a person to give, do, not to do or suffer something, with the aim of unjustly obtaining a non-material benefit, for themselves or for another, and is punishable by imprisonment of between 1 year and 5 years.

There is also *an assimilated* form, provided for under par. (2), which states that the same punishment is applicable for the threat of disclosing a real or imaginary fact that is compromising to the threatened person or to a family member thereof, with the purpose provided for under par. (1).

Par. (3) of Art. 207 represents *an aggravated version* of the forms provided for under the first two paragraphs, namely if they have been committed with the aim of obtaining a material benefit, for themselves or for another, the punishment provided for by law is of between 2 and 7 years' imprisonment.

The main differences between the current regulation and the previous one are the following: firstly, the threat of disclosing real or imaginary facts is now assimilated to the basic form of the offence, whereas in the Criminal Code of 1968, it was an aggravated version; secondly, the sanctioning treatment is differentiated depending on the aim pursued by the perpetrator, namely either a material or a non-material benefit; thirdly, the manner of constraining is no longer specified as in the old law, which expressly stated that it had to be carried out by means of violence or threat [4]. Also, with respect to the assimilated version, it must be taken into consideration that the phrase "family member", currently defined under Art. 177 of the Criminal Code, is more comprehensive under the new law [5].

Although the structure of the offence under the new regulation is not substantially different from the previous one, some scholars [6] have expressed some critical views on the matter, in the sense that there is a somewhat artificial shift of focus from the element of constraint, which should be at the core of the incrimination, on the element of a benefit

[4] Law no. 286/2009, published in the Official Journal of Romania no. 510 of July 24, 2009, with subsequent amendments and supplements.

(and, with regard to the non-material benefit, the concept is deemed vague, which may give rise to difficulties in interpretation).

In the cited authors' opinion [6], the basic version of the offence should have been incriminated regardless of any reference to obtaining a benefit, such as can be found in the German Criminal Code, under Section 240, entitled "Using threats or force to cause a person to do, suffer or omit an act", which states the following: "(1) Whosoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act shall be liable to imprisonment not exceeding three years or a fine. (2) The act shall be unlawful if the use of force or the threat of harm is deemed inappropriate for the purpose of achieving the desired outcome. (3) The attempt shall be punishable. (4) In especially serious cases the penalty shall be imprisonment from six months to five years. An especially serious casetypically occurs if the offender 1. causes another person to engage in sexual activity; 2. causes a pregnant woman to terminate the pregnancy; or 3. abuses his powers or position as a public official" [7].

Conversely, in the French Criminal Code, blackmail is incriminated under Art. 312-10 as "the act of the obtaining either a signature, a commitment or a renunciation, the revelation of a secret, or the handing over of funds, valuables or any asset, by threatening to reveal or to impute facts liable to undermine a person's honour or reputation" and it is punishable by five years' imprisonment and a fine of EUR 75,000 [8]. The current French incrimination seems to have complied with the same design as the one that had served as inspiration for the 1864 Cuza Code.

The emphasis on protecting property is even more evident under the British legislation as blackmail is incriminated under Section 21 of the Theft Act 1968: "(1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief (a) that he has reasonable grounds for making the demand; and (b) that the use of the menaces is a proper means of reinforcing the demand. (2)The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand. (3) A person guilty of blackmail shall on conviction on indictment be liable to imprisonment for a term not exceeding fourteen years"[(5)].

The Romanian lawmaker has also opted for incriminating blackmail in connection to the unjust pursuit of a benefit, which confers a more serious nature to the illicit act of constraining the mental liberty of a person [9].

Under the Romanian Criminal Code, there are cases of multiple offences involving the acts incriminated as offences against personal liberty, such as illegal deprivation of liberty if in exchange of liberation a material benefit or any other advantage is requested, in which case it is concurrent with the offence of blackmail [5]. Also, if blackmail is part of the purpose of an organised crime group and it is committed within such enterprise, it shall be concurrent with the offence of constituting an organised crime group, as per Art. 367 par. (3) of the Criminal Code.

[(5)] Available online at: http://www.legislation.gov.uk/ukpga/1968/60/section/21.

1.2.3. Special Criminal Legislation

In accordance with Art. 13[1] of Law no. 78/2000 on the prevention, discovery, and sanctioning of corruption acts, with subsequent amendments and supplements[6], as amended by Law no. 187/2012 for the enforcement of Law no. 289/2009 on the Criminal Code[7], in the case of the blackmail offence, as per Art. 207 of the Criminal Code, involving a person among those provided under Art. 1 of the same law, the special limits of the punishment are increased by one third.

The categories of persons referred to therein are the following ones: (i) those who hold a public position, regardless of the manner in which they were invested, within the public authorities or public institutions, (ii) who fulfill, permanently or temporarily, according to the law, a position or task, to the extent that they participate in the decision-making process or may influence them, within the public service, autonomous companies, trading companies, national companies, national societies, cooperative units or other economic agents or (iii) who grant specialised assistance to the aforementioned units, to the extent to which they participate in the taking of decisions or can influence them; (iv) who carry out control duties according to the law; (v) who, irrespective of their capacity, achieve, control or grant specialised assistance, to the extent to which they participate in the decision-making process or can influence them, with regard to operations that involve capital circulation, banking, hard currency exchange or credit operations, investment operations in stock exchanges, in insurance, in mutual investment or regarding the bank accounts or those assimilated thereto, domestic and international transactions; (vi) who have a management position in a political party or formation, in a trade union, in an employer's organisation or in a non-profit association or foundation; (vii) other natural persons, under the terms stipulated by law.

This article had been inserted by Law no. 161/2003 regarding some measures for ensuring transparency in the exercise of public office, public positions, and in the business environment, preventing, and sanctioning corruption[8], and its initial form provided for a substantial punishment of between 7 years and 12 years of imprisonment.

Under the conditions set out under Art. 13[1] of Law no. 78/2000, the offence of blackmail is *assimilated to a corruption offence*. In some cases, distinguishing the offence of blackmail from other corruption offences may prove challenging. In a case, the Galați County Court has noted that the defendant had a large variety of control, supervision, and sanctioning duties pertaining to the activities performed by any economic agent in the area of the Galați Port or within the territorial jurisdiction of the defendant. Thus, since, by virtue of the specific position carried out by the defendant, there were multiple possibilities of ordering legal measures with a detrimental impact on the unfolding of the activity of the company directed by the whistleblower, the court determined that there had been a tacit constraint at the time of the defendant's demanding of the sum of Lei 2,000 and, consequently, established that the correct legal classification was that of blackmail and not bribe-taking [10].

The Romanian Constitutional Court has been referred to with an exception of unconstitutionality pertaining to Art. 13[1] of Law no. 78/2000. By Decision no. 253/2008[9],

[6] Published in the Official Journal of Romania no. 219 of May 18, 2000.
[7] Published in the Official Journal of Romania no. 757 of November 12, 2012.
[8] Published in the Official Journal of Romania no. 279 of April 21, 2003.
[9] Published in the Official Journal of Romania no. 243 of March 28, 2008.

it has dismissed the exception by ruling that, as it is clear from the case-law of the European Court of Human Rights, the constitutional principle of equality is not equivalent to uniformity. Thus, the different legal status of the persons provided for under this law, from the point of view of the purpose of the regulation, justifies the establishing of a different legal treatment in terms of a more severe form of incrimination. In the Court's view, providing for a heavier penalty under these terms does not contravene to the Fundamental Law either, the provisions being predictable and clear enough in defining the illicit conduct.

Another special piece of legislation incriminating blackmail was Law no. 189/1999 on exercising the legislative initiative by the citizens[10]. Art. 9 thereof – repealed by Law no. 187/2012, in all probability in order to eliminate unnecessary parallel norms – provided that constraining, misleading or determining a person in any way to sign the supporters' list against their will constituted and offence and was punishable by 6 months to 5 years of imprisonment.

2. Elements of International Judicial Cooperation in Criminal Matters

One of the forms of international judicial assistance in criminal matters is *the transnational surveillance*. Pursuant to Art. 183 par. (3) of Law no. 302/2004 on international judicial cooperation in criminal matters[11], if, in cases of emergency, the prior authorisation of the Romanian state cannot be requested, the foreign agents acting within a judicial investigation in the prosecution phase are authorised to continue the surveillance of the person suspected of having committed one of the acts enumerated under par. (5) – *which includes blackmail* as per sub-section m) – under the following conditions: the crossing of the border shall be immediately communicated, during the surveillance, to the Prosecutor's Office attached to the High Court of Cassation and Justice as well as to the Border Police constituted within the border crossing point and a request for legal assistance indicating the grounds justifying the crossing of the border without prior authorisation shall be transmitted without undue delay.

Also, in accordance with Art. 2 par. (2) of the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)[12], among the offences listed therein that, if punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, shall give rise to surrender pursuant to a European arrest warrant without verification of the double criminality of the act, there is also the offence of *extortion*. This text has been transposed in the national legislation under Art. 96 par. (1) of Law no. 302/2004, which also adds that the provision applies regardless of the name of the offence in the issuing state.

As one source explains [11], extortion represents "a form of theft that occurs when an offender obtains money, property, or services from another person through coercion", while blackmail occurs "when the offender threatens to reveal information about a victim or his family members that is potentially embarrassing, socially damaging, or incriminating unless a demand for money, property, or services is met". In this context, it must be mentioned that, under the Romanian law, there is no formal distinction between the notions of *blackmail*

[10] Republished in the Official Journal of Romania no. 516 of June 8, 2004.
[11] Republished in the Official Journal of Romania no. 377 of May 31, 2011, with subsequent amendments and supplements.
[12] Published in the Official Journal of the European Communities L 190 of July 18, 2002.

and *extortion*, only the former being commonly used in the legal jargon, but in a broad sense, encompassing both notions.

Alongside extortion, the Framework Decision 2002/584/JHA and the corresponding article of Art. 96 par. (1) sub-section 21 of Law no. 302/2004, also mention *racketeering*. The joining of the two legal notions is not random, as the literature shows that there are cases in which extortion is practised on a regular basis by organised, mafia-type groups, called "extortion racket systems" (ERSs) [12].

3. Taking Blackmail to the Next Level: Cyber-Extortion

The development of technology and means of social interaction has given rise to an "innovative" criminal phenomenon known as "cyber-extortion", committed by cybercriminals, asking for substantial sums of money in exchange of not disclosing sensitive information or tampering with websites. For example, it has been reported that, "in 2012, a Hungarian hacker was sentenced to 30 months in prison for stealing data from Marriott's computers then threatening to reveal it publicly unless the hotel chain gave him a $150,000-a-year job and free flights and hotel rooms of his choice" [13].

The commonly affected categories of aggrieved persons in such cases are companies. From this perspective, the Romanian legal framework contains a set-back as, according to the literature [6], the offence of blackmail is not typical when the passive subject thereof is a legal entity, which excludes factual hypotheses such as the one presented above from the protection of the norm of incrimination set out under Art. 207 of the Criminal Code. There is, however, an incrimination that could be applicable in such situations, namely Art. 249 of the Criminal Code regarding cyber-fraud, which provides that the insertion, change or deletion of cyber-data, restricting access to such data or preventing the functioning of a cyber-system in any way, with the purpose of obtaining a material benefit for themselves or for another, if a damage has been caused to a person, shall be punishable by imprisonment of between 2 and 7 years (the limits are identical to the aggravated form of the blackmail offence). One relevant example is the "ransomware" attacks aiming computers belonging to an organisation, in which case it shall be deemed a passive subject of the offence [4].

According to a recent report issued following a survey conducted by the Special Eurobarometer on the topic of cyber-security in the EU Member States, the following findings have been revealed [14]: regarding the issue of cyber-extortion, among the most concerned, one can mention the respondents in Spain, Ireland, the Czech Republic, or Latvia, whereas, among the least concerned, were the respondents from Sweden and the Netherlands. As far as the Romanian respondents are concerned, 23% were very concerned, 32% of them were fairly concerned, whilst 40% of them were not concerned at all.

On the EU level, there have been extensive endeavours in order to strengthen cyber-security. In this respect, one of the strategic priorities of the *Cybersecurity Strategy of the European Union* is the drastic reduction of cybercrime [15].

There are also noteworthy legislative interventions of the EU organisms, with relevance to the fight against cyber-crime:

The subject matter of Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA[13] is to establish minimum rules concerning the definition

[13] Published in the Official Journal of the European Union L. 218 of August 14, 2013.

of criminal offences and sanctions in the area of attacks against information systems, also aiming to facilitate the prevention of such offences and to improve cooperation between judicial and other competent authorities (Article 1).

The EU Directive 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (the NIS Directive)[14], under point 62 of the Recitals, mentions that the prevention, investigation and prosecution of criminal activities is supported by coordination and cooperation between operators of essential services, digital service providers, competent authorities and law enforcement authorities and, where appropriate, the European Cybercrime Centre (EC3) and ENISA (the European Union Agency for Network and Information Security) also play a significant role in facilitating coordination. The transposition deadline of the NIS Directive is May 2018.

4. Conclusions

The Romanian legal framework covers a multitude of aspects regarding the repression of blackmail offences, including as part of the fight against corruption.

The explicit mentioning of the blackmail offence (in the broader sense) within the instruments of judicial cooperation in criminal matters used with EU Member States and third states illustrates the seriousness of such offence against individual liberty and, in the alternative, against property, as well as the need of adequate instruments for suppressing such illicit activity.

However, there is still progress to be made with respect to repressing the newly-developed forms of blackmail, i.e. cyber-extortion, which require an adaptation of the classical guidelines of interpretation and application in the legal literature and case-law to the challenges ahead.

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Some Theoretical and Practical Aspects with regard to the Offence of Child Pornography

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Abstract

Child pornography is a crime against public morality related to the child's honor and sexuality.

The insufficient legislation in the past against such a phenomenon, and also the precarious economic conditions determined a suitable environment for offenders, who profited from the difficulties of the population, fact that has led to the amplification of such a phenomenon.

The negative influence on minors of the production, possession, and distribution of pornographic material, including in computer systems,required a unitary regulation in the Criminal Code.

Keywords: *pornography, minor, sexual exploitation, abuse.*

1. General aspects

The sexual exploitation of minors in the area of pornography has spread lately because such an illicit activity is extremely profitable.

The preoccupation with preventing and fighting this new type of criminality has been a steady one also for the international community.

The Framework Decision 2004/68/JHA of the Council of the European Union [1] and the Directive 2011/93/EU of the European Parliament and the Council [2] stated that child pornography must be counteracted through a global approach which should include the essential elements of criminal law which are common to all Member States, especially in the matter of effective, proportional, and dissuasive sanctions, and should be accompanied by judicial cooperation as extended as possible [3].

Our Criminal Code incriminated child pornography in Art. 374 bringing together the regulations in this matter, namely the Law no. 161/2003 on Some Measures to Ensure Transparency in the Exercise of Public Dignities, Public Positions and in Businesses, Preventing and Sanctioning Corruption [4], the Law no. 196/2003 on Preventing and Combating Pornography [5] and the Law no. 678/2001 on Preventing and Combating Human Trafficking [6]. In the meanwhile, the text of the law suffered another change with

the Government Extraordinary Decree no. 18/2016 for changing and completing Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Code of Criminal Proceedings, as well as for completing Art. 31 par. (1) of Law no. 304/2004 on Judicial Organisation [7].

The offence is stipulated in Art. 374 of the Criminal Code, and it consists in the production, possession for display or distribution purposes, purchase, stocking, display, promotion, distribution, as well as making available, in any way, of pornographic material with minors and is punished with imprisonment from 1 to 5 years.

If the acts indicated in par. (1) have been committed by means of a computer system or other means of stocking computer data, the punishment is the imprisonment from 2 to 7 years.

Accessing, without any right, pornographic material with minors, by means of computer systems or other means of electronic communications, is punished with imprisonment from 3 months to 3 years or with a fine.

Pornographic material with minors means any material which shows a minor engaged in a sexually explicit conduct, or which, although it does not show a real person, simulates credibly a minor engaged in such a conduct.

2. Analysis of the offence

2.1. Prior conditions

By the content of the current law, the legislator wanted to criminalize those attentions to competing or complementary values, such as the image and dignity of the minor.

Unlike other sexual offences in which the offender impinges on the sexual freedom of a minor (for example, in rape) and where the legally protected value is the sexual integrity of the minor, the integrity of his sexual personality respectively, in case of child pornography other concurrent or complementary values are impinged on, such as the "right to image" or even the minor's "dignity".

In cases where pornographic material is developed, it is obvious The owner of the injured social values is the minor, as far as it is used directly in the pornographic scene.

More than that, the distribution of such images of minors, with sexually explicit content, impinges on his right to honour, intimacy and self-image, the distribution also involving a riskThe mass harm of one's rights, produces at the same time a rupture of the minor's personal, emotional and sexual limits, which often causes deep wounds and leaves, in time, scars in the physical, emotional, spiritual and psichological.

By committing this violationthe minor is harmed: the right to privacy, the right to honor and to his/her own image through the production and distribution of pornographic material, as far as it is used directly in the pornographic scene.

The material object of the violation is obscene materials, which have the object of electronically storing the pornographic material with minors, which in explicit form represents the sexual behavior through pictures.

Analysing the offences referring to the sexual life of the human being, we can see that child pornography is different from the other offences because, besides the impingement on the sexual life of minors, there is also an impingement on other values such as the right to image and to dignity.

The minor as a holder of social values of an individual nature is harmed in his right to intimacy, his right to honour and his own image through the development and distribution of pornographic material, when the minor is used directly in the pornographic scene [8].

The offence of child pornography has a material object represented by the pornographic material with minors stocked in a material and/or electronic format, in a form of explicit sexual conduct.

In judicial practice [9], a case was retained where, with regard to the defendant I.A., the exercise of the criminal action and the arraignment were ordered for committing a plurality of three offences: sexual intercourse with a minor, stipulated by Art. 198 of the Criminal Code, corresponding to Art. 220 in the Criminal Code, trafficking in minors, stipulated by Art. 13 par. (1) of Law no. 678/2001, corresponding to Art. 211 par. (1) of the Criminal Code, and child pornography through computer means, stipulated by the provisions of Art. 51 par. (1) of Law no. 161/2003, corresponding to Art. 374 par. (1) and (2) of the Criminal Code.

The criminal legislation shows the elements and the criteria which help classify the pornographic material with minors.

Article 374 par. (4) of the Criminal Code defines the pornographic material as that material which shows a minor engaged in a sexually explicit conduct or which, although it does not show a real person, simulates credibly a minor engaged in such a conduct [10].

The term of pornographic material for the purposes of the criminal law designates the objects, prints, photographs, drawings, writings, films and video records, being absolutely necessary that in the case of audio records they are correlated with the video records.

In cases where pornographic material is developed, it is obvious that these social values of an individual nature, whose holder is the minor, are the ones damaged, when the minor is used directly in the pornographic scene, a context in which the distribution of such images of the minor impinges on his right to honour, intimacy and self-image, the distribution also involving a risk of mass damage of these rights, a situation generating a break of a minor's personal, emotional and sexual limits, which most of the times causes deeps wounds and leaves, over time, physical, emotional, spiritual and psychological scars [11].

For a conduct of a minor to be sexually explicit,in accordance with the incrimination of the act, it has to express a sexual position, a sexual intercourse, a sexual relation or any other attitude which according to morality may be considered sexual conduct [12].

The explicit characteristic comes directly from the depicted images or any other material in a concrete way, and not through implications and suggestions, so that this behavior is obviously contained on that pornographic material.

The sexual conduct of the minor must be obviously included in the pornographic material.

With regard to the subjects of the offence, the active subject is represented by any natural person or legal person and may be classified according to Art. 374 paragraph (31) letter a) as a family member or a person who has a special connection to the minor [letter b) of the same paragraph].

In case of the offence of child pornography, the state is the general passive subject, and the minor is the special passive subject, because through the commission of this socially dangerous act both the sexual freedom of a minor and the social values of cohabitation are damaged.

2.2. The constituent content of the offence of child pornography

According to the typical variant, the material element of the objective part is represented by the alternative actions or inactions: production, possession, procurement, stocking, display, promotion, distribution and making available, in any way, of pornographic material with minors.

For the purposes of the Criminal Code, production means the activity of making, creating pornographic material with minors, which can also be done with the extraction and combination of parts of that material.

Possession is when pornographic material with minors is held for the purpose of displaying or distributing them.

Procurement is the purchase of pornographic material, and promotion means carrying out activities for publishing pornographic material with minors.

Unlike promotion, the distribution refers strictly to the allocation of pornographic material, while making available means making this material ready at hand.

Taking into account the actions of the criminality norm that have an alternative character, for the existence of the violation it is enough to commit only one of them, and when the perpetrator performs several of these actions, for example produces, then holds for exposure and subsequently expands pornographic materials, with minors, the deed does not lose its unitary character.

The regulatory form provided for by Art. 374 par. (2) of the Criminal Code is the assimilated variant of urging or recruiting a minor in order to participate in a pornographic show and obtaining such gains from a show in which the minor participates.

The assimilated variant takes place by urging or recruiting a minor in order to participate in a pornographic show, obtaining gains from such a show in which minors participate or exploiting a minor in any other way in order to make pornographic shows.

The legislator defines the pornographic show as the display addressed directly to a public, including by means of the information and communication technology, of a child engaged in an sexually explicit conduct or of the genitals of a child, for s sexual purpose, and the legislator referred to the concept of child and not that of minor, considering that the two concepts are equivalent.

According to an opinion in which the author acquiesces [13], the assimilated variant which was recently introduced in the criminal legislation in the offence of child pornography has a series of problems, both with regard tothe elaboration of the text, and its correlation with the legal texts in force, because of the terms used in the definition of a pornographic show (the text of the law which provides for the incrimination of child pornography refers to the minor, while the definition of the pornographic show refers to the child, with problems related to thepredictability of the text of the law in case that the concepts of child and minor are not considered as equivalent).

Moreover, the text of the assimilated variant (in urging and recruiting the minor) is found almost with the same formulation in the provisions of Art. 211 of the Criminal Code referring to trafficking in minors.

Therefore, according to the same opinion, the assimilated variant provided by Art. 374 par. (11) makes a plurality of texts with that stipulated in Art. 211 of the Criminal Code, and the legislator's option for a reduced sanction for this variant of child pornography, in the form of urging and recruiting, becomes criticisable. For the purpose of the

considerations presented above, the author considers that because the legal provisions for changing the Criminal Code were adopted in a hurry, there was not an appropriate systematisation of the legal provisions so as to introduce the changes of the intended text of the law for the protection of minors against sexual exploitation in the appropriate text (trafficking in minors), however, in case of subsequent sexual exploitation of the minor (after recruiting), there may be a plurality of offences – the offence of trafficking in minors and that of child pornography.

Article 374 index 1, clearly refers to the fact that the purpose of recruitment or exploitation is a pornographic show. From this perspective, we may say that it is a special form of juvenile trafficking.

So, we can see that the scope of the text provided for this assimilated variant with the recruitment of a minor for the purpose of sexual exploitation according to Art. 211 corroborated with Art. 182 of the Criminal Code [14].

The author considers in this situation that the offence of child pornography is susceptible of making a plurality of offences with the offence against sexual freedom and integrity as long as their constitutive elements are present [15], or with the offence of trafficking in and exploitation of vulnerable people [16].

In attenuating variants, the offense is committed by accessing pornographic material with juvenile material without right and through computer systems or other electronic means of communication or by watching pornographic performances in which minor children partake.

The legislator established in Art. 374 par. (3) letter a) an aggravated variant of the offence of child pornography when committed by a person who has a special connection with the minor (a family member). With the introduction of this aggravated variant, there is a new possibility for a more serious punishment of the offence of child pornography committed inside a family. The purpose of the regulations is more effective protection, by means of criminal law, of minors who become victims of the offence of child pornography committed by family members.

Another aggravated variant is brought under regulation in par. (3) letter b), which incriminates the act committed by a person in a particular capacity in relation to the minor, having the duty to educate, take care of, watch him etc., failing to fulfil in this way their obligations assumed and the public trust in the honesty of people who hold such positions. The duties to which the legislator refers to are for example those of a caretaker, an assistant or a person privately hired to look after the minor.

The act stipulated by letter b) is of increased social danger because it is committed by a person in a particular, more special situation, expressly provided by law in relation to the minor, namely the person in a particular capacity, having the duty to educate, take care of, watch him etc., therefore there is a failure to fulfil one's assumed obligations and the public trust of the honesty of people who hold such positions.

In this sense, we will exemplify the care staff in the sanitary or social units (settlements, shelters, boarding schools) or persons specifically engaged in the care of the minor.

The minor is in the care of the offender when the latter had the obligation to assist him, such as the caretaking staff in medical units or social units (establishments, asylums, boarding schools) or people privately hired to look after the minor. The minor is under the protection of the offender if the capacity of the latter is that of tutor or curator in relation

to the minor. On the other hand the finding of the minor in educating the perpetrator implies the situation in which he had the duty to carry out an educational activity with the minor. Examples for this purpose are primary education teachers, secondary education teachers, pre-primary teachers, trainers, masters (in vocational schools), tutors of different scientific subjects, music teachers, painting teachers etc., as well as those people hired by parents for the education and training of their minor children [17].

In par. (31) letter c), the act of child pornography is sanctioned more severely if it endangered the life of the minor. This aggravated form is held when a possibility was actually created menacing the minor's life. The condition of danger may result from the way the offence was executed or from the treatment to which the victim was submitted (for example, the victim was kept in an insalubrious room, without enough food, in the cold, using the minor in violent sexual shows etc.).

If the act is committed by a tutor or a curator, there is a situation of child protection, and in case that the minor was under the education of the offender, the situation is that he had a duty of carrying out an educational activity.

The situation when the minor is deprived of liberty being submitted to a legal measure with deprivation of liberty, the offender is in a special capacity, which is that of policeman, non-commissioned officer from a prison or a person working in a re-education centre.

The endangerment of a minor's life is an aggravated form of the offence of child pornography being sanctioned with a more serious punishment, because of the treatments to which the minor is submitted, the way the offence is executed and the use of the minor in violent sexual shows.

The immediate consequence is the creation of a condition of danger for minors and for society as a whole with regard to morality, given that pornographic material is of its nature to pervert moral and sexual instincts by creating vindictive temptations and sexually defeating.

The forms of guilt accompanying the commission of the offence of child pornography are both the direct, and the indirect intention.

With regard to the forms of the offence, although there may be preparatory acts, these are not incriminated. The attempt is punished according to Art. 374 par. (5) of the Criminal Code.

The offence of child pornography provides in the regulation of the Criminal Code for eight regulatory forms in par. (1) and an aggravated variant in par. (2). The regulatory forms provided by the legislator may correspond to a multitude of factual forms.

With regard to the sanctions applicable for the commission of this offence, the punishment for the typical form of the offence is imprisonment from 3 months to 3 years or a fine, while for the aggravated forms the punishment is imprisonment from 2 to 7 years.

3. Conclusions

Child pornography must be examined and investigated in the context of actions of abuse against minors, including that of organised crime. The development of communication means and computer systems requires a re-analysis of the constitutional paradigm of freedom of expression, for the development of a balanced computerised society which imposes the respect for the same values as those accepted for real society.

It is still necessary for the legislator to intervene promptly and to criminally sanction any activity which, by its nature, may pervert the citizens' moral sense and to protect the minors who could be sexually exploited through pornography.

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The national legislative perspectives in the matter of combating illicit drug trafficking and drug consumption in global and European context

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Abstract

Regarding the most serious and present form of manifestation – terrorism – but also through its classical forms – drug trafficking, arm trafficking, trafficking in human beings, cybercrime or money laundering – it can be stated for sure, that at this moment, certain organized crime has become a truly major threat of XXI century.

Keywords: *organized crime, combating, prevention, drugs, illicit drug trafficking, drugs consumption, strategy, new psychoactive properties substances.*

In a current contextual approach, the organized crime should be seen as a multiple criminal phenomes, withnational extensions but usually with branches border, which somehow are irreversible and difficult to overcome later, its generates major violations of human rights, severely affecting human dignity and integrityare threats the individual security, social and moral values; and on the other hand, in the same dangerous way, criminal groups specializing in criminal areas where profit is up with directly affecting the economic and social system, organized crime makes a serious risk to the internal security of each state.

For sure, organized crime is a social and legal phenomenon which can no longer be ignored, and for this reason, the concerns for research, incrimination and sanctioning of organized crime are more vivid than ever [1].

Hence, one of the most representative analysis we have has been drafted in 1996 by Phil Williams – professor at Pittsburgh University. He has shown that the entire organized crime has reshaped itself with the globalising society and in many cases, even surpassing this processes. What is being argued is that the "criminal organisations" have become very close in nature to transnational corporations operating worldwide. They have a training camp and a coordination centre.They can be localised in a certain country, but through the relations they have created can be encountered anywhere on the globe, at big distance from their camp country" [2].

From many forms and subdomains the manifestation of organized crime at the national level, starting from the argument of a vast and varied current casuistry, from many areas of criminogenic impact and ending with the various argument of expression in Romania, the operative investigation component regarding the illicit drug traffic takes up a central position.

The necessity of the rigorous evaluation of the causes which generate or amplify the illicit drug use and trafficking phenomenon at global level, with direct influence on the national trends and also finding some means and efficient methods for preventing and fighting this fleau, can be argued and supported by the analysis and the interpretation of at least three statistical categories of elements:

– total number of drug consumers at global level;

– total number of deaths and decays as a result of drug consumption;

– the total amount of illicit returns obtained as a result of drug use and trafficking [3].

From such perspective, the UN Office on Drugs and Crime (UNODC), as a global representative institution in the fight against drug trafficking and organized crime, in the last released assessments given to publicity [4] showed that, globally, in 2014, 1 from 20 adults, the equivalent of a quarter of a billion people (about the total population of France, Germany, Italy and the United Kingdom), aged between 15 and 64 years, have used at least one type a drug.

Although, even the overall amount of drugs consumed worldwide not seems to have increased over the last four years, it should be stressed however that, over 29 million people suffer from a disease caused or drug related.

Out of the total number of drug users, 12 million persons inject the drugs as a consumption alternative and 14% of these are infected with HIV.

The impact of the drug consumption continues to have devastating consequences against the health and life, and that's way has to be shown that, for the reference period (2014), 400 deaths have been reported as being direct related to drug use, which means the morbidity rate being 43,5 deaths/1 million among the population aged between 15-64 years.

If for the two evaluations – the numbers of drug users and the number of deaths and related diseases – we are also taking into consideration the illicit returns obtained as a result of drug use and trafficking, the real perspective of the phenomenon becomes worrisome.

UNODC estimates [5] that the total market value of illicit drugs is around 13 billion USD for production price, 94 billion USD for selling in significant quantities and 322 billion USD for direct product sales, estimates which are realized based of the practicable prices by the drugs dealers and on the confiscations made by law enforcement agencies.

Cannabis remains the most widely drug used in the world with an estimated 183 million consumers in 2014, while consumption of amphetamines remains in the second place, by reference to the same statistical landmark. Opioids still remain important drugs with serious consequences for the health of consumers, the number is 33 million users.

Moreover, the consumption of cocaine, which was relatively stabled after 2010, showed an upward trend, mainly due to increase of cocaine using in South America.

In the absence of recent survey data on drug use in Africa, the experts in the region perceive also an increase of cannabis consumption [6].

The major global concern for assessment of statistical criminological, medical and judicial terms of current status and trends relating to trafficking and illicit drug use has become an objectivenecessity at regional, European level too, sense that the European equivalent institutional of UNODC – and keep in mind – the European Monitoring Center for Drugs and Drug Addiction (EMCDDA) [7] – launched a series of analyzes and recommendations for UE Member States, with direct consequences in terms of activities to prevent and combat this phenomenon.

According to the EMCDDA report on the 2016 [8], it was shownthat drugs contributes about a fifth of global revenues results by crimes, it is estimated that in Europe, there are 0.1-0.6% of gross domestic product (GDP) of eight Member States for which data is published.

Selling drugs on EU market worth at least 24 billion euros (21 to 31 billion Euro in 2013), the market for cannabis is the most developed, representing about 38% of the total, followed by heroin (28%) and cocaine markets (24%).

Another major challenge for the whole Community of European states is represented by the situation of preventing and combating the trafficking with psychoactive properties substances (NPS). According to the same report [9], a total of 101 NPS were found on the EU drug market the first time in 2014 (the latest year for which completed data were available at the time of writing the report), which represents almost 25% of total the NPS monitored since 1997. This thing brings the total number of monitored substances by the EMCDDA to 450 – almost double the number of controlled substances under the international conventions of the United Nations drug control. As a result of this situation, the European Commission stressed the need for a more efficient system to tackle the threats generated by NPS.

Moreover, the ramifications of illegal drug markets are large and outweigh harms caused by drug use, including the involvement in other criminal activities too, even terrorism; It's generate, generally, an impact on legitimate business activities and economy, generate pressure on both government institutions and corruption at their level, all of these with a major impact on society, generally speaking.

In the same sense of jointing the prevent and combat illicit drug trafficking and consumption efforts, European Monitoring Center for Drugs and Drug Addiction issued and EU drug strategy (2013-20) [10], the ninth strategic document on illicit drugs approved by European Union member states from 1990 to present; document shows the current position of the EU on matters of drug control policy and proceed for identifying common objectives to reduce drug demand, dependence and social harm. Implementation of its long-term objectives are based on several operational documents which enable to progressive achievement and intermediary revision.

There are a number of significant changes on EU drug market which the Strategy 2013-20 aims to address, especially, regarding to the rapid increase of the number of new psychoactive substances, which are available on the market and diversification of routes and the methods for drugs transporting.

Especially, the new plan aims to strengthen effective coordination in law enforcement and international cooperation and effective judicial cooperation, and strengthening EU legislation to effectively respond to current and emerging trends in illicit drug activity. The Strategy also proposes a special attention to be given to communications technologies, which have an important role in the spread of drugs, especially for new psychoactive substances. This automatically implies the development of alternatives to traditional law enforcement approach.

For the first time, The Strategy includes reducing health and social risks caused by drugs as a polical objective with the other two traditional objectives already undertaken, respectively, demand reduction and drug supply at the European level.

According to The Strategy, the enhancing cooperation and coordination at the strategic and operational level between law enforcement agencies should include: improving of cross-border information exchanging (including operational information), best practices and knowledges in real time, and conducting investigations and collective operations. Moreover, the document considers necessary the strengthening of EU cooperation regarding to enforcement of judicial decisions and the law on drugs and using of existed practices to determine faster and accurate answers and supporting the cooperation activities for implementation of judicial decisions and law and exchange of information and data too.

It is crucial to underline the need to consolidate international cooperation efforts and ensure efficient use of mechanisms, tools and legal and available judicial platforms, the efforts to improve the exchange of strategically and operationally information and data, and efficient using of resources that can occur by identifying and destroying the geographical locations where are focused the related activities for drug market. Such specific locations, including container ports, parcel delivery centers, land and relatively, specific air crossing borders and discrete geographical areas used to produce drugs are priority targets for prohibition efforts. [11]

The preventing and combating of complex phenomenon of trafficking and illicit drugs can be realized in a manner truly effective unless constantly, if in addition to studies and specific assessments made by representative organizations at global and European level (of the type shown above) are taken and consolidated a number of specific legislative instruments with global or regional application, adapted obviously own national specifics of each country involved in combating criminal phenomenon.

The first fundamental landmark on this way was traced at the same time as adopting the Convention against transnational organized crime; thus, as it's shown in the Preamble of the Resolution A/55/383 of the General Assembly of UN by the Convention against transnational organized crime, the Member states of the United Nationshave stated the following:

"Deeply concerned by the negative economic and social implications related to organized criminal activities, and convinced of the urgent need to strengthen cooperation to prevent and combat such activities more effectively at the national, regional and international levels,

Noting with deep concern the growing links between transnational organized crime and terrorist crimes, taking into account the Charter of the United Nations and the relevant resolutions of the General Assembly,

Determined to deny safe havens to those who engage in transnational organized crime by prosecuting their crimes wherever they occur and by cooperating at the international level,

Strongly convinced that the United Nations Convention against Transnational Organized Crime will constitute an effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage and the growing links between transnational organized crime and terrorist crimes, (…)

Urges all States and regional economic organizations to sign and ratify the United Nations Convention against Transnational Organized Crime and the protocols thereto as soon as possible in order to ensure the speedy entry into force of the Convention and the protocols thereto. [12]

According with all these aspects, at 15 November 2000, in New York, were adopted the United Nations Convention against Transnational Organized Crime and its protocols, which were signed, later on, between 12 and 15 December 2000, in Palermo, more than 120 states of the United Nations. [13]

One of the stated aims of the Convention is to harmonize national laws of signatory countries so that what in a state is considered to be a crime have to be treated as well in other states. However, through adopting or developing the national laws, the governments will can cooperate with each other in investigating and punishing the following types of crimes: complicity to organized criminal group activities, money laundering, corruption and obstruction of justice.

In this ample global and European context –, it is obvious that in Romania was necessary adopting and strengthening suitable and primary legislation too, which have to allow an rigorous preventing action coupled with judicial combating actions with dissuasive effect on environments of traffickers and consumers of drugs; this is all the more necessary as Romania faces with a multiple and varied casuistry on this matter, and our country has a growing interest for hashish traffickingnetworks from Africa (Tanzania and Morocco) and cocaine from South America (Peru, Brazil and Venezuela) to Western Europe (especially Germany, Holland, Belgium, Austria, Italy, Spain), using both routes by sea to the port of Constanta and the air, directly in Bucharest, too.

Moreover, Romania is used for 3 of 5 variant of the "Balcanic Route", respectively:

– Turkey – Romania – Hungary – Slovakia – Czech Republic – Germany – Holland (nordic itinerary);

– Turkey – Bulgaria – Romania – Hungary – Austria – Germany – Holland (nordic itinerary);

– Turkey – Bulgaria – Romania – Ukraine – Poland – Germany (nordic itinerary).

In Romania, the legislative assuming process for fighting against drugs was complete and irreversible finalized alongside with the adoption of Law no. 143/2000 regarding the prevention and fight against illicit drug use and trafficking [14], a legal creation which set up, throughout its applicability period, a bench mark for the law enforcement agencies and for the courts.

Thus, the Law no. 143/2000 realises the reunite in one legal act of all the legal criminal provisions related to drugs.

It should be noted that the legislature denominated the law as to prevent and combat illicit "drug" trafficking and use, not "stupefacient", which can be explained that in that the current definition of "drug" – as – plants and narcotic drugs and psychotropic or mixtures containing such plants and substances listed in the tables. I-III – it is much wider, which gives the law a wider area of applicability.

Through Art. 27 specifically, the crime defined by Art. 312 of the Criminal code of 1969 had as a marginal denomination "trafficking of toxic substances" and the provisions of Art. 17 par. (2) of the Law no. 73/1969 [15] have been implicitly abrogated.

Also, for the first time, in Art. 1 of Law no. 143/2000 it can be seen a detailed legal interpretation of the meaning of some terms and expressions from the respective law:

– "substances placed under national control" – the drugs and precursors listed in appendix-tables nos. I-IV, which are an integral part of the present law; tables may be amended by Government emergency ordinance, by entering a new plant or substance, removing a plant or substance or by transferring it from one table to another, based on the proposal from the minister of health or from the minister of interior.

The Law contains 4 appendix-tables in which are included all the drugs and precursors placed under national control and for which the legal provision is applicable; (table no. III includes 102 substances, table no. III. II includes 118 substances, table no. III includes 95 substances).

– "drugs" – narcotic or psychotropic plants or substances or mixtures containing such plants and substances, listed in tables nos. I-III;

– "high-risk drugs" – drugs listed in tables nos. I and II;

– "risk drugs" – drugs listed in table no. III;

– "precursors" – substances frequently used in drug manufacture, listed in table no. IV;

– "toxic chemical inhalants" – substances listed as such by order of the minister of health;

– "illicit drug consumption" – consumption of drugs placed under national control, without a medical prescription;

– "drug user" – a person who is administering to himself or is allowing others to administer him drugs, in an illicit manner, by swallowing, smoking, injection or any other ways that may allow the drug into his/her body.

– "drug addict" – the consumer who, as a result, of repeated drug administration and under the need or necessity, presents physical and psychological consequences according to the medical and social criteria.

Through Law no. 143/2000 are incriminated 11 crimes (9 in basic form and 2 categories of crimes which areaggravating forms), which contain multiple legal ways which can infringe the drug regime, succeeding as such to cover the entire panel of deeds which might infringe the legal regime of drugs.

Finally, and given that after 2005, Romania has taken a major step in reconsidering important criminal policy in the field of drug use, throughout the same Law are included legal provisions on health-related measures that can be taken to the drug consumers, with priority being given medical treatment of people who use drugs at the expense of sanctions and criminal liability for their actions. In this respect, the undisputed argument is the current form of Art. 4 of the Law, which criminalizes and punishes possession of drugs in view their own consumption and not drug-like singular activity: "(1) The cultivation, production, manufacturing, experimenting, extracting, preparation, processing, acquisition or possession of drugs risk for personal use, without right is punished by imprisonment from 3 months to 2 years or fine.

(2) If the crimes provided in par. (1) concerning high-risk drugs, the punishment is imprisonment from 6 months to 3 years."

Reference to the actual preoccupation existing at the level at UE and already mentioned before, combating the illicit activities with psychoactive properties substances (NPS), known as "ethnobotanical substances", Romania made major legislative progress in this matter too; this denomination is agreed by the EU member states for the products sold through the "dream shops" and it's applied to psychoactive substances which are available in a pure condition or in a mixture.

The constant interest in documenting this new aspect is justified by the worrying increase of consumers of such substances mainly justified by a much lower price compared to the "classic drugs" while obtaining the same type of effects. [16] Therefore, according to the last evaluation in the field [17]the consumption of legal drugs among the young population of 15-24 years from the EU was of 5%, states like UK, Latvia, Poland and Ireland having higher percentages, more precisely 8%, 9%, 9% and 16%.

As a result of the investigations led by the European bodies with competences in this field [18], it has been showed that in 2012, 693 shops were selling legal drugs on the internet for the EU consumers, in comparison with 314 shops identified in January 2011 and 170 in January 2010.

Nowadays, the Early Warning System [19], operated by EMCDDA and Europol is monitoring 280 new psychoactive substances from the category of phenethylamines (which have stimulant and hallucinogen effects, like PMMA and 2C-I), tryptamines (which mostly have and hallucinogen effect, like AMT and 5-MeO-DALT), piperazines (which have a stimulating effect like mCPP and BZP), cathinones (like mephedrone, methylone and MDPV which have stimulant effect), synthetic cannabinoids (which can have hallucinogen and depressive effects).

From the legal point of view of European perpective, the conceptual perspective became unitary with the adoption the Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances [20], which established that its provisions apply to substances which, in the present time, are not listed in any of the tables from the 1961 United Nations Single Convention on Narcotic Drugs which may represent a threat to public health comparable to the one represented by the substances listed in Table I, II or IV and the 1971 United Nations Convention on Psychotropic Substances that may pose a comparable threat to public health as the substances listed in Schedule I or II or III or IV thereof.

In accordance to this Decision, the national legislation in the field of fighting drug trafficking andconsumption of NPS is represented by Law no. 194/2011on countering the operations with products susceptible of having psychoactive effects [21], other than the ones provided by the documents in force, law which sets the legal framework applicable to the preparations, substances, plants, mushrooms and combinations thereof susceptible to have psychoactive effects similar to drugs or drug preparations or psychotropic, plants or substances under national control, others than the ones which have a legal regime established by the legal acts in force.

In an explicit manner, the special law defines, in the introductive part, the basic notions for this crime theme, like the concept of "psychoactive effects" as being one of the following effects which a product can have when consumed by a person:

– the stimulation or inhibition of the nervous system of a person having as a result modifications of the mental functions and processes and of the behavior or the creation of an physical or mental addiction and also the notion of "consumption" as follows:

– introducing in the human body of a product, regardless of the method used, it could have been dissolved, Impregnated, dispersed or diluted, in one of the following ways: orally or injected, inhaled, smoked or externally applied on the body, in any other way which introduces the product in the human body.

The main critique which may be brought to these incrimination norms and which, unfortunately, can be a real obstacle in the criminal investigation lead by the specialized structures, is the sanctioning regime which is far too soft compared to the seriousness of the alleged deeds.

In very concise terms which are strictly related to the similarity of the harmful effects of NPS on the human body comparable to the ones of the classical drugs, the limits of the punishments set by the Law no. 194/2011 should have been comparable to the ones established for the crimes regulated by Law no. 143/2000; furthermore, committing the deeds mentioned by Law no. 194/2011 under the pretense of legality brought by activities performed allegedly in a licit manner, could justify, without significant critics, introducinghigher limits for the punishments, higher than the ones foreseen in the present legal framework. [22].

Conclusions

To sum it up, taking into account all the arguments above, we emphasize that by adopting and implementing the current legislative framework in this area, decision-making entities create modern legal instruments ment to maximize the efforts to combat trafficking and illicit drug use.

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General Considerations on the Crime of Unjust Repression

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Abstract

Judges and prosecutors, throughout their entire activity, have the obligation to ensure the supremacy of the law, to respect the rights and liberties of people as well as their equality before the law, and to ensure a fair judicial treatment to all participants in the judicial proceedings, regardless of their status, to abide by the Deontological Code or the judges and the prosecutors. The magistrate shall not be held responsible penally or disciplinarily when the ruled procedural measure or the ruled solution resulted from the analysis of the whole evidence material administered in the case.

Keywords: *crime, judge, prosecutor, penal responsibility.*

I. Notion

The crime of unjust repression is incriminated by Art. 283 Penal Code. The template version regulated by Art. 283 par. (1) Penal Code consists in "the act of setting in motion the penal action, of taking a noncustodial preventive measure or of prosecuting a person knowing they are innocent".

The aggravated form is stipulated by Art. 283 par. (2) Penal Code and consists in "the detention, arrest or conviction of a person, knowing that they are innocent".

According to Art. 4 in Law no. 303 from 2004, republished and with subsequent ammendments, concerning the judges' and the prosecutors' status, "judges and prosecutors, throughout their entire activity, have the obligation to ensure the supremacy of the law, to respect the rights and liberties of people as well as their equality before the law, and to ensure a fair judicial treatment to all participants in the judicial proceedings, regardless of their status, to abide by the Deontological Code or the judges and the prosecutors." Moreover, according to Art. 9 par. (1) in the Deontological Code [1], "judges and prosecutors must be unbiased when fulfilling their professional attributions, having the obligation to rule objectively, clear of any influences."

Taking into consideration the legal texts enumerated above, as well as the role of justice in a modern society, which must be trusted by the civil society the judicial bodies assigned with accomplishing the act of justice have the obligation, throughout their entire activity,

to abide by the law and to make considerable efforts in order to find the truth so as all the solutions ruled be within reason and legal bounds. Breaking these obligations by committing acts of unjust repression represents a serious offence to the social relations concerning the accomplishment of justice and, last but not least, leads to the decrease of the society's trust in the act of justice.

The special judicial object of the crime under analysis is represented by the "social relations referring to the accomplishment of justice, which exclude holding an innocent person responsible." Apart from these social relations which is the main judicial object of the unjust repression, by committing the crime one "also brings offence to the social relations concerning the liberty and dignity of a person, relations which are, in this way, its secondary objective" [2].

The crime of unjust repression basically lacks material object. However, in the instance where the deed is limited to the body of the innocent person, the material object will be represented by the body of the said person.

II. The subjects of the crime

The active subject of the crime under analysis is circumstanciated. Thus, the crime of unjust repression can be committed only by a magistrate who, according to the law, has the right to set in motion the penal action, to take a custodial or noncustodial preventive measure, to rule prosecution or to rule a conviction sentence.

In the template version regulated by Art. 283 par. (1) Penal Code only a magistrate can have the status of an active subject. The prosecutor who exercises or monitors the prosecution has the right to set in motion the penal action, to rule noncustodial preventive measures (judicial supervesion or conditional bail) as well as to rule the arraignment of a person.

We consider that the court meeting prosecutor can also be an active subject of the crime under analysis, provided that he/she rules the detaining of a person or setting in motion the penal action for a person who is suspect of committing an audience crime. In support of this opinion, we show that according to Art. 360 par. (1) Code of Penal Procedure "the court meeting prosecutor can declare that he/she will begin prosecution, will set the penal action in motion and will be able to detain the suspect or the defendant". Moreover, we consider that if the crime is committed by setting the penal action in motion, it has an exclusive active subject because, according to the current penal procedures legislation, the prosecutor is the only judicial body who has the competence to set up such a procedural act.

An active subject of the crime under analysis can also be the judge of rights and liberties, the preliminary hearing judge, as well as the judge at first instance. The judge of rights and liberties and the judge at first instance can be active subjects of the crime only when they rule a noncustodial preventive measure. As to the preliminary hearing judge, he/she can commit the crime when ruling to take or maintain a noncustodial preventive measure, as well as when ruling the prosecution of a person, knowing that person is innocent.

Regarding the last mentioned hypothesis, we show that according to Art. 341 par. (7) letter c) Code of Penal Procedure, the judge of preliminary hearing, during the procedure of solving the complaints regarding the solutions of not taking legal action, has the competence to "admit to the complaint, to break the attacked solution and to rule the beginning of legal

action regarding the deeds and persons for whom, during the prosecution, was set in motion the penal action, when the legally administered evidence is enough, sendind the file for random distribution." Thus, taking into consideration the legally ruled disposition, we believe that ruling the beginning of legal action is equivalent with ruling the arraignment, taking into account that the act of seizing the court is represented exactly by the decisionm of the preliminary hearing judge ruled after solving the complaint related to the prosecutor's solution of nonarraignment.

As to the aggravated version of the crime of unjust repressioned stipulated by the provisions of Art. 283 par. (2) Penal Code, the active qualified subject can be both a prosecution body and a magistrate. Thus, when the deed is committed by retaining a suspect or a defendant, the crime can be committed by a penal investigation body or by a prosecutor. The judging magistrate does not have the competence of ruling the custodial preventive measure in none of the hypotheses.

When the deed is committed by ruling a custodial preventive measure (preventive arrest or house arrest) the active qualified subject can be represented by the judge or rights and liberties, by the judge of preliminary hearing and by the first instance judge (the panel). In relation to this hypothesis, we consider that the judging magistrate commits the crime under analysis even when he/she rules that a defendant remains in preventive arrest or in hause arrest, being aware of their innocence. At the same time, when the deed is committed by convicting a person knowing they are innocent, the active qualified subject can only be the first instance judge or the judges of the panel who assess the case in its substance or in an ordinary remedy at law.

According to Art. 295 par. (1) Code of Penal Procedure "setting the penal action in motion is carried out only at the injured party's prior complaint, in the case of crimes for which the law stipulates it is necessary to submit suc a complaint". When the injured party submits a prior complaint against a person whom he/she knows is innocent, dispositions regarding the crime of unjust repression will not be retained because the injured party does not have the status required by the incriminating norm; instead the dispositions regarding the crime of misleading the judicial bodies stipulated in Art. 268 par. (1) Penal Code will be retained.

It was considered in the judicial literature that the crime of unjust repression can be committed in the form of co-authorship when all perpetrators meet the requirement provisioned by the law, setting as an example "the deed of the prosecutor to rule the preventive measure of legal supervision, measure confirmed by the judge of rights and liberties, both having agreed upon the innocence of the person against the measure was ruled" [3]. We do not fully agree with this example. Thus, according to the provisions of Art. 213 par. (1) Code of Penal Procedure "against the prosecutor's order, who ruled the measure of legal supervision, within 48 hours from notice, the defendant can make a complaint adressed to the judge of rights and liberties at the court which can have the competence to assess the first instance case". From the interpretation of the enuntiated text results that the prosecutor's order ruling the preventive measure of legal supervision is in effect from the moment it is communicated to the defendant and the means of appeal is not enforcement suspensive. As a consequence, we can conclude that the crime of unjust repression is consumated at the time of communicating the order which rules the preventive measure of legal supervision

by the prosecutor. To these aspects, we consider that in the example mentioned before, the correct classification of the deed is that both the prosecutor and the judge of rights and liberties be each held responsible for every crime of unjust repression as authors.

The penal participation is possible under all forms, respectively: co-authorship, instigation and complicity. As to the coauthorship, it is necessary that when the incriminated action is committed, all coauthors have the special status required by the law and, at the same time, have the competence to rule the respective procedural measure or solution. For example, the crime of unjust repression can be committed as coauthorship when, according to a prior or simultaneous agreement, the judges who form a panel rule a conviction knowing that the defendant is innocent.

The crime of unjust repression, in both normative versions, has as a main passive subject the state as a owner of protected social value concerning the accomplishment of justice. As to the secondary passive subject, he/she is circumstanciated; it can be only a person who acquired the status of suspect or defendant during a pending penal trial.

III. The objective side of the crime

Concerning the objective side, in both normative versions, the crime of unjust repression can be committed only by an action. Thus, the material element of the template version, regulated by Art. 283 par. (1) Penal Code can be achieved by one of the following actions: setting the penal action in motion, taking a noncustodial preventive measureor arraignment of an innocent person.

According to the provisions of Art. 15 Code of Penal Procedure, "the penal action is set in motion and is carried out when there is evidence that a person committed a crime and there are no cases which prevent its setting in motion or carrying out". Thus, in this normative version, the crime can be committed by the prosecutor when from the evidence administered in the case results unequivocally that one of the causes stipulated in Art. 16 par. (1) Code of Penal Procedure obstructs setting in motion the penal action.

The arraignment solution is ruled when the prosecutor determines that the legal provisions which guarantee the finding of the truth were respected, that the prosecution is complete and from the prosecution material results that the deed is real, was committed by the defendant and that he/she will be responsible penally.

Taking into account the penal procedural legislation in effect, the indictment is not the only act by which one can rule the arraignment of a defendant. Therefore, as shown before, when we analysed the qualified active subject of the crime, the arraignment can be ruled by the conclusion of the preliminary hearing judge during the procedure of solving the complaint regarding the solutions of nonarraignment ruled by the prosecutor.

At the same time, we consider that the crime under analysis can also be committed by prosecutors when settling an agreement of guilt acknowledgement, since it also is an act of noticing the court and contains implicitly a decision of arraignment. For example, we consider that the prosecutor commits the crime of unjust repression when settling an agreement of guilt acknowledgement with a defendant (who admits to committing the deed in order to cover for another person), knowing, from the administered evidence, that the defendant did not commit the deed. We also believe that there will be a real concurrence between the crime of abusive investigation stipulated in Art. 280 par. (1) Penal Code and

the crime of unjust repression regulated by Art. 283 par. (1) Penal Code, in the situation where the prosecutor, being aware that the defendant is innocent, makes use of threats, namely that he/she will file for other criminal charges unless the defendant admits to committing the deed for which the penal action was set in motion and, at the same time, consents to settling for an agrrement of guilt acknowledgement regarding the respective deed.

The Code of Penal Procedure regulates two noncustodial preventive measure, namely the legal supervision (art. 211 Code of Penal Procedure) and conditional bail (art. 216 Code of Penal Procedure). According to the provisions of Art. 202 par. (1) Code of Penal Procedure"the preventive measures can be ruled if there is solid evidence or clues which lead to the fact that a person committed a crime and if they are necessary for the penal trial to be carried out adequately, to prevent the suspect or the defendant to evade prosecution or judgement, or to prevent committing another crime".

Thus, from the interpretation of the enunciated text clearly results that any preventive measure which can be ruled when at the time of ruling there is solid evidence or clues that a person committed a crime, aspect which is not equivalent with proving a person guilty. Even when against a defendant a noncustodial preventive measure is ruled, he/she will still enjoy the presumption of innocence. Moreover, the guilt or innocence of a person can only be established by a judge or a panel of judges to whom a certain case was assigned to be solved after the analysis of the whole evidence material administered in the case, while a noncustodial preventive measure can be ruled when there is a series of solid evidence or clues which generate a reasonable suspicion that the defendant could have committed the deed; the law does not impose as a necessary condition to rule a preventive measure the administration of the whole evidence material. Moreover, the guilt of a person is established when an independant court of justice determines, beyond any reasonable doubt, that the deed is real, that it is a crime and it was committed by the defendant. In relation to those mentioned earlier, we consider that when the competent judicial body rules a noncustodial preventive measure they do not establish whether a defendant is guilty or not, they merely perform an analysis of the existence of solid clues or evidence regarding the possibility that a defendant could have committed a certain crime. Thus, as consequence, we believe that the phrase "knowing that they are innocent" is inappropriately inserted in the incriminating text in Art. 283 par. (1) Penal Code, because it can generate a multitude of interpretations contrary to the lawmaker's purpose.

Therefore, an interpretation ad litteram of the provisions of Art. 283 par. (1) Penal Code would lead to the conclusion that a magistrate who ruled a noncustodial preventive measure during the penal trial, although all the conditions imposed by the penal procedural legislation were met at the time of ruling the preventive measure, automatically commits the crime of unjust repression if the defendant is acquitted by the first instance judge or by the panel from the superior court of justice.

As far as we are concerned, we consider that, de lege ferenda, the modification of the provisions of Art. 283 par. (1) Penal Code should be made, respectively the normative version which incriminates ruling noncustodial preventive measures, by replacing the phrase "knowing that they are guilty" with "knowing at the time of ruling the noncustodial

preventive measure that there is a cause which prevents setting in motion or carrying out the penal action".

Concerning the objective side, the aggravated version ofthe crime of unjust repression stipulated by Art. 283 par. (2) Penal Code, the material element can be achieved by 3 alternative actions: retaining a suspect, arresting a defendant or ruling a conviction for a defendant when the competent judicial body was aware that the respective person is innocent.

The preventive measure of retaining is illegal when, at the time of ruling, there are no solid clues or evidence that lead to the reasonable suspicion that the suspect or the defendant has the possibility of committing the crime for which he is investigated or when, from the evidence administered in the case results that there is a cause which prevents setting in motion or carrying out the penal action from those stipulated in Art. 16 par. (1) Code of Penal Procedure. Also, the preventive measure of retaining is illegal when it is ruled against a person who did not acquire the status required by the law, namely that of a suspect or defendant. However, if the preventive measure of retaining is ruled by a judicial body who is not functionally competent, such as a judge or a police officer who does not have the status of penal investigation body, we believe that the constitutive elements are not reunited here to make up the crime of unjust repression, but the crime of unlawful deprivation of freedom, stipulated in Art. 205 Penal Code, as the condition regarding the active qualified subject provisioned in Art. 283 par. (2) Penal Code is not met.

The European Court of Human Rights [5] stated that "on the ground of Art. 5 par. (1) letterb) a person can be arrested or detained in order to guarantee meeting an obligation provisioned by the law. The Court reminds that for a detaining to be justified from the view of Art. 5 par. (1) letter b), The obligation in cause must be specific and practical, and the arrest and detention must have as a purpose the guarantee of its performance, without having a punitive character. Moreover, as soon as this obligation is met, the ground for the detention ceases to exist. An equilibrium must finally settle between the necessity within a democratic society of guaranteeing the immediate performance of the obligation and the importance of the right to freedom. One shall take into account the nature of the obligation, including its purpose and object, the detained person, the specific circumstances which lead to the detaining and its duration".

Thus, from the interpretation of the decision ruled by The European Court of Human Rights, we consider that there can be a custody as stipulated in the Convention and if the competent judicial body rules a warrant of arrest. According to Art. 265 par. (12) Code of Penal Procedure, "the persons brought by means of warrant shall remain at the judicial body's disposition only for the duration imposed by the hearing or carrying out the procedural cat which made their presence necessary, but no more than 8 hours". In relation with the enuntiated disposition we consider that there is a custody if a person brought in with a warrant is kept for the maximum time stipulated by the law, even if their hearing was carried out or the procedural act which required their presence was accomplished. At the same time we believe that there is a custody if the person brought in with a warrant is kept at the disposition of the authorities for a longer period because of the passivity of the competent judicial authorities. For example, a suspect is held for 4 hours in the prosecutor's office for hearing purposes, because the case prosecutor did not have time to carry out the said hearing since he/she participated at a coworker birthday anniversary.

Thus we believe that in the hypotheses shown before the existence of the crime of unjust repression should not be excluded de plano because, in our opinion, the purpose of the lawmaker to incriminate the crime under analysis was to sanction the judicial bodies who unlawfully deprived a person of their freedom. As a consequence, we believe that in order to avoid situations in which a person is held discretionarily at the disposal of the judicial bodies it is a must de lege ferenda to provision in the incriminating text at Art. 238 par. (2) Penal Code the hypothesis of carrying out a warrant of arrest in another way than that provisioned by the law.

Such a custodial preventive measure is illegal when at the time of analysing the conditions required by Art. 223 par. (1) or (2) Code of Penal Procedure there is no evidence which leads to the reasonable suspicion that the defendant could have committed the crime for which they are investigated or from the evidence material results that the defendant is not in a situation regulated by Art. 223 par. (1) Code of Penal Procedure. We also consider that the custodial preventive measure is also illegal if the evidence material administered in the case leads to a cause which obstructs setting in motion or carrying out the penal action.

As far as we are concerned, we consider de lege ferenda that the modification of the provisions of Art. 283 par. (2) Penal Code should be made, respectively the normative version which incriminates ruling noncustodial preventive measures, by replacing the phrase "knowing that they are guilty" with "knowing at the time of ruling the noncustodial preventive measure that there is a cause which prevents setting in motion or carrying out the penal action"

IV. Penal responsibility of the magistrate

The magistrate shall not be held responsible penally or disciplinarily when the procedural measure ruled or the ruled solution resulted from analysing the whole evidence material admininstered in the case. Thus, according to the provisions of Art. 2 in Law no. 303 from 2004, republished and with subsequent ammendments, regarding the judges' and prosecutors' status "the judges and the prosecutors are independent, abide only by the law and must be unbiased". It results that, acording to his professional training and his status of independence, the prosecutor carries out the prosecution and decides on procedural acts and measures which he performs or rules and the evidence to be administered in a penal case which will support the solution ruled by him.

Soliciting, by means of a penal complaint, an investigation of the way the prosecutor administered the evidence which he considers conclusive and useful for the case according to his own judicial reason leads to the conclusion that these operations can be carried out by another authority, fact which goes against the prosecutor's independence principle.

At the same time, the judge of the case is the only authority invested by the law to lead the trial, decide on the judicial reports submitted for trial, the administered evidence, the appliable judicial norms, to establish the truth and rule the solution and the parties interested in the trial have the right and the obligation to contribute to finding the truth and accomplishing justice in the case.Soliciting, by means of a penal complaint, an investigation of how the judge assessed the evidence and solved the case leads to the conclusion that evidence assessment can be carried out by another authority than the judge of the case, in first instance or means of appeal, fact which goes against the judges' independence principle.

If a judge or a prosecutor is irrevocably convicted for committing the crime of unjust repression, he/she is automatically released of their function, according to Art. 65 par. (1) letter f) in Law no. 303 from 2004, republished and with subsequent ammendments, concerning the judges' and the prosecutors' status.

Conclusions

The active subject of the crime under analysis is circumstanciated. Thus, the crime of unjust repression can be committed only by a magistrate who, according to the law, has the right to set in motion the penal action, to take a custodial or noncustodial preventive measure, to rule prosecution or to rule a conviction sentence.

In the template version regulated by Art. 283 par. (1) Penal Code only a magistrate can have the status of an active subject. As to the aggravated version of the crime of unjust repressioned stipulated by the provisions of Art. 283 par. (2) Penal Code, the active qualified subject can be both a prosecution body and a magistrate.

We consider that, de lege ferenda, the modification of the provisions of Art. 283 par. (1) Penal Code should be made, respectively the normative version which incriminates ruling noncustodial preventive measures, by replacing the phrase "knowing that they are guilty" with "knowing at the time of ruling the noncustodial preventive measure that there is a cause which prevents setting in motion or carrying out the penal action".

Simultaneously, we consider de lege ferenda that the modification of the provisions of Art. 283 par. (2) Penal Code should be made, respectively the normative version which incriminates ruling noncustodial preventive measures, by replacing the phrase "knowing that they are guilty" with "knowing at the time of ruling the noncustodial preventive measure that there is a cause which prevents setting in motion or carrying out the penal action".

The magistrate shall not be held responsible penally or disciplinarily when the procedural measure ruled or the ruled solution resulted from analysing the whole evidence material admininstered in the case.

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Organized Crime Groups

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Abstract

The element of novelty that appears in the Criminal Code adopted by Law no. 286/2009 is that it has unified the regulations of the previous laws that were repealed and here we refer to the provisions of Law no. 39/2003 and Art. 323 of the Criminal Code previously included in Art. 367 of the Criminal Code in force.

Even in the event the repeal of some legal provisions occurred it is undeniable that they have not been decriminalized as judged at a time by the legal practice, but on the contrary, the concepts regarding the initiation, establishment, adhesion or support are identical with the actions incriminated in the provisions of Art. 367 of the Criminal Code in force, fact which reaffirms the intention of the legislature to further take over and punish this criminal offence which constitutes a particularly serious phenomenon given that we are witnessing the expansion of the activity and incidence of crime groups that benefit from enormous competitive advantages and fraudulently prejudice the Romanian economy.

Keywords: *crime group, structured group, association, decriminalization.*

The unprecedented scale that organized crime has taken both in the twentieth century and in the early twenty-first century imposed the reaction of international organizations and individual countries to regulate from a criminal point of view sanctions against those who attack the economic system as much and when the fundamental institutions of the rule of law are affected.

The new measures adopted in the criminal legislations took into account the fact that currently organized crime groups have become more sophisticated as they have adapted to the strategies of multinational companies, adapting new techniques that can provide protection from the authorities and at the same time reduce the risks of the illegal activity being detected.

A brief history

Concerns related to organized crime have existed since the late nineteenth century in Romania, when by the adoption of the Criminal Code of 1864 (with effect from April 30th, 1865 until March 18th,1936, published in the Official Gazette, Part I of October 30th, 1864, republished in the Official Gazette, Part I of October 22nd, 1912.), it was regulated

in Articles 213-216 that the association of evildoers that constituted crime against public peace and was made in order to harm the interest of people or properties.

When this crime was accompanied by another crime (given that the criminal code included punishments for crimes, offences and penalties), the authors of the association were punished, which reveals the independent nature of this crime to the end crime.

This type of offences (crimes) envisaged inspiration from the French Criminal Code which in Art. 265 qualifies the associations of evildoers as a crime against public peace and provides two essential conditions: the existence of the Association and for the association to be directed against persons or properties.

The Criminal Code of 1936 (published in the Official Gazette, Part I no. 65 of March 18th, 1936, republished in the Official Gazette, Part I no. 48 of February 2nd, 1948), provided in Art. 315 that "*the mere fact of association in order to prepare or execute crimes or offences, or even just a determined crime or an offence against the life, physical integrity or freedom of persons or against property, regardless of the duration of the association and the number of its members and any commitment established for the same purpose, is a crime of association against public peace."*

The regulation in this respect was more complete than the previous one because it referred both to crimes and offences and the purpose of the offence that would be performed to be directed against human life, physical integrity, freedom of persons or against goods without distinguishing between the duration of the association and the number of its members. The offence only exists if there is an agreement established for this purpose, which means, at the same time, the independent nature of this type of offence.

The Criminal Code of 1968 (published in the Official Gazette no. 79 bis of June 21st, 1968, reprinted in the Official Gazette no. 55 of April 23rd, 1973 and in the Official Gazette no. 65 of April 16th, 1997), entered into force on January 1st, 1969, Art. 323 par. (1) provided for the offences of association for committing offences, as "*the act of one person of associating or initiating the establishment of an association to commit one or more offences other than those shown in art 167, or the adhesion to or support of any form of such an association."*

This type of offence, starting from its social danger differed from the criminal participation provided for in Art. 23 of the Criminal Code (*participants are contributors to committing an offence under the criminal law as perpetrators, instigators or accessories*) because in the case of an association the social danger comes *"from the very creation and establishment of the plurality whose purpose is committing one or more offences"* [1], and *"a plurality of subjects of an offence is absorbed into the criminal activity itself with which it merges"*. [1]

For these offences the material element of the objective side can be carried out in four ways, namely, association, initiation, adhesion or support.

The existence of this act was conditioned by the exclusion of the situations provided in Art. 167 regulating the offence of plotting that provided that the act of initiating or establishing an association or grouping, of adhering to or supporting in any form such an association or grouping with the purpose of committing the offences provided for by Art. 155-163, 165 and Art. 166[1] of the Criminal Code.

Also the old Criminal Code included provisions relating to the association and regulation of the crime provided by Art. 357 par. (3) regarding genocide, which provided the commitment

for the purpose of committing this crime. This provision has also been taken over in the new Criminal Code in Art. 438 par. (3) which expressly uses the term "*commitment for the purpose of committing*" the crime of genocide.

After 1990, by the adoption of Law no. 51/1991 on Romania's national security (originally safety – published in the Official Gazette, Part I no. 163 of July 8th, 1991 and republished in the Official Gazette, Part I no. 190 of March 18th, 2014), it was provided for in Art. 19 par. (1) (repealed by Law no. 187/2012 implementing the new Criminal Code) that *"the initiation, organization or establishment in Romania of some informative structures that might prejudice the national security, supporting them in any way or adhering to them, the possession, manufacture or illegal use of specific means of interception of communications, and the collection and transmission of secret or confidential information by any means, outside the legal framework, is an offence punishable by imprisonment from 2 to 7 years, if the act is not a more serious offence"*.

At international level the United Nations Convention Against Transnational Organized Crime was adopted in 2000, signed by Romania in Palermo on December 14th, 2000, which in the provisions of Art. 2 letters a)-c) shows which is the terminology of crime group and namely:

a) the expression organized crime group means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences covered by this Convention, in order to obtain, directly or indirectly, a financial advantage or another material benefit;

b) the expression serious crime means an act which constitutes an offence punishable by deprivation of liberty the maximum length of which must not be less than four years or by a heavier penalty;

c) the expression structured group means a group that was not randomly formed for the immediate commission of an offence and who may not have a role of continuity or developed structure for its members;

The analysis of these terms shows what is meant by organized crime group, but it is left to the countries that will criminalize these kinds of crimes by law, the definition of the term serious crime, and in letter c) it shows the difference between an organized crime group and a random one.

Moreover, the legislative guide for the implementation of the Convention states that a structured crime group relates to any element of organized training.

The signing of the Convention by Romania led to the adoption of Law no. 39/2003 on preventing and combating organized crime (published in the Official Gazette, Part I no. 50 of January 29th, 2003) which in Art. 2 letter a) provides that an *organized crime group* means *"a structured group of three or more persons, existing for a period and acting in a coordinated manner in order to commit one or more serious crimes in order to obtain directly or indirectly a financial advantage or another material benefit;"*

Regarding the concept of organized crime groups it was provided for both the minimum number of people who form the group, its existence for a period of time and the gravity of the offences, which were provided for in Art. 2 letter b), specifically providing for the pursuit of a financial advantage or another material benefit by the members of the group.

Law no. 39/2003 regulated in Art. 7 par. (1) *"the initiation or establishment of an organized crime group or the adhesion to or support of any form of such group"*, and Art. 8 showed that *"the initiation or establishment or adhesion to or support in any way of a group for the purpose of committing crimes, which is not, under this law, an organized crime group, shall be punished as appropriate, according to Art. 167 or 323 of the Criminal Code."*

As can be seen, the plurality established for the purpose of committing the offences provided for in Art. 8 no longer refers to a serious crime, which would be the purpose of the criminal group and no longer aims for a material purpose, so that the text is identical to that provided for in Art. 323 and Art. 167 of the Criminal Code. Thus, Art. 8, as well as the association provided for by Art. 323 did not provide the number of people who would be part of the group, but there had to be a plurality of subjects, which implies a consensus regarding the association. Also, the provisions of Art. 8 no longer refer to the existence of a period of time, as being necessary and compulsory that upon association to demonstrate the moment when the offence is perpetrated.

In order to be consistent with Art. 2 letter c) of the United Nations Convention Against Transnational Organized Crime, in Art. 2, thesis II of Law no. 39/2003 it has been shown that *"the group formed occasionally with the purpose of immediately committing one or more crimes and which has no continuity or determined structure or roles for its members within the group is not an organized crime group"*

Compared to the provisions of Art. 2 letter a) of Law no. 39/2003, Art. 323 of the Criminal Code, if the case of the established plurality, required that each participant to have a role in committing the crime, even given that not all the members of the association actually participate in committing the offence. In lack of any pre-established role within the association, we have the situation of a plurality of subjects to the commission of an offence, especially when the association would not be aimed at committing one or more criminal offences.

References to the organized crime group can also be found in Law no. 535/2004 on the prevention and fight against terrorism (published in the Official Gazette, Part I no. 1161 of December 8th, 2004) that in Art. 4 points 3-5, defines what is meant by *structured group* – "a group that is not randomly formed for the immediate commission of an act of terrorism, does not involve a constant number of members and does not require establishing in advance their role or a hierarchical structure;" *terrorist group* – "a structured group of more than two persons, established for a certain period of time and acting in concert for committing acts of terrorism;" *terrorist organization* – "a hierarchically-formed structure, with its own organization and action ideology, which is represented at both national and international levels and which in order to achieve its specific goals, uses violent and/or destructive means."

Also, Art. 35 par. (1) in force (as amended by Law no. 187/2012) of Law no. 535/2004 shows that *"the act of associating or initiating the establishment of an association to commit terrorist acts or the adhesion to or support in any form of such association shall be punished with imprisonment from 5 to 12 years and deprivation of some rights, without exceeding the maximum punishment provided by the law for the offence that was the purpose of the association."*

The act of Art. 35 par. (1) of Law no. 535/2004 cannot be confused with other crimes related to the crime group because not only is it a special law but it makes specific reference to acts of terrorism.

Until the entry into force of the new Criminal Code from February 1st, 2014 (Law no. 286/2009 on the Criminal Code, published in the Official Gazette, Part I no. 510 of July 24th, 2009, implemented and amended by Law no. 187/2012 published in the Official Gazette, Part I no. 757 of November 12th, 2012), in legal practice, the High Court of Cassation and Justice has ruled in several cases on Law no. 39/2003 concerning the application of Art. 7 or the application of this law in competition with other crimes.

Thus, by Criminal Decision no. 1021/March 16th, 2011, HCCJ showed that "the achievement of pre-established roles in an organized crime group, group formed by other persons, which satisfies the requirements of Art. 2 letter a) of Law no. 39/2003 meets the constitutive elements of the offence provided by Art. 7 par. (1) of Law no. 39/2003 in the form of adhesion to an organized crime group or support in any form of such a group."

By Decision no. 3091 of October 2nd, 2012, HCCJ, the Criminal Division, it was showed that "in accordance with Art. 2 letter a) of Law no. 39/2003, the concept of organized crime group is the structured group of three or more persons, existing for a period and acting in a coordinated manner in order to commit one or more serious crimes such as the child trafficking offences contained in Art. 2 letter b) pt. 12 of the same law, in order to directly or indirectly obtain a financial benefit or another material benefit. Accordingly, in the application of the mentioned legal provisions, there is an organized crime group, if four defendants – *irrespective of whether there are family ties between them or not* – acted for a period of several months and in a coordinated manner in order to commit the child trafficking offences provided for in Art. 13 of Law no. 678/2001, each of the defendants fulfilling determined roles in committing the mentioned offences, in order to obtain a financial benefit from the exploitation of the child victims by forcing them into prostitution.

Recruiting and hosting a minor by fraud and violence, for purposes of exploiting the victim by forcing them into prostitution if the act was committed by two or more persons together, complies with the provisions of Art. 13 par. (1), (2) and (3) of the Law no. 678/2001 (Article 13 was repealed by Law no. 187/2012 implementing the Criminal Code).

By Decision no. 1349 of April 18th, 2013, HCCJ, the Criminal Division, held that "if three people established an organized crime group are jointly committing the offence of smuggling, the constitutive elements of the offence provided for in Art. 7 par. (1) of Law no. 39/2003 and the constitutive elements of the offence of smuggling provided for in Art. 270 based on the provisions of Art. 274 of Law no. 86/2006 – the thesis regarding the offence of smuggling two or more people together – in the real conjecture of interactions, the retention of the provisions of Art. 274 of Law no. 86/2006 not excluding the retention of the offence provided for in Art. 7 par. (1) of Law no. 39/2003".

Since the penalty provided for in Art. 7 of Law no. 39/2003 was very sore, being punished with imprisonment from 5 to 20 years, par. (2) of the same article expressly stipulated that the penalty imposed for the offence of establishing a criminal organization, or joining or supporting one in any way cannot exceed the punishment provided for the aimed offence.

In this respect, the HCCJ, the Criminal Division, Decision no. 2325 of July 2nd, 2013, stated that "if the purpose of the organized crime groups includes the offence of forgery of electronic payment instruments provided for in Art. 24 par. (1) of Law no. 365/2002, the offence of possession of equipment to forge electronic payment instruments provided for in Art. 25 of Law no. 365/2002 and the offence of making fraudulent financial transactions provided for in Article. 27 par. (1) of Law no. 365/2002, the penalty prescribed by law for the most serious offence that is the purpose of the organized crime group, according to Art. 7 par. (2) of Law no. 39/2003, is the penalty prescribed by the law for the offence of forgery of electronic payment instruments (imprisonment for 3-12 years), even if the defendants are sentenced only for the offence of possession of equipment to forge electronic payment instruments, the perpetration of the offence of forgery of electronic payment instruments and the perpetration of the offence of fraudulent financial operations were prevented by the intervention of the prosecuting authorities."

Current regulation

By the adoption of the new Criminal Code, as shown in the explanatory memorandum – Title VIII is dedicated to crimes related to social life, being regrouped in several chapters both indictments existing in the old Criminal Code and others who were dispersed in various special laws. Chapter I includes offences against public peace and concerning crime groups the legislature adopted in Art. 367 the establishment of an organized crime group, showing in par. (1) that *"The initiation or establishment of an organized crime group, the adhesion to or support in any form of such a group is punishable by imprisonment from one to five years and deprivation of certain rights" and par. (6) states that "the organized crime group means a structured group of three or more persons established for a certain period of time and acting in a coordinated manner in order to commit one or more offences"*

It is important to note that Art. 126 pt. 2 of Law no. 187/2012 for the implementation of Law no. 286/2006 on the Criminal Code, the offences provided by Art. 7 to 10 and 13 of Law no. 39/2003 were repealed.

After the entry into force of the new Criminal Code taking into account the provisions of Art. 367 in which the initiation or establishment of an organized crime group, the adhesion or support in any form must be structured and composed of three or more persons for a certain period of time and act in a coordinated manner in order to commit one or more offences, the courts, for the most part, considered that Art. 8 of Law no. 39/2003 and those provided for by Art. 323 of the old Criminal Code were decriminalized.

Even the High Court of Cassation and Justice by decision no. 449/February 5th, 2014 found that the crime of initiating or establishing or joining or supporting in any form a group for purposes of committing crimes, action provided for by Art. 8 of Law no. 39/2003 referring to Art. 323 of the Criminal Code (above) was decriminalized and for this reason it acquitted the defendant according to Art. 16 par. (1) letter b) of the Criminal Procedure Code, noting that the act was no longer provided by the criminal law.

Similar solutions of the HCCJ, we can find in Criminal Decision no. 608/2014 and no. 1055/2014 by which it was found that the acts provided for in Art. 8 of Law no. 39/2003 and Art. 323 of the Criminal Code above are decriminalized.

Considering the problems raised in the enforcement of the criminal law regarding Art. 367 of the Criminal Code, the High Court of Cassation and Justice was seized regarding a prior judgment for undoing a legal matter under Art. 475 of the Criminal Procedure Code and by Decision No. 12/2014 (published in the Official Gazette no. 507/July 8th, 2014) it ruled that Art. 323 of the previous Criminal Code and Art. 8 of Law no. 39/2003, in the regulation prior to the amendments brought by Law no. 187/2012 can be found in the indictment of Art. 367 of the Criminal Procedure Code, being decriminalized.

The solution of the High Court of Cassation and Justice was based mainly on Art. 3 par. (2) of Law no. 187/2012, which states that "however, there is no decriminalization, although the indictment rule of the old rule can no longer be found in the new law, its contents are taken by another norm of the Criminal Code or by special legislation being covered by an existing general indictment."

By Decision no. 10/2015 (published in the Official Gazette no. 389 of June 4th, 2015) the HCCJ upheld the complaint lodged regarding "the means to interpret the provisions of Art. 367 par. (1) and (6) of the Criminal Code, respectively that if the condition of the typicality of the offence of organized crime group (or if the constitutive elements are met) then the offence which was the purpose of the group was decriminalized with the entry into force of the new Criminal Code.

In this respect, it was held that in the interpretation of the provisions of Art. 367 par. (1) and (6) of the Criminal Code, if with the entry into force of the new Criminal Code, the offence that falls within the scope of the organized group was decriminalized, one of the highlights of the offence is no longer met, namely the condition of typicality."

This last decision establishes that if the offence that was the purpose of the organized group was decriminalized the application of Art. 367 par. (1) and (6) of the Criminal Code (in this case independence of the offence depends on the offence end) can no longer be made, since according to the provisions of Art. 477 of the Criminal Procedure Code, the decision is binding on the courts from its publication in the Official Gazette.

Subsequently, there was the plea of unconstitutionality of Art. 367 par. (1) and 6 of the Criminal Code in the interpretation of Decision no. 12 of June 12th, 2014 of the High Court of Cassation and Justice, the panel for the undoing of law matters in criminal matters.

The Constitutional Court ruled by Decision no. 393 of May 28th, 2015 (published in the Official Gazette no. 609/August 12th, 2015) and Decision no. 17 of January 19th, 2016 (published in the Official Gazette no. 202 of March 18th, 2016) in the sense of rejecting the unconstitutionality of Art. 367 par. (1) and (6) in its interpretation of Decision No. 12/2014 of the HCCJ.

Eloquent for the purpose of rejecting the plea of unconstitutionality seem the considerations of Decision no. 393/2015 showing that the undoing of a law matter regulated by the provisions of Art. 475-477 of the Criminal Procedure Code is a mechanism to prevent the occurrence of uneven practice in the application and interpretation of the law by the courts and according to Art. 146 of the Constitution, the Constitutional Court has no power to censor the constitutionality of judgments, whether rendered in undoing a cause of common law or in view of the interpretation and uniform application of the law.

With regard to the provisions of Art. 323 of the previous Criminal Code and Art. 8 of Law no. 39/2003 ascertained by the HCCJ as not being decriminalized, the Constitutional

Court stated that no prejudice was brought to the invoked constitutional principles, therefore the plea of unconstitutionality was unfounded. Therefore, the interpretation of Art. 367 par. (1) and (6) of the Criminal Code by Decision no. 12/2014 can be found in the current indictment of Art. 367 and reiterates the intention of the legislature to be in force without violating the constitutional provisions.

The Constitutional Court was also seized on the plea of unconstitutionality of Art. 367 par. (1), (3) and (6) of the Criminal Code in the sense that par. (3) would violate certain constitutional provisions in Art. 16 (equality of rights), Art. 21 par. (3) (right to a fair trial), Art. 23 par. (12) (legality of the sentence) and the like, in the sense that the active subject provided for by Art. 367 par. (1) would answer both for its own act and the offence that was the purpose of the group, even if not participating in any way in committing it.

By Decision no. 559/June 12th, 2016 (published in the Official Gazette no. 818/October 17th, 2016) the Constitutional Court dismissed as unfounded the exception considering both the considerations expressed in the previous decisions and the fact that people that have a plurality established under Art. 367 par. (1) are responsible for the offence of organized crime group and the conjecture of offences rule applies to the provisions of par. (3) of the same article, *to the members of the organized crime group who have committed the aimed offence*. The Court also noted that this legal provision is consistent with Art. 7 par. (1) of the European Convention on Human Rights, in the sense that the notion of "*law*" (*rom. drept*) used in Art. 7 corresponds to the notion of "law" that appears in the articles of the Convention and includes both the legal provisions and the legal practice involving qualitative requirements, in particular those of accessibility and foreseeability.

In principle, the decisions of the Constitutional Court regarding Art. 367 par. (1), (3) and (6) of the Criminal Code give a correct interpretation of the legal provisions, but in legal practice there were situations in which the same constitutive elements of the offence provided for by Art. 323 were not found in the offence provided for by Art. 367 par. (1) of the Criminal Code, which is the more favourable criminal law, the length of the penalty being between 1 and 5 years.

We refer to the situation where under the rule of the old law the act of association provided for by Art. 323 was committed by two persons because the plurality of subjects required a number, at least two persons and not for a period of time for which the penalty provided for by the law was from 3 to 15 years, compared with the offence provided for by Art. 367 par. (6), which provides that a crime group means a group consisting of 3 or more persons, established for a certain period of time.

These arguments are also supplemented by the fact that the provisions of Art. 323 of the Criminal Code and Art. 8 of Law no. 39/2003 were decriminalized, and for a period of several months from the implementation of the new Criminal Code, the courts including the HCCJ adopted this view on the decriminalization of acts.

We have to keep in mind here that the application of the more favourable criminal law until the final judgment of the case provided for by Art. 5 of the Criminal Code are constitutional insofar as the provisions of the law do not allow combining the provisions of successive laws in establishing and applying the more favourable criminal law (Constitutional Court Decision no. 265/2014, published in the Official Gazette no. 372/ May 20th, 2014).

We can mention here Decision no. 7/2016 of the HCCJ, panel for the undoing of law matters in criminal matters, published in the Official Gazette no. 251/May 4th, 2016, the application of Art. 5 of the Criminal Code in case of plurality of offences consisting of committing offences based on the old law, and others on the new law, the more favourable criminal law shall apply identified as the old or new law for those committed before February 1st, 2014 and for those committed after that date the new law shall apply.

To those shown we believe that when the factual situation does not result in the fulfilment of the constitutive elements of the offence provided for in Art. 367 par. (1) and (6) of the Criminal Code, and the act was committed before the entry into force of the criminal code and the constitutive elements of the offence provided for by Art. 323 of the Criminal Code remain, we consider that the person under investigation would be relieved of criminal liability.

In terms of level practice, after the appearance of the new Criminal Code we can show that by Decision no. 609 of February 19th, 2014 of the HCCJ, it was stated that the initiation or establishment of an organized crime group, the adhesion to or support in any form of such a group, for the purpose of committing the crime of money laundering, falls within Art. 367 par. (1) of the new Criminal Code. The offence of money laundering, provided for in Article. 29 par. (1) of Law no. 656/2002 is not conditional upon any conviction for the offence of which the goods originated. In this regard, according to Art. 9 par. (5) of the European Council Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, adopted in Warsaw on May 16th, 2005, ratified by Law no. 420/2006, the prior or simultaneous conviction for the predicate offence is not a prerequisite of the conviction for the offence of money laundering.

Also, the HCCJ by decision no. 71/RC of March 4th, 2016 stated that "the act of establishing a criminal organization is an offence under the criminal law, criminalized successively in Art. 323 previous Criminal Code, Art. 7 of Law no. 39/2003 and Art. 367 Criminal Code and therefore, the appeal for cassation based on the case covered in Art. 438 par. (1) pt. 7 of the Civil Procedure Code, on the ground that the offence is not covered by the criminal law, is unfounded. If the time of the exhaustion of the offence of establishing a criminal organization is in time after the entry into force of Law no. 39/2003, the act falls within the provisions of Art. 7 of Law no. 39/2003 (or the provisions of Art. 367 of the Criminal Code, if the new criminal law is the more favourable criminal law), even when the moment of commission was achieved before the entry into force of Law no. 39/2003, whereas in this case the applicable criminal law shall be determined in relation to the time of exhaustion and not the time of committing the offence."

This view of the High Court of Cassation and Justice is correct because according to Art. 367 of the Criminal Code, the crime occurs at the time of initiation, establishment, adhesion or support of the group with the purpose of committing crimes. The offence can have a continuous nature, and its exhaustion must be reported to the last act of the group.

The time element is important in the sense of deciding whether in a given case the act committed and exhausted under the old law may be applied to the more favourable criminal law, otherwise in case the exhaustion occurs after the entry into force of the new law, the law new shall apply.

On the application of Art. 367 par. (2) when the offence falling within the scope of organized crime groups is punishable by law with life imprisonment or imprisonment exceeding 10 years, the penalty being higher than in par. (1), we affirm that the group members must know objectively what would the aimed offence for which the group is established, for which the provisions of par. (2) shall apply.

In situations where there are offences that in the type form are punishable with a penalty provided for by the criminal law under 10 years, such as abuse of office, the provisions of Art. 297 par. (1), and the aggravated form is provided for in Art. 309 of the Criminal Code, we believe that the offence of establishing an organized crime group shall relate to the basic offence that falls within the scope of crime groups namely the abuse of office provided for by Art. 297 of the Criminal Code sanctioned by the legislature for a penalty between two and seven years in prison due to the fact that upon the date of establishment of the alleged group the people involved did not know that there will be a prejudice, nor its scope, which would make it possible to apply the aggravation provided for by Art. 367 par. (2) of the Criminal Code.

In this regard, according to decision no. 405/June 15th, 2016 of the Constitutional Court of Romania, pt. 20, this aggravation is not automatically incidental whenever a civil servant has obtained for itself or for others an undue advantage independent of its subjective attitude, the legal text completing with the general provisions of the Criminal Code that also establish a subjective liability in the case of aggravating circumstances and circumstantial elements of an aggravated nature, according to Art. 30 par. (3) of the Criminal Code.

The provisions of Art. 30 par. (3) of the Criminal Code establish a subjective liability in the case of aggravating circumstances and circumstantial elements of an aggravated nature, expressly stating that the condition, situation and circumstance in which the offender did not know it at the time of committing the offence is not an aggravating circumstance or aggravating circumstantial element.

Also, according to Art. 50 par. (2), the factual circumstances reflect on the authors and participants only insofar as they have known and have foreseen them.

Given that the authors of the alleged crime group did not know the circumstantial elements aggravating the factual circumstance, obviously the aggravation according to the provisions of Art. 367 par. (2) of the Criminal Code cannot be hold, the correct legal classification being the one in par. (1).

In conclusion, it can be seen that the current regulation of the Criminal Code on the creation of an organized crime group, given that it operated a repeal of Art. 323 of the old Criminal Code and Art. 7 and 8 of Law no. 39/2003 took over material elements of the objective side thereof, so that it can be said that they are identical with the actions constituting the material element of the offences provided for by Art. 7 and 8 of Law no. 39/2003 and Art. 323 of the Criminal Code above, the acts not being decriminalized.

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The Active Subject of Embezzlement

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Abstract

In this article, I aimed at making an analysis concerning the active subject of embezzlement, stipulated by Art. 295 of the Criminal Code. I believe that this analysis is imperative, considering that, although the contents of the embezzlement incrimination norm of the current Criminal Code is identical to that in the previous regulation, however there are important changes, which do not concern only the gentler sanctioning system of the current Criminal Code. Thus, if in the former Criminal Code, the offense of embezzlement was included in the category of offenses against patrimony, in the current Criminal Code, it is found in the chapter related to offenses of service. Likewise, in the current Criminal Code, the definition of the notion of public clerk differs substantially from the one in the Criminal Code. All these changes have an influence in terms of the active subject of embezzlement, as we are going to see.

Keywords: *embezzlement, active subject, public clerk, operative, manager.*

1. Introductive notions on embezzlement

In Art. 295 par. (1) of the current Criminal Code, the offense of embezzlement is defined, consisting in "the appropriation, use or trafficking by a public clerk, in his own interest or for another person, of money, valuables or other goods that it operates or manages". The deed is punished by imprisonment from 2 to 7 years and by interdiction to exert the right to occupy a public position.

It needs to be said that, if in the Criminal Code of 1969, this offense was regulated by Art. 215 [1] of Title III, including the Offenses against patrimony, in the current Criminal Code, the offense is included under Tile V, Chapter II, describing Service Offenses.

In the Recitals of the current Criminal Code, it is shown that "this deed has been classified where it belongs, in the group of service offenses, because, by committing it, the social relation of service is prejudiced, firstly, and secondly, the patrimony of a legal person is damaged". At the same time, we are reminded that including the offense of embezzlement in the category of service offenses is not something new to our criminal laws, considering that in the Criminal Code of 1936 as well this offense (stipulated in Art. 236) was part of Chapter I of Title III, called "Offenses and wrongdoings against public administration" [1]. As shown in the Recitals of the current Criminal Code, this solution concerning the classification of embezzlement in the category of service offenses was

adopted" in other laws as well, as it happens with Art. 432 of the Spanish Criminal Code, Art. 314 of the Italian Cod Criminal Code or Art. 432-15 of the French Criminal Code".

This amendment operated in the current Criminal Code as regards the group of offenses including embezzlement has legal consequences firstly as regards the social value protected by the incrimination norm. Thus, if the Criminal Code of 1936 stated that embezzlement had as legal object the protection of patrimony relations, in the current Criminal Code, the main legal object of this offense consists in service relations, and only the secondary legal object refers to patrimony relations. Therefore, when analyzing an actual deed committed in the objective reality, to be able to establish with full accuracy any legal classification of said deed as offense of embezzlement, one must consider, first of all, the prejudice caused to the service relations, and only secondly the possible prejudice caused to the passive subject. [1] In these circumstances, the natural question arises of what is the meaning of service relation, considering the possible implications related to quality that the active subject must have when the deed is committed.

Another important difference made by the current Criminal Code, with implications on the active subject of embezzlement, consists in the notion of public clerk, and the definition given to this notion by Art. 175 par. (1) and (2) of the Criminal Code, unlike the notion of public clerk, used by the Criminal Code of 1969, compared to the definition given by Art. 147 par. (1) for public clerk, respectively par. (2) for public clerk.

Finally, we would like to remind that Art. 308 of the Criminal Code provides an attenuated variant of embezzlement[(1)], in case the active subject, although it is not a public clerk, satisfies the specific requirements of this text of law. Besides, the doctrine has shown that, as regards the active subject of the incrimination included in Art. 295 of the Criminal Code, there have been changes compared to the previous regulation. [2]

For the previously exposed considerations, we believe that the most important modifications brought by the current Criminal Code to the offense of embezzlement concern the active subject, for which reason our analysis will study this condition existing before the offense is committed.

2. Requirements of the active subject

At a first reading of the incrimination norm, one may draw the conclusion that the active subject of embezzlement must cumulatively have two capacities:

– be a public clerk;

– manage or operate money, valuables or other goods.

Thus, as stated in the doctrine, the active subject of this offense is twice qualified: on the one hand, it has the capacity of public clerk, and, on the other hand, it has the capacity of operative or manager of the goods belonging to a person. [3] The absence of any of the two requirements of the active subject triggers the exclusion of the offense of embezzlement.

As regards the capacity of public clerk demanded to a person, this may be replaced by the quality demanded by Art. 308 of the Criminal Code, in which case the person is also

(1) By Decision no. 1/2015, published in the Official Journal no. 105 of February 10, 2015, the High Court of Cassation and Justice, the Panel of settlement of matters of criminal law, admitted the notification filed by Oradea Court of Appeal, Criminal section, for the case related to minors, and decided that "the provisions of Art. 308 represent an attenuated variant of the offense of embezzlement stipulated by Art. 295 of the Criminal Code. When calculating the criminal liability prescription term, the punishment stipulated in art. 295 referring to Art. 308 par. (2) of the Criminal Code is also taken into account".

called in the doctrine "private clerk" [4]. If the active subject has the capacity of private clerk, we are in the presence of the attenuated variant of embezzlement, stipulated in Art. 308 of the Criminal Code.

3. Notion of public clerk

According to Art. 175 par. (1) of the Criminal Code, the public clerk, according to the criminal law, is the person who, on a permanent or temporary basis, with or without remuneration:

a) carries out duties and liabilities, established according to the law, in order to execute the prerogatives of the legislative, executive or judicial powers;

b) performs a position of public dignity or a public position of any nature;

c) caries out, alone or together with other persons, within an autonomous authority, within another economic operator or legal person with full or majority State-owned capital, duties related to the achievement of its activity object.

Likewise, according to Art. 175 par. (2) of the Criminal Code, it is considered to be a public clerk, according to the criminal law, the person carrying out a service of public interest that was vested to do so by the public authorities, or that is subject to their control or supervision as regards the execution of said public service.

In reference of the provisions of Art. 175 par. (1) letter a) of the Criminal Code, we are showing that, according to Art. 1 par. (4) of the Constitution of Romania, the State is organized according to the principle of separation and balance of powers – legislative, executive and judicial – within a constitutional democracy. The legislative power is provided by the Parliament, which is made of the Chamber of Deputies and the Senate. The executive power is held by the President of Romania and by the Government. The Government is made of a Prime Minister, ministers and other members established by an organized law. The judicial power is mainly held by the High Court of Cassation and Justice and by the other courts of law established by the law regulating justice in Romania, but also by the Public Ministry, carrying out duties by prosecutors constituting prosecutors' offices subordinated to courts of law, and also by the Superior Council of Magistrates, which is the guarantor of the independence of justice and who plays the part of court of law as regards the disciplinary liability of judges and prosecutors. [5]

As regards the provisions of Art. 175 par. (1) letter b) of the Criminal Code, we are showing that the persons carrying out a position of public dignity in the meaning of thesis I of this text of law are dignitaries, namely that category of persons whose activity is remunerated from the State budget, without having a law regulating their legal status [6]. According to the Law no. 284/2010 on unitary employment of the staff paid out of public funds, the function of public dignity is the public function occupied by term of office directly acquired, by organized elections, or indirectly acquired, by appointment, according to the law. The positions assimilated to those of public dignity are the positions of management within public institutions subordinated to the Government [7].

The persons holding a public position of any kind, in the meaning of the 2nd thesis of Art. 175 par. (1) letter b) of the Criminal Code are those persons holding any kind of public position within the authorities of a specialized central public administration, within the authorities of the local public administration or in any other public institutions. Thus, it has been decided that the "doctor employed by employment contract in a hospital unit

within the public health system has the capacity of public clerk according to the provisions of Art. 175 par. (1) thesis II of the Criminal Code" [8].

As regards the provisions of Art. 175 par. (1) letter c) of the Criminal Code, we are showing that the legal persons with entirely or majority state-owned capital are those legal persons where the Romanian State holds more than half of the subscribed and paid up share capital. By the context of this text of law, there is no relevance as regards the organization manner of the legal entity (respectively autonomous authority, economic operator or another legal person), and it is important that it has entirely or majority state-owned capital.

The provisions of Art. 175 par. (2) of the Criminal Code regulate the "assimilated public clerk". This text of law takes into account, in general, the persons carrying out a service of public interest, but it however sets a limitation of the scope of these persons by requiring an additional cumulative condition. It is obvious that freelancers carrying out an activity of public interest are targeted. The additional cumulative condition requested to a person rendering a service of public interest, in order to be considered an assimilated public clerk, is the following: i) the person must have been vested in that service of public interest by the public authorities; or ii) said person must be subject to the control or supervision of the public authorities concerning the execution of said public service. For these purposes, it has been decided, for instance, that the technical judicial expert was a public clerk in accordance with the provisions of Art. 175 par. (2) thesis I of the Criminal Code [9]. The doctrine criticized the provisions of Art. 175 par. (2) of the Criminal Code, assimilating to the public clerk the particular persons that, as freelancers, carry out a service of public interest. Thus, it has been seen as excess of the lawmaker to situate at the same level, in terms of applicable criminal treatment, the person carrying out a service of public interest and the public clerk [10]. The analysis of the provisions of Art. 175 of the Criminal Code shows that, as regards par. (1), the active subject of the offense of embezzlement of standard form, as stipulated by Art. 295 of the Criminal Code, may only be a natural person. As regards Art. 175 par. (2) of the Criminal Code, referring to persons carrying out a service of public interest, we must take into account the fact that, according to the specific law of organization of each profession, these persons are likely to constitute in specific organization forms, allowed by the law regulating said profession, which supposes the incorporation of a legal entity. In these circumstances, depending on the actual manner by which the deed was committed, I believe that it is possible that, on the grounds of Art. 175 par. (2) of the Criminal Code, the active subject of the offense of embezzlement may be a legal person as well.

4. Extension of the scope of the active subject according to the provisions of Art. 308 of the Criminal Code

According to Art. 308 of the Criminal Code, the provisions of Art. 295 concerningpublic clerks properly apply to the deeds committed by or in relation to the persons that carry out, on a permanent or temporary basis, with or without remuneration, a duty of any kind in the service of a natural person of those stipulated in Art. 175 par. (2) or within any legal person. As shown, the doctrine calls such person a "private clerk" [4]. The question arises whether this category of persons was in force in the Criminal Code of 1969; the case-law [11] notes that a person is a clerk according to Art. 147 par. (2) regardless of the existence of

the capacity of employee or the lack of it [4]. Therefore, considering the history of the regulation of the notion of public clerk, and, respectively, of clerk, as well as the judicial practice before the enforcement of the current Criminal Code, one may draw the conclusion that, in order to classify as private clerk, in the meaning of Art. 308 of the current Criminal Code, the person must not necessarily be an employee. Likewise, as regards the former regulation, the scope of this notion was extended to the persons carrying out a duty in the service of a natural person of those specified in Art. 175 par. (2) of the Criminal Code.

We wonder, however, whether this conclusion is the correct one, considering that the Criminal Code of 1969 (when, from the interpretation of at least one part of the case-law, the notion of public clerk does not cover only the employees [12]) includes this offense in the category of offenses against patrimony, and not in the category of offenses of service, as it appears in the current Criminal Code.

Therefore, in the interpretation of Art. 308 of the current Criminal Code, the doctrine [13] shows that a person who is not bound by any kind of work relation to a legal person whose goods are managed by the former cannot be an active subject of embezzlement. Also, another opinion [14] states that the criminal law must be interpreted restrictively, therefore the capacity of private clerk should only be assigned to persons that have service relations with a legal or natural person as those specified in Art. 175 par. (2) of the Criminal Code, especially that the notion of private clerk is not defined in the General Part of the Criminal Code, but in the title concerning offenses of corruption and of service. Consequently, the value protected by the incrimination norm concerns service relations.

I do not believe that, according to the current Criminal Code, one may state without any doubt that only the person who has signed an employment contract is subject to Art. 308 of the Criminal Code. Firstly, as one may notice precisely in the previously quoted opinion [14], a service relation does not mandatorily suppose the existence of the capacity of employee, and for these purposes, the author gives the example of the person carrying out duties based on a management contract. Secondly, the text of Art. 308 of the Criminal Code uses the phrase "persons carrying out a duty in the service of a natural person...or within a legal entity". Or, according to the Explanatory Dictionary of Romanian Language, to carry out a duty [15] supposes to entrust someone with the performance of an action, to assign a duty to someone, and the notion of service [16] may be translated as the action to serve, to be of service to a person. In conclusion, the analysis of the text of Art. 308 does not show with certainty that it took into account the existence of an employment contract of the active subject, but the requirement that, on the moment the deed was committed, the person should have fulfilled an action assigned to them by the legal person or by one of the natural persons mentioned in Art. 175 par. (2) of the Criminal Code.

However, considering, on the one hand, the lack of clarity of the text of law, with possible implications related to the breach of the principle of predictability of the criminal law and implicitly of the principle of legality of incrimination, stipulated in Art. 1 of the Criminal Code, and, on the other hand, the fact that the natural persons mentioned in Art. 175 par. (2) of the Criminal Code or the legal person must be employees so as to become an incident as described in Art. 308 of the Criminal Code.

The current regulation related to the private clerk is similar to that of the clerk in general terms, as stipulated by Art. 147 par. (2) of the Criminal Code of 1969. However, one must notice that, if in the older regulation, the term "clerk" included public clerks and the employees carrying out a duty in the service of another legal person than those stipulated

in relation to the public clerk, in the current regulation, the notion of employee has been removed. It is true that, in that interval of time when both the offense of embezzlement, and the provisions of Art. 308 of the Criminal Code were found in the same chapter concerning Service Offenses, I believe that the most appropriate interpretation is the one according to which only an employee may be the active subject of embezzlement in the attenuated variant stipulated in Art. 308 of the Criminal Code. In these circumstances, the active subject of embezzlement in the attenuated variant stipulated by Art. 308 of the Criminal Code can only be a natural person.

The doctrine has shown that the judicial practice was wrong to hold a legal person criminally liable for committing the offense of embezzlement [17], giving as example the Decision no. 97/R/2012 ruled by Brasov Court of Appeal, that would have not considered the fact that Art. 308 of the Criminal Code referred only to natural persons, because only them could work in the service of a natural or legal person. I believe that the solution could have been considered wrong indeed if referred to Art. 308 of the new Criminal Code, but we must not forget, however, that, when this decision was made, the Criminal Code of 1969 was in force; therefore, the provisions of Art. 308 of the Criminal Code could not apply. Or, as already shown, the judicial practice previous to the current Criminal Code held that a person is a clerk according to Art. 147 par. (2) regardless of the existence of the capacity of employee or the lack it [4].

5. Notions of operative and manager

As previously shown, the second cumulative quality that the active subject of embezzlement must fulfill is to manage or operate money, valuables or other goods belonging to a person. We are going to see which are the categories of persons operating or managing money, valuables or other goods.

As regards the notion of operative, it is defined in Art. 1 of the Law no. 22/1969[(2)] as that employee of a legal person stipulated in Art. 176 of the Criminal Code whose main duties consist in receiving, storing and releasing goods that are managed, used or owned, even on a temporary basis, by said person. Considering that, in the definition of the notion of operative, this text of law uses the expression of employee, a first conclusion may be that an operative could be only a person that has the capacity of employee. The legal persons stipulated in Art. 176 of the Criminal Code are the public authorities, public institutions or other legal persons managing or exploiting goods of public property.

As shown by Art. 31 of the Law no. 22/1969, the activity of management supposes receiving, storing and releasing goods. Considering that Art. 31 of the Law no. 22/1969 extends the scope of operatives to employees that perform a management of fact, without satisfying the conditions of Art. 1 of the law, the case-law has held that the operative of fact may be an active subject of embezzlement. Therefore, in a case [18], it has been shown that an operative of fact can only be an employed person, who is employed even by civil covenant of provision of services, who, without being assigned the duties of receiving, storing and releasing goods, is in fact carrying out these activities as well. Considering the provisions of Art. 1 and of Art. 31 of the Law no. 22/1969, the conclusion is that both the

[(2)] The law was published in the Official Journal no. 132 of 18.11.1969

operative, and the operative in fact may be held liable for the offense of embezzlement, provided however that they have the capacity of employees.

As regards the notion of manager, in Art. 70 par. (1) of the Law no. 31/1990 on companies, it is shown that they cannot execute all the requested operations to fulfill the company's activity object, except the restrictions shown in the articles of association. The manager carries out the activity of management and representation, executing directives concerning the goods belonging to a person. If the operative has physical contact with the goods, the director usually has virtual contact only [19]. According to the provisions of Art. 72 of the Law no. 31/1990, the obligations and liability of the managers are regulated by provisions related to term of office and to those specially stipulated by the Law no. 31/1990. Therefore, as regards the provisions specific to the manager, he must not be an employee to be able to fulfill duties of management of a person. However, we believe that, as regards the attenuated variant stipulated by Art. 308 of the Criminal Code, the manager must have the capacity of employee. In the judicial practice, it has been decided that the manager of an owners' association has the capacity of public clerk, with duties of management and administration, for which reason his deed of appropriation, use or trafficking of certain amounts of money that he operates or manages constitutes the offense of embezzlement [20].

The criminal participation is possible in all forms. As regards the co-author, all the participants must satisfy the requirement of the incrimination norm concerning the active subject, unlike accomplices and instigators, that must not have the capacity demanded by the incrimination norm.

6. Conclusions

We may conclude that the scope of the active subject of embezzlement differs first of all according to the interpretation given to the provisions of Art. 308 of the Criminal Code. Thus, if we interpret this text of the law in a restrictive way, supposing the existence of a service relation between the active subject and the passive subject of the offense of embezzlement, then the active subject of this offense in the attenuated variant stipulated by Art. 308 of the Criminal Code must have the capacity of employee. If this text of law is broadly interpreted, then the capacity of employee is no longer a requirement of existence of the attenuated variant stipulated by Art. 308 of this offense. To avoid the breach of the principle of legality of incrimination, I believe that the text of the law must be interpreted in a restrictive way. The active subject of the typical form of embezzlement is an employee, as regards the public clerks stipulated in Art. 175 par. (1) of the Criminal Code, but this requirement is not necessary as regards the assimilated public clerks, foreseen in Art. 175 par. (2) of the Criminal Code. As regards operative duties, I believe that both the operative of law and the operative of fact must have the capacity of employee of the passive subject. Management duties may be carried out both by an employee, and by a person executing the management duties based on the rules of the term of office and possibly of the Law no. 31/1990. If, as regards the persons that fall under the incidence of the provisions of Art. 175 par. (1) and of Art. 308 of the Criminal Code, the active subject may be only a natural person, as regards the provisions of Art. 175 par. (2) of the Criminal Code, at least from the theoretical point of view, a legal person may however be an active subject as well.

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Some Considerations of the Non-Constitutionality of Art. 70 par. (1) of the Code of Criminal Proceedings on the Solution of Abstention or Challenge of the Prosecutor in the Course of the Criminal Trial

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Abstract

The provisions of the Code of Criminal Proceedings are aimed at meeting the need for several desiderata, such as speeding up the duration of criminal proceedings, their simplification and the establishment of unitary jurisprudence, in line with the jurisprudence of the European Court of Human Rights. In order to fulfil these desiderata, it is necessary for the judiciary bodies to give proof of objectivity and impartiality in order to perform their functional duties throughout the criminal trial, so as to eliminate any doubt about their objectivity and impartiality.

Keywords: *criminal trial, judiciary bodies, abstention, challenge, incompatibility.*

1. General considerations

Through the violation of the provisions of the Criminal Code which incriminates some actions committed as crimes, a conflict arises between the will of the law and the will of its addressee, and this conflict generates a legal relation of substantial law [1]. This criminal legal relation of conflict generated by the violation of the law is brought before the judiciary bodies which are entitled to ask for the criminal responsibility of the law breaker within the framework of a criminal trial.

Therefore, the criminal trial is the activity regulated by law, carried out by competent bodies, with the participation of the parties and other persons, in order to determine in good time and in their entirety those actions that are crimes, so as any person who committed a crime to be punished according to their guilt and no innocent person to be criminally responsible [2].

So it is obvious that all the activity of the judiciary bodies aimed at the criminal responsibility of those who committed a crime will be possible only following the criminal justice, in the framework of a criminal trial [3].

At present, there are four phases in the typical structure of a criminal trial: the criminal prosecution, the preliminary chamber, the judgement and the enforcement of final criminal decisions.

The prosecution bodies that carry out activities preceding the judgement and help in the course of criminal prosecution to discover and gather the evidence necessary to solve the case and identify the doer are the prosecutor, the criminal investigation bodies of the judiciary police and the special criminal investigation bodies.

Pursuant to Art. 131 para. (3) of the Constitution, the prosecutors are established in prosecution offices which function as attached to the courts of law, and they conduct and supervise the criminal investigation activity of the judiciary police, under the law. Art. 55 par. (3) of the Code of Criminal Proceedings stipulates the duties of the prosecutor throughout the criminal trial as follows: supervises or carries out the prosecution; approaches the judge for rights and freedoms and the court of law; exercises the criminal action; exercises the civil action, in those cases provided by law; concludes the plea bargain, under the law; formulates and exercises the appeals and remedies provided by law against court rulings; performs any other duties provided by law.

The participation of the prosecutor in the judgement is obligatory, irrespectively of the type of court to which the settlement of the criminal case is assigned, so that, throughout the judgment phase, he plays an *active role* in accordance with the principle of equality of arms, for finding the facts and abiding by the law.

The provisions of Art. 67 par. (1) of Law no. 304/2004 also state that the prosecutor participates in the court meetings, under the law, playing an active role in finding the facts. Moreover, pursuant to Art. 351 and Art. 363 of the Code of Criminal Proceedings, the judgement takes place verbally, directly and contradictorily, and the prosecutor participates obligatorily in the judgement playing an active role in order to find the facts and abide by the law, and he may formulate justified requests, sustain exceptions and submit conclusions in accordance with the objectives established by the Constitution.

With regard to the role of the prosecutor in the criminal trial, the Constitutional Court gave its opinion in the Decision no. 76/2015 [4], indicating that the provisions of Art. 32 of the Code of Criminal Proceedings define the parties of the criminal trial, and these are only the defendant, the plaintiff claiming damages and the responsible plaintiff party. According to Art. 30 of the Code of Criminal Proceedings, the prosecutor is a judiciary body that participates in the criminal trial together with the subjects mentioned in Art. 29, each of them having different roles and positions. Therefore, in the legal texts indicated here above the prosecutor is not a party in the criminal trial, and to that effect also the Art. 131 of the Constitution assigns to the prosecutor an essential role in the judiciary area, namely that of representative of general interests of the society, defender of the rule of law, as well as of citizens' fundamental rights and freedoms. If the prosecutor is missing the judgment meeting this is sanctioned by *absolute nullity*, in accordance with the provisions of Art. 281 par. (1) letter d) of the Code of Criminal Proceedings.

In other words, it is the prosecutor's role, by carrying out his specific activities in an organised way, with the participation of the parties and other persons, to help discover the crimes, identify and apprehend the law breakers, gather and take the evidence, and determine their criminal responsibility with the application of a sanction [5]. For the fulfilment of these desiderata, it is necessary that the judiciary bodies give proof of their good qualification, moral probity, objectivity and impartiality in performing their functional duties throughout the criminal trial, so as to eliminate any suspicion or doubt about their objectivity and impartiality.

When there are situations of incompatibility of the judiciary bodies, they are prevented from participating in the settlement of criminal cases within a criminal trial, the remedy in this situation being to remove the person considered incompatible from the trial.

The following persons who come within the framework of judiciary bodies may be considered incompatible: the judge, the prosecutor, the assistant-magistrate, the criminal investigation body, the registrar and the expert.

The prosecutor is considered incompatible when: he was the agent or the lawyer of one of the parties or of one of the main procedural subjects, even this was in other case; he was a relative or affine, up to the 4th degree inclusively, or he is in other situation provided by Art. 177 of the Criminal Code in relation to one of the parties, one of the main procedural subjects, or to their lawyer or agent; he was an expert or a witness, in the case; he is a tutor or curator of one of the parties or of one of the main procedural subjects; there is reasonable suspicion that the prosecutor's impartiality is affected.

If there is a relation of kinship or affinity up to the 4th degree inclusively between the prosecutor who participates in the judgement and the judge for rights and freedoms, the judge of preliminary chamber or one of the members of the panel, whether they are married or there is other situation provided by Art. 177 of the Criminal Code. Similarly, pursuant to Art. 65 par. (2) of the Code of Criminal Proceedings, the provisions of Art. 64 par. (2) of the Code of Criminal Proceedings are applied if between the prosecutor who participates in the judgement and the registrar or the assistant-magistrate there is a relation of kinship or affinity up to the 4th degree inclusively, if they are married or there is other situation stipulated by Art. 177 of the Criminal Code.

Moreover, the prosecutor who participated as judge in a case may not, in the same case, exercise the prosecution function or submit conclusions in the judgement of that case in the first instance or in appeals. This situation may be encountered, for example, if the judge, after having performed some procedural actions in a case, is transferred to a prosecutor position and he has to carry out criminal prosecution actions in the same case.

On the other hand, the prosecutor who conducted the prosecution is not incompatible when he proceeds to retaking it when the judge of preliminary chamber decided to return the case to the prosecution office, and when the judge of preliminary chamber admits the complaint against the solution of non-indictment and sends the case to the prosecutor in order to complete the prosecution, the prosecutor who previously conducted or supervised the prosecution is not incompatible when he proceeds to its completion following the retake of prosecution.

2. The abstention and the challenge – procedural remedies for incompatibility

In case that a lack of impartiality of an official procedural subject is found or in case that there is a risk that the personal or functional impartiality of the subject is affected, he must formulate an abstention request, otherwise the prosecutor, the main procedural subjects or the parties may formulate a challenge request.

As a matter of fact, in some authors' opinion [6], the abstention is a self-challenge of the judiciary body, as it prevents the challenge, representing the manifestation of the will of a person from the judiciary body who considers that he finds himself in a situation of incompatibility stipulated by the criminal procedural law, and for that reason he cannot participate, in his capacity, in the criminal trial.

In case that the prosecutor finds himself in one of the situations of incompatibility provided by law, he has the obligation to declare, accordingly, to the president of the court, to the prosecutor who supervises the criminal prosecution or to the superior prosecutor that he abstains from participating in the criminal trial, showing the situation of incompatibility and the actual grounds which make the reason for his abstention, the abstention being the institution which allows the person who finds himself in one of the situations of incompatibility to ask to be replaced by another person in the same capacity.

The formulation of an abstention request also has a moral character, as the person who is in a situation of incompatibility and who was aware of that, in case that he fails to fulfil his obligations arising from these provisions, may be disciplinarily sanctioned as a result of non-compliance with the legal provisions referring to incompatibilities and interdictions with regard to judges and prosecutors, according to Art. 99 letter b) of Law no. 303/2004 on the Statute of Judges and Prosecutors.

Moreover, as a guarantee for the observance of the provisions referring to the institution of incompatibility, there is also the challenge, but unlike the abstention, where the initiative belongs to the person in a situation of incompatibility, in the challenge, the initiative of withdrawal from the criminal trial belongs to other persons who, in the course of the criminal trial, became aware of the existence of a situation of incompatibility of a person from the judiciary body. If the person in a situation of incompatibility did not abstain, he may be challenged by the parties as soon as the situation of incompatibility is known, at any time during the trial.

The challenge request is formulated only against the person from the criminal investigation body, against the prosecutor, against the judge who carries out judiciary activities in the case, while it is not admissible to challenge the judge or the prosecutor who is called to decide on the challenge. The challenge may be verbal or in writing, indicating, for every single person, the situation of incompatibility invoked and the factual grounds known at the time when the request is formulated, and when the formulation of the challenge is verbal, it is recorded in the minutes or, accordingly, in the conclusions of the meeting.

To that effect, there is the opinion [7] in which we acquiesce and according to which the new Code of Criminal Proceedings does no longer provides for, as the 1968 Code of Criminal Proceedings used to do for a while, the incompatibility to participate in the judgement (to submit conclusions) of the prosecutor who carried out some criminal prosecution actions (the initiation of the criminal action, the arraignment), which is opposed to another opinion expressed in legal literature [8], according to which the professional interest of the prosecutor in maintaining the solution given by him would be such a circumstance leading to the conclusion that he is "interested in any way".

The inadmissibility of the challenge request may be possible in the following situations: non-compliance with the conditions provided by par. (2)-(4) of Art. 67 of the Code of Criminal Proceedings and the formulation of a challenge request against the same person for the same situation of incompatibility, with the same factual grounds as those invoked in a previous challenge request, which was rejected.

The inadmissibility of a challenge request is determined by the prosecutor or the panel to which the challenge request was addressed.

3. The procedure for solving the abstention or the challenge of the prosecutor

Both in the prosecution phase, and in the judgement phase, the abstention statement, as well as the challenge request with regard to the prosecutor is formulated either in writing, or verbally, indicating the situation of incompatibility, as well as the grounds making the reason for the abstention or challenge.

The abstention statement is drawn up by the prosecutor when he becomes aware of a situation of incompatibility such as those expressly stipulated by the legislator in Art. 65 par. (1) in relation to Art. 64 par. (1) letters a)-d) and f) and par. (2) of the same article, and in case that the prosecutor has not made an abstention statement, the parties and the main procedural subjects may make a challenge request, when they find out about the existence of a situation of incompatibility of the prosecutor.

According to the provisions of Art. 70 par. (1) of the Code of Criminal Proceedings, the abstention statement or the challenge request are addressed to the prosecutor who is superior, otherwise they will be sanctioned by inadmissibility.

The intention of the legislator in this case may be motivated, in terms of hierarchical subordination, as a trait of prosecution, and to that end there is also a subordination of the prosecutor of every prosecution office in relation to the head of the superior prosecution office in the same district, where the decisions of the superior prosecutor made in writing and in compliance with the law are obligatory for the subordinated prosecutors, according to Art. 64 par. (1) of Law no. 304/2004 on Judiciary Organisation.

With regard to Art. 70 of the Code of Criminal Proceedings, the Constitutional Court gave its opinion in the Decision no. 625 presented at the meeting of 26 October 2016 [9], when with a majority of votes and a separate opinion, admitting the exception of non-constitutionality, it noted that the legislative solution included in the provisions ofArticle 70 of the Code of Criminal Proceedings, which states that the superior prosecutordecides on the challenge request regarding the prosecutor, formulated in the phase of judgment, in the phase of preliminary chamber or before the judge for rights and freedoms, is non-constitutional.

For that matter, unlike the provisions of Art. 52 of the previous Code of Criminal Proceedings, where the procedure for solving the request for the abstention or challenge of the judge, the prosecutor, the assistant-magistrate or the registrar was settled by another panel , at a secret meeting, without the participation of the person who makes an abstention statement or who is challenged, the new criminal procedural legislation stipulates that the request for the challenge of the prosecutor at the meeting may not be solved by the court of law, and it is obligatorily solved by the superior prosecutor. In these conditions, the provisions of Art. 70 of the Code of Criminal Proceedings reflect on an essential attribute of the criminal trial, namely the independence of the judge to settle any procedural incident invoked before him, no matter if there is a judge for rights and freedoms, a judge of preliminary chamber or a panel, the judge being the only one in condition to appraise the procedural incidents invoked before him.

In these conditions, it is considered that the procedure for solving the challenge of the prosecutor, whether the challenge request regards the prosecutor who supervises the prosecution, or it refers to the prosecutor at the meeting, has a unitary characteristic, meaning that, pursuant to Art. 70 par. (1) of the Code of Criminal Proceedings, "throughout

the criminal trial, the superior prosecutor decides on the abstention or the challenge of the prosecutor". So, it is notable that the former regulation stipulated that the challenge of persons who determine the constitution of the court – the prosecutor, the assistant-magistrate, the registrar – is settled by another panel, at a secret meeting, therefore by a judge, while the new provisions for criminal proceedings make a distinction within the procedure for solving the challenge of persons who determine the constitution of the court depending on their capacity. The challenge of the assistant-magistrate is settled by the panel, while the challenge of the registrar is settled by the judge for rights and freedoms, the judge of preliminary chamber or, accordingly, by the panel. With regard to the challenge of the prosecutor, the Court holds that the new provisions for criminal proceedings do not differentiate the procedure for solving the request for the challenge of the prosecutor depending on the phase in which it is formulated, so that the provisions of Art. 70 of the Code of Criminal Proceedings bring under regulation without differentiation the procedure for solving the challenge request of the prosecutor both in the course of the prosecution, and in the course of judgement.

According to the legal provisions that have been indicated, throughout the criminal trial, the superior prosecutor decides on the challenge of the prosecutor, the challenge request being addressed to the former, otherwise it will be sanctioned by inadmissibility.

The superior prosecutor solves the request in 48 hours, giving an order without any possibility of appeal.

It was also indicated that the challenge of the prosecutor in the judgement phase is a procedural incident invoked by the parties and the main procedural subjects who suspect the partiality of the prosecutor, an incident that once solved is designed to bring changes with regard to the framework of the litigation. At the same time, the Court held that, in accordance with its jurisprudence, the procedure for solving the challenge requests is an integral part of the judgement procedure, so that its settlement cannot come within the scope of competence of the superior prosecutor, but only within that of the judge's competence.

However, in contradiction to the majority opinion, there was also a separate opinion [10] in the motivation of Decision no. 625 of 2016, considering that the exception concerning the non-constitutionality of the provisions of Art. 70 of the Code of Criminal Proceedings should have been rejected as unfounded, because, unlike the previous Code, the current Code of Criminal proceedings established four phases of the criminal trial, namely the phase of prosecution, the phase of preliminary chamber, the phase of judgement, and the execution phase, the legislator establishing the competence of the superior prosecutor in deciding on such a request, irrespective of the procedural phase of the case on trial,and this fact is not designed so as to affect the impartiality of the judge in any of the phases of the criminal trial, since the superior prosecutor does not perform an act of justice coming within the scope of specific competence of the courts of law, but rather a simple formal act in the administration of justice.

4. Conclusions

The provisions of the Code of Criminal Proceedings are aimed at meeting the need for speeding up the duration of criminal proceedings, as well as for the establishment of unitary jurisprudence, in line with the jurisprudence of the European Court of Human Rights, and for this reason they aim to contribute to removing the use of cumbersome and useless procedures.

It is necessary to state here that the incompatibility of the prosecutor cannot be considered a case of incompetence, but rather a special situation in which he finds himself.

As a matter of fact, also the jurisprudence of the European Court of Human Rights held that the procedure for challenging a magistrate is concerned with aspects related to the composition of the court, being therefore incompatible *ratione materiae*, in the sense of Art. 35 par. (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms, with the provisions of the Convention.

Taking into account the competence of the judiciary bodies throughout the criminal trial, precisely the competence of the prosecutor, the judge for rights and freedoms, the judge of preliminary chamber, as well as the judge in the composition of the panel, we can see that, in this case, the Constitutional Court has justly found that the challenge of the prosecutor in the judgement phase is a procedural incident the settlement of which cannot come within the scope of competence of the superior prosecutor, but only in that of the judge.

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The Evolution of the Waiver to the Criminal Proceedings in the New Criminal Procedure Code

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Abstract

The New Criminal Procedure Code has brought very many changes in the Romanian legislation, upon its entry into force, among which also the institution of the waver to criminal proceedings. Immediately after the New Criminal Procedure Code became effective, has occurred the problem related to the dynamics of the amendments made to the later, as a result, among other, of the declaration of certain procedural criminal provisions as non constitutional . Among the institutions affected by the amendments made to the New Criminal Procedure Code is also the one of the waiver to the criminal proceedings, regulated by Art. 318, the analysis of which will make the scope of the hereby article.

Keywords: *waiver to criminal proceedings, Criminal Procedure Code, unconstitutionality, Romania.*

1. The necessity of regulating the waiver to criminal proceedings

In the Old Criminal Code, the crime was defined as being "the action which poses a danger to society, committed with guilt and enshrined by the criminal law" [1]. In order to ensure a better enforcement of the criminal law, with regard to the specific conditions under which the action enshrined by the criminal law has been committed, to the person who has committed it and to the purpose of the punishment, had been provided Art. 18^1 which stated that the action enshrined by the criminal law, which minimally undermines one of the values defended by the law and which through its precise content, is manifestly deprived of any importance, does not have the same degree of social danger of a crime, does not represent a crime. Moreover, it provided that, upon the effective establishment of the degree of social danger, would be taken into account also the method and the means employed for committing the crime, the purpose aimed, the circumstances in which the action has been committed, the consequence which has been generated or which could have been generated, as well as the person and the conduct of the perpetrator, if he was known, and if necessary, could be applied administrative penalties by the prosecutor or by the court.

The new legislation has varied the concept of crime, the later being defined as being "the action enshrined by the criminal law, committed with guild, not justified and ascribable to the person who has committed it" [2]. At a first analysis it has been noticed that, through the legislator's volition, has been removed the social danger feature from the definition of the crime, and for an accurate enforcement of the criminal law, considering the circumstances under which the action enshrined by the criminal law is committed, the criminal law principles, the purpose of the punishment, it was necessary an institution which might indicate in which cases and under which conditions was no longer necessary to hold criminally responsible the person who committed such a crime.

Unlike the old legislation, the legislator has chosen that in the new legislation, the institution entitled to settle this issue be placed in the New Civil Procedure Code and not in the criminal one, being called a waiver to the criminal proceedings and enshrined by Art. 318 of the afore-mentioned code.

2. The initial concept regarding the waiver to criminal proceedings

The institution of waiver to criminal proceedings has suffered two major changes from the moment in which it was enshrined in Law no. 135/2010 as of June 1, 2010, which is practically the New Criminal Procedure Code.

In the initial form, before the entry into force on February 1, 2014 of the New Criminal Procedure Code, pursuant to Art. 318, which regulated the waiver to criminal proceedings, the provisions mentioned that the prosecutor was entitled to waive the criminal proceedings if: the punishment provided by the law was the fine or the punishment with the prison for no more than 5 years, and according to the accused person, according to the conduct which the later had before the committal of the crime, according to the substance of the crime, to the method and to the means of committal, to the purpose aimed and to the precise circumstances of the committal, according to the consequences generated or which could have been generated as a result of the committal of the crime, according to the efforts made by the accused to remove or to reduce the consequences of the crime, if he ascertains that there is no public interest in performing the criminal proceedings against him.[3]

From the criminal procedural point of view, it was provided that the waiver to criminal proceedings could not be made but only after the initiation of the criminal proceedings and before the referral made to the court.

Moreover, the prosecutor who adopted this decision had to impose to the accused, by ordinance, on a term of maximum 6 months, one or several of the following liabilities:

- to remove the consequences of the criminal action or to remedy the generated damage or to agree with the civil party a method for remedying such damage;
- to publicly apologize the aggrieved person;
- to fulfil his or her maintenance obligations due;
- to perform a community service unpaid work, for a period of 30-60 days, unless, for health condition reasons, the person could not perform such work;
- to attend an advisory programme performed or monitored by the probation service.

The accused person had available 6 months since the communication of the order in order to prove to the prosecutor the fulfilment of the imposed liabilities, otherwise the later

had to revoke the order, a new waiver to criminal proceedings being not possible in that case with regard to the same defendant.

At last, the order for waiver to criminal proceedings was communicated to the defendant and to the other persons concerned who had requested to communication of the settlement. [4]

Analysing this institution, it may be noticed a higher interest expressed towards this provision compared to t he former 181 of the Old Criminal Code. Art. 181 has been many times criticized because it leaved up to the subjective discretion of the prosecutor, without any constraint, when to enforce that institution, the later being possible to be applied also in case of serious offences such as killing, robbery etc.

In the new regulation, the legislator has chosen to outline certain conditions, which might remove an misapplication of the institution, being established punishment limits and criteria according to which the prosecutor is bound to guide himself and to take into account when he/she intends to dispose the waiver to criminal proceedings.

3. The form of Art. 318 regarding the waiver to criminal proceedings upon the entry into force of the New Criminal Procedure Code

Upon the entry into force of the New Criminal Procedure Code, on February 01, 2015, Art. 318 regarding the waiver to criminal proceedings has been amended by Law no. 255/2013, art, 102, point 210.

The legislator returned upon the provisions of Art. 318 of the New Criminal Procedure Code, bringing some important modifications to this institution. The first important amendment made is the modification of the upper limit of the punishment provided by the criminal law, for which may be disposed the waiver to criminal proceedings, such limit being increased from no more than 5 years to no more than 7 years. [5]

Another significant change made was the procedural moment starting from which such institution may be applied, in the first form being necessary the initiation of the criminal proceedings, and according to the amendments made, it could have been applied also in case the criminal proceedings had been continued *in personam*. Therefore, when the author of the crime is known, at the valuation of the public interest are taken into account also the person of the suspect or of the defendant, the conduct which the later had before committing the crime and the efforts made in order to remove or to reduce the consequences of the crime.

Another element of novelty, compared to the first form of Art. 381, is the turning from mandatory into optional for the prosecutor to establish certain obligations, but only after consulting the suspect or the defendant, which the suspect or the defendant must fulfil. The content of the liabilities has remained the same, with the specification that has been removed the liability to fulfil the maintenance liabilities due, and in the case of the liability provided before, to attend an advisory programme, it is no longer necessary to be performed or monitored by the probation service, but it may be performed within any relevant institution, but before establishing such liabilities it is necessary to consult the suspect. [6]

The maximum period for which may be applied the liabilities of the suspect or of the defendant remains of 6 months, with the specification that, in case of the liabilities taken through mediation agreement stipulated with the civil party, it is of 9 months, which commences starting with the date of communication of the order in both cases.

The new variant of Art. 318 regarding the waiver to criminal proceedings does no longer provide the term until which the suspect or the defendant must prove the fulfilment of the liabilities imposed or agreed with the civil party. [7]

Moreover, compared to the initial project of new criminal procedure code, it is provided the sanction of revocation of the prosecutor's order for failure to fulfil the liabilities only in case of bad faith.

At last, Art. 318 provided that the order by which has been disposed the waiver to criminal proceedings shall be communicated in copy to the person who has made the referral, to the suspect, to the defendant or, as the case may be, to other persons concerned, the range of persons receiving such copy having been correctly extended. [8]

Analysing the new modifications made by Law no. 255/2013, it may be noticed that the legislator intended to cover certain gaps, to extend the range of the crimes for which such institution may be applied, since there are very few crimes which have as a punishment enshrined by the criminal law less than 7 years of prison, and to support the suspect or the defendant, so that the application of the waiver to criminal proceedings might attain its purposes.

It has been considered that neither this time is this institution predictable and that it offers to the prosecutor prerogatives which belong by law to the court of law. Moreover, the formulation "when the author of the crime is known" is ambiguous, since it leaves room for interpretation whether or not the waiver to the application of the punishment may be applied also when the author is unknown.

At last, the new modification has brought also positive elements, such as the increase of the maximum limit of punishment for which may be applied the waiver to criminal proceedings or the lack of mandatory character of the initiation of the criminal proceeding, but also negative elements, such as the lack of predictability, the lack of a control upon the prosecutor's actions, etc.

4. The decision of the Constitutional Court regarding the unconstitutionality of Art. 318 of the New Criminal Procedure Code

On February 13, 2015, the Drobeta-Turnu Severin District Court referred to the Constitutional Court the exception of unconstitutionality of the provisions of Art. 318 comma 1 of the New Criminal Procedure Code. in a case having as an object the settlement of a complaint filed against a solution of waiver to criminal proceedings.

The exception was motivated that the collocation "public interest" from the criticized text was ambiguous, generating corruption, led to the committal of crimes for which the law provides punishments of maximum 7 years, favoured the offenders under the conditions in which the criminal prosecution bodies do not act seriously in the sense of collecting evidence regarding the existence of the crimes, the identification of the offenders and the determination of the other elements of the crime, and did not allow the protection and the safeguarding of the property. [9]

The Drobeta-Turnu Severin District Court considered the exception to be inadmissible and that the waiver to criminal proceedings may be disposed only in the cases and under the conditions provided by Art. 318 of the New Criminal Procedure Code, which makes

so that this institution be not applied arbitrarily, and the Ombudsman claimed that the exception plea raised was inadmissible because is was not motivated.

First of all, the Constitutional Court ascertained that the collocation "public interest" has not been defined by the legislator in the contested text of law, and that the other criteria listed in the text of law represented stand-alone individualising criteria serving to the individualisation of the penalties. The Constitutional Court ascertained that Art. 318 did not comply with the standards regarding the clarity, the accuracy and the predictability of the criminal law, infringing the principle of lawfulness of the criminal proceedings regulated and, accordingly, the provisions of Art. 1 comma (5) of the Constitution, which provide the compulsoriness to observe in Romania the Constitution, the supremacy of the later and of the laws. In this sense, the Constitutional Court considered that the legislator must regulate from the normative point of view both the framework of unfolding of the criminal proceedings, and the competence of the judicial bodies and the effective method of achieving each subdivision of each stage of the criminal proceedings. [10]

Moreover, in the decision it was considered that the imposition of the liabilities enshrined by Art. 318 by the prosecutor would exceed the prerogatives of the later and would enter into the range of the judicial prerogatives of individualisation of the penalties. Moreover, the waiver to criminal proceedings is considered to be a solution on the merits of the case, being made reference to the waiver to the application of the punishment, activity which pertains to the powers of the courts of law and not to the powers of the prosecutor, and to the special procedure for guilty plea, which is subjected to the control by the court of law.

A significant problem referred by the Constitutional Court is the lack of the aggrieved person in certain cases, which would render impossible the continuation of the criminal proceedings in case the prosecutor found that it is required the enforcement of the waiver to criminal proceedings. [11]

At last, it was ascertained that the prosecutor would become thus a substitute of the judge in about three-fourths of the total crimes enshrined in the New Criminal Code and in the special laws, reasons why, the Constitutional Court declared on January 20, 2016, that the dispositions of Art. 318 of the New Criminal Procedure Code are unconstitutional. [12]

5. The variation of the provisions regarding the waiver to criminal proceedings upon the declaration of the later to be unconstitutional

Following the Decision of the Constitutional Court, the provisions of Art. 318 of the New Criminal Procedure Code could no longer be enforced, the activity of the prosecutors and of the courts of law being thus made more difficult, since there are very many cases in which there is no interest in the criminal prosecution of the later and in holding criminally liable the persons who commit such crimes enshrined by the criminal law. Moreover, there is a lack of magistrates in the Romanian judicial system, our country being constantly criticized in the CMV reports with regard to the overcrowding of the courts and to the high number of case files dealt with by prosecutors, and the impossibility to enforce this provision rendered even more difficult the mission of the magistrates.

At last, for a lawful, fair enforcement, pursuant to the principles of law, with the Romanian Constitution and for the attainment of the purpose of the penalty, it was absolutely necessary that the modification of such provision be made as soon as possible.

On 23.06.2016 became effective the Emergency Ordinance no. 18 as of May 18, 2016 for the amendment and supplementation of Law no. 286/2009 regarding the Criminal Code, of Law no. 135/2010 regarding the Criminal Procedure Code, and for the supplementation of Art. 31 comma (1) of Law no. 304/2004 regarding the judicial organization. The need to adopt the G.E.O. no. 18 as of May 18, 2016 resulted from the declaration as unconstitutional of several provisions from the criminal area and for the transposition of some Directives of the European Parliament and of the Council.

The main institutions on which interventions have been performed, have been:

- the participation of the prosecutor or of certain parties in the criminal trial at certain procedural stages;
- the procedure for the settlement of the complaint against the solutions issued by the prosecutor;
- the procedure of the guilt plea agreement;
- the need to regulate some remedies at law;
- the need to draft clear and predictable texts;
- the clarification of some competencies;
- the waiver to criminal proceedings. [13]

Art. 318 of the New Criminal Procedure Code regarding the waiver to criminal proceedings has been amended, having at the end, from a number of 7 paragraphs, as it had before the entry into force of the G.E.O. no. 18/2016, a number of 16 paragraphs. Through the mentioned order has been attempted to amend the text of law in order to bring this institution according to the criticisms made by the Constitutional Court.

Thus, the text of the law was amended, establishing only 2 conditions for the enforcement of the waiver to criminal proceedings: the public interest in prosecuting the crime and the penalty enshrined by the criminal law for the relevant crime to consist of the penalty with fine or with imprisonment for maximum 7 years, disappearing thus all the other conditions listed in the previous variants of Art. 318. [14]

Instead, it is provided that the collocation "public interest" be considered by reference to the following circumstances:

- the substance of the crime and the precise circumstances in which the crime was committed;
- the method and the means of committal of the crime;
- the purpose aimed;
- the consequences generated or which could have been generated as a result of the committal of the crime;
- the efforts made by the criminal prosecution bodies, necessary for the unfolding of the criminal proceedings, by reference to the severity of the crime and to the time elapsed since the date of committal of such crime;
- the procedural attitude of the aggrieved person;
- the existence of an obvious disproportion between the costs involved by the unfolding of the criminal proceedings and the severity of the consequences generated or which could have been generated through the committal of the crime. [15]

Analysing the criteria which must be taken into account when assessing the public interest, it may be noticed that to this category pertain a part of the conditions necessary to dispose the waiver to criminal proceedings in the variant existent before the entrance

into force of the G.E.O. 18/2016 (the substance of the crime and the precise circumstances in which the crime was committed, the method and the means by which the crime was committed, the purpose aimed, the consequences generated or which could have been generated by committing the crime), but also 2 new elements: The efforts made by the criminal prosecution bodies, necessary for the unfolding of the criminal proceedings, by reference to the severity of the crime and to the time elapsed since the date of committal of such crime, the procedural attitude of the aggrieved person, but also the existence of an obvious disproportion between the costs involved by the unfolding of the criminal proceedings and the severity of the consequences generated or which could have been generated through the committal of the crime

It may be noticed that the legislator has outlined more clear criteria in order to define and assess as objectively as possible the "public interest", but also the fact that it is taken into account also the procedural attitude of the aggrieved person and the costs which may be involved by the unfolding of the criminal proceedings.

In the situation in which the author of the crime was known, there have been no modifications made, but Art. 318 comma 4 of the New Criminal Procedure Code enshrines that, when the author of the crime is not known, it may be disposed the waiver to criminal proceedings, taking into account only 4 criteria: [16]

- the substance of the crime and the precise circumstances in which the crime was committed;
- the method and the means of committal of the crime;
- the efforts made by the criminal prosecution bodies, necessary for the unfolding of the criminal proceedings, by reference to the severity of the crime and to the time elapsed since the date of committal of such crime;
- the existence of an obvious disproportion between the costs involved by the unfolding of the criminal proceedings and the severity of the consequences generated or which could have been generated through the committal of the crime.

Along with this provision was clarified the issue raised with regard to the previous regulation, whether it was possible or not to dispose the waiver to criminal proceedings if the author was not known, issue which had been raised due to the formulation "When the author is unknown", further on being made no clarification with regard to the situation in which the such author was not known.

Another element of novelty is the fact that the new regulation enshrines that this institution cannot be applied in the case of the crimes which generated the death of the victim. This is a very important modification brought to this institution, because it results that the legislator considered that the right to life must be better protected, and that the crimes which have as a consequence the death of the victim, even if they were praeter-intentional, cannot benefit from this institution. [17]

The obligations along with the conditions under which the former may be disposed and the terms for which they may be established have remained unchanged.

Starting with comma 10 of Art. 318 starts being described a procedure by which the order for waiver to the criminal proceedings is subjected to a hierarchical control and to the control of the preliminary chamber judge, taking thus into consideration the criticisms made by the Constitutional Court in terms of the lack of control of this institution and by

which, because of subjectivism or because of a faulty investigation of a case file in course, might be generated a judicial error.

Thus, the order of the prosecutor for waiver to the criminal proceedings is checked at a first stage in terms of its validity and in terms of its lawfulness by the prime-prosecutor of the Public Prosecutor's Office or by the general prosecutor attached to the Court of Appeal, and once it has been elaborated by the same, the checking shall be done by the hierarchical superior prosecutor. "When it has been drafted by a prosecutor from the Public Prosecutor's Office attached to the High Court of Cassation and Justice", the order is checked by the Chief prosecutor from the section, and if drafted by the later, the checking shall be done by the general prosecutor of this Public Prosecutor's Office." [18]

After such verification, the order is communicated within 10 days since the date when it has been submitted to the judge of preliminary chamber by the court to which could devolve, under the law, the jurisdiction on the case at first instance. Moreover, the order is communicated in copy to the person who has made the referral, to the parties, to the suspect, to the aggrieved person and to other persons concerned.

After receiving the referral, the preliminary chamber judge established the settlement term and summons the above-mentioned persons.

The preliminary chamber judge checks the lawfulness and the validity of the solution of waiver to the criminal proceedings based on the papers and on the material documents existent in the criminal prosecution file and based on the new documents submitted, in the council chamber with the participation of the prosecutor, and further on, through a reasoned ruling, shall admit or shall reject the request of confirmation filed by the prosecutor. In case the judge rejected the request of confirmation, he/she may:

– cancel the solution of waiver to criminal proceedings and submit the case to the prosecutor in order to initiate or to complete the criminal proceeding or, as the case may be, in order to initiate the criminal proceedings and to complete the criminal proceedings

or

– cancel the solution of waiver to criminal proceedings and dispose the dismissal. [19]

Through the G.E.O. no. 18/2016 has been granted this possibility to the judge that, in case he/she noticed the falling under the provisions of Art. 16 of the New Criminal Procedure Code, he/she may dispose through a decision the very dismissal, a prerogative which in the past devolved only to the prosecutor, and not to the judge. Of course, such regulations must be corroborated with the provisions of Art. 340 Criminal Procedure Code and following.

At last, comma 16 of Art. 318 of the New Criminal Procedure Code enshrines that "the resolution by which has been issued one of the solutions provided at comma (15) is final. If the judge had rejected the request of confirmation of the solution for waiver to the criminal proceedings, a new waiver can no longer be disposed, no matter which the claimed reason might be."

Analysing all these modifications made by the G.E.O. no. 18 as of May 18, 2016 it may be noticed the interest shown by the legislator to this institution. Practically all the problems brought into discussion by the Constitutional Court have been remedied, managing thus to have a better definition of the collocation "public interest" and solving the issue regarding the objectivity with which this measure of waiver to the criminal proceedings

is adopted. Moreover, has been imposed a double check of the lawfulness and of the validity of such a decision, the later being subjected to hierarchical and judicial confirmation, the competence devolving to the preliminary chamber judge who, under the law, would be entitled to judge the case at first instance.

Conclusions

As it may be noticed from the analysis of this material, the institution of waiver to criminal proceedings has been subjected to 2 major modifications which each time have put into difficulty the persons who came across it, starting in a first stage with minor modifications such as the upper limit of the punishment provided by the criminal law for which this measure may be disposed, and with the modification of the procedural stage from which it may be enforced, and up to the establishment of an entire new procedure in which are involved also the superior hierarchic prosecutor and the preliminary chamber judge, in order to ensure the checking of the measure in terms of its validity and lawfulness.

As a conclusion, the dynamics of the amendments made to the New Criminal Procedure Code has a devastating effect upon the judicial process, being no longer possible an organic practice, and the practitioners are put into difficulty because they must constantly adapt themselves to the new modifications, and in the future, in order to avoid such problems would be worked on normative deeds which should be compliant with the effective Constitution.

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[2] Art. 15 of the New Criminal Code.
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[4] Idem.
[5] Art. 318 of the New Criminal Procedure Code, the form valid until 31.03.2016.
[6] Idem.
[7] Idem.
[8] Art. 318 of the New Criminal Procedure Code, the form valid until 31.03.2016.
[9] Decision no. 23 as of January 20, 2016 issued by the Constitutional Court, published in the Official Gazette on 31.03.2016.
[10] Idem.
[11] Decision no. 23 as of January 20, 2016 issued by the Constitutional Court, published in the Official Gazette on 31.03.2016.
[12] Idem.
[13] G.E.O. no. 18 as of May 18, 2016.
[14] Art. 318 of the New Civil Procedure Code, as it has been modified through the G.E.O. no. 18 as of May 18, 2016.
[15] Idem.
[16] Art. 318 of the New Criminal Procedure Code, comma 4, as it has been modified through the G.E.O. no. 18 as of May 18, 2016.

[17] Art. 318 of the New Criminal Procedure Code, comma 5, as it has been modified through the G.E.O. no. 18 as of May 18, 2016.
[18] Art. 318 of the New Criminal Procedure Code, comma 10, as it has been modified through the G.E.O. no. 18 as of May 18, 2016.
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Some Aspects with regard to the Non-Constitutionality of Art. 220 Paragraph (1) of the Code of Criminal Proceedings on the Extension of the Preventive Measure of Judicial Control

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Abstract

Unlike the provisions of the previous Code of Criminal Proceedings, which included two alternatives for the execution of provisional release, namely the provisional release under judicial control and the provisional release on bail, we can see now that with the provisions of Law 135/2010 on the Code of Criminal Proceedings, these preventive measures without deprivation of liberty have suffered some changes aimed at diversifying the preventive measures that may be ordered in the course of the criminal trial.

Keywords: *criminal trial, defendant, preventive measures, judicial control.*

1. General considerations

In accordance with the need to comply with the strictest international standards in matters of criminal procedure, namely the standards of the European Court of Human Rights, the provisions of Art. 3 of the Code of Criminal Proceedings bring under regulation the realization in the course of the criminal trial of the following judicial functions: the criminal prosecution (by the criminal investigation bodies and the prosecutor), ordering the fundamental rights and freedoms in the course of the criminal prosecution (by the judge for rights and freedoms), reviewing the legality of the arraignment or non-arraignment (through the preliminary chamber procedure) and the judgment (by the courts of law).

As judicial bodies, the legislator provided in Art. 30 of the Code of Criminal Proceedings for the following specialised bodies of the state that carry out the judicial activity: the criminal investigation bodies, the prosecutor, the judge for rights and freedoms, the judge of preliminary chamber, as well as the courts of law, these having specific duties with regard to the preventive measures that may be ordered.

Unlike the provisions of the previous Code of Criminal Proceedings, the Law no. 135/2010 brings essential changes, both with regard to the categories of measures that may be ordered, and in terms of the criminal procedural rules regulating the way the orders are given by the judicial bodies. For that matter, the criteria regarding the order of a preventive measure

addressed to a person are, pursuant to Art. 202 par. (1) and (2) of the Code of Criminal Proceedings, the following:

– there is evidence or sound clues leading to a reasonable suspicion that a person committed a crime;
– it is necessary in order to ensure a good course of the criminal trial;
– it prevents for the suspect or the defendant to evade the prosecution or the judgement;
– it prevents for another crime to be committed;
– to ensure there is no cause hinderingthe criminal action or its exercise.

The categories of preventive measures that may be ordered in the course of the criminal trial, either with regard to the suspect (only the detention), or to the defendant (the rest of preventive measures), are: the detention, the judicial control, the judicial control on bail, the house arrest and the detention pending trial.

The judicial control is a new preventive measure introduced in the provisions of Law no. 135/2010 on the Code of Criminal Proceedings, where the legislator brought together the provisions referring to the measure of release under judicial control, the obligation not to leave the locality and the obligation not to leave the country [1], stipulated in the previous Code of Criminal Proceedings, with similar provisions found at present in the French Code of Criminal Proceedings regulating the judicial control as an alternative to the detention pending trial [2].

The preventive measure of judicial control is a measure without deprivation of liberty that may be ordered with regard to the defendant.

As long as he is under judicial control, the defendant must respect several obligations provided for by Art. 215 of the Code of Criminal Proceedings, he enjoying physical freedom, but being subjected, through the establishment of a range of obligations and sometimes interdictions, to the control of the judicial authority, meant to reach the purpose provided by law with the establishment of this measure. This measure may not be ordered with regard to a suspect.

The application of this measure must be in line with the jurisprudence of the European Court of Human Rights with regard to the observance of the principle of proportionality of any preventive measure with the gravity of an accusation against a person, being more severe than the measure of detention, but gentler than the judicial control on bail, the house arrest and the detention pending trial [3].

2. Aspects of criminal procedural law with regard to the order of the measure of judicial control

The regulation of the preventive measures of judicial control and judicial control on bail with the provisions of Law no. 135/2010 on the Code of Criminal Proceedings changes the view on the procedural institutions of judicial control and bail respectively, which were applied in the past only to the accused or to the defendant who was previously in detention pending trial.

As stated before, for the measure of judicial control to be ordered it is necessary to meet both the general conditions for the order of a preventive measure, among those stipulated by Art. 202 par. (1) and (2) of the Code of Criminal Proceedings, and some special conditions, such as: the preliminary hearing of the defendant in the presence of his lawyer of choice or counsel ex officio; the preventive measure of the judicial control should be proportional to

the gravity of the accusation against the defendant, and the judicial bodies should estimate that the preventive measure of judicial control would contribute to ensuring the normal course of the criminal trial, preventing other crimes from being committed and preventing the suspect or the defendant from evading the prosecution or the judgement.

During the prosecution, the competence for ordering the preventive measure of judicial control with regard to the defendant belongs to the prosecutor who carries out or supervises, accordingly, the criminal prosecution, as well as to the judge for rights and freedoms.

The prosecutor orders the measure of judicial control by issuing an order.

With regard to the measure of judicial control ordered by the judge for rights and freedoms in the phase of criminal prosecution, there is an opinion [4], in which we acquiesce, considering that this measure could be ordered by the judge either in the first instance (when the judge for rights and freedoms, vested with the prosecutor's proposal for taking or extending the measure of the defendant's detention pending trial or the measure of house arrest, rejects the proposal made in the course of criminal prosecution), or in the appeal of the complaint against the conclusion of the judge for rights and freedoms (from the first instance), when, admitting the complaint formulated, the judge orders, in retrial, to reject the prosecutor's proposal regarding the house arrest or the detention pending trial and to take a gentler preventive measure – including the judicial control, simple or on bail.

In the phase of preliminary chamber, the competence for ordering the preventive measure of judicial control belongs to the judge of preliminary chamber, who settles the proposals regarding this measure in the Council Room, with a conclusion.

In the phase of judgement, the competence for ordering the preventive measure of judicial control falls on the panel vested with the settlement of the case in the first instance.

If during the period for which the judicial control is ordered the defendant fails to fulfil his obligations in bad faith or there is a reasonable suspicion that he intentionally committed a new crime for which there is a formal criminal action against him, the judge for rights and freedoms, the judge of preliminary chamber or the court of law, at the prosecutor's request or ex officio, may order for this measure to be replaced by the measure of house arrest or detention pending trial, under the law.

In this situation, there is non-compliance with the principle of the proportionality of ordering preventive measures in accordance with the gravity of the crime committed by the defendant, as well as the fact that under the same conditions to be met, a different preventive measure may not be ordered, although in terms of the provisions included in Art. 211 par. (1) of the Code of Criminal Proceedings, the general conditions for ordering a preventive measure such as the judicial control are met, the same conditions being necessary also for ordering the measure of judicial control on bail.

There is also the fact that according to the provisions of Art. 215 par. (7) of the Code of Criminal Proceedings, in the case of judicial control too, if the defendant fails to fulfil his obligations in bad faith or there is a reasonable suspicion that he intentionally committed a new crime for which there is a formal criminal action against him, the judge for rights and freedoms, the judge of preliminary chamber or the court of law, at the prosecutor's request or ex officio, may order for this measure to be replaced by the measure of house arrest or detention pending trial, under the law [5]. This is also a situation of non-compliance, given that the need to observe the same principle of proportionality requires that in case of this measure, where there is a failure to of the defendant to fulfil his obligations in bad faith, the

preventive measure of judicial control on bail to be ordered with regard to the defendant, and not the preventive measure of house arrest or detention pending trial.

Nevertheless, according to an opinion [6] it is possible to replace the judicial control and the judicial control on bail with the detention measure, which may be ordered only by the prosecutor in the course of criminal prosecution, actually making a replacement of a preventive measure with another preventive measure, where the reason for this is to meet the requirements of Art. 202 par. (1) of the Code of Criminal Proceedings, because in the course of the criminal trial, with regard to a person, it is possible to order only one preventive measure among those expressly and restrictedly provided by the legislator in Art. 202 par. (4) of the Code of Criminal Proceedings.

3. The extension of the measure of judicial control

Given the fact that the provisions of the Code of Criminal Proceedings did not regulate initially the period for which the preventive measure of judicial control may be ordered, the Constitutional Court has been notified and it admitted the exception of non-constitutionality of the provisions 211– 217 of the Code of Criminal Proceedings, as they violate the Art. 53 of the Constitution referring to the restriction of the exercise of some rights and fundamental freedoms in relation to individual freedom (Article 23), free movement (Article 25) and personal, family and private life (Article 26), and in order to rule this solution the Court held that the provisions of the Code of Criminal Proceedings include among the preventive measures the judicial control, and also the judicial control on bail, without regulating the period for which this measure may be ordered, mentioning that the declaration of the non-constitutionality of these legal provisions imposes an adaptation of the legislation to the requirements of the Decision of the Constitutional Court no. 712 of 4 December 2014 [7].

According to Art. 215^1 of the Code of Criminal Proceedings, an article that was introduced with the provisions of Art. I point 7 of the Government Extraordinary Decree no. 82/2014 for changing and completing the Law no. 135/2010 on the Code of Criminal Proceedings [8], the period for which the judicial control is ordered in the course of the criminal trial is of 60 days at most.

In the course of the criminal prosecution, the period of the measure of judicial control may not exceed one year, if the punishment provided by law is a fine or 5 years of imprisonment at most, and it may not exceed 2 years, if the punishment provided by law is life imprisonment or imprisonment for more than 5 years.

The judge of preliminary chamber, in the preliminary chamber procedure, or the court, in the course of the judgement, may order the measure of judicial control with regard to the defendant for a period that may not exceed 60 days.

According to the provisions of Art. 215^1 par. (2) of the Code of Criminal Proceedings, in the course of the criminal prosecution, the judicial control may be extended by the prosecutor, through an order, if the reasons that determined this measure are still valid or new reasons appeared that justify the extension, and each extension may not exceed 60 days.

The preventive measure of judicial control may be extended in the phase of criminal prosecution by the prosecutor, through an order, in case that it is found that the reasons that determined this measure are still valid or new reasons appeared justifying its extension, and each extension may not exceed 60 days. The order of the prosecutor extending the measure of judicial control is communicated to the defendant on the same day.

The Constitutional Court, in its Decision no. 614 of 4 October 2016 [9], found that the provisions of Art. 215[1] of the Code of Criminal Proceedings are constitutional as far as the extension of the preventive measure of judicial control is done with the application of the procedure provided for by Art. 212 par. (1) and (3) of the Code of Criminal Proceedings referring to the order of the measure of judicial control.

For the motivation of the exception of non-constitutionality, it is argued that the texts under criticism contravene to the constitutional provisions of Art. 16 referring to the equality of rights, Art. 21 par. (3) with regard to the right to a fair trial, Art. 24 regarding the right to defence and Art. 124 referring to the accomplishment of justice, as well as to the provisions of Art. 6 par. (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms, referring to the right to a fair trial. For these considerations, the Court held that the measure of judicial control is a preventive measure that, even if executed in liberty, limits both the individual freedom of the defendant, and the exercise of other fundamental rights, namely the free movement, the personal, family and private life, the freedom of meeting, work and the social protection of labour and the economic freedom, under the regulation of Art. 25, Art. 26, Art. 39, Art. 41 and Art. 45 of the Constitution respectively, and therefore the extension of this measure requires that specific procedural guarantees for the right to defence are ensured.

Having regard to the content of this right and the importance of ensuring it during the order and the extension of preventive measures in the course of the criminal trial, the Court notes that it implies not onlya regulation of the right of the defendant to be present and assisted by a lawyer at the time when the prosecutor reviews the validity of the reasons that determined the measure previously referred to or whether new reasons appeared justifying the extension of this measure, but also the defendant's right to be heard before the extension.

However, in disagreement with the majority opinion, there was also a separate opinion [10] in the motivation of the Decision no. 614 of 2017, considering that the exception concerning the non-constitutionality of the provisions of Art. 215[1] par. (2) of the Code of Criminal Proceedings should have been rejected as unfounded, considering that the legislator, in order to streamline the procedures, considered that it was no longer necessary for the prosecutor to order a new hearing of the defendant, at the time of the extension of the preventive measure of judicial control, because he was already aware of and had formulated defences in relation with the crime he was suspected of and with regard to the reasons invoked by the prosecutor ever since the time of the order of the preventive measure of judicial control.

The harmonization with the statements of the Constitutional Court was accomplished with the provisions of Law 9/2017 for the approval of the Government Extraordinary Decree no. 14/2017 on the Abrogation of the Government Extraordinary Decree no. 13/2017 for changing and completing the Law no. 286/2009 on the Criminal Code and the Law no. 135/2010 on the Code of Criminal Proceedings, as well as for changing the Law 135/2010 on the Code of Criminal Proceedings [11].

Following these modifications, for the extension of the measure of judicial control, the prosecutor shall order that the defendant is summoned if he is in liberty or brought in if in detention, and the measure may be taken only after the defendant has been heard in the presence of his chosen lawyer or ex officio counsel.

4. Conclusions

Continuing the tradition of the provisions of the previous Code of Criminal Proceedings and in line with the jurisprudence of the European Court of Human Rights, the author welcomes the initiative of the legislator to extend the scope of the preventive measures that may be ordered in the course of the criminal trial, although initially, as a consequence of the wish to diversify the types of preventive measures, as well as of the need to determine some distinct criteria for their application, there were some cases of non-observance of the principle of proportionality of the ordered measures with the gravity of the accusation against the person to whom a preventive measure is addressed, more precisely the defendant, as well as the non-observance of some constitutional provisions in the extension of the measure of judicial control.

As a matter of fact, the author considers that the entry into force of the provisions of the Code of Criminal Proceedings is in line with the general desideratum concerning the increase in the degree of confidence that justice is done in our country, but it is absolutely necessary that the rights and the freedoms enshrined in the European Convention of Human Rights and the Constitution of Romania are respected throughout the criminal trial. In this context, the admission by the Constitutional Court of the exception of non-constitutionality with regard to the extension of the preventive measure of judicial control proves to be in line with the need to respect the right to defence throughout the criminal trial, a fact which required the harmonization of the non-constitutional provisions with the Constitution and the change and completion of Art. 215[1] par. (2) of the Code of Criminal Proceedings with the inclusion in the legal text of the possibility for the defendant, as well as his lawyer, to have the right to participate in the extension procedure, if applicable, of the preventive measure of judicial control.

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Relevance of Polygraph Test for the Judicial Trial

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Abstract

The objective of this article is to contribute ideas regarding the use of polygraph within the context of investigations performed during judicial trials. In principle, polygraph test uses mechanical and electronic instruments to record psychophysiological changes that appear at the interrogated subject, in controlled conditions. Measuring, recording, stocking and processing psychophysiological parameters provide us with information regarding the behaviour of the subject, as well as with regards to personality and behaviour traits of the subject. From this point of view, the polygraph test represents an offer that offers significant information needed to draft the indictment in the criminal trial as well as finding the truth in the case submitted to trial.

Keywords: *evidence, judicial trial, investigation, proof value, admissibility, amplitude, pulse, rhythm, blood pressure.*

1. Polygraph functioning principles

I. From a scientific perspective, the polygraph is a mechanic – pneumatic recording device for the changes of blood pressure, pulse, breathing rates, added with a module for recording the galvanometric reflex of the skin and an additional sensor for recording muscles activity, particularly – the muscle pressure of the forearm, thighs and legs of the tested subject. Each psychophysiological parameter recorded as a diagram on the polygraph, presents certain particular characteristics that are analysed and interpreted by the polygraphologist.

From the juridical point of view, even if the institution of the polygraph is not mentioned within the content of Art. 97 par. (2) CPC (Evidence and evidence means), it is still used sometimes in the judicial investigation activity. Although the polygraph test result is not admitted as an evidence in the criminal trial, the judicial investigator can proceed in certain circumstances to polygraph test subjects, under the condition that the respective subject or suspect or indicted person agree to it.

The use of polygraph is founded on more than one scientific theories, such as:

– Theory of the conditioned reflex;
– Theory of punishment threat;
– Conflict theory;
– Dichotomy theory;

– Activation theory;
– Information load theory;
– Psychological stress theory;
– Emotional theory;
– Memory traces activation theory;
– Information need theory.

It can be used to measure the parameters at a certain (static) moment or to measure their variation in time (dynamic). The psychophysiological parameters that the polygraph measures are:

1. Thorax breathing;

2. Abdominal breathing.

The group of breathing indices:

- *Breathing line length (LL)* (it was measured only for abdominal breathing – P1 route)
- *Breathing rhythm or frequency and breathing rate (R.R)*

3. EDA activity, that is GSR at palms level:

The group of EDA electro dermal indices:

- *Electro dermal reaction amplitude (ARED)*
- *Electro dermal reaction duration (TRED)*
- *Electro dermal reaction line length (LLRED)*
- *The scoring for the electro dermal reaction amplitude or the difference in amplitude of the electro dermal reaction (ARED SCORE)*
- *Scoring for the electro dermal reaction line length (LLRED SCORE)*

4. Heart beats – pulse

5. Rhythm and pressure

Group of cardio-vascular indices is formed of:

- *Average amplitude of distal pulse (APulse)*
- *Average amplitude of brachial pulse (ACA)*
- *Cardiac rhythm or cardiac frequency (Pulse)*
- *Amplitude differences of the distal pulse (Diff. APulse)*
- *Amplitude of blood volume at brachial level (AVB)*
- *Scoring for brachial blood volume amplitude (SCOR ACA)*

6. Besides, modern devices have a 6th "sense" that records the muscles movements (voluntary and involuntary movements of the subject).

II. Hypothesis laying at the foundation of the data recorded by polygraph are as follows:

A. In the moment a person deliberately lies, his or her physiological rhythm shows physiological changes produced by the vegetative, cognitive and emotional nervous system, showing on the diagram of the polygraph.

B. Human emotionality is not the decisive factor for the reactions used to detect lying, but human memory – the plave where practically, with the help of the sense (sight, hearing, smell, taste, feeling) we stock the information received from the environment.

There are three types of human memory:

– short duration memory – where we keep insignificant things for short periods of time after which we forget them (for instance what we had for lunch one week ago);

– long duration memory keeps only important, relevant things, that marked us in a way or another during our life, such as memories (pleasant or unpleasant);
– working memory, similar to the live memory of a computer, representing the memory that links long and short duration memory. It is not relevant in the polygraphic studies;
– Its influence on the long and short duration memory is significant, at its level functioning also the filter that measures the relevance of the information from the perspective of the CNS (Central Nervous System).

A polygraph test works with the information recorded in the long duration memory.

2. Areas of application and the specific of the polygraph test

Polygraph is used in the following areas of relevance:
– special investigation activity (in the criminal investigation phase);
– personnel screening;
– internal investigation.

Detection of simulated behaviours with the help of polygraph technique has been introduced as a special investigation tool.

The precedent of using polygraph within special investigation actions dates as long ago as 1917 (revealing a German agent by the intelligence services of USA), the testing being made at the time by William Marston.

Polygraph testing, in the context of special investigation actions, in the criminal investigation phase, has the following objectives:
– Assessing the level of credibility of the information supplied by the subject (suspect or indicted person);
– Obtaining from the tested subject information relevant to the special investigation proceeds (criminal investigation actions);
– Assessment of the involvement level (role in participation – author, co-author, instigator, accomplice) of the tested subject;
– Narrowing the circle of suspected people in relation with the investigated case. Using polygraph within special investigation proceeds is justified by the following circumstances:
– There are no other information sources regarding the person submitted to testing;
– the use of the traditional methods of acquiring information (evidence proving listed within the content of Art. 97 CPC), arising from the circumstances, would consume more time, material and human resources;
– No other traditional method, that could be used, would result in acquiring with the same rapidity the searched information.

Detecting the simulation with the help of the polygraph technique, in general, is based on the idea that in committing an antisocial act (crime) the subject participates with his or her whole personality, with his or her whole cognitive, motivational and emotional potential. This way, the antisocial act (the crime) is far from remaining an random acquisition, peripheral to the consciousness, while integrating it to the consciousness as part of a stabile structure, with a specific emotional and affective content, with a well identified motivational role. The result of the polygraph test helps the investigator to analyse the content of the crime and to decide upon the proper juridical norm applicable. The polygraph technique, while

acting directly upon the subject consciousness, aims to clarify if he or her reproduces with fidelity aspects of what is known to him/her (the subjective aspect of the crime), meaning that it determines the subject to react emotionally every time he or her is presented a relevant object (or the image of it) or is addressed a relevant question.

Personnel screening

The polygraph screening is the personnel testing (either candidates or hired personnel), made with the purpose of optimizing the personnel selection, personnel assessment and preventive identification of eventual disloyalties.

Unlike other application domains, screening is based on the risk factors specific to the respective organization. Risk factor is an antisocial/anticorporation, fact, certified within the biography of the candidate or hired person, unacceptable in respect of the position held within the organization. The list of risk factors is decided upon by the employer, yet formulating the screening questions in basis of the risk factors encumbers upon the polygraphologist.

The screening is used in 3 situations:

– personnel selection;
– planned assessments of personnel;
– selective (unplanned) assessments of personnel.

Testing by use of polygraph within the frame of internal investigations

Polygraph testing within the frame of internal investigation is different from applying it as part of the special investigation proceeds by that it is applied to members of groups (work teams) that are relatively stabile. A goo part of testing required by trading entities is made purposely within the frame of internal investigations.

In general, we can identify five basic phases of the proceeds of polygraph testing":

– Preliminary activities;
– Pre-testing interview;
– Test itself;
– Post-testing interview;
– Polygram analysis and conclusions.

Each of these phases has its specific objectives, all of them equally important to the accomplishment of the testing purposes.

3. Risk factors specific to the polygraphologist

One of the key factors of a successful polygraph test is the polygraphologist himself. There is a complex interaction between the polygraphologist and the tested person – in the case of the criminal trial, with the suspect or the accused person – and it is unjust to state that such interaction does not have any effect upon the test result. The examiner's personality and competence can influence the test results.

The polygraphologist has to be:

– A person with an adequate educational background. Psychological or psychiatric studies are preferred and a good mastering of the fundamental issues of the psychophysiology of behaviour;

- A person with an expertise background. Examiners with a limited experience have a relatively higher rate of errors in the polygrams analysis and conclusion formulation, comparative to those with a larger experience in the field.
- An intelligent person, who can at the same time be explanatory for the tested persons, who, for sure will have different levels of education;
- A special qualities person, such as: empathy, perspicacity, observation spirit, morally-emotionally balanced, professional intuition, etc.;
- An integer person, impartial and independent.

Conclusions

1. Starting as a special investigation tool in, the method of the polygraph testing has developed and imposed itself in time for more than 90 years, as a scientifically founded method, credible and efficient, in preventing and fighting criminality.

2. At present, testing by use of polygraph is spread over more than 75 countries. Leaders in suing this method are USA, Canada and Japan. Polygraph enjoys a good popularity in Europe (Belgium, Bulgaria, Croatia, Estonia, Latvia, Lithuania, Poland, Romania, Ucraine, Hungary). However, for correctness, we have to note that around the world, including Europe, there are countries where the use of polygraph is a forbidden practice (Australia, Germany, Austria).

3. With regards to the juridical regulations applying to the use of polygraph, the world countries have applied various models:

- Regulating the use of polygraph by separate special laws (United States of America, Lithuania and the Republic of Moldavia);
- Regulating the use of polygraph by special legal provisions incorporated within laws that are applicable to a larger spectrum of juridical relations (Poland, Hungary);

4. In those countries where there are separate laws governing this field, such laws govern in principle the use of polygraph in recruiting and screening employees of force agencies, as well as internal investigations.

5. Polygraph is used in a number of fields, of which the salient ones are: special investigation proceeds as part of the criminal investigation; personnel screening; internal investigation.

6. It has been said that testing by use of polygraph is an efficient method in recruiting and screening personnel, as it is oriented to optimizing personnel selection, personnel assessment and preventive identification of eventual disloyalties.

7. During the polygraph testing of personnel, specific risk factors of the testing conditions must be considered, as well as the tested subject, the polygraphologist, the personnel testing. However, such factors can be controlled by a strict implementation of method requirements, meeting the testing proper conditions, assuring independence and high expertise of polygraphologist, using performant and conform techniques (polygraphs).

8. The use of the polygraph in testing the personnel is an integrate human method, ethical and nonviolent. The method does not injure life, integrity and security of the examined subject. The method does not harm the honour, freedom and dignity of the subject and can help in corroboration with the other evidence, provisioned by law, to find the judiciary truth in the respective case.

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Author Index*

Angheni Smaranda **97**

Bacheş Daniela **46**

Bădescu Mihai **37**

Balaban-Grăjdan Constantin-Adrian **233**

Bălan Lidia Lenuța **54**

Barbu Silviu Gabriel **54**

Berna Beatrice **261**

Boroi Alexandru **403**

Buneci Bogdan **385**

Buneci Petre **337**

Carleciuc Cristian **85**

Chifor Daniel **113**

Chirieac Roxana **141**

Chiuariu Tudor **244**

Ciobanu Adelina Maria **54**

Cureluşă Luiza Florentina **21**

Dinu Mădălina **202**

Dobre Stelorian **420**

Doca George **420**

Duminică Ramona **106**

Emin Melis **155**

Gherghina Oana Ruxandra **252**

Ispas Petruța-Elena **193**

Ispas Gabriel-Liviu **10**

Ivan Dragoş **324**

Lupu Andrei Răzvan **28**

Manea Teodor **324**

Mareş Mihai **352**

Maxim Felicia **76**

Mihai Luiza **162**

Morariu Ioan **118**

Năstase Adrian **3**

Negruț Gina **403**

Nistor Iulia **361**

Niță Maria-Carolina **170**

Nour Andrada **272**

Olaru Codruț **368**

Oprican Mariana **310**

* The numbers represent the page number where the author's study can be found.

Pălăcean Carmen **132**

Panc Daniela **10**

Paraschiv Carmen-Silvia **427**

Popescu Alina **211**

Porof Alexandru **377**

Predescu Nicoleta Ramona **299**

Puran Andra **106**

Răducan Gabriela **186**

Safta Marieta **221**

Sima Constantin **317**

Stănescu Andreea-Teodora **126**

Stănescu Şerban-Alexandru **180**

Sultan Titi **61**

Ştefan Gheorghe Daniel **377**

Ştefan Mihai **70**

Teodorescu
Maria-Georgiana **410**

Tinu Andrei **21**

Toader Tudorel **221**

Tudor Cosmin Ionuț **283**

Vîrjan Bogdan **3952**

Volonciu Magda **147**

Zidaru Radu **343**