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CONSIDERATIONS REGARDING THE SALE OF THE PROPERTY BELONGING TO ANOTHER, WITH REFERENCE TO IMMOVABLE PROPERTY SOLD TO TENANTS IN ACCORDANCE WITH LAW NO. 112/1995

Abstract

The limiting possibility of the former proprietor, to recover the immovable properties, in kind, taken over by the State, infringes the provisions of the Article 20 § 1 and 2 of the Constitution of Romania, related to the priority of international regulations to which Romania is a party, on municipal law, because the ECHR has repeatedly stated that "the sale by the State, of an asset belonging to another, to third parties of good faith , even prior to final compliance, in court of the property right of the plaintiff, combined with lack of compensation, constitutes a deprivation of property contrary to Article 1 of Protocol 1 to the Convention ".

The ECHR held that Law No. 112/1995 invoked by the Romanian State, doesn't allow it to sell its tenants a property abusively nationalized, since the law only regulates the sale of the properties legally entered into State's patrimony.

The appeal in the interest of the law admitted by the High Court of Cassation and Justice, has established in a final and binding manner, that irrespective of the solutions pronounced by the trial courts, the European Convention has priority, so that solutions of domestic courts should be in line with the European law.

In the conclusion of a sale-purchase contract, since the parties pursue an exact aim, namely, the transfer of the property right, it results undoubtedly that on its closing date, the vendor must be the proprietor of the asset, this being the prerequisite for that document to be valid.

The origin of this institution has its roots in Roman law, it being considered perfectly valid at that time, because, by the sale of the property belonging to another derived only the seller's obligation to assure the purchaser of the peaceful possession of the property, this one wouldn't complain that he bought a property that didn't belong to the seller, in the circumstances in which he wasn't threatened with eviction by the real owner.

In the Romanian legislation it was concealed the truth concerning the sale of the property belonging to another than the seller, situation in which there were expressed several opinions regarding the validity or the invalidity of the sale, which led to the adoption of different solutions by the trial courts.

A first opinion, considered that such a sale is absolutely null, being in the situation of invalidity for the lack of cause[1]. The purchaser continuing to obtain the ownership of the property purchased, the sale is null from this point of view, being non-existent for the lack of cause. This is regarded as a main and immediate goal, followed by the parties when concluding a contract.

A second opinion[2], appraises the validity of the sale of the property belonging to another, depending on the moment when the parties intended to proceed with the transfer of the property right, so that, if the immediate obtaining of the late was intended, the sale is null, because this thing is not possible, the seller not being the proprietor.

The transfer of the property right from the seller to the purchaser not being possible, obviously, the parties have committed a well-grounded error on the object of Convention, an error which entails the nullity of the sale, according to Article 954 § 1 of the Civil Code which stipulates that the "error produces nullity only when it falls on the substance of the object of Convention".

If the parties have already concluded the contract, being aware of the object of sale, their will must be interpreted as meaning that they didn't wanted the immediate change of the property right, the seller committing himself only to the procurement of the asset sold. We face an obligation of doing something, which in this case leads to the validity of the contract, attracting only the possibility of compensations in case of non-performance.

Analyzing the opinions expressed above, we rally to the point of view shared constantly by the trial courts, which, if the sale was made in fraud of the right of the proprietor by the seller, on the purchaser's risk, it represents a typical case of absolute nullity, taking into account the principle of good faith in connection with civil law and of exercising their rights in accordance with the purpose for which they were recognized by the law.

This point of view is correct, since nullity is dictated by the absence of the cause, because, the seller wouldn't be the proprietor of the sold asset, he cannot satisfy the purpose had in mind by the purchaser, namely, the acquisition of property. In this respect the provisions of Article 966 of the

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[1] Ion Dogaru – „Drept civil – Contracte speciale", Ed. All Beck, Bucureşti, 2004, pag. 91

[2] C. Hamangiu, N. Georgean – „Codul civil adnotat, vol. IV", Bucureşti, 1927, pag. 284-285

Civil Code expressly indicate that "the obligation without cause or based on a false cause, or illicit, cannot have any effect".

This solution was also sanctioned in exchange matters (Article 1407 Civil Code), so that, if the change of property belonging to another is null, the sale of the property belonging to another is absolutely nullified.

In order to comply with the principles of equity and ensure the property right, judicial practice became constant, in the sense of invalidation of the sale of the property belonging to another, adopting the solution of absolute nullity, based on illicit and immoral cases.

We share this point of view, because this is the optimal solution in ensuring the security of civil circuit, but also for the punishment of bad faith mentioned when concluding a contract.

If the purchaser which acted in good faith, not knowing the fact that the sold property is in the ownership of other person than the seller, we appreciate, nor in this conjecture, the relative nullity of the contract shall not impose, because we are not talking about an error concerning the quality of the seller or the substance of the sold property, being in the situation of absolute nullity because of the illicit and immoral cause that we have referred to above.

Taking account of the theoretical considerations above, concerning the sale of the property belonging to another, we will refer there under, to the practical implications of this institution in matters of the immovable property sold to tenants under Law No. 112/1995, regarding the regime of the immovables taken over by the state abusively during 6 March 1945 - 22 December 1989 and to the admissibility of recovery actions founded on the provisions of the Civil Code, in connection with the immovables passed abusively into State property, prior to the adoption of Law No. 10/2001.

This discussion is necessary because the State, by selling immovable properties to former tenants in accordance with Law No. 112/1995, proceeded to the sale of the property another, even if the purchasers which acted in good faith, insofar as its title proved to be invalid.

Basically, the successors of the former proprietor brought the State in justice, by the mayor general of municipality Bucharest (immovable located in Bucharest), and also the former tenants who have bought the immovable by sale-purchase contract under Law No. 112/1995 and solicited to establish first the invalidity of the State's title on the immovable, the property of their author, and on the other hand, the defendants natural persons to be forced to leave in full ownership and possession the recovered housing unit.

The plaintiffs have shown that the recovered immovable was nationalized under Decree No. 92/1950 and this normative act is unlawful,

because, infringed the provisions of Article 8, 10 and 11 of the Constitution of 1948, according to which, the private property and the right of inheritance were recognized and guaranteed by law. In the Constitution from that date, were showed deliberately and restrictively the exceptions to the principle of guaranteeing the right of private property, according to which the expropriation for the case of public utility could be done on the ground of law and also with a fair compensation, being able to pass to the State's property means of protection, banks, insurance societies or immovable properties which were not intended for housing.

It was stated by the plaintiffs that Decree No. 92/1950 is unconstitutional, so that it cannot constitute legal title of acquisition of property by the Romanian state, reason for which the sale made under Law No. 112/1995 is null, because concerns the alienation of property belonging another, their author being part, at the moment of nationalization, of the category of exempt persons from this action, since he was a pensioner.

The defendants, natural persons who bought the immovable in accordance with Law No. 112/1995, have concluded sale-purchase contracts not with a proprietor, because the state title wasn't valid, so the transfer of the property right couldn't operate legally. The sales being closed in bad faith, results that are struck by the absolute nullity.

We asses that the action formulated by the plaintiffs, as well as the point of view expressed by the trial court, by which it was established the invalidity of the State's title concerning the recovered immovable and the obligation of defendants to leave it in full ownership and possession, are perfectly legal, since the takeover made by the state under Decree No. 92/1950, was in breach of the Constitution of 1948, which stipulated in Article 8 that "private property and the right of inheritance shall be guaranteed".

On the other hand, the provisions of Article 480 and 481 of the Civil Code expressly indicate that "the property is the right of a person to use an asset, to gather the benefits and to dispose of it, nobody could being forced to cede his property, unless for reason ns of public utility and receiving a fair and prior compensation".

By the infringement of provisions described above, the State hasn't gain possession of the recovered asset under a valid title, situation in which also the transmission is unlawful, because, it doesn't descend from the true proprietor, being in the classical position of the sale of the property belonging to another.

Under Article 6 of Law No. 213/1998, "are part of public or private domain of the State or of the administrative territorial units, and the assets acquired by the State during 06 March 1945 - 22 December 1989, if they

came into State's property pursuant to a valid title, with the observance of the Constitution, international treaties to which Romania is part of and of the laws in force at the time of their takeover by the State, the final paragraph of the article indicating that "the trial courts are competent to establish the validity of the title".

Even if the Law. 10/2001 stated expressly that all the immovable properties were abusively took over during the period referred to above, however the trial court has the jurisdiction to determine the invalidity of the State's title and as a consequence, to compare the titles invoked by the parties in this particular case, those of the former and present proprietors who obtained the immovable by purchase under Law No. 112/1995.

The recovery action formulated by the plaintiffs against purchasers-tenants buyers, after entering into force the Law No. 10/2001, is admissible, because, the prior procedure stipulated by this normative act, is applicable only if the recovered immovable property is in the patrimony of the State or of the legal person holding, situation in which, the legitimate person can obtain the restitution in kind of the immovable property that is subject to notification.

On the other hand, the recovery action against tenants who became proprietors by purchase, in accordance with Law No. 112/1995, is also admissible in the situation in which the former proprietor or his successors have formulated a notification in accordance with Law No. 10 / 2001, because, each procedure is based on different legal grounds, so, it cannot sustain that they would get twice the same thing.

To this solution contributes also the Protocol No. 1 to the ECHR, which guarantees the property right, same as Article 21 of the Romanian Constitution.

Under the conditions proving that State took over the immovable with invalid title, the recovery action will be admissible, because with the exception of expropriation, the law regarded as a title, being a method of acquisition and not of loss of property, considers the situation where the State disposes its patrimony in favour of third parties, but not of third-parties patrimony in its favour, because it cannot dispose of assets belonging to another, the provision being an exclusively attribute of the proprietor.

Therefore, in case of transition of the immovable under the State's property, in the conditions of Decree No. 92/1950, not being subordinated to the requirements of an expropriation under Article 481 of Civil Code, it doesn't represent a valid acquisition of property, couldn't constitute a title of the State, as defined by Article 645 of Civil Code. This nationalization is

actually a probative instrument self-constituted by the State to justify the illegal dispossession of the proprietor.

In this particular case that we have referred to above, the title of the authors' plaintiffs is previous to that of state, which, as described above, is not valid, situation in which they justify valid the property right in relation to the State but also with the defendants.

The title of the plaintiffs is preferable from the title of the defendants which is subsequent, and doesn't descend from the true proprietor, so that, the recovery action is perfectly admissible, consecrating the principle of equity and of guaranteeing the property right.

It is true that the title of the acquirers of good faith emanates from the state, but, their right cannot be preferable, compared to the title of the true proprietor, because the transition of the asset under the State's property was made abusively.

By the admission of a recovery action, after ascertaining the invalidity of the State's title, it was respected the RCHR practice in matter, according to which, the sale by the state of the immovable to tenants, pursuant to Law No. 112/1995, represents a violation to Article 1 of the Additional Protocol No. 1, because the procedure provided by Law 10/2001 wouldn't have the effect of restitution in kind of the immovable, if the sale-purchase contract is not cancelled.

The sale by the State pursuant to Law No. 112/1995 of an immovable taken over without a valid title, represents the sale of the property belonging to another to a third party, and as a result of this sale, the interested person has no longer the opportunity to come into possession of the asset, to sell it or to dispose of it, which leads to the depriving of the plaintiff of property ownership within the meaning of Protocol 1.

Taking account of the Additional Protocol No. 1 at ECHR, and also of the provisions of Article 2 § 2 of Law No. 10/2001, under which the property title of the proprietors abusively dispossessed, produces further effects, and also the fact that the title of tenants proprietors emanates from a non-dominus, it was admitted in the right way the recovery action formulated by the plaintiffs, confirming the point of view expressed in the judicial practice, according to which, in order to respect the principles of equity and guaranteeing the property, the sale of the property belonging to another will be invalid.

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CONSEQUENCES OF THE EMPLOYEE'S RESIGNATION BY THE EMPLOYER'S FAULT ON THE EMPLOYEE'S REINSTATEMENT IN HIS FORMER JOB

Abstract

Romanian legislation should adopt an explicit text acknowledging the right of an employee who resigned to prove that his act was due to the employer's abusive conduct, who made impossible for the employee to continue his employment and that what in fact occurred was a constructive dismissal.

As "constructive dismissal" or "self-resignation" are jurisprudential creations operating abroad, we consider that there is nothing to hinder our law courts from creating them, as it would be in the employer's best interest, whose protection is the Employment Law reason for existence and continuous improvement.

A test case settled down by Bucharest Court of Law and Bucharest Court of Appeal makes us tackle upon the employee's interest to seek in a civil action the observance of his right regarding his stability in work, which being breached forced him to resign.

1. Introduction

A test case settled down by Bucharest Law Court [1] and by Bucharest Court of Appeal[2] gives us the opportunity to tackle upon the subject matter related to an employee's interest who seeks with the justice system the observance of his right regarding his stability in work, when the breach of his right forced him to resign.

2. Facts

Complaint with the person in question's individual employment contract and with her job description record, the plaintiff was hired as **Coordinator Recruitment Developer**.

In September 2003 she was given by the employer written notice to temporarily take over the position of ***Training Coordinator for the GLOBE project***, until its completion, without diminishing her salary.

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[1] Section VIII Labour and social ensurances litigations, civil sentence no. 2084/2008 (unpublished).

[2] Civil Section VII and for cases regarding labour and social ensurances litigations, civil decision no. 3979/R/2008, published in "Romanian Review of Employment Law" no. 1/2009, pp. 165-169.

The respective assignment has been extended for several times, and all her attempts to be reinstated in her former position have failed. Moreover, she was informed that she would held definetively this position; her former job was declared vacant and taken out for contest.

3. The employee's reactions

In September 2007, the plaintiff filed for her action at Bucharest Law Court, disputing the unilateral alteration of her job content; she obviously asked for her reinstatement in her former position held according to her individual employment contract.

At the same time, she also tried to discuss with the employer's representatives for the amiable settlement of the disagreement risen between the two parties. But, their conflictworsened, the continuation of her labour relationship becoming impossible.

This situation made the employee hand over the employeer (on September 24th, 2007) the following written notification: „Hereby, I bring to your attention my decision to resign from my position held within this company. My last day of work is October 12th, 2007"

4. Courts decisions

Bucharest Law Court **repelled the request regarding the cancellation of the measure of unilateral alteration of the job content and on the reinstatement in the position previous held as deemed lacking interest.**

The court held that related to the date when the request for resignation was submitted (September 24th, 2007) and the date when the litigation was opened at the court of law (September 21st, 2007), the interest for furtherance of the litigation was valid only for 3 days.

Moreover, the unilateral alteration of the job content invoked by the plaintiff was not mentioned under the labour book. But, the court also held that: „Even if the plaintiff's position was renamed, but her job content and the wage remained unaltered, the employer's measure can not be deemed an unilateral alteration of the job content, as it is the employer's right to make such changes within the company in order to judiciously organize his activity".

Bucharest Court of Appeal, invested by the plaintiff to settle down the recourse, dismissed her request mainly on two grounds.

First ground is lack of interest. This „being a condition to exercise the civil action for which it is sufficient not only the affirmation of the

existence of an actual right, but also the practical interest that a party seeks to obtain by putting into motion a judicious procedure." And, lack of interes is deemed unanswereable exception which makes useless the litigation au fond of the dispute.

Second ground: the recurrent has not resigned from her new job given to which she was assigned by the employer as his unilateral act of will totally meets the conditions that must be met in the case of resignation, as it is regulated under the provisions stipulated under art. 79 para 1 of the Labour Code.

5. Commentary

We have our doubts in what the decisions of the two courts are concerned, which seem to be not only illegal and unsubstantial, but also ambiguously reasoned.

It is true that, interest represents one of the general and essential condition for weilding the civil action or any other concrete form of manifestation[1]. Putting differently, the interest to commence a civil action means to justify or to determine the putting into motion of the judicial procedure, meaning for the plaintiff to obtain by court decision the judious defendance of his breached, litigated right and therefore, to strenghten his statutory position. Therefore, the interest condition is necessary to be met, not only when addressing the matter to the court, and also subsequently, during the trial settlement, until its completion, fact which makes „interest" distinguishable from „the subjective right", whose existence is not necessarily to be justified until the completion of the trial for the acceptance of the civil action. Consequently, the judicious procedure can not be initiated and maintained without the seeking and justification of one particular interest, meaning an immediate practical advantage that the plaintiff seeks to obtain when he requests the law court to settle down the request.[2]

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[1] The etimology of the term or of the word „interes" derives from the Lation word „interest qui", which means concern to obtain a success, an advantage, or covetousness laid down into a civil action seeking the fulfillment of some needs. Before commencing a civil action, the rational man asks himself: what is its purpose? Who is its beneficary? (qui prodest?, ce qui importe?).

[2] For further reading: I. Stoenescu, S. Zilberstein, *Civil Procedural Law. General practice*, Didactică şi Pedagogică Publishing House, Bucharest, 1983, pp. 297; V.M. Ciodanu, *Civil Procedural Treaty, General Practise*, Volume. I, Național Publishing House, Bucharest, 1996, pp. 270; Gr. Porumb, Romanian *Civil Procedural Law*, Didactică şi Pedagogică Publishing House, Bucharest, 1971, pp. 131; D. Radu, *Civil*

Therefore, the courts held that at the date when the civil action started the plaintiff met the condition of the interest, but as her resignation occured, this requirement could not longer be fulfilled.

In our view, interest or lack of interest should have been judged related not to the act of resignation, but to the alleged breached right by the unilateral alteration of the individual employment contract.

As stated above, the interest to address a matter to a law court is justified by the necessity to defend a litigated or breached right; the interest is closely connected, by its purpose, with the subjective right.

Consequently, the law court trial was supposed to establish wheather there existed such a litigimate right that should be defended by the plaintiff's action, meaning wheather the job content was altered or not.

If the alteration occured, being illegal, as the plaitiff argued, her interest in promoting and backing-up her action existed. On the contrary, if such an alteration did not occur, nor the interest or the action can be justified, and in this case the action, was supposed to be dismissed as such.

Legal litterature does unaminously helds that when *the job content* is deemed an essential element of the individual employment contract, it is compulsory to be stipulated therein.[1] Job content can only be altered by the mutual agreement of the parties or in cases strictly regulated by the law, as it is stipulated under art. 41 of the Labour Code.

The main criterion for determing the job content is represented by *profession, job or position,* acquired and backed-up by a proper professional background.

Position is the activity carried out by a person under a funcotinal executive or management hiercharcy; it is made up by the totality of the attributions or professional assignments that the employee must perform based on a certain professional bacground.[2]

Action in a civil trial, Junimea Publishing House, Iaşi, 1974, pp. 163; I. Deleanu, *Civil Procedural Treaty*, Volume I, 2nd Edition, C. H. Beck Publishing House, Bucharest, 2007, pp. 54; Gh. Buta, *Commercial Jurisdiction.Theory and jurisprudence,* Lumina Lex Publishing House, Bucharest, 2003, pp. 74; M. Tăbârcă, *Civil Procedural Law*, 2nd Editon amended and completed, Universul juridic Publishing House, Bucharest, 2008, pp. 101-105; M. Fodor, *Civil Procedural Law*, Volume. I, Universul juridic Publishing House, Bucharest, 2006, pp. 127.

[1] For further reading: I. T. Ştefănescu, *Employment Law Treaty*, Wolters Kluwer Publishing House, Bucharest, 2007, pp. 162; Al. Ţiclea, *Employment Law Treaty*, Universul juridic Publishing House, Bucharest, 2009, pp. 404

[2] I. T. Ştefănescu, *op. cit*., p. 266.

Attributions (professional assignments), that the employee must perform under his position are documented under the job-description record,[1] which is addendum to the individual employment contract.

The alteration of the professional assignment in the currency of the performance of the individual employment contract is at any time possible by mutual agreement of the parties. But, the unilateral alteration of the contract, by the employer's act, in principle is inadmissible.[2]

Judicious practice still helds that the passing over for an undeterminated period of one employee even with the same employer, to another job than the one agreed when hired is deemed an essential alteration of the labour contract and can not be enforced without the other party's consent [3].

Even the passing over from one job to another with the same employer, and by granting the same salary, but with the alteration of the professional assignments is deemed alteration of the job content and thus alteration of the labour contract, fact which is inadmissible[4].

Among other things the au fond court stated that it was changed only the name of the position and not the job content or the salary, but it did not manage the proofs in this matter, and without asking the parties to do so. *At first sight*, it is obvious that a *Coordinator Recruitment Developer's* duties can not be identical to the duties performed by a Training Coordinator of a project.

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[1] *Ibidem*, p. 267.

[2] Al. Ţiclea, *op. cit.*, p. 513.

[3]Bucharest Law Court, Civil Section IV, issued in December no. 1729/1991 and no. 146/1991, in *"Civil Procedural Practice Compilation" for the 1991 (Forewords signed by* dr. Ioan Mihuţă), Publishing and Press House "Şansa", Bucharest, 1992, pp. 154-155). For the same reason for further reading Supreme Law-court, Civil Section, issued in December no. 2037/1972 and no. 1168/1975, in Ioan Mihuţă, *Judicial Practical Repertoire in the civil field of the Supreme Law Court and other law courts*, for the years 1969-1975, Publishing House Ştiinţifică şi Enciclopedică, Bucharest, 1976, p. 256, no. 9 and no. 8 respectively.

[4] Ploiesti Court of Appeal, December no. 392/1998, under Jurisprudence Bulletin *Procedural Practice Compilation,* I Quarter -1998 (sellective work drafted by Ioan – Nicolae Fava, Mona-Lisa Belu Magdo, Elena Negulescu), Lumina Lex Publishing House, Bucharest, 1998, pp. 247-240.

In a case, it was held that the unilateral alteration of the individual labour contract is allowed by exception only under the cases stipulated under the Labour Code, namely by means of delegation or assignment (Court of Appeal Craiova, Labour and social ensurances litigations section, Dec. no. 2966/2006, citated by Mrs. Roxana Radu, in "Romanian Review of Employment Law no. 1/2009, pp. 143-144).

At the same time, the au fond court, as well as the recourse trial made no connection between the alteration (lawful or unlawful) of the job content and the plaintiff's interest in promoting her action.

In considering the following, we hold that *the interest requirement existed during the entire currency of the judicial procedure and not only* "...for 3 days", as the law court wrongfully argued.

We consider that, the interest was not extinguished when the plaintiff notified her resignation, but it continued to subsist as long as the plaintiff has not given up to her subjective right constured to trial and not even when the introductory request was on trial.

The plaintiff's resignation can not be deemed such a giving up, as it can be easily noticed under the notification, the employee (the plaintiff) resigned from the position held under the company at the date when the court law was seized (meaning the new position in which she was appointed by the employer, without her prior approval), measure which she disputed by her request, and not from the position held compliant to her individual employment contract in which she required to be reinstated.

Thus judging the situation, one should notice that it is not the case of a pure and simple resignation, as a result of the expression of the employee's free will, assumption taken into consideration by the legislator according to art. 79 of the Labour Code, but that what occured was a forced, constructive dismissal determined by the employer's conduct. If this does not unilaterally and illegally alters the job content, the resignation would have not occured and it would not have been justified.

The employee's interest should be considered by judging the abuse committed by the employer, but also by taking into consideration the employee's need to regain her lost position. Going forward with the action started prior to the date of resignation is exactly the proof that her interest existed both at the date when the law court was seized and also during the entire currency of the judicial procedure.

The plaintiff's interest became even more obvious when her job was declared vacant and taken out to contest.

The plaintiff's interest was also *legitimate*, rightfullness which resulted from the fact that the right whose judicial protection was alleged was legitimate; the right to stability in work is expressly stipulated under the Labour Code (art. 41 and art. 42; art 49 and art. 50; art. 55 and art. 56).

The court of law, based on its active role, should have given the plaintiff's request its exact juridical qualification, depending on its content and based on the provisions stipulated under art. 84 and art. 129 Civil Procedure Code, and to file for the plaintiff's matters brought into attention at the trial. The judge is thus called for understanding the party's will when

addressing her claims, to „see beyond" the terms used by the party, to establish which is the object of her request and consequently, to pass a lawfull and grounded decision in the limits of the claim which makes the object of the cause, by observing the provisions stipulated under art. 129 last para C of the Civil procedure Code[1]

It is also obvious the fact that her interest is *direct and personal* and also *born and actual,* as the effects of the future circumstances can not remove such characteristics, especially that the resignation, as we previously stated, can not be deemed giving–up of a triable subjective right or abnegation of judicial protection.

We consider that the case under discussion is similar to what is known in England as *constructive dismissal* (implicit dismissal)[2].

This consists in acknowledging an employee's right who resigned to prove that his act is the consequence of the employer's conduct, which made impossible for the employee to continue his labour relationship and that, in fact what occured was a dismissal. The employee was forced to resign; thus his consent was not freely expressed, but it was vitiated, forced.

In such a situation, what ococured was not a resignation by the employee, but an unlawfull and abussive dismissal, a constructive dismissal by the employer. The employee was under the pressures made by the employer, who, for example failed to observe his statutory or contractual obligations, thus breaching the rights of the party in question, forcing the employee to terminate his employment. Even if he files his resignation as such, he does not waive his right to attack the act related to the termination of the employment contract. The doctrine on constructive dismissal is invoqued under the following circumstances:

- where is unilateral alteration of the individual employment contract (alteration of the job content or of the work place);
- where is increase in the number and difficulty level of the professional assignments;

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[1] M. Fodor, *op. cit*., p. 88; M. Filimon, *Critical note to the decision no. 586/A/5.06.2002 of Bihor Law Court*, under "Romanian Pandects" no. 3/2003, p. 137.

[2] G. Schaub, U. Koch, R. Linck, H. Vogelsang, *Arbeitsrechts – Handbuch*, 12 Auflage, Verlag C.H. Beck, München, 2007, pp. 1346-1348.
For further reading R. Dimitriu, *Doctrine on contructive dismissal under the English law*, under „Romanian Review of Trade Law " no. 2/2001, pp. 70-78; *Idem*, *Individual labor contract, actual and perspective*,Tribuna Economică Publishing House, Bucharest, 2005, pp. 403-404.

- humiliating or despizing attitude towards the employee from the employer's part (or its representatives);

- hiring on the same position of another person who takes over the job assignments of the person in question etc. [1]

The French jurisprudence[2] deems forced resignment as dismissal. For this, it should be the case of grave acts of the employer who makes impossible the continuation of the employment contract. Under such a circumstance, resignation is not the consequence of the employee's clear and unequivocal will, but a forced resignation, generated by the employer's unlawful and abussive attitude.

Whereas the concept of „constructive dismissal" or of the „forced resignation which is in fact dismissal" are jurisdictional creations (valid abroad), we consider that there is nothing to hinder our law courts to make such creations. Their creation would be in the best interest of the weaker party under the labor relationships : the worker; **his/her protection is the Employment Law reason for existince and continuous improvement...**

It is true that the employee did not dispute in a civil action her act of resigning (from another position than the once for which she was hired), properly completing her action,[3] but that she previously disputed the unilateral and abussive measure taken by the employer, which can be deemed (unlawful) dismissal from the position held bcompliant with her individual employment contract. By seeking completion of her action even after notifying her resignation, she implicitly disputed this resignation. During the trial the moral violence to which was subjected the person in question could have been proved, thus forcing the employee to resign.

Nevertheless, it can be said that under the circumstances of a rigid legislation and lacking a lawful substantiation, able to regulate cases as the above-mentioned, the law courts found an easier and more comfortable solution to settle down the cause, with no complications and avoiding to

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[1] A. Ţiclea, *Employment Law Treaty*, Universul juridic Publishing House, Bucharest, 2009, pp. 589-590.

[2] J. Pélissier, A. Lyon-Caen, A. Jeammaud, E. Dockès, *Les grands arrêts, du droit du travail,* 3e édition, Dalloz, Paris, 2004, pp. 304-309.

[3] According to art. 132 para. 1 first phrase Civil Procedure Code, on the first day of hearing the court law can grant the plaintiff a legal term within which to complete or amend his request, as well as for putting forward new proofs.
At the same time, we mention the fact that under art. 129 para 5 Civil Procedure Code is dedicated to the judge's active role, who is liable to make use of all the statutory means to prevent the occurence of any mistake related to the finding out the truth, based on facts and by the lawful application of law, in order to find for a rightful and statutory decision.

play an active creative act when interpreting and applying the legal provisions in force.

For sure, the reasoning was as follows: *as long as the individual employmentcontract is no longer in force, and the way in which itterminated has not been directly disputed (by only incidentally), there is no interest in cancelling the alteration of the job content.*

In order to avoid under similar cases such a consequence**, an expressed text should be adopted** stipulating that dismissal will not be deemed as such when it did not occur as a consequence of the employee's will, but when it was determined by the employer's abussive conduct.

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ADMINISTRATION OF ECONOMIC INTEREST GROUPS

Abstract

Just like in case of the commercial companies, the managers of E.I.G. represent the executive body of the general management of the members of the economic interest group.

The E.I.G. managers may be members who represent and manage the group, natural or moral persons administrators.

The powers and attributions of the managers are established by the general assembly of the members of the group who also establish the way in which the E.I.G. management will be carried out, together or separately, as well as the conditions for revocation.

In brief, one may conclude that the E.I.G. managers carry out the social will of the members of the group, according to its economic interest.

I. E.I.G. – A New Legal Form of Organization of the Traders

The need to harmonize the Romanian legislation with that of the E.U. countries as regards the commercial activity lead to the regulation by Law no. 161/2003 of a new entity: that of the economic interest group (E.I.G.). This original entity was conceived as a legal structure situated between the commercial company and the association, in which dominant in its organization is the will of the members that make it up and the contractual freedom.

The Economic Interest Group is a structure which, observing the independence of its members, allow for the realization of mutual actions, more efficient than the mere contractual collaborations, due to the legal personality of the group.

Thus, according to article 118 of Law 161/2003, an E.I.G. is formed for a determined period of time and represents an association of two or more natural or legal persons (never more than 20). The association is based on a contract which represents the constitutive deed of the group. It is not a "company contract" which allows for the manifestation of the will of the members to a larger extent.

The Economic Interest Group has a patrimonial purpose and it may have the quality of trader or non-trader, depending on the operations and documents it makes (article 127 of Law 161/2003).

The constitutive deed of an E.I.G. is legally registered with the Trade Registry in the jurisdiction area where the group has its headquarters, at the demand of the founders, of the managers or of an

authorized representative (proxy), within 15 days from the authentication of the constitutive deed (article 125 of Law 161/2003).

II. Nomination of Managers.

The Quality of Manager

The constitutive deed of the Economic Interest Group establishes, according to article 122, letter "g" as follows: "the members who represent and manage the group or the managers non-members, natural or legal persons, the powers conferred to them and whether they will exercise them jointly or separately as well as the conditions in which they can be revoked".

If the constitutive deed of the E.I.G. makes no mention of the managers, then they can be elected by the unanimous vote of the members of the group, who also establish their attributions, the duration of the nomination and their eventual remuneration (art. 157 of Law no. 161/2003).

In case a legal person has been appointed or chosen as manager, the rights and obligations of the parties are established by a management contract. The contract should also mention the permanent natural person representing the legal person who is submitted to the same conditions, obligations and civil and penal responsibility as a manager-natural person acting on own behalf (art. 158, paragraph 2 of Law no. 161/2003).

When the Economic Interest Group has appointed several managers, the right to represent the group belongs to each manager, except the case when a contrary stipulation is made (art. 170 of Law no. 161/2003). The following article reads: "If the constitutive deed provides that the managers should work together, the decision must be taken unanimously; in case of disagreement between the managers, the decision shall be taken with the majority vote of the members. For urgent documents, whose misunderstanding would cause a substantial loss for the group, one of the managers can take the decision alone in the absence of the other managers who are in impossibility, even temporarily, to take part in the management." (art. 171 of Law no. 161/2003).

III. Publicity of Managers' Appointment

The decision to appoint the managers of the Economic Interest Group, their name/denomination, the stipulation if they can act individually or together, as well as the ceasing of their attributions will be published, according to art. 129 of Law 161/2003 in the Official Gazette of Romania, Part IV.

The signatures of the managers shall be registered with the Office of the Trade Registry upon the filling in of the application for the registration of the E.I.G, if they have been appointed through the constitutive deed, while those elected during the existence of the group should be registered within 15 days from their election (art. 132 of the same Law),

together with the submission of the certificate issued by the persons fulfilling the attributes of auditors and from which it results that the guarantee has been deposited (art. 160 of Law).

Art. 19 of Law no. 26/1990 regarding the Trade Registry, stipulates the obligation of the managers or of the representatives of the trade companies to record in the registry the specimen signature in the presence of the delegate judge, of the director of the trade registry or his/her deputy, who will certify the signature.

IV. Remuneration of the Managers

The members of the Economic Interest Group may decide by unanimous vote the eventual remuneration of the managers or any other sums or advantages for these, except when the constitutive deed provides otherwise (art. 219, paragraph 1 of Law 161/2003).

It is forbidden that the group should credit the managers by means of operations such as:

1. loans to the managers (art. 219, paragraph 1, letter a);
2. financial advantages for the managers (art. 219, paragraph 2, letter b);
3. direct or indirect guarantee, total or partial, for the execution by the managers of any personal obligations towards third persons (art. 219, paragraph 2, letter d);
4. the acquisition, with certain obligations or by full or partly payment, of a debt having as object a loan given by a third party to the managers, or another personal service to them (art. 219, paragraph2, let. e).

The above provisions do not apply for the operations whose cumulated exigible value is less than the equivalent in RON of 5,000.00 EURO, or in case the operation is concluded by the group in the conditions of the current exercise of its activity, and the clauses of the operation are those usually practiced towards third persons and are not favorable to the spouse, relatives or in-laws up to the 4th degree included, of the manager.

V. Liability of the Managers

The managers have joint liability towards to company in the cases stipulated in article 151 of Law 161/2003, for:

1. the existence of the registers requested by the law and their correct keeping;
2. the fulfillment of the decisions of the general assemblies;
3. the strict fulfillment of the obligations imposed by the law and by the constitutive deed.

The liability action against the managers of the group is decided by the majority vote of the group. It belongs to the group creditors only when the obligations of the group are repeatedly not paid at maturity or when the group is submitted to the procedure of judiciary reorganization and bankruptcy, as regulated by Law no. 64/1995.

The manager who, without right, substitutes himself/herself by another person, is joint and several reliable with him for the eventual losses caused to the group. (art. 149, paragraph 3).

VI. Obligations of the Managers

The obligations of the managers of the Economic Interest Group are established by:

- the dispositions regarding the mandate – the same as for those who manage the commercial companies;
- the dispositions of Law 161/2003.

The managers have the obligation:

- to carry out all the operations necessary for the fulfillment of the object of activity of the group, except for the restrictions shown in the constitutive deed (art. 148, paragraph 1);
- to take part in all the meetings of the group, in the administration board and similar managing bodies meetings (art. 148, paragraph 2);
- to convoke at once the general assembly of the members for the adoption of a decision in the competence of the assembly (art. 154, paragraph 1);
- to reply, in written, within 15 days, to the complaints made by the members regarding the administration of the group (art. 156, paragraph 1);
- to deposit, for their administration, a guarantee that cannot be less than the double of the monthly remuneration (art. 159, paragraph 1);

- to register their signature with the office of the trade registry on the date of the filling in of the registration application, if they were appointed by the constitutive deed, or within 15 days , if they were elected during the operation of the group (art. 132);

- to draw up the annual financial situation of the economic interest group according to the standards established for the general partnership companies and to submit one copy of it, within 15 days, at the administration of public finances and one at the office of the trade registry, after its approval by the general assembly of the members (art. 173, paragraph 1);

- to inform immediately all the other members of the group in case one of them ceases to belong to the group, and to undertake the necessary action in order to register this mention in the trade registry and to publish it in the Official Gazette of Romania, Part IV (art.178, paragraph 1);

- not to perform any new operations when the economic interest group is dissolving as otherwise, they will be jointly and severally reliable for the operations performed (art. 189, paragraph 2);

- to draw up, based on the decision of the general assembly of the members of the economic interest group, the merger or division projects, that will include all the data regarding the conditions of the merger or of the division, the names and head offices of all the groups taking part in the operation, the evaluation of the assets and liabilities, the way of delivering the interest parts with the date on which they give right to dividends, any other data of interest for the operation (art.196). At the same time the managers have the obligation to put at the disposal of the members, at the head office of the group, at least one month before the date of the meeting of the general assembly of the group that merges or divides, the project of the merger or division, the report of the managers with the economic and legal justifications of the financial situations together with the annual reports for the last three financial exercises and with three months before the date of the merger or division project, of the auditors' report, the evidence of the contract with values exceeding 100,000,000 lei (ROL) in course of execution and their repartition in case of group division (art. 199).

In case of the liquidation of the economic interest group the managers are obliged, according to art. 207 of Law 161/2003:

- to continue their mandate, with the exception provided in art. 189, until the transfer of the function towards the liquidators;

- to make an inventory and to conclude a financial situation that would present the exact situation of the assets and liabilities of the group and to sign them;

- to hand over to the liquidators the registers and the documents of the group;
- to keep a register with all the operations of the liquidation, in their chronological order.

VII. The Powers of the Managers

The powers of the managers refer to:
- all the operations necessary for the fulfillment of the object of activity of the Economic Interest Group, except the restrictions stipulated in the constitutive deed or by the decisions of the general assembly (art. 148 of Law 161/2003);
- representation of the group in relation with third parties.

The non-observance of the legal dispositions regarding the conclusion of the legal documents between the manager and the group, determines their nullity (art. 221 of the law).

The manager representing the economic interest group is not entitled to transfer this right to another person unless he has been expressly empowered to do so (art. 149, paragraph 2). If this interdiction is infringed, the company can pretend from the substitute person the benefits resulting from the operation realized. The manager shall be jointly and severally reliable with the third substitute for the losses incurred (art.149, paragraph 3).

VIII. Revocation of the Managers

By unanimous vote, the members of the group may decide the revocation of the managers or the limitation of their powers, except the case where the managers were not appointed by the constitutive deed (art. 157, paragraph 2).

IX. Sanctions for Managers

All the documents issued by the groups of economic interest should bear the name, head office address and other identification codes; the non-observance of this obligation is considered as contravention. The ascertaining of this fact and the enforcement of the sanctions is made by the control bodies of the Ministry of Public Finances (art. 223), according to the dispositions of Governmental Ordinance no. 2/2001 regarding the legal status of contraventions, approved with the modifications and completions in Law no. 180/2002, with subsequent modifications.

The non-observance of the legal dispositions and terms provided for the application for registration, recording of mentions, depositing of signatures or other documents is penalized with judiciary fine, applied by judge decision, if according to the penal law the act is considered an offence (art.122). Any interested person may refer the matter to the court. The judiciary fine is submitted to the regime of common law of the civil fines, as stipulated by the Civil Procedure Code, and it is applied by the judiciary instance in whose jurisdiction the action was committed.

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SPECIFIC FEATURES OF THE BANKING COMPANIES

Abstract

The aim (purpose, goal) of the study is the legal (juridical) regime of banking commercial companies (societies) as credit institutions, according to the Government Emergency Ordinance 99/2006 (Section 1). The specific characteristics of banking companies are analyzed beginning with their legal qualification (definition) as commercial companies (Section 2), continuing with their special (specific) issues. Section 3 is discussing the legal regime of bank directors and the conclusions are referring to the legal rules of banking companies administration activities.

1. Introductive notions

Taking into consideration the fact that the Romanian Trade Code presents to art. 3, point 11 as trade activities the banking operations, along with those of exchange, we consider applicable the definition formulated by doctrine (Demetrescu, 1939) through which by **bank** it is understood "an organism of interposition in the operations of banking credit, taking credit money from those who search a placement for their capitals and giving credit money to those who need capitals, accomplishing this way a benefit (Gheorghe, 2006)".

Strictly from the legal point of view, as **trade company**, the bank represent that group of persons, constituted based on a company agreement and having legal personality, to exercise several trade acts, with the purpose of fulfilling and sharing benefits.

From the perspective of the chosen (Capatana, 1996) form of the company, so that the bank can be constituted as Trade Company, it can not have other form that of Share Company, which has as main object of activity the collection of funds and the granting of credits, and also the performance of banking (Gheorghe, 2006) services.

Under the terms of OUG no. 99/2006 concerning the banking[1] activity, the trade banks are authorized **credit institutions**, along with the cooperative credit organizations, the institutions issuers of electronic

[1] This abrogates Law no. 58/1998, concerning the banking activity, published in the Official Monitor no. 1027 from 27.12.2006, approved and modified by Law no. 227 / 2007, published in Official Monitor no. 480 from July 18th 2007.

currency, the banks of economy and crediting in the locative field and the banks of mortgage credits. The difference between those five categories of credit institutions results from the category of activities which they can develop[1].

As **categories of activities** we remark that while the banks can develop 20 authorized activities (acc. Art. 18, OUG no. 99/2006), the issuers of electronic (Andronache and Bunescu, 2004) currency can not attract other reimbursable funds than those which are immediately transformed in electronic currency, and their object of activity is constitute by the issue of electronic currency and some connected services, without including other banking operations. Finally, the cooperative organizations of credit and the economy houses for the locative field can function only on two segments of the banking activities: the market of deposits and the credit market (Andronache and Bunescu, 2004), in other words they can only collect deposits or other reimbursable funds from the public and to grant credits in their own account.

2. Specific features of the banking trade companies

A. General features (Carpenaru, 2002**)**

a. The company constitutes a minimum number of associates named shareholders; according to Law 31/90, regarding the trade companies, republished2, the minimum number of shareholders is pf two (acc. art. 10, paragraph 3); these shareholders can be traders and non-traders, not being relevant their personal qualities, but the pecuniary (Cristea and Stoica, 2002) contribution.

b. The social capital is divided in shares, which are negotiable and transmissible;

c. The responsibility of shareholders for the social obligations is limited to the value of the contribution to the social capital.

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[1] Unlike the initial form of Law 58/1998, published in Official Monitor no. 121 from March 23rd, which provided that the banking activity in Romania will be developed through credit institutions (art. 1, paragraph 1). We can see that BNR vanishes from the list of operators on the banking marker. In this meaning, to be seen Vasile Andronache and Ion Bunescu, "Aspecte ale activitatii bancare dupa recentele modificari operate in textul Legii bancare nr. 58/1998 by Law no. 485/2003", in the Magazine of Trade Law (MTL), no. 2/2004, page 94/95.

[2] Law 31/90 was modified through Law 441/2006, published in Official Monitor no. 955 from November 28th 2006.

B. Special features

a. Special features which underline the elements of the agreement of banking company (Gheorghe, 2006).

- The object of activity: the banks have as main activity the collecting of funds form natural and legal persons and the granting of credits (but not only, to be seen the 20 operations provided by art. 18, OUG no. 99/2006);

- The contribution of the shareholders: unlike those of the share holder company, for the banks' incorporation it can not be contributed, but cash, which have to be integrally paid-up at the moment of subscription into un account opened to a credit institution;

- Social capital: while the minimum quantum for the S.A. can not be smaller than 90.000 RON, meaning the equivalent in lei of 25.000 Euro (acc. Art. 10, paragraph 1 of Law 31/90, modified in 2006), the minimum quantum of a banking company is of 5 millions Euro[1], being settled by BNR through special regulations;

- Legal form: it can not be incorporated differently than Shareholder Company.

The conditions for incorporation of a bank are the following

There are necessary the previous approval of incorporation and the functioning authorization from the central bank.

According to OUG no. 99/2006, in term of 4 months from the receipt of the request of incorporation, BNR will approve of reject the request and it will notify the petitioner its decision. In case of rejection, there are going to be specified the reasons.

According to art. 35 of OUG no. 99/20006 the authorization granted is valid on unlimited period and it can not be transferred to other entity. After authorization, the institutions are registered by BNR into a special regime, BNR having the obligation to notify the European Commission any granted authorization, excepting the institutions issuers of electronic currency. The notification is necessary so the credit institutions can be included in the actualized list of the commission and published in the Official Monitor of the European Union.

[1] According to Law 297/2004, concerning the capital market, published in Official Monitor no. 571, from June 29th 2004, the minimum capital has to be of 5 millions euro.

After incorporation as trade company and submission of the registration request at the trade register, the authorization will be given by BNR in term of 4 months from the date of registration of the authorization request, along with the document that certify, mainly, the qualification and the professional experience of the leaders, the shareholders and the constitutors, the initial capital, the organizational structure, the operations of the banks, the financial audit, the headquarter or headquarters.

There is observable an **innovation of law concerning the bank's headquarter**, in the meaning that "the banks, Romanian legal persons, will have **registered headquarter**, and, by case, a real headquarter ("the place where it is the main place of leading and management of the statutory activity")". But in its official documents, the bank has the obligation to mention its **registered headquarters**. The credit institution has to develop effectively and preponderantly on the Romanian territory the activity it is authorized for.

The authorization request can be rejected only by reasons provisioned by law.

The approval of the **incorporation request does not constitute an authorization**. In term of 2 months from the communication of the incorporation approval, there will be submitted to BNR the documents which attest the legal incorporation of the bank. These documents will be attached to the request of authorization. Unlike the old regulation, OUG no. 99/2006 provisions the impossibility of incorporation by public subscription of the credit institutions, Romanian legal persons.

The incorporation of the bank will be done by respecting the conditions provisioned by law, regarding trade companies.

As a result (Andronache and Bunescu, 2004), being a shareholder company, the bank will be incorporated **by company's agreement and status, in authentic form**, signed by shareholders. The company's agreement and the status can be concluded as a sole document, **named Articles of Association**. These will contain mentions regarding the identity of the shareholders, the form, the denomination, the headquarter, and, if it is the case, the logo of the bank, the object of activity, the registered capital, the number and nominal value of the shares, the identity of the administrators, the submitted warranty and their powers, the censors, the duration of the company, the method of distribution of the benefits and sustenance of loses, the form of dissolution and liquidation of the bank.

As a conclusion for those mentioned above, there are three big phases to be realized in order to incorporate a bank:

1. Approval for the incorporation of the bank, given by BNR. This approval allows the passing to the next phase, respectively,

2. the incorporation of the bank as trade company, under the regulations provisioned by Law no. 31 / 1990, plus the specific rules, including the registration to trade register and

3. The authorization of the bank, according to the regulated procedures of the BNR Norms no. 2 / 1999.

d. other features resulted from the specific of the banking activity:

- The supreme organ of leading is the general meeting of shareholders (AGA).

The organization, functioning and attributions of AGA, the AGA convocation, the approval of the decisions, the quorum conditions for different resolutions, etc are governed by rules implied by the law regarding the trade companies and by the Articles of Association.

Unlike the partner law, in the banking field can not be violated the rule that a share gives the right to a vote (art. 12 of OUG no. 99/2006).

The actions of the bank are only nominative.

With reference to constitutors and shareholders operates, like in the business matter, the association freedom. The legal regime of these is governed by the provisions of the laws regarding trade companies, completed by the resolutions of civil and business law.

Regarding the shareholders, banking constitutors, the banking law introduces, in addition, some specific rules, derogatory from the partner law, therefore:

- The quality of the shareholders and the structure of the groups they are in which has to correspond to the need of granting a prudent and healthy management of the bank;
- The person who intends to become a qualified participation to a bank has to fulfill the following conditions, cumulative:
  - To have a stabile financial situation, on two directions: to justify satisfactory the provenience of the funds necessary to obtain the joint undertaking and to offer the premises for the financial sustenance of the bank;
  - To provide sufficient information to identify the structure of the group he is already part in;
  - Legal persons to function with at least 2 years before;
  - To be supervised adequately by the competent authority "from the origin country"
- The same conditions have to be fulfilled also by the significant shareholder which intends to major his joint undertaking. It has joint undertaking qualified authorized natural person, legal person of the group of persons which action together, which detains directly or indirectly; a) minimum of 10% of the registered capital of the bank; b)

minimum 10% pf the right to vote; c) a joint undertaking which would allow a significant influence on the administration of the respective entity (art. 7, point 17 and art. 16 of OUG no. 99/2006).

The National Bank of Romania can settle also other conditions by special regulations.

Regarding the shareholders of the banks there can be introduced indirectly some restrictions, implied by the request of a prudent and healthy policy. Hence, according to art. 13 and art. 15 of OUG no. 99/2006, the request of authorization can be rejected by BNR if the shareholders:

- don't have the qualities necessary to assure a prudent and healthy banking practice;
- the structure of the group they are part in or the persons with who they have very close connections don't correspond to the requests of a healthy and prudent management and to realize an efficient supervision, or
- as constitutors they made public notifications regarding the activity of the bank before the approval of incorporation (Andronache and Bunescu, 2004).
- Current management of the trade banks is assured by the administration council.

Like the other trade companies, according to Law no. 31 / 1990, the current management of business is assured by the administration council.

The law regarding the banking activity does not have special regulations regarding the organization, the functioning and the attributions of the CA, the approval of resolutions, the responsibilities of the administrators for the approved resolutions, etc., which are governed by the rules instituted by law regarding the trade company or, where the law allows or it does not request an express conduit, by rules of corporative governance (meaning those settled by the Articles of Association).

From the comparative examination of those two normative acts results that in regard of organization, functioning and the attribution of the administration council of the bank, commune rules operate, which are applicable to all trade companies, including banks, and specific rules, which are applied only to banking companies.

Commune rules for trade companies and banks:

- the administrators are chosen by secret vote by the ordinary general meeting of shareholders (art. 111 and 129 of Law 31/1990);
- the number of administrators depends by the corporative governance, expressed by the Articles of Association or resolutions of the

statutory organs, the law wouldn't provide a minimum or maximum number of administrators;

According to Law no. 441/2006 to modify the Law no. 31/ 1990, regarding the trade companies, the number of administrators has to be always odd (acc. To art. 137), and when the trade company has legal obligations of audit, the minimum number of administrators is 3 (three).

For the first time we talk about independent administrators (according to art. 138, paragraph 2), whose activities is connected by the counseling commissions in fields like: audit, remuneration of administrators, directors or connected to the nomination of candidates for leading functions (according to art. 140).

There can not be administrators the persons which can not be constitutors, meaning: incapables (children, persons under interdiction by court resolution) and the persons to whom the law forbids to conclude legal documenters of administration, how there are those condemned for infractions with economic connection;

The administrators are temporary, the maximum duration of the mandate being 4 years (the so-called cooperative duration, meaning the one settled by the Articles of Association); if the articles of association do not provide the maximum duration of the administrators' mandate, this is limited by law to two years (art. 152 of Law no. 31/1990);

They are revocable during the mandate and re-eligible at its end (art. 153 of Law no. 31/1990)

Nobody can have concomitantly more than 5 mandates as administrator and/or of member of the supervision council in shareholder companies, in case these have their premises on the Romanian territory. This interdiction is applicable for the natural person administrator or member of the supervision council, and also to the natural person permanent representative of a legal person – administrator or member of the supervision council.

The interdiction is not applicable when the person has ¼ of the total of the company's shares or, when represents a legal person and this, being a member of the administration council or in the supervision council, they have ¼ from the number of shares of the company they are registered in.

- The administrators are responsible together before the company for the reality of the payments realized, the real existence of paid dividends, the existence of the registers requested by law and their correct evidence, the right fulfillment of the resolutions of the general meeting, the strict fulfillment of the assignments which are implied by law or the Articles of Association (art. 73 of Law no. 31/1990);

- For all the other acts, the responsibility of the administrators is personal;
- The obligations and the responsibility of the administrators are regulated by the disposals regarding the mandate and by those provided in the law concerning the trade companies (art. 72 of Law no. 31/1990);
- The mandate of the administrators is strictly personal. It can be transferred to other persons only if this capacity was granted expressly by the Articles of Association or the resolution of the shareholders. The administrator who, without right, substitutes other person answers solely for the possible loses (art. 71 of Law no. 31/1990);
- The action of liability of the administrators is of the shareholders (the rule of the mandate of Civil Code) and to the bank. It is of creditors of company, but only in case of liquidation of the company (art. 73 of Law no. 31/1990).

3. The leadership of the bank

Unlike the category of administrators, the class of the leaders of the bank has a special treatment from legal perspective, concerning the banking activity. They are situated on an intermediary position in the hierarchy of the bank, being immediately under the council of administration and upon the executive managers. From this situation results, regarding the leaders, an amount of features and requests, which we will present below:

- The leaders of the bank have the competency to realize all the operations to fulfill the object of activity of the society";
- The competences of the leaders of the bank settle by functioning regulation, approved by the statutory organs;
- They are approved by BNR before starting the activities;
- They have to be employees of the bank. Therefore, the legal norms of labor legislation, implicitly the labor collective agreement are applicable to them, as employees;
- The law provides that the leaders can be also members of the administration council.

Two aspects are to be taken in consideration

1. being a rule with disposition character, it does not imply an obligation for the leaders to be concomitantly administrators also, the bank being able to chose each variant, but in any case the unemployed administrators have to be the majority;

2. the leaders who are concomitantly administrators also have a double responsibility: of labor right for the employee activity and of civil right (the mandate rule) for the activity developed as administrators;

Regarding this aspect, by the Law 441/2006 of modification of Law 31/1999 regarding the trade companies acc. to art. 137, paragraph 3, during the mandate, the administrators can not conclude with the company a labor contract (and if the administrators are named through the employees, their labor contract is ceased during the mandate). In the meaning that the general law brings the special modifications of the law, we consider that OUG no. 99/2006 will support some modifications as a result.

The leaders of the bank have to fulfill some educational conditions, so:

- To be bachelors in the fields of economy or law, or in any other field that connects with the financial and banking activity.
- To have post graduate studies in one of these fields (economic or legal), but in this case to have at least 7 years experience in the financial and banking field.

The leaders have to have a good reputation, qualification and competency to fulfill the proposed objectives, the development of the activity according to law and to a prudent and healthy practice.

At the nomination of leaders the bank has to be sure that each leader has the experience for the types of activities which they coordinate.

For the leaders of the banks there are applicable the legal provisions applicable to administrators, regarding the conflict of interests and the incompatibilities.

The bank is hired by the signature of at least two leaders, in the limit of the statutory competencies, or at least of two employees of the bank, empowered by its leadership.

The national bank of Romania will settle by regulations and other specific criteria of assessment of quality, activity and experience of the persons named in a leading function of the bank.

Conclusions

The specific rules for the administration of the banking companies are;

- In the banking companies the administrators can be only natural persons, unlike the trade companies, to which the act of administration can be also fulfilled by a firm of management, which will exercise its attributions by a representative named as administrator.

- The administrators of the bank have to have minimum 3 years experience in the banking field or in a filed relevant to the banking activity.
- The administrators of the bank have to have a good reputation, qualification and the competency to develop the activities in the limits of law and of a prudent and healthy practice (art. 15 OUG no. 99/2006).
- Before starting to exercise the attributions, each administrator of the bank must be approved by BNR.
- To banks, the administrator has certain obligations connected to the solution of each conflict of interests between him and the banking institution, and in this meaning the administrator:
- Will notify the bank in written if he is a part of an agreement with the bank or he is the administrator of a legal person, which is a part of an agreement with the bank or has any material interest or a material relation with a person who is a part of an agreement with the bank.
- At least once a year he will present to the council of administration of the bank the name of his associations and the information regarding the material interests of him and of his family;
- If he has an interest or a material relation, he will not participate to the discussions regarding the contract and he will abstain to vote, but his present will count for the fulfillment of the legal or statutory quorum.
- It the administrator does not declare the conflict of interest, he gives to the bank the right to ask in court the annulment of the agreement in which the administrator has the undeclared interest and he confers to the central bank the right to suspend for maximum one year or to replace the administrator in cause;
- An interest is "material" is regards the fortune, the business or the interests of the family; for the use of this law, the family include: husband/wife, relatives and relatives-in-law until the second grade included;
- The law settles also some incompatibilities. Therefore, a person can not be chosen in the administration council, and if he was chosen loses its quality if: 1) he is an employee of the bank (excepting the leaders) or of any other credit institution; 2) is the financial auditor or administrator to any credit institution; 3) he had the approval revoked or he was replaced from the leader position of one credit institution, as remedy measure or 4) an court or other competent authority forbidden him to be leader or to develop activities specific to the credit institutions, financial or insurances institutions;
- The administrators of the bank do not have the competency to make all the operation in order to fulfill the object of activity of the

company, to assure the leading and the coordination of the daily activities, as trade companies; in banks, the leaders have this competency (art. 13 OUG no. 99/2006).

- To trade companies the acts of the administrators hire the company, even if they overpass the object of activity of the company. The clauses of the Articles of Association or the AGA resolutions which limit the powers of the administrators are inoposable to thirds, even though they were published; therefore, the rights achieved from thirds based on the documents of administrators remain valid, documents made by over passing the mandate or extending the object of activity (art. 55 of Law no. 31/1999). All these consequences can not be produced in case of banks that are hired only based on the signature of a two leaders (art. 13 of OUG no. 99/2006).

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Petre BUNECI

THE TRANSFER OF SENTENCED PERSONS

Abstract

The concept of transfer of sentenced persons was regulated by the Convention on the transfer of sentenced persons adopted in Strasbourg on 21. 03. 1983 and ratified by Romania by Law No. 76 of 12. 07. 1996.

In the preamble of the Convention, as well as in the Additional Protocol thereto, was mentioned that the Member States of the Council of Europe are obliged to cooperate in order to accomplish a better administration of the justice and for the social re-integration of sentenced persons, to this end, those deprived of liberty as a result of a criminal offence, having the possibility, by the transfer in their own countries, to serve their sentence in their milieu of origin.

Romania ratified the Convention by Law No. 76 of 12. 07. 1996, and the legislator had to amend the provisions of the law relating to the transfer of sentenced persons, so that, through the years have been adopted several normative acts in this area, the last amendment occurring by Law No. 224/2006, updated by Law No. 222/2008, which in Title VI refers concretely to the transfer of sentenced persons and to the transfer of criminal procedures.

The delinquent phenomenon has spread in alarming way, acquiring nuances that make impossible its fighting through singular efforts of the states, so that in the last period it was ascertained also the necessity of a complex cooperation in this area, in such case, between states were concluded conventions and treaties through which it makes sure of the institutional framework concerning the international legal assistance in criminal problems.

The international legal assistance in criminal problems must be regarded in a much broader sense, for which reason it applies to forms of assistance in different areas or different types of activities, with the general aim to combat the delinquent phenomenon on international scale.

The matter has its substance in the Law No. 302/2004, concerning the international judicial cooperation in criminal problems, which are referenced to expressly in the Article 513 of the Code of Penal Procedure1, with the amendments intervened subsequently by Law No. 224/20062, Government Ordinance No. 103/20061 and Law No. 222/20082.

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[1] published in the Official Gazette No. 594/01.07.2004
[2] published in the Official Gazette No. 534 from 21/06/2006
[3] published in the Official Gazette No. 1019 from 21/12/2006
[4] published in the Official Gazette No. 758 from 10/11/2008

At the European level has been adopted the European Convention on legal assistance in criminal problems - Strasbourg on 20 April 1959 and also the Additional Protocol to the Convention, adopted on 17 March 1978, also in Strasbourg, and Romania adopted this Convention by Law No. 236/1998.

The domain of application of Law No. 302/2004, amended by Law No. 224/2006 and updated by Law No. 228/2008, refers to the following types of international judicial cooperation:

a) the extradition;
b) the handing over under a European warrant;
c) the transfer of procedures in criminal problems;
d) the recognition and the enforcement of sentences in criminal problems;
e) the transfer of sentenced persons;
f) the rogatory letters;
g) the appearance of witnesses, experts and prosecuted persons;
h) the notification of procedural acts which shall be drawn or laid down in a criminal trial;
i) the criminal record.

For the purposes of Law No. 302/2004, amended, the following terms and phrases are defined as:

a) the requesting State - the State which formulates a request in the areas regulated by this law;
b) the requested State – the State to which is addressed a request in the areas regulated by this law;
c) the central authority - the authority so designated by the requesting state or by the requested state in the application of the provisions of international conventions;
d) the legal authority - the Courts of Appeal and the prosecution departments affiliated to these, established in accordance with la Romanian law, as well as the authorities which have this quality in the requesting state, according to its latter statements to the international applicable instruments.

Referring strictly to the transfer of sentenced persons, we specify that this institution was regulated by the Convention on the transfer of

sentenced persons adopted in Strasbourg on 21. 03. 1983 and ratified by Romania by Law No. 76 of 12. 07. 1996.1

In the preamble of the Convention, as well as in its Additional Protocol adopted in Strasbourg on 18. 12. 1997 and ratified by Romania through Government Ordinance No. 92 of 30. 08. 19992, shall be indicated that the Member States of the Council of Europe are obliged to cooperate in order to accomplish a better administration of the justice and for the social re-integration of sentenced persons, with that end in view, those deprived of liberty as a result of a criminal offence, having the opportunity to serve one's sentence in their milieu of origin by the transfer in their own countries.

The signatory parties of the Convention have committed to give each other the fullest cooperation in matters of transfer of sentenced persons, thus a person sentenced on the territory of a party to have the possibility to be transferred on the territory of another party in order to enforce here the sentence which was applied to him. With this end in view, he may express either within the sentencing State, either within the administering State, the desire to be transferred under the Convention that we have mentioned above.

Romania ratified the Convention by Law No. 76 of 12. 07. 1996, and the legislator had to amend the provisions of the law relating to the transfer of sentenced persons, so that, over time have been adopted several normative acts in this area that we have mentioned above, the last amendment occurring by Law No. 224/2006, updated by Law No. 222/2008, which in Title VI refers concretely to the transfer of sentenced persons and to the transfer of procedures in criminal problems.

Thus, under Article 128 of Law No. 224/2006, a person given a final sentence on Romanian territory can be transferred on the territory of the state whose national is, in order to enforce the sentence, in accordance with the provisions of this law.

Pursuant to the conventional reciprocity, the provisions above shall apply adequately when a Romanian citizen has been sentenced in another state.

The sentenced person may address to the sentencing State or to the administering State to be transferred in order to enforce the sentence, and the transfer may be requested either by the sentencing State, or by the administering State.

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[1] published in the Official Gazette Part I No. 154/19. 07. 1996

[2] published in the Official Gazette Part I No. 425/30. 08. 1999 approved by Law No. 511 of 04.10. 2001 published in the Official Gazette No. 643 of 15. 10. 2001

A sentenced person may be transferred in order to enforce the sentence only if the following conditions are cumulatively fulfilled:
- the sentenced person is a national of the administering State;
- the judgement is final;
- at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve. In exceptional circumstances, on the basis of agreements between the states involved, the transfer can take place even if the part of unfulfilled sentence is less than 6 months;
- the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative. The consent is not required in case of the escaped which takes refuge in the administering State whose national is;
- the acts that have attracted the sentence constitute offences, in accordance with the administering State law;
- the sentencing State and the administering State must bring about an agreement regarding this transfer; otherwise, the transfer cannot take place.

Thus, the request for transfer, as well as the answer to this, must be formulated in writing, this following to address itself by the competent authority of the requesting state, to the competent authority of the requested state. The answer is communicated via the same means.

The competent central authority under the provisions of international conventions and of the law-frame is the Ministry of Justice, as for the foreign state, the competent central authority.

The Romanian requested state shall inform the requesting foreign state on its decision concerning the acceptance or refusal of the transfer requested.

In Chapter II of Title VI of Law No. 224/2006, is covered the procedure of the transfer of sentenced persons, mentioning that any person sentenced by a Romanian court, which was applied the provisions of this law, must be informed in writing by the Ministry of Justice, about the exact content of the international incidence convention .

The law regulates two distinct situations, namely:
a) The Romanian State as sentencing State.

In case that the sentenced person addressed to the Romanian state, as sentencing State, in order to his transfer, the Ministry of Justice will inform the competent central authority of the administering state about this, as soon as practicable, after the judgment becomes final.

The information transmitted must include: the name, date and birth of place of the sentenced person, if necessary, the address of the sentenced

person in the administering State, a statement of the facts upon which the sentence was based, the nature, duration and date of commencement of the sentence.

If the sentenced person has addressed to the administering State regarding his transfer, the Romanian State shall, on request, communicate to this State the information referred to above.

The sentenced person shall be informed, in writing, of any action taken by any of the two states regarding the request for transfer.

In order to solve the request for transfer, the Romanian state solicits to the administering State to furnish the following documents:

- a document or statement indicating that the sentenced person is a national of the administering State;
- a copy of the relevant law of the administering State which provides that the acts on account of which the sentence has been imposed in the sentencing State constitute a criminal offence according to the law of the administering State;
- a statement containing information regarding the procedure that is to choose, in order to serve the sentence.

If one of the two states won't agree to the transfer, the Romanian state shall provide to the administering state the following:

- a certified copy of the judgment, stating that it is final, as well as a copy of the legal provisions applied;
- a statement indicating how much of the sentence has already been served, including information on any preventive detention, on diminishing the sentence, or another document regarding the stage of the enforcement of the sentence;
- a declaration containing the consent to the transfer;
- whenever appropriate, any reports or medical and legal findings, or any other medical documents attesting the physical and mental state of the sentenced person, the treatment undergone by this one on the territory of the Romanian state and any recommendation for his further treatment in the administering State, as well as, in the event of an under-aged person sentenced, the copy of the social inquiry report performed in case.

It is necessary that the person who will give its consent to transfer, to do it voluntarily and with full knowledge of the legal consequences thereof.

Also, the Romanian state shall afford an opportunity to the administering State to verify through the a consul or other official agreed upon with administering State, that the consent is given in accordance with the conditions referred to above.

The taking into charge of the sentenced person by the authorities of the administering State shall have the effect of suspending the enforcement of the sentence in Romania, and the Romanian State may no longer enforce the sentence or to continue the enforcement of the sentence if the administering State considers, in accordance with the law, enforcement of the sentence to have been completed.

The Romanian state has the right to exercise of special means of attack, in order to amend or overturn the final sentence. The sentenced person may exercise or, as the case may be, to solicit the exercise of special means of attack, even after the transfer.

For the previous procedure the request for transfer formulated by a foreign national sentenced by a Romanian court shall be communicated to the Ministry of Justice. After receiving the request, the Ministry of Justice will solicit the communication, as a matter of urgency, by the National Administration of Penitentiaries, of the documents and information referred to above, and after receiving them, the Ministry of Justice will translate and communicate them, alongside with the request for transfer, to the central authority of the administering State, from which it will solicit, however, the communication of the documents provided by the law, as well as the decision regarding the acceptance of the request for transfer.

If the Romanian authorities have information or documents which necessarily attract the refusal of the transfer, the documents and information won't be communicated to the central authority of the administering State. The solution may be given by the competent Court of Appeal, noticed by the Attorney General of the court, ex officio or at the request of the Minister of Justice. The sentence of the Court of Appeal shall be justified and shall be subject to appeal within 5 days after the pronouncement. If the sentence remains final, the Ministry of Justice shall inform without delay the central authority of the administering State about this. The information of the sentenced person shall be made in duly, through the agency of the National Administration of Penitentiaries.

When the conditions are fulfilled, the ministry communicates the request and the adjuvant documents, accompanied by translations, to the Attorney General of the Prosecuting affiliated to the Court of Appeal. In the dossier shall be also attached the notifications concerning the request for transfer by the competent foreign consular office.

The Attorney General, receiving the request and the documents referred to above, shall start taking a statement to the sentenced person, to ensure that he consented to transferring, personally or by representative. The statement of the sentenced person shall be recorded in the official report, which shall be signed by the prosecutor and the sentenced person.

The Attorney General informs, in order to solve the request for transfer, the Court of Appeal in whose district finds out the place of detention or, in case that the sentenced person didn't begin the enforcement of the penalty, from his residence. However, before informing the Court of Appeal, the Attorney General will verify if the sentenced person is subject to a criminal record on the Romanian legal authority's roll, informing the court properly. In case that the obtained information leads to the delay of the transfer procedure, the Attorney General will dispose the informing of the Court of Appeal, which will be obtained until the first trial term, at the latest.

The request is judged in the council chamber, with the prosecutor's participation, summoning the sentenced person, as well as, if the occasion arise, with the contribution of an interpreter. The sentenced person may be assisted, upon request, by a chosen defendant or, in the absence, appointed ex officio. The judging of the request is made immediately and pre-eminently, and the judgement shall be justified in less than 5 days from the pronouncement and is communicated to the Ministry of Justice.

The Attorney General of the Court of Appeal, as well as the sentenced person, may appeal against the sentence, within 5 days from the pronouncement, ex officio or at the request of the Minister of Justice.

The Ministry of Justice shall inform, as soon as possible, the central authority of the administering State, on the final solution passed by the Romanian courts on the request for transfer.

If the transfer of the sentenced person has been accepted, the Ministry of Justice shall inform about this the Ministry of Administration and Interior, which ensures the hand over under escort.

In case of a person who, after having been sentenced by a final criminal judgement pronounced by a Romanian court, escapes, when starting the enforcement of the sentence, or, in case that he didn't begin the enforcement of the sentence, avoids the enforcement of the sentence, finding refuge on the territory of the state whose national he is, the Romanian state could state a request for taking over the enforcement of the sentence inflicted. The request shall be formulated by the executing court, in case that the sentenced person avoids the enforcement of the sentence, or by the court in whose district shall find the place of detention, in case that the sentenced person has started the enforcement of the sentence. The request may include also the request that the state on whose territory the sentenced person was a refugee, should take the measure of detaining him or any other measure to guarantee that the sentenced person will remain on its territory until the communication of the sentence on the request for the taking over of the enforcement.

However, the request for transferring the sentenced person may also be denied, mainly, for the reasons set out deliberately in Article 140 of Law No. 224/2006, namely:
- the person that has been sentenced for serious offences which had a profoundly negative echo in the public opinion of Romania;
- the sentence provided by the administering State's law is clearly superior or inferior in comparison with that established by the Romanian court's sentence;
- there are sufficient clues to think that, once transferred, the sentenced person could be released immediately or within a time too short compared to the sentence duration remained to be enforced in accordance with the Romanian law;
- the sentenced person hasn't repaired the damages caused by his crime, nor he has paid the expenses, as he was bound to, by the judgement of the Romanian court, nor he has guaranteed the payment of damages;
- if there are sufficient clues to think that the administering State won't respect the rule of specialty.

From the above mentioned, it results that one of the conditions for the transfer of the enforcement of the sentence in another state, of a sentenced person in Romania, is his consent to transfer.

In case that, by the decision of conviction it was disposed the expulsion of the accused, the sentencing State may request to the foreign state to give its consent to the transfer of the sentenced person for the enforcement of the sentence, without the consent of the one sentenced; the requested state giving its consent only after having taken into account the notification of the sentenced person.

As such, the transfer cannot be disposed without the consent of the subject to expulsion, to be transferred for the enforcement of the sentence, only at the request of the sentencing State, with the approval of the requesting state after taking into consideration the notification of the sentenced.1

b) in case of transferring sentenced persons, considering that the Romanian state is the administering State, this one has the obligation to provide, at the request of the sentencing State, all the adjuvant documents with the purpose of solving the request.

Even in this situation, the Romanian state will solicit to the Romanian consular office, through the agency of the Ministry of Foreign Affairs to obtain from the sentenced person or from its representative a

[1] Criminal decision No. 861/04. 02. 2005 of the Supreme Court of Appeal - Criminal department

statement in which shall be record the consent to transfer, expressed freely and in full knowledge of concerned about legal consequences arising from the transfer of the sentenced person in Romania.

For the acceptance of the request for transfer by the requesting state, in order to continue the enforcement of the sentence in Romania is not enough the consent of the sentenced; it must be accompanied by the consent, specifically formulated, of the requesting state, in the sense that it agrees with the transfer of the sentenced.1

The Romanian consular office will be required to draw up a document on social and family situation of the sentenced taking in account of his statements and indicating his possibilities of rehabilitation in Romania.

The Romanian state will request to the central authority of the sentencing State to provide it a copy of the criminal record of the sentenced, as well as information regarding the eventual relations maintained by this one with social criminal environments.

In case that the Romanian state chooses to continue the enforcement of the sentence applied in the sentencing State, it must respect the nature and length of the sentence provided in the decision of conviction.

Under Article 144 (l) a) and b) of Law No. 302/2004, amended by Law No. 224/2006, in case of transfer of the sentenced persons, when the Romanian state is an administering State, the Romanian competent authorities are obliged either to continue the enforcement of the sentence, or to change the sentencing, by a judicial decision, replacing the sentence imposed in the sentencing State with a sentence provided by the Romanian legislation for the same offence, and according to Article 145 of the same law, if the Romanian state chooses to continue the enforcement of the sentence imposed in the sentencing State, it must respect the nature and length of the sentence provided in the decision of conviction. Therefore, if the Romanian competent authorities decide for continuing the enforcement of the sentence imposed in the sentencing State, by arithmetic cumulation, for a concurrence of offences under the legislation in force in this state, the Romanian courts cannot apply to Article 34 of Penal Code relating to legal cumulation, since, in this way, would be violated the provisions of Article 145 of Law No. 302/2004, which don't allow changing the duration of the sentence imposed by the decision of conviction.2

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[1] Criminal decision No. 5538/27. 10. 2004 of the Supreme Court of Appeal - Criminal department

[2] Criminal decision No. 817/08. 02. 2006 of the Supreme Court of Appeal - Criminal department

If the type of the sentence applied, or its duration are incompatible with the Romanian legislation, the Romanian State may, by judicial decision, adapt this sentence to that provided by the Romanian law for the acts that drew the sentencing. This sentence must correspond, as far as possible, to the type of the punishment applied by the decision of the sentencing State, and in any case, cannot aggravate the situation of the sentenced person.

In case of changing the sentence shall apply the procedure provided by the Romanian legislation.

In the case of conversion of sentence and of the applicable criteria, the Romanian court must comply with the following conditions:

- it shall be bound by the findings as to the facts insofar as they appear, explicitly or implicitly, from the judgment imposed in the sentencing State;
- it won't change a sanction involving deprivation of liberty to a pecuniary sanction;
- it shall deduct from the sentence the full period of deprivation of liberty served by the sentenced person;
- it shall not aggravate the penal position of the sentenced person, and should not be bound by the lower limit of the sentence eventually provided by administering State legislation for the offence or offences committed.

If the conversion procedure takes place after the transfer of the sentenced person, the Romanian State shall keep that person in custody or otherwise ensure his presence in the territory of the Romanian State pending the outcome of that procedure.

The enforcement of the sentence shall cease as soon as the Romanian state has been informed by the sentencing State of any decision or measure which entails the impossibility of continuing the enforcement.

The Romanian state shall provide information to the administering State concerning the enforcement of the sentence in the following situations:

- when it considers enforcement of the sentence to have been completed;;
- if the sentenced person has escaped;
- if the sentencing State solicits a special report.

By this means, the National Administration of Penitentiaries will inform periodically the Ministry of Justice on the enforcement of the sentence.

If the Romanian Ministry of Justice receives a request for transfer from a Romanian national sentenced in another state, it shall notify about this request the central authority of the sentencing State, to which solicits the information and documents provided by the law, as well as a statement specifying whether the competent authorities give their consent to transfer.

If the request for transfer is refused, the Ministry of Justice notifies the sentenced person about it.

If the application is approved, the Ministry of Justice shall transmit to the central authority of the sentencing State the documents provided by the law.

As soon as the Ministry of Justice receives the declaration of consent from the sentencing State, it shall communicate the documents to the Attorney General of the Prosecuting Magistracy affiliated to the competent Court of Appeal, which, in its turn, shall inform the Court of Appeal for this to recognize the foreign sentence and to enforce it.

The sentence shall be justified within 3 days and shall be subject to appeal within 10 days of communication. The communication of the decision to the sentenced person shall be made by fax or other means of transmission, to the central authority of the sentencing State, by the Ministry of Justice, as soon as possible.

The Court of Appeal shall issue a warrant of enforcement of the sentence, which the Ministry of Justice shall communicate to the competent central authority of the sentencing State, in order to transfer the sentenced person.

The handing over of the sentenced person will take place, usually, on the territory of the sentencing State, and its takeover by the Romanian state will be made by the Ministry of Administration and Interior, with the notification of the Ministry of Justice.

The sentenced person transferred in Romania can no longer be prosecuted for the same offence that was the subject of condemnation abroad.

The competent legal authorities in the procedures referred to above are the Bucharest Court of Appeal and the Prosecuting Magistracy affiliated to these.

The request for transfer of the sentenced person may also be denied, mainly, in the following situations:

- the process in which the sentence was pronounced wasn't conducted in accordance with the relevant provisions of the European Convention on Human Rights and Fundamental Freedoms;
- against the sentenced person it was pronounced in Romania a decision of conviction for the same act or is under a criminal procedure for the same act for which he was condemned abroad;
- the sentenced person has left Romania, taking up its residence in another state, and its connections with the Romanian state are no longer significant;
- the sentenced person has committed a serious offence, which could alert the society, or he maintained close relations with members of criminal

organizations, which could make questionable his social reintegration in Romania.

Under Article 140 c) of Law No. 302/2004, amended by Law No. 224/2006, the request for transfer to another state of the sentenced person in Romania may be refused if there is sufficient evidence that, once transferred, the sentenced person could be released immediately or within a term too short compared to the duration of the sentence remained to be enforced in accordance with the Romanian law.

These provisions are applicable in case that the Romanian court finds that the sentenced person could be released under condition, in accordance with the state law where he is to be transferred, within a much too short term - for example, 7 years earlier - in comparison with the duration of the sentence remained to be enforced by implementing the rules relating to the release under the circumstances provided by the Romanian law.1

In case of recognition of the decision of conviction pronounced abroad and of transferring of the sentenced person in order to continue the enforcement of a sentence privative of liberty in Romania, the court is obliged, under Article 146 (2) c) of Law No. 302/2004 to deduct entirely from the sentence, both the detention period enforced after the pronouncement of the decision of conviction and the duration of preventive arrest prior to this moment.

[1] Criminal decision No. 4723/02.08.2006 of the Supreme Court of Appeal - Criminal department

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Viorel DAGHIE
ORIGINE ET APPARITION DU DROIT. SYSTEMES DE DROIT DANS L'ORIENT ANTIQUE[1]

Résume

Nous avons vécu et probablement nous vivrons dans un monde gouverné par normes, c'est-à-dire par de règles qui ont fait et continuent à faire la preuve de leur utilité sociale.

Tenant compte que lesdites règles naissent par suite de l'exercice de la pratique sociale, il est indéniable qu'elles s'imposent par la volonté des membres de la société, lesquels souhaitent qu'il existe une garantie du respect de ces règles par tous, justement pour assurer un climat de sécurité sociale, dans la cadre de la participation au circuit juridique. Il est bien connu qu'aucune loi ne peut être au gré de tous, mais pour englober la volonté sociale générale, devenue ensuite volonté juridique, donc obligatoire, il faut qu'elle soit au gré de la plupart, de telle façon que, ultérieurement, la minorité se soumette à la volonté de la majorité.

Le droit est envisagé comme l'un des plus profonds concepts de la civilisation de l'homme, parce qu'il offre une protection contre l'ironie et l'anarchie, le droit c'est l'un des principaux instruments de la société pour conserver la liberté et l'ordre, contre l'immixtion dans les intérêts individuels.

L'histoire du droit se perd dans la brume du temps. Le droit est l'un des produits de la ment et de l'expérience humaine avec respectable vieillesse et résolution dans le temps digne de sa mission civilisatrice, de son but intime corrélé avec le sens général de l'existence de l'homme dans la société. La dimension historique du droit lui confère du prestige et d'autorité, le situe près des créations à large résonance socio humaine – la dimension sociale du droit.

Ses normes interviennent dans le processus productif, établissant des règles générales pour l'acte journalier répété de la production, de la répartition et de l'échange de produits. Les causes de l'apparition du droit doivent cherchées comme celles de l'apparition de l'Etat, étant donné leur indispensable liaison, dans l'évolution de la société primitive dans les sphères de la vie matérielle et spirituelle qui ont nécessité une nouvelle forme d'organisation - l'Etat.

Il était besoin d'un certain ordre social réalisé par le biais de règles sociales. Cet ordre était assuré par des normes de droit de nature administrative, morale et religieuse. Ces règles exprimaient les nécessités

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vitales de la communauté respective et elles se sont formées grâce à une longue expérience devenant une habileté, une nécessité pour le développement de la vie en commun.

Ultérieurement il a y eu lieu des modifications rapides tant économiques que sociales dans la société gentilice tribale. Les vieilles normes de la communauté se fondaient sur des coutumes et des traditions, elles étaient directement intégrées dans la vie de la gent et même si parfois elles ont connu un processus de déformation, prenant des formes mystiques elles s'imposaient par le fait qu'elles représentaient l'intérêt général de la communauté.

Les demandes qui exprimaient les intérêts des groupes directeurs devaient introduites et imposées en cas de besoin par la force de contrainte de l'Etat.

Dans la société primitive, le pouvoir, l'autorité correspondaient à la force physique. Ensuite il est intervenu la contrainte psychique par le biais de la religion.

Le suivant pas a été la concentration de deux, le chef politique étant le chef religieux et de cette façon l'autorité politique arrive à acquérir un caractère sacré.

A un certain stade de civilisation, l'autorité politique cesse à être exercée par le fait et obtient la réglementation par droit. C'est le stade quand l'autorité s'institutionnalise. On arrive à des institutions politiques distinctes d'individus qui les représentent.

Partant de la force matérielle et de la contrainte morale sur un certain niveau de développement il apparaît la contrainte juridique, l'idée que les décisions politiques prises représentent un caractère obligatoire et donc elles doivent être exécutées sous la contrainte des sanctions. Un problème de maxime importance et beaucoup controversée est celle de la légitimité du pouvoir politique, c'est-à-dire la détermination de ceux qui ont la vocation d'être titulaires du pouvoir politique.

Dans l'organisation gentilice, comme on le sait, la victime pouvait ou se venger personnellement ou être vengée par les autres membres de la gent, comme un devoir qui résulte la liaison de sang qui unissait tous les cogentits.

«Les camarades de gent - écrit Engels - devaient réciproquement l'aide, la protection et surtout l'assistance pour la vengeance des offenses faites par un étranger. En ce qui concerne sa sécurité personnelle, l'individu se basait sur la protection de la gent et il pouvait se baser parce que celui qui offensait, offensait l'entière gent. Ce sont les liaisons de sang de la gent qu'il se tirait l'obligation de la vengeance par le sang».

Avec le temps, la vengeance illimitée a été arrêtée par la soi-disante loi du talion en vertu de laquelle la victime ou ses parents ne pouvaient pas provoquer au délinquant un mal ou un préjudice plus grand que le fait commis par celui-ci.

L'apparition du droit a représenté une nécessité historique, un progrès social réel parce que le maintien de l'ordre ne pouvait plus être assuré par le système des règles de la communauté gentilice tribale.

Il s'imposait l'apparition de nouvelles règles qui établissaient les relations et qui assuraient les conditions sociales et la transformation de la volonté sociale en volonté d'Etat, une volonté généralement obligatoire.

La formation du droit comme système de règles qui exprime la volonté d'Etat dont le respect est assuré par le pouvoir de l'Etat, a constitué un processus de durée et d'une grande complexité, processus qui présente des particularités d'un peuple à l'autre.

Les premières lois sont données par les prêtres, qui prenaient part effectivement à la direction de la vie politique et religieuse. Les germes avaient apparu beaucoup en avant dans l'Orient antique – le code d'Hammourabi, la Loi de Manu.

I. MESOPOTAMIE – AKKAD

Selon les connaissances à ce jour, les plus anciennes lois de l'humanité ont été promulguées en Mésopotamie. Les villes Etats entre Tigre et Euphrate sont fières d'être la patrie de premières codifications. Il convient de noter, toutefois, que ceux-ci ne sont pas de codes à fixer, comme ceux modernes, un ensemble de règles pour une branche particulière ou une zone de droit, mais des recueils de dispositions juridiques relatives aux problèmes sociaux plus importants nécessitant une intervention rapide et appropriée de résolution.

Parmi les premiers codificateurs, les documents mésopotamiens rappellent Urukagina, qui, comme il résulte de petits tableaux d'argile brûlée découverts à Ninive, s'est soulevé contre l'aristocratie l'année 2370 avant notre ère, devenant «patèches» (chef religieux) puis roi de la ville Lagash. Se révoltant contre l'aristocratie citadine Urukagina a initié une série de reformes visant à alléger le poids sur les épaules de nombreuses personnes à donner vie à certaines règles qui avaient domine les villages d'autrefois.

Une importante inscription, qui relate ses mesures juridiques et administratives, montre que «la loi divine» quoique traitée avec irrespect par l'aristocratie, n'a pas pu être annulée et vivra de nouveau grâce à Urukagina.

Mais les plus importantes mesures prises par Urukagina sont les lois que celui-ci les a dressées pour la surveillance des citoyens contre les crimes, les pillages, le vol, l'escroquerie des fonctionnaires, des usuriers, etc.

Les dernières années de son gouvernement, Urukagina a introduit aussi quelques changements dans l'organisation familiale, dans le but d'écarter les restes du matriarcat primitif qui persistait encore spécialement dans les couches de l'aristocratie.

Quand la domination politique en Mésopotamie revient à la forteresse d'Ur (2132-2024) ses rois procèdent, conformément à la tradition déjà fixée, à l'élaboration de nouvelles lois qui les décident le règne. Spécialement le fondateur de la logomanie d'Ur, Urnammu et son fils Sulgi se sont remarqués par de nouvelles reformes juridiques nécessaires pour une société en transition de l'organisation primitive à l'esclavagisme.

L'activité juridique d' Urnammu est mentionnée sur un petit tableau écrit sur les deux faces. Après un prologue qui montre que Urnammu «représentant» de la divinité qui protège le château d'Ur, à assuré le pouvoir politique et militaire de l'État, il présente ses réformes sociales. Urnammu - dit le texte, «a eu l'intention de frapper le voleur, ayant soin que l'orphelin ne devienne pas la proie du riche, la veuve la proie du puissant, l'homme avec un sicle (appât avec une petite valeur) la proie de celui avec une mine (monnaie de près de 60 Sicles)». Le reste du texte sur la première face étant totalement détruit n'a pas pu être connu ; probablement il suivait une exposition des raisons des paragraphes de lois écrites sur la deuxième face du petit tableau. Même si ces textes ne sont pas lisibles, cependant, leur contenu montrent qu'il s'agit de textes pénaux qui prévoient comme sanction à la place du talion («oeil pour oeil, dent pour dent»), composition légale: 10 sicles à la coupe d'un pied, 2/3 de mine à la coupe du nez, une mine d'argent pour le broyage des os, etc.

Au début du IIe millénaire avant JC, Bilalama le roi de l'Etat d'Esmmua, a composé une loi d'environ 60 articles avec un contenu très varié.

Le code est écrit en akkadien, étant sur deux petites tables, découvertes en 1948, représentant le plus ancien monument juridique Akkadien.

Une partie d'articles traite des questions de droit civil: la protection de la propriété des gens libres, la fixation du prix maximum de produits différents, l'expression des formes d'affermage, les contrats de prêt, etc. D'autres articles avaient un caractère pénal: la composition légale avait remplacé tant le talion que la composition volontaire. Mais la fixation des amendes encourageait les riches pour lesquels le paiement d'une somme

signifiait beaucoup moins, à la fois matériel et moral, que les profits obtenus des infractions commises. Sur le fond, certains articles traitaient l'organisation de la famille.

Les dernières fouilles archéologiques ont découvert d'autres petites tables comprenant tant des fragments de lois que de nombreuses décisions de la pratique judiciaire mésopotamienne ce qui prouve que, jusqu'à l'apparition du célèbre code d'Hammourabi l'évolution des institutions juridiques du « pays des deux fleuves» a suivi une voie de développement continu.

Le plus important texte législatif babylonien le représente le «Code d'Hammourabi. Il a été nommé dans un bloc de Dior (granit noir) haut de 2,25 mètres ayant 1,90 mètres de circonférence à la base. Il n'est pas proprement dit un code c'est-à-dire un système entièrement législatif, mais un recueil de décisions des rois, des ordonnances après des sujets. Le Code commence par un prologue étendu sur les premières 4 colonnes de texte et sur une partie de la colonne 5. Hammourabi déclare que les dieux lui ont donné le sceptre et en raison de cette mission, il promulgue le texte du code pour «détruire le mal et le rusé que le fort n'oppresse pas les faibles». Bien que Hammourabi invoque le nom des dieux, la loi elle-même n'est pas «directement» leur travail. Si les lois de Urukogina apparaissent comme des lois divines, car le «dieu Ningirsu» les crée à partir de Urnammu il se fixe l'idée que le roi est celui qui exerce le pouvoir législatif, bien que le pouvoir temporaire le détienne les dieux.

Le Code d'Hammourabi poursuit sa tradition et en tant que telle il n'est pas une loi religieuse édictée «directement» par les dieux, mais fait de l'ordre des dieux et sous leur surveillance, qui détiennent dans l'Etat le droit de légiférer. Par conséquent, Hammourabi se déclarant le «noble qui se soumet aux grands dieux», conclue ainsi le prologue: «Moi, roi qui règne les quatre parties du monde … j'ai construit moi-même le droit et la justice dans la langue akkadienne, apportant la joie aux hommes».

Le premier éditeur du code - V. Schell - a divisé le texte en 282 articles, tenant compte tant du contenu matériel de la loi que des exigences de la technique juridique moderne.

Les premiers cinq articles traitent la procédure de jugement. Les articles 6-13 réglementent le vol, prévoyant la façon de constater aussi les sanctions conformes. Les articles 14-20 punissent le vol d'esclaves, d'enfants, la cache des esclaves fuyards, récompensant les personnes qui attrapent les esclaves fuyards du maître.

Les suivants 16 articles réglementent en détail les droits et les obligations des soldats, traitant en même temps le régime de la propriété foncière. Les articles 42-47 sont consacrés à la position juridique des

affermeurs et les suivants 5 concernent les droits du créditeur sur les fruits du terrain en gage. Les articles 53-56 fixent les punitions auxquelles s'exposent ceux qui n'utilisent pas les canaux d'irrigations conformément aux règles fixées par les autorités. Les suivants deux articles protègent le propriétaires fonciers contre les dégâts apportés par les animaux du troupeau d'autrui et les articles 59-66 concernent le droit de propriété sur les jardiniers, occasion avec laquelle il s'occupe aussi des droits que le créditeur peut avoir pour ce qui sont les fruits du verger de son débiteur.

La plupart des suivants 35 articles ont été rasés avec le ciseau. Ils traitaient - conformément à la reconstitution opérée à l'aide des copies trouvées dans quelques bibliothèques mésopotamiennes - principalement des normes concernant la propriété immobilière et en deuxième lieu, des dispositions concernant l'usure. Les articles 100-107 traitent l'activité des marchands et leurs auxiliaires, et les suivants 4 s'occupent des pubs. Les articles 112-116 réglementent le contrat de dépôt et d'emprunt et la garantie des dettes par l'intermédiaire des membres de la famille du débiteur.

Un grand nombre d'articles (127-195) concernent l'organisation familiale et dans les articles 196-225 le code se préoccupe de la détermination des punitions en cas de blessures corporelles. Les deux suivants protègent les maîtres d'esclaves, les articles 226-235 concernent les architectes et les constructeurs de navires et par les articles 236-277 le code établit le régime juridique du contrat de location. Les derniers articles comprennent des dispositions relatives aux esclaves.

Les articles du code sont écrits synthétiquement, réduits aux formulations courtes. Souvent, le texte a en vue des cas concrets et, après leur exposition, fournit aussi une solution juridique. De l'économie des texte du code, et du contenu du prologue et de l'épilogue, il résulte que les lois ne visent pas à couvrir toutes les institutions juridiques, mais seulement les plus importants, laissant à la pratique judiciaire la charge de résoudre les espèces non couvertes ou partiellement couvertes par le code.

Contrairement aux précédentes lois mésopotamiennes, incomplètes dans les réglementations qu'elles comprenaient, entièrement locales en ce qui concerne leur rayon d'application et plutôt éthiques que juridiques dans leur contenu le code d'Hammourabi réglemente les plus importantes et usuelles institutions juridiques, il a un caractère purement juridique et un cadre général d'application au sein du territoire de l'empire récemment créé.

Méthodique dans la manière de régler les institutions, le code tient compte de toutes les conditions politiques du temps, suivant la fusion des traditions sumériennes, c'est-à-dire les vieilles coutumes autochtones, avec les traditions et les réglementations des populations sémitiques fondatrices

du premier empire babylonien. C'est pourquoi, quelques chercheurs ont considéré, quoique d'une façon impropre mais assez suggestif, le code d'Hammourabi comme «une codification de la conciliation» dans le sens d'une loi commune de la population sumérienne autochtone et akkadienne, d'origine sémitique, après conquête, a mis les bases du nouveau «royaume».

Quant à la pratique judiciaire du «pays entre les eaux», le Code d'Hammourabi, cependant, ne porte pas la marque des décisions judiciaires. Par conséquent, les articles sont très près d'espèce, de la réalité concrète.

Pour le législatif babylonien il n'y a pas d'infraction, mais seulement d'infracteur, aucun crédit, seulement de créditeur, ni débit mais seulement d'emprunteur, le processus de conceptualisation des notions juridiques se trouvant à ses débuts.

De plus, le mot même de la loi (dinatum) désigne plutôt que d'une décision judiciaire qu'une norme abstraite et générale de conduite.

Voici ci-dessous certaines de prévisions du code d'Hammourabi :

- l'article 1 - Si quelqu'un accuse l'autre, l'incriminant de meurtre, mais il ne peut pas prouver alors l'accusateur soit donné à la mort,

- l'article 3 - Si quelqu'un s'est présenté à un processus avec un faux témoin et celui-ci n'a pas pu prouver la déclaration faite, il sera tué si le processus est un processus de condamnation à mort,

- l'article 16 - Si quelqu'un a caché dans sa maison un esclave et une esclave enfuis du palais ou d'un citoyen et un militaire quelconque et à la demande du palais ne le remets pas, le hôte de cette maison sera tué,

- l'article 48 - Si quelqu'un a une dette avec intérêt, et son terrain a été inondé par le dieu du temps ou une inondation l'a détruit ou en raison de l'absence de pluie il n'a pas fait de grain sur le terrain, cette année-là il ne donnera pas au créditeur de céréales. Il doit renouveler le contrat et pour cette année-là il ne payera pas d'intérêt.

- l'article 128 - Si quelqu'un a pris une femme, sans conclure un acte, cette femme n'est pas pour «épouse».

Bien que dressé par les légistes praticiens de la Cour, l'initiative de l'élaboration appartient à Hammourabi, qui a eu l'intuition du moment historique dans lequel l'Etat avait besoin d'une législation uniforme. Egalement à la «Loi des douze tables», le code met en évidence un processus similaire dans la région mésopotamienne. Centré sur l'enseignement pratique et casuistique - qu'il prévoit, à certains égards, le roman - le droit de l'époque de Hammourabi allait mettre les fondements du cadre historique d'une société des plus anciennes.

Les peuples qui ont vécu en Mésopotamie ont développé un «caractère national» on dirait, qui les a différencié de tous les peuples qui vivaient autour d'eux: «la vénération et le respect du droit». Chaque vente, achat, prêt, mariage, adoption ou succession étaient étudiés en termes de morale et à la disposition des lois écrites précises. Il est certain que, nulle part dans l'Orient Antique la jurisprudence n'a acquis une assez grande importance aussi rapidement et aussi profondément qu'en Babylonie.

II. PERSE

Dans le régime monarchique absolutiste de type du despotisme persan, le roi était l'unique source du droit. Ses décisions devenaient des lois immuables ; des lois, qui, prétendant qu'elles étaient inspirées par le dieu suprême Ahura Mazda, signifiaient qu'elles exprimaient la volonté même de la divinité et la violation de la décision du roi représente une offense intolérable apportée même à la divinité.

Par conséquent il n'y avait pas de code de législation persane compacte et organique, stable et unique. Quand Darius a songé - le premier - à donner à son Etat une orientation législative véritable, il a ordonné lui consigner les décisions sur de petites tables de cuivre, sur des étoiles en pierre ou sur le papyrus - les documents étant reçus ensuite pour connaissance dans les différents points de l'empire. (Mais les peuples soumis gardaient leur propre législation). Les décisions de la loi de Darius peuvent être souvent inspirées du «Code de Hammourabi», que ses conseillers connaissaient.

Les textes des lois décidées par le roi étaient rédigés par les prêtres – qui longtemps ont accompli la fonction de juges. Plus tard, leur place a été prise par des juges laïques. Dans les villages «le chef du village» était également le juge local. Le juge suprême était le roi qui lui-même pouvait déléguer un représentant pour juger en dernière instance. N'importe qui pouvait faire appel au roi. Après le roi, c'était la cour suprême de justice composée de sept membres : ensuite les nombreux tribunaux dans les villes plus importantes et l'empire. Les tribunaux disposaient des délais de jugement pour les affaires présentées. Le coupable - qui ne pouvait pas se débrouiller dans la multitude de lois qui s'étaient amassées au cours du temps - pouvait être conseillé par les «orateurs de la loi» - une sorte d'avocats, qui s'occupaient de l'entière démarche de l'affaire.

Dans l'arrêt à dire, le tribunal devait tenir compte aussi de la personne morale, du passé et des mérites de l'accusateur. Les juges étaient nommés sur vie, mais dans le cas avéré de corruption, ils étaient enlevés et punis avec la mort.

Les sanctions étaient généralement d'une cruauté que seulement les assyriens l'avaient égalée. La punition la plus facile (et dans certains cas elle pouvait être remplacée par une amende) était en coups de fouet: entre 5 et 200. Le nombre maximum de coups qui était administré, punissait celui qui avait empoisonné le chien d'un berger (alors que pour le meurtre de culpabilité il était prévu seulement 90 frappes). La loi a ensuite établi que pour un crime soit punie toute la famille du coupable. Les crimes et les délits les plus graves étaient punis par la mutilation, l'enlèvement des yeux, avec la marque de fer rouge, ou avec la mort. (Darius punissant un traître, a envoyé lui consigner dans ces termes son arrêt: «J'ai ordonné de lui couper le nez et les oreilles, j'ai ordonné de lui couper la langue et de lui enlever les yeux. Ensuite, j'ai ordonné être tué par crucifixion»). Les délits pour lesquels il a prévu la peine de mort étaient: la trahison, le vol, l'assassinat, la culpabilité d'entrer dans la vie intime d'un roi ou de s'asseoir au hasard sur le trône du roi. La peine capitale était exécutée par empoisonnement, empaler, crucifixion, pendaison avec la tête en bas, meurtre avec des pierres, dépouillement, écrasement de la tête, couverture avec cendre chauffée, enterrement de vif jusqu'à la gorge, etc.

III. ELAM

Il s'est développé à l'est de Mésopotamie à partir du IVe millénaire av. JC, dans la région de collines, de montagnes du sud-ouest de l'Iran d'aujourd'hui. L'Elam, comme entité politique, a appartenu souvent au pays nommé Aushan. Il comprenait souvent la totalité des régions soumises au «roi de Ashan et de Suse».

Dans les plusieurs centaines d'actes trouvés à Suse, à partir de 1927, on mentionne tout d'abord les noms des personnes pour lesquelles ils sont faits, on cite les démarches et les cérémonies pour les écrire, les sanctions contre ceux qui violeraient les stipulations de l'acte et finalement la liste des témoins. On vote la prestation du serment par dieux et aussi par rois.

Les actes de mariage notent qui était le roi au règne (sukkal), de sorte qu'on puisse déterminer la date de cette cérémonie. Pour rédiger un contrat de mariage on appelait 10 témoins. L'adoption rend que le fils ou la fille adoptée ait les mêmes droits que le fils ou la fille naturelle. Elle permettait de changer le nom de l'adopté. D'autre part, l'adoption peut être réciproque, de sorte que deux personnes puissent se déclarer des frères entre eux. Les donations se faisaient soient par l'époux à l'épouse, soit par le père ou la mère à l'enfant. On prévoit, en général, l'immersion dans l'eau, pour celui qui va contester la validité du don. Le dieu Sazi est celui qui préside cette immersion. On ajouter une liste de témoins et on met tout

d'abord les dieux Samas et Sasinak. Au bord de l'acte de donation on imprime l'ongle du donateur, l'équivalent des empreintes digitales plus tard.

Les actes de partage sont généralement en bon accord entre les descendants. On ne donne pas les dimensions d'un terrain qu'ils partagent, mais on écrit «leurs fortune à la campagne ou en ville». Parfois, il montre le secteur de ville dans lequel se trouve la maison ou le terrain en question. S'il y plusieurs lots à partager, ils sont attribués par lancer le dé aux différents héritiers. Pour éviter que l'un d'entre eux retourne au partage fait, on insérait une formule par laquelle on imposait à celui qui contestait l'équité du partage soit soumis à une grave punition : la réduction de la langue et de la main, une amende de 10 mines d'argent (une mine est de 60 shekels de 8,5 grammes chacune), etc.

L'acte de partage se déroule dans la présence des témoins en nombre de 7 à 42, qui rendent parfois tous l'ongle sur la tablette de l'acte.

Les actes d'achat-vente d'une propriété immobilière enregistrent sa nature et ses limites. Dans le cas d'un champ, sa superficie est exprimée par la quantité de semence nécessaire pour la semer et il montre comment les terres devraient être irrigués. La vente est considérée comme achevée lorsque le nouveau maître enfonçait un poteau dans la terre achetée. On prévoit de graves châtiments corporels et de lourdes amendes contre celui qui violera les stipulations de l'acte.

L'acte d'affermage ou de location d'un terrain ressemble beaucoup à celui de vente. La location se faisait pour un nombre déterminé d'années. Dans un tel acte on précise les moyens d'irrigation et les limites du terrain.

Les juges ou les dignitaires qui étaient chargés avec l'administration à Elam portaient des noms différents, dont «Hassa» et «kipari», puis «hapio» et «Zukkio» et «teppio». Ce dernier semble être une sorte de maire, parce qu'à sa porte s'asseyaient les juges, avec un grand nombre de personnes âgées, constituant une sorte de jury.

IV. EGYPTE

Dans l'Egypte antique, la justice constituait une fonction distincte, mais elle n'était pas attribuée à un corps séparé de celui de l'administration.

Le pouvoir législatif et judiciaire était pratiquement dans les mains du vizir qui l'exerçait à travers le tribunal royal. Le vizir recevait personnellement en audience tout requérant.

La procédure judiciaire suivait la voie des normes rigoureuses, précises et étonnamment «modernes». La procédure civile, au moins, était très civilisée.

Par exemple, en cas de litige avec les autorités fiscales, le requérant de la capitale pouvait faire appel dans un délai de 3 jours et celui du reste du pays, dans un délai de 2 mois.

Toute plainte était soumise à un greffier, tandis que les personnes de l'archivage tenaient l'évidence des documents. Les juges donnaient un arrêt basé sur des documents écrits, des preuves et des témoignages. La démarche de l'instruction était également enregistrée par écrit.

Le Tribunal décidait si l'affaire était encore à l'enquête, ou si les témoins devaient prouver un serment. Les tribunaux étaient un grand nombre et les juges très nombreux. Les affaires de moindre importance se jugeaient sur place aussi, au dehors du siège des tribunaux. Les parties étaient longuement écoutées par les juges - qui consignaient à l'écrit l'arrêt.

Les sanctions semblent avoir été très graves, en particulier pendant le Nouvel Royaume, lorsque on croit que les lois des Egyptiens seraient inspirées par «Le Code d'Hammourabi». Dans la phase de formation des affaires pénales on pouvait appliquer aussi des coups de bâtons.

La même peine était prévue pour la calomnie, les petits vols, les abus dans l'administration. Il y avait des prisons, pour détentions préventives ou pour les personnes en attente de la peine capitale. Celle-ci s'appliquait plus rarement - en cas de rébellion et de conspiration contre l'État, de meurtre, d'adultère, de vol d'une tombe royale.

La corruption des juges était aussi punie avec la mort, par semi meurtre imposé. Les formes usuelles de peine capitale étaient la décapitation ou le brûlement. Pour d'autres délits, c'étaient les Égyptiens qui avaient installé des camps de travail forcé.

Un travail de réflexion moral du XVe siècle, av. JC note les instructions que le pharaon donne à son vizir. N'oublie pas, donc, de juger par la justice.

«Regardez l'homme que vous savez comme l'homme que vous ne connaissez pas».

Mais d'autres écrits indiquent que de telles instructions n'étaient pas respectées. Dans un autre texte, pas beaucoup antérieurement à celui au-dessus, les constatations sont graves: «Des voleurs, des voleurs, voici qui sont les grands dignitaires, qui ont néanmoins été nommés à condamner le mal, un endroit pour échapper pour celui forcé, voici qui sont les hauts fonctionnaires qui ont été nommés, toutefois, pour punir la tromperie illégale».

V. PALESTINE

La justice dans la période de la vie nomade des juifs était administrée par le conseil des vieillards du clan et après le passage à la vie sédentaire, par les vieillards du village. Près de ce tribunal laïc, il fonctionnait encore un tribunal religieux formé de prêtres qui disaient les arrêts au nom de Yahme. Après l'institution de la monarchie on a fondé aussi un tribunal royal, comme une sorte d'instance suprême. Dans toutes ces trois juridictions communale, sacerdotale et royale – la loi civile n'était pas différente de celle religieuse.

Le jugement avait lieu – comme était l'habitude dans d'autres pays de l'Orient antique – devant la porte des villes. On ne jugeait jamais sans la présence d'au moins deux témoins, qui étaient également obligés à assister à l'exécution de la punition.

Si les témoins témoignaient faux ils étaient punis eux-mêmes avec la même peine que l'accusé allait exécuter. Quand on ne pouvait pas apporter des témoins, on déposait un serment, dans le temple, devant les prêtres. Un autre outil dans de tels cas était la «justice de Dieu» - essentiellement un moyen de tirage au sort.

Si le condamné ne pouvait pas être trouvé ou capturé, il était maudit, et celui qui le connaissait et prenant connaissance qu'il avait été maudit, ne le dénonçait pas, il subissait aussi la même peine. Après avoir dit l'arrêt, il suivait immédiatement l'exécution de la peine.

La punition corporelle consistait dans des coups bâton (pas plus de 40, mais suffisamment souvent pour causer la mort). Une autre sanction était la privation de liberté, par exemple: les voleurs qui ne pouvaient pas restituer ce qu'ils avaient volé étaient vendus comme esclaves. La sanction avec la prison a été imposée après le retour des Juifs de la captivité babylonienne. Il ne manque pas aussi certains instruments de torture.

L'exécution de la punition capitale - qui se déroulait en public et consistait généralement en lapidation, était confiée soit à la famille de celui qui avait subi l'humiliation soit à la communauté. Dans le cas d'un crime particulièrement grave, la sanction était aggravée par la pendaison, par l'empaler ou le brûlement du cadavre.

La mort demandait être punie avec la mort, la famille de celui tué devait tuer l'assassin, ou un membre de sa famille. La loi de la «vengeance du sang» a été maintenue aussi dans la période suivante, mode de vie sédentaire, étant complétée par le principe juridique - commun à tous les peuples sémites – du «talion». Une fois avec le passage à la vie sédentaire, la collectivité territoriale a pris la place de la communauté de famille de sang, qui avait été avant la base de la vie de clan. Par conséquent le délit

sera examiné d'une manière objective. On prendra en considération le fait lui-même, parce que les concepts juridiques de «tentative» ou de «complicité» manquaient. Il intervient maintenant aux juifs d'autres concepts juridiques, - la préméditation, la circonstance atténuante ou l'autodéfense, qui est un progrès évident par rapport au «Code d'Hammourabi». Plusieurs articles du «Vieux Testament» traitent le droit de propriété, mais en aucun cas pas il n'est pas prévu la peine avec la mort.

Bien entendu que dans le droit hébreu on rencontre des influences du Code babylonien mais en ensemble son originalité est évidente. Pour imposer au peuple d'une manière absolue les normes de droit que le législatif Moïse avait formulées, il a prétendu que celles-ci - gravées dans la pierre «les Tables de la Loi» contiennent «les 10 ordres» - lui ont été dictées sur le mont de Sinaï par Yahme lui-même. Comme dans tant de formes de la vie des hébreux, dans la justice aussi l'autorité de la religion devait être invoquée.

VI. INDE

Peut-être plus que dans d'autres pays de l'Orient antique dans l'Inde la notion de droit et celle de culte se confondaient. Une règle religieuse devenait une règle réglait juridiquement les relations sociales. Lorsque, au cours de l'élaboration de « brahmans » (VIII-VI siècles avant J.C.) il a commencé à être fixées les relations de droit aussi, toutes les coutumes et les traditions qui ont été en étroite liaison avec les prescriptions, les dogmes et les rituels religieux. La «Loi» exprimait un idéal religieux appliqué également aux relations sociales. La «Loi» (Dharme - la bonne conduite), en Inde, apparaît comme un étrange mélange de règles de caste, de dispositions royales de coutumes du milieu rural. Il n'y a pas de «code» dans le sens européen du mot. Les lois étaient rédigées sous la forme de prose aphoristique (Sutras), où des sentences morales s'intercalaient dans les vers.

Parmi ces collections - chaque collection étant rédigée par une école ou par une secte brahmanique, ayant autorité sur les disciples respectifs - la plus connue est la «Loi d'Olanu», dont le noyau originel a été probablement une «Sutre» des V-IV siècles av. JC. Ce «Code» compilation ordonnée de normes et de traditions est devenue avec le temps objet de la conduite de l'individu et de comportement social, généralement acceptée avec le but évident de consacrer le systèmes des castes et l'hégémonie des brahmans.

La justice est appliquée - le cas échéant - par le chef de la famille, par le chef du village, par le chef de la caste respective, par le tribunal de la

corporation, par le gouverneur de la province, ou, dans les cas graves par le roi même. Le roi était le responsable, en principe, si une décision a été injuste ou si un crime est resté impuni. Il déléguait les magistrats qui devaient savoir bien environ 8000 articles et dispositions judiciaires (bien entendu, de droit coutumier) aidés par un «greffier» un «scribe» et un «petit pasteur».

Les affaires pénales étaient jugées généralement par les brahmans et celles civiles par les magistrats laïques nommés des membres des suivantes deux castes. Les organes judiciaires stables constitués étaient les tribunaux ruraux (composés de trois juges pour un groupe de 10 villages) et les hautes cours judiciaires dans les villes. Les corporations avaient leur propre législation spéciale.

Comme procédure le requérant rédigeait sa plaine à l'écrit, cherchant 3 témoins, qui représentaient «la défense» respectivement «l'accusation» formulée par le requérant.

En cas de témoignage faux, on appliquait aux témoins des punitions corporelles lourdes et l'accusé pouvait être aussi soumis à la torture. Celui qui gagnait l'affaire recevait l'arrêt à l'écrit. Quand il gagnait seulement dans la deuxième instance, le juge de la première instance qui avait donné un arrêt contraire était puni avec une amende.

Les crimes étaient attentivement cherchés et sévèrement punis. Car «si elle est détruite, la justice détruit, si elle est défendue, elle défend» («les lois de Manu», VIII, 15). En réalité il s'agit d'une justice de classe : si un «sudra» (serf) blesse un membre des autres castes supérieures on lui coupe la main ; si seulement il ose s'asseoir près de lui, il doit être signé avec le fer rouge et torturé (ib. 279, 282).

En échange si un brahman «a commis tous les crimes possibles», la seule punition recommandée était «d'être chassé du royaume , en lui laissant tous les biens sans lui faire du mal» (ib. 380).

Dans l'époque védique (1500-500 av. JC) on n'appliquait pas de punitions corporelles mais seulement des amendes. Ensuite on a appliqué la punition capitale pour assassinat, complot contre le roi, la pénétration dans les pièces du palais réservées aux femmes, le vol d'éléphants ou de chevaux, les vols de dépôts de grains, d'arsenaux ou de temples (ib.280).

Pour autres sortes de vol on prévoyait la coupe des doits, de la main, d'un pied ou on empalait (ib. 276).

Il est vrai que pendant la dynastie de Gupta (siècles IV-VII av. JC) les punitions corporelles et les tortures ont été petit à petit supprimées ; ensuite le vieux système et les vieilles pratiques judiciaires sont revenus mais dans des formes plus douces.

Le bouddhisme, avec les idées humanitaires qu'il promouvait, ont eu sans doute une influence positive à cet égard.

VII. CHINE

Depuis les temps anciens, lorsque nous avons des informations sur le système juridique chinois il est mentionné un système de répression pénale extrêmement grave. Les textes de l'époque de Shang parlent de la peine capitale avec la mort pour l'alcool et un roi par une ordonnance royale prévient: «Si parmi vous il y a des délinquants ... Je vais vous couper le nez et je vais tous les exterminer».

Le droit chinois présente certaines particularités. Tout d'abord le code chinois visait en majeure partie la répression des crimes. En dehors d'un code pénal, code civil l n'y avait pas.

Les dispositions de droit civil étaient incorporées dans le code seulement dans la mesure où elles traitaient l'ordre d'Etat - et elles prenaient le caractère général. Les affaires civiles se jugeaient selon des normes extrêmement variées et arbitraires, en tenant compte des habitudes locales. En outre, les conditions de jugement étaient tellement coûteuses que les inculpés renonçaient à se juger. Il y avait des tribunaux qui pendant des années ne jugeaient aucune affaire.

Deuxièmement, les peines étaient étendues à toute la famille du coupable, et même à ses voisins. Cette mesure est conforme à l'idée de solidarité et de responsabilité partagée qui est à la base de la structure familiale chinoise, une idée qui presque annulait le concept de personnalité et limitait la liberté d'action de l'individu.

Troisièmement: le concept de la loi souveraine et le respect pour la loi écrite n'ont pas pu être imposés en Chine. On a écrit de nombreux codes, dès l'époque de la dynastie Wei (siècles V-IV avant JC) jusqu'au dernier, datant du XVIIe siècle ou XVIIIe siècle notre ère sans que ceux-ci aient ce pouvoir qu'a la législation d'Europe. Le droit coutumier était toujours au-dessus de la loi écrite. Lié à cela il était stipulé que: «Le juge est tenu de suivre l'esprit de la loi et de prendre en compte les circonstances».

Quatrièmement: en Chine, l'égalité devant la loi n'a pas existé vraiment, avec toute la lutte que les «légistes» ont menée à cet égard. Il est resté donc en vigueur la règle (dans le IIIe siècle, notre ère) qui indiquait huit catégories de personnes qui avaient le droit à une juridiction extraordinaire: les parents de l'empereur, les descendants des dynasties précédentes, les vieux serviteurs de la famille impériale, les personnes qui ont apporté des services spéciaux à l'Etat, les philosophes (les intelligents), ceux qui ont montré de grandes qualités dans l'armée ou dans les fonctions

publiques, les nobles et les hauts fonctionnaires de l'État. En dehors de ces exceptions, certaines catégories avaient le droit de racheter la peine (les fonctionnaires, les femmes, les aînés de plus de 70 ans, les malades et les enfants de moins de 15 ans).

Cinquièmement: depuis des temps immémoriaux, les chinois ont fait une distinction entre la coulpe volontaire et celle involontaire. Ensuite, un certain nombre d'autres questions: la peine était d'autant plus grave que le coupable était d'un degré de parenté plus proche de la victime.

Au juge qui délibérément a absout un coupable ou avait condamné un innocent on lui applique la sanction selon la loi du coupable. Le juge qui de mauvaise foi, a illégalement dit un arrêt de peine capitale, lui-même, il était exécuté. La loi prévoyait la peine de mort aussi pour ceux qui cachaient ou ne dénonçaient pas un rebelle.

Toute personne ayant commis un crime, mais elle s'est présentée au juge avant que le crime soit connu il était automatiquement absout. On prévoyait que les dénonciations anonymes soient punies de mort, même lorsqu'elles contenaient la vérité et le juge qui prenait en considération ces dénonciations lui il était également condamné à 100 coups de bâton - alors que l'accusé était hors de question, même s'il était coupable.

Toutes ces dispositions juridiques, en indiquant des réminiscences archaïques, primitives, s'expliquent par l'état social même retardé dans lequel la société chinoise a persisté pendant des millénaires.

VIII. JAPON

Au Japon antique, les normes de droit coutumier étaient différentes d'une région à l'autre. En règle générale, le chef de la famille était celui qui jugeait et sanctionnait les membres de la famille et les serviteurs. Quand les preuves ou les témoins manquaient, c'était la devineuse qui, tombant dans la transe, établissait la vérité.

A partir du IIIe siècle notre ère, celui qui jugeait toutes les affaires était le samurai local selon certaines normes établies par le gouvernement shogunal. Les punitions étaient en fonction de la gravité du délit et de la position sociale du coupable : tant qu'elle était plus haute tant la punition était plus sévère. En effet, ce critère surprend mais il est caractéristique à la mentalité japonaise aristocrate.

A Kamakura, près du siège du gouvernement shogunal, il fonctionnait deux instances judiciaires (l'une de procédure pénale et l'autre de procédure civile) pour les affaires où étaient impliqués les samurai et les nobles. Les hommes habituels étaient jugés par le seigneur local.

Les condamnés pour des délits plus faciles étaient enlevés pour une période de temps de la communauté et personne ne leur parlait et ni les aidait.

Pour les motifs plus graves les coupables étaient exclus de tout droit civil, ils étaient ignorés par tous, isolés dans des quartiers spéciaux près des lépreux, contraints à des métiers les plus «impurs», réduit à l'état de pauvre, ils restaient dans la plus noire misère. Il ne manquait pas, bien sûr, les peines les plus lourdes, les tortures ou la pendaison.

En conclusion, on pouvait dire que les relations entre les personnes, la famille, entre gents et tribus, les obligations et les droits étaient régis par des normes généralement acceptées qui se fondaient sur l'habitude de la terre, interprétée et appliquée par les classes dominantes. Au fil du temps, ces normes ont été consignées par écrit, devenant des « lois ».

Afin de garantir l'autorité des lois dans l'Orient, elles étaient considérées d'origine divine, données par les dieux aux rois ou aux empereurs. Elles prévoyaient de lourdes sanctions, ayant presque toujours un caractère de classe, mais également les formes de liaison entre les différents pays, mettant les bases du droit international.

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Gheorghe NEGOESCU [1]

INTERACTIVE SYSTEM FOR ON-LINE CONSULTING

Abstract

Liberal professions, developed after 1990, require an historical casuistry that enable them to reach a pertinent conclusion to another similar case. Where there is not a similar case tried, it is required the need for a procedure for resolving differences, based on the existing legal framework in Romania to the date of the analysis of the case.

Human resource in training, especially graduates of economics, law, administrative sciences and technical sciences could benefit by a casuistry in real terms and practical examples from real economy. At the same time the teachers from several universities in the country could also benefit by an actual training program in order to obtain a certificate for management business trainer in Europe.

Keywords: bar, process model, standard, association.

JEL code work: M: Business Administration and Business Economics, Marketing, Accounting

1. Project description

"Interactive System for On-line Consulting" is a project which aims to provide answers to fundamental current or future questions of employers of companies, employees, pensioners, unemployed and other disadvantaged persons, and also to collaboration needs for the liberal professions (such as accountants experts, assessors, liquidation experts, financial auditors, lawyers, doctors, teachers) through an online platform, which, on the one hand, collect the questions, and, on the other hand, spread to be solved these questions to the experts performers, who are responsible to answer to these questions taking into account a model of response and some hypotheses which, once introduced in the model, solves the problem raised by the client (Figure 1).

To be able to answer to these questions the performer expert needs specialty and common (general) knowledge. For specialty knowledge is developed a specialized model for each client category which is validated with the opinion of a committee of models based on a protocol analysis and model validation. The models are analyzed within 7 committee for analysis and validation, as follows:

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- Commission 1: auditor.
- Committee 2: assessment.
- Committee 3: liquidators.
- Committee 4: financial auditors.
- Commission 5: lawyers.
- Commission 6: doctors.
- Commission 7: teachers.

Each member of these committees, in addition to specialty knowledge, must know in the following modules:

- **Module 1 – Foreign Language**: Business English that broadens specialized vocabulary business. English language develops business skills - from the spoken English on the phone and written simple reports (at lower levels) to business presentations, teamwork and negotiation (advanced levels).

- **Module 2 - ECDL** (European Computer Driving License) with the seven modules[1]: Module 1 - Basic Concepts of Information Technology, Module 2 - Using computers and files (Windows), Module 3 - Processing text (Word), Module 4 - Spreadsheet (Excel), Module 5 - Databases (Access), Module 6 - Presentations (Power Point), Module 7 - Information and Communication (Internet and E-mail).

- **Module 3 - Legislation**: Law no. 31/1990 of companies, republished and updated in 2009, updated Labor Code, Law no. 85/2006 on insolvency

proceedings, updated, the Tax Code, updated.

- **Module 4 - Creating a business**: Opportunity study, feasibility study, business plan, european projects.

- **Module 5 - Managing a Business**: Report of management, balance sheet, profit and loss account, financial annexes, statements.

- **Module 6 - Redesigning Business**: Strategic diagnosis, assessment report, the redesign of management.

- **Module 7 - Closing a business**: liquidation, audit, merger, division, ethics, communication, conflict.

[1] http://www.ecdl.org.ro/.

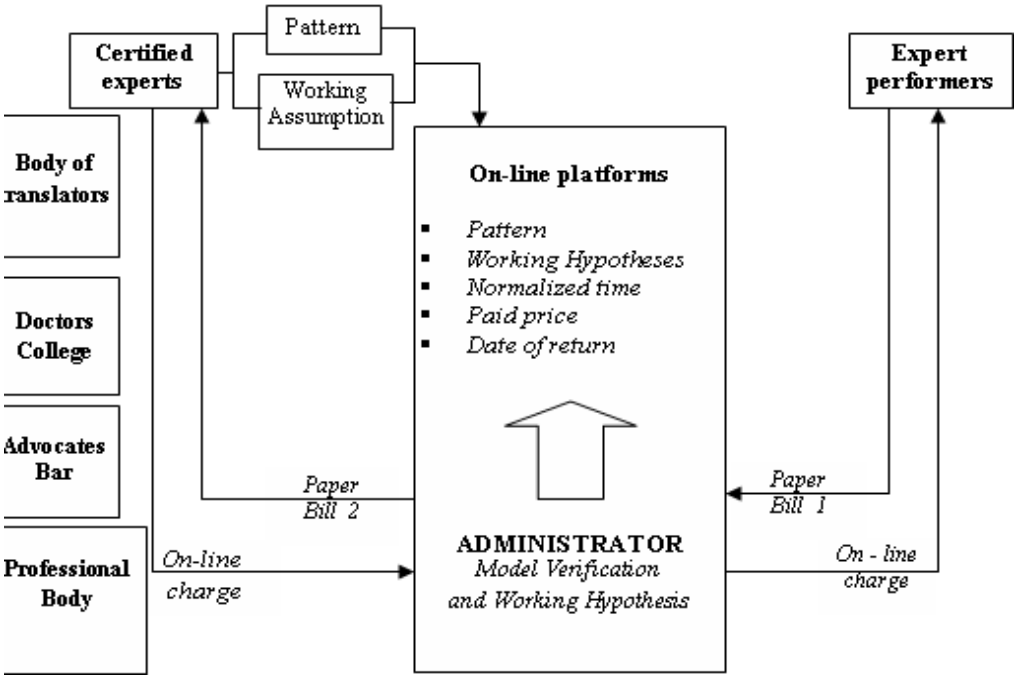

Figure 1- Interactive System for On-line Consulting

The overall objective of the project belonging to the Sectoral Operational Program Competitiveness Economic Growth is the awareness of the members of liberal professions associations for specific business transparency through the use of labor resources in training for designing work to the detriment of the work routine.

The specific objectives of the project are resulting from the general purpose and consist of:

- Increase the information period and continues processing throughout life for a significant part of the liberal members of associations such as CECCAR, UNPI, CAFR, ANEVAR, financial advisers, translators body, and for specialists interested in rapid resolution of administrative or routine service less important for them (doctors, lawyers, notaries, teachers).

- Standardization of papers with periodic character realized by experts in order to promote the best practice in the development of works and specific services under conditions of extreme rigor and quality in accordance with the update law at attractive prices to both experts and for human resource training.

- Preparing a platform to facilitate the exchange of works and services among members of liberal associations such as CECCAR, UNPI,

CAFR, ANEVAR, financial advisors, translators body and other training specialists in human resources for processing in accordance with the law.
- Identification of areas of concern regarding the use of online advice, and identification of the main problems with periodic or administrative character which faced with liberal associations.

The project is a complex operation which aims higher economic, legal and technical education, near to requirements of employers in Romania[1]. For example, in our opinion any education graduate needs general competencies (knowledge of foreign languages, computer knowledge: Word, Excel, Power Point, Internet, communication and law knowledge of: Labor Code, Tax Code, Commercial Code and specific knowledge to liberal profession that wants to practice (accountant expert, financial auditor, technical expert, expert in insolvency, assessment expert, tax expert, expert in construction, expert in energy balance of buildings, etc.).

By standardizing the routine work needed for the regular work required by the market such as reports of judicial expertise, evaluation reports, reports of merger, liquidation reports, audit reports, etc., our project aims to outline in a standard the skills required to a future economist, lawyer, engineer.

By standardizing the work routine in order to realize the expert, appraisal, liquidation etc. reports it can be achieved a national casuistry that can represents models to solve specific issues with which are facing the institutions and enterprises, in particular small and medium enterprises which can not afford to develop research - advice activities inside their companies (for lack of funds).

Main activities generated by the project are:

- Identification of a space for rented for the project team and procurement of necessary equipment.
- Identification of financial statements with the periodic character specific to expert accountant activity.
- Organizing a symposium by 12 accounting experts in order to present the opinion of experts concerning the financial statements suitable for execution on the Internet.
- Identification of financial statements with periodic character specific to financial auditors activity.

[1] www.fse.romania.ro.

- Organizing a symposium with 12 financial auditors in order to present the experts' opinion concerning the financial statements suitable for execution on the Internet.
- Identification of financial statements with the periodic activity specific to ANEVAR members activity.
- Organizing a symposium with 12 assessors in order to present the experts' opinion concerning the financial statements suitable for execution on the Internet.
- Identification of financial statements with the periodic character specific to UNPIR members activity.
- Organizing a symposium with 12 liquidators in order to present the experts' opinion concerning the financial statements suitable for execution on the Internet.
- Preparing of a computer platforms to view the request of the experts performers.
- Organizing a summer school for 30 people, preferably students, to present the user manual of the platform for the purpose of obtaining the certificate of an expert performer.
- Organization of summer schools with 30 representatives of CECCAR, ANEVAR, UNPI, CAFR in order to promote the platform and the opening of the applicant experts catalog.
- Organizing a final conference with the participation of 50 experts and performers applicants in which is validated the IT platform and it is presented the further development strategy of the project.
- Study of feed-back from the experts and applicants in human resource training.
- Organizing an annual conference with locality representatives of the subscribers to on-line platform for the approval of the development strategy of the company during the period 2011 to 2016 (5 years after the project ends).

2. Computing Platform

Platform Computing which is to be achieved through subcontracting on the basis of tender and specification meets the following requirements:

- Management platform has a single administrator.
- Manage a database system with MySQL (Structured Query Language).
- To allow a flow management information between a number of around 100 000 unique users.

- The basic software platform should enable in real-time the resolving of only standard situation (situation which are resolving automatically by the program without the intervention of an expert performer).

From technically point of view, the platform must run on-line, to be accessed from anywhere by the user, authentication being required to access the information.

Information platform will be written in the following languages and programming environments:

- **PHP** - main programming language. Will be used to connect to database, for security, for user authentication, etc.

- **MySQL -** SOL client used to store data in relational system, tables for users, files evidence and their connecting by different requirements, etc.

- **HTML** - the programming language that will be generated from the code written in PHP in order to be used by the browser and to be posted to the user [1].

- **CSS** - the creation of a style classes and so to a friendly interface for the user.

- **XML** - store of a various settings and communication channels (such as between PHP and Flash via AMFPHP).

- **MXML and ActionScript 3** (or AS3)- languages used in creating applications in Flex 3 to provide real-time dynamics for the platform and other facilities in real time that the PHP can not provide. Also, compiled programs in Flex (SWF files), are running on the client machine, reducing the risk of overloading the server.

- **Adobe Flex 3** - technology used to implement the two languages mentioned above. This technology offers the Flex Framework, necessary to define different components and classes needed to implement the platform information (such as Text Input, Array Coliection, File Reference, etc.) and creating a RIA (Rich Internet Application) for quick and simple interaction.

- **Flash** - ultra known technology and used worldwide web and beyond. It is the environment for the running of the applications in Flex, written in Action Script 3, using ASVM (Action Script Virtual Machine).

- **AMFPHP** - PHP library that enables communication between PHP and Flash using Flash Remoting method, communication being very fast, the information being binary negotiated. In practice, AMFPHP allows call PHP functions and variables within the applications written in Flex. This

[1] To see Pavel Nastase, Floarea Nastase - INTERNET World Wide Web JavaScript - HTML - Java, Economic Publishing House, Bucharest, 1998, p. 77-124.

library is required to "care" of information from and in the database (for verification, display, recording, etc.), the Flash environment having no support for such operations.

3. Project management

Are directly interested members of professional associations CECCAR, ANEVAR, UNPI, CAFR, students of economic, technical and legal faculty profile who want to acquire professional skills recognized by the labor market.

The project is coordinated by a project manager assisted by a team consisting of an economic manager, a legal advisor and an executive director. During the project it will be used a number of 48 type A and B experts by whom it will be finalized the financial statements which shall be made periodically within the liberal professions. Will also be involved in the project and a number of 500 students from 10 university towns across the country who will learn and deepen throughout the project, the knowledge needed to attain professional competencies specified in the project. The project *duration* will be 24 months.

The project generates a series of standard forms that contribute to the uniformity of the activity of auditing, accounting expertise, technical expertise, legal expertise at country level, which allows the development of knowledge in the field. By providing a rich case, the project contributes to decreasing the time of making a new case and also allows the updating of knowledge throughout life. The project has no impact on exhaustible resource materials, and therefore, the development of the project ensures the compliance of the principle of sustainable development.

One of the *main objectives* of the project is to promote the mainstreaming and policies in the field of education and national training, and to allow all vulnerable groups, particularly subjects with physical disabilities, to enjoy the same education and training as the subjects without disabilities. According to the Human Development Report 2004 of the United Nations, Romania deals with the fifty-sixth position concerning the index of gender inequality. The situation of women in the labor market in Romania presents many critical issues that, on the one hand, are referring to employment and on the other hand, to working conditions. According to EUROSTAT data for the period 1999-2004, the employment rate in Romania was reduced from 63.5% to 57.9% while the share of employed women has dropped from 46.2% to 45.6%. Our project aims to attract both men and women, employees and employers, young people

more than 14 years, and elderly up to 70 years old, fully healthy people and people with disabilities.

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Nicoleta DIACONU

RELATIONS INTERNATIONALES DE L'UNION EUROPÉENNE

Résumé

Union européenne entretient des relations internationales avec les organisations internationales et avec les pays tiers.

Traités de la Communauté contenant des règles sur la compétence communautaire externe (art.300 du Traité CE, art. 101-106 - Traité CEEA, art. 93-94-traité CECA) et sur les relations de l'UE avec certaines organisations internationales (art. J4 - Traité de Maastricht, art. F - Traité de Maastricht) ou groupes de pays (art. 131 - 136bis - Traité CE).

Ayant la personnalité juridique, chacune des trois communautés ont la capacité de conclure des accords avec des pays ou groupes de pays tiers ou des organisations internationales (Article 281 - Traité CE, art. 184 - Traité CEEA, art. 6. 2 du Traité CECA). Traité de Maastricht est une extension de la Communauté en matière de relations extérieures dans de nouvelles zones, essentiellement politique.

Des relations étrangères de l'Union européenne du gouvernement ne sont pas des règles de droit mais les règles du droit international public, y compris les dispositions de la Convention de Vienne de 1986 sur la conclusion de traités internationaux entre Etats et organisations internationales ou entre organisations internationales. Institutions de remplir certaines tâches, définies dans les traités, dans l'exercice des fonctions de la communauté internationale.

1. La conclusion d'accords internationaux

1.1. Le précédent traité de Lisbonne

Conformément à l'art. 300 - Traité CE, qui régit la procédure de la conclusion d'accords entre la commune ¬ ta ¬ te et un ou plusieurs États ou organisations internationales dans l'exercice de leurs activités internationales contribuent Commission, Conseil et Parlement européen.

Si les dispositions du traité prévoient la conclusion d'accords entre la Communauté et un ou plusieurs États ou organisations internationales, la Commission présente des recommandations au Conseil, qui autorise les négociations nécessaires pour commencer.

Ces négociations sont menées par la Commission, qui consulte des comités spéciaux désignés par le Conseil pour l'assister dans cette tâche et dans les lignes directrices établies par le Conseil peut y répondre.

Dans l'exercice des pouvoirs qui lui sont conférées, le Conseil, statuant à la majorité qualifiée, à l'exception des cas expressément prévus, en agissant à l'unanimité. Le Conseil statue à l'unanimité lorsque l'accord porte sur un domaine dans lequel ¬ niu de l'adoption des règles, l'unanimité est requise, et les accords visés à l'art. 310 - Traité CE.

Conseil conclut l'accord, après consultation du Parlement européen - à l'exception des accords mentionnés à l'art. 133 par. 3 Y compris les cas où l'accord porte sur un domaine dans lequel d'adopter des règles nécessaires à la procédure prévue à l'art. 251 ou de celles visées à l'art. 252.

Le Parlement européen émet son avis dans un délai fixé par le Conseil, en fonction de l'urgence. En l'absence d'un avis dans ce délai, le Conseil décide mai. Mai Conseil autorise la Commission à approuver les modifications au nom de la Communauté lorsque l'accord prévoit que les amendements soient adoptés par une procédure simplifiée ou par un organe créé par l'accord, le Conseil mai soumettre l'autonomisation de certaines conditions particulières.

Conseil, la Commission ou un État membre mai demande l'avis de la Cour de Justice sur la compatibilité de l'accord prévu par le traité. Si l'avis de la Cour de justice est négatif, il ne peut entrer en vigueur jusqu'à ce que les conditions prévues à l'article I du TUE.

En ce qui concerne les accords sur la politique monétaire est régie par une dérogation à celle qui est présentée conformément à la art.111-CE.

Par dérogation à l'art.300, où un accord sur des questions qui ont trait à la monnaie ou l'échange doivent faire l'objet de négociations entre la Communauté et un ou plusieurs États ou organisations internationales, le Conseil, statuant à la majorité qualifiée sur recommandation de la Commission et après consultation de la BCE, arrête les modalités de la négociation et la conclusion de tels accords. Ces règles doivent assurer l'expression d'une position unique. La Commission est associée aux négociations.

Sans préjudice des compétences et des accords dans le domaine de l'union économique et monétaire, les États membres mai négocier dans les instances internationales et conclure des accords internationaux.

Certaines dispositions mai fournir une ou plusieurs institutions internationales, une juridiction particulière.

Ainsi, selon l'art. CE-111 paragraphe 4 du Conseil, statuant à la majorité qualifiée tate, la proposition de la Commission et après consultation de la BCE, décide de la position au niveau international sur des questions d'importance pour l'Union économique et monétaire et, statuant à l'unanimité, décide de sa représentation conformément à la répartition des pouvoirs prévue à l'art. 99 et 105.

Aussi, conformément à l'art. 301 - Traité CE, si une position commune ou une action commune adoptées en vertu du traité sur l'Union européenne concernant la politique étrangère et la politique de sécurité exigent une action communautaire visant à arrêter ou à réduire tout ou partie des relations économiques de la Communauté un ou plusieurs pays

tiers, statuant à la majorité qualifiée sur proposition de la Commission, prendre des mesures appropriées.

Toujours à propos de la juridiction internationale peut notamment être mentionnées, et les articles. J5 par. 1 - Traité de Maastricht (désormais J8 (18) par le TA) et de l'art. J6 (aujourd'hui J10 (20) par le TA) - Traité de Maastricht, qui se réfèrent à des actions au sein des organisations et conférences internationales.

1.2. La conclusion d'accords internationaux dans le cadre du traité de Lisbonne

Traité de Lisbonne introduit de nouvelles dispositions de l'article L 188 - 188 A du traité CE concernant la procédure de conclusion des accords internationaux.

L'Union mai conclure des accords avec un ou plusieurs pays tiers ou organisations internationales, lorsque cela est stipulé dans les traités ou les cas où un accord est nécessaire pour atteindre la politique de l'UE, l'un des objectifs fixés par les traités être fournis par le biais d'un acte juridiquement contraignant de l'Union, ou affecter des règles communes mai mai ou de modifier la portée de celle-ci.

Les accords conclus par l'Union lient les institutions de l'UE et les États membres.

L'Union mai conclure avec un ou plusieurs pays tiers ou organisations internationales des accords créant l'association caractérisée par des droits et obligations réciproques, des actions communes et des procédures privées.

Accords entre l'UE et des pays tiers ou organisations internationales sont négociés et conclus conformément à la procédure suivante.

Conseil autorise l'ouverture de négociations, d'adopter des directives de négociation autorisant la signature et à conclure des accords.

Commission ou du Haut représentant pour les affaires étrangères et la politique de sécurité, lorsque l'accord en cause, uniquement ou principalement la politique étrangère et de sécurité commune, doit faire des recommandations au Conseil adopte une décision autorisant l'ouverture de négociations et doivent, selon champ du présent accord, le négociateur en chef ou de l'équipe de négociation de l'Union.

Conseil de mai adresse directives négociateur et désigner un comité spécial, les négociations doivent être menées en consultation avec ce comité.

Conseil, la proposition de négociateur, adopte une décision autorisant la signature de l'accord et, le cas échéant, son application à titre provisoire avant l'entrée en vigueur.

Conseil, la proposition de négociateur, adopte une décision sur l'accord.

Sauf si l'accord porte exclusivement sur la politique étrangère et de sécurité commune, la décision sur l'accord:

a) après approbation par le Parlement dans les cas suivants:

i) accords d'association;

ii) un accord sur l'adhésion à l'Union à la Convention européenne des droits de l'homme et des libertés fondamentales;

iii) accords créant un cadre institutionnel spécifique en organisant des procédures de coopération;

iv) accords ayant des implications budgétaires notables pour l'Union;

v) les accords dans les domaines dans lesquels la procédure législative ordinaire ou la procédure législative spéciale lorsque l'approbation du Parlement européen.

En cas d'urgence, le Parlement et le Conseil de mai pour convenir d'une date limite d'approbation;

b) après consultation du Parlement européen, dans les autres cas. Le Parlement européen émet son avis dans un délai que le Conseil de mai fixer en fonction de l'urgence du problème. En l'absence d'un avis rendu dans ce délai, le Conseil décide mai.

Tout au long de la procédure, le Conseil, statuant à la majorité qualifiée. Toutefois, le Conseil statue à l'unanimité lorsque l'accord porte sur un domaine pour lequel l'unanimité est requise pour l'adoption d'un acte de l'Union et si les accords d'association avec le candidat. Le Conseil a également décidé à l'unanimité en termes de l'accord sur l'adhésion à l'Union à la Convention européenne des droits de l'homme et des libertés fondamentales, la décision relative à la conclusion du présent accord entrera en vigueur après approbation par les États membres conformément à leurs règles constitutionnelles respectives.

Conseil une proposition de la Commission ou du haut représentant pour les affaires étrangères et la politique de sécurité, a adopté une décision de surseoir à l'exécution d'un accord et établissant les positions à prendre au nom de l'Union dans une instance créée par un accord, si l'organisme doit adopter des actes ayant des effets juridiques, à l'exception des actes de modifier ou de compléter le cadre institutionnel de l'accord.

Le Parlement européen doit être informé immédiatement et intégralement à toutes les étapes de la procédure.

Un État membre, le Conseil européen de mai ou de la Commission d'obtenir l'avis de la Cour de justice sur la compatibilité d'un projet

d'accord avec les traités. Si un avis négatif de la Cour, l'accord peut prendre effet qu'après la modification ou la révision des traités.

Conseil ou à la recommandation de la Banque centrale européenne ou sur la recommandation de la Commission et après consultation de la Banque centrale européenne à parvenir à un consensus compatible avec l'objectif de stabilité des prix, mai conclure des accords formels portant sur un taux de change de l'euro contre les monnaies des pays tiers . Le Conseil statue à l'unanimité après consultation du Parlement européen.

Union établit toute forme de coopération utile avec les Nations Unies et ses institutions spécialisées, le Conseil de l'Europe, l'Organisation pour la sécurité et la coopération en Europe et l'Organisation de coopération et de développement économiques. L'Union a également assurer des liens appropriés avec d'autres organisations internationales.

Haut Représentant pour les affaires étrangères et la politique de sécurité et de la Commission la responsabilité d'appliquer les dispositions de cette coopération.

Les délégations de l'Union dans les pays tiers et les organisations internationales est de représenter l'Union. Les délégations de l'Union sont placés sous l'autorité du Haut Représentant pour les affaires étrangères et la politique de sécurité. Ces délégués agissent en étroite coopération avec les missions diplomatiques et des bureaux consulaires des États membres.

2. Les relations de l'UE avec les organisations

Les pays membres et international Union européenne participant à la mise sur le marché international comme une puissance commerciale mondiale, il détient environ 20% du commerce mondial, il importe de grandes quantités de produits agricoles et des matières premières et fournit la plupart de l'aide pour le développement et l'aide humanitaire aussi bien les nouvelles démocraties et les pays du Tiers-Monde.

UE dans le cadre de l'Organisation de coopération et de développement économiques (OCDE) et a le statut d'observateur à l'Organisation des Nations Unies. Il a également participé à des réunions de hauts représentants des pouvoirs économiques de l'Ouest, tels qu'ils sont représentés dans ces réunions, le président et des délégués des quatre Etats membres: France, Allemagne, Italie, Royaume-Uni.

L'Union européenne est l'un des principaux membres de l'Organisation mondiale du commerce (OMC). La raison en est que l'UE a une politique commerciale commune et la Commission européenne négocie au nom de tous les États membres. L'UE est l'une des forces soutenant le cadre des négociations commerciales multilatérales à l'OMC de Doha

Development Agenda (DDA - Agenda de Doha pour le développement). DDA a comme objectif la poursuite de l'ouverture des marchés et l'affirmation de règles, régies par toutes les mesures nécessaires pour intégrer les pays en développement au système commercial mondial, en particulier par le renforcement de l'assistance technique pour la formation du personnel. L'objectif principal du programme de Doha est de donner le "développement" dans le système commercial mondial afin que la pauvreté peut être combattue.

2.1. Relations avec l'Union européenne de l'Association européenne De libre-échange (AELE)

Après avoir créé les trois Communauté européenne par le traité de Paris (1951) et le Traité de Rome (1957), la Grande-Bretagne a tenté de faire contrepoids à l'activité exercée au sein de la Communauté, à travers les bases de l'Association européenne de libre-échange en 1960 -- par la Convention de Stockholm.

La suite, plusieurs États membres de l'AELE ont adhéré à l'Union européenne: Royaume-Uni, le Danemark, le Portugal, l'Autriche, la Suède et la Finlande. Actuellement, en tant que membres de l'AELE: Islande, Liechtenstein, Norvège et Suisse.

Le but de cette association est de promouvoir les échanges entre États membres, mais sans le transfert d'une partie de la souveraineté nationale à des institutions avec un pouvoir législatif, comme l'Union européenne.

Depuis 1973, les Communautés européennes ont conclu l'industrie du libre-échange avec chacun des pays membres de l'AELE.

En 1984, l'AELE et la Communauté européenne a décidé de créer un espace économique unique et de développer la coopération dans les domaines économique, monétaire, politique industrielle, de recherche et de technologie, l'environnement, la pêche, des transports et de l'acier.

En Mai 1992, l'AELE et les Communautés européennes ont signé un traité instituant l'Espace économique européen (EEE), le traité est entré en vigueur le 1 er Janvier 1994.

Espace économique européen, l'application des politiques communautaires et les pays membres de l'AELE. Ainsi, il s'étend de l'AELE, les États membres appliquant les quatre libertés communautaires - libre circulation des marchandises, des services, des capitaux et du travail.

2.2. Relations de l'UE avec l'Union de l'Europe occidentale

Déclaration annexée au Traité de Maastricht sur l'Union de l'Europe occidentale est un cadre pour la poursuite du développement des relations entre les deux organisations.

Dans la déclaration indique que les États membres de l'UEO reconnaissent la nécessité de développer une véritable identité européenne sur la défense et de sécurité et de la nécessité d'assumer de plus grandes responsabilités dans la défense européenne. Au cours d'un processus qui comprend plusieurs étapes successives poursuivra cette identité.

L'UEO fait partie intégrante du développement de l'UE et renforcera sa contribution en termes de solidarité au sein de l'Alliance atlantique. UEO, les États membres ont décidé d'accroître le rôle de cette organisation sur le long terme, une politique de défense commune au sein de l'UE, ce qui pourrait conduire à l'avenir à une défense commune compatible avec l'Alliance atlantique. Dans la déclaration qu'il montre que l'UEO sera développée en tant que partie de l'Union européenne et en tant que moyen de renforcer le pilier européen de l'Alliance atlantique. À cette fin, il élaborera une politique de défense européenne commune et veillera à son application pratique, de développer encore son propre rôle opérationnel.

Pour une intégration progressive de l'UEO en tant que composante de défense de l'UE seront prises à la suite de l'UEO:

- La synchronisation, le cas échéant, les dates et lieux de réunions et l'harmonisation des méthodes de travail;

- Mise en place d'une coopération étroite entre le Conseil et le Secrétariat général de l'UEO, d'une part, et le Conseil et le Secrétariat général du Conseil, de l'autre;

- Prendre la question de l'harmonisation de la séquence et la durée des présidences respectives;

- Le développement des moyens appropriés pour assurer une information régulière à la Commission européenne et, si nécessaire, de les consulter sur les activités de l'UEO par la Commission conformément à son rôle dans la politique étrangère et la politique de sécurité tel que défini dans le TUE.

- L'encouragement d'une coopération plus étroite entre l'Assemblée de l'UEO le parlement et le Parlement européen.

Conseil de l'UEO prendra les mesures concrètes à prendre, en accord avec les institutions compétentes de l'UE.

- Déclaration sur l'UEO - annexe du traité de Maastricht est le résultat de la commune de points de vue exprimés par les États membres

de l'UEO et l'UE (Belgique, Angleterre, Allemagne, Italie, Pays-Bas, Luxembourg, Portugal, Espagne, France).

L'Etat se félicite du développement de l'identité européenne de sécurité et de défense. Compte tenu du rôle de l'UEO comme la défense de l'UE comme un moyen de renforcer le pilier européen de l'Alliance de l'Atlantique, ils sont déterminés à régler les relations entre l'UEO et d'autres pays européens sur une nouvelle, afin de garantir la stabilité et la sécurité en Europe.

Selon les indications dans la déclaration de l'UE sont invités à adhérer à l'UEO à convenir conformément à l'art. XI du Traité de Bruxelles modifié, ou à devenir observateurs s'ils le souhaitent. Par ailleurs, d'autres membres européens de l'OTAN sont invités à devenir membres associés de l'UEO d'une manière qui leur permettent de participer à toutes les activités de l'UEO.

Traité de Maastricht a été un approfondissement de l'intervention communautaire à de nouveaux domaines. Comme la nouvelle Union européenne réunit trois piliers: d'abord, la Communauté, y compris les communautés et les deux autres, avec notamment entre la politique étrangère et la sécurité commune et de coopération en matière de justice et des affaires intérieures. Dans le cadre des dispositions relatives à la politique étrangère et de sécurité commune (titre V), le traité régissant les relations entre l'UE et l'UEO.

Dans l'art. J4 de 2 a noté que l'Union de l'Europe occidentale demande qui fait partie intégrante du développement de l'Union européenne à élaborer et mettre en œuvre les décisions et les actions qui ont des implications de défense. L'accord avec l'UEO prendra les dispositions pratiques qui s'imposent.

En par.5 art. J4 a déclaré que les dispositions sur la politique étrangère et de sécurité ne fait pas obstacle à la mise en place d'une coopération plus étroite entre deux ou plusieurs États membres au niveau bilatéral, au sein de l'UEO et l'Alliance atlantique, à condition que cette coopération n'est pas dans la traité, ni un stânjeneşte.

L'UEO, créée par le traité de Bruxelles de 1948, (nom original donné par Western Union, de prendre votre nom actuel par le traité de Paris de 1954), organisation régionale avec une politique et des moyens militaires "bras armé" de l'Union européenne.

Le traité d'Amsterdam a apporté certaines précisions sur la coopération entre l'UE et l'UEO, mais n'apporte rien de nouveau sur l'intégration de l'UEO dans l'UE.

Dans l'art. J7 par. 1 - Le traité d'Amsterdam a déclaré que l'UEO est inté ta gran dans le développement, lui permettant l'accès à une capacité

opérationnelle. Il aide à définir les aspects de la politique étrangère et de sécurité liées à la défense commune, telle que définie.

L'Union encourage l'établissement de relations institutionnelles plus étroites avec l'UEO en vue d'une éventuelle intégration de l'UEO dans l'UE si le Conseil européen en décide ainsi. Au par. 3 du même article stipule que l'Union va utiliser l'UEO pour élaborer et mettre en œuvre les décisions et les actions de la défense qui ont des incidences. Chaque fois que l'Union à l'UEO pour elle d'élaborer et d'appliquer des décisions de l'Union, tous les États membres ont le droit de participer pleinement à ces missions. Conseil est d'accord avec l'UEO, adopte les modalités pratiques nécessaires pour permettre à tous les États Membres à apporter une contribution à des tâches et de participer pleinement et sur un pied d'égalité dans la planification et la prise de décision au sein de l'UEO.

2.3. Relations de l'UE le Conseil de l'Europe

Conseil de l'Europe, organisation régionale à caractère politique, créée en 1949, vise à établir des liens encore plus étroits entre les États membres dans les domaines économique, social, culturel, juridique et administratif, et surtout à promouvoir la démocratie et le respect des droits de l'homme.

La protection des droits fondamentaux de l'homme font partie intégrante des principes généraux du droit des Communautés européennes. La protection de ces droits, tout en s'inspirant des traditions constitutionnelles communes aux États membres doit être assurée au sein de la structure et les objectifs de la Communauté.

Le droit communautaire n'a pas donné le premier rang et d'une hiérarchie des droits fondamentaux de l'homme, mais fait référence à cet effet les documents adoptés par le Conseil de l'Europe.

La reconnaissance par les réglementations de l'Union européenne adoptée par le Conseil de l'Europe sur la protection des droits fondamentaux de l'homme, s'avère des orientations communes des deux organisations dans ce domaine.

En art.F - Traité de Maastricht stipule que l'Union respecte l'identité nationale des États membres, dont les systèmes de gouvernement sont fondés sur des principes démocratiques. L'Union respecte les droits fondamentaux tels que garantis par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, signée à Rome le 4 Novembre 1950 et à la suite des traditions constitutionnelles communes aux États membres en tant que principes généraux du droit communautaire.

Par la suite, par la Charte des droits fondamentaux de l'Union européenne a adopté ses propres règles sur la classification et la hiérarchie des droits fondamentaux de l'homme. Charte de récupérer à un niveau plus élevé des réglementations internationales adoptées dans le domaine.

2.4. Relations de l'UE avec les pays industrialisés en dehors de l'Europe

Union européenne entretient des relations économiques avec les pays industrialisés, en dehors de l'Europe: les Etats-Unis, Japon, Canada, Australie, Nouvelle-Zélande et d'autres.

* Les relations entre l'Union européenne et les États-Unis remonte à la création des Communautés européennes.

Le 5 Janvier 1947 le Général Marshall, Secrétaire d'État des États-Unis, dans un discours prononcé à l'Université de Harvard répertoires d'exposer des idées pour un plan d'aide économique pour la reconstruction de l'Europe occidentale après la Seconde Guerre mondiale. L'aide américaine a été subordonnée à établir une coopération entre l'organisation bénéficiaire.

UE et États-Unis ont des principes communs et partagent les principes démocratiques d'une philosophie commune qui a contribué à leur prospérité. A partir de 1981 entre les Communautés européennes et les États-Unis ont été l'échange annuel de haut niveau de la délégation, dirigée par le président de la Commission européenne et U. S. secrétaire d'État.

En 1980, les Communautés européennes et les États-Unis ont signé la Charte transatlantique, qui a contribué à accroître leurs relations en particulier au niveau politique.

Une étape importante sur la cristallisation des mécanismes et des objectifs que le partenariat transatlantique est l'Agenda transatlantique adopté lors de la réunion de Madrid, le 3 Décembre 1995. Agenda propose la création d'un espace économique transatlantique par la réduction progressive jusqu'à la suppression des obstacles qui entravent les flux de l'entraide des biens, des services et des capitaux.

Agenda transatlantique contient un plan d'action commun, dont l'objectif principal dans les relations économiques bilatérales se référer à:

- Négociation d'une élimination complète des barrières tarifaires et tarifaires au commerce des technologies de l'information;

- Accélérer les efforts visant à résoudre les questions restant en suspension après le Cycle d'Uruguay, en particulier en ce qui concerne la libéralisation des services de télécommunications et le transport maritime;

- Un accord de reconnaissance mutuelle des procédures d'essais et de certification des normes de performance technique comme une étape

décisive sur la ligne à supprimer les «obstacles techniques" pour les échanges de marchandises;

- Poursuite et approfondissement de la coopération entre les autorités chargées de l'application de la politique de coopération dont les bases ont été mises par le biais d'un accord bilatéral en 1991.

* Communautés européennes étroite relations commerciales avec le Japon, dont les investissements en Europe sont très élevés. Par exemple, les investissements dans la construction de voitures dans l'UE ont conduit à la législation qui stipule que 80% de l'industrie automobile japonaise à être produit dans les États membres de l'UE.

En 1991, les Communautés européennes et le Japon ont signé un accord-cadre de commerce. Aussi, les deux parties ont signé une déclaration commune qui sous-tend les relations.

Coordonnées de la stratégie communautaire contre le Japon envisagent de:

- Déterminer un rythme plus rapide d'ajustement structurel en cours de l'économie japonaise dans le sens de la création d'un environnement commercial plus ouvert et plus concurrentiel;

- La négociation de mesures visant à assurer une plus grande ouverture aux importations de l'intérieur du marché japonais, notamment en supprimant les obstacles subtilelor techniques et administratives;

- Maintien dans le cadre de la surveillance des importations en provenance du Japon dans un certain nombre de zones sensibles afin de réagir rapidement en cas de perturbation du marché.

Les régimes ont été lancées pour stimuler l'exportation d'assistance pour la réalisation d'une des conditions de commercialisation appropriées marché japonais et l'organisation de visites et de programmes d'études au Japon.

* Communautés européennes de maintenir des relations avec le Canada, le partage de valeurs communes. Les deux Communautés européennes et le Canada ont atteint des stades de développement industriel basé sur une technologie de pointe et des services. Le Canada est de l'UE un partenaire commercial important et une source de capitaux d'investissement. Les relations bilatérales entre l'UE et le Canada sont revus chaque année lors des réunions semestrielles organisées à Bruxelles et à Ottawa entre les fonctionnaires canadiens et la Commission européenne.

Aussi, les membres du Parlement européen et le Parlement du Canada organise des réunions visant à promouvoir les relations bilatérales et de l'analyse des événements internationaux. En 1990, les Communautés européennes et le Canada ont signé une charte régissant les relations entre les deux parties.

* Communautés européennes de maintenir un dialogue étroit avec l'Australie et la Nouvelle-Zélande, par le biais de consultations au niveau ministériel et parlementaire échanges.

L'UE est le principal partenaire commercial de la Nouvelle-Zélande et l'Australie, le plus important fournisseur des importations et un deuxième débouché pour les produits australiens. UE fournit un tiers de l'investissement australien.

* Les échanges commerciaux entre la Russie et l'UE ont été en 2005, d'une valeur de 166 milliards d'euros, l'UE clasând la première place parmi les partenaires commerciaux de la Russie. Ceci est le troisième parmi les partenaires commerciaux de l'UE, après les États-Unis et la Chine. Les deux parties ont besoin de bonnes conditions dans le domaine du commerce et des investissements.

Le principal produit exporté par la Russie à l'Union européenne de l'énergie sous forme de gaz et de pétrole. Certes, l'UE veut une sécurité d'approvisionnement énergétique. C'est l'une des parties sont parvenues à un accord, à condition de développer conjointement un système d'alerte rapide des goulets d'étranglement dans l'approvisionnement en énergie.

Coopération en matière de recherche sera également intensifiée, car les parties ont convenu de coopérer en ce qui concerne la navigation par satellite européen, Galileo, et le 1 Juin, entrera en vigueur d'un accord UE - Russie de faciliter l'octroi de visas.

2.5. Association des relations entre l'Union européenne et les pays en développement D'Afrique, des Caraïbes et du Pacifique (ACP)

L'association entre l'Union européenne et d'autres États ou groupes d'États est régie par les art.310 - Traité CE (art. 206 - traité CEEA) et par l'art. 182-188 - CE.

Conformément à l'art. 310 - Traité CE, la Communauté mai conclure des accords avec un ou plusieurs États ou organisations internationales pour parvenir à une association des droits et obligations réciproques, des actions en commun et des procédures spéciales.

Dans l'art. 182 - Traité CE dispose que l'association des pays et territoires d'outre-mer (dont la liste figure à l'annexe IV du traité) a pour but de promouvoir le développement économique et social des pays et territoires et d'établir des relations économiques étroites entre eux et la Communauté dans son ensemble.

En vertu des principes généraux énoncés dans le préambule du traité instituant la Communauté européenne, l'association doit permettre de favoriser l'intérêt premier et la prospérité des peuples de ces pays et les

territoires à atteindre les objectifs économiques, sociaux et culturels qui aspirent à.

Une catégorie d'Etats à l'examen dans une combinaison de pays africains, des Caraïbes et du Pacifique.

Les relations sont établies entre les États membres des Communautés européennes et des pays associés et des territoires, conformément à l'art. 182-187-traité CE ne représente pas une véritable association, que la participation doit se comporter dans des institutions spécifiques, mais plutôt un mode particulier de l'extension territoriale traité. Aussi, les pays qui concluent un accord d'association avec les communautés dans l'art. 310 - Traité CE, ne font pas partie de la, mais restent en dehors.

Liens historiques (certains colonial) sous-tendent les relations actuelles entre les Communautés européennes et les pays d'Afrique, des Caraïbes et du Pacifique. Processus basé sur la combinaison des territoires d'outre-mer dans les collectivités a été lancé suite à la déclaration d'indépendance de ces pays, principalement en français. Les relations entre la Communauté et les pays ACP ont vu l'adoption de conventions - Yaoundé I, Yaoundé II, et la Convention de Lomé (Lomé I-28, Février 1975, Lomé II-31 Octobre 1979, Lomé III-8 Décembre 1984, Lome IV, 15 Décembre 1989.)

Convention de Lomé IV est entré en vigueur en Septembre 1991, j'ai été entre les Communautés européennes et leurs États membres, d'une part, et 69 pays africains, de l'autre. But de ces accords est de promouvoir le développement économique et social des pays ACP et à établir une étroite coopération dans l'esprit de la légalité. Lomé IV bis a été conclu en 1995 entre les Communautés et d'un certain nombre des 71 pays africains.

Convention de Lomé IV prévoit un dialogue sur les politiques de développement et d'échanges et de soutien financier. Mise en œuvre de la Convention est assurée par un Conseil conjoint des ministres (de l'UE et les pays ACP), un comité paritaire d'ambassadeurs, une réunion conjointe des membres du Parlement et des représentants des États ACP.

UE-ACP a un certain nombre de caractéristiques qui fournit un exemplaire pour les relations entre les pays développés et pays en développement:

- Les engagements contractuels, ont abouti à la mutuelle des instruments juridiques;
- La durabilité, ce qui donne prévisibles les relations entre les parties;
- Le caractère multilatéral, qui permet la pleine expression de la solidarité du tiers monde;

- Le dialogue permanent mené par le Conseil des ministres, des ambassadeurs et l'Assemblée parlementaire.

2.6. Relations avec les pays de l'Union européenne dans la région méditerranéenne, Moyen-Orient, en Amérique latine et en Asie

Communautés européennes ont conclu des accords de coopération et des accords d'association avec les pays de la région méditerranéenne et le Moyen-Orient. Dans la politique de la combinaison est remarquable les relations avec les pays méditerranéens avec lesquels il existe des accords de coopération (Algérie, Maroc, Tunisie, Égypte, Liban, Jordanie, Syrie, Israël).

L'objectif de ces accords est de soutenir les pays en développement concernés et de promouvoir les échanges commerciaux avec eux. Conseil européen d'Essen en Décembre 1994, l'UE a décidé d'accroître les liens avec ses voisins méditerranéens, en créant des relations avec eux.

L'UE a conclu un accord avec le Conseil de coopération du golfe Persique, qui regroupe l'Arabie saoudite, Koweït, Bahreïn, Oman, Qatar et les Émirats arabes unis.

L'UE est le plus grand fournisseur d'aide financière et un soutien technique pour les Palestiniens dans l'autonomie de leurs accords avec Israël. L'UE aidera également palesinienilor dans les territoires occupés.

Pays d'Amérique latine bénéficient de privilèges commerciaux de l'UE et d'autres mesures visant à soutenir le développement de ces pays, les exportations vers l'UE. L'UE a conclu des accords de coopération avec les pays d'Amérique latine et les pays membres du Pacte andin, qui vise à promouvoir la paix et la démocratie pour le développement économique dans ces régions.
Plan de l'approche institutionnelle entre les communautés et les pays d'Amérique latine exige une plus longue période à partir de 1971-1973, par la signature d'accords avec des non-commercial préférentiel avec l'Argentine, Uruguay, Brésil.

Ces accords de caractère strictement professionnel, il a suivi une nouvelle génération, le cadre d'accords de coopération conclu en 1982 - avec le Brésil, en 1983, les pays membres du Pacte andin (Bolivie, Colombie, Équateur, Pérou, Venezuela) en 1987 -- pays du Marché commun d'Amérique centrale (Costa - Rica, Guatemala, Honduras, Nicaragua, Panama, Salvador) en 1990 avec l'Argentine et le Chili.

Ces accords, bien que non, en vue de promouvoir les échanges mutuels et la coopération dans la mise en place de divers secteurs. En 1990, l'UE a accordé une série de concessions tarifaires pays du Pacte andin, et en 1991, offre des caractéristiques similaires et les pays d'Amérique centrale.

En Décembre 1995, lors d'une réunion entre le sommet des chefs d'État ou de gouvernement des pays membres de l'UE et leur regroupement des pays du Mercosur (Argentine, Brésil, Uruguay et Paraguay), ont convenu les deux parties à conclure un accord de libre-échange avant 2001.

UE entretient des relations économiques avec les pays de l'Asie. Ainsi, l'UE a conclu un accord de coopération avec l'Association des Nations du Sud - Asie de l'Est (ANASE), l'organisation de la coopération politique, en Indonésie, les Philippines, la Malaisie, la Thaïlande, Singapour, Brunei et le Viêt Nam.

L'UE a signé des accord de coopération avec l'Inde, Pakistan, Sri Lanka, le Bangladesh, la Chine et la Mongolie.

Aide pour les pauvres des pays en développement et la promotion de la liberté du commerce sont les principaux objectifs de la politique extérieure de l'UE.

Sur la ligne à construire une approche uniforme de la politique de l'UE vers les pays asiatiques, en Mars 1996 a été le premier sommet euro-asiatique, organisée par la Thaïlande, qui a réuni des représentants de l'UE et de leur (les chefs d'État ou de gouvernement), de le Japon, la Chine, la Corée du Sud et les membres de l'ANASE. A poursuivi le dialogue bilatéral au niveau ministériel en 1997 et à nouveau au top en 1998, à la suite de l'échange d'idées sur des questions d'intérêt commun.

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QUELQUES OBSERVATIONS SUR LE PREJUDICE MORAL

Résume

Le préjudice, l'un des components essentiel de la responsabilité civile délictuelle, constituent en présent l'objet de certaines disputes jurisprudentielles et doctrinaires, alimentées par certaines consacrassions législatives récentes.

Le préjudice moral, en qualité de composante de 1'institution du préjudice en général, constitue encore la source des clarifications et orientations théorétiques et pratiques ayant leur racines les plus inédites, du point de vue de la nouveauté et de la variété.

Son quantification pour atteindre le but de la responsabilité civile, comme finalité de Faction civile en justice, constitue l'étape la plus importante dans toutes les solutions doctrinaires, mais surtout jurisprudentielles.

Le préjudice, l'une des composantes essentielles de la responsabilité civile délictuelle, représente même a présent, l'objet de plusieurs disputes jurisprudentielles et doctrinaires alimentées aussi par des consacrassions législatives de date récente.

Le préjudice moral, comme composante de l'institution du préjudice en général, constitue encore la somme de plusieurs clarifications et orientations théoriques et pratiques ayant les ressources le plus inédits, aussi bien par sa nouveauté que par sa variété.

Son quantification pour atteindre le but d'attirer la responsabilité civile comme finalité de la responsabilité civile en justice, représente la plus importante étape dans tous le solutions doctrinaires, mais surtout les jurisprudentielles.

Le préjudice représente l'effet négatif souffert par une certaine personne a cause d'une action illicite réalisée par une autre personne . Cet effet peut avoir un caractère patrimonial, mais il est admis le fait qu'il soit de nature morale aussi[1].

[1] En ce qui concerne le préjudice moral, les opinions des repûtes spécialistes mais aussi dans la littérature de date récente, le reconnaissent comme figure juridique distincte mais surtout la possibilité de l'évaluer et de l'accorder. Dans ce sens, C. Statescu et C. Barsan – Traite de droit civil. La théorie générale des obligations civiles – Ed. Academiei Bucarest, 1981 page. 167 ; I.P. Filipescu – Droit civil. La théorie générale des obligations – Ed. Actami, Bucarest 1994, Pge : 115 ou I. Urs et Sm. Angheni – Droit civil. Droits réels. La théorie générale des obligations civiles - Ed. Oscar Print, Bucarest 1998, 2eme volume, page : 182, I. Apostu – Les sources des obligations civiles – Ed. National, Bucarest 2003, , C. Turianu et Ghe. Stancu, - Cours de droit civil. Les droits réels. La théorie générale des obligations – Ed.

Il constitue un préjudice, toute perte matérielle souffert par une personne , représentée par une diminution de l'actif ou l'augmentation du passif patrimonial, dommage l'intégrité corporelle, détruire des biens, le décès du soutenant légal, etc/

Dans une classification moderne et rigoureuse du préjudice, celui-ci peut être **patrimonial (matériel), ou non- patrimonial** nommé dans la littérature, de plus en plus régulier, le **préjudice moral**.[1] A leur tour, les préjudices moraux, sont susceptibles d'être sous- qualifiés en préjudices corporels et préjudices moraux non- corporels atteintes a la personnalité physique, affective ou sociale.

Il est **matériel**, le préjudice qui concerne le patrimoine et les biens d ;une personne, le profit non- réalisé ou la perte subite a cause de l'action illicite.

Il est **corporel,** le préjudice qui puisse être conçu comme toute atteinte a l'intégrité physique d'une personne par laquelle il résulte une perte de la capacité de travail, permanente ou temporaire, applicable en pourcentage[2].

Celui-ci peut être *un préjudice de la douleur physique (pretium doloris)* [3] *ou psychique, préjudice esthétique*[4]*, préjudice d'agrément*[5] *la perte de l'espérance de vie (loss of expectation of life) et le préjudice juvénile*.

Universitara, Bucarest 2006, page : 1181, I. Adam – Droit civil. La théorie générale des obligations Ed. All Beck , Bucarest 2004, page : 255.

[1] Dans la littérature, il est aussi *nommé non- patrimonial, non- matériel, extra-patrimonial , préjudice non- pécuniaire ou préjudice personnel non- patrimonial.* Pour détails, I. Adam œuvre citee, page : 257 ou Gerard Legier – Droit civil. Les obligations. Ed. Mementos Dalloz Paris 1993, page : 94

[2] Ainsi, on a accorde des dédommagements pour dommage la santé ou l'intégrité corporelle , car la victime doit déposer un effort plus grand ou assurer une ambiance en conformité avec la situation dans laquelle se trouve (Trib. Constanta , dec.pen. 791/1985 dans RRD no. 2/1986, page : 76).

[3] On a considéré qu'on puisse donner endommagement matériel pour dommage moral, non pas a titre de réparation ou comme un pretium doloris, mais comme une satisfaction donnée a la victime et comme une peine pour le coupable, pour contribuer a la prévention dans l'avenir, des faits illicites de la même nature. (M. G. Rarincescu, Citee par I. P. Filipescu, œuvre citee, page : 118)

[4] Le préjudice esthétique et le préjudice d'agreement sont fréquemment placés dans la catégorie des préjudices morales.

[5] Le préjudice représenté par la paralysie peut privé la personne a la participation a sa vie sociale. Ce préjudice peut être améliorer en accordant un endommagement qui assurera une ambiance en famille. Par exemple, endommagement pour un véhicule spéciale pour que la victime puisse se déplacer (T.S. Décision pénale 2132/1985 en R.R.D. 9/1986 page : 70)

Le préjudice représenté par *les douleurs physiques of psychiques* incluent les souffrances et les douleurs de nature physique et psychique souffert par la victime d'une action illicite et coupable[1]. Au delà de la souffrance physique on doit tenir compte des conséquences psychiques subséquentes. Dans cette catégorie on devra y inclure par exemple la peur d'une personne qui a perdu un oeuil dans la perspective de perdre entièrement la vue ou l'angoisse provoquée par l'imminence d'une intervention chirurgicale risquée.

Le préjudice esthétique (pretium pulchriundinis) incluse les dommages et les lésions qui affecte l'harmonie physique ou l'aspect d'une personne, avec les conséquences désagréables causées par la mutilation, la des figuration ou les cicatrices qui restent après une action illicite. Des tels préjudices corporels peuvent représenter pour une personne un handicap générateur de complexes ayant des effets négatifs permanents dans le plan de l'exclusion de la personne de la vie sociale, sa stigmatisation ou marginalisation par rapport aux autres personnes ou a la société dont la personne fait partie[2]. Un tel préjudice est susceptible de générer des endommagement patrimonial, si on parle des personnes pour lesquelles, dans le cadre de leur activite professionnelle, un aspect agréable soit nécessaire, par exemple les hautesses de l'air, les reporteurs TV,etc.

Le préjudice d'agrément représente la diminution des éléments plaisantes de la vie humaine, par la réduction ou la disparition de certains sens, de la vie sexuelle ou de la possibilité de participer a la vie sociale. Un tel préjudice, nommé aussi, « hédoniste » peut aussi être placée dans la sphère de l'atteinte aux satisfactions et plaisirs de la vie représentées par la perte de la possibilité d'enrichissement spirituel, divertir et relaxation.

Le préjudice de la perte de l'espérance de vie représente la conséquence des dommages souffert dans le plan de la diminution de la période de vie comme une conséquence de l'action illicite. Un tel préjudice souffre par exemple la personne qui est infesté avec le virus HIV , qui a son droit de demander des endommagements moraux a cause du caractère incurable de la maladie et du fait que la diminution de l'espérance de vie est évident.

Le préjudice juvénile représente un inconvénient corporel de la personne plus jeune qui voit ses espérances de vie réduites. Une telle

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[1] Dans cette catégorie on devra inclure la souffrance causée par blessure, par la transmission d'une maladie ou arrestation illégale.

[2] Dans ce sens, voir Ghe. Vintila et C. Furtuna, Endommagement moral. Etude de doctrine et jurisprudence, Ed. Allbeck, Bucarest 2002, page : 27 ou I. Albu, V. Ursa, Responsabilité civile pour endommagement moral, Ed. Dacia, Cluj Napoca, 1979, page 23

hypostase part de la justification que les résultats de durée du dommage corporel soit ressentit avec plus d'ntensite par les personnes jeunes, qui sont moins réalisées du point de vue professionnel, spirituel, affectif, etc que les personnes plus âgées.

Il est moral et non corporel le préjudice qui concerne les valeurs morales de la personne. A son tour, il peut intéresser l'endommagement a l'honneur ou a la vie privée oy peut représenter un préjudice d'affection[1].

D'habitude, les endommagements accordés ont toujours un caractère patrimonial car le préjudice a lui aussi un caractère patrimonial[2].

L'existence du préjudice représente une condition essentielle dans l'engrenage de la responsabilité civile délictuelle. La coulpe, non suivie par un préjudice pour une autre personne, ne donne pas le droit a une action pour endommagement, parce que le fait n'a pas produit l'endommagement et en droit, seulement la personne qui a un intérêt au droit d'une action en justice (pas d'intérêt, pas d'action)[3].

En temps que la responsabilité pénale a comme objectif de responsabiliser le coupable en lui appliquant une peine, la responsabilité civile délictuelle a comme objective de couvrir le préjudice causé a une personne par une action illicite.

Avec raison, on a soutenu le fait que le préjudice esgtt la mesure de la réparation, peut importe de degré de la culpabilité[4]. Les aspects concernant la culpabilité en concret ne sont pas relevante que dans le cas d'un fait produit par plusieurs personnes en qualité de co- auteurs, ou dans le cas ou, le moment du préjudice, il y a eut une contribution, la contribution de la victime.

Pour pouvoir déterminer la responsabilité civile délictuelle d'une personne, le préjudice causé par celle-ci doit réunir les conditions suivantes :

1. – le préjudice doit être certain, ça veut dire que sa présence soit sure, du point de vue de son existence que surtout en ce qui concerne la

[1] Si suite a une calomnie, a une lésion de l'honneur, les sentiments d'affection pour les amis, ont lieu des conséquences patrimoniales, elles doivent être réparées. Il faut aussi, l'endommagement pour la lésion des sentiments des successeurs pour la victime decedee. (I.P. Filipescu, œuvre citee, page : 118

[2] Sur la modalité d'apprésentation du montant du préjudice moral, voir C.S.J. décision 3812/05.12.2000 en Revue D. 11/2001 page : 1999.

[3] P.C. Vlachide, Répétition des principes de droit. Ed. Euripa Nova, Bucarest 1994, 2eme volume, page : 44

[4] Sm. Angheni, Œuvre citee, page : 103

possibilité d'évaluation des conséquences patrimoniales de la personne qui les a souffert.

2. la certitude du préjudice implique son actualité, car on ne parle par d'une réparation que dans le cas ou il s'est déjà produit. Exceptionnellement, on peut prétendre la réparation du préjudice ultérieur, en mesure ou, bien qu'il ne soit pas encore produit, il est sure qu'il se produira et il peut être évaluer avec certitude.[1]

De plus, quand l'endommagement future se produira successivement, « rata temporis » et sa réparation peut prendre la forme d'une prestation future et successive.

Dans la pratique judiciaire, on a fixé le fait que pour garder un équilibre entre l'endommagement produit par l'action de préjudice et la compensation destinée a remplacer l'endommagement en cause, le montant accorde en mensualités, sous forme des prestations périodiques peut être modifie.[2]

Une autre question concernant l'actualité du préjudice, qui a imposé des réglementations doctrinaires et jurisprudentielles, a été celle concernant l'actualisation de celui- ci, en fonction de l'évolution du procès d'inflation les derniers ans, en Roumanie. Objectivement, entre la date de l'action illicite provoquant un préjudice et la date de prononciation d'une décision de réparation, peut apparaître une période de temps ou, a cause de la dévalorisation de la valeur nationale, l'endommagement calculé en numéraire, ne couvrent plus le préjudice effectif. On a aussi parle du problème de la concordance qui doit exister entre le niveau des prix et celui du préjudice causé, en tenant compte du fait que en conformité avec le principe de l'article 998 du Code civil, le préjudice doit être réparer en intégralité. Objectivement, on ne peut pas soutenir le fait qu'en temps que les prix augmentent, en s'adaptant aux procès d'inflation, le préjudice reste le même, raportee a la valeur du jour ou il a été causé. Pour cela, la solution adoptée par les instances, soutenue du pont de vue doctrinaire (a laquelle on adhère sans réserve) et celui que le préjudice doit être actualiser en fonction de la rate de l'inflation, le jour de la décision d'obligation du coupable. Tant que les prix augmentent a cause de la dévalorisation de la monnaie, rien ne justifie de ne pas ajuster le préjudice avec le procès

[1] Par exemple, la réparation du préjudice causé par une incapacité irréversible de travail (amputation d'un bras ou un pied) peut être demandée pour le future aussi, en existant motifs pour lui déterminer l'extension.

[2] Sur la possibilité de modifier l'endommagement par une décision définitive sous forme des prestations réguliers, pour des préjudices résultés des faits illicites, voir la décision d'orientation de T.S. 16/25.07.1964 en C.D. 1964 page : 34

d'inflation. Procéder contrairement, va représenter de ne pas prendre en compte le principe de la repartions intégrale du préjudice, consacrée par l'article 998 du Code civil.[1]

Différemment du préjudice future, le préjudice éventuel, est celui dont la réalisation soit incerte, c'est pourquoi il n'est pas justifiée d'accorder l'endommagement.

3– Le préjudice doit être direct, caractère qui résulte du contenu de l'article 1086 du Code civil, qui bien qu'il concerne la responsabilité contractuelle, constitue une norme générale de la responsabilité civile, applicable donc, a la responsabilité délictuelle aussi.[2] (« Même dans le cas ou la non-réalisation de l'obligation résulte du dole du debiteur, l'endommagement – intérêt qui ne doit pas inclure que ce qui est une conséquence directe et nécessaire de la non realisation de l'obligation »).

Le préjudice est donc, direct, lorsqu'il soit la conséquence d'une action illicite, conexion qui explique la liaison de causalite entre l'action illicite et le résultat produit avec des conséquences patrimoniaux non-desirees.[3]

4.- Le préjudice doit être personnel, caractère qui deroule du fait que uniquement les conséquences patrimoniales du fait illicite soient susceptibles de réparation. Mais, de telles conséquences ne peuvent être supportées que par des personnes physiques ou juridiques, les seules susceptibles a essayer une diminution de leur patrimoine.

Le fait d'attendre le patrimoine d'une personne peut être de nature matérielle et de nature morale, tant que la dernière puisse être évaluée par ses conséquences, par des critères patrimoniales. Tant que le préjudice matériel représente la conséquence de l'endommagement d'un intérêt patrimonial, (la diminution de l'actif ou l'augmentation du passif patrimonial), le préjudice moral représente le suivi de la lésion produite par le fait illicite d'un droit non-patrimonial. En temps que par le préjudice

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[1] Corneliu Turianu, Déterminer l'endommagement civil dans les conditions de l'inflation dans R.D. 11/1997 page : 35, Betinio Diamant et Vasile Luncean, Endomagement civil. Montant. Réévaluation judiciaire des créances… dans R.D. 5-6 /1994 page : 161., Pavel Perju, Synthèse théorique de la jurisprudence des instances dans la circonscription de la Court d'Appel de Suceava en matière civile (Juillet 1994- Juin 1995) sur la decision no. 1571/1994 en R.D. 2/1996 page : 86

[2] M. Eliescu, Responsabilité civile délictuelle, Ed. Academiei, Bucarest 1972, p : 95

[3] Dans la pratique de l'instance suprême, on a décide que les frais de l'ambulance pour transporter a l'hôpital la victime d'un accident doit être incluse dans l'endommagement civil car le transport de la victime a été nécessaire pour lui accorder assistance médicale. (C.S.J. Section penale , décision 1878/28.06.1995, en R.D. 5/1996 page : 125)

matériel, la personne essaye de détruire ou perdre un bien, le préjudice moral implique une lésion des attributs de sa personnalité, lésions corporelles et de santé.

Le préjudice matériel, incluse, comme il est précisée dans l'article 1084 du Code civil, la perte effectivement soufferte (damnum emergens), mais aussi le bénéfice non- réalisée (lucrum cessans), qui représente le fait de priver l'actif patrimonial d'un enrichissement qui aurait eut lieu le cas ou le fait illicite ne se produisait.[1]

Si dans le cas du préjudice matériel, les problèmes concernant l'évaluation et réparation soient définies dans la littérature et dans la jurisprudence, le préjudice de moral suscite encore des débats et solutions.

Le préjudice moral ou l'endommagement moral est diffluer a évaluer, même impossible, car on ne peut pas décider sur une équivalence entre la douleur morale et une certaine somme d'argent, et ni le fait que l'endommagement matériel du sentiment d'affection puisse être récompensé en argent.

Longtemps, en utilisant une ancienne décision de l'instance suprême[2], les instances ont apprécié qu'on ne peut pas accorder des réparations matérielles pour un préjudice moral.

Les tendances jurisprudentielles actuelles sont pour accorder l'endommagement pour le préjudice moral. Par exemple, on a accorde de l'argent pour des préjudices a caractère non- patrimonial, qui étaient les conséquences de la lésion de la santé ou de l'intégrité physique de la personne.

La lésion corporelle sévère peut avoir comme conséquence, au delà de la perte totale or partielle de la capacité de travail (un préjudice facilement a évaluer, comme une différence entre le salaire eut antérieurement et la rétribution pour invalidité), paralysie ou immobilisation qui ne laissent plus la personne a participer a la vie sociale ou culturelle et de bénéficier des biens de cette participation. Un tel préjudice nommé préjudice d'agrément, peut être atténuée par un endommagement qui puisse assurer une ambiance agréable dans l'environnement ou vie la personne en cause (en famille, institut de récupération, etc).[3]

En même temps, on considère que un tel dommage puisse réclamer pour la personne en cause, un effort suplimentaire pour ses activités quotidiennes. Un tel effort (traduit par exemple par le mouvement a l'aide

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[1] E. Safta- Romano, Droit civil. Obligations. Ed. Neuron Focsani, 1996, page : 129
[2] Dec. De Indrumare no. VII, de 29.12.1952, en C.D. 1952-1954, page 25
[3] I. P. Filipescu, œuvre citee, page : 117

d'un équipement spécial, lire a l'aide d'un seul oeuil) peut être évalué et doit être réparée.

Réparer un préjudice moral en général a déterminé la science de droit et la jurisprudence a se confronter a une série de questions spéciales qui méritent a être passée en revue a la fin de cette démarche.

Une première question est celui concernant l'extension du domaine de l'endommagement moral et l'accorder dans d'autres situations que celle concernant la responsabilité civile délictuelle. C'est le cas de l'arrêt sans droit, ou il existe déjà une pratique constante de la Courte Suprême de Justice et d'autres instances.[1] En même temps, une extension est représenter par l'attribution de l'endommagement moral pour ne pas avoir exécuté coupable, les contrat civils et commerciaux, ou par un arret abusif du contrat de travail. [2]

La Haute Court de Cassation et de Justice a déterminé aussi, dans une décision, que la plaignante a le droit de solliciter, indépendant d'autres dommages matériels, l'endommagement moral pour les frustrations causée par sa suspension de sa fonction. On a retenu qu'il soit nécessaire d'accorder une satisfaction morale a cause de l'apparitions dans la presse locale et centrale des article non favorable, qui ont attirée une image négative non seulement dans l'opinion publique mais aussi dans le plan familial.[3]

Une solution aussi intéressante est celle de l'endommagement accorde a d'autres catégories de personnes que celles qui ont souffert effectivement le préjudice non- patrimonial. On a apprécie que les souffrances psychiques a cause de la lésion des sentiments d'affection, comme c'est le cas la souffrence psychique, produite a un parent par la mort de son fils, peut et doit être réparé.

On a déjà mis en question le problème d'endommagement moral pour les personnes en état végétatif chronique, demandées par les parents de la victime « mis en situation de veiller et éduquer dans le future un enfant a handicap, sans la perspective d'une récupération.[4] La même idée

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[1] C.S.J. Section civile, décision 3633/02.11.1999 dans Buletinul Jurisprudentei – Recueil de décisions pour l'année 1999, ed. Juris Agressis, Curtea de Arges, 2000 page : 67

[2] Voir Mona-Lisa Belu Magdo, L'endommagement dans les rapports de travail. Discutions sur un cas dans R.D.C. no. 5/1999 page : 96-100.

[3] I.C.C.J. – SCAF Décision 2037/20.03.2005 dans le Buleten de la Cassation no. 3/2005 page : 3

[4]Pour des détails, Mircea Boar, Réparer l'endommagement moral dans le cas des personnes en état végétatif chronique, en D. 12/1997 page : 24-34

d'endommagement moral a été adoptée dans le cas de l'inconscience totale et définitive de la victime. [1]

Sans analyser toutes les situations ou ont été accorde ou ils ont été proposée d'accorder l'endommagement pour un préjudice moral[2], on souligne un fait très bénéfique, celui que a présent, ce problème, constitue une préoccupation actuelle en plan législatif.

En ce qui concerne la consécration législative, l'attention est pour des domaines très variées.

De tels résolutions ont été prévues dans plusieurs actes normatives, dont :

L'article 9 de la Loi 11/1991 sur la lutte contre la concurrence non- loyale mentionne que si les faits de concurrence non- loyale provoquent des dommages matériel ou morales, la personne en cause a le droit a s'adresser a l'instance avec une action de responsabilité civile. [3]

La Loi 8/1006 sur le droit d'auteur et les droit conexes protégent et guarantent le droit d'auteur sur les œuvres scientifiques, littéraires et artistiques. Leur non- respect permet aux personnes en cause d'actionner en justice pour réparer l'endommagement matériel et moral.

L'article 18 al.3 de la Loi 554/2004 sur le contencious administratif, mentionne que dans le cas de la solution de la demande, l'instance va décider sur l'endommagement moral et matériel[4], provoquées, si le plaignait l'a sollicité.

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[1] On a soutenu que « «Si tu n'est pas conscient, tu ne peut pas avoir une souffrance psychique car toute souffrance psychique incluse une consciencieuse du handicap eut, dans le contexte des relations sociales « .Le mal dérive non pas de la réparation d'un préjudice très grave que la personne ne sent pas, mais de ne pas obliger le coupable d'un préjudice tellement grave. Pour cela, Ilie Urs, Réparation du préjudice moral dans le cas de l'inconscience totale et définitive de la victime, en D. 5/1997, page : 30-35

[2] Dans ce sens, voir C. Turianu, Responsabilité juridique pour l'endommagement moral dans la Revue D. 4/1993, page : 11-27, I. Albu, Considérations sur la reconsidération de la jurisprudence roumaine a la pratique de la réparation en argent, en D. 8/1996 ou Ilie Urs, Critères d'apprésentation du préjudice moral et l'endommagement en argent pour les dommages morales en D. 4/1998, page : 25.

[3] De tels dispositions sont dans l'Ordonnance du Gouvernement 47/29.08.1994 qui concernent l'endommagement matériel, écologiques et morales a cause d'un désastre provoqué par ne pas respecter les obligations des agents économiques.

[4] C.S.J. , Section de contencious administratif, Décision 727/25.03.1998 dans la Revue no. D 12/1998 page : 152.

En même temps, la Loi 48/1992 de l'audio- visuel, mention dans l'article 2 al.5 la responsabilité pour l'endommagement moral a cause des communications audio- visuels.

Il ne faut pas négliger ni le texte de l'article 998 et 999 du Code civil, sur le préjudice, ou il n'y a pas de distinction entre le préjudice patrimonial et celui non- patrimonial, donc l'obligation d'endommagement des deux types de prejuidces, y resulte sans doute, car « ubi lex non distinguit, nec nos distinguere debemus ».[1]

Le projet du Code civil accorde une attention importante au préjudice moral, en le consacrant dans plusieurs textes et sous plusieurs formes. Ainsi, l'article 1403 concerne la réparation du préjudice non- patrimonial en générale, l'article 1404 concerne les frais pour la santé, le décès et les coûts pour l'enterrement et 1405 les droits des successeurs.

[1] Pour des possibles comparaisons avec le droit des autres états sur l'endommagement moral, voir Mircea Boar, Réparation en argent de l'endommagement moral dans des etats occidentaux, en D. no. 8/1996 page : 23-25.

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Mihnea Claudiu DRUMEA[1]

EUROPEAN SECURITY SYSTEM AND IMPLEMENTATION OF RULES OF PROFESSIONAL TRAINING - THEIR APPLICABILITY IN ROMANIA

Abstract

In the states of the community, professional qualification courses have become a long habit. Employers bank on the idea that it is better to prepare an employee from the inside than to get more money and get an already skilled worker. In exchange, in our country, unqualified persons still occupy qualifying positions. In this way, the employer does not assume any risk if the worker decides to leave. In Europe, the degree of professional training is 25% while in Romania it is less than 5%. We have to understand that after the way things evolve, professional training will be something vital. Employers would benefit due to increased labor productivity, and employees could more easily find an activity under the preparation acquired as a result of specialization.

In a society based on scientific and technical progress and in constant change, the individual is faced with the need to acquire new skills, and to renew the baggage of knowledge and skills, at least once in 2-3 years, through programs of professional training in order to acquire new specializations.

The investment in human resource, the most valuable asset of an organization, proves to be an intelligent and long term one, even if it involves some costs and the results are not seen immediately. Applying the principle of the "3L" – "lifelong learning" (permanent learning), generates benefits both to companies and employees, by creating a better qualified workforce, by increasing the competitiveness, productivity and personal development of each employee in the chosen field of activity.

The system of professional training continues to play an important role in reducing differences between the EU Member States, by providing the human resource necessary to economic development. Even if in a society and an economy based on knowledge, the traditional system is not sufficient for a successful career, permanent training is far from becoming a reality for all employees. On average, the EU Member States allocated about 5% of GDP for education and professional training, with large differences from one country to another. The education is a constant concern of the governments of all Member States, but the structure of

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education varies considerably from country to country. In this context, the EU is a useful forum for exchanging ideas and best practices. The EU has no common policy on vocational training, but on the contrary, its role is to create a system of cooperation between Member States by maintaining the right of each Member State to decide on the content and organization of education and training. Regarding transparency and recognition of diplomas and qualifications for academic purposes, a network of National Centers for recognition of diplomas was created in 1984 at the initiative of the European Commission, where all EU Member States and the European Economic Area as well as all the associated States of Central and Eastern Europe are found. They offer advice and information on recognition of diplomas and periods of studies abroad. Regarding transparency and recognition for professional qualifications, a network of National Information Points for vocational qualifications is currently being created and it will be a first point of contact for issues related to professional qualifications.

Companies in Romania have started to access, since March 31st, funds for the hiring of new employees, training and improvement of working conditions, after officially launching the new financing scheme from the European Social Fund.

These financing schemes include:

- State aid for employment;
- State aid for training the employees;
- Minims aid to subsidize the cost of information, training and investment in health and safety in the workplace.

The projects which aim at the first two aid schemes may have a value of costs between € 10,000 and € 2,000,000, and include:

1. grants as a percentage of 50% for the first 12 months of employment for wage costs of new employees, which come from among certain population groups such as: unemployed who have not found a job in the last 6 months, people who represent the unique maintenance of the family, people who have exceeded the age of 50 years, people from Roma communities or people who do not have medium education and qualifications to give them great chances on the labor market;

2. grants as a percentage of 75% for the first 24 months from hiring people with disabilities and 100% of the costs made by the employer to adapt the spaces of work, providing support and equipment necessary for workers with disabilities;

3. grants for professional training, between 25% and 80% of eligible expenses, depending on the enterprise and training type.

Grants will be awarded on the "first-come, first served" basis and the applications for funding will be submitted online to the POSDRU Management Authority.

We live today in an era of economic and cultural globalization. People from different countries and cultures communicate frequently on several occasions. To be able to work together, they must know each other. Mutual knowledge is not limited to the knowledge of language in which communicates the other, but also to the knowledge of culture and traditions in which the language has been created.

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Gheorghe Teodor ARAT

ROMANIA'S PARTICIPATION TO THE REGIONAL COOPERATION STRUCTURES

Abstract

The international society nowadays and especially the European one are strongly influenced by several processes, the most obvious being globalisation and regionalism.

However, regional and sub-regional cooperation develop faster and more efficiently than international cooperation.

In Europe, regional cooperation within certain structures outside the European Union has generally resulted in the integration within Euro-Atlantic and European structures. Cooperation and interaction at a regional level represent a useful exercise for taking part to the promotion of European and Euro-Atlantic common interests and goals.

Experience showed that a series of political, economic, safety and cultural issues can be better approached and solved in a relatively homogenous framework, where there is a certain degree of cohesion and common development experience.

Regional cooperation represents a significant dimension of the Romanian diplomacy, manifesting itself through the knowledge, observation and participation to regional cooperation structures such as: South-East European Cooperation Process, Central European Initiative, Danube Cooperation Process, South-East European Cooperation Initiative, Organisation of the Black Sea Economic Cooperation and various forms of trilateral cooperation created for strengthening the political and economic environment of the area.

The international society nowadays and especially the European one are strongly influenced by several processes, the most obvious being globalisation and regionalism.

Regional and sub-regional cooperation develop faster and more efficiently than international cooperation. This would, however depend on the interests of all parties involved. The cooperation among the European Union states as well as among Shanghai states could be considered successful examples of regional cooperation which have generates benefits for the parties involved.

In Europe, the regional cooperation was a good preparation for creating and extending the European Union. Over the years, the European institutions have increased their scope based on the success on the cooperation among the European states.

Regional cooperation represents a significant dimension of the Romanian diplomacy. Being part of the EU and NATO were major objectives achieved by Romanian governments over the years.

Regional cooperation and interdependency represent a real, practical approach to the visions promoted by both organizations. They

also represent a useful exercise for taking part to the promotion of European and Euro-Atlantic common interests and goals.

Regional cooperation structures such as: South-East European Cooperation Process, Central European Initiative, Danube Cooperation Process, South-East European Cooperation Initiative, Organization of the Black Sea Economic Cooperation and various other forms of cooperation have been created for strengthening the political and economic environment of the area and to guarantee a peaceful and secure development of the members states in the region

Experience showed that a series of political, economic, safety and cultural issues can be better approached and solved in a relatively homogenous framework, where there is a certain degree of cohesion and common development experience. This framework creates the basis which guarantees the development of certain mechanisms of cooperation among regions which contributes to strengthening of the international security.

The political efforts and commitment associated with the development of these mechanisms of cooperation among regions enhances the credibility of the common processes and actions and furthermore builds trusts among these regions.

Romanian diplomacy has shown that Romania is open toward learning and monitoring the processes for regional cooperation in Central and South-Eastern Europe. This is perceived as part of the efforts made by Romania to consolidate its position in the process for European integration as well as Euro- Atlantic integration.

As an active member of all South-Eastern European organizations, Romania has been actively involved in promoting the policies and programs for regional cooperation. Romania had proposed a series of initiatives and had had a constant contribution to the discussions which were within the scope of these organizations and had as object the interests of its state members.

What follows are a few examples of the organizations for regional cooperation that Romanian diplomats have contributed to:

South-East European Cooperation Process (SEEP) was initiated in 1996 by Bulgaria. This is one of the regional cooperation structures which have not been institutionalized. Yet it has been the basis of cooperation between the Balkan states after the First World War.

After the first world war, Nicolae Tituleascu, one of the best Romanian diplomats, has initiated the collaboration between the Balkan states. After the Second World War, this collaboration was revived and continued to function as a summit of the ministers for foreign affairs of the Balkan states (regardless of the political regime in the country).

SEEP has been founded as a new cooperation structure, after the former Yugoslavian states have become independent states. SEEP is lead by a President which has a one year mandate. During SEECP Summit of 20 February 2000, held in Bucharest, Heads of State and Government adopted the "Charter of Bucharest - Charter good neighborliness, stability, security and Cooperation in Southeastern Europe", which reiterates the desire of Member signatories to develop good neighborly relations and to do the democratic and economic reforms.

SEECP has been consolidated as a forum for political cooperation, under which, participating states have concluded a series of agreements such as: the Joint Declaration on combating terrorism, on the fight against terrorism, on the fight against organized crime and corruption, promoting investment, creating a regional energy market.

Between April 2004 and April 2005, Romania held the presidency and aimed to stimulate regional cooperation so that this structure would become the true voice of the region, and shaped strategies and actions conform to the specific needs of countries in the region. It also launched an academic review aiming to create a regional geo-political model, which might prove useful for the surrounding areas (the Caucasus, Black Sea). Romania had also accelerated the process for founding the South East Europe Energy Community, a process which is a prerequisite for sustainable development and European integration of the region.

Organization of the Black Sea Economic Cooperation

The first structure of the Black Sea Economic Cooperation, whose founder state was Romania, was launched on 25 June 1992 by signing the Declaration of Istanbul. The 'Charter for Black Sea Economic Cooperation " signed on 5 June 1998 at Yalta, marked the transformation of this structure of cooperation in an international organization. The newly formed organization became functional when it was ratified by 10 Member States (including Romania) on 30 April 1999, for the Black Sea Economic Cooperation

The Establishment and transformation of the structure of regional cooperation, have once again demonstrated a "regional leadership" Romania "authorized by the voice of its diplomacy

"Decade Declaration" adopted on 25 June 2002 in Istanbul, indicate the main objective of the BSEC: accelerating economic and social development of Member States through multilateral cooperation and the use of the advantages arising from geographic proximity and complementarity of national economies.

Romanian foreign policy priorities regarding Black Sea Economic Cooperation include: supporting the initiatives with high regional impact

using a fund for projects development as a basis for financing regional development projects; supporting the organization attempts to gain privileged status and relations with the EU in specific areas, based on common interests; revitalization of the working groups and joint programs to promote the development of European transport corridors and the creation of a regional transport infrastructure connected to Western Europe; implementing the project for integrated the South Eastern European energy, supporting the Caucasus to strengthen democratic processes and economic reforms ; finalizing the additional Project on combating terrorism, as the leading country coordinating of the working group for cooperation in combating organized crime. Last but not least, Romania is acting to increase the contribution of OCEMN to strengthening security and stability in the Black Sea.

Central European Initiative (CEI), established in 1989 is a structure of regional cooperation bringing together 17 states, as a liaison between the Central and Eastern Europe, and also a partner in the institutional dialogue with the EU, Council of Europe and NATO. Romania joined the ICE in 1996, at the Vienna meeting of foreign ministers of member states.

Within ICE, Romania works to promote, as a priority, the training future civil servants needed to reform government. Romania also considers a critical priority economic as well as competitiveness growth both for the Romanian Government as well as all Member States; therefore showing a particular interest for: the development of the energy infrastructure and transport, urgent reopening of the navigation course of the Danube, fighting crime the course migration and human trafficking. This latter priority was materialized in the establishment in Bucharest of the Committee for Combating Crime border.

Stability Pact for South Eastern Europe (PSESE)

Forty partner states and international organizations have committed, by the declaration of the "Stability Pact for South Eastern Europe" adopted in Cologne on 10iunie 1999, to assist countries in Southeastern Europe, in their efforts to promote peace, democracy, respect for human rights and economic prosperity in order to ensure security in the region.

PSESE represents the most ambitious challenge to the EU and U.S. to help stabilize the former Yugoslavia and the Balkans in general. European Commission and World Bank pledged to provide the financial and economic assistance.

However both the beneficiary and the donor states are equally critical to the pact, highlighting the fact that the support offered after 1999 was not at the level of expectations and real needs of the region. An

example is the funds allocated to Romania, Bulgaria and Macedonia to compensate for damages suffered as a result of military intervention in Yugoslavia, far below expectations.

As co-chairman of Working Table III, Romania is concerned about issues such as: security defense, home affairs and justice and seeks as priority:

• implementing the UN convention on transnational organized crime;

• strengthening the political support for SEECAP (South East Europe Assessment Common Paper of Regional Security Challenges and Opportunities)

• increasing the role of the Regional Center for Combating Crime at the Borders, a major project of regional cooperation in the field of law enforcement against asymmetric risks, including the fight against terrorism;

• promoting closer cooperation among the South Eastern European countries and managing political and diplomatic initiatives in this area;

• increasing public visibility of the objectives and achievements obtained in Table III work.

As described in this paper, regional cooperation covers all economic, political and social aspects which are within the scope of European Community policies. The joint actions of all states in this part of Europe have as objectives the creation of a region characterized by security and order as well as strengthening their positions in the process of European integration and Euro-Atlantic integration. The economic crisis affecting the world economy today, make these objectives even more urgent and important.

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Ioana Nely Militaru

ACTIONS OF FULL JURISDICTION IN FRONT OF THE COURT OF JUSTICE OF EUROPEAN COMMUNITIES[1]

Abstract

The article lights up the role of the actions of full jurisdiction from the perspective of the Luxembourg Court to appreciate all the elements de facto and de jure of the case brought before it. By this it is modified the decision of the respective community organism that was challenged, by adopting a new biding solution for the parties. It is analyzed, in this regard, the most frequent types of actions in the community practice, as follows: the actions for failure of a member state to fulfill the obligations assumed by the Community Treaties; actions for damages; actions brought by public community employees; actions for extra-contractual liability of the European Communities; as well as the appeal against the decisions of the First Instance Tribunal.

Preamble

Unlike the procedures of annulment and insolvency and in comparison to the prejudiciary references for the interpretation and examination of validity, which allow to the Court of Justice, either to annul a contestable law, to oblige the communitarian institution which abstains from proceeding to act in consequence, or to interpret a communitarian rule or law, the action in full jurisdiction gives the possibility to the Court of Luxemburg to take into consideration all the elements in fact and of law of the cause presented, modifying the communitarian body's resolution, which was brought under discussion, in order to settle another obligatory solution for the parties[2].

We won't take into consideration all the actions in full jurisdiction, but only those which are the most frequent in the communitarian cases.

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[1] For details, see Brandusa Stefanescu, *The Court of Justice of European Communities*; The Scientific and Encyclopedic Publishing House, 1979, Bucharest and René Joliet, *Le droit institutionnel des Communautés européennes, Faculté de Droit d'Economie et de Sciences Sociales de Liège, Liège,* vol II. To be seen also, J. Boulouis et R.-M. Chevallier, Grants Arrets de la Cour de Justice des CE, T.I, 2e ed, Paris, 1978, p. 299.

[2] To be seen, Brandusa Stefanescu, op. Cit. P. 82-83.

Section 1

The action of stating the obligations' unfulfillment, by the member states, for which these are liable under the Communitarian Treaties

The Court of Justice has the exclusive competency, pursuant to art. 226 – 228 EC[1], art. 141-143 CEEA, to judge the member states for the unfulfillment of their obligations, imposed by the Treaties and, generally by the communitarian laws.

The Commission has the obligation to supervise the actions of the states, pursuant to art. 211 EC, so it assures the applicability of the provisions of the Treaty and of the measures taken by the communitarian institutions based on it.

The supervision exercised by the Commission is materialized by gathering dates and informations, in order to perform the given assignments.

There will be considered unfulfilled actions by the states, the actions or the abstentions against the communitarian law (prime, derivate, general principles) and namely:

- *The legal acts or the actions* against the communitarian law, that are represented by laws, decrees, administrative resolutions; the classical example is: the inexact presentation of a directive.
- *The abstentions or the inactions* which are determined by delays or carelessness, in choosing the necessary measures in order to apply the communitarian law or the refuse to abrogate a contrary internal measure; the classical example is: non-presentation or the late presentation of a directive.

After the Commission states that the member state did not perform its obligations, it proceeds to consultations with it. If following the discussions, the Commission states the unfulfillment it will issue a *reasoned decision*[2] and will give to the member state a term, until which this will fulfill its obligation.

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[1] It was identical in the CECO Treaty, in art. 88, CECO Treaty got in force in the year 2002.

[2] The decision is enforceable; even if the incriminated state has the right to introduce an action to the Court of Justice against the latter (the term was of two months since the notification, pursuant to art. 88, paragraph 1 CECO. CECO Treaty got in force in the year 2002.

The Court had, pursuant to art. 88, paragraph 2, CECO, the unlimited competency in settling the actions addressed by the member state.

After it was analyzing all the arguments of the parties, taking into consideration the relevant acts of the cause, the Court had the right to replace the decision of the Commission with its own decision.

Pursuant to the EC and CEEA Treaties, the Commission is informed by a state or by a representative, by a claim. The most frequent case is when the Commission itself takes the initiative of starting the stating procedure, by opening an official dialog with the state presumed to be guilty of unfulfillment of its obligations.

If the member state continues its initial action of non-acknowledgment of unfulfillment of its obligations, the Commission will formulate a *reasoned notification* by which will present the necessary measures in order to set right the illegal situation.

If the state does not follow the measures presented by the notification, within the settled term, the Commission can inform the Court of Justice; if it complies with the notification, the state will inform the Commission, clearly and precisely, about the measures taken in order to stop the unfulfillment of its obligation.

It is possible the direct information of the Court of Justice by the Commission or by another member state (in case there is no notification from the Commission).

If a member state enacted laws in reference to which the Commission requested the intervention of CJCE, according to art. 226 EC, *the Court will not have the right to invalidate the respective laws*, because it would constitute an encroachment in the internal jurisdictional activity, which is against the provisions of the Treaties[1].

The Court can only settle the *unfulfillment of the obligations for which the respective state is liable*, and the latter has to take all the necessary measures implied by the execution of the Court's resolution, according to art. 228, paragraph 1, EC, in order to stop this infringement[2].

In the legal text there *is not stipulated a term* for the execution of the Court's resolution, but the legal practice settled that it is obvious that the

[1] To be seen for details, Marin Voicu, Communitarian Law, Theory and Jurisprudence, Ex Ponto Publishing House, Constanta, 2002, page 185.
[2] To be seen for details, O. Manolache, Treaty of Communitarian Law, fifth edition, C.H. Beck Publishing House, Bucharest, 2006, page 717-718.

process of fulfillment of a resolution, must be initiated immediately and finalized in the shortest time[1].

The resolution regarding the settlement of unfulfilled obligations has an adjucative character and the state has to *carry the consequences*; in case of non-performance, a new procedure can lead to the second resolution on the same unfulfillment.

The resolution is imposed to the courts[2] of the states which did not fulfill their obligations provisioned by Treaty and implies for these:

- The obligation to not apply a rule acknowledged as inappropriate;
- The obligation to admit the liability (of the state) as a result of the infringement of the communitarian law.

Section 2
Action against the pecuniary sanctions

The right to impose the pecuniary sanction was of the Commission, pursuant to CECO Treaty, according to art. 47, paragraph 3, art. 64 paragraph 5, art. 68 paragraph 6. This right is granted to the *Commission* by the Council, in the system of the EC Treaty, based on the regulations adopted in different fields (especially in the concurrence field).

The Commission has the right to impose pecuniary sanctions for the infringement of the communitarian law, adopting resolution in this purpose, which can be challenged in the communitarian justice. The resolutions taken by the Commission, in the matter of pecuniary sanctions, can be challenged pursuant to art. 225 EC and to the provisions of the appendant[3] legislation. Practically, it is treated as an action for the annulment of a resolution, even though it is an independent action. Its starting point is the Commission's resolution and not the pretended infringement[4].

The Court of Justice *can invalidate, increase or decrease* the applied sanctions; it can be considered that it has an unlimited competency in the matter of the actions regarding the applied sanctions.

This underlines the essential difference between the action against the sanctions and the annulment action. The Court is not limited only to

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[1] CJCE, 06.02.1992, 75-91, Netherlands Commission in ECR, 1992, 549-556, CJCE, 30.01.1992, 328-90, Greece Commission in ECR, 425.
[2] CJCE, 14.12.1982, Waterkeyn Rec. 4337.
[3] Regulation no. 17/62, art. 17 and Regulation no. 4056/86, art. 21.
[4] According to art. 225 CE, TPI will have the competency to settle in the Prime Instance the procedures against the Pecuniary sanctions.

search if the facts are right or how these were appreciated; it can express another point of view than the Commission's one, which can replace the latter.

The resolutions of the Commission are immediately executable. The introduction of a new action in justice does not suspend the execution, and non-paying the imposed amounts in this situation determines interests[1].

Section 3
Actions presented by the public communitarian clerks

The action is provisioned in art. 236 EC (179) and 152 CEEA.

The category of the public communitarian clerks contains the officials of the communities and the other clerks. The first ones are persons named in positions settled by the written decision of the competent authority (according to the Regulation of Personnel in force). *The other clerks or agents* are part of the category of temporary, local, auxiliary personnel, etc. The Community's clerks and agents exercise certain actions within the Regulation Status, before the Court of First Instance. They can inform the competent jurisdictional bodies, notifying the assignment authority, by the agency of their superiors, in order to achieve an amiable settlement of the litigations.

It is an alternative legal matter:

- A legal claim *in annulment* when a communitarian clerk or agent challenges the legality of an individual law, addressing a claim. The clerks can action *against any law which affects them*, even though it was addressed to other persons (by example, the persons which were *assigned* or *promoted*). The important thing is that those clerks action in the name of their interest[2].
- A legal claim in *full jurisdiction*, when the communitarian clerk or agent requests a pecuniary compensation.

[1] According to art. 424, CE, the Court can decide the injunction of the applicability of a contested law, if the circumstances determine it. For details, to be seen, O. Manolache, op.cit., p. 741-742 and Marin Voicu, op.cit., page 190.

[2] To be seen P.J. Kapteyn, P. ver Loren van Themaat, The impact of case-law of the Court of Justice of the European Communities on the economic world order, in MLR, vol. 82, no. 5-6, 1984, page 245-246.

Section 4
The action of extra-contractual liability of the European Communities

The action of granting compensations is *opened* for the states or for the legal and natural persons for five years, and it can start at the moment of the prejudice, against the institutions which is the author of the prejudicial act (the Court accepts both the action against the European Investments Bank and against the Central European Bank).

The communitarian judge can be informed by an action for the *liability settlement*, previous and different than the action of granting the compensations, in order to prevent the future prejudices.

The action is *autonomous* (independent), unlike the annulment and insolvency action. If initially, the Court requested in one of the causes the previous annulment of the act[1] (criticizable solution taking into consideration the access difficulties of the particulars in the annulment action), subsequently it sustained this point of view in supporting the independency of the liability action[2]. Even so, the action of granting the compensations will not be admissible, if there are parallel actions regarding the legality (annulment, insolvency, prejudice procedure[3]).

The action has an *appendant* character, unlike the legal methods presented before the national courts. The jurisdictional applicability of the appendant law (outside and before any call for art. 5 [3B]) of EC Treaty, implies a form of *running out* of internal recourse methods. This is connected mostly to the limitation of the suppositions in which the responsibility of the Community is taken into consideration.

- The member states have to fix the prejudices, produced as a result of the communitarian law infringement or as a result of the illegal applicability of the communitarian law[4].
- The appendant law is applicable to the actions for the payment of the due amounts or to the actions regarding the refundment of the amounts levied indirectly, when the refuse was based on an invalidate

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[1] CJCE, 15.07.1963, 25/62 Plaumann v Commission ECR 95; [1964] CMLR 29.
[2] CJCE, Zuckerfabrik, 2.02.1971 aff. Jointes 143/88 et 92/89 Rec. I, 415.
[3] To be seen, Jean Claude Gautron, *Droit Europeen*, Ed. Dalloz, Paris, 1999, p. 170.
[4] The refuse to pay all the compensatory amounts to the DOM French Enterprises (CJCE< 26.11.1975, Grands Moulins del Antilles) excepting the severe lack of a specific control which had to be performed by the Commission (CJCE, 28.04.1971, Lutticke aff. 6/49 Rec. 173).

communitarian law; the actions are opened (where is the case, after the verification of the validity by prejudiciary way) before the national courts[1].

- In case of the joint culpability, the liability principle *in solidum* is not applicable[2]; the petitioner will have to inform first of all the national court in order to settle the liability which incubates the state and then the communitarian jurisdiction.

The *EC Treaty* provides, to art. 288 paragraphs 2 and 3 (similarly, in art. 188 CEEA): "The Community has to fix, according to the *general common principles of the member states law*, the damages caused by its institutions or by its agents during their functions (assignments)".

The CECO Treaty regulates this matter differently[3] and mentions to art. 40, paragraphs 1 and 2, that "subject to the first paragraph of art. 34, the Court will have the competency to grant, *at the request of the damaged party*, a pecuniary settlement from the Community, in case the prejudice was caused during the execution of the Treaty, *by an illegal act or by omission of the Community in performing its functions*. Also, the Court has the competency to grant a settlement from the Community, in case the prejudice was caused by *personal guilt* of an agent of the Community, during the performance of its duties". Thus, the liability regime was established based on the concept of guilt– guilt in function (art. 40 CECO). This formulation implied a difficult jurisprudential construction[4], taking into account the necessity for a judge to separate the common principles from the different legal systems.

"The general common principles imply the duty of the legal communitarian bodies to discover those elements from the legal systems of the member states based on which can conclude communitarian rules and principles which would lead to the correct settlement of the problems regarding the Communities' liabilities"[5].

In the *CEEA Treaty's system* – art. 188 is formulated following the same terms as art. 288 EC. The Court, in one of its resolutions, gives a

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[1] CJCE, 10.06.1982, Interagra rec. 123.

[2] CJCE, 14.07.1967, Kampffmeyer, aff. 5,7 et 13 a 24/66 Rec. 299, 300, 301.

[3] The difference is explained by the fact that the non-contractual liability according to the CECO Treaty was inspired by the French law. The regulation makes reference to the general principles, common in the laws of the member states. For details, to be seen O. Manolache, op.cit., p. 727; V. Marcu, Nicoleta Diaconu, General Communitarian Law, Lumina Lex, 2002, page 291 and the following J.C. Gautron, op.cit., page 172.

[4] To be seen, Jean Claude Gautron, op.cit., page 172.

[5] To be seen, O. Manolache, op.cit., page 69-70.

restrictive definition[1] of the *guilt committed* by an agent of the Community during its assignments[2], thereby reducing the filed of applicability of the Communities' liability.

The CECO Treaty excluded any liability without guilt, and the relative jurisprudence of the EC Treaty, without excluding it *a priori*, did not consecrated it until today, even though it is present in the legal order of many member states.

The Court of First Instance considers also, that the liability is based on guilt[3].

In reference to the relative conditions, for the *assessment of the prejudice* (which has to be real and certain), and for the *causality connection* between and act (the culpable act of the Community[4]) and the prejudice (which has to be direct), the two systems are identical.

The main contribution of the jurisprudence is constituted by *the expansion of liability over the normative activity of the Community*. Therefore, the damages can be caused by different acts, including those with normative character. There are excluded from this field, the Communitarian Treaties and the laws equivalent to these.

Only the other laws can determine prejudices after their enactment or based on how there are integrated in the system. It is possible to be introduced actions regarding the validity of these laws (according to art. 173 EC [230]) and to request damages, concomitantly. The Court will follow to pronounce separately over the validity of the act and the damages[5].

Section 5
The recourse against the resolutions of the Court of First Instance

The Court of Justice is also the recourse instance. Pursuant to the provisions of art. 225, paragraph 1, the *resolutions* pronounced by the Court of First Instance in the causes provisioned by the articles 230 EC (annulment actions), 232 EC (insolvency actions), 235 EC (actions of extra

[1] CJCE, 18.09.1995 Holle, To be seen, Jean Claude Gautron, op.cit., page 172.
[2] CJCE, 10.07.1969, Sayog, quoted by Jean Claude Gautron, op.cit., page 172.
[3] It is a formulation closer to the German law than the French law.
[4] The culpable act can make reference to: non-performance of the obligations by the Community; erroneous information; the abuse of power with intention leading to arbitrage; illegal termination of the employment agreements for the personnel of the Communities and the insufficient protection of its members; violation of a superior law; to be seen, Jean Claude Gautron, op.cit., page 172.
[5] To be seen for details, O. Manolache, op.cit., page 732 and the authors quoted there.

contractual liability), 236 EC and 238 EC, and also in the case of some other actions' categories that can be provisioned in the Court of Justice status, can make the object of a recourse to the Court of Justice, limited to the matters of law, according to the conditions and the limits settled in the status. The reason of recourse *is limited to the matters of law*[1], so the Court can not decide on the matters in fact. But in some cases is difficult to separate the maters of law by those in fact, so certain events produced (and considered maters in fact) can not be anymore discussed or under doubt again before the Court of Justice[2].

In the EC Treaty, it was introduced by the *Treaty of Nice* a new article (225A) whose paragraph 3 provides that the resolutions of the jurisdictional chambers can be considered the object of *recourse*, limited to the maters of law to the Court of First Instance. Also, the resolutions of the jurisdictional chambers can be considered the object of appeal, putting under discussion this time the matters in fact, at the Court of First Instance, when the decision of establishing the legal chamber provides this thing. Therefore, in case of exercising the right of appeal to the Court of First Instance, there is no limitation to the matters of law[3].

The recourse can be against:

- The final decisions (by which it was settled the litigation) of the Court of First Instance;
- The decisions of the Court of First Instance that settled the fond litigations only partially or a procedure incident regarding an exception of incompetence or inadmissibility[4].

There can be invoked only the *reasons of illegality*, since the recourse is limited only to the matters of law, and namely:

- The incompetence of the Court of First Instance;
- The disrespect for the procedure, prejudicing the interests of the recurrent;
- The violation of the communitarian law by this Court.

The recourse will not be based, taking into consideration only the reasons related to the amount of the judgment expenses or the relative ones of the party obliged to pay.

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[1] C. 174/97 P. Federation FreanAaise des Sovietes d'Assurance (FFSA) and others. Resolution from March 25th 1988, considered 21 in ECR, 1988 3(2), 1324.

[2] C 53/92, P, Hilte AG, Communitarian Commission, resolution from March 2nd 1994, considered 10 in ECR, 1994-3, 667-710.

[3] For details, to be seen O. Manolache op.cit., page 793-802.

[4] The Status of the Court of Justice, art. 57, paragraph 1.

The object of the action to the Court of First Instance can not be changed during the recourse.

In order to limit the number of recourses, before the Court of Justice there can not be formulated new conclusions and there can not be addressed any other reasons. There has to be rejected, as inadmissible, a reason presented for the first time before the Court, because it would allow the possibility to present a cause with an extended subject, unlike the one presented before the Court. As a result, the competency of the Court *is limited to reviewing the assessment done by the Court*, regarding the reasons that were brought under discussion, during the recourse.

If the recourse is reasoned, the Court of Justice will invalidate the decision of the Court and if the stage of the procedure allows, it can proceed itself to judgment, giving the final decision in the matter or it can send the cause to the Court, in order to be settled, but the Court will be hold by the resolution of the Court of Justice regarding the matters in law.

Conclusions

The Court of Luxemburg is defined by its competency attributed by the Communitarian Treaties and also by its jurisprudence underlined by its decisions, with obligatory legal force, as an instance with obvious extra national characteristics. In comparison to the international jurisdictions of classical type, the Court of Justice presents the essential differences due to the objectives of its intervention, of the role and its connection with the national jurisdictions[1], of the direct access that the particulars have. All these, determine the Court of Luxemburg to be considered an internal jurisdiction of a Community of states committed to the integration process, being invested not only with the right of assuring the respect of the communitarian right, but also with the applicability unity of it[2].

[1] The reports of the Courts of Justice with the national courts are underlined through the agency of the prejudiciary address in interpretation and examination of the validity of the communitarian laws. To be seen for details, Ioana Nely MIlitaru, The Prejudiciary Address before the European Court of Justice, Lumina Lex Publishing House, Bucharest, 2005.

[2] To be seen, Roxana Munteanu, European Law, Oscar Print Publishing House, 1996, page. 241.

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2. René Joliet, *Le droit institutionnel des Communautés européennes, Faculté de Droit d'Economie et de Sciences Sociales de Liège, Liège,* vol II.

3. J. Boulouis et R.-M.Chevallier, *Grands arrets de la Cour de Justice des CE*, T.I,2é éd., Paris, 1978.

4. Marin Voicu, *Communitarian Law, Theory and Jurisprudence* Ex Ponto Publishing House, Constanţa, 2002.

5. O. Manolache, *Communitarian Law Treaty*, Fifth Edition, C.H. Beck Publishing House, Bucharest, 2006.

6. P. J. Kapteyn, P. ver Loren van Themaat, *The impact of case-law of the Court of Justice of the European Communities on the economic world order,* in MLR, vol. 82, nr. 5-6.

7. Jean Claude Gautron, *Droit européen*, èd. Dalloz, Paris, *1999,* p.170.

8. V. Marcu, Nicoleta Diaconu, *General Communitarian Law,* Lumina Lex, 2002.

9. Ioana Nely Militaru, Prejudiciary Address before the European Court of Law, Lex Publishing House, Bucharest, 2005.

10. Roxana Munteanu, European Law, Publishing House Oscar Print, Bucharest, 1996., p. 245.

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CONCEPTS THEORIQUES ET PRATIQUES SUR LA COMPETENCE DE VALEUR EN MATIERE CIVILE

Résume

Déterminer la compétence de l'instance représente le plus important moment préliminaire du commencement de toute procédure judiciaire dans le domaine du droit prive.

Si les normes de compétence générales, matérielle et territorialité, ont déjà une réglementation stable, confirmée par unité jurisprudentielle, les récentes normes concernant la compétence du point de vue de la valeur implique certaines détails et une nouvelle orientation dans la pratique des instances judiciaires et dans la science du droit processuel civil.

Cella impose certaines clarifications doctrinaires, auxquelles on va faire référence ensuite, la démarche en cause.

Déterminer la compétence de l'instance représente le plus important moment préliminaire du début de toute procédure juridique dans le domaine du droit privée.

Si les normes de compétence générale, matérielle et teritorielle, ont un règlement déjà déterminée, confirmée par unité jurisprudentielle, les normes récentes sur la compétence de valeur impliques quelques précisions et une nouvelle orientation dans la pratique des instances et dans la science du droit processuel civil.

La **compétence matérielle**, nommée par certains auteurs **compétence des attributions**[1] aussi, implique, comme on le déjà connaît, une délimitation de la sphère d'activité entre les instances de degré différent, sur ligne verticale donc hiérarchique, mais aussi entre celles de droit commun et les instances spéciales. La différence se fait soit en fonction du type des attributions juridictionnelles, **sous aspect juridictionnel**, soit en fonction de l'objet, la valeur or la nature des causes a analyser, donc **sous un aspect processuel**[2].

Les normes de compétence matérielle fonctionnelle, aussi bien que les processuelles, ont leur siège dans le code de procédure civile, la Loi

[1] Dans ce sens, I. Deleanu, Traite de Procédure Civile, Ed. Europe Bova, Bucarest 1995, page : 132, J.Vincent et S. Guichard, Procédure civile, Precis Dalloy Paris, 1991, page : 304

[2] V.M. Ciobanu, Modifications concernant la compétence des instances apportes par le Code de procédure civile par la Loi 59/1993, dans la revue : Droit no. 1/1994, page :7

d'organisation des instances et La Loi de la Haute Court de Cassation et de Justice que dans des autres actes normatives a caractère spécial.

Etant réglementée par des normes a caractère impératif, les parties ne peuvent pas déroger par leur convention, ni avec l'accord de l'instance, des dispositions de compétence matérielle.

Parmi d'autres critères qu'on ne va pas analyse dans ce document, le critère valorique représente le repère d'attribution de la compétence matérielle, donc entre instances de degrés différents.

La compétence de valeur opère d'ailler dans d'autre branches du droit, l'exemple le plus signifiant étant la délimitation des juridictions entre tribunaux et tribunaux de première instance en matière de certaines infractions[1], comme il est par exemple l'infraction de fraude prévue par l'article 215 all.5 du Code pénale. En fonction de ses conséquences, comme elles sont prévues dans l'article 146 du Code pénale, pour un préjudice inférieur au montant de 200.000 Lei, la compétence comme première instance appartienne au tribunal de première instance et supérieur a ce montantle tribunal, comme il est prévue par les dispositions de l'article 27 point 1 lettre a) du Code de procédure penale.[2]

Délimiter la compétence entre tribunal de première instance et tribunal dans les cas prévus par les dispositions de l'article 2 point 1 lettre a) du Code de procédure civile se fait en fonction du critère de **la valeur de l'objet de litigieux**.

En conformité avec les dispositions procédurales d'après la modification du code, le 12 février 1948, pour déterminer la compétence matérielle, opérait premièrement le critère de la valeur[3], et seulement pour certaines catégories de procès le critère de la nature de l'objet.[4] Dans ce système, les litigieuses ayant une valeur modique (bagatelaires) étaient jugée premièrement par les premières instances, sans droit d'appellation, avec recours au tribunal du département, celles ayant une valeur supérieures dans les mêmes instances, mais les décisions avaient l'appel au tribunal du département et le recours a la Court de Cassation, tandis que les litigieuses ayant une valeur exceptionnelle, étaient jugées en fond par le

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[1] Gr. Teodoru , Traite de droit processuel pénal, Ed. Hamangiu, Bucarest 2007, page : 292-295

[2] I. Stroienescu et S. Zilbertstein, Droit processuel civil. Theorie générale. Ed. Didactica et Pedagogica, Bucarest 1966, page : 160

[3] P. Vasilescu, Traite théorique et pratique de procédure civile, Iasi 1941, page : 508

[4] Pour plus d'information, I. Apostu, Compétence des instances en matière civile, Ed. National, Bucarest 1997, page : 79

tribunal du département, en appel par la Cour d'Appel et en recours par la Court de Cassation.

Le code de procédure civile, modifie par la Loi no. 59/1993, a fixée pour délimiter la compétence matérielle « rationne valorise » des deux instances, le seuil valorique en montant de 10.000.000 Lei en matière commerciale (article 2 point 1, lettre a) et de 150.000.000 Lei dans les procès de nature civile (article 2, point 1, lettre b).[1]

Dans cette formule, le code de procédure civile donne au tribunal la compétence de solutionner les procès et les actions en matière commerciale dont l'objet a une valeur qui dépasse 100.000 Lei (article 2 point 1, lettre a), aussi bien que celles de matière civile dont l'objet a aussi une valeur supérieure a celle de 100.000 Lei.[2]

Les dispositions des lois spéciales consacrent a présent des nouvelles roules de compétence de valeur, en parlant la délimitation entre les juridictions des tribunaux et des Courts d'Appel dans la matière du contencious administratif.

La règle de droit commun dans ce matière est représentée par les dispositions de l'article 2 point 1 lettre c) du code de procédure civile qui confère plénitude de compétence aux tribunaux.[3] L'article 3 point 1 du même code fixe la compétence des Courts d'Appel en première instance pour les procès et les actions en matière de contencious administratif sur les actes des autorités et des institutions centrales.

Nouvelles dispositions et spéciales en ce qui concerne la compétence matérielle ont été adoptée dans cette matière par la Loi 554/2004 du contencious administratif. En conformité avec l'article 10 al.1 de l'acte normatif, « les litigations sur les actes administratifs délivrées par les autorités publiques locales et du département, aussi bien que celle concernant les taxes et les impôts, contributions, taxes de doines et accessoires, **jusqu'au 500.000 Lei** seront solutiones en fond par les tribunaux administratifs fiscaux et celles sur les actes administratives délivrées par les autorités publiques centrales aussi bien que celle concernant les taxes et les impôts, contributions, taxes de doines et accessoires, **au delà de 500.000 Lei** seront solutiones en fond par les sections de contencious administratifs et fiscaux des Courts d'Appel.

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[1] Ces montants ont été convertues dans la nouvelle monnaye en conformité avec l'article 5 al' 5 de la Loi 348/2004 sur la dénomination de la monnaye nationale.

[2] I. Santai , Compétence des instances sur le non respect de la loi dans l'activité des autorités de l'administration publique, Revue : Dreptul no. 1/1995, page : 35

[3] Gabriela – Victoria Bîrsan et B. Georgescu, La loi du contentieux administratif no. 554/2004 adnotee, Ed. Hamangiu, Bucarest 2007, page : 72

Comme on peut voir, ce texte règle la compétence matérielle de fond en fonction de deux critères :

a) La position de l'autorité publique délivrant du document dans le système de l'administration publique ;

b) La valeur de l'impôt, de la taxe, de la contribution, la taxe de doine qui fait l'objet du document administratif attaquée.

Il resulte que, si l'acte administratif n'a pas comme objet un impot, taxe, contribution ou taxe de doine, la compétence est fixée en fonction de la position de l'organe délivrant, peu importe le montant demandée ou contestée par l'action.[1]

Par contre, si l'objet de l'action est représentée par des impôts, taxes, etc, peu importe l'organe délivrant, l'autorité publique et centrale, la compétence est attirée par le seul valorique de 500.000 Lei sous lequel l'action sera juge en fond par les tribunaux et au delà de laquelle par la section de contentieux administratif et fiscaux de la Court d'Appel.[2]

Dans la pratique judiciaire, on a décidée que dans le cas ou, la personne qui se considère endommagé ne conteste entièrement l'obligation décidé par l'acte administratif attaqué, le seuil valorique prend en compte uniquement le montant en litigieuse et non pas le montant qui se trouve dans le document en cause.[3]

On a dit aussi, que ces règles de compétence de valeur déterminées par l'article 10 al.1 sont a appliquer pour les demandes de suspension de l'exécution des actes administratifs qui ont comme substrat juridique l'articles 14 et 15 de la Loi 554/2004.[4]

Dans le système de notre droit processuel, le caractère d'ordre publique de la compétence de valeur résulte des dispositions de l'article 159 code de procédure civile. Pour déterminer la compétence, on doit partir de la valeur de l'objet du procès, celle mentionné par les parties. Quand même, les instances peuvent et doivent vérifier si les parties par leur acte de volonté, ne choisissent les instances.[5]

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[1] I.C.C.J. – La jurisprudence de la section de contentieux administratif et fiscal pour 2006, Ed. Hamangiu, Bucarest 2007, page : 210

[2] Dans ce sens dec. 3090/15.06.2007 de SCAF-ICCJ cite par G. Bogasiu dans La loi du contentieux administratif commenté et adnotee avec législation et jurisprudence, Ed. Universul Juridic, Bucarest 2008, page : 187

[3] Antonie Iorgovan, et autres, La loi du contentieux administratif commenté et adnotee, Ed. Universul Juridic, Bucarest 2008, page : 206

[4] I. Mihuta, Répertoire de pratique juridique pour les années 1975-1980, Trib. Supr. Sec. Civ., Dec. Nr. 140/31.01.1978, page : 277

[5] I. Les, Commentaires sur le code de procédure civile, volume I, Ed. All Beck, Bucarest 2001, page : 40

Déterminer la valeur de l'objet de litigation implique certains commentaires :

Premièrement, on a apreciee que le **moment** qui intéresse est celui de la **sesisation de l'instance**.[1] Or, l'objet de la demande et sa valeur doivent être précisé par le plaignait dans son action, a son avis, quand il soit possible, comme il est prévu par les dispositions de l'article 112 point 3 du code de procédure civile.[2]

Pour déterminer la compétence, le point de référence et la valeur de l'action principale, car la valeur des accessoires dépendent de la durer du procès donc elles ne peuvent être déterminées ni au debuit ni pendant le procès, car il sera incerte l'instance[3].

Par contre, si les revenues et intérêts sont sollicités pour un intervalle de temps antérieur de l'investissement de l'instance, le montant étant cert, elles peuvent être comptées et par cosequence, on peut déterminer la compétence.[4]

Lorsque le plaignait change en conformité avec l'article 132/code de procédure civile, l'action, en fonction du montant, l'instance va vérifier sa compétence, en tenant compte de la nouvelle valeur en rapport de laquelle elle va solutionner l'action où elle va décliner sa compétence.[5]

Si, la diminution de la valeur de l'objet soit la conséquence de l'exécution partielle de l'obligation de la part de l'accusée, il n'est pas justifié de décliner la compétence, tant que la litigation a eut une valeur déterminé au début par le plaignant, n'a pas été infirmé, l'instance étant donc légalement sesisee.[6]

La valeur totale des prétentions invoques par plusieurs plaignants demandant le montant de la part d'une seule accusée, mais pour des obligations résultant des rapports juridiques distinctes, ne justifient une addition et déterminer la compétence en rapport de la valeur totale. Pour la

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[1] V.M. Ciobanu, Traite théorique et pratique de procédure civile, Ed. National Bucarest 1997, volume I, page : 165 , note 78 y compris

[2] V.M. Ciobanu, œuvre cite, page : 410

[3] I. Mihuta, Répertoire de pratique juridique pour les années 1975-1980, Trib. Supr. Sec. Civ., Dec. Nr. 140/31.01.1978, page : 277, commentaire au point 5

[4] I. Mihuta, Problèmes de droit de la pratique du tribunal suprême, section civile dans la revue : Dreptul no. 9 /1993 page :48

[5] P.Perju, Synthèse théorique et pratique judiciaire des instances de la circonscription de la Court d'Appel de Suceava en matière de droit commercial, droit de travail, de la famille et contentieux administratif dans la revue : Dreptul no. 8/1994 page :69.

[6] Gh. Botea, I. Les et autres, Institutions de droit civil et droit processuel civil, Ed. Lumina Lex, Bucarest 2007, page : 304

même raison, ni dans le cas des demandes connexes, il n'est pas relevante la valeur totale, car chacune garde l'individualité.

A débattre en ce qui concerne la compétence de valeur, reste l'incidence de l'article 17 du code de procédure civile en conformité avec lequel « les demandes accessoires et incidentes sont pour l'instance compétente pour juger l'action principale »[1]. Dans une interprétation a laquelle on adere, de telles actions pourront être solutions par l'instance compétence a juger l'action principale même si du point de vue de la valeur de leur objet il ne sera de la compétence de cet instance.

Biensur, dans un règlement future, il sera possible de trouver une consécration législative pour certaines des solutions imposées par la nécessite de pratique judiciaire.

[1] V.M. Ciobanu, Ouvre cité, volume I, page : 179-180

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THE PROGRESS REGISTERED IN TIME IN THE LEGAL PROCEDURES OF DETERMINING THE CESSATION OF A NATURAL PERSON'S CAPACITY TO USE

Abstract

The court declaration of death is a legal institution and, from the time perspective, the means by which the court determines the ending of the capacity of usage of an individual when his/her death can't be ascertained directly based on a medical report.

The presence of this legal institution is found on a socio-legal necessity as to clarify the juridical situation of the missing person, which situation of death or life is not clear.

Clarifying the situation of a person is of major interest for both society and relatives or associated persons (his/her creditors and debtors, heirs)

1. The notion of a natural person's capacity to use

The capacity can be expressed scientifically, only by starting from the quality of subject of civil law. Such an approach to the problem is not only necessary but also useful to clarify the reason underlying the legal rules that define the legal status of persons as subjects of civil law.

Law addresses to people, regulating their conduct in the social relations. It sets out on their account, a complex of rights - specifying the conditions and the limitations under which they can be exercised - and it also imposes many obligations whose execution is ensured, if necessary, by force of coercion of the state. Therefore, each person manifests in the context of social life, as holder of rights and obligations, and it is generically named subject of law.

In such a quality - that the law recognizes to individuals, and in certain conditions also to organized groups of individuals - the people establish between them the most various social relationships, and some of these relationships, falling under the incidence of *legal* rules, become legal relations. Exercising rights legally recognized and executing obligations validly assumed happen in this type of relations [M. N. Costin, *Great institutions of the Romanian Civil Law*, volume II, Legal and natural person, Publishing House Dacia, Cluj-Napoca, 1984, p.7]

As a result, the quality of the subject is permanently doubled of that of legal subject. However, these concepts are and remain distinct one from another, each representing a specific condition of the one participating to

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the legal life: the subject of law is, by its specificity, a virtual participant, while the subject of the legal report is an effective participant.

The syntagm of natural person was enshrined in the science of law and in the legislation, receiving a more limited sense than that su ggested by its semantic content, aiming at the bio-psycho-social being, meaning at the man considered in his entire complexity as the philosophical anthropology deals with him. The law detained it, giving to it a specific meaning. In this area the man is seen only as a participant in social relations with legal value. The human participation in such social relationships such as those from the legal field is not random or casual, but it is necessary and it is continuously performing, as a way of manifesting the human substance [M. N. Costin, *op. cit*., 1984, p. 8]

The holder of civil rights and obligations is called subject of civil law and his vocation to participate to civil legal relationships finds its expression in the technical legal concept of *civil capacity*, or in other terms, it is found in the concept of *capacity of civil law*. Under our law, the subjects of civil law are divided into two categories: natural and legal persons, each category having its own legal regime.

The quality of holder of rights and obligations mean only the ability of the subject- natural person – legal person -to have rights and obligations, and generally, it is expressed by the concept of "*subject of law*". Similarly, the legal quality of the individual or of the community of people to have rights and obligations is generally expressed by the legal general concept of "*legal capacity*" or "*capacity of law*".

The law fixes the time of occurrence of the legal capacity, and its scope, the volume of rights and obligations which may form the content of a legal report.

In theory we encounter very different acceptations of the notions of capacity, as well as differentiated usages of the term in relation to branch of law or of juridical institution in a field or another (capacity to use and legal competence, electoral capacity, the ability to inherit, etc.).

The term of "*capacity*" is closely linked to the human person and to his personality. The human personality is a product of society and of its culture. In the sociological sense, it is considered that the personality determines the man's value, his capacity of action.

As possibility recognized by law to have rights and obligations in legal concrete relationships, the legal capacity appears as a prerequisite for the quality of the subject of law; in its absence, the participation of people or of their organizations in social relations regulated by law, would not be possible.

The legal capacity can be defined as the ability recognized by law to the subject of civil law, to have, generally, rights and obligations in various branches of law.

According to a definition generally shared by the specialized literature, the civil capacity represents *the ability - recognized by law - to be the holder of civil rights and obligations.*

On the basis of article 5 of Decree no. 31/1954, it is widely accepted in the specialized literature, that the structure of the civil capacity has two elements: the capacity to use and the exercise capacity. Article 5, paragraph 2 of Decree no. 31/1954 defines the capacity to use as "the capacity to have rights and obligations".

The capacity to use expresses the quality of subject of civil law, meaning its ability to be holder of rights and obligations.

In terms of terminology, the legislation, the doctrine and the jurisprudence use, frequently, the expression "capacity to use" for the natural person; for the legal person, the legislation uses the terms "legal personality" (Article 22 of Law no. 14/2003) and "the ability to have rights and obligations" (Article 33 of Decree no. 31/1954).

A component of the civil capacity is the capacity to use.

According to article 5 of Decree no. 31/1954, every natural person has the ability to use, stating in this way the fundamental legal principle according to which the quality of subject of law is recognized to any individual.

Paragraph 2 of the same article stipulates: *"The ability to use is the capacity to have rights and obligations"*. This is the potential state, from the legal point of view, of the natural person to acquire any subjective right, without any limitations.

In other words, the ability to use prefigures potentially all subjective rights which a natural person can acquire. This is not confused with the rights, but it expresses only a general and abstract ability, to acquire them [**I. C. Statescu**, *Civil Law. Natural Person. Legal Person. Real Rights*. Publishing House Didactica si Pedagogica, Bucharest, 1970, p. 22].

The quality of subject of law, considered generally, enables persons to participate in legal life, entering into various legal relationships, regardless of their legal nature.

When we do study the ability to use, as an expression of the quality of subject of civil law, we do not take into consideration the quality of subject of law in general, but the quality of subject of civil law.

In theory, the definition of the capacity to use was maintained around the legal provision, so that there are no substantial differences between the definitions formulated.

In the first form it is evaluated: "*The natural person's ability to use is that part of the civil capacity which consists of the general ability to acquire civil rights and obligations" [Otilia Calmuschi, Romanian Civil Law. Persons. Bucharest, 1992].*

Another formulation shows that: "the natural person's ability to use may be defined as part of the people's civil capacity, consisting of their ability to have civil rights and obligations" [E. Lupan, Civil law. Natural Person. Publishing House Lex, 1993, p. 20].

In formulating the most recent definition of the capacity to use, the author [Gh. Beleiu, Romanian Civil Law. Introduction in the civil law. Subjects of civil law. Publishing House Universul Juridic, Edition VII, revised and added by M. Nicolae and P. Trusca, Bucharest, 2001, p. 305-306] starts from the provisions of Decree no. 31/1954 regarding the natural and legal persons and from the content of the International Covenant on civil and political rights, ratified by Decree no. 212/1974, considering that in defining the ability to use of a natural person, it is mandatory the detention of three key elements:

- the natural person's ability to use *is part of the man's civil capacity*;
- the ability to use consists of *the man's ability to have rights and obligations*;
- these *rights* and *obligations* are civil, not rights and obligations in general, resulting from articles 1 and 2 of Decree no. 31/1954, which recognize to natural and legal persons legal subjective rights, not any rights.

Given these three elements, we can define the natural person's ability to use as a part of civil capacity which consists of the man's ability to have civil rights and obligations.

2. The date of cessation of the natural person's capacity to use

The natural person's capacity to use ceases with the cessation of the existence itself of that person (human being). According to the provisions of article 7, paragraph 1 of Decree no. 31/1954, "*The ability to use begins with the person's birth and ceases with his death*" [The natural person's death implies not only the cessation of the capacity to use and, respectively of the quality of subject of civil law, but the cessation of the ability of law (in general). In this sense, also the cessation of the procedural capacity because of the death of one of the parties, see December. no. 1146/1996, Court of Bucharest, Section IV of civil, in the Collection of legal practice from 1993 to 1997].

The Civil Code or other laws do not give a legal definition of death. Certainly it would be risky to impose a rigid legal definition of a problem which can not be solved solely by an individual diagnostic and for criteria are restored in question because of developments in science [O. Ungureanu, C. Jugastru, *Civil Law. Persons*. Ed 2, Publishing House Hamangiu, Bucharest, 2007, p. 74].

From this legal provision it results that the date (the moment) of the man's death is marking the end of its capacity to use, or in other words, of the quality of subject of civil law.

3. The cessation of the natural person's capacity to use

According to realities, the civil law regulates the manner of establishing the date of death for two possible hypotheses:

- the hypothesis of the death physically found, directly (through the examination of corpse), both in the case of death which has a natural cause, and in the case of death which has a violent cause;
- the hypothesis of the missing person, in which case the corpse examination is not possible, although the person's death is certain, or almost certain; this hypothesis is applied to the missing person and the legislature has created the institution of legally declaring the death.

For both hypotheses, the time of cessation of the natural person's ability to use coincides with the date of death.

As a concept, "the judicial declaration of death" is the legal institution and, in time, the legal means through which it is determined the end of the natural person's capacity to use when his death can not be found directly, being grounded on medical examination of the person.

The expression "judicial declaration of death" is used with two meanings:

In the first sense, the term designates the legal institution, meaning the rules forming the premises of the material (Articles 16 - 21 of Decree no. 31/1954 and art. 36 - 43 of Decree no. 32/1954 as rules of procedure).

A second meaning of the expression "judicial declaration of death" is the judicial means of determining the cessation of the ability to use for the assumption in which the physical, direct finding of death is not possible.

The existence of this legal institution is based on the social legal need to clarify the situation of the missing person, about whom no one knows whether he is alive or not.

Both the society and the people with whom the missing person had civil relations (the missing person's creditors and debtors: the presumptive heirs) are interested in clarifying the missing person' situation.

Removing the state of uncertainty involved by the missing person's situation supposes the unleashing of the legal mechanism of the judicial declaration of death.

The "judicial declaration of death" is regulated both by rules of material and substantial law, and by rules of procedural law.

According to article 40 of Decree no. 32/1954 "Declaring death by court order will be done in accordance with articles 36 – 38, including of this decree, which shall apply accordingly". The quoted text refers to provisions governing the procedure of judicial declaration of disappearance, provisions which are also applicable to the declaration of death.

After the procedure is done, art. 41 of the same act provides that: "The decision of declaring the death which remains final, will be communicated to the civil service". This registration is done through the preparation of the act of decease. To the column "date of death" from the decease register, the date determined in court as the date of death will be the one written down in the act.

The date of death is an essential and mandatory element of the declarative decision of death. The procedure of the court declaring the death takes place in order to reach, in the end, the determining of the date of death, in the decision, which marks the end of the missing person's ability to use.

According to the provisions of article 21 of Decree no. 31/1954 "In the case in which two or more persons died in the same circumstances, without being able to determine whether one survived the other, they are considered to have died at the same time".

Article 21, quoted above, regulates, what is called in the doctrine "the commorients". The expression of "commorients" comes from "co-mortals" or people who died in the same circumstances, without the possibility of determining whether one survived the other.

The legal situation called "commorient" has practical utility, especially in the successional spheres because the person who inherits must be alive at the time of the inheritance opening.

The proof of the moment of death can provide by any means of proof allowed by law. The case of the commorients is one of those cases where such evidence can not be provided. For this case, the legislature established the presumption of simultaneity or concomitance of the moment of death.

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KNOWLEDGE AND INNOVATION – THE ROAD TO COMPETITIVITY

Abstract

The central idea around which this essay is built is that knowledge, as an appreciating asset,intellectual capital and investment in education are becoming dominant realities in the new economics and knowledge-based society.

The first chapter underlines the importance of knowledge and intellectual capital as the main driven forces in the new millenium.

The nation's output depends not only on the number of hours people work ,but also on how productive those hours are.One of the important determinants of workers' productivity is educationBoth private and public returns to education are highlighted in the third chapter.

The implications of globalisation on the business world are of such nature that it is necessary for us to redefine the economic concepts and models,aspect which I've tried to focus on in the fourth chapter.

In the fifth chapter the attention is headed towards the new economies,which in the global civilisation are based on innovations and furthermore on technological development which leads towards a high level of competitivity and human devlopment.

More and more countries are interested in becoming knowledge-based societies,thus being more prepared to face the challenges of the new millenium.

Starting with 1998, OECD (the Organisation for Economic Cooperation and Development) and the World Bank cooperated in their activities to create economies based on knowledge, and were helped in their efforts by countries going through transition also.

In Carl Dahlman's opinion, manager of the Programme "Knowledge for Development inside the Institute of the World Bank": "To benefit from the knowledge revolution, concrete strategies that can satisfy the four pillars of the knowledge economy are necessary:

- an institutional and economic background that promotes the efficient use of knowledge;
- an educated population endowed to create and use knowledge;
- a dynamic information infrastructure;
- an efficient innovating system inside the the companies and the research centers that can satisfy the new needs of the population."

1. The knowledge-based society and the appearance of the intellectual capital

1.1 Knowledge – the main propelling force in the new millenium

The last decades have seen an expansion of the concept of "new economy" as a new type of approach concerning the economic science. A part of the economists think the modern economies are dynamic adapting systems rather than closed equilibrium systems, as it was thought for a long time. Some of these are Kenneth Arrow, winner of the Nobel Prize and one of the first promoters of the neo-classic modern model, and Brian Arthur of the Santa Fe Institute. Sometimes the *new economy* is known also as the *economic school from Santa Fe* because many of the economists preoccupied with complexity are affiliated to the center of interdisciplinary research in this institute. The complexity specific to the modern economy's environment determined some authors to plead for a new approach of the basic economy to a new dynamic adapting system. That's why sometimes the economists studying the new economy are also called complexity economists. These economists argue that economies are like the human biological systems, following the same fundamental laws. These laws will manifest differently in economy and in biology, but if we can improve the level of understanding them, we will gain from the possibility of getting closer, to a greater extent, to the functionning mechanism of markets and firms. The difference between approaching the equilibrium in the classic economy and in the new economy is presented in a suggestive way by **Ilya Prigogine**: "*The classic economy puts accent on stability and equilibrium. Today we notice the existence of instabilities, fluctuations and evolutionist tendancies that manifest themselves practically at all levels. We are in front of a universe much more complex and more structured than we could ever imagine. The end of this century is associated with the birth of a new vision on nature and science which brings the human being a little closer to nature, a science that makes from human inteligence and creativity an expression of a fundamental tendency in the universe. Thus new perspectives open up for the interdisciplinary research.*"

In the new economy and in the society of knowing the intangible goods such as knowledge and the management of information and knowledge become the new nucleus of competences. In profesor Quash's opinion, from the London School of Economics, we are in a world that puts accent on the economic value of the intangible goods. We are dealing with "cognitive domains" where ideas are worth billions, while the products cost less and less. In Peter Drucker's opinion, in the future there will be other succes factors: "the traditional production factors – the land, the labour and the capital – haven't disappeared. But they became secondary. Knowledge becomes the only resource truly relevant today." The new economy requires a rethinking of the production factors' theory. Knowledge becomes the essential component of the contemporary social

and economic development system. The spreading of inovations and convergence of the top technologies will play a key part in accelerating the importance of knowledge in the context of the process of globalisation."

The modern concepts of "e-economics" and electronic trade demand the appealing to a nucleus of competences where knowledge will be the main propelling force. The new economy means showing a greater interest to the so-called knowledge society, to hte employee who has knowledge, to the intelectual capital, as well as to the organisations that learn.

Knowledge has always been extreamly important, we aren't homo sapiens for nothing. Throughout history, victory has been to in the hands of those who used knowledge, being aware of its matchless potential: among these winners are the primitive warriors who learned to build iron weapons, the businessmen from the United States who, for a hundred years, are the beneficiaries of the best public schools system in the world, with an extremely well educated work force and, of course, the list can continue. But knowledge is much more important than before, because we are at the center of an economic revolution that gives birth to the Era of Information.

Knowledge, unlike labour, land and capital is an asset which gains value while used. The more used, the more effective and efficient the knowledge becomes. In Karl Erck Sveiby's opinion, in the new economy, knowledge has four characteristics: it is tacit/implicit; it is action-oriented; it is based on rules; it modifies constantly.

An organisation based on knowledge can give a new entrepreneurial vibe in an organisation and can motivate the top managers to be preoccupied with transforming the organisation so that it becomes capable of capturing, applying and developping value as a consequence of implementing some performing technologies. Knowledge and advanced technologies can transform in a significant way a nation's economy.

Knowledge and information are the thermonuclear, competitive weapons of nowadays.Knowledge is more powerful and more valuable than natural resources and big factories. Let's take for example Microsoft and Toyota which didn't become what they are today because they were wealthier than IBM and General Motors. On the contrary. But they had a much more precious thing than physical and financial assets, they had intellectual capital.

1.2 The appearance of the intellectual capital

The society of the third millenium disposes of employees who are valuable because of their knowledge. In many of these companies, value isn't found in the tangible assets, but in those intangible. The intellectual capital is the term attributed to the combined intangible assets that allow the company to work efficiently. The intellectual capital is the practice and the intuition of a team of chemists who discover a new drug worth millions of dollars, is the ability of workers to inovate in thousands of horse-power to improve the efficiency of a factory. It is the electronic network that transports information at the speed of light through a company, so that the answer is faster and prompter than that of the rivals. It is the colaboration between a company and its clients, the strong bond between them which brings back the client again and again. It is the power of the collective mind. It is very difficult to identify and even more difficult to use efficiently. But once we find and exploit it, we will surely win.

The components of the intellectual capital are:

- **The market assets** – are those deriving from a good relationship of the organisation with the market and the clients. The market assets reflect the potential of an organisation due to some intangible assets concerning the market. Examples can include: the clients and their degree of loyalty, the distribution channels, different contracts and agreements etc.
- **The assets based on intelectual property** – include the know-how, the commercial secrets, thr copyright, the patents, or other rights. The intellectual property represents the legal protection mechanism of several assets of the organisations.
- **The assets based on human resources** – reffer to the ability and creativity shown in solving problems, as well as to the leader, entrepreneur and manager qualities of the employees of an organisation. The individual is not abilitated to carry on a certain activity, on the contrary he has to prove he is a dynamic person, who can carry on a variety of activities in time. As they become more competitive in the activity carried on, people learn more and more and become more valuable.
- **The assets specific to infrastructure** – have in view those technologies, methods and processes allowing an organisation to work efficiently on long term. The examples include: the organisation's culture, the methods of management, the financial structure, the data bases and the information about the market or about the clients, the communication systems like the e-mail and the modern teleconference systems.

A hundred years ago labour was relatively cheap. In the third millenium labour stops being cheap. The assets based on human resource

with which an organisation has to operate will be rare and expensive. The amplifying of the importance of the intellectual capital reflects the increase of the dependancy of some organisations on the intangible assets. Every day new types of companies appear that have intangible assets. Their products are intangible and can be electronically distributed in the "virtual market space" via internet.

The organisation intensive from a point of view of media means and of knowledge, whose products are digital, are the organsations of the third millenium. The world has changed again and new means of monitoring and managing these organisations that reflect these changes must be found. The people of the third millenium rely more and more on knowledge. They want to understand the organisation's objectives and to know their role in the organisation.

In the third millenium the organisation from Romania must place the accent on encouraging the personnel's involvement by showing consideration to the contribution of an individual inside an organisation. There are several ways to try to increase the potential and the obvious value of the people in an organisation. The modern forms of investing in education are especially recommended: training, professionalised and specialised qualifications, activities about knowledge as well as forming some components concerning the carrying on of some activities. As the labour force becomes more and more global", the valuable employers and employees invest in themselves more and more. This can contribute to the protection and the increase of the components' nucleus. The so-called analysts of knowledge are more and more requested to work with the individuals of an organisation to identify the key assets for knowledge. To permit the increase in the people's power it is necessary to measure the assets based on the human resource. Knowledge is power and profit.

Each country, company and individual depend more and more on knowledge: patents, abilities, technologies, information on clients. Even Pope John Paul the 2nd acknoledged the increasing importance of knowledge in the "Centessimus Annus", by writing: " if some time ago the decisive production factor was the land, and later the capital, nowadays the decisive factor is the human being himself, the human being and his knowledge."

The spreading of the intellectual capital can be reached in the third millenium if innovation and creativity are ubiquitous in an organisation. The feeling of succes is expressed and the need of a permanent mutation and change is felt.

The true "heroes" of an organisation are those excelling and thus helping his organisation to be a winner in competition and to develop in

the long run. This means also the creation of a culture of the organisation which promotes and supports the innovation process. There is a direct relationship between the extent to which an organisation proves to be innovating and its ability to expand its intellectual capital. The extent to which a company is innovating is also a measure of its surviving force.

2. The Investment in Education

3.1 The private benefits of the investment in education

The empolyees don't lose their value. Their value for the organisation, when they are understood and appreciated, is incomparable." David Decenzo

Managers all around the world make decisions on investing the capital. They weigh things carefully before making a decision and analyse every alternative and opportunity to acquire assets. Let's take for example the buying of a car. They think which one is best and which one would bring the most benefits. In the end, they will invest tens or maybe hundreds of thousand of dollars for that car.

For the managers to appreciate the employees at their just value, it is necessary for these to have a proper education. A person's level of education affects the level of his earnings, as there is a direct proportionality relationship between them. The more profound the studies of a person, the better this person is prepared to absorb the new information and to familiarise with the new technologies, thus their earnings are considerably greater.

The education a person receives has strong implications on his work place. In his book "Studies on the Human Capital", Jacob Mincer specifies:"the educated employees have at least two advantages in comparison with the less educated, among which are: bigger wages and a bigger stability at his work place."

Another aspect worth mentionning and closely related to education is represented by the quality of our lives. The persons with a higher level of education tend to have a better healh than those with lower level of education, the former making an investment in themselves, which they protect by taking preventive measures.

2.2 The public benefits of the investment in education

Economists have been interested in the economic growth the moment Adam Smith elaborated his study on the nations' riches.

The education's contribution to the economic growth is done through two mechanisms. The first and the most known is the creation of new knowledge, also known as the "Schumpeteriana growth". The much more educated persons will later become scientists and investors working to contribute to the growth of the human intelligence stock by developping new processes and technologies. So we arrive at the second mechanism through which education affects the economic growth by transmitting knowledge and information. The schools ensure the level of education necessary to understand the new information, and at this chapter Romania is among the first countries, in my opinion. The rising of the educational level facilitated greatly the process of inovation, that took place in the computers' industry, for example if there hadn't been for the schools to teach the pupils and the students how to use these new applications, the innovation's effect would have been much diminished.

Education transforms people, they become better citizens, better mothers, fathers and children. In his study "Capitalism and Freedom", written in 1962, the winner of the Nobel Prize Milton Friedman describes some of the effects associated with education: " a stable democratic society can't exist without a minimal degree of studying and knowledge by its citizens and without the acceptance of a common set of values. Education can contribute to both."

3. The Knowledge Economy and the Competitive Advantage

The implications of globalisation on the business world demand a redefining of the concepts and of the economic models.

Today the accent is placed on flexible, agile enough organisations that need specialists who work together in teams. Such teams are suggestively called multi-functional teams. We thus move from the world of narrow specialisations towards the world of teams and especially the world of inter-functional teams underlining not only the product's quality, but also that of those making decisions in the business world. The inter and multi-functional teams consist of members having different qualifications and competences. And this fact is full of meanings in the new economy and in the knowledge society. Here is a new provocation Romania has to accept, a condition it must satisfy in its process of transition towards a knowledge society. The work teams also require other organising structures than the pyramidal structures specific to the traditional organisation based on hierarchies and the division of labour. A horizontal structure facilitates the labour organisation around production processes which unify the clients' needs and not around the functions and duties that

need to be fulfilled. Career directions favour those who can practice several professions and who show real qualities for working in a group and for continuous improvement. The remodeling and the reconfiguration of the new business world has a considerable impact on some of the key economic concepts and models, which implies:

- introducing multi and inter-functional teams;
- adopting horizontal structures and removing hierarchies;
- re-engineering processes.

The accent was moved from organising labour as a traditional production factor based on the division of labour, towards organising people in teams and towards identifying and developping the career and competences management. Experience proved that dynamic performing teams can be more efficient in an environment dominated by change than the big organisations individually or the singular persons.

The new economy must take into consideration such an approach and incorporate these new concepts into the economic sciencs discipline. Many of the performing modern organisations transform and are no longer interested exclusively in maximising profits, but they look to maintain themselves in the business area, in competition with other performing organisations. Some organisations transformed and eliminated the formal structures, especially the pyramidal structures. The personnel of such organisations is no longer interested in having a job that formally takes place at the same office; such persons simultaneously attend to several work places; the accent is no longer placed on the traditional specifications of a certain duty in a work place or on a rigid programme, strictly respecting certain hours.

The competitive organisations think individuals become much more interested in the activities that challenge them to manifest their creativity and inventiveness, bringing them satisfaction; such individuals show less interest in a certain formal socio-professional statute or in detaining certain titles with social resonance.

The economic and technological convergence generated by globalisation changes and will continue to change the manner in which wealth is created both at a national level and at a transnational level. To facilitate the effective spreading of knowledge and innovation, an important information-based structure is developping more and more. Amplifying the convergence will have a significant impact on the economic bases of all countries implicated in or affected by the process of globalisation. Globalisation considerably modifies the manner in which business is conducted and accelerates the spreading of the "know-how" and of the innovation.

From this point of view organisations must become more and more competitive. This makes it necessary to reformulate the principle of the comparative advantage by appealing to a concept much more suggestive in the context of the new economy and of the knowledge society, that of the competitive advantage.

The main factors allowing Romania to become innovating have in view:

- **Consistent investments** as size order in education in general and in the superior level education in particular;
- **A quality technological and information-related basis**;
- **High levels of Goverment spendings on research and development**;
- **Efficient laws to protect the intellectual property to sustain the research-development activity.**

4. The Knowledge Economy, the Technological Process and the Human Development

In the global civilisation, the new economies based on innovations have as a main component the technological development which leads to a high level of competitiveness and to human development. The technological progress is essential for the human progress. The digital, genetic, molecular innovations open up new perspectives and "break the frontiers" related to the way people can use technologies to extend their knowledge, by stimulating growth and development. The new technologies spread both between different countries, and inside them. The technological innovations affect the human development. The human development and the technological progress are supporting, intensifying and propelling one another:

- The technological innovations can improve the human potential and abilities;
- The technological innovations are a means of ensuring the human development;
- The human development is an important means of sustaining the technological development.

The analysis of the Human Development Index in the countries in transition offers new results. So, even if it is placed last, compared to the value of the human development index among the seven countries in transition grouped as states with a medium value of the HDI, Romania recorded during 1990 and 1998 the lowest negative value in the modification of the human development index.

In Gerardo Berthrin's opinion, author of the **National Human Development Report, Romania 2000**, "... the synergy and the articulation of these three dimensions will ensure favourable premises so that the Government's actions lead to Romania's acceptance as a EU member and to the ensurance of a human development on the long term."

The analysis of the tendencies recorded in the evolution of the human development index in Romania during 1995 and 1999 proves that there are some evolution tendencies of the three components of the HDI in less synchronized directions:

- The medium life expectancy at birth reduced starting with 1995 up to 1997, then it began to grow reaching a 69,7 years level in 1999.
- The last five analysed years the level of liquidation of illiteracy among adults remained relatively constant, registering a slight growth after 1998 up to 97,2%;
- On the whole, the situation of the development index on the educational system in Romania improved.

The knowledge society, in general and the knowledge economy in particular lead, according to some authors, even to the modification of rules specific to the traditional economic development: "...Societies or regions can evolve from economies with a strong agrarian character towards knowledge economies without necessarily going through an industrialisation phase."

A society based on cultural diversity has to invest strongly in education, in health protection and in other programmes with social character. The key-principle that has to reign in modern societies over the investment policies, public or private should be that of of allowing and favouring a special investment in the human and social capital. This principle can be applied and linked to the systems that ensure prosperity and life quality as well as to other aspects of the social-economic development. The traditionally understood prosperity, based on the transferable payment system, on bureaucratic services and on the so-called social engineering, must give way to the new approach about the active prosperity, the continuous education and the development of systems which ensure life quality by appealing to a set of priority investment programmes, like those concerning the investment in education.

Education and implicitly the investment in education must become key components for the ensurance of an authentic human development on the long term.

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THE SETTLEMENT OF BUSINESS DISPUTES TROUGH ADR METHODS

Abstract

During the past years, alternative dispute resolution – ADR – has become increasingly topical in the international business community.

The increased interest in ADR can be interpreted as a response to negative factors attributed to litigation, such as length and cost of legal proceedings.

ADR may be described as a structured negotiation process during which the parties in dispute are assisted by a third person (the neutral) and that is focused on enabling the parties to reach a result whereby they can put an end to their differences on a voluntary basis.

ADR process can only be commenced if all parties agree to this effect. An agreement to initiate ADR process may arise from a clause in the contract between the parties or from an agreement into after the dispute has emerged. The inobservance of this clause was differently ratified by the various legal systems.

The International Chamber of Commerce has promoted the rules to govern these proceedings that became the model for all the institutions referring to ADR techniques.

Introduction

As people have become more aware of their legal rights, and consequently more litigious, and different areas of litigation have opened to potential disputants, the increased caseload faced by the courts has resulted in long delays and exaggerated costs. It is no wonder, therefore, that speedier and less expensive methods of dispute resolution have been devised to combat this situation. In recent years, a number of alternatives to this traditional method of dealing with conflicts have developed.

Alternative dispute resolution (usually referred to by acronym ADR) is the focus of growing interest in the world, and particularly the international business world.

The reason for ADR being considered by the business community as an increasingly attractive complement to litigation is that there are many situations today where the true object of a commercial dispute is not adequately resolved by a court ruling or an arbitral award[2].

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[2] The interest in having the matter resolved may dissolve with the passage of the time necessary to try the case before a court or an arbitral tribunal; monetary relief

1. The term ADR

Obviously, ADR is in vogue. Although used with increasing frequency, the abbreviation is understood in different ways, the common feature being that it is always used to point a contrast with another method of dispute settlement.

ADR is commonly interpreted as meaning all *alternative* methods of resolving disputes. In other words, it is contrasted with the traditional method available to any individual wishing to assert his or her rights[1]. From this perspective, arbitration belongs amongst the alternative methods of resolving disputes. Arbitration can only be used if the parties have made a special agreement (arbitration clause or submission agreement) providing for the resolution of disputes by one or more individuals (arbitrators) chosen for their particular skills. In this case, the procedure has a contractual rather than a statutory basis[2].

The letter "A" does not only refer to one word, "alternative", but to several words which carry different meanings[3].

ADR refers also to so-called "amicable" methods of resolving disputes. As such, it contrasts not only with litigation but also with arbitration. If a dispute is decided by a judgment or an award, this is an imposed solution to the dispute handed down by a court or an arbitral tribunal. More often than not, the decision is enforceable. In contrast, all other proceedings are in principle of an "amicable" nature, in that a third party to whom the parties have recourse does not render a decision which is enforceable by a process of execution, but simply helps the parties to find or agree to a mutually acceptable solution of a strictly contractual nature[4].

In short, ADR lies between two types of dispute resolution-those leading to a binding decision and those of a contractual nature in which the

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may be inadequate; the solution received from a court or arbitral tribunal - though legally correct - may simply miss the point of restoring the commercial relationship from which the dispute arises.

[1] The statutory procedures leading to a judgment rendered by a court.

[2] For more details, see Pierre Tercier, *Foreword*, in J.C. Goldsmith, G.H. Pointon, A. Ingen-Housz, *ADR in Business. Practice and issues across countries and cultures,* Kluwer Law International, The Netherlands, 2006.

[3] "A" sometimes refers to "additional" or to "amicable"; The ICC has chosen to refer to ADR as "Amicable Dispute Resolution" when issuing its ICC ADR Rules. In addition the friendly, non-adversarial and voluntary nature of ADR is underlined.

[4] See Pierre Tercier, *op.cit*.

parties negotiate with a view to settling without seeking the assistance of a third party.

ADR may be described as a structured negotiation process during which the parties in dispute are assisted by one or more third person(s), the 'Neutral', and that is focused on enabling the parties to reach a result whereby they can put an end to their differences on a voluntary basis[1]. In ADR proceedings, the parties call upon a third party not for a decision, but for assistance in reaching an agreement.

The involvement of the Neutral and the added value that (s)he confers, is one of the key features that distinguishes ADR from settlement negotiations, familiar to most business people and lawyers.

2. Alternative Dispute Resolution compared with Litigation and Arbitration

In many situations, negotiated settlement may simply not be possible[2]. There are some circumstances in which an order made by a national court may be the only realistic option. One of the parties may have no interest in settling or may even have an interest not to settle. The relationship between the parties may have so deteriorated as to make settlement impossible. In addition, the parties may prefer to have a decision that definitively determines their rights and liabilities under applicable law rather than pursuing negotiations.

In those and other cases, litigation or arbitration would be a more appropriate dispute resolution tool than ADR.

In other circumstances, however, ADR is a sensible and practical option that has much to offer as a dispute resolution process. Thus, it is important to notice the main differences between those methods and the court procedures and arbitration.

Litigation has a fundamental, indispensable and irreplaceable role in all societies. This is the "natural" method, which should be available to each and every person[3].

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[1] See Carita Wallgren, *ADR and Business*, in J.C. Goldsmith, G.H. Pointon, A. Ingen-Housz, *op.cit.*, p. 6

[2] In some cases, the parties in dispute may need a resolution of greater legal force than an agreement, for example, because the dispute or important aspects thereof, concerns or affects rights in general or has other ramifications on their operations. Sometimes an enforceable solution is required or a legal precedent needs to be set.

[3] See Pierre Tercier, *op.cit*.

There is usually a court to which one can turn an established procedure and, in most cases, a means of appeal if one is not satisfied with the initial decision. All these features are found in commercial proceedings, be they domestic or international.

Also, it is nowadays increasingly unlikely that a party to a contract would agree to give jurisdiction over disputes to the courts in the other party's country.

The jurisdiction of a national court is determined by the applicable procedural rules, and if the court finds that a respondent which is an individual or corporate body is subject to its competence, the respondent will be obliged to defend its legal rights before such court or risk judgment being given in default.

It is an undeniable fact that they are sometimes unable to meet the needs of commerce and especially international commerce.

Arbitration provides an answer to most of the shortcomings of which litigation is accused because it is based on contract and requires that the parties have agreed to submit their dispute to the jurisdiction of an arbitral tribunal. If the parties have not entered into an arbitration agreement applicable to the dispute in question, the arbitral tribunal is not competent to decide it.

On the other hand, if the parties have entered into an arbitration agreement applicable to the specific dispute, the respondent will be obliged to defend its legal rights before the arbitral tribunal as it would before a court or risk an award being made without its participation.

ADR is also based on contract which provides that the parties in dispute agree to involve a Neutral, whose powers are derived from the parties' contract and have no direct link with a State court other than by way of the place where they sit, and then with limited effect.

Disputes are not handled by judges appointed by the State, but by arbitrators freely chosen by the parties on the basis of trust. The arbitrators have the special knowledge necessary for applying international commercial law, they are familiar with the rules and the spirit of that law, and they have the time needed to handle all the intricacies of the case.

The award rendered at the end cannot, as a rule, be reviewed by the courts. It will be enforceable in the same way as judgments or even more easily so, given the fact that most States have adopted the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958[1] (the New York Convention)[1].

[1] The ultimate object of referring a dispute to international commercial arbitration is the enforcement of the award made by the Arbitral Tribunal. The United Nations

However, it cannot de denied that international arbitration has become the target of serious criticism. The proceedings are said to be too long, too complicated, sometimes risky and above all too expensive.

ADR in its various forms-the most familiar being mediation and conciliation-is a consensual process which offers an answer to some of the criticisms directed at arbitration: it is clearly less expensive, usually quicker, and is capable of giving both parties some degree of satisfaction. ADR is a voluntary and non-legalistic process, as it is not focused on determining the parties' legal rights, but on identifying a basis on which the parties may be willing to settle their dispute voluntarily. Consequently, ADR processes do not necessarily require the involvement of lawyers (though some form of lawyer involvement may be desirable).

This also means that a dispute subject to ADR can be resolved as soon as the parties are ready to settle, and that the settlement need not mirror the parties' legal rights. In an ADR process, no clear winner is expected - or desired - to emerge, the essence being that both parties should feel that they have gained something and at the same time avoided the procedural risks, costs and possible negative publicity related to the institution of legal or arbitral proceedings.

It is often said that ADR brings the dispute closer to the parties, that they become the "owners" of the proceedings instead of being the subject of a dispute processed by intermediaries[2].

It has to be recognized, however, that the parties do not end up with a decision enforceable by a process of execution, but with a contract, which, if not performed spontaneously, can only be enforced through litigation or arbitration. It also has to be recognized that the result is by no means guaranteed, as a party is under no obligation to accept the proposals put to

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Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is intended to provide for the mutual recognition and enforcement of arbitral awards made in countries that are parties to the Convention. Although the Convention, adopted by diplomatic conference on 10 June 1958, was prepared by the United Nations prior to the establishment of UNCITRAL, promotion of the Convention is an integral part of the Commission's programme of work. The Convention is widely recognized as a foundation instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions. The Convention entered into force on 7 June 1959.

[1] For details see Anthony Connerty, *A Manual of International Dispute Resolution*, Commonwealth Secretariat, 2006, p. 16.

[2] See Carita Wallgren, *op.cit.*, p. 9.

it. In this case, far from being shorter or simpler, the procedure will become longer and more cumbersome. However, even where the ADR process does not lead to a settlement, the parties have not necessarily wasted their time and money. Depending on the point they have reached, any subsequent proceedings before an arbitral tribunal or a court may become more focused, and the matters in dispute more refined, after an ADR process. Conversely, an ADR process may be more fruitful where the object of the dispute has already crystallized through court or arbitral proceedings.

It is clear, therefore, that ADR has become an essential practice, different and independent from, but complementary and in no way contradictory to, arbitration.

3. ADR Clauses

An ADR procedure cannot be commenced without an agreement of all the parties. This agreement may arise from a clause[1] in the contract between the parties or from an agreement entered into after the dispute has emerged.

ADR may be contractually envisaged either as an option[2]or as an obligation[3]. Even if the ADR clause is formulated as an obligation to submit a dispute to ADR, participation in the ADR process will nevertheless remain voluntary[4].

The dispute resolution clause may also be formulated as a "two- or multi-tier clause"[5].

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[1] The institutions providing ADR and/or arbitration services suggest a variety of standard clauses that may be inserted as such, or used as inspiration for a tailor-made clause. The standard clauses are.usually to be found on the respective institutions'website. See for example the suggested ICC ADR Rules: http://www.uscib.org/index.asp?documentID=3262.

[2] The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with Institute X's ADR rules

[3] The parties agree to submit any dispute arising out of or in connection with the present contract to Institute X's ADR rules. If the dispute has not been settled pursuant to said rules (within a certain period of time), the parties shall have no further obligation under this paragraph.

[4] It will depend on the parties' will at the relevant point of time

[5] Obliging the parties to try to first resolve their differences by negotiation, and if this fails, obliging them to submit their dispute to ADR followed by arbitration or court proceedings

The ADR clauses run from a purely optional ADR clause, recognizing the possibility of submitting to ADR, to mandatory clauses requiring disputes to be so submitted.

The above examples are only intended as illustrations of possible ADR/arbitration clauses. Specific circumstances and requirements of each business relationship should obviously dictate their respective contents.

It is therefore important to evaluate carefully the advantages and disadvantages of including an ADR clause in the contract or waiting until a dispute arises.

ADR raises serious legal questions with regards to the clauses providing recourse to ADR[1], the problem of prescription (or limitation period), the requirement for confidentiality, the validity of consents, the effectiveness of agreements arising from ADR, as well as the training of neutrals, their accreditation, and their liability.

4. Prerequisites for a successful ADR process

As already stated, all ADR-processes are characterized by the involvement of one or several third person(s), the Neutral. The main task of the Neutral in most ADR processes is to assist the parties in gradually refocusing from what has happened in the past (and cannot be undone) to reshaping their future by seeking creative solutions which reflect their business interests[2].

The success of an ADR-process depends on the abilities of the Neutral, in particular on his or her human and professional qualities. These are also needed to create an atmosphere of trust in the process and in the possibility of it leading to a constructive outcome.

It is also crucial, for the success of the process, that the parties believe that they can trust the Neutral. Thus, a crucial element in this context is confidentiality. With ADR, it is much easier to preserve confidentiality of the dispute, the discussions and the outcome reached. ADR undoubtedly offers better protection in terms of confidentiality

[1] In French law (the Decision of the French Court – the Upper Bench from 14 February 2003), a clause in which parties had specified that recourse to ADR is mandatory (the allusion was done to the conciliation procedure as an alternative dispute resolution) had as effect the rejection of the action addressed to the court or the arbitral tribunal with her ignorance as inadmissible. For details, see X. Lagarde, *Droit processuel et les moyens alternatifs de reglement des litiges*, in P. Chevalier, Y. Desdevises, Ph., Milburn, *Les modes alternatifs de règlement des litiges: les voies nouvelles d'une autre justice,* La documentation francaise, Paris, 2003.

[2] See Carita Wallgren, *op.cit.*, p. 12.

because the parties have total control over the institution and conduct of the procedure[1].

Because at present, no international rules exist regarding the confidentiality of information exchanges in ADR, proper precautions should be taken by drawing up a detailed confidentiality agreement.

In order to be effective, all ADR processes, in addition to a skilful Neutral, require that the parties be willing to commit themselves fully to the process and provide the Neutral with relevant information. With respect to timing (the point in time at which to institute an ADR-process), obviously no universal answer can be given.

As a process, ADR may be initiated whenever the parties are ready.

ADR need not always be the first stage in resolving a dispute. It may very well be that in order to make its opponent react and respond to a claim, a party will need to institute court or arbitral proceedings, or at least assert that it intends to do so. It may also be that the parties realize only during the course, or even after the close, of arbitral proceedings that it is worthwhile making an attempt to settle the dispute, or at least one or more aspects thereof, through ADR.

In practice, certain ADR techniques are already used alongside proceedings before a court or an arbitral tribunal to complement and assist settlement negotiations between the parties and/or their counsel. There are some situations where parties are put under a legal obligation to have recourse to ADR mechanisms[2].

What it is really important is that the parties approach each agreement by trying to foresee the kinds of issues and disputes that may emerge for a business agreement. This will allow the parties to provide for and make early use of the dispute resolution device that is most likely to produce the best result from an overall commercial point of view in each situation. It is well known that settlements which are made at a late rather than early stage incur greater costs.

If the ADR process does result in a settlement, it will be binding upon the parties as a contractual obligation only. Thus, if one party does

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[1] See Jean Francois Guillemin, *Reasons for Choosing Alternative Dispute Resolution*, in J.C.Goldsmith, G. H. Pointon, A. I. Housz, *op.cit.*, p. 36.

[2] In many states of America, the courts may order a mediation procedure. In Great Britain, the courts can put strong pressure on both sides to accept mediation, and will issue a warning that a party which refuses to do so will be ordered to bear the costs. Although not so robust as these methods, a common legal practice, particularly in France, is for the courts to recommend mediation, which is often so forceful that neither side dare refuse.

not perform its obligations under the settlement agreement, the other will not be able to enforce its corresponding rights immediately, but will be obliged to initiate proceedings before; a national court or an arbitral tribunal, as appropriate, in order to have its contractual rights under the settlement confirmed, and only then will it have the right to seek forcible execution.

5. International legislation dealing with ADR

At present, no international ADR rules of general application exist. However, some legislative initiatives at an international level have been stated.

Thus, The United Nations Commission on International Trade Law (UNCITRAL)[1], however, adopted a Model Law on International Commercial Conciliation in 2002 and recommended that all states consider enacting national legislation on this basis in view of the perceived desirability of creating a uniform legislative framework for the application of conciliatory settlement procedures in international commercial disputes.

This model law is a product similar to the Model Law on International Commercial Arbitration and it is to be hoped that it will enjoy similar success in the development of an international culture of mediation. The model law makes it clear that it should be interpreted in light of its international origins, as well as the need to promote uniform application and respect for good faith. It is also clear that the issues that fall under the model law's scope but that it not specifically address are to be dealt with according to the general principles from which the model law stems.

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[1] The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 (Resolution 2205 (XXI) of 17 December 1966. In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles. The General Assembly gave the Commission the general mandate to further the progressive harmonization and unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law. The Commission is composed of sixty member States elected by the General Assembly. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years. For more details, see: http://www.uncitral.org/uncitral/en/about/origin.html.

The model law specifies that it covers any procedure, whether it bears the name of conciliation, of mediation or an equivalent name, in which the parties ask a third party to help them in their efforts to reach the amicable resolution of a dispute arising from legal, contractual or other relations, or linked to such relations. The conciliator does not have the power to impose a solution to the dispute on the parties. It is also stated that it applies irrespective of the basis on which conciliation is being conducted, including an agreement between the parties concluded before or after the occurrence of a dispute, a legal obligation, or pursuant to the requirement or suggestion of a State court, an arbitral tribunal or a competent public entity. On the other hand, the model law does not apply to cases in which a judge or an arbitrator during court or arbitral proceedings is trying to facilitate settlement.

The law contains provisions concerning important legal questions that may arise within the framework of mediation. It contains provisions dealing notably with the beginning of the conciliation procedure, the number and the appointment of the conciliators, the conduct of the conciliation, communication between the conciliator and the parties, disclosure of information, confidentiality, admissibility of elements of proof in other proceedings, the end of the conciliation procedure, med-arb, *lis pendens* and the enforceability of the agreement arising from conciliation. The Commission also suggests that States should adopt a section that provides for the interruption of the prescription (or limitation period) when conciliation begins and for its resumption in the event of failure[1].

In 2002 the European Commission presented a Green Paper on Alternative Dispute Resolution in Civil and Commercial Law (the 'Green Paper'). In the Green Paper, the European Commission took stock of the then-current legal framework of ADR within the European Union and invited the member states and all other interested parties to participate in discussions concerning the development of ADR processes by responding to certain questions which it had raised in the Green Paper.

Conventional ADR mechanisms do not fall under any particular set of regulations in Member States. They are based on the general principles of contractual law, the law of civil procedure and private international law. Depending on Member States, contractual practice and the neutrals' ethical rules are more or less developed in the field of ADR. However certain principles common to all procedures can be discerned.

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[1] For details, see Nabil N. Antaki, *Cultural Diversity and ADR Procedures in the World*, in J.C. Goldsmith, G.H. Pointon, A. Ingen-Housz, *op.cit.*, p. 299-301.

The parties in conflict are free to have recourse to ADR or not, as they see fit. They choose by themselves how to organize the procedure, relying on the neutral's impartiality and the fairness of the process. This neutral must respect the principle of confidentiality. Member States are particularly keen for these principles to be presented in the form of minimal procedural guarantees.

The Commission is particularly aware of the legal questions raised by trans-border disputes, which are marked even more than domestic disputes by the slowness and expense of the procedures involved. Indeed, the complexity of relations and transactions within an ever-growing common market necessarily increases the quantity of judicial recourses. The practical problems of court overload are compounded by the often-complicated questions of conflicts of laws and of jurisdictions as well as by practical difficulties of a linguistic and financial nature.

In light of the comments received and subsequent discussion in the European Parliament, a European Code for Mediators (the 'Code of Conduct') was developed by a group of stakeholders with the assistance of the European Commission and launched in 2004. The purpose of the Code of Conduct is to improve the quality of and trust in mediation. To that end, the code sets out a number of principles to which individual mediators can voluntarily decide to commit, on their own responsibility. It covers various issues, ranging from basics, such as independence and appointment of mediators, to the more debatable topics of procedure and confidentiality.

The Code of Conduct is intended to apply to mediation in civil and commercial matters. Organizations providing mediation services can also apply the code of conduct by requiring mediators acting under the auspices of their organization to respect the code. Adherence to the code is without prejudice to national legislation or rules regulating individual professions[1].

In 2008 the European Parliament enacted a Directive (Directive 2008/52/EC)[2] to encourage the use of mediation in civil and commercial matters, and to make uniform throughout the European Union the legal status of certain attributes of that practice. The Directive culminated a ten-year process that occasioned each member state within the European community to consider the role of mediation in commercial affairs, and to take a position on the minimum requirements of the use of commercial mediation throughout the region.

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[1] For details, see Carita Wallgren, *op.cit.*, p. 16-17.

[2] The text of the Directive is available on-line: http://www.arbitration-adr.org/mater/Directive%202008-52-EC_en.pdf.

The Directive is intended to provide a predictable and clear legal framework, while at the same time safeguarding the flexibility and informal nature of the mediation process.

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THE PENAL RESPONSIBILITY OF THE NOTARY PUBLIC

Abstract

The notaries represent, along with the attorney and the legal adviser, a justice partner, a „magistrate" in issues of non-disputed claims.

The notary status constitutes the main originality of an institution that lies at half way between the public function and the liberal profession: the notary is a public officer, that does not need be a clerk, but the holder of a liberal profession, without being released from the state trusteeship. The breach from the state cannot be complete, considering that the notary is „a public officer having received a delegation of authority from the state, in order to confer the authenticity character to the documents issued, being liable for the preservation, the proof exertion and the executory exertion of the above-mentioned documents". On these grounds, the notary public is appointed by the Ministry of Justice, submitted to the state control and accountable for obligations specific to the public services.

The current regulation does not benefit from particular provisions on the penal responsibility of the notary public. Considering the lack of derogatory norms from the common law, the general regulations included in the penal legislation will be applied.

The manner we chose to draw up an analysis of the infringements which may be committed by the notary public is the one in which the order is given by the Penal Code and the dedicated special laws. The first to draw our attention are the infringements included in the Penal Code, whose order is given by the titles that the infringements are part of. The acts qualified as infringements by special laws, will be analyzed subsequently to those included in the Penal Code and their order of description is chronologically decreasing, according to the year of adoption the normative act of interest.

1. The notaries represent, along with the attorney and the legal adviser, a justice partner, a „magistrate" in issues of non-disputed claims.

The notary status constitutes the main originality of an institution that lies at half way between the public function and the liberal profession: the notary is a public officer that does not need to be a clerk, but the holder of a liberal profession, without being released from the state trusteeship[1]. The breach from the state cannot be complete, considering that the notary is „a public officer having received a delegation of authority from the state, in order to confer the authenticity character to the documents issued, being liable for the preservation, the proof exertion and the executory exertion of

[1] Fl. Măgureanu – *Organization of judicial system*, „Universul Juridic" Printing House , Bucharest , 2006, p.377

the above-mentioned documents"[1]. On these grounds, the notary public is appointed by the Ministry of Justice, submitted to the state control and accountable for obligations specific to the public services.

As per the public authority delegated to the notaries in the discharge of their duty, this is an undisputed generator of legal safety. The legal safety, which is the main added value to the notary function in the broader context of the preventive justice, leads to reestablishing the preventive justice, to reestablishing the climate of trust and also to the economic safety[2].

Law no. 36/1995, with the last modification and completions[3], contains designedly provisions with view to the *disciplinary responsibility*[4] of the notary public. Similarly, it contains brief dispositions regarding the incidence of the civil responsibility.[5] The present regulating act does not benefit from particular provisions on the *penal responsibility* of the notary public. Such juridical norms were not even necessary[6]. Considering the lack of derogatory norms from the common law, the general regulations included in the penal legislation will be applied. Any law infringements can lead to the discharge of the notaries once they receive a penal conviction[7].

The specialized juridical literature has tackled on the issue of knowing if the notary public may be the subject of certain infringements while being in exercise or in relation to his exercise (negligence or abuse

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[1] A significant definition of the notary public given by the deontologic Code of the notaries public of the European Union, adopted unanimously by the member Notary Offices on March, 22-23 1990, in Madrid.

[2] R.Rădoi , UNNPR representative in Brussels – The place of the notary in Europe, http://www.uniuneanotarilor.ro

[3] Law no.36 of May 12 1995 – the Law of the notaries public and of the notarial activity was published in the Official Gazette no. 92 of May 16 1995. The last modification has been introduced by the Emergency Ordinance no. 166/2008.

[4] Art.39-41 of th Law no.36 of May 12 1995

[5] As per the art. 38 align.1 of the Law no.36 of May 12 1995, the civil responsibility of the notary public may be engaged, under the civil law conditions, for the infringements of his professional responsibility, when causing a prejudice, whereas align.2 states that: ,,ensuring the professional responsibility of the notary public is performed by the Ensurance House, established for this purpose".

[6] I. Leş- Notarial Law Manual, C.H.Beck Printing House, Bucharest, 2008, p.44

[7] Art. 23 align. (1) let. f) of the Law no. 36/1995 stipulates: ,,The quality of notary public ceases (…)f) in case of ultimate conviction for commiting a serious offence on purpose which brings prejudice to the prestige of the profesion;"

while on duty)[1] or active subject of other sorts of infringements which denounces the public clerk quality of the person infringing the law.

A fist opinion claims that the notary public can become an active subject of such infringements, considering that this person fulfills a public service, acquiring thus the quality of public clerk[2]. Assimilating the notary with the public clerk is disputable[3], in spite of the fact that the notary public fulfills a service of public interest.

The public function that the article no. 3 of the Law no. 36/1995 refers to is not achieved within an institution or public authority. It is delivered by a freelancer which shares the status of an autonomous function. On the other hand, the notary public is not employed and neither does he get a salary for the delivered services. The notary is entitled to get a fee, which is established based on the agreement with the client. On these grounds, we are in favor of the opinion according to which the notary public cannot be an active subject of the infringement on duty, such as accepting bribery or abuse while being in exercise[4].

The contrary solution has already had a response in the judicial practice, based on the dispositions of art. 147, Penal Code.[5]

We asses that a judicious solution would be that of express consecration of the penal responsibility of the notary public for the infringements specific to his activity[6].

Similarly, It has to be mentioned a proposal of defining the notion of public clerk in the latest Project of the Romanian Penal Code[7]. According According to art. 175 align. 1, „a clerk" is the person who exerts, permanently or temporarily, a series of attributions allowing him to take decisions, to participate in taking decisions or to influence the process of taking decisions within a legal person which is a type of activity which does not belong to the private domain. Align.2 of the same text states that: ,,likewise, the person performing an activity after being invested by a public authority and being submitted to its control, is considered to be a clerk as per the criminal law".

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[1] Gh. Dobrican, *The Penal Responsibility of the Notary Public*, Law no. 8/2000, page 108-115

[2] H. Diaconescu, *Points of View Regarding the Active Subject of Accepting Bribery*, Law no. 10/1998

[3] I. Leş- *op.cit.*, p.44; G. Antoniu, *The Notary Public and the Criminal Law*, Law no. 3/1999, p. 120

[4] G. Antoniu, *The Notary Public and the Criminal Law*, Law no. 3/1999, p. 120

[5] Î.C.C.J., penală section, decision no. 2013 March 29 2006, http://www.scj.ro;

[6] I. Leş- *op.cit.*, p.44

[7] http://www.just.ro;

Text align. 2 of art. 175 assimilates to the public clerk also those people who perform a certain profession of public interest for which they need a special empowerment from the public authorities and which is submitted to their control.

In the doctrine, there are reserved opinions expressed as regards this provision[1]. The persons performing a profession of public interest, but on their account, namely without being employed by a legal person of public law, cannot be accounted at the same level as the proper public clerk, who is an employee of a legal person.

The persons performing a profession of public interest cannot be public clerks, since they do not performs and activity in the service of a legal person, they are not submitted to anyone, they are not paid from the budget (attorneys, *notaries*, court enforcement officers etc.), they are freelancers instead. In the case of not having clients, they may not have what to live on. This is why, only for certain facts, they could be responsible the same as the public clerk, but without being a one. In order to mark their distinct position from that of the public clerk, a separate text is necessary to be dedicated to these persons that could be named *„Persons performing a service of public interest*". The banks are likewise submitted to the control of authorities and they need a special empowerment for operating, but they are not public but private institutions, exactly as the freelancers. They are not part of a hierarchy; they are neither grouped into a class, nor submitted to a discipline. They perform their activity on their free will, even though, in certain aspects, they obey to the authorities.

The notions of clerk and public clerk, although apparently they would substitute to each other, are in fact technical terms expressing relatively independent realities, substituting to each other only when the law stipulates this fact explicitly (art.147 align.2; art.258 Penal Code). There has to be excluded from this title the person performing a public service, but who is not clerk, but who is mentioned as an active subject of a law infringement, with the name of "person performing a public service".

2. The manner we chose to draw up an analysis of the infringements that may be committed by the notary public is that where the order is given by the Penal Code and the special laws that are sanction them. The first to draw our attention are the infringements included in the Penal Code, whose order is given by the titles that the infringements are part of. The acts qualified as infringements by special laws, will be

[1] G.Antoniu – The Previous Project of a second Penal Code, R.D.P. no.4/2007, p.34

analyzed subsequently to those included in the Penal Code and their order of description is chronologically decreasing, according to the year of adoption the normative act of interest.

Moreover, we need to specify that, by concurring the opinion assessing that the notary public cannot be a clerk, we will omit the analysis of certain duty infringements or the active subject other types of infringements claiming the quality of public clerk or clerk of the perpetrator.

The offence of disclosing professional secrets

The infringement is directed against the people's freedom and is stipulated by art. 196 of the Penal Code. The infringement consists in: disclosing, unrightfully, certain data, by the one who has been entrusted with the respective information or the one who has come to know by way of profession, in case the act can bring prejudice to any person.

The incrimination protects peoples' liberty of be granted respect with view to the data entrusted to those who perform a profession or fill a certain position, to whom they need to resort to.

The act cannot be committed unless by a person performing a profession or filling a position involving an obligation of keeping the secret.

By the term „profession" we mean a permanent occupation having as object delivering services and involving a special training (attorneys, physicians, pharmacists, priests, dentists, notaries public, etc.). By the term „position" we mean a temporary or permanent duty in the service of any organ or institution, no matter how it is filled (prosecutor, policeman, etc.).

The law refers to those positions and professions which, by their nature or the way they are regulated, they are related to listening to confidences or finding secrets. It is also about positions or professions acknowledged by the law. The one addressing to a person performing a profession that is legally non-authorized and confides a secret to that person, cannot ask for the application of the provisions of art. 196 Penal Code. This is similar to addressing to a person performing illegally a certain profession (for instance, a clandestine notarial activity).

The penal participation is possible only under the form of instigation and complicity.

The co-author is excluded, considering that the obligation of keeping the secret is personal.

Any person can be the passive subject and if the secret refers to two or several persons, there will be participation for infringements. This is because, in the case of personal offences, the plurality of passive subjects is

incompatible both with the continuous offence, as well with the natural unity of offence.

The material element of the infringement consists in an action of disclosing certain data by the person compelled to keep the secret, namely an action by which that information is revealed, brought to other people's knowledge. The act can be committed also by not taking action, when the author has enabled other people to come to know (example: the notary allows a stranger to read the documents drawn up within a procedure related to a succession).

The data susceptible to be revealed can be any kind of information, references regarding a person and which can constitute, by their nature, by the person's will or by a legal disposition, a secret. This data may refer to aspects belonging to the private sphere of the victim's life, to the state of health, to family issues, addictions, convictions, material state – but it can also refer to other elements. The obligation of non-disclosure, is related to all the known data and is also complete, namely in relation to all the people.

Under the circumstances, for an infringement to exist, two essential requirements should be fulfilled cumulatively.

First of all, the disclosure has to be done unrightfully, meaning that there should be no legal duty to denounce the secrets found out. (as in art. 170, art. 262, 263, 265 Penal Code, stipulating the obligation of denouncing certain infringements when committed).

The act of disclosing will not constitute an infringement in case that it happens by the request or under the consent of the interested part.

Secondly, for an infringement to exist, it is requested that the act should cause prejudices to a person[1]. The prejudices may be moral or material and may concern the person that the data disclosed refers to or any other person. These prejudices may not be caused effectively; they may also be potential.

The offence is intentional and its perpetration by fault does not fall under the incidence of the criminal law.

During the notarial activity, the obligation of keeping the professional secret is raised at the level of principle, as expressed in the art. 36 of the Law no. 36/1995: „The notaries public…. are compelled to keep the professional secret as regards the documents and the facts that they came to be aware of during their activity". As a matter of fact, this obligation comes from the proper oath taken when entering this profession by the notary

[1] Gh. Nistoreanu, A. Boroi, *Criminal Law, the special part*, All Beck Printing House; Bucharest, 2004, pag. 147

public: „I swear to respect the Constitution and the laws of the country and to fulfill my duties with honor and public credibility, with conscience and with no partiality and the attributions I am due to and to keep the professional secret. So help me God!".[1]

The obligation of keeping the professional secret is maintained also in case that the notary *public* is called to testify in front of a judiciary organ. Art. 29 align. 3 of the Regulation of applying Law no. 36/1995 stipulates that the *notary* called as witness in front of a court or a criminal investigation organ can be spared of the obligation of keeping the professional secret only by those that are interested in keeping the secret. In the specialized literature, it has been noticed that the *notary* is not compelled to testify in case the interested part unbinds him of the obligation for keeping the professional secret[2].

In spite of that, the law establishes clearly that the *notary archive* can be searched by a magistrate based on a delegation issued for this purpose by the competent judiciary authority. If these *notarial documents* are searched for forgery, they may be confiscated and they remain attached to the file of the cause only if declared to be false, with the obligation of communicating the decision or the prosecutor ordinance. If the *notary public* will refuse submitting the documents, he will commit the offence of detaining or destroying of documents stipulated by art. 272 Penal Code as an offence against justice.

The obligation of keeping the professional secret, as per the art. 36 of the Law no. 36/1995 is maintained even after the position is no longer filled, except for the cases that the law or the interested parts release the notary of this obligation.

In case that this obligation is not complied with by the *notary public,* he commits the offence of disclosing the professional secret stipulated by the art. 196 Penal Code. The concrete ways of perpetrating the offence may be numerous, for instance: after signing a contract in front of a public, the notary has to bring to their attention the details related to the clauses that the contract has been signed.

The fraud offence

This offence, stipulated by art. 215 Penal Code consists, in the typical variant, in deceiving somebody, by presenting an untrue fact as

[1] Art. 19 alin. 2 din Law no. 36/1995.

[2] M. Ionescu, „Notarial legislation regarding the notary duty of keeping the professional secret", in Notarial Discutions no. 3/2002, pag. 2.

being true or a true fact as a lie, with the purpose of obtaining, for the self or for somebody else a material unjust gain and in case of causing a loss.

The first special variant of the offence involves deceiving a person on the occasion of signing or delivering a contract, and the offence is perpetrated in such a way as if the deceived person never signed or received the contract under the stipulated conditions.

The second variant, in the aggravated form, consists in issuing a cheque to a crediting institution or person, knowing that for its capitalizing, there is no provision or necessary available amount of money, as well as the act of withdrawing, after issuing, the total or partial provision, or the prohibition of payment before the term expires, with the purpose indicated under align. (1), in case of causing a loss to the owner of the cheque.

The first aggravated variant, common to the typical and to the special variants, consists in the fraud perpetrated by using certain false names or qualities or any other fraudulent means.

The second aggravated variant is accomplished when the fraud has extremely serious consequences.

From the *notarial activity* point of view, there is of main interest the variant when the perpetrator has deceived a person or constantly lied to a person on the occasion of signing or delivering a contract, if the victim had not had signed the contract under the stipulated conditions unless this act of deceit. This is the case of a modality known under the name of „fraud in conventions".

This modality would not exist if the perpetrator did not use fraudulent means in order to determine the contract signing, and the latter could not be executed out of reasons that are independent of its will[1].

Similarly, there has to be mentioned the fact that for holding a fraud on the occasion of signing or delivering a contract the following conditions have to be fulfilled:

a) a contract should be signed;

b) on the occasion of contract signing, the active subject is to deceive or constantly lie to the passive subject;

c) the deceit is to determine the deceived to close a deal under the stipulated conditions, that is under the circumstances that otherwise would have not been accepted and which created a loss for the passive subject;

d) the act is to be perpetrated intentionally[2].

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[1] G. Antoniu, C. Bulai, *The Penal judiciary Practice*, vol. III, p. 138.

[2] V.Dongoroz şi colab., *The Offence Against the Commonwealth*, Academiei Printing House, 1963, Bucureşti, p. 302.

During the *notarial activity*, situations may come up when the parts request that a contract should be signed, a contract that produces juridical obligations for both parts, but, by the time the contract is signed, one of the parts presents a distorted reality. By indicating certain untrue situations as being true or certain true situations as being untrue, the respective part manages to determine the other one to close the deal under the stipulated conditions, a fact that would have never been accomplished unless the prejudiced part had known the truth.

As an example, there is the case of the contracts for which the law imposes an authentic form for validity. In this case, the certification represents the summation of the content and form related conditions legally established, conditions that fall under the responsibility of the parts involved and of notary public. On these grounds, the *responsibility of the notary* extends both on the contract content, by the obligation of fulfilling all the content conditions, and on the contract form imposed by the law, as well as on the careful checking of the identity of the signing parts. There are though, contracts drawn up by the parts for which the law does not impose the obligation of fulfilling the authenticity condition and which are the object of *notarial activity* only as a consequence of a request for legalizing a signature or seals to be applied by the parts in front of the notary. Under these circumstances, the *notary's responsibility* extends only on the identity of the parts involved in the contract, without having any responsibility towards the concrete its content.

Perpetrating an offence means committing an infringement in a consumed or tentative form, but also participating in perpetration or any other form of participation[1]. In case that the *notary* does not admit the fact that one of the parts intends to deceive the other by signing the contract, it cannot be concluded that this person has any form of participation in the fraud. On the other hand, when signing the contract, the *notary* is aware of the intention of that part, he will become an accomplice to the fraud perpetrated by that part. For instance, in case that the *notary* closes a sale-purchase of a real estate between the parts although he is aware of the fact that the estate does no longer belong to the part selling it, being previously sold to some other person.

Currently, the *notarial activity* is involved more and more in the commercial relations among companies[2], among legal persons, or among

[1] Art. 144 Penal Code.

[2] Giancarlo Laurini, „The Role of the Notary in the Commercial Law", The notaries public bulletin no. 4/2003, page 38.

the latter and distinct natural person, especially as regards documents concerning property transfers on real estates or movable assets

Within these social relations, it is possible to come up a situation where on e of the parts could use a cheque to pay a purchased commodity. In case the cheque is not covered in the account, when the provision has been withdrawn after the cheque issuing but before the presentation deadline or when the bank is instructed not to pay the cheque, the fraud offence has been committed under the means stipulated by art. 215 align. 4 of the Penal Code.

If the *notary public* is aware of the incapacity of payment situation of the person issuing the cheque, he becomes again an accomplice of the fraud offence.

The concealing offence

The concealing offence is stipulated by the art. 221 Penal Code and consists in receiving, acquiring, transformation of an asset, or in facilitating its capitalization, being aware that the respective asset comes from perpetrating an act stipulated by the criminal law, and if by this act, a material benefit has been intended.

The material object if this offence is represented by an asset or several assets which can come from perpetrating an offence.

The material element of this concealing offence consists in an alternative action, namely, the receipt, acquiring, transformation or facilitating the capitalization of the asset resulting from the act stipulated by the criminal law.

For the existence of this offence, it is necessary that the incriminated act should bear upon an asset resulted from an act stipulated by the criminal law. It is not compulsory that this main act to fulfill all the conditions in order to make an offence. For instance, when the asset comes from a robbery perpetrated by a 13 year old child; the underage person is subject to the rules regarding the age as a cause removing the criminal character of the act and the person purchasing the asset from the underage person will be accountable for concealing).

The transformation involves modifying the substance or the form of the asset, according to its nature, by processing, melting, mounting, molding, grinding etc.

Since the offence is stipulated in alternative ways, it is necessary for its existence that any of the ways should be perpetrated.

The form of guilt that the offence is perpetrated in, is the direct intention, this being qualified by scope, namely, obtaining a gain for the self or for another person.

If by perpetrating these acts, the perpetrator does not use any material gain, the act will fall under the dispositions of art. 264, regarding favoring the offender.

For the subjective side to exist, it is required that the perpetrator should be aware also of the fact that the asset comes from perpetrating an offence, even if the correct juridical frame that the asset comes from, is not familiar to the perpetrator.

Usually, the person committing the concealing offence is aware that the asset comes from infringing the law or has the real possibility of foreseeing this fact (for instance, in case of acquiring an asset at a much lower price to the market price or in case of facilitating the capitalization of an asset strikingly contracting with the condition of the person pretending to be the owner of the asset).

We assess that the notary public may commit this offence during exerting its attributions. We chose as an illustration the situation when a person presents to the *notary public*, explains the fact that previously owned an asset based on a loan contract, that the asset eventually was not returned to its rightful owner when the contract expired and by the owner's request (committing thus the offence of abuse of trust, stipulated by art. 213 C. pen.) and requires the closing of a sale-purchase agreement in order to become the owner of the asset to sell it. The n*otary* closes such a contract in exchange of a certain amount of money, and thus facilitates the capitalization of an asset obtained from committing an offence.

In case that the *notary* does not know the real source of the asset, he will not commit the concealing offence. In this case, the dispositions of 51 Penal Code are applicable (the error in fact), on condition that all the conditions stipulated by the law are complied with.

When the offence that is supported is a serious one[1], (such as a robbery), we consider that the act committed under the above-indicated conditions represents the offence of money laundry stipulated by art. 23 of the Law no. 656/2002 regarding the money laundry prevention and control.

Purloining or documents destruction

In art. 242 of the Penal Code, there is incriminated the purloining or the destruction of files, records, documents or any other certificate which is kept or held by an organ or a state institution, or any other units of the ones stipulated in art. 145.

[1] Noțiunea urmează să fie definită cu ocazia analizării infracțiunii de spălare a banilor

The act is less serious if the of any of the above-mentioned documents is perpetrated by fault, while the document has an artistic, scientific, historical value, or any other value of the kind.

If the act is perpetrated by a public clerk while on duty, the penalty is to be increased.

The offence is part of the group of offences against the authority and its material object is represented by the file, record, document or any other certificate which is kept or held by an organization among the ones enlisted under the art. 145 Penal Code; the file wraps up the sum of acts regarding the same issue, business, person, etc. taking for instance the file regarding a procedure for a succession. By record, we mean a book of entry with a number of pages where certain facts or juridical acts are included, for instance: the record of vehicles entries and exists in and from an institution; the document has a special value in case it represents the constitutive act of an organ, an international treaty, etc. Anyway, by any other document, we understand the certificates that may produce legal effects, for instance an official report of inventory for a successional asset.

This category of documents does not include those documents comprising a certain material value. Their purloin or destruction constitutes an offence against the patrimony (destructions stipulated by the art. 217-219 of the Penal Code). Neither are those documents issued by an organ of criminal proceedings, by a court of justice or any other jurisdiction organ included in this category. Their purloin or destruction represent an independent infringement, holding or destroying documents under art. 272 of the Penal Code., is an offence preventing justice to be served. This way, the delineation of these infringements is done according to the nature of the destroyed or purloined[1].

During the notarial activity, we asses that this kind of infringement may be committed even by the notary public. To be more concrete, this infringement will exist when, for instance, the *notary* destroys the records of the notarial office. Nevertheless, if the act is directed on a false heir certificate included in a file drawn up in a successional procedure, and the certificate is required by a court instance, the committed offence will be that of holding or destroying documents, stipulated by the art. 272 of the Penal Code.

[1] T. Vasiliu, V. Papadopol, D. Pavel, V. Rămureanu, G. Antoniu, D. Lucinescu, T*he Commented and Annotated Penal Code, the special part, The Scientific and Encyclopedic Printing House*, Bucharest, vol. I, II, 1975, p. 39.

Favoring the perpetrator

The offence of favoring the perpetrator, stipulated by the art. 264 of the Penal Code, consists in endorsing a perpetrator, with no agreement before or while committing the offence, in order to hinder or thwart the legal proceedings, the trial or the sanction execution, or for ensuring the perpetrator the usage or product of the offence.

If in case that the support given to a person constitutes an offence in itself, the *rules of participation in the offence* rules are applicable (for instance, the *notary public* draws up an official document in order to help a person to keep the borrowed asset from another person. In this case, there will be considered a concurrence of offences between the favoring of the offender and the material forgery in official documents).

It is of an utmost importance that the support given to an offender should have as objective destination the hinder or thwart of the criminal proceedings, the trial or carrying out of the punishment or providing the offender with the use or product of the offence.

The support given may also concern providing the offender with the use or product of the offence (for example, the receipt, alteration, enabling the capitalization). *If these activities are done with the purpose of obtaining a material profit, the act will be treated as concealing (art. 221, Penal Code).*

In case of concealing, the support should be given *with no previous agreement to the offence perpetration or during the perpetration;* if not, the act is to be considered as moral complicity by way of promise for support.

Document Holding or Destruction

This offence is stipulated by the art. 272, Penal Code and it consists of holding or destroying a document issued by a criminal proceeding organ, by a court of justice, or any other jurisdiction organ or of the hindrance in any way of one of the above-mentioned representatives to get to these documents, when such documents are necessary for a cause to be solved.

This is a similar offence to that of *purloining or documents destruction,* stipulated by art. 242 of the Penal Code, as an offence against the authority, with the difference standing in the nature of the document representing the material object of the offence.

In case of *purloining or document destruction, as an offence against justice,* it is about a document which is either, issued by a judiciary authority, by an organ or a state institution, either a document written under a secret signature of a natural person, when such a document is destined to a jurisdiction organ in general. For it to be a material object of

the offence there is a condition that the document should be necessary to a case solving. By interpreting art. 272, Penal Code, there can be drawn the conclusion that the document should be *necessary to solving a cause*, nor necessarily used effectively in solving the case, and, on these grounds, the offence survives even if when the act was perpetrated, the document was necessary in solving a case, and subsequently, the court reached the conclusion that the document does not involve such a character.

The material element consists in an action, namely the *holding, destruction or hindrance* in any way that a document should not get to a judiciary organ.

According to the nature of the document, we may come across other *juridical classifications*, determined also by the versions of the material element. Thus, if *a document having a patrimonial value is purloined*, the act will fall under art. 208 align (2). Penal Code; *if a document of any other nature is destroyed*, the act will be classified under 217 Penal Code; *if a document issued or held by a state authority is destroyed or purloined*, the act will fall under art. 242, Penal Code. Therefore, we may notice that *only when a document issued by a judiciary organ and it is necessary to a case solving, the act will fall under 272, Penal Code.*

We asses that the offence under analysis may be perpetrated also by the e *notary public* while exercising his attributions. We chose for exemplification the situation when in the file opened as part of a succession procedure by the notary, contains a false document which is necessary for solving a criminal cause having the object of perpetrating material forgery in official documents. If the *notary public refuses to submit this document, by the request of the court, we consider that the notary perpetrates the offence of holding or destroying documents, stipulated by art. 272,* Penal Code.

Material forgery in official documents

This is another type of offence which may be perpetrated during the notarial activity and which is stipulated by art. *288,* Penal Code. The act consists in *forging an official document by falsifying the document or subscription byway of its alteration in any way so that it may produce juridical consequences.*

The official documents, as per the criminal law, are both the original and the duplicates, as well as the legalized or authenticated copies.

According to art. 288 align. (3), Penal Code, there are assimilated with the official documents, the tickets or any other imprints producing legal consequences, such as tickets for shows or sports contests, the lottery tickets or any other games, restaurant or canteen tickets, the imprints for raising the state alimony, etc.

The official imprints, as *material object* of the forgery offence, has to bring about *legal consequences*, that is they should be able to create, to modify or extinguish juridical relations, rights and obligations.

Under the aspect of *material element* of the objective side, the offence consists in an action of falsifying by one of the means expressly indicated by the law: *the counterfeit of a writing or underwriting in an official document or by alteration of the document in any way*.

The counterfeit of a writing implies, *stricto senso*, the creation, namely the confectioning by imitation, of an identical inscription to the official one. *Lato senso*, t*he counterfeit of a writing* equals the reproduction of the content that usually such a writing has[1]; to put it differently, confectioning a similar inscription to the official one.

The counterfeit of a subscription is to be met when the signature is forged on an official document, by way of imitation or by applying another signature which appears to be the same with the signature of the entitled person to sign.

The alteration implies the modification, the distortion, the alteration or change in the content of an official existent document, by adding or erasing certain parts on this document.

We assess that this offence may be committed by the *notary* while in exercise of his duty in case that, for instance, he interferes with an official document.

The false of identity

This offence is stipulated by article. 293, Penal Code and, in its basic modality which is of interest in our current paper, it consists in: presenting under false identity or attributing of such identity to another person, in order to lead or maintain in error an organ or a state institution or any other unit among those referred to under art. 145, with view to producing a juridical consequence for the self or for other persons.

The material element of the offence in the typical variant can be presented either, under the form of an action of self presentation under a false identity, or attributing a false identity to another person.

We assess that the *notary public* may commit such an offence by attributing a false identity to another person*, despite of knowing that the identity did not belong to this person*.

[1] V. Dongoroz and colab., op. cit., vol. IV, pag. 426.

Intellectual Forgery of the Accounting Organization

This is an offence stipulated by *Law no. 82/1991 regarding the organization of the accounting activity*[1]. The norm regulating the offence is to be found under art. 43 which stipulates: „Carrying into effect certain inaccurate records, as well as the intentional omission of accounting records, with the purpose of distorting incomes, expenditures, financial results, as well as the active and passive elements reflected in the balance, constitute the offence of intellectual forgery and are to be sanctioned as per the law."

Admitting the possibility that the offence of intellectual forgery in the organization of accounting activity is perpetrated in the field of notarial activity, this is based on certain provisions of the *Law no. 36/1995.*

From the accounting activity and financial perspective, *the individual notary is an authorized natural person, a quality which is maintained even in case of carrying an activity within a civil association*[2].

The accounting law no. 82/1991, with the subsequent modifications and completions, republished, stipulates under art. 1 align. (1) and (2), the obligation of organizing and leading the financial accounting both for legal persons and for the natural persons that carry out income generating activities.

The associations or the individual notarial offices, registered as VAT paying organisms, have the following rights from the point of view of taxable *operations*:

- *To account distinctly the incomes and expenditures resulted from the associations or from the individual notarial activity;*
- *The legal rights and obligations regarding the added value tax, belong to the taxable persons registered as VAT paying organisms* (the association or the independent notarial office, depending on the case);
- In case of associations – taxable persons, at the end of the reporting period, *the income and expenditures recorded on the invoices, are submitted, based on deduction, to every associate with view to registration in their own accounts*. The deducted amounts among the parties without the compliance of these provisions are submitted to the VAT, within the quotes of the legal stipulations.

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[1] The Law was published in the Official Gazette of Romania, Part I, no. 265/1991; it underwent numerous modifications and was republished most recently in the Official Gazatte if Romania, Part I, no. 454/2008.

[2] Maria Manolescu, „The accounting of the authorized natural person. Regulations as per the European norms", a communication presented at the Seminat on: „The Notary and Tax Policy", Bucharest, 2005.

For all these, we appreciate that during the *notarial activity, the intellectual forgery may be perpetrated also in accounting activities, when the obligations of the accounting records are not observed intentionally and when the other conditions imposed for this offence are met*.

The offence is perpetrated, for instance, in case that the inventory-register[1] *kept by the notary public does not contain the incomes achieved based on the justifying documents.*

Tax Dodging Offences

These offences are stipulated by the Law no. 241/2005[2].

The *notary public* is regarded as an *active participant to the fiscal financial circuit*, since, due to his activity, he contributes significantly to the achievement of budgetary incomes, both of the local community budgets and implicitly of the consolidated state budget[3].

There are two distinct aspects where his activity role and responsibility submit the notary to not only a series of requirements, but also, for at least one of them, to an unique requirement to other professions. In the field of tax policy the *notary public plays a double part:*

- liable to pay duties, as he is paying taxes according to the independent activities carried out;

- fiscal *public officer*, having attributions that are similar to those of the clerks and the fiscal organs since he establishes, manages and pays the tax for real estate transactions, stamp taxes, and the fee for real estate publicity.

After a summary comparative analysis of the rolling out of every component in the independent activities package, we can notice that among all the liberal professions, such as attorney, doctor, auditor, accounting expert, etc. exerting their profession in individual offices or within civil associated companies, the n*otary public has the most laborious fiscal activity both from the importance point of view, as from the responsibility perspective. The individual notary is from the accounting-tax policy point of view, an authorized natural person*, a quality maintained even if he operates in a civil associate company.

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[1] The obligation of having this acconting register is stipulated by the Norms regarding the book keeping which is organized and lead by the notaries public, issued by the National Union of the Notaries Public in Romania and şi published in the BNP Supplement no. 6/2000, pag. 26.

[2] It is about the Law for preventing and controlling the tax dodging, published in the Official Gazette of Romania, Part I, no. 672/2005.

[3] Laurenţiu Dobroţeanu, „The Fiscal Impact on the Notary Public Activity", a communication at the Symposium entitled „The Notary and the Tax Policy", 2005.

A simple authentication of a copy which involves the certifying the conformity with the original carry in fact the following fiscal *components*:

- a *stamp tax*, representing a source of income for the local community budget;

- a fee, as income obtained from independent activities and subject to taxation. It becomes a source for the state budget income to which the VAT may be added as a direct tax and, similarly a source for the state budget income;

- a *judiciary stamp* which constitutes an income for the Ministry of Justice budget.

Only as an enumeration, we can distinguish *four fiscal obligations* (stamp tax, income tax, VAT, judiciary stamp) with three distinct destinations: local budget, state budget, Ministry of Justice budget. For all these fiscal obligations, the notary public is compelled to establish, manage and pay them, as per the stipulations of the Law 163/2005 regarding the sanctioning of Government Emergency Ordinance no. 138/2004 for the modification and completion of the Law 571/2003 concerning the Fiscal Code.

In the plan of penalizing the behaviors infringing the fiscal organization, the Law no. *241/2005* was decreed in our country, with view to preventing and controlling the tax dodging.

The above-mentioned normative act was decreed, as it may be seen in its art. 1 so that preventive and controlling measures for tax-dodging and other related offences could be instituted.

The offences stipulated by the law are to be found in art. 3-9, a part of them being overtaken from the *Law no. 87/1994* regulating previously the field of interest, other being a novelty.

We estimate that the most of these offences may be perpetrated in the field of notarial activity.

We may take into account even the first offence of this group, the one stipulated by art. 3, which consists in: „the act of the person liable to pay duties who, intentionally recovers the destroyed book-keeping registers, within the dead-line inscribed in the control documents, although it is possible for him not to."

The notary public may perpetrate other types of offences out of the ones stipulated in the previously quoted normative act.

We may also observe the offence stipulated under *art. 4* which consists in the non-justified refuse of a person to present to the competent organs, after being summoned 3 times, the legal documents and the patrimony assets with the purpose of preventing the financial, fiscal or customs auditing. *In case that the notary, for instance, refuses to present the*

documents after a 3 times summoning on the part of the Camber of the Notaries Public, we estimate that the respective notary has committed the offence.

The notary public can be in the position of the active *subject of the offence stipulated by art. 5 of the Law no. 241/2005* if, for instance, he prevents, in any form, the competent organs to enter, as per the law, into headquarters, precincts or onto certain grounds, with the purpose of financial, fiscal or customs auditing.

Within the same group of actions, the *notary public may commit the offence under art. 6, consisting in holding and non-paying intentionally, within 30 days at the most from the payment term, the amounts representing the taxes or contributions with stoppage at the source. This may happen in case that, for instance*, the notary orders the stoppage of the amounts representing the contribution to the social insurance fund on the part of the auxiliary personnel employed in the office and does not pay these amounts withing the deadline indicated by the law, plus 30 days from the payment term.

The notary public may also perpetrate some of the offences indicated by *art. 9 in in Law no. 241/2005, namely:*

a) *hiding the asset or the taxable source* – when, for instance, there are translation services delivered within the office and this activity is not stated;

b) the complete or partial omission of marking out in the accounting book or in other legal documents, *of the commercial operations performed or of the achieved income.* Here is, as an example, the situation when the notary public does registers in the book-keeping al the operations related to authentications of document copies;

c) marking out, *in the book-keeping or in any other legal documents, the expenditures which are not based on real operations, or inscribing other fictitious operations*. We may take into account such an example when, in order to benefit from the stipulations of art. 38 of the Law no. 589/2004[1] regarding the juridical regime of the notarial activity[2], the notary public records in the office book-keeping, certain expenditures, higher than the real ones, on the occasion of starting the notarial electronic activity;

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[1] Art. 38, Law no. 485 has the following content: „(1) The expenditures on investments and other utilities necessary for the notarial electronic activity are substracted from the gross income, for 2 years since the beginning of this activity.

(2) The expenditures for the modification and improving the informatic systems used in the notarial electronic activity are substracted from the taxable incomes corresponding to the fiscal year when the investment has been operated."

[2] Published in the Official Gazette of Romania, part I, no. 1227/2004.

d) *altering, destroying or hiding records, memories of the taxing or fiscal electronic marking devices or any other means of data storage* – when, for instance, the book-keeping records that the notarial office is compelled to have, are destroyed, etc.

The n*otary public will be able to benefit from the stipulations of art. 10, of the* Law no. 241/2005 which institutes certain causes of non-punishment and reduction of punishment.

In case of the offence of tax-dodging, if during the trial or criminal procedures, until the first term of the trial*, the defendant covers entirely the prejudice*, the limits of the punishment stipulated by the law are halved. If the prejudice caused an recovered in the same conditions amounts up to 100,000 Euros, converted in the national currency, the fine can be applied.

All these stipulations are applicable only if the perpetrator has not already taken benefit of them, for other tax-dodge offence, in less than 5 years before the perpetration of the same offence.

Money Laundry Offence

The *Money Laundry Offence stipulated by art. 23, Law no. 656/2002 regarding the prevention and control of the money laundry*[1].

In art. 23 of the Law no. 656/2002, the offence is incriminated in three variants:

There are considered Money Laundry Offences and are punishable with imprisonment from 3 to 12 years, the following actions:

a) *assets changing or transfer,* knowing that they are the result of committing an offence with the purpose of hiding or dissimulation the illicit origin of these assets with the purpose of helping a person that committed the offence to avoid the legal proceedings, the trial or carrying-out the punishment;

b) *hiding or* dissimulation the origin, the true nature, the location, the circulation or the ownership of the assets or the right on the assets, being aware that the assets are obtained from the law infringement;

c) *obtaining, owning of using assets,* being aware that the assets are obtained from the law infringement.

As it can be noticed, this is about an offence which may be perpetrated by adopting any of the behaviors described by the incrimination norm, having an alternative character. This way, when a person meets the conditions of several variants referred in art. 23, there will

[1] Published in the Official Gazette no. 904/2002, eith the latest modifications and completions, that is G.E.O. no. 53/2008, published in the Official Gazette of Romania, Part I, no. 333/2008.

not be a concurrence of infractions, but an offence unity and the circumstances of perpetration being relevant in the process of individualizing the applicable punishment.

All these behaviors constitute the *money laundry offence* in case that they are perpetrated by means of the institutions indicated under art. 8, Law no. 656/2002. Enlisting these behaviors is very comprehensive. This is why we will give some examples only: banks, branches of foreign banks, foreign credit institutions, and the branches in Romania of these institutions; the insurance, reinsurance companies, as well as the branches in Romania of the foreign şi insurance, reinsurance companies; the economic agents that deal with gambling activities, pawn brokers, sale-purchase of art objects, jewelry, tourism dealers, service companies and any other similar activities that may circulate valuable assets, etc.

In any case, the money laundry offence involves a premise situation consisting in the previous perpetration of a main offence, generating certain amounts of money or goods. These are exactly the values to become the *material object of the money laundry offence*.

The Unloyal Competition Offence

As we have previously mentioned, the Deontological Code of the notaries public in Romania expressly specifies that it is prohibited to the *notary public any manifestation of unloyal competition,* wile exercising the duty or in relation to the job.

It is nevertheless disputable if it is convenient to use the name of offence regulated by art. 301, Penal Code and by the Law no. 11/1991 regarding the control of the unloyal competition[1]*, as an economic offence in the mentioned context.* This is because among the unloyal competition manifestations, the Deontological Code enumerates the following: public assertions disavowing with regards to other notary colleagues, but also the critics brought to other notary colleagues concerning their training and the quality of their work. *Art. 301, Penal Code defines the unloyal competition* as the fabrication or circulation of products carrying false origin names or indications of source, as well as the application on the products in circulation, false mentions regarding patents or commercial names or names of the commerce or industrial organizations with the purpose of

[1] Published in the Official Gazette of Romania, Part I, no. 24/1991

deceiving the beneficiaries. *Art. 5, Law no. 11/1991* defines the following *offences of unloyal competition*[1]*:*

a) using a company, an invention, a trade mark, a geographic indication of a drawing or industrial model, certain topographies of an integrated circuit, a logo or a package so as to cause confusion as regards the rightfully used elements of the kind;

b) introducing counterfeits or pirate products, whose selling may bring prejudice to the title owner of the mark and deceives the consumer regarding the quality of the product /service;

c) using with a commercial purpose the results of certain experiments that necessitated significant efforts or secret information, submitted to the competent authorities with the purpose of obtaining the selling rights of pharmaceuticals or chemical substances used in agriculture, containing new chemical elements;

d) disclosing certain information stipulated under let. c), except for the situations when disclosing this information is necessary for the public protection or except for the case that steps have been taken so as to make sure that the information is protected against unloyal exploitation within commerce, if this information comes from the competent authorities;

e) disclosing, purchasing or using the commercial secret by the third parties without the consent of the rightful owner, as a result of a commercial or industrial espionage action;

f) disclosing or using the commercial secrets by representatives of the public authorities, as well as by the people delegated by the rightful owners of these secrets to be presented in from of the public authorities;

g) producing in any way the import, the export, the storage, the selling of goods/services with false mentions regarding the patents, trade marks, the geographic indications of a drawing or industrial model, certain topographies of integrated circuits, other types of intellectual property, such as the exterior aspect of the firm, the design of the windows or the personnel clothing, the advertising means, as the origin and characteristics of the goods, as well as references to the name of the producer or seller, with the purpose of deceiving the other sellers or the beneficiaries.

Here are, consequently, the legal d*efinitions for the unloyal competition offence demonstrating that this has a distinct content from the acceptance that the* Deontological Code of the notaries public *offers.*

[1] Law no. 298 of June, 7 2001 for the modification complettion of the Law no. 11/1991 regarding the control of nonloyal competition, published in the Official Gazette of Romania, Part I, no. 313/2001

Art. 2 of the Law no. 11/1991 offers a general definition for the concept of unloyal competition: any act or fact that is contrary to the fair usage in the industrial and product selling activity, in the work execution, as well as in the service areas. The *notarial activity does not fall under the commercial segment, even if it provides services.* On these grounds, we estimate that *the unloyal competition offence cannot be perpetrated in the notarial field*, even if the stipulation of the above-quoted Deontological Code makes an express reference to this offence.

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CRIMINAL OFFENCES IN THE COMPUTATIONAL FIELD LEGAL SETTLEMENT

Abstract

Member States of the European Council have drafted and signed on 23 November 2001, "Convention on cybernetics crime". After the event, on 28 January 2003, was submitted for signature by Member States „Additional Protocol to the Convention on cyber crime, for the incrimination of acts of xenophobia and the act of racial discriminating committed through computer systems". Romanian State has signed the Additional Protocol on 9 October 2003.

Through the Convention and Additional Protocol is established the base for enquirying and sanctioning of criminal offenses committed through the computer and inter-governmental agreement necessary to stop this scourge.

Convention put at issue the need the conviction of criminal acts such as illegal access to a computer system, unlawful boud trap, computer forgery, informatics fraud, child pornography through internet, violation of property rights and other rights related etc.

The Romanian Parliament has tried to transpose this directivs introducing Act 161/2003 respecting measures to ensure transparency and exercion of the public dignity functions to public and business environment, preventing and sanctioning corruption in Title III of Book I (Prevention and combating computer crime, art. 34 - 67).

The purpose of this normative act is to prevent and combat computer crime by specific measures of prevention, discovery and punishment of crimes committed through computer systems, ensuring the respect for human rights and protection of personal data (art. 34).

Act does not offer a definition of "computer crime" (as beside it s not made by the Council of Europe Convention). A definition like this is in fact very difficult to lay down considering the great variety of criminal matters that have been discovered so far, and how new criminal acts in this field.

"The computer science deliquency" is "the entirety of the acts committed in the area of new technologies....", "crime computer science "could be defined as" all acts of criminal nature committed in the computer science space''.

For crime prevention and detection information, the law requires the public authorities and institutions witch competences in the field, service providers, nongovernmental organizations, representatives of civil society that promotes policies, practices, measures, procedures and minimum standards of security of information systems, The Romanian Executive Justice Department The Romanian Ministry of Administration and Administrative Reform, Ministry of Communications and Information Technology, the Romanian Information Service and Foreign Intelligence Service (which must be continuously and update the database on crime), the National Institute of Criminology, etc.

I. The notion of information is part of everyday life. Any decision in any field is based on information obtained by processing some data about the object of that activity. In order to become information, the data regarding the activity object has to be processed according to the computational requirements; this means gathering the data from different sources, proper processing and distributing the results of computational processing to the place where they have been requested.

The object of data processing consists in transforming the data into information that should be the basis for taking decisions.

The data concern primary events gathered from different places, undefined or put in a form that should be the basis for taking decisions.

The information represents messages obtained by processing the data; these messages must be concise, actual and complete and clear, so that they meet the computational requirements for the purpose for which the data[1] have been processed.

The data can be processes manually or by means of electronic calculation devices – automatic processing of data; as the automatic processing of data supposes both material resources – electronic calculation equipments – and human resources - operators, programming operators – organized so that they can operate as a unitary assembly, this is named automatic data processing system (SPAD).

The reality of computational networks imposed itself concentrically, from the local level to the national, and then to the global level. A world of inter-connected networks is, potentially, a world of plenary communication and subsequently, a world of great conjugated meanings and of efficient effort. Is enough to evaluate the Internet impact, this global network of systems, upon contemporary communication and upon representations regarding the world's unity and diversity in order to understand that the information regarding the world's unity and diversity is much more than a matter of communication. The Internet has changed the material and spiritual dimensions of the world and started to re-configure the contemporary man's profile.

The importance of computational technology and communications is unanimously known and accepted at the economic, social and political level. The end of the XXth century and the beginning of the new millennium are obviously dominated by the informatics revolution on the Internet, which is considered to represent the third industrial revolution. On the consequence way, people are preoccupied not only by the efficient

[1] Gh.Alecu,Al.Barbăneagră, Reglementarea penală şi investigarea criminalistică a infracţiunilor din domeniul informatic,Ed.Pinguin Book,Bucureşti, 2006, p.10

usage and permanent development of the information technology field and of the Internet but also by establishing the legal frame in which the interactions in this field called also Cyberspace or Global Village[1] should progress.

Extremely actual is also the matter of knowing the legislation that rules the Internet but also the decision of the international community to fill in the legal gaps of this new world and to harmonize them. The existence of Internet as a structure and at the same time as a society, which develops freely and without limits in comparison to the legal provisions of the states on the territory of which the network's servers are, led to a real criminality on the Internet, criminality carried on by cyber-criminals.

The member states of European Council drew up and signed on 23rd of November 2001, "The convention upon cybernetic criminality ". Subsequently, on 28th of January 2003, "The additional Protocol for the Convention upon cybernetic criminality concerning the incrimination of racial and xenophobe actions committed by means of computational systems" was forwarded to the member states to be signed. The Romanian state signed this Additional Protocol on the 9th of October 2003.

By the Convention and the Additional Protocol, the basic frame for investigating and penal sanctioning of the offences committed by computer as well as for cooperation between the states, necessary to stop this scourge is established.

The convention brings in discussion the necessity to incriminate some actions such as: illegal access to a computational system, illegal interception of information transmissions, computational forgery, computational embezzlement, infantile pornography on the Internet, violations of property rights and other related rights etc.

The Parliament of Romania tried to transpose all these directions in Law no 161/2003 regarding some measures to assure transparency and public dignity exertion of public functions and in business, prevention and penalization of corruption, in Title III of Book I (Prevention and fighting against computational criminality, art. 34 - 67).

The purpose of this normative document is to prevent and fight against computational criminality by specific preventive measures, discovery and punishment measures of the offences committed by means of computational systems, assuring that human rights and personal data protection are respected (art. 34).

The notion of computational offence includes very different offences more or less incriminated by some member states. Once the directing

[1] V.V.Patriciu,I.Vasiu,S.G.Patriciu, Internetul şi dreptul, Ed.AllBeck,Bucureşti,1999

principles for the national legislators are drown up, it seems that it is not necessary to adopt a formal definition for the computer related criminality, definition that would create more difficulties than it could resolve. The computer related criminality is reduced to offences defined in the directing principles for national legislators that leave to other states' task the care of adapting this "definition" to their own juridical system and to their historic customs.

In order to prevent and discover the computational offences, the law asks for the help of public authorities and institutions that have competences in this field, to service suppliers, to non-governmental organizations, to the representatives of civil societies who promote policies, practices, measures, procedures and minimum standard security of information systems, to the Ministry of Justice, Ministry of Internal Affairs and Administrative Reform, to the Ministry of Communications and Information Technology, to Romanian Service of Information and to the Service of External Information (who have to make and permanently update the database regarding computational criminality), to National Institute of Criminology, etc.

II. The computational criminality represents the social phenomenon characterized by committing offences in the field of informatics[1].

Beside numerous benefits, the computational systems have brought to contemporary world, also a multitude of negative aspects, the criminality in the Internet network reaching today alarming levels[2].

In general, the offences aiming at computational systems can be divided into two categories:

- Traditional offences committed by means of computational systems and
- Offences committed upon computational systems.

In other words, this type of systems can be considered both a mean of committing the offences and also their object.

Law no 161/2003 regarding some measures for assuring the transparency when exerting the public dignities, the public functions and business environment, preventing and punishing corruption, in Title III art. 35 alin. l letter b defines the following terms:

1. *Computational system*: any device or assembly of inter-connected devices or that has a functional relationship, out of which one or more provide automatic processing of data by means of a computational program

[1]Gh.Alecu,Al.Barbăneagră, op.cit.,Ed.Pinguin Book,Bucureşti, 2006, p.10
[2] D.Gărăiman, Dreptul şi informatica, Ed.AllBeck,Bucureşti,2003, p.272

2. *Automatic processing of data*: the process through which the data in a computational system are processed by means of a computational program
3. *Computational program*: an assembly of instructions that can be executed by a computational system in order to obtain a determined result
4. *Computational data*: any representation of some facts, information or concepts in a form that can be processed by a computational system. In this category is included any computational program that can determine the realization of a function by the system.
5. *Service supplier*:
a) Any natural or juridical person offering the users the possibility to communicate through computational systems;
b) Any natural or juridical person processing or storing computational data for the persons mentioned in point a) and for the users of the services provided by that person
6. *Data regarding computational traffic*: any computational data regarding a communication made by a computational system and produced by it, which represent a part of the communication chain, and indicates the origin, destination, route, hour, date, size, volume and duration of the communication as well as the type of the service that was used for the communication;
7. *Data regarding the users*: any information that may lead to identification of an user, including the communication type and the service used for it, postal address, geographic address, phone numbers or other access numbers and the payment modality for that service as well as any other data that may lead to the identification of the user;
8. *Security measures*: means the use of some procedures, devices or specialized computational programs by means of which the access to a computational system is restricted or denied for certain classes of users;
9. *Pornographic materials with under age persons*: any material presenting an under age person having an explicit sexual behavior or a full age person who is presented as under age person having an explicit sexual behavior or images that, although do not show a real person, simulates in a credible way an under age person who has an explicit sexual behavior;

As regards the *offences committed by the means of computational systems*, many types of offences considered as traditional embezzlement are committed by the help of computational networks. National and international settlements have started recently to play an active role in disassembling fraudulent schemes committed via Internet and in on-line

services. Here are included the most different national and international juridical regimes and instruments, for example[1]:
- National security (instructions for making bombs, illegal production of drugs, terrorist activities);
- Protection of the under age persons (abusive forms of marketing, violence and pornography);
- Protection of personal dignity (instigation to racial hate and racial discrimination);
- Economical security (embezzlements, instructions regarding the credit cards piracy);
- Protection of private life (unauthorized communication of data with personal character);
- Protection of reputation (written calumnies and illegal publicity);
- Intellectual property (unauthorized spreading of works protected by the author's right, for example music, literary works, software).

Thus, there are offences in which the *„modus operandi*" is not pointed against proper functioning of a computational system or the information comprised in it but the *result of data processing is used for committing some classical offences*. The authors appeal this way to non-traditional means for committing offences having a „traditional" character. As an example, we mention:
- The offence of bringing, without any right, the work (intellectual creation protected by the author's right law) to the public attention (art. 140, letter a in Law no 8/1996 regarding the author's right and the related rights);
- The offence of reproducing, without any right, a work (art. 142, letter a in Law no 8/1996 regarding the author's right and the related rights);
- The offence of money laundry (art. 23 in Law no 21/1999, for preventing and punishing money laundry);
- The offence of treason by secrets transmitting (art. 157 in the Penal Code);
- The offence of disclosing the secret that endangers the state's security (art. 169 in the Penal Code and art. 12 alin.2 in Law no 51/1991 regarding national security);
- The offence of disclosing the professional secret (art. 196 in the Penal Code);
- The offence of fraudulent management (art. 214 in the Penal Code);
- The offence of forgery of currency or other values (art. 282 in the Penal Code);
- The offence of forgery of official instruments (art. 286 in the Penal Code);
- The offence of material forgery in official documents (art. 288 in the Penal Code);
- The offence of disclosing the economical secret (art. 298 in the Penal Code);

[1] D.Gărăiman, op.cit, p.273

- The offence of funds embezzlement (art. 302[1] in the Penal Code);
- The offence of instigation to discrimination (art. 317 in the Penal Code)[1].

The space economy determines us also to approach more carefully the subject of settlement of the offences committed on computational systems, preeminently the offences against confidentiality and integrity of data and computational systems.

3. *Offences committed on computational systems*

The law of computational criminality establishes three categories of offences:

A.. Offences upon confidentiality and integrity of data and computational systems:
- The offence of illegal access to a computational system;
- The offence of illegal intercept of a computational data transmission;
- The offence of damaging computational data;
- The offence of disturbing the computational system's operation;
- The offence of making illegal operations using computational devices or programs.

B. Computational offences:
- The offence of computational forgery;
- The offence of computational embezzlement.

C. Infantile pornography through computational systems:
- The offence of infantile pornography by the means of computational systems.

The law of author right establishes the following offences:
- The offence of allowing the public access to the computer databases, which contain or which are protected works;
- The offence of making available for the public some technical neutralizing means of computer programs protection.

III. *Offences against confidentiality and integrity of data and computational systems:*

Transnational expansion of computer networks and the possibility of accessing the remote systems increase the vulnerability of these systems and give the possibility of committing offence activities.

Thus, the advantages obtained in the efficiency and effectiveness field, the progress achieved in computers' technology were and still are shaded by the vulnerability of data and information; at the same time, they led to the appearance of serous problems concerning the data security.

[1] Art. 317 is been modified by art. I point 66 in Law no 278/2006. Previous to the modification, the text incriminated the nationalist – chauvinist propaganda action.

Computers' security is a new domain whose main objective is to protect and assure confidentiality, integrity and availability of systems and data that they contain. Each of these terms has specific meanings that have developed based on technical ideas about leakage and loss of information in the automatic systems.

Anti-social actions committed by means of the computer cover a large range of offences: unauthorized access and unauthorized usage of the resources of a computational system, theft of data, destroy of the stored data, employ the computational systems in attack services, traffic of stolen passwords, spread of computational viruses and another number of offences with the same character.

Getting information by an unauthorized access, even in the case of the crediting company which is interested in the financial results of the debtor institution was considered an action outside the law. Illegal accessing of computers, data destruction, modification or revealing the data found in a computational system can be considered as illegal.

1. Unauthorized access

Exclusive access of some persons to certain categories of data considered as confidential data or private data is settled in the Romanian law system. Due to increasing resorting to computational progresses in economic units and in administration, valuable economical, administrative and official and private data are mainly stored in computational systems and on data supports[1]. Thus, the protection given by the penal law has to be extended also upon this new branch of information science that has a huge capacity of storing and processing data.

The development specific to the computational world, proliferation of personal computers and big progresses of telecommunication as well as the new video-text systems and other inter-active supports that allow the dialogues to be established with and between computers located in different areas of the world are the origin of these new problems.

These new problems that the information society has faced created the highly mediated character of the hacker who is trying to get access to the computers of a company or of an institution. The connection is made from distance by means of a computer and a modem, usually through the public network of telecommunications. The hackers use the computer networks as well as the telecommunication resources make them work for

[1] Ioana Vasiu, Implicaţiile legale şi etice ale folosirii Internetului, R. D. P., nr. 2/1996

them. Successful breaks in the communication systems and the computers in the whole world have shown the danger that appeared qt the same time with technology development.

The super-powerful and perfected military and scientific computers, have suffered breaks into just like the computers belonging to some governmental institutions, banks[1] and credit cards management buildings, important health care and educational institutions, etc., fact that endangered the protection of economical, scientific or personal data or of very important data for national security, most of them stored in national banks.

According to art. 42 in Law no 161 / 2003 unauthorized access consists in *the access without any right to a computational system. If the action is committed by breaking the security measures, the punishment is imprisonment from 3 to 12 years. If the action is committed in the purpose of getting computational data, the punishment is imprisonment from 6 months to 5 years.*

The material object of the offence consists of material entities that represent the computational networks or systems (computers, servers, routers, firewalls).

The active subject can be any person who is responsible penal, as the text does not provide a special quality for this. Of course, this person cannot be but a computer expert, hacker (unfortunately, lately, the programs needed to commit an action having as purpose breaking into a computational system can be found very easily on Internet and they are accessible to all; this way we reach the situation in which a simple apprentice in the art of computer usage and programming, and networks respectively, may cause huge damages to a computational system by using the resources existing on World Wide Web).

The material element of the offence is achieved by an access activity to a computational system, without any right.

- *The access to a computational system* represents its usage without having the right to.

For example, is the case of the employee in the accountancy sector of a company who, after finishing the working program, opens a computer

[1] Since January 1997, Romania's National Bank has been benefiting from the first computer network in the country, which has protection devices against unauthorized access.

belonging to the graphics section in order to play some games and, eventually to show other applications that are not available in his system.

We notice that here it could be included the theft of time – computer, a situation that many times slips out from the employers' supervision as they cannot supervise all the activities of their employees who could develop a large field of activities that have no relation to their tasks such as: the case of some programmers who are testing the programs they have created in commercial purposes on the computers of the company, the case of clerks who use the computer of the company to solve some personal problems or problems of third persons, use the computers in some companies or institutions for playing games.

- The access without any right to a computational system in the purpose of getting computational data

This is the case of the employee who accesses without having the right to, the computer of a company in order to get the list of wages paid by that company.

This situation is meeting many times with that mentioned in alin. 3.

- The access without the right of the computational system by breaking the security measures

In the sense of the present title, the person who is in one of the following situations acts *without any right*:

a) Is not authorized, on the grounds of law or a contract;
b) Exceeds the limits of the authorization;

c) has not the permission from the natural or juridical person that according to the law is competent to give, to use, administer or control a computational system or to perform scientific researches or any other operation in a computational system.

The offence of unauthorized access is committed with direct or indirect intention.

The action to mount in an ITM a device for reading the magnetic tape of the cards gathers constitutive elements of the offence of access without any right to a computational system by breaking the security measures, which is provided by art. 42 alin. (1) and (3) in Law no 161/2003, as the ITM is considered as computational system in the meaning of art. 35 alin. (1) letter a) in this law, and by mounting the magnetic tape reading device, the ITM's security measures are broken, their purpose being to assure the secret of the account number and the operations made as well as

to prevent fraudulent usage of cards[1]

The motive of the offence of unauthorized access is one of the most different manifestations. Many times, getting into the system originates in the simple curiosity of the visitor; but these are happy situations. The industrial espionage is often done by unauthorized access to the computational system of the rival company. It may appen that the computational system to aim at destroying the data which is in the computational system or placing some Trojans, computational worms, or other back-door[2] type programs. Anyway, the only cases in which unauthorized cases have benefic effects, without taking the form of an action that presents social risk, are those in which the owner or the administrator of the computational system wants to find out what are the weak points of the system and hires persons to try to penetrate the system in order to learn from them how to improve their protection.

2. Unauthorized interception

Unauthorized interception is an offence specific to the information technology which is added to traditional forms of espionage. So that at the same time with diversifying the way in which people can interact and communicate, the methods in which these communications can be intercepted also became more diverse. The electronic letters mainly, any form of data transmissions, in general, are the object of espionage actions since the beginning of the new millennium. The interception of in transit data communications means the same serious violation of communications' secret as well as the interception of written or telephone communications between individuals. At the same time with Internet development, unauthorized interception has become the most used method of getting secret data.

Referring to the "European convention about cybernetic criminality ", in its "Explicative Report" it is shown that by the term of "illegal interception" we understand the "violation of communications confidentiality either if we talk about the transfer of some data by computerized means, or about the transfer of data by a fix telephone, a fax or an e-mail – all these are included in the filed of article 8 in the European Convention of Human Rights "[3].

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[1] A se vedea I.C.C.J., secția penală, decizia nr. 5288 din 15 septembrie 2006

[2] Resident programs in the memory of a computer without the person using that system to know about their existance, and which allow a distant user to take over the control of that computer.

[3] I.Georgescu, Infracțiunile informatice prevăzute de Legea nr.161/2003, publicat în Buletin Documentar al DNA nr.3/2005

According to art.43 alin.1 in Law 161/2003, unauthorized interception consists of *interception, without any right, of a computational data transmission which is not public and which is meant to a computational system or is performed within a computational system.*

Although, as alin.2 in art.43 provides, unauthorized interception is considered also the *interception without any right of an electro-magnetic emission coming from a computational system which contains computational data that cannot be made public.*

Up to a certain point, the settlement is a parallel of the classical offence of violation of the correspondence secret provided by art. 195 in the Penal Code. The electronic communications may also refer to more that the simple correspondence protected by virtue of the right to private life[1].

The material object of the offence is represented by the flux of computational packages (bites succession „0" and „1", this meaning the succession of electrical impulses resulted from the controlled variation of power), which are being transported from one calculation equipment to another one or inside the same computational system, and towards which the interest of the offender[2] is directed.

Particularly, the material object may be even the technical support through which the data communications are made between equipments, starting from the outlet ports of the working stations (the connectors of the network plate or telephonic connectors of modems) and going on with the transport cables (network or telephonic cables), junction boxes (in which the network switches are – the switches), the network distributors, the routers etc.).

In the case of alin. 2), the material object is made of the electro-magnetic energy (emission) that radiates or that is found under residual or uncontrolled (uncontrollable) form in the next vicinity of electronic equipments which form the concerned computational system. Thus, the electro-magnetic emission around an equipment (printer, monitor, cable, etc) cannot be considered as material object if at the moment of the interception moment, this was not connected to a computational system in the conditions mentioned in alin. 2).

Another interception situation, provisioned by the hypothesis in alin 2 of art 43 is known under the name of the *interception of cables and emitted signals (Wiretapping, Eavesdropping on Emanations).*

The material element is characterized by the interception action of a computational communication, by any mean and using any type of tools.

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[1] Gh.Alecu,Al.Barbăneagră, op.cit.,Ed.Pinguin Book,Bucureşti, 2006, p.75

[2] M.Dobrinoiu, Infracţiuni în domeniul informatic,Ed.C.H.Beck, Bucureşti, 2006

The interception can be present also in the passive form, as a simple perception of the information coming from the system, by connecting to the network or by capturing the radiations emitted, knowing that all systems emit electrical and electro-magnetic radiations which can be intercepted, analyzed and decoded[1].

The offence of unauthorized interception is committed just as the other computational offences, only with (direct or indirect) intention.

3. Alteration of computational data

Consequence of economical importance of data and programs for computers, of societies and administration's dependence on informatics as well as of the concentration force of electronic stored data, modification, unauthorized deletion or prejudice of data is considered a special danger for the business' world and for administration. The good operation of societies and organizations as well as of social activities is here especially at stake. The damages of the data and computer programs, which constitute a purpose in themselves and not only an element of a fraudulent plan, appeared in the United States and in other states. The damages and the perturbations thus created are considerable[2].

According to art. 44 in Law 161/2003 regarding some measures to assure the transparency when exerting the public dignities, public functions and in business field, preventing and punishing the corruption by altering the integrity of computational data, we understand *the action to modify, delete or damage computational data or to restrict the access to these data, without any right.* The aggravate circumstance is constituted by the *unauthorized transfer of computational data in a computational system.*

The material object of this offence lies in the material support on which the affected data or computer programming. Because as usual, inside a computational system, the computational data are kept on the hard-disk; this is the material object. But also, the material object can be constituted also in the other modes of keeping the information (floppy disk, CD-ROM, DVR-ROM).

The material element of the offence can consist of several alternative actions-non-actions: modification, deletion, deterioration of some computational data or restriction of access to these data or, in the form provided in alin. 2 and 3, in the unauthorized transfer of data from one

[1] D.Gărăiman, op.cit, p.307
[2] Ioana Vasiu, "Criminalitatea informatică", p.87

computational system or from a storing mean of computational data[1].
Act without any right the natural or juridical person who is not authorized on the grounds of the law or of a contract, who exceeds the limits of authorization and who is not allowed, by the capacitated person, to use administer or control a computational system or to perform scientific researches or any other operations in a computational system.

4. Computational sabotage

The perturbations of computational systems and of telecommunication systems may have worse consequences than the simple damaging of data or the computer program modifications. Due to the increasing dependence of modern technology in comparison with the information technology (Information Technology – IT), the protection of computer functioning but especially the protection of computer networks, both of than having the same final purpose, namely to protect the confidential data which represents a basic component of any business, no matter of the field in which it activates. Thus, hindering from operation some important public systems (such as private computers of a bank, or of other assurances institution) or strategic (such as those in the medical or military field) may have not only serious economical consequences but they can even lead to catastrophes at a human level[2]. If, for example, the accountancy is blocked in calculation networks, in some particular cases this might lead to ruining the operators of the center and to the bankruptcy of the unit cooperating with this one.

According to art. 45 in Law 161/2003, by computational sabotage we can understand *the action of disturbing seriously and without any right the operation of a computational system, by introducing, transmitting, modifying, deleting, or altering the computational data or by restricting the access to these data.*

The material object is represented by the computational system which is disturbed from its functioning, namely:

Component (components) – one of the parts forming a computer or a network;

Computer (computer) – a device which consists in one or more associated components, including units (peripheral and processing units and which is controlled by programs stored internally;

[1] D.Gărăiman, op.cit, p.309
[2] Ioana Vasiu, op. cit., p.96

Network (network) – An inter-connected group of computers, switching equipments and inter-connection branches;

Internet (inter-network) – is a network of systems (nets).

Serious disturbance may have as object either the entire computational system or parts of it or programs served or shown by it.

The material element of the objective part consists of:

1) *Introduction* of computational data - is the action through which the intruder adds data, information into the system so that they can affect its functioning. For example, in a wages management system, a command can be introduced which is making the income taxes not to be applied anymore.

2) *Transmission* of computational data – is the action through which data is sent to the concerned system (through different communication channels – for example, direct access to the server of the company, Internet connection, and from here penetration into the system, etc.) that damages its normal operation. For example, a system which is the server of more Internet sites is importuned with information, which makes impossible for that system to answer to all users.

3) *Modification* of computational data – is the action through which computational data is directly affected, the result being an improper functioning of the system. For example, modification of the operating system's data in the server of an university would make the entire information activity in that place to be suspended.

4) *Deletion* of computational data – is the action having as a result the disappearance of computational data needed for the normal operation of the system. For example, emptying the content of a hard-disk leads to a total loss of the data and to an incomplete usage of the system.

5) *Deterioration* of computational data is the action through which the data are damaged and they do not correspond to reality. For example, the effects of a computational virus may lead to the fact that the data continue to exist but they are damaged, they can no longer be used.

6) *Restriction* of the access to computational data – is the action having as result the fact that the persons having normally access to the computational system can no longer use it. For example, a change of the names and access codes of the employees of a company will lead to the fact that they cannot carry out their normal activities.

In order to achieve the material object of the offence of computational sabotage, each of these actions has to be carried on without any right.

It is enough to commit only one action of the above mentioned so that the offence can exist and if the action will be committed in two or more of the alternative modalities, the offence will be unique and no offences junction will exist.

5. Illegal operations with devices or computational programs

As we have already mentioned, serious damages can be produced to the computational systems also by persons who do not have a special training in the computers' field, but who instead manage to get the necessary tools (programs or passwords, access codes) and use them. To stop such kind of actions, the legislator incriminated owing and transmitting such devices.

According to art. 46 in Law 160/ 2003, the following constitute the offence of illegal operation with devices or computational programs:

1) a) the action to produce, sell, import, distribute or make available under any other form, without the right, of a device or computational program conceived or adapted with the purpose of committing one of the offences provided by art. 42-45;

a) the action to produce, sell, import, distribute or make available under any other form, without the right, of a password, access code or other similar computational data which allow total or partial access to a computational system with the purpose of committing one of the offences provided by art. 42-45.

(2) Owing without any right a device, computational program, password, access code or computational data of those provided in alin. (1) in the purpose of committing one of the offences provided by art. 42-45

The material object is materialized in:

- devices
- computational programs
- password
- access code
- such as to allow total or partial access to a computational system

The tools can consist of:

- Script or program;
- Independent agent: virus or Trojan;
- Integrated program
- Distributed tools or
- Data interceptor.

The material element consists of:

1) *Producing action*. By this, the legislator referred to the creation of a computer program (these are the most common and very easy to find on the Internet) or devices (as for example the so called black boxes, electronic devices that attach to the telephone in order to make impossible to find its identity). Sometimes, these devices are objects that exist around us and they are used with a lot of imagination
2) *Selling action* implies the transfer against an amount of money.
3) *Import action* implies bringing something from outside the country.
4) *Distribution action* refers to creating a network whose purpose is to make available (it does not matter if this is does with money or not)
5) *Making available action* can be achieved for example by using an Internet site.
6) *Owing action* of a device, computational program, password, access code or computational data of those mentioned in alin. (1) with the purpose of committing one of the offences provided in art. 42-45.

In this fight with the computational criminality, a very well made legislative framework is needed as regards the prevention, discovery and punishment of these actions. By the international documents to which Romania is part of, it is forced to develop a legislative system specific to this kind of offences. More than that, old offences are committed nowadays by modern means (computational theft), at a thousands kilometers distance, the international cooperation is essential to fight against this scourge[1]. Law no 161 from 2003 represents a beginning but in order to keep pace with the huge offences diversity which develops by a simple keyboard and a simple click on the mouse, the legislative activity must not stop here.

[1] I.Georgescu, Infracțiunile informatice prevăzute de Legea nr.161/2003, publicat în Buletin Documentar al DNA nr.3/2005

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NEW STIPULATIONS OF THE ROMANIAN PENAL PROCEDURE DRAFT CODE AND THE PRACTICE EXPECTATIONS

1. General regards
2. About the Penal Procedure Code project
3. Implication of the reasonable term in penal cases
4. Juridical institutions of penal procedure law in "transition"

Abstract

The paper focuses on the main juridical institutions of penal procedure law, which are stipulated in the current Romanian Penal Procedure draft code. Even if the rules are still in project phase, the legislator must define well its changing and use more efficiently these new procedures. Moreover, in this paper I would like to present how the Romanian society will receive all of these and what exactly are the changes in the jurisprudence field.

1. General regards

Romanian justice reform has had as objective the one of the most necessary projects, meaning the law project regarding the alteration of Penal Code and Penal Procedure Code. Being, for more than six years, in the stage of project, these laws have caused deep polemics, both at the level of the political system and especially, among jurists – theoreticians and practitioners. Very often, these laws were at the verge of being adopted by the Romanian Parliament, as it is the case of the Penal Code, it was later adopted in 2004 through the law 301 (the Romanian Official Journal no. 575 of 29 June 2004), and entered into force one year later. This did not occur for reasons depending on the organization of justice and the fact that, the national society was not ready enough, at the time, to implement the new regulations and juridical institutions regulated by the new adopted law, said the responsible factors at the time. The result of abrogation, before being enforced, of the new Romanian Penal Code was entirely felt not just

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by the "defeated" authorities by the society in general. I say this because, mostly, even if substantial changes of the penal code in force have occurred, the most significant substantive penal law institutions had not yet been regulated in the normative document.

Therefore, in spite of all the efforts made by national authorities and we expressly refer to the actions taken by juridical authorities, in continuing the reform in the field of justice – penal justice has been unfortunately little felt in the juridical life.

2. About the Penal Procedure Code project

2.1. Common legal framework

Recently, the work commission of the law project regarding the adoption of the new Romanian penal procedure code concluded its activity. In general, at a first lecture, we can see that this project includes, among its regulations, some new juridical institutions of penal procedure, which are more than necessary, at current moment, for the Romanian society. I say this because, most of juridical regulations or, more specifically consecrated juridical procedures in the penal procedure code, in force, are obsolete. But, because the penal juridical system reformation intention has existed ever since the year 2000, we can really say that in its current form, the new penal procedure code shall cover these lacks and shall give a whole new meaning to the penal procedure in our country.

As a matter of fact, there are very few juridical institutions found in many European penal legislations, which makes us believe that some of them cause juridical effects in the virtue of their implementation in our law system or due to national legislation compliance with the communitarian acquis, action developed by Romanian authorities from the pre-adhesion period to the European Union.

Another category of penal institutions are taken into consideration by the lawmaker because the existence of a new set of rules – directing principles regarding protection, within penal law, of some European values, like the case of communitarian financial interests protection (Sicurella Rosaria, *Verso uno spazio giudiziario Europeo, Corpus Juris*, 1997). From this point of view, we can appreciate that, beyond the hard work of authorities in Bucharest to accelerate reform in penal justice, consisting mostly of the elaboration of the two law projects regarding the penal code and penal procedure code, a juridical collaboration in penal matter, with European relevant authorities has caused the most wanted results. Therefore, the bases of "restoring" the new penal law juridical institutions have been laid, on one hand together with the harmonization of national

legislation to the communitarian acquis but together with the acceleration of juridical cooperation in penal matter as well, and between our country and neighbour countries which are not members of the European Union, on the other hand.

2.2. New juridical institutions

The need for reformation of the juridical system in our country has been felt ever since the moment of ratifying the Convention on the juridical cooperation in penal matter (the Law no. 236/1998 and the Law no. 34/2000), corroborated of course with the need to change existent procedures in the pre-Decembrist period. It is as a matter of fact, a reference moment, in creating the modern juridical framework and, at the same time, too much expected at national level. Taking this into consideration, we have to appreciate the fact that, above the efforts made by national authorities, a special part is held by the international cooperation in penal matter. It is true, that mostly, these institutions shall produce their juridical effects in the future, but it is also true that some of them, the most important ones, shall find their place in the new code, that shall be adopted.

The same arguments have been taken into consideration bringing on the first place of the juridical activity, objectives like the ones connected to the creation if a modern legislative framework in the matter of penal law that would allow the development, under good conditions of modern justice, adapted to the contemporary society – imperative of increasing the quality of public service, both during the penal pursuit phase and trial phase.

Therefore, the new juridical institutions of the penal procedure code shall provide unitary jurisprudence, according to European Court of Human Rights jurisprudence. The lawmaker takes into consideration several juridical institutions, new, for the penal justice in Romania.

These being said, the special procedure of blaming is one of them. Named, in the code project, "*guilt admittance agreement*", the new special penal procedure aims to accelerate the trial of less complex penal causes, of those that do not require long terms of trial, as well as the efficacy of justice act management, in general.

Blaming procedure is a special procedure with the purpose of increasing the promptness of juridical activity, with less expenses, in other words, it provides a better development of the justice act, knowing that the purpose of the penal lawsuit is to penalty make responsible the person committing an offence, according to its guilt.

Due to the aforementioned reasons, we can say that things are different if the defendant wants to simplify penal procedure, by admitting its guilt during the penal pursuit phase. This leads to some juridical consequences of real interest to the juridical institution in discussion.

It is known that, every time it is necessary to make de defendant responsible from the penal point of view for committing one or more offences, with a low degree of social danger it is admitted the right to negotiate the blame, either directly, either through its lawyer, with the district attorney during the penal pursuit phase. The juridical consequence of such a negotiation is the cessation of the penal lawsuit in this phase, without sending the defendant to trial or by applying a pre-established minimum penalty (Deysine Anne, *Justiția în Statele Unite ale Americii*, 2002).

What is specific to this procedure is that the institution brings advantages to both contracting parties. On one hand, it has an advantage for juridical bodies because, if the penal lawsuit stops during the penal pursuit phase (Bovio Corso, *Patteggiamento allargato e giustizia penale*, 2004), it avoids to overload the law courts with less complex penal actions, and on the other hand, the institution has an advantage for the defendant because only in this way the penalty shall be considerably reduced, provided by the penal law for the committed offence (Magherescu Delia, *Unele considerații în legătură cu negocierea învinuirii în justiția penală a Statelor Unite ale Americii*, 2003).

Beyond the material and formal meaning of blaming, of special significance for studying the juridical institution of blaming institution, is the juridical meaning of blaming. We say this because the more relevant blaming shall be not in its drawing-up stage, but during the stage of its notification by the defendant or, also, during the penal pursuit phase, during the penal action setting into motion, of which some juridical reference effects are related.

We notice that the moment when a negotiation of blaming occurs is very important. This moment can, to a certain extent, be established by evolutionary factors of blaming that can lead to its drawing-up, with all the consequences resulting hereof, or leading to its cancellation, with the consequence of altering it in the first instance (Magherescu Delia, *Modificarea învinuirii în prima instanță. Aspecte comparative,* 2006).

From the blaming features point of view, three such features are relevant. *The official character* of blaming is the exponent of the penal pursuit phase, when appear the blaming formulation and its communication to the defendant. *The complete character* shall be deducted from the fact that blaming has to include all the facts – actions and inactions – imputed to the accused person, in order not to cause further alterations. And not last, *the*

compulsiveness of notifying the defendant, the action or actions of the accusation, causing some juridical consequences involving the compliance by the juridical bodies of the defendant's lawsuit guarantees.

3. Implication of the reasonable term in penal cases

Regulated by article 6 point 1 of European Convention of Human Rights, the principle provides, that any person, accused of committing an offence is entitled to the equitable trial, in public and within a reasonable term of its penal lawsuit.

From the European Court of Human Rights practice the solution way of trial incidental matters is relevant. Therefore, the Court decided through the Sentence no. 86 from 26th of October 1984, *De Cubber vs Belgium*, and through the sentence no. 154 from 24th of May 1989, *Hauschildt vs Denmark*, regarding the causes where the same person carried juridical functions during the preparing phase of the penal lawsuit and in the list of analogous functions, during the preparing phase of the penal lawsuit and during analogous functions in the trial phase. Other recent resolutions in the same matter are underlined through the Sentence no. 255-A from 24th of February 1993, *Fey vs Austria*; Sentence no. 257-B from 26th of February 1993, *Padovani vs Italy* (Mireille Delmas-Marty, *Procedure penali d'Europa*, 2001; Marzia Finotto, *Il diritto alla ragionevole durata del processo*, in La giustizia penale 2001).

According to Strasbourg Court of Justice, the reasonable term referred to in article 6 point 1 in the Convention begins as soon as a person has been accused. This means that it can be before the lawsuit gets to trial, more often causing the penal pursuit phase, when the juridical investigating body notifies the defendant the offences and the fact that he is entitled to a lawyer.

Reported to the things that we have discussed previously, we may have the following question: does the negotiation of the blaming represent an exponent of solving reasonably the criminal causes? Or does it represent a progress factor that the good organization of the criminal justice depends on it, both in criminal pursuit stage and in the judging stage? We consider that it is one of the serious problems of the judiciary authorities in the administration process of the criminal justice, a problem that was noticed a long time before and that called especially the legislator's attention.

This refers exclusively to the Criminal process in Romania, not considering other European procedure criminal systems; knowing the fact that, in Romania, the reasonable term related to article 6, point 1 of European Convention of Human Rights does not enjoy the value that the

European document wanted to give it. The danger is bigger when the ordinary solving of the criminal causes is prolonged, many times too much in time, sometimes touching alarming limits.

Of course, the legislator has to think about the imperative need to solve the criminal causes as fast as possible. This is an essential demand of the criminal process in Romania, at present, required by the society for the judiciary authorities (Romania's Constitutional Court's Decision no. 129 of October 24th, 1996, Official Journal No. 158 since July 16th, 1997; Decision 208 of October 25th, 2000, published in the Official Journal no. 695 of December 27th, 2000 – www.ccr.ro/cedo).

Considering the principle of the fast solving of the criminal causes, and also its colligation with the European principle of the reasonable term if starting the judicial procedure in criminal matter, we have appreciated that "*the criminal causes must be solved as fast as possible, keeping their high quality and justice standards. The trial's acceleration is an essential quality of a criminal procedure*". On the other hand, a trial's acceleration would represent an important simplification of the procedure in the criminal pursuit stage, when the defendant would regulate his criminal right conflict by recognizing his guilt that would lead to the negotiation of the blaming.

I affirm this thing because, from this point of view, he would operate not only a procedural simplification of the criminal process, but also a formal one, reported exclusively to placing in time the development of process.

In other words, the defendant's will to give up the formalities of the criminal pursuit authorities related to the truth settlement (the real situation settlement, the circumstances of the offence, the causes that have determined it, the purpose of the offence, the means that he used, the consequences and the personal circumstances of the perpetrator) may influence positively solving the criminal process and also a better organization of the judiciary authorities' activity. That is why I consider that the legislator should adopt juridical norms that have to accelerate the gait of trial, not to make it more difficult.

4. Juridical institutions of penal procedure law in "transition"

Establishing an adequate balance between the demands of an efficient criminal procedure, protecting the elementary and fundamental procedural rights of the human being and implicitly of the participants to the criminal process, and also respecting integrated the principles that

regard the fair development of the criminal process, is the first objective of the new Criminal Procedure Code that is just a project, for the moment.

Of course, this will regulate expressly the fundamental principles of the criminal process. In the project, we have introduced, beside classical principles, like finding the truth, the innocence assumption, to right to be defended, respecting the human dignity, other new principles, like the right to a fair process developed in a reasonable term, separating the judiciary functions in the criminal process, the compulsoriness of the criminal action related to the subsidiary one of the opportunity, the *non bis in idem* rule, the right to be free and safe. In the proof matter, we respect the loyalty rule in obtaining the evidence.

The project of the code rethought the procedural position of the attorney in the frame of the criminal pursuit authorities and also its competence. In order to answer the demand to develop fast the criminal process, the project suggests a simplification of the criminal pursuit stage, rethinking it, inclusively repositioning the attorney's role to manage and supervise this activity, according to the constitutional disposals, and also introducing the principle of opportunity. Rethinking the categories of the pursuit solutions that may be pronounced represents another new element. First, we consider the regulation of the alternative solutions of the pursuit, in the attorney's competence, respectively giving up the pursuit, as a consequence of the opportunity's principle.

The attorney manages and supervises the activity of the criminal research authorities, of the judiciary police and of other special criminal research authorities. He may accomplish any criminal pursuit act, in the causes that he manages and supervises. He also accomplishes the criminal pursuit in the case of offences for which the first judgement competence belongs to the appeal courts or to the High Cassation and Justice Court, and also in other cases foreseen by the law.

By elaborating the preliminary chamber, the projects want to answer to the legality and balance exigencies of the criminal process. By regulating the preliminary chamber, we want to solve the things related to the legality of sending to the court and the legality of administrating the evidence, insuring the premises to solve fast the criminal cause in the first court. Thus, we may remove some of the deficiencies that lead to Romania's conviction by European Court of Human Rights because it did not respect the time of the criminal process.

The project gives up to the limitative enumeration of the proof means, foreseeing the fact that we may used, in the frame of the criminal process, any proof means that are not rejected by the law. In order to insure a fair procedure, in the evidence administration stage, the projects

improves essentially the disposals referring to the right to demand the evidence administration regulating expressly the cases where the judiciary authorities may reject a demand regarding some evidence administration.

Such situations are considered when the evidence are not relevant reported to the object of proof in cause or when they appreciate that, in order to proof the element that represents the object of proof, they have administrated enough proving means. Also, if they consider that the proof is not necessary because the relieved fact is notorious, and also when the proof is impossible to obtain or when the demand was formulated in order to protract the process, the court may refuse its administration.

Staying with the proving means, the project of the new criminal procedural code regulates expressly for the first time the principle of the procedures loyalty in administrating the evidence, in order to avoid using any other means that could administrate with dishonesty a proving means or that could provoke the accomplishment of an offence, in order to protect the person's dignity and also his or her right to a fair process and to private life. The elaboration of excluding the evidence that are illegally or disloyally administrated is regulated in detail, according to the legitimacy theory that place the debate in a larger context, considering the functions of the criminal process and of the judging decision.

Therefore, considering the nature of the juridical criminal procedural right institution, taken from the continental right system in the common-law judiciary system, and also the European Court of Human Rights jurisprudence, excluding the administrated proving means may exist only if they find a substantially and significant violation of a legal disposal, regarding the proof administration that, in the concrete circumstances of the cause, makes the proving means to touch the fair feature of the criminal process in ensemble.

Another new institution is excluding the derived proof, known in doctrine as "*the distance effect*" or "*the poisoned tree's fruits*" and it has as an object removing the proving means that were illegally administrated, but derived from legal evidence.

Although, according to the European Court of Human Rights jurisprudence, we accomplish the explicit regulation of the principle of the proportionality of any preventing measure to the gravity of a person's accusation, and also of the principle of needing such a measure in order to accomplish the legal purpose followed by its disposal. This happens because, on one hand, the criminal process purpose is that any guilty person has to be criminally responsible according to his or her guilt and, equally, no innocent person has to suffer the law unfair consequences.

As a general rule, we regulated the necessity of informing in written the person submissive to any preventing measure above all the rights recognized by the law.

Conclusion

I consider that, when adopting and validating the new Criminal Procedural Code, that we hope that will happen as soon as possible, it should be possible to create a legislative frame adequate to develop the criminal justice administration activity where the criminal process is faster and more efficient and implicitly, less expensive, in a significant way.

Also, we expect, in practice, a better and unitary protection of the human's rights and the freedoms guaranteed by the Constitution and the international juridical tools, according to the conceptual harmonization of the foresights of the new Criminal Code that, also, is in project and expects to be adopted, paying a special attention to the offence.

The adequate regulation of the international obligations assumed by our country, regarding the normative acts in criminal procedural right is very important according the treaties and conventions contracted by our country, in the global process of reforming the international society and insuring the legal frame for a "cleaner" society.

In consequence, we expect the implementation of the new juridical criminal procedure right institutions so that the practitioners may conceive a new and efficient criminal procedure, with all its positive consequences.

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THE LEGAL NATURE OF THE ECONOMIC ACTIVITY OF NATURAL PERSONS, IN THE LIGHT OF THE PROVISIONS OF URGENCY ORDINANCE OF THE GOVERNMENT NO. 44/2008. OPINION

Abstract

The Urgency Ordinance of the Government no. 44/2008 concerning the economic activity of authorized natural persons, individual companies and family companies questions the legal nature of the economical activity of the natural person in the 3 forms mentioned in the act: individually and independently as authorized natural person, as holder of an individual company or as a member of a family company. Our observations regard two aspects. Firstly, the law maker replaced the tradition notion of commercial fact as it is provided traditionally by art. 3 of the Commercial Code, with the notion of economical activity defined by art. 2 lit. a of Ordinance no. 44/2008. Probably, an extension of the commercial activity to domains such as agriculture was wanted.

Then, the Law maker rules in a different manner the legal nature of the economical activities of the natural person. In the case of the natural person who perform individually and independently economical activities, the performed economical activities are or not commercial reported to the fulfillment of the 3 conditions provided by art. 7 of the Commercial Code: to perform commercial facts, these commercial fact to be performed as a common profession and for his or her own benefit.

In the case when a natural person performs economical activity within an individual company or within a family company, the person has the quality of merchant starting from the day of registration in the Registry of Commerce, thus the performed activity has a commercial nature.

We appreciate that the solution proposed by Ordinance no. 44/2008, can be a source for discussions due to the fact that both legal doctrine and judicial practice regards that a commercial fact has a commercial nature regardless of the person who performs it.

1. Preliminary considerations

The commercial facts provided by art. 3 of the Commercial Code are defined in doctrine and legal practice as being the legal acts, legal facts and economical operations by which the production of stocks is realized, or the execution of works or services with the purpose of obtaining profit.[2] In one domination opinion in the doctrine, the enumeration of the commercial facts in art. 3 has an enumerative nature, and to the 20 commercial facts

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[2] Cărpănaru, S., 2007, "Drept commercial, ed. a VI-a, revăzută şi adăugită", (Universul Juridic, Bucureşti), p. 34; Guyon, Y., 1994, "Droit des affaires, Tome 1, 8eme edition, (Economica, Paris), p. 12-18

there can be added other commercial facts with the condition to fulfill the characteristics of the commercial facts: realization of profit (*animus lucri*) and the act to be interposed in the circulation of stocks, between the produces and the consumer.[1]

In the legal doctrine before Ordinance 44/2008, it was underlined the idea that the natural person who individually or within a family association perform a commercial activity (of those provided by art. 3 and of the other operations that can be added to that list) have the quality of a merchant. As follows, before starting commercial activity, the natural person has to register at the Registry of Commerce.

On this doctrinal coordinates unanimously accepted by case law we propose to establish two things:

a) in what measure the economical activities, as defined by Ordinance no. 44/2008, are commercial facts.

b) if the economical activities performed individually and independently by the natural person confer to the person the status of a merchant from the date of register in the Registry of Commerce or, as provided by Ordinance no. 44/2008, the status of merchant is gained in the terms of art. 7 Commercial Code.

2. The economical activity performed by the merchant natural person

The notion of *economical activity* is defined by the provisions of art. 2 lit. a of Ordinance no. 44/2008 as being "the agricultural, industrial, commercial activity performed for obtaining goods and services of which value can be expressed in money and that are destined for shale of change on the organized markets of for some determined or determinable beneficiaries with the purpose of obtaining profit."

From the sphere of economical activities are excluded: 1) liberal professions; 2) economical activities organized and provided by special law; 3) economical activities for which the law instituted a special legal

[1] Georgescu, I.L.,1946, "Drept commercial", p. 161; Vonica, R.P., 2000, "Drept comercial", (Lumina Lex, Bucureşti), pp. 251-252l; Căpăţână, O., 1991, Notă la decizia civilă nr. 249/1991 a Tribunalului Cluj, Dreptul 9, p. 751; Turcu, I., 1998, "Teorica şi practica dreptului comercial, vol. I., (Lumina Lex, Bucureşti), p. 45; Cărpănaru, S., 1991, "Faptele de comerţ în dreptul comercial roman", Dreptul 10-11, p. 8; Poruţiu, P., 1946, "Tratat de drept comercial", vol. I., (Editura Universităţii Cluj, Cluj-Napoca), pp. 87-179; Clocotici, D.,1998, "Dreptul comercial al afacerilor", (Fundaţia "România de Mâine"), p. 51-66

regime, with restrictions regarding its performance or other interdictions; 4) activities of professional training of noviciate at the workplace; 5) the services provided in the context of the liberty of the transfrontier services, as provided by art. 49 of the Treaty of the European Communities.

The legal definition of the concept of economical activity underlines 3 aspects: firstly, it encompasses both of the characteristics of commercial facts: the economical activity has as purpose the profit and it is interposed in the circulation of goods. Secondly, it can be observed that the legal definition of economical activities encompasses the next elements from the content of the definition of commerce from legal perspective: the activity of production of goods, of interposition in the circulation of goods and providing services.[1] Thirdly, it is introduced in the sphere of commerce, certain activities from agriculture, silviculture and fishing. According to art. 3 para. 2 of Ordinance no. 44/2008, all economical activities can be performed ill all the domains, professions and occupations and jobs not prohibited, namely the activities from the CAEN Code (Classification of activities from the national economy, approved by Government decision no. 656/1997) excluding those provided by a special law. Among other activities, according to the CAEN Code, the authorized natural person cultivate cereals, rice, grapes, necessary for the preparation of beverages, etc., raising cattle, sheep, pigs, etc., activities of silviculture, fishing.

The sale of agricultural products by the grower is not enlisted among the economical activities that can be performed by the authorized natural person in any of the three presented forms. On this aspect, Ordinance no. 44/2008 is consequent with doctrine and commercial practice, that consider the sale of agricultural products in their natural state, obtained by the grower as a civil and not a commercial act.

The economical activities that can be performed by the merchants – natural persons on the field of agriculture regards exclusively the groove of some plants breeding of some species of animals; the activities auxiliary for the production of vegetables and the breeding of animals; the preparation of seeds; the hunting and connected services, the forestry, the fishing, the aquaculture.

In conclusion, the economical activities provided by Ordinance no. 44/2008, fulfill the conditions of commerciality, established by legal doctrine and case law, in order to be considered commercial facts.

[1] Cărpănaru, S., 2007, p. 7; Vonica, R.P., 2000, p. 12; Arion, C.C., "Elemente de drept comercial", (Socec, Bucureşti), pp. 3-46

3. The legal nature of the economical activities performed by authorized
natural persons, individual companies and family companies

According to case law, the natural person who fulfils independent activities gains the status of merchant, in the sense that is fulfilling objective facts of commerce.[1] The same position is presented by doctrine: "In the conception of the Commercial Code, the merchant natural person is defined not by his belonging to a professional group but by the acts and operations fulfilled, namely by commercial facts performed as a profession."[2]

In clarifying the legal nature of the commercial activities, the provisions of the Ordinance do not constitute doubtless arguments. We confront the situation in which the commercial character of an economical activity depend on the status of the person who executes the act, situation that is contrary to the principle according to which the operations considered to be commercial facts are governed by commercial law, regardless the status of the person who performs the acts. The ordinance provides at art. 20 para. 1 that the authorized natural person has the status of merchant in accordance with the provision of art. 7 of the Commercial Code (to perform commercial facts, having commerce as common occupation, and – provided by doctrine – all these for his own benefit). For example, the natural person if is performing the activity of "manufacturing mortar" individually and independently, as authorized natural person gains the status of merchant only in the conditions of art. 7 of the Commercial Code.

Instead, even if they perform the same economical activity, the member of an individual company or of a family company, have the status of merchants starting from the day when they were registered in the Registry of Commerce (art. 23). Being merchants, the holder of a private company and the member of the family company, they perform commercial facts. Thus, the economical activity performed have the legal nature of commercial facts. The conclusion differs, and regards prudence in the case of authorized natural persons, as to consider their acts as commercial facts.

[1] Curtea Supremă de Justiție, Secția contencios administrative, Decizia nr. 265/1994, Revista de drept comercial 10/1996, p. 124
[2] Cărpănaru, S., 2007, p. 67

Conclusion

The commercial activities performed by individual companies and family companies are commercial facts (art. 23 and art. 27 of Ordinance no. 44/2008) and they have this character only respecting the provisions of art. 7 of the Commercial Code. The case of authorized natural persons (art. 20 of Ordinance no. 44/2008) can give rise to contradictory discussions. For identity of ration we appreciate that the economical activities have a commercial nature, regardless the form in which they are performed: individually and independently, as holder of an individual company, or as member of a family company.

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THE TRANSFER OF CONVICTED PERSONS AS AN ACT OF INTERNATIONAL COOPERATION IN PENAL LAW

Abstract

The transfer of convicted persons is an act of international cooperation in penal law. It means moving the persons convicted to sanctions implying freedom deprivation, persons who are not inhabitants of the state where they have been convicted, from this territory to that they belong to in order to execute or carry out the execution of their conviction.

The execution of punishment in the state of origin of the convicted person has several advantages. Among them are the following: it allows the use of proper education programmes for the convicted, in their mother tongue; social integration in the socio-cultural environment they have been formed into is an important objective.

The transfer of convicted persons is not aimed to apply justice stricto sensu, but to assure the carrying out of punishment implying deprivation of liberty with a maximum efficiency; more precisely the state takes on its side the task of executing a sentence of conviction given in the state of conviction, which is thus excused from carrying out the sentence, including the financial efforts involved.

The transfer of convicted persons is an act of international cooperation in penal law. It means moving the persons convicted to sanctions implying freedom deprivation, persons who are not inhabitants of the state where they have been convicted, from this territory to that they belong to in order to execute or carry out the execution of their conviction.

The transfer of the convicted persons – as a first means of cooperation in penal matters – within the Union (J. Pradel, G. Corstens, 2002, "Droit pénal européen", 2 edition, Daloz, Paris, pp. 53 and next) - means - as the other forms of primary cooperation – an abdication of the states from their sovereignty and a transfer of the penal prosecution to certain persons, or a completion of a sentence in the benefit of another state that shall exercise these attributions.

The problem of transferring the convicted occurs because, though the principle of territoriality in penal law exists, this law applies to all criminal acts committed on the territory where the state exercise its

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sovereignty, no matter if the citizens who committed them are inhabitants of the respective state, foreign citizens or stateless persons residing on the territory or outside. The existence of a certain number of persons, foreign citizens or stateless persons not living in the country, who are convicted and are to execute sentences depriving them of freedom, raises difficult issues for the respective state regarding the carrying out of punishment by the persons involved (George Antoniu, 2005, "European Penal Law – Course Notes", Academica Printing House, Târgu Jiu., pp. 132).

The execution of punishment in the state of origin of the convicted person has several advantages. Among them are the following: it allows the use of proper education programmes for the convicted, in their mother tongue; social integration in the socio-cultural environment they have been formed into is an important objective.

The Romanian state concluded agreements with different states (Turkey – 1991, the Arabian Egyptian Republic - 2002 – all of them ratified by inner laws) and also ratified the Convention on the transfer of persons sentenced by Law no 76/1996, as well as by the UN Convention on organized transnational criminality (New York 2000, by Law no 565/2002).

The Transfer from Romania of the Convicted Persons

At present in Romania, the norm regulating the transfer of the convicted persons is Law no 302/82004 on the juridical international cooperation in penal matters.

In conformity with art 11 paragraph 2 of the Constitution, all international treaties and conventions ratified by the Parliament belong to the inner law, so that we can firmly declare that the Convention on the transfer of the convicted persons (concluded on March 21, 1983) is a special penal law, a law to be completed – in non-regulated situations – by the decisions of law no 302/2004; the law does not bring contiguity to the rights and obligations deriving from the international norms regarding the transfer of the convicts abroad with a view to be heard as witnesses or in case of confrontations.

In the request concerning the transfer of the convict, the Romanian state shall indicate the international instrument in whose basis the request was made.

As for the convict, in the absence of a formal transfer request, the convict was considered to be able to formulate his express desire of being transferred; in such a case he can address himself to either the state he had been sentenced in or to the state where he is going to execute his sentence

(Gh. Mateuț, Mihaela Vasiescu, "The Transfer of the Convicts" (I)", in Review of Penal Law no 2/2003, pp. 46).

He can thus draw the attention on his personal status from both cultural and familial point of view. The very Strasbourg Convention provides in art 2 paragraph 2 that the convict can express his wish of being transferred – in the grounds of the present convention – to either the state where he was condemned or to the state where he is supposed to execute his penalty.

The transfer conditions are provided in both art 3 of the Convention and in art 129 and 130 of Law no 302/2004. Consequently, the transfer can take place only if the following conditions are cumulatively taken into consideration:

a. the convict is a national of a sentencing or of executing state;

b. the decision is final;

Although the text does not make any distinction, alongside with other authors (Gh. Mateuț, Mihaela Vasiescu – " The Transfer of the Convicts (I)", in Review of Penal Law no. 2/2003, pp. 46.), we consider that it is about an executory decision; this means that either all the ordinary means of prosecution provided by the law were exhausted or that the legal terms fixed for their being executed was expired; still, there exists the possibility of a revised request, in the grounds of new de facto elements that might have appeared.

c. at the date the transfer request was registered the convict is supposed to have at least 6 more months until the end of his imprisonment period. In extraordinary situations, in the basis of the agreement between the involved countries, the transfer may take place even if the rest of the remaining period punishment is less than 6 months;

d. the transfer is sanctioned by the convict himself or by the personal representative of the convict in case that this one has age, mental or physical disturbances and if the two states consider it necessary;

This condition is perfectly justified as it is grounded on the objective principle of the law, that is, on the one of enabling re-integration in better conditions. Nevertheless, the transfer of a convict without his own accept will be a nonsense (E. Harremoes,1983, "Une nouvelle Convention du Conseil de l' Europe: le transfer des personnes condamnees", R. sc. crim. et de d. pen. comp., pp. 235.).

As for the convict's representative, he can be any person legally authorized to speak on behalf of the convict only if he respects the legal regulations in force.

By the Schengen Convention this condition was somehow restricted; consequently no consent is any more necessary in case the

convict abstracts from the execution of the respective sentence and takes refuge in his native country.

e. the deeds that led to the sentence are considered infringements according to the law of the state of execution;

This condition simply turns to practice the principle of a double incrimination, and that is why, we consider that the condition is fulfilled even if in the two states - the sentencing and the execution state - the infringement receives a different juridical classification. It is only necessary for a correlation between the two essential constitutive elements of the infringement to exist and to a way the two law systems are regarded (The Explanatory report of the Convention, quote by J. Pradel, G. Corstens in "Droit pénal européen", Ed. Daloz, Paris, 1999, pp. 94).

f. the sentencing and the execution state shall come to terms with respect to the transfer proper; in a contrary situation the transfer cannot take place;

The transfer request shall fulfill certain basic and formal conditions, that is, it has to be written by the competent authority of the claiming state and has to be addressed to the competent authority of the requested state; the answer will always be in written.

According to the Romanian legislation, the Ministry of Justice is obliged to inform in written any person sentenced by a Romanian instance - susceptible for a transfer – about the exact content of the incident international convention, and in case the convict requested to be transferred, the Ministry of Justice shall inform – in the shortest time after the definitive sentence – the competent central authority of the state of execution, by mentioning the name, the birth date and place as well as the convict's address in the state of execution, the description of the deeds that led to his being sentenced, and the nature, the duration and the date of the commencement of sentence.

If one of the two states takes certain steps or makes a decision referring to the transfer request, then the convict shall be informed in written about these cases (see art. 133 of Law no 302/2004 that reproduce the decisions of art. 4 of The European Convention on the transfer of Convicts, under the title of the "obligation of supplying information").

To solve the transfer request the Romanian state has to ask from the execution state the following documents:

a. a document or a declaration to demonstrate that the convict is a national of the executing state;

b. a copy of the legal dispositions of the executing state to prove that the deeds that made the pronunciation of the final decision in the executing state are considered infringements in the executing state;

c. a declaration containing the information referring to the procedure to be opted for, with a view to the execution of the sentence.

If both states agree, the Romanian state informs the executing state of the following:

a. an authenticated copy of the definitive decision, as well as a copy of the applicable legal dispositions;

b. a document mentioning the duration of the punishment already executed, as well as information on every the temporary arrest, diminishment of sentence, or any other document referring to the stage of the sentence execution;

c. a declaration referring to the transfer consent;

d. if necessary, any report or forensic or legal reference or other medical documents certifying the physical or mental state of the convict, the medical treatment applied to him on the territory of the Romanian state as well as any other possible recommendations for the continuation of the treatment in the executing state, or, in case of a minor convict, the copy of the respective social investigation report.

The person who consents with the transfer shall make it by free will and in full knowledge of the juridical consequences that derive from this consent, as the Romania state is obliged to offer the executing state the possibility to check this declaration of consent

The delivery of the convict by the Romanian authorities suspends the execution of the punishment in Romania. Both the convict and the Romanian state (as a sentencing state) have the right to exercise ex-officio or at the convict's request all extraordinary means of attack with a view to abolishing or modifying the definitive sentence decision

The transfer request issued by a foreign national convicted by a Romanian instance is transmitted to the Ministry of Justice. In agreement with the amendment brought to art 138, the documents necessary to the transfer are no longer requested by the Ministry of Justice of the executing instance, but by the National Administration of Penitentiaries.

In conformity to art no 139 in case the procedure of solving the transfer request is still in progress, all documents, inclusively those supplied by the executing state, are submitted to an international regularity exam within the Ministry of Justice.

After observing that all conditions have been met, the ministry transmits the request and the additional documents, accompanied by the respective translations, to the General Attorney/ Prosecutor of the Prosecuting Magistracy by the competent Court of Appeal, attaching to the dossier all notifications concerning the transfer request obtained from the competent foreign consular office.

Once the request and the documents received, the general Attorney will hear the convict and will note his declaration in a report then he will inform the Court of Appeal in the jurisdiction of which the place of detention or the residence of the convict is.

The request is discussed in the council room, with the participation of the prosecutor, with the subpoena of the convicted person and with the participation – if necessary – of an interpreter. The convict can be assisted by a barrister

The judgment of the request is urgent and prior. The resolution is given in at least 5 days since it had been uttered and is transmitted to the Ministry of Justice; it can be attacked in a higher instance by either the convict himself or by the General Prosecutor/ Attorney of the Court of Appeal, ex-officio or at the request of the Ministry of Justice.

Although the law is interested only in the "acceptance" or the "refusal" of the transfer, in reality, the procedural solutions can be but common: that is the acceptance or the refusal of the transfer request. It cannot be provided which are the proofs on which the decision is based, nor can the reason for which the request was admitted or rejected. Taking into account this aspect we consider that auxiliary documents and records provided by art 134 of the law are to be analyzed, as well as other information: the convict's hearing report, the declaration of the convict himself or the conclusions uttered in front of the instance by his representative, or any other proof considered to be necessary (Gh. Mateuț, Mihaela Vasiescu, "The Transfer of the Convicts" (II)", in Review of Penal Law no 3/2003, pp. 31).

If the transfer if rejected the Ministry of Justice shall inform in the due time both the commander – by the agency of the National Administration of Penitentiaries – and the central authority of the executing state, at the latest.

If the transfer of the convict was accepted, the Ministry of Justice informs the Ministry of the interior and of the Administrative Reform, that assures the delivery of the convict under escort.

In case of a person who – after having been convicted through a definitive penal decision by a Romanian instance – escapes from prison, avoids the execution of the punishment or takes refuge on the territory of the state a national he is, the Romanian state can address the latter state a take-over request that obliges the convict to execute the penalty.

Pursuing to the modification of paragraph 8 of art 139, the take-over request that obliges the convict to execute the penalty addressed to the state on whose territory the convict took shelter is no longer issued by the General Attorney of the Prosecuting Magistracy affiliated to the Court of

Appeal on whose territory the executing instance is, but by the executing instance, or by the instance at the place of arrest.

In conformity with art 140 of Law 302/2004 the request of the convict can be refused, mainly, for the following reasons:

a. the convict was sentenced for serious infringements that had a deep and unfavorable echo over the Romanian public opinion;

b. the punishment provided by the law of the executing state is evidently superior or inferior as compared to the one fixed by the decision of the Romanian instance;

c. there are enough proofs demonstrating that, once transferred, the convict might be liberated immediately or within an exaggerated short period of time as compared to the remaining punishment to be executed, as stipulated by the Romanian legislation;

d. the convict did not repair the damages produced by the infringement and did not pay the expenses he was obliged to pay through the decision of the Romanian instance and did not guarantee for the compensation of the damages;

e. in case there are enough proofs that the executing state will not respect the rule of the specialty.

Consequently, to reject a transfer request it is not necessary to cumulatively fulfill all these conditions; to fulfill at least one of the above mentions conditions is equal to a refusal.

The Transfer in Romania of a Person Sentenced Abroad

In case Romania is an executing state, the competent Romanian consular agency shall obtain from the convict or from his representative a declaration ascertaining his consent with the transfer that shall freely and responsibly express his knowledge about the juridical consequences deriving from the transfer of the convict in Romania.

At the same time, the Romanian consular agency will be urged to make up a report concerning the social and familial state of the convict after having taken into account the convict's declarations and his possibilities of his re-adapting to Romania. The Romanian state shall also demand the central authority of the sentencing state to send the copy of the convict's juridical criminal record as well as any other information with regard to any possible relationship the convict had with other criminal groups (G. Mateuţ, M. Vasiescu – idem (II), pp 31).

The Romanian Ministry of Justice demands the competent authority of the sentencing state a declaration including its consent with the transfer given by the competent authorities and any information and documents

provided by the law (H. D. Bosly, D. Vandermeersch, 2001, "Droit de la procedure penale", 2 edition, La Charte, Bruge, pp. 828.): name of the convict, date and place of birth, address and a presentation of the deeds that led to his being convicted, the nature, the duration and the date the sentenced was operational, as well as a copy of the authenticated original decision of the definitive sentencing and of the document mentioning the duration of the already executed sentence and any information regarding any previous detention, diminishment of punishment, and any act referring to the stage of the of the sentence execution, a declaration referring to the consent with the transfer and, if necessary, any medical or social report concerning the convict.

Both the internal and the European Convention on the transfer of the convicts provide two alternative executing procedures: one in which the continuation of the execution takes place immediately or in the basis of a legal decision, and another in which the change of the sentence can be done in the basis of a judicial decision.

The fundamental difference between the two procedures is the following: the procedure of the continuation of the execution the executing state simply continues the activity they started and totally following its stages; on the contrary, in the case of the procedure of changing the sentence, the sentence pronounced by the sentencing state is transformed in a sanction of the executing state, so that the executed sentence is no longer directly grounded on the sanction started in the sentencing state.

Much more serious than the simple adaptation of the sanction, the conversion is simply a substitution of a sanction with another sanction chosen by the executing state, and that was uttered by the sentencing state (J. Pradel, G. Corstens, idem, pp. 103).

Still the conversion is limited as it has to take into consideration the deeds as they had been evaluated by the requesting state, because the substitution is used only to provide the execution of a sentence - for example, the sentence with prison cannot be substituted by a fine (Gavril Paraschiv, "Penal Union Dispositions Referring to the Modalities of Cooperation Among the States of the Union", in PRO LEGE no. 3/2008, pp. 202).

Conversion was provided because in practice there are very many situations when the two legislations are completely different

The execution of the punishment ceases as soon as the Romanian state has been informed by the sentencing state about any decision or measure making the continuation of the execution impossible. This means that the sentencing state is obliged to inform the Romanian state about any change or about the moment when the convict will be liberated (Al. Boroi, I.Rusu –

2008, "The Juridical International Cooperation in Penal Matters", C.H. Beck Printing House, Bucharest, pp. 389).

In the case of a transfer request from the part of a Romanian national sentenced in another state, the Ministry of Justice is obliged to inform the central competent authority from the sentencing state that, if it consents with the sentence, enables the Romanian Ministry of Justice to transmit the documents to the General Attorney/ Prosecutor of the Prosecuting Magistracy affiliated to the competent Court of Appeal that, in its turn, will inform the Bucharest Court of Appeal with a view to recognizing and execution of the foreign decision.

The Decision of the Court is communicated to the convict, and then, the Court of Appeal issues a warrant for the execution of the sentence, which the Ministry of Justice will transmit to the central competent authority from the state the sentence had been given, with a view to transferring the convict; the transfer will take place by the agency of the Ministry of the Interior and of the Administrative Reform.

In agreement with art 152 (art.152 bears the marginal name of "the optional refusal of extradition") the transfer request can be declined mainly if:

a. the case in which the sentence had been pronounced was not held in conformity with the pertinent dispositions mentioned in the European Convention on the defense of man's fundamental rights and liberties;

b. if against the convict a decision mentioning that he had to be sentenced for the same deed, was issued in Romania, or if a penal procedure is grounded on the same deed the convict was sentenced abroad;

c. if the convict left Romania, establishing his domicile in another state, and so his relationship with the Romanian state are no longer significant;

d. the convict had committed a serious infringement, able to alarm society, or if he had close relationship with the members of a criminal organization able to make his social re-insertion in Romania quite doubtful.

The Transit of the Transferred Convicts through Romania

In order to create an international juridical cooperation, in the form of the transfer of convicts, it is very often necessary to cross the territory of a third country, exactly like in the case of extradition. That is why the legislation concerning the transfer of the convicts involves the regulation concerning their crossing the territory of one or several states places in between the sentencing and the executing state (G. Antoniu, idem, pp. 136).

This is exactly what the European Convention does by its provisions of art 16, when referring to the transfer of the convicted persons.

Besides, Law no 302/2004 provides the fact that the Romanian state can admit a transit request of a convict over its territory, as being formulated by a third state, only if the latter had agreed with another state about the transfer to or from its territory.

In the European Convention regarding the transfer of the convicted persons it is also provided the right of each state that, by a declaration addressed to the Secretary General of the Council of Europe, the state – as a third state - is entitled to demand that any border crossing shall be notified if the latter agreed with another state about the transfer of the convict to or from its territory; consequently the Romanian state can decline the approval of the transit in the following situations:

- if the convict is a Romanian or a stateless citizen residing in Romania;
- that in conformity with the Romanian penal legislation the deed that led to his being convicted is not considered a transgression.

The decision concerning the approval to the transit request is uttered by the Ministry of Justice that immediately informs the competent authorities of the requesting state and to the Ministry of the Interior and of the Administrative Reform about the decision (see art 154 par 3^1 of Law no 302/2004 as modified by Law no 224/2006).

At the demand of the requesting state, the Romanian state, requested to agree with the transit, can ascertain that the convict will not be prosecuted, detained, or submitted to other liberty constrictive measures - while being on the Romanian territory – for deeds or sentences previous to his leaving the sentencing state territory. The only situation in which there is no need of a transit request is when the Romanian air space is over flown, and no landing on the Romanian territory was done.

The transfer of the convicts is different from extradition, although both modalities regarding the international penal juridical assistance is a bi-lateral act concluded by two states (the sentencing state and the executing state), with their own agreement; the only condition is that the deed the sentence had been uttered to be considered infringement by the executing state. Still, the two institutions are different because extradition means to remit the prosecuted or the sentenced person with a view to be judged and condemned or submitted to the execution of a penalty he had been sentenced for – this generally being a measure taken against the will of the convict; the transfer of the convicts cannot be accomplished but with their consent.

To end with, we can say that the objective in view – the transfer of the persons convicted in their state of origin – is that the execution of the uttered penal sanctions should take place in the state of whose national the convict is, there where the executing conditions, the community whose language is known to him and the social environment are more appropriate for the achievement of the aim of his being sentenced for: the rehabilitation and the social reintegration of the convict.

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THE PROBLEM OF VISAS AND MIGRATION IN THE CONTEXT OF MOLDOVAN-ROMANIAN CROSS-BORDER COOPERATION AND THE EUROPEAN INTEGRATION OF THE REPUBLIC OF MOLDOVA

Abstract

The improvement of the cross-border cooperation of the Republic of Moldova with neighboring countries is one of the objectives of the European Union - Republic of Moldova Action Plan. The achievement of this objective, however, confronts a series of obstacles due to the rigors for securing the EU external frontiers set forth for Romania, the difference of normative framework, or, which may be more important, to political will of the authorities of the two states. The problem of visas and freedom of movement in border line areas are two major aspects which we put forward to approach in this communication by means of Romania as a state on the EU external frontier and the Republic of Moldova as a member in the European Neighborhood Policy as well as the perspectives of its aspirations to European integration.

Key words: *Visa policy, migration policy, cross-border cooperation, European Neighborhood Policy, European integration*

In order to institutionalize the relationships with its neighbours in a new political and geopolitical framework, and to contribute to ensuring stability, security and prosperity in its neighbourhood, the EU has launched the European Neighbourhood Policy (ENP). The ENP is both praised for its general scope by some and criticized by others for the unassuming offer of this policy towards neighbouring countries that deserve more than the statute of a neighbour, such as the Republic of Moldova as well as Ukraine. The ENP message to the countries included in this policy is rather "Be like us" not "be one of us". (Avery Graham, 2008) Likewise, Michael Hastings, with regard to the meaning of the concept of neighbour, maintained that „*il n'est pas totalement des notres, mais il n'est pas totalement des autres*", taking an interfacing position between "*Nous*" and "*Eux*". (Hastings, 2007) The same author asserts that every new wave of enlargement re-defines the environs of Europe and re-invents new neighbours. One of the consequences of this inclusive advancement is that

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the EU today is being built by the neighbours from yesterday, representing at the same time a diplomatic manner to establish and legalize classifications among the neighbouring countries. (Hastings, 2007)

Studies of various research, as well as some public opinion surveys at the European level, confirm the fact that one of the main arguments or reasons, on the basis of which the European citizens are diffident regarding the EU enlargement, lies in the fear that the labor market of member states would be invaded by labor forces from the countries with accession aspirations, due to better conditions and higher levels of economic development in the EU. Another reason lies in the tarnished image created in the EU by some immigrants from the East and other countries of the world. When the Europeans speak about the EU's Eastern enlargement, they often refer to the controversial topic of immigration. (Poole, 2003) A highly important factor to ensuring communitarian security and implementing the common external policy is the existence of a clear and efficient strategy in the field of free movement of people within and outside the EU; the EU external borders, visas and migration management. Free movement of people, as a matter of fact, is one of the four fundamental liberties foreseen in Treaty of Rome, signed in 1957, establishing the European Economic Community (EEC), and remains an essential element in defining the communitarian space. The very freedom of movement and the EU prosperity represent an important constituent in motivating and stimulating the European accession of the Eastern countries, a field which was and is sensitive in the process of negotiations as much as in the EU-acquis implementation. (Dandiş, 2008)

The achievement of this desideratum of the European citizens to move without any restrictions within the Community has known different stages and endeavours of community institutions for their evolution as well as of the member states, which gradually, after having studied thoroughly the economic and political integration, became aware of the necessity to eliminate the internal borders of the Community, assuming a regular downsizing of inspections and visas between countries. (Dandiş, 2008) The delimitation of this area by specific regulations regarding free movement of people, which in fact represents a process, started on 14 June 1985 when the representatives of 5 states (Federal Republic of Germany, France, Belgium, Luxembourg, and Holland) out of 10 Member States of the European Community at that time, signed in Schengen[1] locality in Luxembourg an

[1] Schengen is a wine-growing village in South-Eastern Luxembourg with a population of approximately 425 people, near the point where the borders of Germany, France, and Luxembourg meet. Part of the commune of Remercshen,

Agreement, titled – *Schengen Agreement.* The Agreement provides the gradual abolition of common customs inspection between the signatory states. The reasons of the Schengen area creation by the five states or, as Vendelin Hreblay (Hreblay, 1998) calls it, the "free movement laboratory", have been determined, first of all, by the traditional relationships between these countries, the economic pressures exercised by the department of transports in order to eliminate the obstacles for commercial relations between the EU Member States (Elspeth, Guild., Didier, Bigo., 2003), and due to the fact that few documents have been signed in this sense between these countries; the Benelux states signed a Convention on 11 April 1960 in Brussels, and the Sarrebruck Agreement was signed between France and Germany on 13 April 1984, which facilitated this process. (Gaelle, 1995)

It ought to be mentioned that, without approaching in details aspects linked to the development of this process, after the Agreement was signed in 1985, the same states signed on 19 June 1990 a Convention implementing the Schengen Agreement. The five-state signers of the Agreement of 1985 have been joined by Italy (27 November 1990), Spain, Portugal (25 June 1991), Greece (6 November 1992), Austria (28 April 1995), Sweden, Denmark, and Finland (19 November 1996), Norway and Island (19 December 1996). Owing to technical and legal requirements which had to be adapted to and coordinated between the signatory states of the Convention, the provisions were coming into force on 26 March 1995 for the five states and for Italy, Spain, and Portugal. (Monica den Boer, 1997) For Sweden, Finland and Denmark the Convention came into force on 25 March 2001. Starting on 1 May 1999, the Schengen Protocol to the Treaty of Amsterdam of 2 October 1997 incorporated the Schengen cooperation within the Europe Union, thus leading to the "Schengen acquis communitarization", with certain exceptions for Great Britain, Ireland, and Denmark. In this way, the Schengen acquis[1] began "to subordinate to community laws, not to Member States". (Bărbulescu, 2006)

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canton Remich, Schengen became famous after 14 June 1985 when aboard of vessel *Princess Marie-Astrid,* on the Mosselle river, near the village, the Schengen Agreement was signed between the five states (Belgium, France, Germany, Luxembourg, Holland).

[1] The definition of the "Schengen acquis" and of its legal basis was made by twi decisions of the Council on 20 May 1999 – 1999/435/EC and 1999/436/EC (published in the Official Journal 176/07.10.1999, pp.1-30). The Schengen Acquis includes the agreements concluded on 14 June 1985 and 19 June 1990 between the five states (France, Holland, Belgium, Germany, Luxembourg), the protocols and joining agreements signed with other eight states (Italy, Greece, Spain, Portugal, Austria, Denmark, Finland, and Sweden), the decisions and declarations of the

Kris Pollet maintains that the Schengen acquis's integration within the EU will have an important external dimension because the Schengen Protocol "obliges the candidate states to completely accept the Schengen Acquis, so that the capacity to apply the provisions regarding external border control has become an additional accession prerequisite". (Pollet, 1999)

Nine states (Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia, Slovakia, and the Czech Republic) out of 10 states that adhered to the EU on 1 May 2004 also joined the Schengen area on 21 December 2007. On 20 December 2008, Switzerland adhered to the Schengen area, although it is not a member of the EU, whereas Cyprus planned to have adhered to this area by the end of 2009. Accordingly, out of 25 Member states of the Schengen area at present time, only 22 are Member States of the EU, while three other states, Island, Norway, and Switzerland are not members of the EU.

By means of this article, we aim at emphasizing the impact of Romanian objectives to adhere to the Schengen area on migration at the Moldovan-Romanian border and the cross-border cooperation between these two states through the visa regime required by the EU in order to secure its external borders. Although with modest achievements in key fields of the Europe Union – Republic of Moldova Action Plan signed on 22 February 2005 for a period of three years, the Republic of Moldova is actively engaged in the European Neighbourhood Policy and asserted the European integration as national priority through a majority of strategic documents, as did Ukraine. The free movement of people is indubitably one of the most emphasized perceptions regarding the advantages of accession to the EU among the population of the Republic of Moldova. It is difficult to keep real statistics about how many citizens of the Republic of Moldova work abroad, which is mostly due to illegal migration and illegal stay on the territory of other countries after legal migration. Obviously, seeking a better paid job is the most important reason of emigration. The greatest part of those who stay illegally abroad, live on the EU territory. The Europe Union is aware of this and is also familiar with the special status of the relations between the Republic of Moldova and Romania, which is a member of the EU, and with the objectives for accession to the Schengen area in the spring of 2011. Therefore, in line with point 2.5 (Cooperation in Justice and Home Affairs) of the EU-Moldova Action Plan

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Schengen Executive Committee, as well as the acts adopted by the authorized bodies or by the Council (body that replaced the Schengen Executive Committee). See: Lefter Cornelia, *Fundamente ale dreptului comunitar instituţional*, Bucureşti: Editura Economică, 2003, p.38.

within the ENP, the cooperation between the Republic of Moldova and the EU in such fields as Migration issues (legal and illegal migration, readmission, visa, asylum) and Border Management was centered around the following objectives:

- Exchange information concerning, and assessment of the scale of, illegal migration in the EU and Moldova, including the establishment of an electronic database for monitoring of migration flows to, via and from Moldova;
- Further alignment of domestic legislation to the EU standards in order to criminalise illegal migration;
- Adoption and implementation of Moldova's National Action Programme on Migration and Asylum Issues (migration issues);
- Exchange of views on Schengen procedures and initiate a dialogue on the possibilities of visa facilitation in compliance with the acquis;
- Dialogue and exchange of views on visa co-operation (criteria and the procedure for the issue of visas)
- Dialogue on document security;
- Implement the Concept on Border Control adopted on 4 December 2003, in particular the transformation of the Border Guards into a law enforcement agency, and make necessary amendments to national legislation;
- Enhance inter-agency co-operation (among authorities involved in state border management) as well as co-operation with neighbouring countries, including border demarcation and the conclusion of co-operation agreements;
- Start developing a comprehensive education and training strategy on state border management, including improved understanding of Schengen rules and standards;
- Enhance equipment and develop infrastructure for efficient state border management;
- Continuation of the "Söderköping process";
- Develop regional co-operation between relevant law enforcement bodies (police, border guards, migration and asylum services, customs).

According to these objectives set out in the document, we also can understand the EU's concerns towards its Eastern border with the Republic of Moldova regarding visa and migration problems, cross-border cooperation, etc. Securing the Eastern border of Romania becomes more important because it represents in fact the EU and NATO border; moreover, it is a geopolitical area which Russian imperialism does not want to abandon in accordance with all provisions of the international law. The Transdniestr conflict is, at the very least, a clear indicator that the Russian

Federation's interest is still present in the region. The objectives with regard to strengthening the cooperation between customs and border institutions of the Member States on the external borders and the neighbouring countries in order to ensure an area of prosperity and security in the region are laid out in the European Security Strategy, in all basic documents of the European Neighbourhood Policy and strategies regarding enlargement policy. Romania holds 2.050 kilometers of external border and 1.090 kilometers of internal border of the Europe Union. The European aspirations of the Republic of Moldova and Ukraine encourage them to make substantial efforts in order to fight against illegal migration and to secure their frontiers, if they want to be highly rated in the accession process to the EU, whereas these directions are laid out in the Action Plans within the ENP with both countries.

Interestingly enough, the official data provided about the border between the Republic of Moldova and Romania differs. According to Border Guard Service of the Republic of Moldova the length of the border is 684 km, including 610.1 km on the Prut River and 73.9 km on the Stinca-Costesti Lake. On the Prut River along the border there are 27 islands that belong to the Republic of Moldova and 33 islands that belong to Romania (Graur, 2002). The Romanian side provides a length of the border of 681.3 km between localities Cuzlau (Botosani county) and the Prut River mouth (Galati county). Along the Moldovan-Romanian border 8 border crossing points are placed (5 road and 3 railroad crossing points) (Table 1). Although Romania was the first state to recognize the independence of the Republic of Moldova in 1991, the relationships between the two states have known different stages, both productive and strained, mostly owing to the political dialogue between the authorities of the two states.

One of the first documents concluded by the MSSR Government with the Romanian Government was the Convention on cooperation in Tourism, on September 27, 1990, signed in Chisinau by Moldovan Prime Minister Mircea Druc, and Romanian Minister of State Anton Vatasescu, under which the parties granted mutual facilitations for border procedures and formalities, as well as for accommodation and tourist services. (Chirtoaca, 2002) Various studies refer to 2001 as being a stage of crisis in bilateral relations, marked by the charge of Moldovan Minister of Justice in October 2001 within the European Court of Human Rights (Strasbourg) upon Romania, concerning the involvement of the latter in the internal affairs of the Republic of Moldova, supporting the Metropolitan Church of Bessarabia. These reactions can also be explained on grounds that 2001 signifies the coming to power of the Communist Party that is known for their anti-Romanian attitude. The advancement of the Romanian

relationships with the European Union implied as well the undertaking of measures required by the EU on its Eastern border, including those relating to the movement of people. On 27 July 2001 in Bucharest, the Agreement on readmission of foreigners was signed between the Republic of Moldova and Romania. The "Big Bang" of NATO's enlargement in 2002 with seven states (Slovenia, Slovakia, Estonia, Latvia, Lithuania, Romania, and Bulgaria) laid an emphasize on the geopolitical importance of the borders of Romania (with Moldova – 681.3 km, with Ukraine – 649.4 km, with Serbia – 546.4 km), including the 193.5 km of border at the Black Sea. The Justice and Home Affairs Council of the EU decided on 7 December 2001 (Regulation (CE) No. 2414/2001) to exempt Romanian citizens from possessing a visa starting on 1 January 2002 within the Schengen area. The new Romanian passport, which came into circulation starting in January of 2002, according to the Government Decision No.460 of June 2001, is in line with *acquis* provisions, in regard to the design, the contents and the security features against forgeries.

The cross-border cooperation between the two states is achieved through the Border Guard Service of the Republic of Moldova (*The Law on the Border Guard Service of the Republic of Moldova No.162 of 13 July 2007*) and the General Inspectorate of Romania Border Police (Romanian Border Police activity is established by the *Emergency Government Ordinance No.104/2001*), part of the Ministry of Administration and Interior. Regarding the border traffic with the Republic of Moldova, two documents have been signed in 2001:

- The Agreement between the Government of Romania and the Government of the Republic of Moldova regarding the mutual travels of their citizens, signed in Kishinev, on 29 June 2001;

- The Protocol between the General Inspectorate of the Border Police within the Romanian Ministry of Interior and the Department of the Border Guards of the Republic of Moldova, regarding the mutual travels of their citizens, concluded in Albita, on 27 September 2001.

Starting in 2002, Romania introduced a mandatory visa regime for different states in the region. These measures have been implemented by Romania on the basis of the pre-accession strategy, after the negotiations with the EU concerning the fight against illegal migration, securing and border management in view of harmonizing the standards of crossing the external borders of the Shengen area. Romania negotiated with the EU in 2004 in order not to introduce a visa regime for Moldova, due to, first of all, the special status of the relationships between the citizens of both countries who share the same language, history and culture. But for Ukraine, a visa regime was established in the summer of 2004. (Popescu, 2006) Bulgaria

introduced a visa regime for Moldovan citizens on 1 November 1999, Czech – on 22 October 2000, Poland – on 11 February 2001, Hungary – on 1 June 2001. Although, at the beginning a visa regime was not established, according to the Agreement between Romania and the Republic of Moldova on 29 June 2001 the Moldovan citizens, however, could enter Romania with national passport only. Romania provided financial support of 1 million US Dollars for particular categories of Moldovan citizens (students in Romania, population of border localities, citizens with low incomes) in order to facilitate the passport issuance. Almost 30.000 individuals benefitted from this support. (Chirtoaca, 2002)

The introduction of passport system on the border with obvious precognition of further restrictions or visa regimes for neighbouring countries from the East has been perceived by the greatest part of Moldovans as a new demarcation line in Europe and an infringement of the right for free movement of people from the Eastern to Western Europe. The EU Member States consider the visa policy a new mechanism or form to ensure control along the external borders of the Schengen area. A decrease in negative effects caused by the restrictions imposed via the Schengen aquis, according to some authors, can be achieved through a constructive dialogue between the EU and the states along the new European borders, which would allow coordination and gradual implementation of different measures in a civilized way. (Chirtoaca, N., O. Graur, V. Gheorghiu., 2002) The EU claims towards the implementation of visa policy and cross-border accessibility also sparked off bilateral sensitive problems that existed between the Member States and candidate countries or their neighbours. Heather Grabbe holds that "Policies concerning frontiers and visas which the EU intended to disseminate have been the most controversial, because they affected the political relations and economic integration with neighbouring countries". (Grabbe, 2008) Along with negotiating the Chapter 24 – Justice and Home Affairs, the candidate countries were asked to implement standards regarding inspection at the external borders of the Schengen area, but their vagueness was a source of uncertainty in the process of the Schengen acquis adoption. (Grabbe, 2008) Even if Romania had not desired the introduction of visa regime for Moldovan citizens since its accession to the EU, this became mandatory by provisions of Article 4 paragraph (1) of 2005 Act of Accession of Bulgaria and Romania, which stipulates the compulsoriness of establishing a visa regime in conjunction with its accession to the EU on January 1, 2007 for nationals of the third-countries that are listed in Annex I of Regulation (EC) No.539/2001 of March 15, 2001 listing the third-countries whose nationals must be in possession of visas when crossing the external border of Member States

and those whose nationals are exempt from that requirement. Thousands of Moldovan citizens live, work or study in Romania, whereas the local border traffic and the daily crossing of Moldovan-Romanian border is often the only source of living for the population in border localities. The restrictions or measures undertaken by Romania in view of visas and border securing, in the context of endeavours of accession to the Schengen area, have left immediate impact on the social-economical life in localities along the border. At the same time, on the Romanian side, according to results of some empirical researches, placing the Schengen border on the Prut River and massive investments and allocations of European funds in creating transport infrastructure will contribute to local development of important cities along the Eastern border of Romania, such as Iasi and Galati. Thus, while in conjunction with the enlargement of the Schengen area Eastwards the population of the Republic of Moldova suffers negative consequences, from the perspective of the difficulty to move freely, various localities from Romania perceive it as an opportunity to attract investments and non-repayable funds. It ought to be mentioned that on account of such restrictions economic agents, manufactures, and consumers from both sides of the Prut River, who are involved in cross-border trade, will suffer. (Ilinca, Cristina., Ciobotaru, Luciana. Pasti, Vladimir., 2002)

In order to comply with the provisions of Act of Accession of Romania regarding visas for Moldovans, Romania signed the Agreement on reciprocal traveling of citizens on 20 October 2006 in Bucharest. The Agreement provides the introduction of visa regime for the citizens of the Republic of Moldova starting on 1 January 2007, with Romanian's accession to the EU. Moldovan citizens will be able to enter, exit, transit, and stay on Romanian territory on the basis of valid travel documents with visas issued for granted by the diplomatic missions and Romanian consular offices. Additionally, on 1 January 2007 the citizens of the EU (although including Romanian ones), USA, Canada, Switzerland, Japan, as well as Norway and Island, at the European Commission's request travel to the Republic of Moldova without visas. The introduction of the visa regime by Romania for Moldovan citizens has caused them problems in obtaining visas in other EU countries, thus bringing out the well-known phenomenon "visa for visa" because, in order to reach Bucharest to apply for another visa, one needs to pick up the visa to Romania from the Romanian Consulate in Chisinau. Owing to shared history and traditional relationships between Romanians from both sides of the Prut River, as much as to cross-border trade relationships, there are a great number of visa requests to Romania daily. One might ask oneself from whom a Moldovan citizens shall receive an invitation to Romania in order to justify the goal of their visit for which

a visa is requested from Romanian Consulate, when they only want to go to the market in the border locality on the other side of the Prut River? Besides, traveling from any part of the country to Chisinau can also constitute a problem for Moldovan citizens, whereas the opening of Romanian Consulates in Cahul and Balti would have contributed to alleviating these problems.

On November 13, through Government Decision no.1306, the National Action Plan for the facilitation of the issuance of visas with the Europe Union was elaborated. On December 19, 2006, the European Council adopted the mandates that authorize the European Commission to negotiate the Agreement between the European Commission and the Republic of Moldova on the facilitation of the issuance of visas and the Agreement on readmission. On October 9, 2007, the Council of the Europe Union adopted the decision with regard to signing the Agreement on the facilitation of the issuance of visas[1] and the Agreement regarding the readmission of the persons with illegal stay between the Republic of Moldova and the European Community, initialed by Franco Frattini's visit onApril 25, 2007 in Chisinau the opening of the Common Visa Application Center[2]. On October 10, 2007, these documents (*Official Journal of the European Union L 334, 19.12.2007, pp.169-179*) were signed in Brussels for an undetermined period of time, excepting the case when terminated by any party. The goal of the Agreement on the facilitation of the issuance of visas with the Republic of Moldova, which came into force on January 1, 2008, is to facilitate the issuance of visas for Moldovan citizens, for an intended stay of no more than 90 days per period of 180 days. In general terms, the Agreement provides:

a) Limitation of documents necessary to receive a visa;
b) Reduction of visa processing time;
c) Establishment of categories of persons who will be able to obtain a visa in a simplified way and for a longer period of time (up to 5 years);
d) Establishment of a reduced fee of 35 Euro, instead of 60 Euro, for developing a visa, as well as setting up categories of persons who will benefit from free visas;

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[1] Countries party to the Agreement between the Republic of Moldova and the EU regarding the facilitation of the issuance of visas are: Austria, Belgium, Bulgaria, Cyprus, Czech, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Holland, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.

[2] See the website: www.cac.md

e) Travels without visas for the holders of diplomatic passports.

Following the Hague Programme[1], on May 31, 2006, the Commission presented a proposal to the European Parliament and the Council, in order to formulate the legal framework for consular offices of the Member States and to enhance consular cooperation[2]. This initiative laid basis for an entirely new development in the common visa policy. It has introduced new forms of cooperation such as Common Visa Application Centers that will receive and process visa application. (Pop, 2008) The mission of the Common Center for issuance of Schengen visas hosted by the Hungarian Embassy in Chisinau, which as a matter of fact is the first institution of its kind created by the EU, was to obviate the phenomenon "visa for visa", while the European Commission encourages the Member States, especially the Member States that issue Schengen visas, to improve their presence in the Republic of Moldova.

As we showed above, the objectives concerning the visa policy and the border set out in the Action Plan Republic of Moldova – Europe Union foresee reciprocal involvement and commitments from both the EU and the Republic of Moldova. After the Action Plan was signed, the dialogue between Moldovan authorities and the European institutions has been amplified, although the cooperation structures were established within the EU – Moldova Partnership and Cooperation Agreement which came into force in 1998.

In order to facilitate the local border traffic at the external land border of the EU with the neighbouring countries, thus reducing the negative impact of the border security measures on the population in the border regions, the EU adopted the Regulation 1931/2006 ofDecember 20, 2006, which ensures the European legal framework for the Member States at the external land borders of the EU regarding the local border traffic, as

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[1] On 10 th May 2005 the European Commission launched its 5 year Action Plan for Freedom, Justice and Security – with detailed proposals for EU action on terrorism, migration management, visa policies, asylum, privacy and security, the fight against organised crime and criminal justice. This is a major policy initiative and a cornerstone of the Commission's Strategic Objectives for 2010 - built around prosperity, solidarity and security. The Action Plan takes the overall priorities for Freedom, Justice and Security set out in the *The Hague Programme* - endorsed by the European Council in November 2004 - and turns them into concrete actions, including a timetable for their adoption and implementation. http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/

[2] The document is available at:
http://eur -lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0269en01.pdf

well as the provisions of Regulation 562/2006 regarding the Schengen Borders Code which lays down the terms of crossing control points at the borders of the Schengen area and the EU external ones. Under Article 3 of this Regulation, the *local border traffic* means the regular crossing of external land border by border residents in order to stay in a border area (30 to 50 km from the border, depending on the location of the territorial-administrative unit, a territorial segment set out through coordination of the parties and foreseen in the bilateral Agreement) for any reason. Thus, according to this Regulation, Romania may want to sign an Agreement regarding the local border traffic with the Republic of Moldova, but the proposal brought forward in that purpose to the Republic of Moldova in March 2008 was not accepted by the Communist authorities in Chisinau. Moreover, the Agreement on the facilitation of the issuance of visas between the Republic of Moldova and the EU, which came into force on January 1, 2008, was supplemented with the Declaration from Romania regarding the local border traffic, by means of which "Romania declares its willingness to enter into negotiations of a bilateral agreement with the Republic of Moldova for the purpose of implementing the local border traffic regime established by EC Regulation No 1931/2006 of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention", and the Declaration from the Republic of Moldova through which "The Republic of Moldova declares its willingness to enter into negotiations of a bilateral agreement with Romania for the purpose of implementing such a local border traffic regime". The authorities from Chisinau invoked legal arguments referring to the lack of political basic documents with regard to the border of the two states, although this fact does not impede the Agreement to be signed. Consequently, they completely deprive from this right the residents in border regions of eleven districts and Balti municipality and, partially, the residents of ten districts and the Territorial-Administrative Unit Gagauzia. The basic political act between the two countries is considered by Romania as a bilateral Agreement titled "European Partnership". According to Regulation 1931/2006, the border residents are issued local border traffic permit that shall be valid for a minimum of one year and a maximum of five years (Article 10), while no exit or entry stamp shall be affixed to the local border traffic permit (Article 6). The local border traffic permit is issued to border residents under specific conditions by Article 9 (to be in possession of a valid travel document entitling them to cross the external borders; provide documents proving their status as border residents and proving the existence of legitimate reasons to frequently cross an external land border;

not registered in the data base of SIS for the purposes of refusing them entry in the Schengen area and is not considered to be a threat to public security, health, etc).

The degree of cross-border cooperation at the level of local authorities, civil society, academic environment, private sector or between the citizens in the border regions is conditioned, first of all, by the freedom of movement and visa policy. The visa policy, whether restrictive or not, has a direct impact on the legal and illegal migration. The cross-border cooperation between the Republic of Moldova and Romania within the three euro-regions ("Lower Danube" Euro-region, "Superior Prut" Euro-region, "Prut-Sirt-Nistru" Euro-region) for elaborating and implementing joint projects that would gradually draw the Republic of Moldova closer to the Europe Union or within an informal framework of cooperation is encumbered by the visa issuance problems. This impediment has been understood in particular within the Neighbourhood Programme Romania – the Republic of Moldova 2004-2006 in the context of the European Neighbourhood Programme. Gabriel Popescu states that perhaps the Schengen regime could undermine the role of the euro-regions as promoters of economic development and political cooperation at the Eastern frontiers of the EU, whereas external border fortification will not resolve the problem of illegal migration and of criminality, but they will bring them closer to the border. Therefore, it is necessary that the EU find alternative solutions with the intention of creating both conditions to facilitate border crossing for the population in the border regions and facilities for the local border traffic. (Popescu, 2006)

The enlargement of the Schengen area implies an increase in length of the external border of this area with respective expenditures for border security and risks regarding the growth of illegal migration due to the EU attractiveness, towards which approximately 80 million citizens who need visas annually cross the external border. The European Council from Laeken 2001 put forward the rethinking of the concept of "integral border administration" so as to be able to effectively achieve the two objectives: security strengthening and travel facilitation for the nationals of the third countries. For securing its borders, including the Eastern one, Romania benefits according to Article 32 of the EU Accession Treaty for Romania, the Schengen Facility, through which new actions at the external borders of the Union will be financed. In order to implement the Schengen acquis and control on the border with neighbouring countries, Romanian was allotted: 2007 – 297.2 million Euro, 2008 – 131.8 million Euro, 2009 – 130.8 million Euro. By Government Decision of Romania no.715 of 2 July 2008, Multi-annual Indicative Plan 2007-2009 Schengen Facility for Romania was

adopted, with the aim of ensuring the funding allotted to Romania by the Europe Union along with the description of the implemented projects by Romania in this direction. Upon termination of financing allotted through Schengen Facility, Romania will benefit in 2010 from "four funds": *European Fund for Refugees* established by Decision no.573 /2007/EC, *The External Border Fund* established by Decision no.574/2007/EC of 23 May 2007, *European Fund for repayment* established by Decision no.575/2007/EC of the European Parliament and of the Council and *the European Fund for the Integration of the Third-Country Nationals* established by Decision no.435/2007EC of the Council, as part of the general Programme "Solidarity and management of migration flows" from the total budget of which for 2007-2013, approximately 2.152 million Euro will be allotted for external border management.

Developing Moldovan and Romanian relationships, through bilateral agreements on visa issues, migration, local border traffic, becomes more important since the Republic of Moldova remains the main provider of migrations to Romania. The impediments regarding visas and the precarious social-economical situation from the Republic of Moldova make Romanian citizenship more attractive, which could have been ensured by the freedom of movement in the European area, although this is an indisputable historic right. The impudence of certain Russian high officials in accusing Bucharest of offering Romanian citizenship to Moldovan citizens is revolting. On the contrary, we have found a postponement and blocking of this process along the last few years. According to some data, among the citizens of the Republic of Moldova from January 1, 1990 through April 20, 2007, 101.656 citizens obtained or recovered Romanian citizenship. (Pop, 2009) Out of 3910 persons arrested at the Romanian border, from 2006 through the first half of 2008, 2175 were Moldovan citizens, 408 – Turkish citizens, 240 – Serbian citizens and others. The numbers reflect the share according to the citizenship of the persons involved in illegal migration. Just as relevant are the numbers that show from 2005 through 2007, out of 49,697 stay permits issued by Romania to foreign citizens, 10,043 were Moldovan citizens, 7,019 – Turkish citizens, 5,424 – Chinese citizens and 2,632 – Italian citizens[1]. In September 2008, Romanian Immigration Office registered approximately 43,588 foreign citizens with legal residence in Romania, out of which 10,973 come from the Republic of Moldova. Among the immigrants with temporary residence in Romania, Moldovan citizens also head the list – 11,852 persons. Generally, in 2007, the largest waves of immigration sprang up from the Republic of

[1] http://soderkoping.org.ua/page21053.html

Moldova and Turkey. (*Tendinţe şi politici migraţionioste în Regiunea Mării Negre: cazurile Republicii Moldova, României şi Ucrainei*, 2008)

On January 25, 2008, within the framework of the Justice and Home Affairs Council in Brdo (Slovenia), Romania and Bulgaria signed the Joint Declaration on Bulgarian's and Romanian's preparations for accession to the Schengen area, foreseen for March 2011. In this context, different strategic documents of Romania regarding borders and migration aim at the period until 2011[1]. Most of these Strategies are being reviewed on an annual basis together with the Schengen Action Plan. After Romania and Bulgaria transmitted the Declaration of readiness, they virtually enter the process of Schengen evaluation. The process of evaluation consists of verifying that all necessary conditions are fulfilled in order to completely implement the Schengen acquis. This means that Romania must prove its capacity to fulfill the Schengen acquis requirements in a uniform, correct, consistent and efficient manner. The Schengen evaluation is the responsibility of the Schengen Evaluation Group within the Council of the Europe Union. The final report of the Schengen Evaluation Group will be presented to the EU Council, which will adopt the necessary decision for authorizing the application of the second category provisions, on a certain suitable date/dates.

Beside the provisions of the Action Plan with the EU within the ENP, the Republic of Moldova also adopted documents[2] that aim at

[1] Among which: Government Decision no.1314 of 24 October 2007 adopting the National Strategy for joining the Schengen Space; Romanian Government Decision no.1540 of 25 November 2008 adopting the National Strategy for joining the Schengen Space for the period of 2008-2011, the goal of the Strategy lying in establishing a general framework necessary to approach coherently the objective regarding the accession to the Schengen space, as well as joining the endeavours of authorities and institutions charged in this field; Romanian Government Decision no.324/2007 adopting the National Strategy for the Integrated Management of State Border for 2007-2010 and the National Strategy on Migration for 2007-2010 of 18 September 2007.

[2] State Border Infrastructure Development Plan for 2009-2011 (Government Decision no.827 of 4 July 2008); Integrated Automated Informational System "Migration and Azylum" concept (Government Decision no.1401 of 13 December 2007); Integrated Automated Informational System in the field of Migration (Government Decision no.40 of 12 January 2007); Action Plan for consolidation of migration management and asylum system of the Republic of Moldova for 2008-2009 (Government Decision no.768 of 27 June 2008); Concept for vehicle and individuals monitoring system at customs (Government Decision no.1049 of 21 September 2007) and the Concept for the Customs Integrated Informational System

migration and border security. The biggest problem for Moldova does not lie in its Western border, but in the Eastern one, especially in the Transdniestrian segment. Although Romania would prefer to make exceptions from applying some European norms towards the Republic of Moldova, there is not a lot of room for that. In such circumstances, taking into account what is characteristic of the Eastern border, the EU supports the strengthening in various fields between the Member States and the ones included in the ENP or the EU-Russia Strategic Partnership. The Member States also owe certain flexibility in the process of applying the Schengen acquis. This process of offering certain flexibility to countries whether or not to adopt a part of the acquis is called *differentiated integration.* According to different authors, this flexible integration complicates the process of elaboration of communitarian policies and can negatively affect the relationships between the member states. Petre Prisecaru maintains that this "brings forth difficulties of institutional and functional nature within the communitarian system of governance, can engender tension between Member States both participants and non-participants, can perturb the communitarian system of law by laying down partially applicable rules and structures" (Prisecaru, 2005) As a state that is going to completely apply the Schengen acquis, Romania is "the temporary external border" of this space. The Schengen Borders Code (Article 2), Regulation laying down rules on local border traffic (Article 3), and Decision no.574/2007/EC of the European Parliament and of the Council of 23 May 2007 on establishing the External Borders Fund (Article 2) define the notion of *external border of the EU* and *temporary external border*, as follows:

a) the common border between a Member State fully implementing the Schengen acquis and a Member State bound to apply the Schengen acquis in full, in conformity with its Act of Accession, but for which the relevant Council Decision authorising it to fully apply that acquis has not entered into force;

b) the common border between two Member States bound to apply the Schengen acquis in full, in conformity with their respective Acts of Accession, but for which the relevant Council Decision authorising them to fully apply that acquis has not yet entered into force.

At present, Romania is thoroughly going through the process of alignment to the Community standards in the field of cross-

(Government Decision no.561 of 18 May 2007); the Concept of Migration Policy of the Republic of Moldova (Parliament Decision no.1368-XV of 11 October 2002); Law on Migration no.1518 of 6 December 2002; Law of the Republic of Moldova on Labor Migration no.180 of 10 July 2008.

border cooperation, visa policy, police cooperation, Schengen Informational System (SIS), personal data protection. On July 9, 2008, the Regulation (EC) no.767/2008 concerning Visa Information System (VIS) was adopted, which "represents one of the key initiatives within the EU policies aimed at supporting stability and security". Romania has to commence its preparations for implementing the Visa Information System (VIS), before its accession to the Schengen area. For ensuring a coherent and unitary process of preparation of Romanian accession to the Schengen space, the Schengen Department was established by Government Decision no.1317/2007. The Schengen Department is a specialized structure within the Ministry of Administration and Interior that coordinates and monitors the fulfillment of all conditions necessary for applying integrally the provisions of the Schengen Agreement. The EU policy on migration at the external borders is interfered by the policy on borders, visas, etc. In June 2007, the European Commission issued the Communication no.247 *Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European Union*. The document sets forth principles and general context of the relationships concerning migration to countries in neighbouring regions. In October 2008, the European Council adopted the European Pact on Immigration and Asylum. At the level of European institutions, as well as in research milieus, the phenomenon of migration, on the one hand, is sharply criticized, but, on the other hand, is positively supported from the economic and demographic point of view for the European continent of migration. The very European Commissar Franco Frattini in September 2007, after a conference on legal migration, declared that illegal migration ought to be perceived as an inevitable phenomenon in contemporary world; moreover, for the EU, this phenomenon is an advantage. In May 2007, the European Commission (EC) published its Communication on Mobility Partnerships and Circular Migration (COM (2007) 248 final). On the basis of this document and the directives regarding the European policy on migration, as much as „considering its proactive manifestation in promoting national interests for the advantages offered by this new EU initiative, Moldova together with Cape Verde was selected as a pilot-country for the implementation of the Mobility Partnership". (Newsletter, *Mobility partnership between Moldova and European Union*, 2009) Thus, on 5 June 2008 the EU – Republic of Moldova Mobility Partnership was signed for a determined period of time. The RM – EU Mobility Partnership projects, elaborated in compliance with Moldovan priorities are related to the following areas:

- Strengthening the Moldovan communities abroad as well as their links with motherland;

- Creating partnerships between Moldova and the main countries of destination and transit for Moldovan citizens in order to consolidate the mechanism of voluntary return and reintegration to Moldova;
- Strengthening the national institutional framework on migration management;
- Efficient management and investment of remittances in the Moldovan economy;
- Border management and documents security;
- Social protection of migrants;
- Cooperation in preventing and fighting illegal migration and human trafficking.

15 EU member states currently participating at the Partnership through various projects (Republic of Bulgaria, Czech Republic, Cyprus, France, Germany, Greece, Italy, Lithuania, Poland, Portugal, Romania, Slovakia, Sweden, and Hungary), European Commission, FRONTEX and the European Training Foundation are also participating in the Partnership.

Signing of these agreements or mobility partnerships is purported to create conditions and mechanisms to promote legal migration, strengthen institutional capacities to fight against illegal migration, and return and reintegrate the migrants. An important category of the population, usually from the localities in the region, are *cross-border workers*[1] who live and work in the regions on both sides of the Moldovan-Romanian border. This is the very segment of population, engaged in cross-border trade or in labor activities in border localities on the territory of the neighbouring country, which is probably affected the most by the restrictive policy on migration and visas. Opening the borders for all skilled workers from the Central and Eastern Europe is a more correct approach by the EU, whereas the Western Europe would have to take actions quicker in this direction. Opening the borders stimulates the competition, increases human capital and creates minimal negative social repercussions. (Alesina, Alberto., Giavazzi, Francesco, 2008) The way the

[1] In compliance with the Law of the Republic of Moldova regarding Labour Migration no.180 of 10.07.2008 (Official Gazette no.162-164 of 29 August 2008) which came into force on 1 January 2009, (Article 1) the notion of *cross-border workers* refer to "citizens of a state with common border with the Republic of Moldova, engaged in labor activities in border areas on the territory of the Republic of Moldova, and citizens of the Republic of Moldova engaged in labor activities in border areas of the state with common border with the Republic of Moldova and provided they return to their permanent place of residence on a daily, or at least on a weekly basis."

visa policy is currently administered with the Republic of Moldova is an important preparation test for the time when, starting in 2011 in Chisinau, perhaps in Cahul and Balti as well, Romanian Consulates will issue Schengen visas. Taking into account the specific context of the Moldovan-Romanian border and the role played by it in the process of the Republic of Moldova's accession to the EU, as Gabriel Partos mentions, the best thing both Bucharest and Chisinau can think of is the abolition by the EU of the Schengen visa requirements for Moldovan citizens. (Partos, 2003) This could have been achieved if, on the Eastern border of the Republic of Moldova, there had not been the Transdniestrian conflict and Ukraine had advanced qualitatively on its way to the EU. Although, there is not much until 2011, in terms of respecting the timetable of Romanian's accessioin to the Schengen acquis, we shall agree that the EU does not yet have a solution to the effects of implementation of the Schengen Agreement on the EU Eastern borders extended to the neighbouring countries of the new members, especially to the national ethnic groups that live outside the Union. On both sides of the Eastern borders of the wider EU one may ask oneself whether or not the Schengen border will act as a new wall in spite of the existing efforts under the umbrella of the ENP. (Jozon, 2006) The Moldovan-Romanian cross-border cooperation is seen in a larger framework of land and inter-regional cooperation necessary between the countries in the region, (Wesley Scott, 2005) in the context of both the ENPI 2007-2013 assistance and Black Sea cooperation initiative.

For the facilitation of citizens' movement and the introduction of a simplified regime for the control of persons at the external borders, the EU adopted Decision no.582/2008/EC and Decision no.586/2008/EC of 17 June 2008, so that countries such as Romania, Bulgaria, or Cyprus recognize the Schengen visa as equivalent for the purposes of transit through their territories. Citizens of the Republic of Moldova shall not need a transit visa to Romania, Bulgaria or Cyprus if:

1. They are holders of one of the following documents issued by the Member States of the EU that apply integrally the Schengen acquis (Austria, Blegium, Czech, Estonia, France, Finland, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Holland, Poland, Portugal, Spain, Slovenia, Slovakia, Hungary), as well as Denmark, Island, Norway: a) "uniform Schengen visa"; b) a long-stay Schengen visa; c) a stay permit.
2. They are in possession of a valid short-stay visa, a long-stay visa or a stay permit, issued by Romania, Bulgaria or Cyprus.
3. They are in possession of a valid stay permit issued by Switzerland or Liechtenstein.

As a result of applying the EU decisions by Romania and Bulgaria, the holder of one of the aforementioned documents can transit Romania without a visa starting on 11 July 2008 for a period of 5 days and Bulgaria on 18 July 2008 for a period of 36 hours. Decision no.582/2008/EC is applied until the date set out by a decision of the Council adopted under Article 3 section (2) first paragraph of Act on accession from 2003 regarding Cyprus, and under Article 4 section (2) first paragraph of Act on accession from 2005 regarding Bulgaria and Romania, a date when the member state applies all provisions of the Schengen acquis concerning common policy on visas and movement of nationals of the third-countries who have legal residence on the territory of the Member States. Applying the Decision does not affect the control of persons at the external borders, in compliance with Articles 5-13 and Articles 18 and 19 of Regulation (EC) no.562/2006.

On 13 February 2008, the Commission presented two Communications: *Examining the creation of a European border surveillance system (EUROSUR) (COM(2008) 68 final) and Preparing the next steps in border management in the European Union* (COM(2008) 69 final). These documents reflect not only the main achievements of the EU for ensuring the right to free movement of people, automating of data recording about its citizens, but also tasks and objectives for ensuring in future security measures on its borders. Starting on 29 June 2009, on the basis of Regulation adopted in 2004 with the amendments of the European Parliament in January 2009, biometric passports will be introduced which will contain a facial photo and ten digital fingerprints. These digital fingerprints will not be applied to children under 12 years old. The principle "one person – one passport" recommended by the International Civil Aviation Organization (ICAO)[1] will be applied. These increased security measures provoke certain reticence from the European citizens, especially towards the security of these data, while the expenditures to ensure these conditions for the Member States or for countries aspiring to accession increase significantly. Beside the physical borders, the EU also owes political borders, such as the Schengen space which contains 22 Member States out of 27 and the Euro space which contains 16 states out of 27 Member States of the EU.

The debates about the new document to be signed, which will form the ground of the EU – Republic of Moldova relationships, are focused on an essential priority – liberalization of visa regime with the EU. An important reference to this priority is found in a report of the European Parliament on the review of the ENPI. One of paragraphs of this document

[1] http://www.icao.int/icao/en/atb/fal/passport_concept.htm

Takes the view that the recent geopolitical developments in the EU's Eastern neighbourhood underscore the importance of developing the ENP further by adapting it better to the needs of the partners, including enhanced EU involvement in the Black Sea region and an ambitious Eastern Partnership; stresses the need to speed up, in relation to Armenia, Azerbaijan, Georgia, Ukraine and the Republic of Moldova in particular, the establishment of a free-trade zone as soon as partner countries are ready, and the need to finalise as soon as possible steps towards visa freedom with the EU (*author's underscoring*) as well as the need to enhance regional cooperation so as to promote stability and prosperity in the European neighbourhood". (2008/2236(INI), 28.1.2009)

In conclusion, it ought to be mentioned that after Romanian's accession to the EU, the Republic of Moldova is focused primarily on bidirectional cooperation in order to promote its interests: Chisinau – Bucharest and Chisinau – Brussels, whereas a qualitative advancement of the cooperative relationships with the EU is directly conditioned by the existence of good bilateral Moldovan-Romanian collaborative relationships. The Republic of Moldova is an important source of legal and illegal migration for the EU labor market; moreover, it is a transit country for migration towards the Occidental Europe through Romania. Similarly, if Romania, until its accession to the EU, used to be mainly a transit country, it gradually becomes a country of destination for citizens who, through migration corridors, cross its Eastern or South-Eastern border on the Sea. (Mosneaga, 2008) Since the Giurgiulesti passenger Port has already started to work, cruises to Turkey constitute one more potential factor for illegal migration, along with the legal migration in the region. Most of European documents of the EU and of the EC centered on cross-border cooperation state that the cooperative relationships between border communities make up the most favorable framework for European integration. Each enlargement of the EU creates new external borders and their length is growing. At present time, "the twenty-seven Member States are an area of increasing prosperity, and with external land borders of 8,000 km and sea borders of 80,000 km, migration to these countries is a considerable attraction for those seeking the chance of a better life, or simply trying to escape from their own countries for whatever reason"[1]. The Moldovan-Romanian border is daily crossed by many Moldovan citizens who study, engage in economic activities or voyage. The problem of visa in the asymmetrical regimes between Romania and the Republic of Moldova is a big inconvenience for Moldovan citizens, which is undesirable for either of

[1] http://www.cerium.ca/Frontex-The-EU-External-Borders

the two states, but is required by rules of Collective Security System in the process of Romanian's accession to the Schengen space. Once a member of the Schengen space, Romania is likely to put forward to Moldovan's citizens the same requirements as any other Schengen state, or maybe not. As a rule, the realization of the desideratum regarding the elimination of the visa regime for Moldovan citizens in medium term is conditioned, first of all, by six factors:

- Existence of a democratic and pro-European Government in the Republic of Moldova;
- Political commitment and will of the authorities of both states;
- Qualitative advancement of Euro-Atlantic relations of Ukraine;
- Degree of securing the Eastern border of the Republic of Moldova within a complex and viable solution on the Transdniestrian conflict;
- Positive image of bilateral relations at the EU level;
- Creation of a favorable climate for foreign investments in the Republic of Moldova.

Obviously, these conditions shall imply political will and considerable efforts that would allow the resolution of various problems, which, as a matter of fact, represent our outstanding tasks concerning accession criteria. With the purpose of developing these factors in a favorable direction of the process of Moldova's accession to the EU and, respectively, of elimination of visa regime for Moldovan citizens, different measures must be undertaken, such as:

- Improvement of political dialogue and of the collaboration relations between the Republic of Moldova with Romania and Romanian's support for the implementation of reforms in the process of European integration of the Republic of Moldova;
- Signing by Chisinau administration the Agreement on local border traffic with Romania on the basis of Regulation EU of December 2006;
- Further legislative harmonization and advancing the elaboration and implementation of democratic reforms and standards that form the ground of the criteria of accession to the EU, including the objectives in line with Chapter 24 "Justice and Home Affairs";
- Qualitative improvement of relationships between the Republic of Moldova and Ukraine regarding the Eastern border within common efforts and international institutions to regulate the Transdniestrian conflict, including the EUBAM;
- Learning from existent positive practices concerning the free movement of people and the local border traffic, etc. at the EU external

border (An example for the visa regime could be the cooperation between Slovakia and Ukraine in resolving their mutual visa problems and special visa provisions granted by Hungary for the ethnic Hungarians from non-EU countries); (Pop, 2009)

- Joint commitment of the Republic of Moldova and Romania to a company to promote positive images of good neighbourliness between the two states at the EU level, especially through the diplomatic representatives;
- Improvement and development of collaborative relationships between the Republic of Moldova and the Member States of the EU on various aspects;
- Informing the Moldovan citizens who are to take part in the opportunities offered by the Agreement on facilitation of the issuance of visa and the EU – RM Mobility Partnership;
- Consultancy in the process of elaboration and implementation of strategic documents of the Republic of Moldova regarding the migration and the border with Romania and the EU states where the Moldovan citizens' Diaspora is focused;
- Strengthening and extending the cooperation on multiple aspects between the Customs Service, the Border Guard Service of the Republic of Moldova, FRONTEX Agency and the structures within the Ministry of Administration and Interior of Romania (the Schengen Department, Romanian Border Police, etc) including within the Söderköping process[1];
- Attracting and turning account of the European funds through projects with cross-border impact at the level of local communities within the Euro-regions, which would contribute to the organization of infrastructure, institutions and necessary procedures for ensuring citizens' right to free movement, etc.

These and other measures that can and must be undertaken by the authorities of the Republic of Moldova, as well as by the society as a whole, the existence of a regional geopolitical context of security and stability favorable to the aspirations of European or even Euro-Atlantic integration, will allow the insurance of an European future of the Republic of Moldova.

[1] Since 2001, the Söderköping process has grown to include now ten countries situated along the enlarged EU border: Belarus, Estonia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Slovakia, and Ukraine. The process is supported by the EC, IOM, the SMB and UNHCR.

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3. Decision No 586/2008/EC of the European Parliament and of the Council of 17 June 2008 amending decision No 896/2006/EC establishing a simplified regime for the control of persons at the external borders based on the unilateral recognition by the Member States of certain residence permits issued by Switzerland and Liechtenstein for the purpose of transit through their territory. (*Official Journal of the European Union* L 162, 21.6.2008, pp.27-29.)

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Table 1. ***The list of crossing points which operate on the Moldovan-Romanian state border***
Source: http://www.border.gov.md/index_m.htm

№ D/o	**Name of crossing point**	**Statute**	**Type**	**Work regime**
1	„Costesti – Stinca"	international	auto	24/24
2	„Sculeni – Sculeni"	international	auto	24/24
3	„Ungheni – Ungheni"	international	railroad	24/24
4	„Leuseni – Albita"	international	auto	24/24
5	„Cahul – Oancea"	international	auto	24/24
6	„Prut – Falciu"	interstatal	railroad	According to schedule
7	„Giurgiulesti – Galati"	international	auto	24/24
8	„Giurgiulesti – Galati"	international	railroad	24/24

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Simona Petrina GAVRILA

REGULATIONS APPLICABLE TO THE PRESS WITHIN THE NEW ROMANIAN CIVIL CODE

Abstract

At present, the only express regulations, applicable both to the written press and to the audio-visual are those dating from the time of the old regime. They are included in 5 articles (72-75 and 93), still in force, of Law no. 3/1974 concerning the press of the Socialist Republic of Romania. They establish, mainly, the right to reply.

The need to adopt a law which would expressly govern and regularize the press has been the subject of several debates, both mediatic and doctrinarian.

Meanwhile, the project of the new Romanian Civil Code, being in public debate, includes regulations concerning this field.It is still left to see to what extent these provisions represent a sufficient minimum in the field and to what extent they match to the international legal dispositions protecting man's rights.

The hundreds of legal actions in which reporters are implied, the billions claimed as compensations, the toxic information are all part of a large number of attempts of politicians to subordinate mass-media. The "powers" of the state, mass-media as the forth power, the multiparty principles are all a giant form without substance, that hide the tragedy of a whole people. Mass-media ought to be truest expression of the civil society, keeping in sight the legal, executive and judicial powers, so that they work for the benefit of the citizens. This does not happen because mass-media, the most important power for a real democracy, is not legislated.

When, during the Congress for setting up the Association of the Romanian Journalists in 1990, a mass-media law was suggested, this initiative was the subject of violent protests. The journalists protesting were thinking of the censorship, of the recently abolished regulations of the Ceausescu regime. But nobody was thinking to defend the rights and liberties of the journalists, for where there is no law, there is no justice either. It is not possible to have free mass-media without a law to protect this freedom and the law is to be made by the journalists themselves.

Mention should be made that the Mass-media Law no. 3/1974 [1] provided that "mass-media carries out their activities under the leadership of P.C.R.", "being designed to fight permanently to bring its politics to life" and that "it should carry out an important social-political mission, to be in the service of the people, to defend the highest benefit of the socialist nation". On the other hand, the law stipulated that "the liberty of mass-

[1] Mass media law no. 3/1974 published in the Official Blletin no. 48 of 1st April 1974.

media represents a fundamental right written in the Constitution" and that "all the citizens have the right and conditions to express in mass-media their opinions concerning general and political problems, to be informed about the domestic and world events". The same law provided that the profession of a journalist is "acknowledged and protected".

A law for the journalists is necessary, just as there are judicial norms for doctors, teachers, jurists, artists, that is for all the liberal professions, norms that cannot and should not be ruled by the Work Code. This law must regulate who can be a journalist, what are the rights and the obligations of a journalist, the right to retort, what is calumny, what is the insult, what is disinformation, what is mass-media misdemeanor (art.30, par.8 of the Constitution), how can these be classified and punished, which are civil and which are penal.

As long as there is no law to rule this fundamental domain in a democracy, mass-media, as well as anybody may rule their own law in the newspapers, paying for information and misinforming the people of Romania, mass-media being not "guarding dogs of democracy", but "dogs attacking democracy".

The new draft of the Civil Code, brought to the attention of the public, contains in Book I, Title II, Chapter 2, entitled the Respect for the private life and human dignity and in Book I, Title V, entitled Defense of non-patrimonial rights, regulations that can be applied directly or indirectly to mass-media.

These regulations provoked sharp debates and tough criticisms, especially from mass-media representatives. We are going to talk about these and analyse them in the following pages.

Recognising the right to privacy and dignity (art. 77 and 78), the draft of the Civil Code assures their protection by forbidding the public use of a person's voice or image without the consent of the person. It is also forbidden the public use of (...) information concerning the private life of a person without the person's consent, if these are likely to damage the person's image or reputation (art.79).

It should be noticed, firstly, that the two rights are also provided both by the revised Constitution of Romania, and by the Universal Declaration of Human Rights and the European Convention of the Human Rights.

Thus, art. 26 from the Constitution, entitled "The intimate, family and private life", shows that the public authorities have the obligation to observe and protect the intimate, family and private life. Certainly, the public authorities are also obliged to provide the legal background that can

protect the private life. The human dignity is indirectly considered having an important social value, as in art. 30, entitled Freedom of Expression, shows in par. 6 that the freedom of expression cannot damage the dignity, honour, the private life of a person, as well as the right to their own image.

The human dignity is considered an important social value in the Universal Declaration of the Human Rights as, in art. 1, it mentions that "All the human beings are born free and equal as their dignity and rights are concerned". This international document of outstanding importance protects the private life too, as in art. 12 it stipulates: "Nobody will be subjected to abusive intrusion into their personal life, their family, home or correspondence, or to abuse against their honour and reputation. Every person has the right to be protected by the law against such intrusions or abuse".

Lastly, the European Convention of the Human Rights protects the right to the private life in art. 8, par. 1, stipulating that "Every person has the right to have their private and family life, home and correspondence respected".

It follows, therefore, that the two rights have been recognised for some time by the Romanian and international legislation.

As for the way to protect the private life of a person, to forbid publicly the recording of a person's image or voice, or information concerning their private life, without their consent, it is obvious that this concept is not new either.

The protection of a person's image and correspondence, being included in the information concerning the private life, was stipulated in Law no. 8 of 14th March 1996, concerning the copyright and additional rights[1], where in art. 88-90 mentions the following:

To utilise the portrait of a person in a certain work, one needs the consent of the person whose portrait is utilised. The author, the owner or the holder of the work has no right to reproduce or utilise the portrait without the consent of the person or of their descendents, for a period of 20 years after the death of the person who was represented.

If no otherwise mentioned, the consent is not necessary if the person represented in the portrait is a model or was paid for posing. The consent is not necessary to utilise a work containing the portrait of a person who is famous, if the portrait was done while the person exercises their

[1] Published in Official Gazette no. 60 of 26 March 1996 and modified through Law no. 146/1997, Law no. 285/2004, Government Emegency Ordinance no. 123/2005 and Government Emegency Ordinance no. 190/2005, Law no. 329/2006.

public activities or of a person whose representation is only a detail in a work describing a meeting, a landscape or a public manifestation.

To utilise the correspondence addressed to a person, the consent of the addressee is needed, and after the latter's death, for 20 years, the consent of their descendents, if the addressee didn't express a different wish.

It is important to mention that art. 79 of the Draft of the Civil Code exonerates from interdictions, the cases in which the use is allowed by the law (for instance, by Law no. 8/1996), or when there is a justified public benefit.

The next regulation applicable to the mass-media can be found within art. 80 in the Draft of the Civil Code, which mentions among the prejudices against the private life the following:

- recording or utilising the image or voice of a person, if this person was not in a public place, disseminating a person's image taken in their own home or in any private places, without the consent of the person;
- disseminating images of inside or outside a private residence, without the consent of the person living in it legally;
- disseminating news, debates, surveys or written or audiovisual reports regarding the intimate, personal or family life of a person, without the consent of the person;
- disseminating materials containing images of a person under medical care, as well as personal data regarding the health condition, the diagnosis, prognosis treatment, circumstances of the illness and other deeds, including the result of the autopsy, without the consent of the person and, in case the person is deceased, without the consent of the family or the legal persons;
- utilising the name, the image or the voice or the resemblance with other person otherwise than the legitimate information of the public;
- disseminating or utilising the correspondence, the manuscript or other personal documents, including data regarding the domicile, the residence, as well as telephone numbers of a person or of their family members, without the consent of the person to which all these belong or, as case be, has the right to have them at their disposal.

Art. 81 mentions the fact that, when the person themselves to which information or some materials refer, places them at the disposal of a physical or legal person who they know that they work in the field of public information, the consent for utilising these is implied and no written agreement is necessary.

Despite the wrong place of the instances of damage of private life, it is worth noting that the exception provided by art. 79 in par. 3, consisting

of "utilising is allowed by law or there is a justified public benefit", stays applicable in such cases.

There are incident regulations, in that this can happen in mass-media, as in art. 89, which forbid the prejudice against the memory of the deceased person.

Thus, it is forbidden to bring prejudice to the memory of a deceased person, in words, gestures, insults or assigning a defect, a disease or a disability which, even real, should not have been mentioned. Also, it is considered prejudice against the memory of a deceased person, the statement or public reproach, by any means, of some activities regarding the person, which, if true, could have exposed that person, while alive, to a penal, administrative or disciplinary case or to the public contempt.

This idea, of the distinct judicial assignment of the right of a person to image, even after their death, is new in the Romanian legislation. It is also worth mentioning that the wording is very close to the legal definition of calumny.

A whole title addressed to the mass-media is Title V, which rules the defence of patrimonial rights.

The right to act of a physical person whose non-patrimonial rights were infringed upon or threatened upon includes the right to ask the prohibition of performing the illicit activity if this is imminent, ceasing the infringement and forbidding it in the future, if this still continues, or noticing the illicit condition of the deed, if the prejudice it produced still exists.

At the same time, the person who endured the infringement of such rights, according to art. 263, can request from the court to force the doer of the deed to accomplish any necessary measures that the court considers in order to re-establish the right which was prejudiced, such as:

a) sequestration, destruction, confiscation or withdrawing from circulation of goods or means that served or were destined to serve when putting into execution the prejudicing deed;

b) forcing the author, under their own expense, to publish the decision of sentencing or to pay an amount of money for the benefit of a legal non-patrimonial person, who carries out a charity;

c) any other necessary measures considered to repair the prejudice produced and ceasing the illicit damage of the personality.

Independently, the prejudiced person can request compensations or, if necessary, a patrimonial repair for the prejudice, or even non-patrimonial prejudice, which was produced, if the damage can be

attributed to the author of the prejudicing deed. In these cases, the right to action is under the extinctive prescription.

We consider that this disposition refers only to the content solution of the cause, in its name, no temporary measures being possible. If such an interpretation weren't possible, art. 272 would represent only judicial tautology.

The draft of the Civil Code extensively regulates the institution of the right to rebut. Mass-media commented that this regulation is not necessary, as it is already judicially ruled.

Indeed, among the four articles still valid of the old mass-media law, three (art. 72-74) regulates the right to rebut.

But these are rather shortly written, mentioning:

The physical or legal person prejudiced by statements produces in mass-media, which they consider false, can request, within 30 days, that the respective mass-media should publish or disseminate a reply, rectification or declaration. The answer must be impersonal and targeted to re-establishing the truth. The objective, principled and constructive criticism aimed to perform social-political functions is not considered prejudice.

The mass-media is obliged to publish, free of charge, the answer, as under the conditions of the previous article, within 15 days from its receiving, if the mass-media is daily, or at the latest, in the second issue from the reception of the answer, if the mass-media features a different periodicity.

The refusal to publish or disseminate an answer is to be communicated to the prejudiced person within 15 days from the reception of the written perception. The failure to publish or disseminate the answer within the terms provided by the previous article will be considered a refusal, even if this was not communicated.

Moreover, many Romanian periodicals do not acknowledge the existence of the right to rebut, considering the above mentioned regulation out-fashioned, as being edited during the previous regime.

There are also existing regulations regarding the right to rebut, but these are applicable only to audiovisual programs, included in the Decision of the National Council for Audiovisual, no. 187 of 3rd April 2006, regarding the regulation Code of the audiovisual content.

Therefore, it is necessary to adopt norms to regulate in a unitary way the right to rebut.

In this domain, the draft of the Civil Code provides the following:

Any person whose rights or legal interests were prejudiced directly by rendering in mass-media, either written or audiovisual, false deeds, benefits of the right to rebut.

This right does not apply when some public debates are reproduced exactly in the context of authorities or institutions in which the person considered prejudiced took part. Also, this right does not apply when the presentation objected reproduces exactly some content coming directly from that person.

The answer must be short, written and refer strictly to the object of the respective presentation.

For materials broadcast in audiovisual program, the answer can be, at the discretion of the person who considers to be prejudiced, written or either audio or video registered, the technical standards used by the mass-media institution that disseminated the respective presentation being observed. Also, if the institution to be informed agrees, the answer can be presented directly, the person considered to be prejudiced being able to speak live.

The answer can be denied if it is obviously false or if it is against the law or good sense.

The author of the answer can address the mass-media institution within 20 days from the date they became aware of the presentation they contest, but no later than 3 months from the date of the publication or dissemination of such presentation.

The mass-media institution which was informed must notify the author of the answer within two days from the receiving of the rebut request, about the date, time and program when the answer will be published or disseminated, or, in case the live intervention is requested, if this will be allowed and provided. If the mass-media institution denies the publication or the dissemination of the rebut, or the live intervention, the reasons for this denial will be notified straightaway.

The answer must be published or disseminated in such a way that as much a part of the public who became aware of the presentation which is contested should be reached. For this, the rebut will be published or disseminated in the same manner and place as the presentation which is contested on the spot, but no later than 3 days from the date when the publication or dissemination was approved.

During audiovisual programs, the rebut must be presented within the same time span, the same program, within the same duration and the program in which the prejudice was brought being mentioned. If the program in which the prejudice was brought is planned to be broadcast after more than 7 days, the rebut will be disseminated within 3 days, in the

same time span and the program in which the prejudice was brought being mentioned.

The rebut must be published or disseminated integrally, without being modified, distorted, reformulated or changed. The mass-media institution which was informed cannot add something or comment immediately, besides a declaration mentioning the fact that the presentation of the deed is maintained or the sources which were used to carry out or disseminate the respective presentation.

In all cases, the publication or dissemination of the rebut is free of charge, any contrary convention or clause being considered unwritten.

If the institution informed prevents the execution of these rights, denies publication or dissemination or does not achieve these correctly, the person who believes to be prejudiced can address the competent legal courts. The court will soon give an answer based on the evidence received, in the form of a presidential decision.

Exercising or, if case be, not exercising the right to rebut, does not imply that the prejudiced person gives up their right to obtain legally a right compensation of the prejudice.

As an addition to the right to rebut, for a correct information of the public, the draft of the Civil Code regulates also the right to rectify the wrong information.

The holder of this right is any person whose legal rights or interests were prejudiced by the presentation in the written or audiovisual mass-media of some wrong aspects.

The procedure for exercising the right to rectifying wrong information is the same as the procedure for exercising the right to rebut.

For a better protection of non-patrimonial rights of physical or legal persons, the draft of the Civil Code provides the possibility to formulate an action as a presidential decision, in which, if there is relevant evidence that it is the object of some illicit prejudice, real or imminent, as is the case, and that this prejudice can be considered difficult to be compensated, the interdiction of infringement or the temporary discontinuance or the taking of such measures as are considered necessary to assure the conservation of evidence. Without being obliged, the court can dispose that the claimant should pay a bail, under the sanction of rightly cease the measures taken.

In order to avoid the preliminary censoring, the law disposes that, in case of prejudice made in the periodical written or audiovisual mass-media, the court cannot dispose the temporary ceasing of it, unless the

prejudice is very serious and is not obviously justified, and the measure taken by the court is not disproportionate to the prejudice.

The action for re-establishing the non-patrimonial right which was violated, although apparently a personal action, can be continued or started, after the death of the prejudiced person by the surviving spouse or any direct relative of the deceased person, as well as by any collateral relative until the forth level inclusively.

In this domain, the law provides an impairment of the regime of the civil responsibility liable to penalty. Thus, like in the common law, the petitioner is forced to repair at the request of the interested party, the prejudice caused by the temporary measures, if the content action is rejected as being non-justified. In spite of this, if the petitioner was not guilty or had a light guilt, the court, taking into consideration the real circumstances, can either deny its obligation to bring the repairs requested by the counterparty, or decide that the repair should be reduced

As the rule is, in civil law, that the person be responsible even for the lightest guilt, the possibility of not being responsible for a light guilt is a novelty.

Contrary to the vehement criticism brought in mass-media, we believe that adopting some norms in this domain is necessary, both considering the necessity of the protection of persons whose rights can be infringed by the mass-media, but mostly for the responsibility of the journalists and for creating the possibility that this profession can have the reputation it deserves.

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REFLECTIONS UPON OFFENCE OF INFANTICIDE

Abstract

Infanticide has been incriminated since the oldest times, differing only the forms of incrimination or options of the legislators regarding its ways of sanction (more severe or less severe for the offence of homicide).

In "Criminal Code" in force (Article 177), it is incriminated "murdering of a new-born, committed immediately after birth by mother being in a bad condition caused by birth" and is punished with imprisonment from 2 to 7 years.

In Art. 180 from the Criminal Code (adopted in 2004 with its entering into force postponed to 1st of September 2009), the infanticide has the same legal content.

In the project of Criminal Code of Justice Ministry (published on 24th of January 2008, on the site of the Minister of Justice– www.just.ro) it has been proposed the same way of approaching the matter. Thus, in Art. 197, under the secondary name of "Murdering or hurting the new-born committed by mother" it has been incriminated not only the deed of murdering the new-born, but also the deeds of hitting or other violence, body injure and wounds or injures causing death by mother being in a bad condition caused by birth.

In the project of Criminal Code of Justice Ministry (published at the beginning of 2009, on the site of the Minister of Justice– www.just.ro), in the form transmitted to the Parliament, it has been given other form to the incrimination. Thus, in Art 198, under the secondary name of "Murdering or hurting the new-born committed by mother" it has been incriminated not only the deed of murdering the new-born, but also the deeds of hitting or other violence, body injure and wounds or injures causing death immediately after birth, but not later than 24 hours, by mother being in a bad condition.

1. Concept and characterization. Infanticide is the deed of mother who, being in a bad condition caused by birth, murders her new-born child immediately after birth.

The deed is incriminated in Art. 177 Criminal Code.

It is disputable the solution of the Romanian law to cancel the difference between the victim offence of the new-born child outside the marriage and the new-born child born during the marriage, although the two situations are deeply different, as well as the psychological pressure under which the mother acts in such situations. Our law, from more propagandistic reasons, considered the bad condition caused by birth,

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regarding the decision of mother of murdering the own new-born child, as being decisive.

Not accidentally, some foreign legislations consider infanticide only in case of murdering the new-born child outside the marriage or for hiding or saving a dishonorable situation, without referring to the disturbances of other nature (physiological) of mother.

In Art. 180 from the Criminal Law (adopted in 2004 with its entering into force postponed to 1st of September 2008) the infanticide has the same legal content

2. Judicial object and material object. Infanticide has as special judicial object, the social relationships regarding the right to life of the new-born child. We can talk about a new-born child from the moment when, the process of giving birth ended, the child has been expulsed and started its own existence. The child must have been born alive, not necessarily viable, meaning being endowed with the power of living.

The material object of infanticide means the body of the new-born child.

3. Direct active subject (author) is the mother of the new-born child. Thus, infanticide is an offence with an unique qualified author.

In the juridical literature and judicial practice, it has been raised the problem of participation in this offence, as instigation and complicity.

Considering the infanticide as a attenuated variant of homicide, it has been considered that the participants (co-authors, instigators, accomplices) shall be responsible for taking part in committing the offense of qualified homicide (Art. 175, letter d.), not having repercussions from the benefit mentioned in Art. 177 from the Criminal Code (bad condition of mother being considered a personal matter). The German authors have followed the same way.

If the infanticide hadn't been considered an attenuated variant of homicide, but an independent offence, than, the participants were responsible for infanticide. The previous text, existing in the Spanish criminal law, provided that the less severe treatment regarding the mother, shall extend upon her parents also, giving the parents the opportunity of a criminal treatment less severe. The Italian Criminal Law regulates intentionally the criminal treatment of the participants in infanticide.

In case mother instigates or helps other person to kill her new-born child, it has been stated that, in the practice of the supreme instance, she shall be responsible for instigation or complicity to qualified homicide.

Against this solution, it could have been stated that, mother being in bad condition caused by birth, should be responsible under attenuated conditions (regarding the offence of infanticide), even if she is an accomplice or instigator. This personal matter is revaluated irrespective of the form of participation where mother would have acted.

4. General passive and mediated subject is the state.
Special passive and immediate subject is the new-born child (qualified subject).

5. Structure and juridical content of offence. In the structure of the offence and thus in its juridical content, there are the following components: the premise situation and the constitutive content.

A. *The premise situation* states in pre-existence of a recent birth.

Conditions:

a) to be born a life child not necessary viable. Disposition of Art. 177 does not apply in case the baby was born dead or was killed during birth.

b) The child to be *a new-born*. A new-born child is, as resulted from the content of Disposition of Art. 177, the baby who can medically be named "i*mmediately after birth*" and who has recent signs of birth on its body.

In case of murdering a child that cannot be considered new-born, the deed shall be a qualified homicide.

B. *The constitutive content of offence*. The infanticide, being a variety of homicide offences, its constitutive content, both in the objective side and subjective side, in broad outline, does not differ from the constitutive content of homicide.

a) *Objective side*. Under the material aspect, infanticide is committed by the activity of homicide of the new-born child. This activity can consist in action or inaction.

Regarding the material element, there are required two essential requirements:

- The first essential requirement consist in the condition that the action of homicide of the new-born child to take place immediately after birth.

"Immediately after birth" refers to the time period in which on the body of the child the signs of a recent birth still persists. This expression is ambiguous and departs from the rule that the norm must determine the illicit exactly. In this case, it is given to the judge the possibility of decision. It is possible that to some children the signs of birth to disappear faster, and to the others later. In the Criminal Code from 1936 it is provided that the

homicide of child must take place in the legal term of declaring the birth to the Civil Status Office (Art. 465).

If the homicide of child was not committed immediately after birth, the deed is considered murder not infanticide.

The second essential requirement regarding the material element of the infanticide offence is that the deed of murdering to be determined by the condition of anxiety caused by birth. It is a double causal process: birth caused the condition of anxiety and the condition of anxiety caused the action of homicide. If the condition of anxiety is not caused by birth, the deed shall constitute a murder.

Anxiety caused by birth is of psychical order, but it can be generated by physical factors. Anxiety has effect on woman's will and consciousness, altering them and provoking the action of homicide (thus, the well known puerperal fever caused by penetration in the uterus of a patogenous agent is always given as an example among the cases that can provoke conditions of anxiety).

Understanding the notion of "anxiety caused by birth" used by the Art. 177 from the Criminal Code, provoked disputes in the judicial practice. Some instances considered that this notion includes also the psychical disorders, the "psychical shock" that mother experiences as a result from giving birth of a child in unusual conditions (for example as a result of shame, fear of social consequences, familial, public opprobrium, etc.). Other instances considered that the anxiety regards existence of a psycho-physiological condition caused exclusively by the birth process. This latter opinion has imposed on the matter.

In the doctrine, it has been discussed if the requirements of law of a disturbance caused by birth does not lead to subordering the juridical solution to the medical one (the judge is retained by the medical solution), the juridical specification being conditioned almost exclusively by the conclusions of forensic expertise. It is to be reflected a perfection of the text to permit to the instance an evaluation of proofs, on the whole, to decide if there are accomplished or not the constitutive elements of the infanticide offence.

It is also discussable the solution of the legislator of not taking into consideration the infanticide from social causes as far as it is a reality.

The immediate consequence of offence is the death of the new-born child; this consequence can be produced immediately or later, because the law does not require that the death of the victim to occur immediately after death. As well as the murder, the infanticide is an offence of the result.

The connection of causality. In the action (inaction) of the perpetrator and the produced result (death of the victim) must be the *connection of*

causality (usually this results from the materialization of the deeds). Causal connection must exist not only between the action of mother and death of the victim but also between the birth of the victim and condition of anxiety of mother; if the anxiety had other causes, it will not exist the infanticide offence but the offence of qualified murder.

There is no interest if the action or inaction of mother was sufficient by itself to lead to the death of the child or if this result occurred in competition with other causes or circumstances, preexistent, concomitant or occurred. If death of the child occurs immediately after birth, but due to some congenital malformations incompatible with life, connection of causality between action or inaction of mother and death of the child does not exist, and the deed does not constitute an offence.

b) Subjective side. Infanticide is committed with direct or indirect intention. If mother murders her child at fault, immediately after birth, the deed is murder at fault (Art. 178, Criminal Code).

Intention of mother to murder her child must be determined by the condition of anxiety caused by birth. Thus, in case of infanticide, intention is spontaneous: it is made under the impulse of the anxiety condition and is executed simultaneously or during the time this condition exists. Condition of anxiety must be caused by birth. There cannot be considered disorders caused by birth, according to Art. 177 from the Criminal Code, the disorders proper to birth that cease at birth and neither can the emotional-affective states determined by the conflictual states of the mother who does not want the child. Anxiety caused by birth, that the legislator took into consideration, are only the psycho-pathological disorders, abnormal and pathological disorders provoked by different harmful factors (for example, classic puerperal psychosis, maniac-depressive psychosis, schizophrenic-form disorders, etc.)

For establishing the state of anxiety caused by birth, it is necessary a forensic expertise that certifies under certain conditions in which she committed the deed, that mother was under such condition. If the forensic examination was not performed immediately after birth, in drawing the conclusions, it shall be also taken into consideration the circumstances of fact that result from the documents of penal or judicial research.

If mother of the child was not under an anxiety state or if, being in a state of anxiety, this state was not provoked by birth, the deed is a qualified murder, according to Art. 175, letter c) and d) from the Criminal Code and after the case, according to Art. 175, letter a) from the Criminal Code.

6. Forms of offence. *Consummation* of an infanticide offence occurs in the moment when the new-born child dies. *Attempt* to an infanticide

offence is possible but it is not incriminated by the legislator. In this respect, with good reason, in the criminal judicial practice, it has been decided that: "Murder of the new-born child, committed immediately after birth, by mother being in a psychical anxiety state caused by birth, established according to a forensic expertise, meets the constitutive elements of infanticide offence mentioned in Art. 117 from the Criminal Code. If the action of murdering by the mother being in such condition did not have any effect, and the new-born child being saved, the solution of its acquittal is legal, as the attemption to the infanticide offence is not incriminated"[1]

7. Sanctions.

Infanticide offence is punished with imprisonment from 2 to 7 years, so the punishment provided by the legislator is under the limits provided for the offence of murder, thing that justifies the affirmation made at the beginning of the offence analysis, when we showed that the infanticide can be considered an attenuated variant of homicide.

8. General aspects.

According to art. 209 paragraph 3 from the Criminal Procedure Code, in case of infanticide offence, prosecution of criminal action is mandatory performed by the Attorney, and judgment in first instance of the causes of this type is of Tribunal competence, according to Art. 27, paragraph 1, letter a) from the Criminal Procedure Code. Both the anxiety state of mother and the state of newborn child, as well as the period to which Art. 177 refers (immediately after birth) shall be retained according to the conclusions of the forensic expertise that are necessary in such cases.

9. Legislative antecedents. It is interesting to notice that along time, the concept regarding the sanctioning of the infanticide has oscillated between a more or less severe restriction in comparison with the simple homicide. Thus, the Criminal Code from 1864 placed in Art. 230 the infanticide that consists in murdering the new-born child beside the worse variants of the murder, respectively "murder with premeditation", "poisoning", "parental homicide" and provided for this deed the most severe punishment – hard working for life (Art. 232, paragraph 1). It was also provided an attenuation of responsibility, but insignificant, in case the infanticide was committed upon an illegitimate child by its mother, while

1. High Court of Cassation and Justice, criminal section, decision no. 1948 from 22nd March 2005, http://www.scj.ro, (selections 2005).

the provided punishment was seclusion for life (Art. 232 paragraph 2). The Code from 1936 brought a different view. Considering the infanticide as an attenuated variant of murder, punishment of imprisonment from 3 to 5 for mother who murdered the natural child, before expiration of the legal term for declaration to the marital status office (Art. 465).

Thus, both the Code from 1864 and from 1936 did not admit any sanction less severe but for the case when the new-born child was natural or illegitimate, meaning to be born out of marriage, and the deed was committed by its mother.

The Criminal code in force – as it has been showed before – treats the infanticide in the same way, irrespective of the fact that the child is born during the marriage or out of marriage. Unlike the previous Criminal Code that provided the condition that the infanticide to have been committed "within the term of declaring the birth to the civil status service", the Criminal Code in force requires that the murdering of the child to have been committed "immediately after birth".

In addition, the Criminal Code in force mentions that the perpetrator, to benefit of the sanction less severe that penal law provides for infanticide, must have been in the moment of murdering the child "in a disordered condition caused by death".

10. References of compared legislation.

A. the Italian Criminal Code, under the name of "infanticide (infanticidio) in conditions of material and moral desertion", provides in Art. 578:

"Mother who causes the death of own new-born child (neonato)" immediately after birth, or of the fetus (feto) during birth (durante il parto), when the deed is determined by the conditions of material and moral desertion connected to birth, is punished with seclusion from 4 to 12 years.

For those who compete with the first paragraph, the seclusion shall be applied shortly after 21 years. However, if they acted only for the purpose to help mother, the punishment can be diminished from one third to two thirds.

The worse circumstances mentioned in Art, 61 from the Criminal Code, Art. from the Criminal Code""

B. It is noticeable that the Italian law calls the "new-born" (neonato) the one murdered immediately after birth and "fetus" the one murdered during birth (durante il parto), that shall accredit the idea that until disconnection from the mother's body, the new-born child is still a fetus and not a child. According to the Romanian law that refers to the murder of the new-born child, means that it has into consideration not the fetus

(name that has the product of conception until disconnection from mother), but the child, meaning the being that named herself mother. It seems that the Italian law offers an argument for supporting the thesis of Romanian authors who consider that it might exist infringement and if it is being acted upon the product of the concept just before detachment from mother (regarding the fetus).

Although such opinion of the Romanian authors could be accepted, by an excessive interpretation of Art. 177 from the Criminal code, the arguments brought for it are not protected from the critique. Thus, it is considered that if immediately after birth we are in the presence of a disturbance condition of mother, this condition existed *a fortiori*, even amplified also during the birth. The critique that could be brought is that the specific of the mother's anxiety is that one that is provoked by birth, thus occurring after birth, as its consequence and after the process of birth it ended.

What must be discussed for supporting this theory is the exact determination of the moment of starting life, when the baby acquires the quality of the new-born.

Some Romanian authors consider that in the sense of the criminal law, protection of an individual's life begins in the moment of detaching the baby from mother and when this is no more a part of mother's body (C.Bulai, A. Filipas, C.Mitrache, I. Vasiu, V. Dobrinoiu)

Other Romanian authors that the moment of birth does not coincide with the one of detaching the baby from mother, but it is before, between starting of the birth process and the proper birth, when the baby was expelled or extracted from the uterus of mother, even if there were not expelled the fetal annexes (placenta, membranes, umbilical cord) and neither was realized the autonomy of the baby from mother. In this process of birth there can be committed deeds of infanticide (O.Stoica, C.Barbu). In this regard, some Italian authors show that according to the Italian legislation the quality of human being does not start with the proper birth, namely with the total detaching of the baby from mother, but in a previous moment, namely when it started the detaching of the baby from the uterus of the woman.(F.Antolisei).

Finally, there are also Romanian authors who consider that the moment of starting life must be established according to the results of medical scientific research which should be taken into consideration by the juridical science and judicial practice (V.Dongoroz) or that the moment of starting life would be conditioned by the particularities of the birth process in each case separately, this moment couldn't be fixed theoretically and abstractly (I.Dobrinescu, T.Vasiliu)

In our opinion it is decisive the moment of total detachment of the baby from mother and the beginning of an independent life from mother, by cutting the umbilical cord that makes him/her a part of mother's body. We bring as an argument Art 177 from the Romanian Criminal Code that incriminates the murder of the new-born child, namely the product of conception that started an extra- uterine life (G.Antoniu).

C. Some recent criminal legislations(French Criminal Code, Spanish Criminal Code, German Criminal Code) gave up to incriminate distinctively the murder of the new-born child. It is interesting the solution of the Spanish Criminal Code that in distinct section (*De las lesiones al feto)* incriminated the deed of hurting the baby (Art 157) be it on purpose or by mistake (besides the offence of abortion provided in Art 144, 145 from Criminal Code, after the offence of homicide provided in Art 138-143). Such a regulation confirms the opinion of those who think that the baby and the actions against him/her in the birth process must be criminally treated distinctively from those against the new-born child who represents a human being passed over the stage of fetus by detaching from the mother's body.

As it is well known, in the French Criminal Law there is no distinct incrimination of the infanticide offence (*infanticide*), being abandoned dispositions of the previous criminal code; at present infanticide is sanctioned as a homicide committed to a minor till 15 years (Art 221-4 from French Criminal Code).From the way the legislator expresses, who takes into consideration the age criterion, we conclude that it is not about the fetus, but about the child, because only from the beginning of the extra-uterine life it is calculated the age of the conception product (M.Veron)

11. Proposals of ferendal law. In comparison with these provisions of reference legislations we would suggest the legislator to think again the entire formulation of the actual text that incriminates infanticide. We would suggest, on this level, that the legislator should inspire in writing the next text from the Italian regulation [the main element being not the fact that it is given birth to a child outside the marriage, as the previous text from the German Criminal Code (paragraph 217-regarding infanticide offence – presently abrogated) mentioned, but the fact that the infant killing mother is in condition of material and moral abandon regarding the act of birth-condition that can be met when it is about the birth of a child during marriage]. Likewise we think that it is also suitable a special regulation of the participants treatment, giving them the benefit of an attenuation to those who act with an unique purpose of helping them other.

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Dragu CREȚU

THE REVIEW WITHIN THE ROMANIAN PROCEDURAL LAW AND THE REVIEW WITHIN THE COMPETENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract

This paper focuses on a comparative analysis of the review within the Romanian procedural law and of the review within the competence of the European Court of Human Rights.

The review within the Romanian procedural law is an extraordinary legal remedy, a retraction, undevolutive, common and unsuspensive execution way.

These features of the review institution can also be found at the level of the same institution within the competence of the European Court of Human Rights.

The review within the Romanian procedural law is an extraordinary remedy, a retraction, undevolutive, common and unsuspensive execution way.

These features of the review institution can also be found at the level of the same institution within the competence of the European Court of Human Rights.

- it is an extraordinary remedy, which results from the fact that it is formulated against a definitive judgement and only in the cases and under the conditions provided by the law.
- it is an extraordinary way of retraction, as it falls within the competence of the jurisdiction which passed the judgement challenged by way of review.
- the review does not lead to a new judgement of the case.
- the remedy does not suspend the execution of the challenged judgement.
- it is a common remedy, because it can be exerted by the parties.

In the Romanian procedural law the review is governed by the provisions of articles 322 - 328.

The review is not governed by the Convention, but only by the Regulation of the European Court in articles 80 and 102.

The object of the review, in the Romanian procedural law, is governed by art. 322 paragraph 1 of the Code of Civil Procedure and is represented by the judgements which remain definitive at the appeal or by non recourse, as well as by the judgements passed by an appeal court when evoking the matter.

In the procedure before the European Court, the situation is simplified by the concrete and concise regulation concerning the object of review.

Concerning the intimation of the court, the provisions of the Code of Civil Procedure do not include special norms, which means that the provisions to be enforced are those of the common law related to the content of the summons (art. 82 and art. 112 of the Code of Civil Procedure).

Art. 80 of the Court Regulation includes similar rules with respect to the request for intimation of the European Court.

Both in the Romanian procedural law and in the procedure before the European Court of Human Rights, only one of the parties involved in the lawsuit whose judgement has been challenged can formulate a request for review.

As per art. 324 paragraph 1 of the Code of Civil Procedure, the period for review is of one month, elapsing differently from one case to another.

In the case of the review stipulated by art. 80 of the Court Regulation, there is only one case of review and one 6-month period starting from the acknowledgement of that fact.

The date from which the term to submit a request for review is deemed to start is set differently, according to each reason, both in the Romanian procedural law and before the European Court, as mentioned above in the description of the legal texts.

As per art. 323 paragraph 1 of the Code of Civil Procedure, the court competent to solve the request for review is the one which passed the definitive judgment, now asked to be reviewed.

The Court Regulation establishes in art. 80 paragraph 3 the competence to solve the request for review in favour of the initial Chamber, either one Chamber or the Great Chamber, as already mentioned.

In both of the analysed systems, the judgement of the request for review consists in two stages, namely the admissibility and the rationality of the request.

In the Romanian law, it has been emphasized in connection with the reasons for review that one must distinguish among them, some demanding the communication of two judgements.

As per article 328 paragraph 1 of the Code of Civil Procedure, the judgement on the review is subject to the remedies provided by the law for the reviewed judgement, either appeal and recourse or only recourse.

Article 80 of the Court Regulation does not provide a remedy against judgements passed on requests for revision.

In such circumstances the "common law" provisions concerning the judgements passed by the Court shall be applied.

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Oana GĂLĂȚEANU

REFLECTIONS ON THE REGIME S ANCTIONED MINORS IN CRIMINAL MATTERS

Abstract

"Exploration, education and progress in millennium III "... Starting from the title of this conference is an author reflection and express opinions on the regime applicable to minors punished in Romania. In presenting its views are as a starting point penal provisions in force concerning the criminal liability of minors and the legal consequences of this responsibility.

First a brief overview of the current criminal provisions and proposals amending the Criminal Code and Criminal Procedure, which included proposals for projects new codes to be submitted to the Romanian Parliament for debate and adoption.

Subsequently the author begins his presentation of their views on aspects of minimum age at which a minor can meet penal consequences of criminal liability of minor and prosecution of minors who commit criminal acts. It expressed the view that it would be desirable to treat with greater care interest and concern the re-education of minors who have committed crimes, and creating an appropriate system of drawing responsibility of parents and other individuals who have care and educate children and show indifference, indolence and immorality in the process of educating them.

Is presented in its final opinion on the prosecution of offenders minors, emphasis need to create a specialized research, trial and execution of criminal penalties - they set for juveniles who commit crimes, to receive system of organs of inquiry , public prosecutor, judges and staff to ensure enforcement of judgments given by courts of final competent.

Exploration, education and progress in millennium III ... Reading the title of conference who we are, I began to reflect: millennium III (already)..., progress ... ... society, education ... Yes, really, human society has evolved, there were remarkable progress in various spheres of social life. But everywhere there were registered - only treatment progress? Stage of the evolution of human society and become the default Romanian society brought with him only achievements, and the burden or lead to negative in some areas of social life and personality to the individual reached stage of human evolution?

We believe that the answer to these questions is that the Romanian society millennium III has reached the desired stage of development in certain aspects of social life.

One of these is the law as a whole, and in what us, as we have to study the criminal law as a distinct branch of law.

Investigating the criminal law, we focus on the sanctioned of minors:

1. As we all know, in terms of **criminal liability** under the provisions in criminal force, currently do not meet criminal juveniles who have not turned on committing the crime by age 14 years. Those aged 14 and 16 years only criminal charge if it is proved that they committed the crime with discernment, and minors who have reached age 16 years will be held criminally liable for their acts (as provided for dispute. art.99 paragraph 1, 2.3 Criminal Code).

2. Once established the criminal liability of minors, the Romanian legislature provided and which are consequences of criminal liability. Thus, at present, compared to minors responsible criminal court may order a measure of educational those expressly provided for in the Criminal Code (art.101 in: **a)** reprimand, **b)** supervised freedom; **c)** internment in a reeducation center, d) internment in a medical-educational) or may apply a penalty if it considers that an arrangement would have education action insufficient referral to juvenile (Code art.100al.2 pen.). In the latter case, Romanian law, given the minority status of the author of a criminal, a seen as the punishment to be applied to minors should be reduced by half (but minimum penalty not exceeding 5 years, cf.art.109 Code al.1 pen.).

3. Application from the accused child of one of the educational or a penalty will be ordered by the court as the result of judgments performed with the legal provisions.

Thus, the Criminal Procedure Code in force provides for those cases in which defendant it is minor, to be heard by the judges appointed under the law and according to ordinary rules of jurisdiction (art.483 al.1Cod proc. pen. as amended by Law nr.281/2003).

Currently there are two draft amendments to the penal provisions and process existing criminal, what is to come into the Romanian Parliament to debate and adoption. These projects aimed at bringing changes in the terms the child so that the vision of the new penal codes and penal procedural follow as:

1. Criminal liability of the minor have the following limits:

- 13 Years-old minimum required to meet criminal, so that the child has not reached that age at the time the crime is not criminal liability;
- Between 13 and 16 years of minor criminal liability will be involved only if the evidences enough to commit the deed with guilt;
- From 16-years old child will answer criminal law.

2. As the **consequences of criminal liability**, the new codes require from child who at the time the crime was committed was aged between 13 and 18 years to take a following measures of educational non-custodial (carried out by probation service):

a) civic training (that is required for the minor to participate in a program for a period not exceeding two months, to help them realize the consequences - the legal and social displays in which case the crime was committed and the responsibility on his future);

b) monitoring (consisting of controlling and guiding the child in the program its daily over a period of between two and four months to ensure participation seem to schools or courses of training and prevent the deployment of activities or entry in connection with certain people that could affect the referral thereof);

c) record at weekends (the obligation not to minor leave the house on Saturdays and Sundays, for a duration of between 4 and 12 weeks unless within that period is required to participate in certain up activities required by the court);

d) assisting daily (lies in order to meet the child a daily containing the schedule and conditions for everyday activities and interdictions imposed on the child for a period between 3 and 6 months).

In some instances expressly provided by law, from the minor will can take one of the following **educational deprivation of liberty**:

(1) internment in an educational (or internment in a juvenile institutions specializes in the recovery of children, which will follow a program of Education appropriate training and skills, and reintegration programs social)

(2) internment in a detention center (consisting of internment child for a period between 2 and 5 years in an institution specializing in the recovery of children with the security and surveillance, which will follow intensive programs for social reintegration and education and training consistent with his skills).

3. As regards the prosecution of cases with juvenile offenders, the project new Criminal Procedure Code does not make the procedural changes already existing.

Reflecting on minorities and the criminal liability of minors, we stopped on the minimum age at which a minor may be responsible criminal.

In criminal science has emphasized that the children are all possible vices: anger, revenge, jealousy, lying, selfishness, cruelty, idleness, theft, vanity, etc..

In the first phase of life, a result of its physiological need to increase human is prone to selfishness and to behave less morally.

Age is therefore one of the causes which influence the will. The children level is lower, the more instinctive and willing to commit antisocial acts.

Assuming that a minor has committed a crime, it raises the question : will must too punished he ? And that would be the most appropriate punishment for his referral?

Studying the history of criminal law are different concepts found throughout the whole evolution of human society on the criminal liability of the minor.

Of these give just a few examples such as:

● in Greek Antiquity, children were punished and even death from the age of 9ani (Athens);

● the old law in France, Italy and Germany, children under 7 years were exempt from punishment and considered incapable of malice, those under 14 years (boys) and under 12 years (girls), non puberty person were excusable, while those committing criminal acts were close to puberty punished, but with a lesser punishment;

● canon law considered it irresponsible to children aged 7 years and from 7 years to 14 years (boys) and 12 years (girls) recognizing responsibility questionable.

● XVII century in England there were even cases of conviction the gallows for children 8 years (example a child who has proven that a second fire barns of revenge).

● old in our written not just criminal responsibility to children 7 years and between 7 and 25 years receive a lighter penalty (see Pravila of Matei Basarab and Pravila of Vasile Lupu). Subsequently, in his Andronache Pravila Donici provide that case of murder or child does not have to escape the death penalty.

In 1924 the law of disrespectful stretched up to the age 8 years. From that age until 20 years, the penalty was lighter, and from 20 years answered fully. Currently romanian legislature set a minimum limit of criminal liability age of 14 years, as I said.

As is known, the rule addresses criminal individuals, showing them the which their actions are allowed and thus, indirectly, the canceled certain actions [1] (I. Tanoviceanu, treaty law and criminal procedure, Curierul Judicial, 1924, pag.14).

Criminal law today is based more on psychology and physiology, the study of scientific crime-viewed objectively as a deviation from normal social activities individual, and less on logic and metaphysics.

Crime is influenced by following causes:

- human nature
- the education received by individual
-living environment

Education will affect humans. The role of education is very important in the evolution any individual and that this concept and make it across behavior which should have within their social relationship, and from the laws which it is addressed.

But what is the role of education finished achieve it in time before the spirit would become restive under the domination of a body overwhelmed by hard imperfections of a deadly legacy.

Extremely important is the method, the way education should be undertaken, is necessary to take into account the differences existing from one child to another, from one disposition to another.

However, moral education must be accompanied by an appropriate healthcare and creating an environment for it.

Good organization of the moral education, physical, intellectual and professional in the reeducation centers is a problem to be solved by science pedagogical.

Particularly important is educating parents to such an extent that they to ensure their children a good climate and training to make them understand the necessary existence of an honest and an attitude of respect for the law. Any carelessness on the part of parents or those who have the education and growth assured children should be severely punished by the law.

Besides the family an important role in shaping attitudes towards child moral and social norms it has school, which should not be limited only to instructions you, but to put a big emphasis on education.

At present time seems compressed, children fall more rapidly in the social raising so quickly, and therefore communication is very important family and educational establishments.

Causes of crime are divided into infantile: causes biological and psychosocial causes social.

Among psycho-biological causes include heredity. Even children born hale due to the misery in which they are reared, the lack of care and education, the privations result of numerous and inadequate treatment of the parents become unfortunately, unsuitable for a honest life, being psycho-physically unable to earn the existing

To save these children and prevent crime, child-care generates field-recidivist adult must hold the fully activity protection of abandoned children and offenders. Society should not wait the minor to commit antisocial acts, but must intervene wherever a child is abandoned material or moral, whether it is found hobo, tramp, is mistreated or neglected by parents or on the contrary, with the family and what can would not admonish the crime regardless of the seriousness which it commits.

Whereas it is the human condition not only the present and last, but for the future, the ideal which he pursues the goal of realizare.2 (as said Professor Paul Negulescu course in constitutional law Romanian, Bucharest 1927, pag.6)

The fight against infant should be performed first through prevention, by protecting those children abandoned material and moral, and secondly part by completing a response against young offenders through the use of a series of coercive measures and education, but take out the idea of punishment.

We believe we should truly implemented the principle of humanism, fundamental in criminal law. To proof (and) if that child, really, criminal sanctions applicable to them which, in addition to the coercive and the reeducation. Would be necessary to find real relief for minors, to no interest and concern in this regard from the authorities.

Whereas it is the "jacket" that takes the needs of life. Life is in a continuous movement, the social changes from day to day and then intervenes legislature should "take" the social, economic, religious, political legal coat. So that the law will be consistent with real life. When the law was properly pound with reality, not the application is (Paul Negulescu, op. cit., pag.13).

The current security measures instituted by the legislature does not believe that successful to achieve the purpose of re-education of offenders against minors who have given the to the high number of crimes committed by minors, and that reality many of which are to provide the type of educational centers reeducation (for example) continue to commit criminal acts.

And should we believe, to take into account that once the child free or finally by providing a supervised provisional freedom, should be encouraged, assisted and guided the first steps to free up what life will be at all master it until you have ensured that. For this state should go a policy of supporting young liberal to find an occupation.

We believe also that the legislature should consider and punishment impairment of the parents or guardians who have neglected the children, leaving them to get in fact, when committed acts could have been prevented by them. Obviously we also drawing to a liability in addition to their liability to be trained for acts of minors.

Based on all these considerations exposed above, we appreciate that the
draft new Criminal Code on criminal liability of the minor may have greater efficacy in terms of education and referral for those minors who have committed criminal offenses.

We reserve but on the proposal to be removed application punishment for minors. In our opinion it may be that the punishment should not be removed from the total of sanctioned minors, meaning that compared to children aged 16-18 years can have a sentence where the court as it concludes that, clearly, an educational measure would be insufficient for their referral. But in these cases the punishment should be willing to reduced due to the minority status of the offender, as, otherwise, and shall be present (when applicable punishment of children is reduced by half according to Article 109 paragraph 1 of the current Criminal Code).

At the same time, we appreciate that it was necessary to change the minimum age at which minors can be held criminally liable from the age of 14 years at the age of 13 years.

Whereas this world evolves, go to progress and civilization and the natural and man, because heredity and social environment, becomes more precocious, raising of the for psycho-physical than earlier.

In literature there are opinions, what is the oldest (I. Tanoviceanu) under which it would be more appropriate for a system of non-minimum age criminal liability on the grounds that precocity , reaching them, varies from individual to individual, and that punishment could have the desired results especially on a child at a young age, proof being the reality that parents punish their children before the true even if only 8 years. According to this opinion, the age of 8 years would be desirable for Judge to confer the power to assess punishment when a child will thinks necessary.

Also, in our opinion should be as compared to juveniles who have committed antisocial acts, but who have not reached the minimum age required to respond criminal may still have some measures aimed at correcting a their behavior.

Once analyzed aspects of the criminal liability of minors and its consequences, the last point to which we refer in this study is the refer to juvenile offenders from prosecution.In the current legislation in court cases with children is according to the rules ordinary jurisdiction of the judges appointed.

The new draft law provides for amendments of the procedure for judge of juvenile offenders.

We believe however, that would be more appropriate to establish special courts for minors will be composed of judges that specialize.

Courts for children were proposed for the first time in United States of America where he founded and first such court (in 1878). Because the effectiveness this project such courts were subsequently established in

Norway (1896), Denmark (1905), England (1907-1908), Germany, Belgium, France (1912), Hungary (1913) Austria (1919), Italy (1921), etc.

In Romania the Law no. 304/2004 on the business process are provided specialized courts for minors and family in all the county seats and in Bucharest (according to art.35 of the Act). But so far not been established also special courts truly specialized personnel in the field, except constituting a special court for minors and family Brasov.

All the same law in Article 33 alin.3 that in the courts of appeal works department for cases with children and family. It is true that in some courts of appeal in the country there are such sections (an example is the Court of Appeal Galati) which dealt only with cases of crimes against minors or them. In others, however, these sections were removed, one of the reasons the number small causes court deducted (Court of Appeal Pitesti).

We believe that it would be desirable that nationally there are also instances
specialist with the magistrates who have special training to address these causes.

It required training and specialization of magistrates to hear whereas children believe that research in such cases is not easy, requiring some knowledge, interpretation and understanding of the complex personality of the author minor crime of criminal cases that led him to commit the deed and influences exterior which urged him to act the way he did it, taking into account that minors may exaggerate or be close to them may be faking, and understanding their take a certain preparation necessary.

Moreover, people believe that specialized in researching and resolving cases with minor offenders would be desirable to have not only at court but also the prosecutor (as in the Act and provides nr.304/2004) and bodies investigation (police) in criminal cases.

Basically, it would be necessary to create a specialized research, trial and enforcement of criminal penalties established for juvenile offenders who receive investigative bodies, prosecutors, judges and staff to ensure the implementation of final judgments handed down by competent courts.

We should not forget that, as Cesare Beccaria said (in his "On crime and punishment"), "the most difficult and most secure means of preventing crime is to improve education which, among other things, urge you in the young people to virtue by a slight sense of and depart from evil by the way (...) need a safe and not by way of uncertain order, not only obtain a submission of false and time "(Cesare Beccaria," On crime and punishment ", ed. Rosetti, Bucharest, 2001, pag.144).

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COMPETITION BETWEEN MODIFYING PUNISHMENT CAUSES

Abstract

Judicial individualization of punishment is performed by a complex operation in which there are used all those criteria of individualization provided by law(general and special criteria); within these criteria it is also situated the necessity of taking into consideration all causes of aggravation or attenuation of punishment because only by a general appreciation of all circumstances that influence the degree of social danger of the deed and of the dangerousness state of the perpetrator, it can be established the corresponding punishment and there can be reached the purposes of the repressive reaction. As, under the circumstances in which an offence can be committed, there can be both aggravated and attenuated circumstances, thus circumstances that produce opposite effects, it seemed necessary regulation by law of the effects of these coexistent circumstances to established the real punishment. But besides these circumstances, there can be some certain states of aggravation that can compete with the first, situation that should have found its regulation by law.

Determined by these necessities, the Criminal Code in force includes regulations regarding the way in which there must be applied the different modifying punishment causes, when they come into competition, regulations mentioned in dispositions of Art.80.

1.We can define the modifying punishment causes as being those states, situations or circumstances exterior to the offence content and which emphasize a degree of social danger of the deed or of dangerousness of the perpetrator, thus determining a modification of punishment, either quantitative (regarding period or quantum) or qualitative (exchange of main punishment with another).

In theory of the criminal law it is made a distinction, within these causes, between states of aggravation or attenuation, on one hand, and aggravating or attenuating circumstances, on the other hand. The states refer to the way how some entities institutions are presented with a distinct regulation in the general part of the Criminal Code, being significant for the degree of social danger of deed or dangerousness of the perpetrator, by their direct or indirect connection with committing an offence (for example the plurality of offences, the continuing form of offence, the attempt).In

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turn, circumstances are situations, happenings ,qualities, features and any other realities or information liable to individualize the deed or the perpetrator, always implying a relationship either from the deed to its ambiance or from the perpetrator to its biography.

In the doctrine it has been emphasize that special circumstances, even when they are provided in the norms of incrimination, keep their character of circumstances, the constitutive content of offence being established in the norm which incriminates the deed in its typical form. It is improper to talk about "aggravated" or "qualified" content of offence like something autonomous against the proper content of offence.

In another opinion it has been shown that the circumstances should not be confused with those states features, qualities etc. that the legislator included in the content of offence as elements of the aggravated and qualified content. These circumstantial elements of the offence, although they are originally circumstances, have been raised by the legislator to the stage of elements of the aggravated content of offence taking into consideration univocal character.

The circumstantial element having the role of special, legal aggravating or attenuated circumstance, in case it would come into competition with a general circumstance, shall have priority of application against the latter one couldn't be valued twice the same circumstance on the offender's charge.

Distinction between states and circumstances, within the modifying punishment causes, is important under the report of the effects that they produce on punishment. While the states of aggravation and attenuation produce the effects separately, influencing successively the punishment and producing two or more aggravations or attenuations, the circumstances do not produce a plurality of aggravations or attenuations, but a single aggravation or attenuation; to the individualization of the punishment it will be taken into consideration the plurality of circumstances.

2. Causes of modifying the punishment are, as it is well known, either general or special.

General causes exercise their influence regarding all offences and are provided in the general part of the Criminal Code.

Unlikely, special causes have influence only to a certain offence and are provided in the special part of the Criminal Code or in special laws.

In the doctrine, it has been shown that among general causes of punishment aggravation, our criminal law provides some states of aggravation (competition of offences, state of repetition of an offence, continued offence) as well as many aggravating circumstances, and among

general causes of attenuation, it provides some causes of differentiation (keeping the offence at the stage of attempt), as well as some attenuating circumstances.

Among special causes of aggravation, the Criminal Code provides in special part many special aggravating circumstances [for example, number of victims-Art.176 letter b), condition or quality of the victim-Art.175-letter c) and d), quality of the offender – Art.242 paragraph 3, place of committing the offence-Art.175 letter i) etc] and attenuating [enabling the imprisonment of the participants in case of the offences against states security –Art.172 paragraph 2, identification of the false character of the declaration, complained or proves by the slanderous denouncer- Art.259 last paragraph, withdrawal of the false evidence under certain condition Art.269 paragraph 3 etc.]

3.Our majority doctrine considers the competition of offences, the state of repetition of an offence and continued offence as states of punishment aggravation, sustaining that the one who commits more offences is in more severe situation than if he had committed only one offence.

Other authors include among the states of aggravation only the post-executor state of repetition of an offence and the committing of the offence in a continuous way, and the other plurality forms of offences (competition of offences, post-convicted repetition and intermediary plurality) consider than causes of modifying punishment and not of aggravation, because in this case it occurs a modification of the criminal treatment and not its aggravation, as in no situation the convicted shall not execute a punishment that exceeds the total of the punishments established for the offences that constitute the terms of plurality.

In another view, it has been stated that in case of offence plurality our criminal law, accepting as a general rule absorption or juridical concurrence instead of concurrence of penalties (exceptionally admitted), provides implicitly a criminal treatment easier than totalization of the established penalties for each committed offence. Only if the law would have provided the possibility of exceeding the total of established penalties, it would be sustained that the plurality of offences is indeed a state of penalty aggravation. But as long as the criminal law permits, for example, in case of competition of offences post-imprisonment repetition and intermediary plurality [Art.34, Art.39 paragraph 1, Art.40 Criminal Code] to be applied the most sever punishment, to which it can be added a plus, seems closer to the truth that we are in front of the attenuation of punishment.

But we cannot either talk about modifying punishment causes because such a neutral expression is equivoque letting to be believed that the modification could be either *in bonam partem*, or *in malam partem,* namely in an attenuated or aggravating way, thing that does not correspond to reality which emphasizes clearly that such a criminal treatment (if does not exceed the arithmetic plurality)is always easier.

Only in case of post-executor repetition, it could be said that this constitutes a cause only of punishment modification (neither aggravation nor attenuation), because the convict shall execute both punishments mandatory. Regarding the applied sanction to the second term of repetition, this is not a resultant, but a single punishment that is executed for the offence that constitute the second term of repetition. Only if this term is formed of more competitive offences, it would be raised the problem of the resultant, but not in respect of the first term but in respect of the other punishments applied for the competitive offenses.

Regarding the continuing offence, it is being noticed that as long as the law permits restraint of single offence with application of an addition that shall never exceed the total of the punishments to be applied to the component acts of the continuing offence, this being considered a state of punishment attenuation.

4.In the criminal doctrine it has been also stated the opinion that the attempt and the minority are states of punishment attenuation, sustaining that in these cases the legislator provided reduced limits of punishment.

As it is well known, starting from some certain particularities that characterized the minor offender, the Romanian legislator provided for the criminal deeds committed by himself a special and mixed sanctioning system made of educative measures and punishments.

According to dispositions from Art.109 paragraph 1 Criminal Code, the punishments that can be applied to the minor are imprisonment or fine provided by law for the committed offence, and the limits of these punishments are reduced to a half.

This frame of punishments provided by law special for delinquent minors does not constitute sanctioning attenuated treatment in comparison with the criminal treatment provided for the adult offenders, because in the concept of the Romanian criminal law the minority of the offender does not constitute, as it might seem at the first sight, a cause of punishment attenuation, namely a circumstance that diminishes in reality the degree of social danger of the deeds committed by minors but a special cause of differentiation of the criminal sanctioning regime applicable to this category of offenders. Consequently, attenuation is not the purpose of the

sanctioning system for minors but the differentiation; if from this results an attenuation, this is a normal result of regulation.

Causes of attenuation assume that the ordinary criminal sanctions are, mainly, applicable to the offender, but due to the presence of any of these causes, the ordinary sanction is attenuated; or, in case of the minor offenders, sanctions from the ordinary system are not applicable, the law providing for them a special system of sanction.

Thus, we can consider that the minority represents a special cause of differentiation of the criminal treatment applicable to the minors and not a state of punishment attenuation, as it might seem at the first sight. Obviously, regarding the minor offenders, the legislator provided milder treatment having an attenuating character, but it can't be drawn the conclusion that it constitutes a state of punishment attenuation, minority being, in fact, a differentiation in the concept of our legislator.

Regarding the juridical aspect of the attempt we mention that the Romanian criminal law has adopted the system of diversification, sanctioning the attempt in more reduced limits than the consumed offence (between the half of the minimum and maximum).

Diversification of the punishment attempt in comparison with the consumed form of the offence is based on the concept that the degree of generic social danger which the attempt presents, being determined by the place it holds during the development of the offence activity, is smaller than the one of the committed deed. Thus, for establishing the sanctioning treatment of the attempt, it has been taken into consideration the reduced seriousness of the attempted deed in comparison with the committed deed.

5.As shown before, within the causes of modifying punishments, there are both attenuating or aggravating circumstances and states of aggravation and attenuation (or better said causes of differentiation) of the punishment. Referring to the causes of punishment differentiation, namely to the attempt and minority, we notice that it wasn't necessary a regulation of their competition with the other causes of modification (states of aggravation, attenuating or aggravating circumstances), because they have a special system of sanction established by the legislator and it has priority in application.

6. In disposition from the first paragraph of Art.80 Criminal Code, it is provided that in case of competition between causes of aggravation and causes of attenuation of punishment, to the establishment of the real punishment, it will be first taken into consideration the aggravating circumstances, than the attenuating circumstances, and only after this, it will be taken into consideration, if it is the case the state of repetition.

Referring to aggravating and attenuating circumstances, the law takes into consideration the general circumstances and not the special circumstances, because the special legal circumstances have the character of circumstantial elements in the aggravated or qualified content of offence and thus it determines the qualification of the deed according to a certain law text; these circumstances shall be applied prior to the general circumstances.

Establishing priority for the first, the law took into consideration the necessity of emphasizing the degree of social danger of the deed and of the offender, according to all circumstances of the cause to realize its repressive function, it is necessary to be established the way in which the committed deed threatens the society. Or, only taking into consideration the aggravating circumstances, it can be obtained a clear view on the maximum real seriousness of the deed, to which it is reported the attenuating circumstances. Examining, first, the way in which the aggravating circumstances influence the degree of social danger of the deed and the offender, the instance is in the position to evaluate more exactly the attenuating circumstances and thus to determine more precisely the real social danger and its proper punishment.

7. In disposition from paragraph 2 of Art.80 Criminal Code, it is provided that in case of competition between aggravating and attenuating circumstances diminishing of the punishment under the special minimum is no more mandatory. Thus, the law gives full freedom of appreciation to the instance of judgment, eliminating obligation of diminishing the punishment under the special minimum, because such a diminish would become irrational, leading practically to the annihilation of the effect of aggravating circumstances.

8. By disposition from the paragraph 3 of Art.80 Criminal Code, it is established the maximum limits of punishment aggravation in case of competition between more causes of aggravation (states or circumstances).Thus, in case of simultaneous application of dispositions regarding the aggravating circumstances, repetition and competition of offences, the punishment of imprisonment can not exceed 25 years, if the special maximum for each offence is of 10 years or less and of 30 years if the special maximum for at least one of the offences is more than 10 years.

9. In disposition from paragraph 4 of Art.80 Criminal Code, it is provided that in case of simultaneous application of the dispositions regarding the aggravating circumstances, repetition and competition of offences, the punishment of the fine for a legal person can be increased to the general maximum.

10. Taking into consideration that the way of regulation of the competition between causes of aggravation and attenuation adopted by the Criminal Code in force is liable to multiple interpretation and contradictory solutions, the new Criminal Code (adopted in 2004 and postponed its entry in force on 1st September 2009) has found another solution, considered superior and which is inspired from the Italian Criminal Code (Art. 69). Unlikely the Criminal Code in force which adopted an objective criterion regarding the way in which must be applied the different modifying punishment causes, the new Criminal Code takes into consideration subjective criterion, giving to the judge the freedom of appreciating the preponderance of the modifying punishment causes.

11. In disposition the first paragraph of Art. The new Criminal Code, it is provided that in case of competition between causes of aggravation and attenuation the instance applies the provisions of Art. 92 (referring to the effects of the attenuating circumstances) or of Art.93 (referring to the effects of the aggravating circumstances) as the causes of aggravation and attenuation have a preponderant character. In case some causes of attenuation have a preponderant character, the causes of aggravation can be left aside, and if the causes of aggravation have a preponderant character, the causes of attenuation can be left aside.

In paragraph 2 of Art.94 it is provided that in case of equivalence of these causes, it is applied a punishment excluding the causes of attenuation or aggravation.

So, each time the causes of attenuation or aggravation would compete simultaneously, it is appealed to a judgment of preponderance or equivalence. Thus, if the causes of aggravation are kept preponderant than it is not taken into consideration the diminishing of punishment provided for the causes of attenuation and it is applied only the rise of punishment proper to the causes of aggravation. If, on the contrary, the causes of attenuation are kept preponderant, then it is applied only the diminishing of punishment and it is not taken into consideration the rises of punishment proper to the causes of aggravation. In case that between the causes of aggravation and the causes of attenuation would be equivalence, then it is applied the punishment between its special limits provided by law, leaving aside the eventual incident causes; in other words, it shall be applied the punishment that would have been incident if any cause of punishment modification wouldn't compete.

12. In the Italian doctrine there have been formulated critiques regarding this judgment of preponderance (prevalence) and of equivalence emphasizing that it is increased the discretionary power of judge in the hypothesis of competition of heterogeneous circumstances (namely both

attenuating and aggravating circumstances): he can take into consideration only the attenuating circumstances or the aggravating circumstances; he can even not take into consideration any of them or others. In this situation, it is possible that in the case of the "offence aggravated by the result" (for example, the fight followed by the death of one of the enemies –Art. 588 Criminal Code), if it is admitted the circumstantial nature of the produced result (death of the victim) and the judge would consider an attenuating circumstance to be preponderant in respect of this aggravating circumstance (of the produced result), it is to be applied to the accused even the punishment of fine ("*multa*") despite of the seriousness of the deed. On the other hand, the legislator omitted to indicate the parameters of the balancing judgment (preponderance or equivalence), having as consequence delicate problem of choosing the criteria after which the judge must guide. The dominant doctrine and the jurisprudence consider that these criteria of orientation would be those provided in Art.133 Criminal Code, which regulate the discretionary power of the judge for individualization of the punishment. It has been replied to this thesis that Art.133 is limited to indicate only the criteria that must be obeyed at the stage of punishment individualization, without establishing an eventual hierarchy in case of competition between them. According to some Italian authors the actual system provided in Art.69 Criminal Code opens the way of subjectivism of the judges with important consequences for the real punishment that is to be applied.

13. In spite of all the critiques brought to the Italian system, we consider it to be more flexible than the system consecrated by the Criminal Code in force (Art.80), which led to many controversies and practical difficulties; the new system which gives to the judge the freedom of appreciating the preponderance (prevalence) of the modifying punishment causes and of giving them the proper legal effect seems to us more adequate.

14. In the project of the Criminal Code of the Minister of Justice (published on 24th January 2008 on the site of Minister of Justice-www.just.ro), it has been proposed another way of approaching the problem. Thus, in Art.80 under the marginal name "Competition between causes of attenuation or aggravation" it is provided:

"(1) When in case of the same offence are incident two or more dispositions that have as effect the diminishing of punishment, the special limits of the punishment provided by law for the committed offence are reduced by the successive application of the fractions regarding the attempted, attenuating circumstances and special cases of diminishing the punishment, in this order.

(2) If in case of the same offence are incident two or more dispositions that have as effect the rising of punishment, the special limits of the punishment provided by law for the committed offence are raised only once by the application of the biggest fraction between those regarding the aggravating circumstances, continuing offence or repetition.

(3) When in case of the same offence are incident one or more causes of diminishing the punishment and one or more causes of raising the punishment, special limits of the punishment provided by law for the committed offence are reduced according to paragraph 1, after that the resulted limits of punishment are raised according to paragraph 2.

(4) No punishment can be applied and executed outside its general limits".

It is being noticed that in case that there are incident only causes of punishment attenuation there are produced as many attenuations of the punishment as many causes exist. The Project of Criminal Code takes into consideration only the attempt, the attenuating circumstances and the special causes of punishment attenuation. It is excluded the minority which represent a special cause of differentiation of the criminal treatment applicable to the minors. For the above mentioned, it should have been excluded the attempt, being also a cause of differentiation of the punishment.

In the second paragraph of Art.80, it is provided that in case of incidence of more causes of aggravation (aggravating circumstances, continuing offence or repetition) it is produced a single aggravation by application of the biggest fraction (one third, a half etc.). Nobody knows why it has been excluded the competition of offences if it was intended a definite solution of the problem. It has been consecrated an exception from the rule, so far consecrated by all legislations, according to which the states of aggravation or attenuation produce separately their effects, influencing successively the punishment and producing two or more aggravations or attenuations. For example, in the Italian criminal law, when more homogenous circumstances compete, being all aggravating or all attenuating, there are produced as many raises or diminishing of punishment as how many competing circumstances exist, according to Art.63 paragraph 2 Criminal Code.

In the third paragraph of Art.80, it is provided that in case of competition between causes of aggravation and causes of attenuation, it is necessary to be established a punishment corresponding to the causes of attenuation and after that to raise the punishment in respect of the causes of aggravation.

In practice of our instances of judgment, it has been consecrated the following rule: if there are both causes of attenuation and causes of aggravation the punishment is established between the minimum limit that can be reached according to the legal dispositions regarding the diminishing of punishment and the special maximum provided by law for the respective offence, and if the special maximum is not enough, it can be added an addition, in the limits provided for the causes of aggravation; in this case it is not necessary to be established first a punishment corresponding to the existence of attenuation causes and after that to be raised the punishment in respect of the existence of aggravation causes.

In the last paragraph it is provided that in no situation, the punishments can not exceed the limits established in the general frame of the punishments.

In the project of Criminal Code of the Minister of Justice (published at the beginning of 2009 on the site of Minister of Justice-www.just.ro), in the form submitted to the Parliament, it has been kept the same way of approaching the problem, but with some amendments. Thus, in Art.79 under the marginal name "Competition between causes of attenuation or aggravation" it is provided:

"(1) When in case of the same offence are incident two or more dispositions that have as effect the diminishing of punishment, the special limits of the punishment provided by law for the committed offence are reduced by the successive application of the dispositions regarding the attempt, attenuating circumstances and special causes of diminishing the punishment, in this order.

(2) If there are incident two or more dispositions that have as effect the aggravation of criminal responsibility, the punishment is established by the successive application of the dispositions regarding the aggravating circumstances, continuing offence, competition or repetition,

(3) When in case of the same offence are incident one or more causes of diminishing the punishment and one or more causes of raising the punishment, special limits of the punishment provided by law for the committed offence are reduced according to paragraph 1, after that the resulted limits of punishment are raised according to paragraph 2".

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Dragu CREȚU

THE JURISDICTIONAL COMPETENCE OF THE ROMANIAN COURTS UNDER THE GENERAL PRINCIPLES OF LAW NO. 105/1992

Abstract

This paper analyses the norms governing the jurisdictional competence of the Romanian courts, under the general principles of Law no. 105/1992.

The laws of each country set norms which determine, for the courts of that country, the competence in private international law.

Such norms reveal whether the courts of that country are competent or not to settle a conflict with an element of extraneity.

These norms, applied directly to the legal report submitted to judgement, differ from the conflictual norms, which are reference norms and which solve the conflict of laws.

The jurisdictional competence can be in private international law and in internal law.

Competence in private international law represents the jurisdictional ability of a certain country to settle a conflict with an element of extraneity, that competence which refers to determining a country's jurisdictions by relating them to other countries' jurisdictions, called upon to settle the conflict.

The jurisdictional competence in internal law refers to determining one of the law courts of the country for which there has been previously determined the competence to settle that conflict.

One notices that in the case of occurrence of a conflict concerning private international law reports, the conflicts are solved in the following order:

a. determining the jurisdiction competent to settle the conflict – competence in private international law

b. determining the applicable procedural law

c. determining the law applicable to the legal report under discussion – settling the conflict of laws

If the conflictual norms are not compulsory, the parties can give up the enforcement of the competent foreign law and to apply the law of the forum.

In Romania, the private international law reports are governed by Law no. 105/1992.

Consequently, this rule represents the common law regarding the regulation of the Romanian private international law reports; the special regulations provided by the international conventions attended by Romania as well are to be enforced forthwith.

Given this context, one must mention the Council Regulation no. 44/EC/2001 concerning legal competence, the recognition and the execution of judgements at civil and commercial levels.

Article 157 of Law no. 105/1992 stipulates that the intimated Romanian court checks its competence to judge the lawsuit with an element of extraneity and, if it finds that neither it nor other Romanian court is competent, it dismisses the request as exceeding the scope of the Romanian courts' competence.

It means that, taking into consideration these legal provisions and the absolute lack of competence of the Romanian courts, the same solution is not automatically imposed in the case of relative competence.

In the case of relative competence, governed by dispositions, the parties can enter an agreement and establish through their agreement the competence of the Romanian or foreign jurisdiction. The aspects regarding this possibility, governed by art. 154 of Law no. 105/1992, are to be detailed in the section related to the competence conventional prorogation as set by Law no. 105/1992.

On the contrary, in the case of absolute competence, the competence norms are mandatory both for the parties and for the court, the parties being unable to derogate from them by entering an agreement which sets the competence for settlement in favour of a foreign jurisdiction.

The importance of determining the exclusive competence is also motivated by the fact that foreign judgments which ignore the exclusive competence of the Romanian jurisdiction cannot be recognised in Romania.

The relative competence is governed by dispositions included in art. 149 and art. 150 of Law no. 105/1992.

Art. 149 of Law no. 105/1992 governs alternative or facultative competence and stipulates that Romanian courts are competent if:

1. The defender or one of the parties has the domicile, residence or stock-in-trade in Romania; if the residence of the defender from abroad is not known, the request is submitted to the jurisdiction of the domicile or residence of the plaintiff from the country.

2. The legal office of the defendant, legal person, is in Romania; for the purposes of the article hereto, the foreign legal person is deemed to have the legal office in Romania if it has a branch, subsidiary, agency or office in the country.

3. The plaintiff in the support pension resides in Romania.

Consequently, the requests deemed to be of the competence of Romanian courts are those for support pensions formulated by the creditor of the support obligation residing in Romania.

Under these circumstances, given the express regulation of the procedural norm, the requests formulated by the plaintiff-debtor of the support pension and which would concern either the reduction or the cessation of the support pension are not subject to the same regulations.

4. The place where an obligation arising from a contract started or where it must be fulfilled, even partially, is in Romania.

5. The place where a legal act giving rise to extra-contractual obligations occurred or its consequences are in Romania.

6. The railway or road station, as well as the harbour or airport for loading and unloading the shipped goods or for transporting passengers is in Romania.

7. The insured commodity or the place where the risk occurred is in Romania.

8. The last domicile of the deceased or goods left from him/her are in Romania.

9. The building the request refers to is in Romania.

The same relative competence for the Romanian courts is also governed by the provisions of art. 150 of Law no. 105/1992, as follows:

1. Lawsuits between people residing abroad, concerning documents or civil documents registered in Romania, if at least one of the parties is a Romanian citizen.

2. Lawsuits concerning the protection of the minor or the ban, Romanian citizen residing abroad.

3. Declaring the presumed decease of a Romanian citizen, even if he/she is abroad when the disappearance occurs. The provisory measures taken by the foreign court shall be in force until the Romanian court takes several provisory measures.

4. Lawsuits concerning the protection abroad of the intellectual property of a person residing in Romania, Romanian citizen or foreigner without citizenships, if the parties' agreement did not choose another jurisdiction.

5. Lawsuits between foreigners, if they have expressly agreed so, and if the legal reports concern rights they can dispose of in connection with goods or interests of the people in Romania.

6. Lawsuits concerning the collision of certain ships or aircrafts, as well as those concerning the assistance or rescue of certain people or goods in the free sea or in a place or area free from the sovereignty of any state, if:

a) the ship or the aircraft has Romanian nationality;

b) the destination place or the first harbour or airport where the ship or the aircraft arrives is on the Romanian territory;

c) the ship or the aircraft has been seized in Romania;

d) the defendant has the domicile or the residence in Romania.

7. Bankruptcy or any other legal procedure concerning the cessation of payments in the case of a foreign commercial company which has the legal office in Romania.

8. Any other lawsuits provided by the law.

Law no. 105/1992 stipulates in art. 151 the cases which determine the exclusive, absolute competence of the Romanian jurisdiction in lawsuits concerning the international private law reports, cases referring to:

1. Civil status documents made in Romania and referring to people residing in Romania, Romanian citizens or foreigners without citizenship.

2. Approval of adoption if the person to be adopted resides in Romania or if he/she is a Romanian citizen or a foreigner without citizenship.

3. Guardianship or trusteeship concerning the protection of a person residing in Romania, Romanian citizen or foreigner without citizenship.

4. The ban of a person residing in Romania.

5. The dissolution, cancellation or invalidity of marriage, as well as other disputes between the parties, with the exception of those concerning buildings from abroad, if at the time of the request both spouses reside in Romania and one of them is a Romanian citizen or a foreigner without citizenship.

6. The heritage left by a person whose last place of domicile was in Romania.

7. Buildings situated on the Romanian territory.

8. The forced execution of an executorial title on the Romanian territory.

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Onorina GRECU[1]

LEGAL EDUCATION VOCABULARY

Abstract

Legal education is the education of individuals who intend to become legal professionals or those who simply intend to use their law degree to some end, either related to law (such as politics or academic) or business. It includes: first degrees in law, which may be studied at either undergraduate or graduate level depending on the country, vocational courses which prospective lawyers are required to pass in some countries before they may enter practice, and higher academic degrees. This paper aims to highlight the legal educational vocabulary, as the cultural background is different from state to state.

The law school program is divided following the European standards for university studies (Bologna process): first a license program - three-year period, then a Master of law program - two-year period, and eventually, for those who are interested in academic careers, there is the third program of doctorate studies - three-year period.

Legal English is now a distinctive field of language instruction within the overall ESP disciplines and assuming an increasingly high profile in Law degree programmes across European universities, particularly among those of EU member states.

While intercultural differences may pose little number of issues in Business English or be even unimportant in Technical English instruction, they are of major importance to Legal English. The teacher must raise the students' awareness of intercultural aspects, such as different sources of law when two legal systems are involved, different juridical culture, different legal institutions.

Nouns "lawyer", "attorney", "barrister" and "solicitor" are legal culture-bound terms. The common sense of the term "attorney" – "avocat" is very well known, as in "attorney-at-law", the original meaning is that of a person who acts in name and on behalf of someone on its request is somehow forgot. Thus, when one acts in his/her own behalf, we can say that he or she is "his own attorney". In this very situation, "attorney" must be translated by "mandatar", "reprezentant" or "împuternicit". The connotations of "attorney" and its near synonyms have historically been quite different in British English and American English. Originally, "attorney" denoted a practitioner in common-law courts, "solicitor" one in

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equity courts, and "proctor" one in ecclesiastical courts. During centuries, the word "attorney" was replaced by "solicitor". Thus in England, "attorney", for a lawyer, survives only as "the attorney" (the attorney general), while in America the chief respectable lawyer-solicitor is the "solicitor-general". [Melinkoff, *The language of the Law*, p. 198].

The two most common terms in American English, "lawyer" and "attorney", are not generally distinguished even by members of the profession. In the U.S., "attorney", "attorney-at-law", and "lawyer" are generally viewed as synonyms. Today there seems to be a notion afoot, that "attorney" is more formal term than lawyer.

Technically, "lawyer" is the more general term, referring to one who practices law. "Attorney" literally means "one who is designed to transact business for another." An "attorney", technically and archaically may or may not be a lawyer.

In the U.S., those licensed to practice law are admitted to practice as "attorneys and counselors". This combination of names is known in English law, in which "attorney" means solicitor, and "counsellor" means barrister. But, the term "attorney" has come to have a generic understanding of all the branches of the legal profession.

In Great Britain, a "solicitor" or "attorney" does all sorts of legal work for clients, but generally represents them only in inferior courts, while a "barrister" is a trial lawyer, who has the right to plead in any jurisdiction.

In American English, one refers to a "counsel" or "counselor" as to a person who gives legal advice, which is translated in Legal Romanian, as a juridical reality, "consilier juridic". In expression like "attorney at law" and "attorney in fact", it represents the legal profession as well, the former as a "licensed lawyer" and the latter the one having the powers to act for another. Like, lawyer, attorney has come to be used as a verb in Legal English, e.g. "He attorneys his own case"/ "Îsi este propiul avocat". In this case, the translation changes the categories (verb – substantive), as, there is no language proof of such use in Romanian.

For "onorariul avocatului", there are several expressions used: "attorney's fees", "attorneys' fees", "attorney fees" and "counsel fees". The first one is more often used; the plural possessive "attorneys' fees" is just as good; "attorney fees" is clearly common, but should be avoided in use, because the first word is a genitive adjective with the apostrophe wrongly omitted.

The term "lawyer" represents, at origin, any person who owns a law school diploma; it should be translated, in this larger sense, as "jurist". We could, as well, for this very term to use the expression "om de drept". If

both "lawyer" and "attorney" may be translated as "avocat", one must remember that "lawyer" does not intrinsically mean "attorney", after all one is a lawyer before being an attorney, representing or counseling clients.

As we referred above to "attorney" as a verb, "lawyering" is, in colloquial speech, the action of conducting a lawsuit against someone or the action of practicing as a lawyer. Even though it was considered an Americanism, at first, the word "lawyering" has gained another meaning, that of giving to/ supply with lawyers. Although "lawyering" is still used disparagingly in some areas, many lawyers describe what they do through the means of this verb and the Romanian translation for it is a typical analytical construction vb + subst (do smth) – "a face avocatură". Other derivates from the *lawyer* radical, as "lawyerdom", "lawyeress", "lawyerish", "lawyerism", "lawyerize/ lawyerization", and "lawyerly/ lawyerlike" are the irrefutable proof of the dynamic character and social-reality translation of legal activities. The world of lawyers, "lawyerdom" in contexts like "to join lawyerdom/ to be part of lawyerdom" may be translated as "breaslă" in Romanian. The wife of a lawyer, or, in some cases, the female lawyer, "lawyeress" is reffered to in Romanian as "doamna avocat" which comprises both senses. "Lawyerish" is a disparaging use of "lawyerlike". There are two paths of analogy that might be taken in translating these derivates in Romanian: "în stil avocățesc" as analogy for „în stil polițienesc" and "conform deontologiei profesiei de avocat" as following the styling analogy „în litera legii". "Lawyerism" refers to a mannerism of speech or writing, though it might be translated "în stil avocățesc", it clearly highlights the "retorica, discursul avocatului". As it comes to the term "lawyerize/ lawyerization", the question points out the need of neologisms formed with the suffix –*ize*, which are sometimes useless. This term is tightened directly to the American culture of "Sue me!" Applying the proper suffix in Romanian, it may become "avocatiza/ avocatizarea". Most American and English dictionaries record "lawyerlike" but not "lawerly" despite the fact the term is largely used in legal text and court discourse.

A special case that poses various and difficult problems of translation are names actually given to lawyers. Difficulties arise from social and juridical realities that vary from country to country. Here may be found two categories of expressions, ones that carry negative connotations and others that describe the general image of legal practitioners, in pejoratives terms. "Court street lawyer" is the one opposed to "white-shoe lawyer", expression that points out the level or quality of legal services offered. A "dump truck" is a public defender, "avocat din oficiu"; curiously, the expression reflects a reality that is commonly understood in

any country. Example of expression that highlights the competences of lawyers is "Philadelphia lawyer", an ultracompetent lawyer who knows the ins and outs of legal profession; it is worth to be mentioned that the expression is a pattern, which is most commonly used accordingly to the geographical areas.

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THE NOTICE OF CLAIM FOR AN IMMOVABLE ASSET, A COMMON SHARES PROPERTY, INITIATED BY ONE OF THE JOINT OWNERS

Abstract

As a rule, the notice of claim in real estate can be initiated only by the holder of the right to property. The acknowledged doctrinal view is that, in order for this kind of notice to be admissible, the holder must be the exclusive owner of the property. Consequently, in the situation of an asset that is under common share ownership, the notice of claim is admissible only if it is initiated by all the joint owners and one owner has no such means of defense of the right to property. Especially in the last decade, the doctrine has registered another opinion according to which the notice of claim carried out by a single owner is admissible.

The common property is an aspect of the property right, which is characterized in that the powers of ownership belong together and simultaneously to few persons; the common property can have the following forms: common shares, joint or periodic property.

The object of the right to common shares property is materially undivided, but divided from an ideal point of view; none of the holders has an exclusive right to a material fraction of the respective asset, but it possesses an ideal share of the right to property.

With regard to the acts that are exercised over the property, they may be material acts consisting in acts of use and acts of material provision and respectively, juridical acts which have the forms of acts of conservation, management and provision.

The attribute of use is the joint owners' right to use the common property in their own interest, acquiring in property the fruits and incomes which they can obtain from the respective asset or assets. Although the Civil Code does not regulate the right to use of the common property, the judicial doctrine and practice have outlined a general principle, namely that each joint owner can use the good, only by respecting two conditions: not to change the destination of the property and not to hinder the participative and simultaneous exercise of use of other joint owners. A change or a transformation of property can take place, but only with the consent of all joint owners.

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Concerning the material acts of use, the sharers' unanimity rule applies. The jurisprudence has intervened in this rule, admitting that each sharer can exercise this right, but only by respecting the rights of others sharers (1).

If the joint owners do not agree upon the exercising of the material acts to use, it can resort to the judicial share of use, meaning by that the act by which one of the joint owners requires, in contradiction with the other joint owners, the setting up of some lots which have to be given for an exclusive use but not in ownership. If this is not possible the sharers have no other solution than to put an end to the common shares property by actually sharing it.

A long time, the share of use has not been judicially possible. Currently, in practice there is a growing trend of increased acceptance of share of use, even without the agreement of all joint owners. (2)

The unanimity rule of the legal acts which have as their object the common asset has been attenuated by the judicial practice concerning the acts of conservation and management, the latter being completed by a single owner without the express consent of the others. (3)

The conservation measures are those which seek to maintain the property in its current state, the maintenance, the preservation of an asset in the holder's patrimony, such as the discontinuation of the prescription process, the transcription of a property sale contract, the request for an inventory, the transcription of the mortgage, etc.

The acts of administration are those acts which are closed to put value on the asset through renting it, collecting the revenues or maintaining it in order to be exploited, such as a contract which has as object the repairing of the asset. (4)

Such acts are profitable and indispensable to all joint owners, having the possibility of closure by a single joint owner without the express consent of others. The judiciary practice validates them often on grounds of the business management or of the tacit mandate, provided that the conservation or administration act had been useful, and none of the joint owners had opposed to closing it. (5)

In respect of the documents of provision, the unanimity rule applies in its completeness. One joint owner can not conclude acts of provision without the unanimous consent of other sharers and consequently can estrange or mortgage the entire asset only with the risk of exposing such acts to civil penalties.

The notice of claim, one of the ancient institutions of our civil law with origins in the old Roman private law - *rei vindicatio* (6) - is the real action through which the owner who lost the possession of his property

requires to the court to recognize him the right to property on the asset and its restitution from the owner which is not proprietary.

An issue, that has created in the last decades heated debates in theory, is the admissibility of the notice of claim initiated by one or some of the joint owners, in other words, the issue is if the unanimity rule operates or not in this matter.

The solution to this problem is given depending on how is qualified to notice of claim: act of conservation or act of provision.

The traditional view and still most predominant is that, if the claimed property belong in severalty to more specific joint owners, the participation of all joint owners is mandatory, as co-claimers, and in other cases so is the approval to exercise their action. In this view, the notice of claim is seen as an act of provision.

In applying this reasoning, a single joint owner can not claim an undivided asset before the administration of share, because the notice of claim involves an exclusive right on a determined asset. (7) A sharer may claim the property only if it has been assigned to him by lot partition; since none of the joint owners is the exclusive owner of the property, he will not be able to reclaim the property by himself; the solution in such a situation is rejecting the action as inadmissible. In this regard, the Supreme Court ruled in the older law (The Supreme Court, civil department., Dec. No. 2241/1972, published in the Reports of decisions of the Supreme Court of 1972, p. 85, SC, civil department., Dec. no. 1030/1975, published in the Report of decisions of the Supreme Court of 1975, p. 222) and in the most recent: (...) it has no legal support and the solution for rejecting the action is unfounded provided that the unanimity rule was violated, the action would have been inadmissible or filed by persons with no active procedural quality". (The High Court of Cassation and Justice, the Civil and of Intellectual Property Department, Decision No. 43/15 January 2003). (8)

In the event of an asset claim, common property in severalty, it must be distinguished whether the claimed asset is mobile or immobile. The notice of claim of a movable property in severalty may be initiated only by one of the spouses, without the express consent of the other, whereas the presumption of tacit mutual mandate established by art. 35, paragraph 2 of the Family Code is applied; however, this presumption no longer applies to the same text under the law, in the case of the notice of claim of an immovable property of the spouses, such action requiring to be filed by both spouses. (9)

The doctrine and the jurisprudence have motivated this traditional solution in our law because the notice of claim is an act of ruling, and such acts can be concluded only by respecting the principle of unanimity.

Under the influence of the French doctrine, some Romanian authors have invoked an opinion arguing that the notice of claim is an act of conservation and not one of provision. (10) The acts of conservation have as purpose to avoid a material loss or the disappearance of a right, and the closing of these acts by a single owner is validated on the basis of business management.

The acts of preservation admit also the acts of interrupting the prescription, and the notice of claim represents exactly this interruption. (11)

In such an interpretation, the notice of claim being an act of conservation, can be brought against a third party, even just by one or some of joint owners, because it is an act of interrupting the acquisitive prescription, and not admitting this possibility would lead to acquiring, by a third party, a common property through acquisitive prescription. (12)

The solution is applicable but only assuming that the defendant is a third person, and the co-participants can not promote the notice of claim against the other, because they have competing and simultaneous rights on the property in co-ownership. (13)

The European Court of Human Rights has decided to support the same solution, considering that the current national law is likely to infringe the plaintiff's right to a fair trial guaranteed by Article 6 point 1 of the Convention in terms of access to justice.

The Romanian jurisprudence, meaning the impossibility of filing the notice of claim on an undivided asset only by some copartners, was censored by the European Court of Human Rights. Thus, in one case, the plaintiffs have complained of infringement of their right of access to a court, guaranteed by Article 6 point 1 of the European Convention on Human Rights, in that, by applying the principle of unanimity required to claim more undivided goods, the Romanian courts have rejected their notice of claim whose object were the assets. The claimants argued that the notice of claim must be considered as an act of preservation of an asset that can be exercised by any of the joint owners, being advantageous for all the joint owners. The Government has defended itself demonstrating that when it concerns the claim of a property, it is considered an act of provision that requires, in order to be filed, to have the consent of all joint owners.

The European Court found that the unanimity rule in the matter of claim prevented the examination of the plaintiffs' action, proving to be "an insurmountable obstacle to any future attempt to claim the undivided

assets". This means that the notice of claim of an undivided good, by one or some of the joint owners can not be dismissed as inadmissible, because this would violate their right to a court, part of the right to a fair trial guaranteed by art. 6 point 1 of the Convention. The Court noted with interest that the Civil Code in the debate explicitly removed the unanimity rule in the matters discussed. (14)

In the old draft of Civil Code, art. 501, paragraph 1 stipulated that "each co-owner can stand for himself in court, regardless of his procedural quality, in any action relating to co-proprietorship, even in the case of the notice of claim. Paragraph 2 of that same article reinforced this provision, stating that "the court orders in matter of co-ownership are for the benefit of all joint owners. The court orders opposable to an owner are not also against the other joint owners". (15) Thus, the legal documents signed by one or more joint owners with the infringement of other joint owners' right to expressing consent became not opposable for the joint owners who did not expressly or tacitly agreed to closing the act. (16)

The current project of the Civil Code transfers the stipulations from the old project, from art. 501 to art. 661, stating that: - "(paragraph 1) each owner can stand for himself in court, regardless of his procedural quality, in any action relating to co-proprietorship, even in the case of the notice of claim.(paragraph 2) "The court orders in matter of co-ownership are for the benefit of all joint owners. The court orders opposable to an owner are not also against the other joint owners".(paragraph 3) When the action is not filed by all the joint owners, the defendant may ask to the court to introduce the other joint owners as plaintiffs, on terms and conditions stipulated in the Code of Civil Procedure for calling to trial other persons".

The legal literature supported also the opinion that a co-owner may file by himself the notice of claim, even if it is seen as an act of provision. (17)

In order to support this idea, exercising the notice of claim of a movable property belonging to the spouses was initially admitted, on grounds of the tacit mutual mandate provided by art. 35 of the Family Code.

Also, the action of boundary limitation, the real estate action may be formulated, according to recent court practice, even by one of the spouses, as it represents an act of administration. The measure to remove the expropriation of property and the annulment of ownership of the Romanian state is admissible only if it had been exercised only by one of the joint owners, being in fact an act of conserving the common rights. The correction of the registration in the land register is considered the action through which any interested person may, in cases provided by law,

request the annulment or rectification of entries in the land register, in order to restore the consistency between the tabulated state and the real legal situation of estate registered in the land register. With regard to the corrective action, this is a real action when it concerns birth registrations, modification or extinguishment of rights in land.

In the recent law practice, the notice of claim, of boundary limitation or of rectifying the land book were admitted on the grounds that these actions are acts of conservation, but they could be initiated only by one or several joint owners, not by all of them.

The opinion which we are referring to, sustains that in reality, all these actions constitute acts of provision, but the legal practice considered them as acts of conservation or administration in order to justify the initiation of the action by one of the joint owners.

The arguments were that the act of conservation prevents the loss of a right and involves a negligible expense in comparison with the value of the saved property; but the action of boundary limitation, claim or rectification in the land book as real action, do not fall into this category whereas it involves big expenses and the administration of a large and hard evidence. The action of boundary limitation, claim, and rectification of the land book can not be considered acts of administration because they put in question the right of ownership and do not pursue the valorization and administration of this right, but just its recovery, the entry into the possession of the property in order to perpetrate on it acts of administration. (18)

According to article 480 of the Civil Code, the ownership is an absolute and exclusive right.

By its absolute character, the legislature sought to distinguish the ownership of other real rights. Based on the absolute character, the owner can use the property according to its nature or destination, can collect the fruits and revenues that a thing may give, can dispose of a property by alienation or consumption. (19)

The holder of the right to property can do anything except what is prohibited by law.

The exclusive character of the right to property assumes that the owner exercises by himself all the attributes of ownership, without the help of other persons to exercise those attributes. Other people can not exercise the owner's attributes, except for the cases when the law allows it or an agreement between the parties intervenes. (20)

The exclusive character of the right to property is limited in the case of the co-ownership or if the dismemberments of ownership are constituted.

But some authors treat the co-ownership as a task of property, next to usufruct and easement, mentioning that the state of co-proprietorship constitutes for each joint owner a task of property consisting in using the common asset only by respecting the others' right.

Another argument stated in theory against the opinion of not admitting the notice of claim exercised by one or several joint owners is that, its application prejudices the exclusive and absolute character of the right to property.

In this regard, although stated that the right to common shares property is a limited right, it is considered to be limited only in relation to the other joint owners, and not in relation with third parties who have the general and negative obligation not to do anything likely to impede the exercise of the prerogatives of real right . If this obligation is violated by a third party by taking improper possession of the property, every joint owner can file for the action of claim; on the contrary, the right to property remains deprived of its essential features. Although the right to property is divided as a mathematical fraction, its absolute and exclusive character is not susceptible of division as this character is a trait of ownership and it surprises its essence. (21)

There are situations where a third party does not posses the undivided asset *animus sibi habendi* (with the will of being owner) being just a simple precarious holder who holds for another person (for instance, the tenant, the depositary or lessee who do not posses for them but for the tenant, the deponent or the lessor etc.). Resolving the conflict situations between one or another of the co-owners and the third holder is different, as the latter holds the good for a person other than a co-owner or, conversely, he possesses for one of them. (22)

When the person filed in court for recognition of the undivided right, declares that he possesses for a person, other than one of the co-owners, on grounds of art. 64-66 C. pr. CIV that person will be introduced in the trial and the cause will be judged in contradictory with that person, after the rules of the notice of claim.

In the second case when the defendant states that he holds the property for one of co-owners, according to the same provisions of art. 64-66 Code of civil procedure, the defendant co-owner indicated will be introduced in the trial. This time, the litigation will not have as object the claim (such an action is, in principle, not admissible between co-owners), but one in which is involved the unenforceability of the administration act concluded by one of the co-owners without the others' agreement, with the third holder.

If the third party who possesses the undivided asset defends himself by the fact that he holds from one of the co-owners, an act of property translation, the co-owner complainer may obtain a declaration that this act is not opposable to him and, consequently, the third party is compelled to hand over the undivided asset.

In any case, if one or another of the co-owners opposes to handing over the property (owned by third parties) to the plaintiff co-owner, there is a dispute which has as object the use of the undivided property, in which case the share use of the undivided property will be pronounced, according to the jurisprudence which currently admits such a partition.

The solution according to which it is recognized to the plaintiff co-owner without the agreement of other co-owners, only the possibility to claim the recognition of his undivided right, and not the possibility to obtain the delivery of the asset by the third owner is classified as unacceptable for part of the doctrinarians. If such a solution was admitted despite the recognition of the plaintiff's undivided right, the third remaining with the possessions, it might be possible that he acquires the ownership through acquisitive prescription, under the condition that not all the co-owners agree with the promotion of the notice of claim. In such a situation it would come that, by the will of some co-owners (those who oppose to the promotion of the notice of claim), majority or not, but in any case without satisfying the unanimity, to transfer the property to the third owner, or this is, truly inadmissible. (23)

Another case dealt with in the theory is that in which the third party purchaser has not yet entered into possession of the property and brings an action of claim against the other joint owners that hold the asset. There are opinions according to which the plaintiff buyer's application will not be admitted, as the title of ownership shown by the joint owners is preferable to the plaintiff's title who acquired the property from one of the joint owners. Also, the joint owners' title is older and they have a better legal situation property because they possess the asset, circumstances requiring the rejection of the third party buyer's action. In conclusion, if the other joint owners can protect themselves exceptionally, they can also protect their rights on the path of a primary action, such as the notice of claim filed against the third party that has bought from one of the joint owners. (24)

Analyzing the point of view from above, we make the following observations: in terms of the solution of rejecting the notice of claim brought by a third party buyer from one of the joint owners against the other joint owners, we agree, on the acceptance of a action of claim brought by the other joint owners against the third party that has bought from one of the joint owners; we have, however, reservations because after buying

from a co-owner, the third party becomes, at his turn, co-owner and the action of claim brought against him by the other joint owners appears as inadmissible.

Another analysis is done by the same author on the situation in which the co-owners have concluded an agreement to maintain the severalty for a period of 5 years, according to art. 728 paragraph 2 of the Civil Code. The co-owner could remove the time limit set by agreement by selling the asset, thus obliging the other joint owners to request the removal from severalty before the time fixed by convention. However, if the idea that the other joint owners may file for a notice of claim against the third party buyer is accepted, the effects of the convention are safeguarded. The other joint owners can not be obliged to require the partition whereas they can be often more interested to use the specific asset in co-ownership. Once the sharing problem is solved, the court would be obliged to assign the property to the joint owner seller so that the third party buyer should not be obliged to return the property and to give preference to the stability of legal relations. Thus, in a case concerning the cancellation of a contract of sale on the grounds that the apartment was sold only by a co-owner, the Court of Appeal held that "to the first instance, when preparing the allotment variants, the expert would have in mind also the contracts of sale of the apartment, drawing up a variant in which in the lot that was assigned to the vendor these apartments should be included, but without damaging through this variant the applicant's rights and interests. Although the existence of a contract concluded with the third party does not necessarily lead to assigning the asset to the co-owner seller, existing also the possibility to be assigned to another co-owner when claiming a right or legitimate interest (for example, improvements of real great value have been brought to the real estate asset) in practice, the absence of special interests of the other co-owner leads to assigning the property to the co-owner seller. (25)

The opponents of the solution of not admitting the notice of claim pursued by one of the joint owners, criticize it also on the considerations that it affects the right to pursue which represents the faculty recognized to the holder of the real right of searching and claiming the property from any person and it affects an essential character of ownership which consists of direct and immediate power over the property. Equally, arguments are brought that it is not admissible the necessity that all co-owners file for the notice of claim whereas this would mean giving preeminence to the quantity of property, given by the aggregation of ideal and abstract shares and not to the quality, given by absolute and exclusive nature of the

specific right to pursue and of the direct and immediate power on the property. (26)

Another argument brought to support the admissibility of the notice of claim by a single co-owner, is that if the claimed property is part of the successional assets, the successional seizin has incidence; this seizin is indivisible and gives to each heir the power to act on behalf of all the legacy and file for himself the notice of claim in (27).

The seizin gives to the heir the opportunity to take possession of the successional property and exercise the rights and actions acquired from the deceased or entered into inheritance later, without the prior necessary certification of the quality of heir by the Notary or the tribunal. The heir who has a seizin may exercise the patrimonial rights and actions of assets acquired by inheritance, including the owners' one, even if the real estate possessions had not been in fact exercised. (28) The heir who has a seizin can act on behalf of heritage, not only on his behalf as heir. (29)

The opinion of the doctrine applies the unanimity rule to all legal acts relating to goods found in successional severalty, even to the notice of claim. (30)

In principle, the unanimity rule applies to administration and conservation acts concerning the assets of successional severalty. However, compared to the utility of administration and conservation of the inheritance, in practice these acts drawn up by the co-owner have been validated on the basis of business management or tacit mandate, if the act is useful to the community and none of the joint owners has objected to making it. Unlike the legal acts regime, the view is that the possession in fact and the material use of the undivided assets can be exercised by a co-owner without the others' consent, under the condition that he does not hinder the other co-owners to use the asset and not to prejudice their rights by transforming the undivided assets or by changing their destination or way of use. (31)

In a decision of law, presented and analyzed in theory, the notice of claim was exercised by the two descendants of one of the deceased owner's sons to whom belonged the property claimed; this son received, by inheritance from *cuius* a share of 1 / 5 of the property and died in the time interval between the date of opening the inheritance and the date of filing for the claim by the plaintiffs, four other descendants of the deceased, each of them, heir of a rate of 1 / 5 of the inherited property, without initiating notice of claim. According to article 653 paragraph 1 of the Civil Code, the descendants and the ascendants of the deceased have the right to the possessions of inheritance, meaning the seizin, from the date of the inheritance opening. In this case, the notice of claim was exercised by two

grandchildren of the deceased son, heirs of an heir who had a seizin (downward) of the deceased, without the prior consent of the other coheirs (descendants of the deceased), also heirs who have a seizin. The seizin gives heirs who benefit from it, on one hand, the possibility to take possession of the inherited property, and on the other hand the possibility to draw up acts of administration, concerning the inheritance. Having the right to administrate the inheritance, the heirs who have a seizin, have the right to exercise actions that ensure its conservation, such as, for example, the invalidity action of an act done by *the cuius*, of claiming a good owned by a third party or of requesting to ascertain the existence of a debt of the deceased, to a third party. "The hereditary seizin gives to the heir a strengthening and even a considerable extra power to those recognized by the co-owner's common law". More specifically, the seizin because of its indivisible character, confers to each heir the power to act on behalf of all the legacy, not only for its share of the inheritance; the seizin realizes the substitution of full right of the deceased by his heirs both actively (in terms of rights) and passively (in terms of obligations), which means that the heirs who have a seizin have the quality to exert themselves the actions through which the deceased could have capitalized the rights with patrimonial content if they had been alive, as well as the quality to protect the inheritance from actions that third parties could initiate against the deceased. "The heir, even if acting alone, and whatever its share of inheritance is, can watch over the entire inheritance, all inherited assets remaining, from the third holders in order to recompose the integrality of the shareable mass". In such circumstances, the possibility that one heir files for a notice of claiming a successional good against a third holder was recognized without any ambiguity. The only condition required for this is that the other co-heirs who have a seizin to remain inactive, because in case of disagreement between them, on exercising the action, it could no longer be exercised by a single co-owner; the dispute, in this case would be the appointment by the court of a provisional manager of the inherited mass until partition. In conclusion, the notice of claim brought by two plaintiffs in the absence of other heirs' opposition should be admitted under the principle of the seizin's indivisibility. (32)

Regarding the notice of claim which requires to the court the recognition of the right of ownership on an immovable common property of the spouses, the legal text which is operating, is in art. 35 of the Family Code according to which: "The spouses administer and use together the common property and possess it just as well. (Paragraph1). Any of the spouses, exercising by himself these rights, it is reckoned that he has the

other spouse's consent. However, none of the spouses can estrange or mortgage a land or a building which is part of common property, unless he has the consent of the other spouse. (Paragraph 2)"

In this matter were outlined, as in other cases, two guidelines (33), namely: the notice of claim is considered act of provision and consequently it is necessary the participation of both spouses as claimants; the presumption of the tacit mandate is not operant (34); a second opinion, in minority, according to which the notice of real estate claim is considered act of conservation operating with the mutual tacit mandate. (35)

The supporters of the majority opinion argued that, if the notice of claim can be exercised by one of the spouses, when the court will settle the action, it will pronounce not only on the violation or contestation of the right to property, but it will state with the authority of a judged thing on its inexistence in the husbands' patrimony, yet with great consequences for the spouse who has not participated to the trial. It was considered that if this little thesis was accepted, this would mean that if the notice of claim was rejected, the court decision would be opposable to his disagreement to advancing the action. (36)

The enforceability of such a decision requires some comments.

If the notice of claim is admitted to the co-owner complainant, the court order is also beneficial to the other joint owners. Admitting the action does not mean the recognition of the plaintiff co-owner's right of exclusive ownership on the claimed property whereas the title from which results the co-ownership remains valid and generates effects; the other joint owners may require anytime sharing. Indeed, the decision of the claim does not damage the others.

If the notice of claim is rejected, it raises the question to what extent this decision, with the power of judged thing, according to art. 166 of the Code of civil procedure harms the other joint owners who have not attended the trial, were not defended, whatever were the causes that have promoted the claim together with the plaintiff.

In theory, it is stated that the court order does not damage the other joint owners, and not being enforceable against them because third parties are excluded from the power of decision. In principle, nothing can prevent a third party to invoke its own right against one of the parties who participated in the trial or even against both sides. The third party will not challenge the decision given, but may act to maximize their rights in respect of claims already established by the court, and which have the power of a judged thing. In the articles 47 and 48 of the Code of civil procedure under which all co-owners would be applicants to the action of claim and their defenses could neither use nor harm others, even more so, a

court order obtained by notice of claim, of one of joint owners can not harm other joint owners. (37)

Another argument brought to reject the thesis of inadmissibility, the action of claim promoted by one or more (but not all) of the joint owners, is that that would reach the situation that the holder of a right to claim valorize this right in more advantageous and efficient conditions than the holder of a real right. Thus starting from article 1034 of the Civil Code - the solidarity of obligation and 1057 Civil Code – the indivisibility of obligation, it is shown that if any of the property co-owners can require the handing over from the person against whom he has a right to claim and who holds property, why can he not require the handing over of this asset from a third party, on grounds of the real right of property where this right includes the right to pursue and a direct and immediate power over the property? Although the right represents a real legal and material power on a thing, the juridical relationship are established between persons and in the situation where a person affects the right of property of another person, the latter may constrain the first to respect the right exactly as the creditor claims to the debtor. The real right allows a more effective protection of property; this is why the legislature has qualified the seller's action of canceling the sale as real (art. 1368 of the Civil Code). In conclusion, a co-owner can not have a situation worse than a co-creditor of an obligation basis. (38)

In conclusion, between the traditional solution of inadmissibility and the relatively recent solution (with both its variants - acts of conservation and of administration), of admissibility, the first is losing more ground, while the second is on a upward trend in the opinions expressed in the doctrine, and the trend is confirmed also by the view expressed lately by legislator.

Finding the disadvantages of the theory of inadmissibility, resulted from the judicial practice and doctrine, but also under the pressure of the opinions expressed by the ECHR, the Romanian legislature, in the last two projects of civil law tends to embrace the contrary thesis, in the sense that the claim advanced by one or more of joint owners, in the absence of unanimity, is admissible. This solution is inserted in art. 661 of the new draft of civil code, which in the first two paragraphs, repeats the provisions of art. 501 from the old project of civil code of 2004: "(paragraph 1) Each owner can stand alone in court, regardless of the procedural quality in any action relating to co-proprietorship, even in the case of the notice of claim. (Paragraph 2) The court orders pronounced for the co-ownership are in the

benefit of all joint owners. The court orders that are against a co-owner are not opposable to the other joint owners".

At all this, the legislature adds the new provision and included in paragraph 3 of art. 661 of the new project: "(paragraph 3) When the action is filed by all co-owners, the defendant may ask to the court to introduce in the trial the other joint owners as plaintiffs, on the terms and conditions set out in the Code of Civil Procedure for the calling in trial of other persons".

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SEVERAL CONSIDERATION ON THE LATEST CHANGES IN REGULATIONS MADE ON CONSTRUCTION`S AUTHORIZATION

Abstract

Urban population is 55% from entire contry and only in capital lives over 16% of them.

Now, 181 towns and municipalities have an General Urbanistic Plan (PUG), maded before 2004, who must renewed and updated to the present dinamism of social life.

After 19 years of chaos in building, after some „big" scandals maded by unbelievable situation – Platza Cathedral, Bordei Park etc, the latest changes in buiding reglementation try to make order and to give back the city to the cititzen.

Authorizations and opinions are the only methods by which the administrative body can control compliance with the rules issued by it.

In this paper, we try to show which are the major changes in buiding rules, with special overview on construction`s authorization.

We will try to see what was happened in our legal sistem, for what reason do we need so many changes in this domain – after the 1990 when was adopted the Building law, it changed at least twice a year, the latest one was in december 2008, and in the same time Ministry has developed and proposed for debate a project for a „Buiding Code".

We analise, on the one hand, the impact of this new rules on real estate developers businesses, their reaction and, on the other hand what is the authotity`s position on this „war", between the cititzens - who want good condition of life - and the builders – who want mesures for reduction the bureaucracy.

Considerations on the latest changes in the authorization for construction

1. Introduction

Romania is facing increasingly acute problem of chaotic urban development, indiscipline in the construction area, too much flexibility in applying the rules of urbanism, sacrificing green spaces in the cities until their total disappearance; a record of the authorities' loss of control over the phenomenon was recognized by everyone.

The intensification of traffic, the real estate boom beyond expectations have left public authorities at the highest levels, shocked by the magnitude of some situations - St. Joseph Cathedral, Bordei Park

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because of the regulations, indulgently said, fragile in the construction industry, urbanism and town planning.

However, a "fuss" in the field begins to feel; more and more categories of social actors realize that the effects of these rules are seen and felt by each of us, for what we live today, but especially for what we build, and leave legacy to the future generations.

The legislation has evolved and regulations have considerably multiplied over the years. Thus, a general law[1] on the authorization of construction was adopted, amended and supplemented over time but, unfortunately, the plans of urbanism and many rules have remained just ministerial orders, decisions of the government or of local authorities, particularly sensitive to political changes.

2. Current regulations on the authorization for construction

In 2001, was adopted a law on spatial planning and urbanism, which established a series of interdictions, however without any visible effects. The need to unify the rules in a code seems increasingly urgent.

In this respect, it should be mentioned that in May 2007, at the request of the Ministry of Development, Public Works and Housing, a group of French experts has completed an audit[2] of the existing legislative situation in Romania about territorial planning and constructions. The conclusions reached explain the anomalies from Romania in this area. What remains, however, incomprehensible is the slowness to amend the regulations that create so many problems. The experts committee considers that:

- The rules of town planning affect directly private property without providing compensation to owners - and in this context, it is mentioned that often not the law, but an act with a lower legal force – the Government Decision imposes greater restrictions;
- The legislation presents a number of inconsistencies that violate the stipulations of the Constitution relating to regulating citizens' rights and freedoms; this situation is ultimately sanctioned by national and European courts;
- There is a gap between our regulations and the European ones.

[1] Law 50/1991 republished in the Official Gazette, no. 933/2004 with subsequent amendments

[2] Audit results may be checked on the website of the Ministry of Development, Public Works and Territorial Development: http://www.mdlpat.ro

The recommendations given following the French audit referred to the need to amend laws in order to clarify the responsibilities of institutions involved; the publication of urban decisions would lead to the co-interest of public opinion and of community members, and this would imply higher levels of civic and community culture, area in which, unfortunately, we have too much to catch up.

Currently, is up to public debate the Draft Code of Spatial Planning, Urbanism and Construction, which, from its occurrence generated enough discussion and controversy:

Although, from the occurrence of the project, legislative changes have occurred and have tried to remedy some of the denounced situations, the steps can not be qualified as total success; thus, according to the regulations of the code, possibilities of derogations from the urbanism documentation approved according to stipulations provided by PUZ and PUD are still retained. There would not also be a total restriction of the construction in special areas - parks, reservations, monuments and archaeological and historical ensembles, remaining the possibility of planning in these places holiday homes. Another unacceptable situation is the possibility of declaring public utility to works concerning buildings that can not be finished according to the original authorization, including the related land - this provision violates the right of private property leading to the extension of works; most of the times, the land owner prosecutes the state;

Even if the process of adopting the code is slow, for the legal situation to be normal, some proposals in the text of the code are authenticated through legislative acts, the last of them being GEO 228 of December 30th, 2008[1], with justifying the extraordinary situation in the need to harmonize specific legislation for licensing the constructions with the community legislation in the area.

We will, further, try to submit to your attention some of the changes that the normative act brings to the construction authorization.

- the applicant for the construction permit will be the holder of a real right on a property - land and / or construction – meaning, any natural or legal[2] person holding a title on a property, showing ownership (contract of sale, exchange, donation, heir certificate, administrative act of

[1] Published in the Official Gazette, no. 3/5.01.2009 it completes with some major changes made by GEO 214 / December 4th, 2008, published in the Official Gazette no.847/ December 16th, 2008

[2] Oliviu Puie, *Legal regulations in matters of town planning and urbanism. Legislation. Doctrine. Jurisprudence*, Universul Juridic Publishing House, Bucharest, 2008, p. 35.

restitution, court resolution, etc..), or right to build under the conditions of law (concession or lease contract obtained by public auction[1]);

- the concept of "technical documentation" is regulated and it will replace the term of "project for the execution authorization of construction works";
- the steps to obtain authorization to construct are mentioned, including the initial assessment of investment and determining the need to assess its effects on the environment by the competent authority for environmental protection, as well as the notification of the local public administration authority, by the applicant on maintaining the application for the execution authorization of construction works in a situation where the competent authority for environmental protection determines the need to assess the effects of the investment on the environment;
- Where, after issuance of the administrative act of the authority responsible for environmental protection and before the submission of documentation for approving the execution of construction works, the investment undergoes changes that have not been evaluated concerning their effects on the environment; they will be mentioned by the technical verifier for essential requirement "hygiene, health and environment" in the report of amending the technical documentation related to investment and the applicant / investor is required to notify the public authority for environmental protection with regard to these changes, under the legislation concerning the impact assessment of certain public and private projects, on the environment;
- In order to harmonize the conditions of approval for the entire investment, appears the notion of "coordinator notice" which will be issued for works that are done on sites that exceed the limits of the counties and of Bucharest Municipality;
- the concept of "unique agreement" disappears and the agreements referring to the urbanism certificate concerning the insurance, the connecting or the connection to facilities or utilities, the connecting to the network of communications, fire safety, civil protection, health protection and the administrative act of the authority responsible for environmental protection must be obtained by the applicant for authorization to construct directly from the competent authorities;
- the public's right to participate effectively and in time to the procedure for authorizing the execution of construction works is expressly regulated. Thus, before a decision on the request for execution

[1] Article 13 of Law No. 50/1991, republished in 2004 with subsequent amendments;

authorization for construction works related to investment (for which the competent authority for environmental assessment established the necessity of assessing environmental effects), the public has the right to document on a work , comment and express opinions in front of the local competent authorities of public administration;

- new provisions relating to irregularities stipulated in Law 50/1991 and to the procedure of finding them are introduced;

3. Conclusions and proposals for law ferenda

The integration into the European family should give us an incentive; in most developed countries there is a code of urbanization and, even if this issue is not part of the Community AQ, each European state has its own policy in the construction area; in the U.S. there is an urban planning code, as in France, etc.

It is more than obvious that the absence of a code leads to aberrations in constructions - and there are, unfortunately, examples at every step: St. Joseph Cathedral – "Plaza" as it is called even in the international[1] press, various situations in which persons considered injured by the authorities have won the trials to international courts; consequently, the Romanian state had to pay substantial damages.

We will present several aspects that we believe they should be considered in developing future legislation in this area:

• systematizing, in a coherent vision, all rules concerning, on one hand *the increase of the role of factors involved* in the urban planning process, and on the other hand to ensure the effectiveness of urban planning; it should be necessary the *establishment of specialized courts dealing with urban area* which should have at hand necessary tools to successfully intervene in time to stop work in case of a project started, proving to be plenty of occasions so far where the destruction of illegal construction is almost impossible.

[1]ECHR Decision of July 12th, 2007 - unpublished - Case- *Ruxandra Trading against Romania*,: Public authorities issued a provisional construction permit, refusing the final release. Both the Court of Appeal and the Supreme Court allowed the request of the applicant, but the public authority refused the application of the decision. Finally, after 12 years (action started in 1995), the ECHR gives successful issue; the Romanian state was required to implement the decision of the Court of Appeal, in 2000; the material can be found on: www.csm1909.ro/ MSC / index.php? cmd = 9503

• the increased involvement of the *notary*, who may be required to ensure the legal possibility or impossibility to build on an area at the time of transaction and to ensure legal assistance for buyers and builders in the urbanism area.

• the consolidation of PUG and more strict framing of the documentation of lower level - PUZ and PUD, and requirements that the general plan (PUG) must identify areas that can not be modified in another way, and establish strictly the areas with temporary or total interdiction for construction;

• Reducing taxes and the time to release permits by reducing the number of documents needed to get the notices underlying the obtaining of the construction permit;

• Establish a single office with extensive powers in the City Hall, meant to ensure, next to the relationship with the applicant, also the inter-institutional relationship for entities involved in the process of authorizing a work, having a series of tasks among which we could mention:

- In addition to informing the customer on the steps of how to obtain the authorization of construction, the collection and registration of applications for obtaining an authorization in a single database which will lead to a better record of the activity;

- To ensure the existence in all institutions involved, of all necessary forms for obtaining the advices;

- Giving to specialized persons from the local public administration authorities, responsibilities for drawing up the dossier (application, copies of property title, advices obtained), ensuring in this way the accuracy of preparation and implicitly shortening the period of notice;

- Handing a copy of the client's dossier, so that he can complete it with the construction project (architect);

- receiving and sending the complete dossier to the Urban Planning Department, from the City Hall.

• Changing the term of validity of the building authorization, meaning extending it and extending also the working hours with the public;

• Ensuring transparency of contact between the citizen and the administration staff;

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SPECIAL PROBLEMS CONCERNING THE FIELD OF EXTINCTIVE PRESCRIPTION AND THE IDEA OF FLOW OF TIME AS TO THE NULLITY OF THE LEGAL ACT

Abstract

Completing the field of extinctive prescription requires the submission of aspects towards which there is no unity in theory or practice.

In this paper we will refer, in particular to the problem of extinctive prescription regarding the invalidity of the legal act.

In practice, to this point have been shown to be necessary some explanations in order to understand this problem or there were given non-homogenous solutions.

1. The legal nature of prescription

The extinctive prescription is known in all branches of law and its legal nature must be determined within each branch of law.

The prescription of the right to action is part of the civil law, in the material sense. The prescription extinguishes neither the subjective right, nor the correlative obligation, but only the right to action; therefore, the action brought to court by the active subject instituted after the expiration of the extinctive prescription, will be dismissed as prescribed, which amounts to the denial of the coercive force of the state, requested by the holder of subjective right, submitted to prescription. (1)

The extinctive prescription institution was and continues to be the object of controversy in the Romanian law and comparative law. From the approaches found in the specialized literature it results that, in fact, the issue of "legal nature of prescription" involves two aspects, namely: 1) to determine the belonging of the legal institution of prescription to the substantial civil law or to the procedural civil law and 2) the legal qualification that must receive the prescription of the right to action in the respective branch of law (civil or procedural civil) (1). This issue is more theoretical because, in practice, generally, the legislature took care to regulate the legal consequences of extinguishing by prescription, the subjective civil right or the civil action, as appropriate.

The legislative origins of the controversy goes down, through the French Civil Code of 1804 and through the Byzantine law up to the Roman

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law, which saw both the acquisitive prescription as a means of acquisition of property of a mobile or immobile thing, on the basis of uninterrupted use during the time required by law, and the prescription (*praescriptio*) as a means of extinguishing any real or personal actions not executed within the time established by law. Napoleon's Civil Code took from the Roman and Byzantine tradition, the rules in the same way of prescription, under its both forms – the acquisitive prescription and the extinctive prescription (liberator). Similarly to the French Civil Code, all civil codes that have had as model this civil code followed the same method, as to the regulation of prescription. The Romanian Civil Code of 1864 provides to the article1091 that *the prescription is a way of extinguishing obligations*, and to the art. 1837 it provides that "*the prescription is a means to acquire property or to be free of a duty*" while articles 619, 840, 1334,1890,1900,1903 and 1904 refer only to the *prescription of actions in court*. From this way of writing, it would set out that the first two provisions would hint at the fact that the extinctive prescription extinguishes the civil obligation and, consequently, the subjective correlative right, while the last listed provisions may lead to the conclusion that the prescription extinguishes only the civil action in court and not the subjective right, as a whole.

In the Civil Code, until the emergence of Decree 167/1958, both in doctrine and in jurisprudence, the dominant solution was in the sense that the prescription extinguishes the civil duty and subjective right, however, remaining in the debtor's responsibility a natural obligation, without penalty, which could be the object of a valid voluntary payment (2).

After the emergence of decree 167/1958 which mentions the extinction by prescription only of the "right to action" and not of "duty" or of "subjective right", the controversy in the specialized literature has not faded but has continued and continues today. In the controversy, two fundamentally different points of view can be identified: one of civil nature, and the other of procedural nature.

2. The field of extinctive prescription in matters of personally non-patrimonial rights

The *per a contrario* interpretation of article 1, paragraph 1 of Decree no. 167/1958 reaches the conclusion that the right to action for recovery of personal non-patrimonial rights is not subject to extinctive prescription. It involves subjective rights closely related to the human person that are not valued in money, not having an economic content. Being inseparable from the human person, their legal protection is imposed; there is no interest for limiting their defence in time. (3)

As regards the invalidity of a legal act, this principle of imprescriptibility of non- patrimonial actions knows also exceptions (4):

- the action for cancellation or for declaration of relative nullity. This solution results from art. 9 of Decree no. 167/1954 which provides for a limitation period of 3 years for annulment of the civil legal act;
- the action for relative nullification of marriage. Thus, art. 21 of the Family Code provides: "Marriage may be annulled at the request of the spouse whose consent was vitiated by error, as regards to the physical identity of the other spouse, by ruse or violence. The annulment of marriage from these reasons may be requested by the one whose consent has been vitiated, within 6 months from the cessation of violence or the discovery of error or ruse."

Also in the field of exceptions to the principle of imprescriptibility of personal non- patrimonial rights was the issue whether the provisions of art. 2 according to which the nullity of a legal act may be invoked at any time either by action or by way of exception, refers both to cases of absolute nullity, and to relative invalidity. In the legal literature and in legal practice it is recognized by some authors that the text concerns only the absolute nullity, being however necessary to distinguish, though the text does not, between the recovery of invalidity as such and the recovery of patrimonial, subsequent consequences of absolute invalidity. In the first case, the right to action is imprescriptible, in the second case is subject to extinctive prescription, as a real object. Regarding the relative nullity, this may be invoked only in general terms of prescription, established by Decree no. 167/1954. (5)

For example, the action for the establishment of forged official documents is imprescriptible. The falsification of official documents is likely to draw in all cases absolute nullity whereas affected social values are not limited to the interests of one or more persons, but they concern the civil circuit itself, undermining, at the same time the authority of the issuing state bodies. Therefore, this action is imprescriptible according to article 2 of the Decree no. 167/1958. (6)

A controversial issue is whether the invocation of relative invalidity by way of exception can be made at any time or only in general terms of prescription. In the first opinion, invoking the exception of relative nullity is imprescriptible because *quo temporalia sunt ad agendum, perpetua sunt ad excipiendum*, meaning that the action is temporary, the exception is permanent. In a second opinion, invoking the nullity by way of exception is prescriptive. The opinions of authors and practitioners is that in the case of exception of relative invalidity invoked against the action through which

the plaintiff seeks the execution of the voidable legal act, the exception must be rejected if it has reached the limitation period within which the defendant could have asked, by way of action, the cancellation of that act. This solution is necessary because it takes account of the fact that what is prescriptive by way of action-the right to request cancellation of act- can not become imprescriptible, by way of defence. Assuming that the limitation period for the right to request annulment of the act has been fulfilled, the act must be unassailable. Whenever you try to capitalize by way of exception, a means that could be valued by action, within the legal period of limitation, the solution that should be eluded from the extinctive effect of prescription would not be justified, since the party was not obliged to wait to be sued, but it could use directly, within the limitation period, the action for annulment. (7)

3. Rules concerning the beginning of the flow of prescription of the action for cancellation

The prescription of the action for cancellation begins to run at different times, depending on the cause of relative nullity.

According to article 9 of Decree no. 167/1958: "The prescription of the right to action for cancellation of a judicial act for violence begins to flow from the date when it ceased. In case of error or guile or in other cases of cancellation, the prescription begins to run from the date when the rightful person, his legal representative or the person required by law to agree to his acts, has known the cause for cancellation, but no later than at the expiration of 18 months from the date of completion of the act".

Also, in the case of violence, the prescription has a single moment from which it starts, more precisely the time of cessation of violence; after this moment, the victim of violence can get out of passivity. When the cancellation is due to other causes, the special rule concerning the beginning of prescription includes two alternative moments: the subjective moment of acknowledging the cause of cancellation and the objective moment of expiry of the 18 months following the closing of the document. These 18 months do not represent a prescription period, but they have the function of marking the objective moment from which the prescription begins to flow. (8)

According to article 2 of the Family Code, the annulment of the marriage for error, guile or violence may be requested by the person whose consent was vitiated within 6 months from cessation of violence or from the discovery of error or ruse, without setting a time limit in order to acknowledge the error or the guile. (9)

As to the action for cancellation of will, being a *mortis causa* act, the prescription begins to run, in principle, from the date of the succession opening. (10)

4. The regulation of the extinctive prescription in the draft of the new civil code

The extinctive prescription is regulated in the draft of the new civil code in Book VI entitled *"About the extinctive prescription, revocation and calculation of periods"*, Title I *"Extinctive prescription"*, of articles 2509-2553.

The most significant articles on the prescription of nullity are:

Art.2511 - (1) The right to action is imprescriptible in the cases provided by law, and whenever through the nature or the object of the protected subjective right, its exercise can not be limited in time.

2) Except the cases pointed out in paragraph (1), are indefeasible the rights relating to:

1. the action concerning the defence of a non-patrimonial right, unless the law provides otherwise;

2. the action for finding the existence or lack of existence of a right;

3. the action for finding the absolute invalidity of a legal act;

4. the action for annulment of the heir certificate, if its object is whether the setting of the inheritance mass or the inheritance share, under the condition of accepting the inheritance within the period provided by law.

Art. 2538 - (1) The prescription of the right to annul a legal act begins to flow:

a. in case of violence, the day when it ceased;

b. in case of fraud, the day when it was discovered,

c. in case of error or in other cases of cancellation, from the day when the rightful person, his legal representative or the one called by law to consent or to authorize the acts, has known the cause of cancellation, but no later than at the expiration of 18 months, from the day on which the legal act was closed.

(2) In cases where the relative nullity may be invoked by a third person, the prescription begins to run, if the law does not provide otherwise, from the date when the third party acknowledged the existence of the cause of invalidity.

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ASPECTS REGARDING JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN MATTERS OF MORAL PREJUDICES

Abstract

In conformity with art. 34 of the European Convention on Human Rights, the Court may be asked to an application by any person or nongovernmental organization or a group of individuals who alleged victim of a breach by one of the high contracting parties of the rights recognized in the Convention or in its protocols. If the Court finds that there has been a breach of the Convention or its Protocols, and if law does not allow only incomplete removal of the consequences of such violations, the Court may grant an aggrieved party repair fair.

Moral damages awarded for harm caused such a person, consisting of a mental suffering as equity and ethics rules prohibit in principle the granting of compensation for material damage morale, because the pain of mind is incompatible with a cash equivalent. It is however justified the granting of material compensation to those persons whose opportunities for social and family life have been altered as a result of unlawful acts committed by others. This compensation is intended to create living conditions that counterbalance to some extent the victim's mental suffering.

European Court of Human Rights is an international institution that can receive, in the case of fulfillment of certain conditions, applications from persons who complain of violations of fundamental rights guaranteed by the Convention and Protocols. It is not a court of control over national courts, not having the power to cancel or modify their decisions. When one of the contracting states (called the High Contracting Parties) violated one of these fundamental rights, the persons concerned may complain about it to the Court. Complaints must be related to acts of public authorities (parliament, court, administration) of one of the signatory states of the Convention, the Court not having the authority to deal with complaints against certain individuals or private institutions.

Individual applications can be addressed to the Court, according to art. 34 of the Convention, by any person, non-governmental organization, or any group of people.

The conditions of admissibility to the Court of an individual complaint are as follows: (Duculescu, 2006)

1. Court may be solicited only after exhausting the internal possibilities of appeal of applications. This implies that the person had

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appeared before the highest court competent, following all the rules and terms of procedure.

2. The period in which the Court can be solicited is of 6 months after the final internal decision. The term of 6 months becomes from the date on which the competent the highest national authority has delivered its decision (if the complaint relates to a conviction, the period runs from the final judgment in the normal order of appeal methods and not from the subsequent rejection of possible applications for review). If this period is exceeded, the Court can no longer examine the complaint.

3. Application must be made in *writing and signed* by the complainant or the person it represents, if the application is filed by an non-governmental organization or a group of individuals, it must be signed by persons authorized to represent the organization or group. When the person, NGO or group of persons acts through a representative, he must submit a written power of attorney or a proxy. The Board or committee of the Court may decide on any issue relating to whether the persons, who have signed the application, were empowered to do so.

The procedure of a complaint to the European Court of Human Rights knows two distinct phases. In the first stage is considered the request in the sense of its admissibility or inadmissibility. If it is deemed inadmissible, the complaint will not be registered to be settled by the Court. (Duculescu, 2008)

If the complaint is found admissible, phase two begins – the complaint is registered, which will include establishing the facts, an attempt of amicable settlement, and whether the attempt of amicable settlement has failed, a report will be prepare, which will be brought before the Court which will rule a decision in this case.

During the solving of the application in the second phase, if the Court finds that there has been a breach of the Convention or its Protocols, and if the law of the high contracting parties allows only incomplete removal of the consequences of this violation, the Court grants the aggrieved part, if appropriate, an equitable remedy.

In terms of prejudice, the Court analyses and rules first on the financial compensations which are due to the plaintiff, then on the moral loss. These forms of compensation are granted only to the extent of proving the causal link. (Popescu, 2003)

It can be noticed that in the practice of the European Court, the main divisions with which it is operate on the notion of injury refer to its partition based on its intrinsic nature in patrimonial prejudice and non-patrimonial prejudice (also called moral prejudice).

The material prejudice is the violation of a patrimonial right and the moral prejudice is the violation of a non-patrimonial one. Material prejudice is the one which can be the result of a patrimonial interest. They may be assessed in money. Therefore, such prejudice is known as economic or pecuniary. It is also considered a material prejudice and loss, in whole or in part, of a national patrimony such as the right to maintenance, rent. This includes actual loss and undeserved gain.

Moral damages is that form of compensation to be paid when, through illegal acts committed with guilt, the patrimony of a person is not diminished, but the morale values are harmed.

In the doctrine of civil law, moral prejudice was defined as "any damage brought to any of the prerogatives which represent the attribute of the human personality" (Tercier, 1971) and then as "the prejudice resulting from an impairment of personal interests and that is manifested through the physical or moral suffering that the victim feels" (Stark, B., Roland, H. and Boyer, L., 1996).

Examining the recent practice of the European Court of Human Rights in cases against Romania, we see that moral damages were awarded, for example, for:

- breach of Article. 6 § 1 of the Convention, concerning the right to a fair trial (judgments of 13 January 2009 in Case Faimblat against Romania, published in Official Gazette no. 141 of 06.03.2009);
- Infringement of art. 1 of Protocol no. 1 to the Convention (Ruling from 7 February 2008, Case Silimon and Gross against Romania, published in the Official Gazette no. 107 of 23.02.2009), which resulted in a state of uncertainty and suffering for the plaintiffs;
- Infringement of article 6 § 1 of the Convention and of art. 1 of Protocol no. 1 to the Convention by failure of the administrative authorities to execute a final court decision, thereby causing moral injury to plaintiffs particularily because of frustration caused by the impossibility of obtaining execution of the sentence handed down in their favor (judgments of 17 June 2008, Case Matache and Others against Romania, published in the Official Gazette, Part I no. 65 of 03.02.2009);
- Breach of art. 2 of the Protocol. 4, on freedom of movement, the ground for moral damages being that the plaintiff could not leave the Romanian state (judgments of 25 January 2007, Case Sissanis against Romania, published in the Official Gazette no. 784 of 24.11.2008).

In some situations, although a causal link was not established between the trialed crime and the material compensations requested by plaintiff, the Court does not grant any compensation for material damage,

but allocates an allowance for the moral prejudice. Thus, moral damage is repaired regardless of the existence and extent of real patrimonial damage.

As a rule, in its jurisprudence, the Court stated that the moral injury should not be examined on its own. Allowance for such an injury is granted only at the express request of the complainant. (Popescu, 2003)

The value of the moral damage is determined based on estimation, as a result of the implementation by the European Court of the criteria concerning the negative consequences suffered by those concerned, both physically and psychologically, the importance of values affected, the extent to which these values were affected, the intensity with which the consequences of injury were perceived, the extent to which it has affected the familial, professional and social life. Also, in moral damages quantification, these criteria are subject to reasonable appreciation connotations, on a fair base, appropriate to the real and effective prejudice suffered by the complainant. Thus, the Court has sometimes granted the allowance money to repair the moral suffering of the petitioner, but can state that the fact of considering the case as a breach of the Convention constitutes in itself sufficient satisfaction, on the basis of art.41 of the Convention. (Popescu, 2006)

The compensation in money for morale damages has a relatively new history in our system of law, as the former Supreme Court of RSR tribune had ruled in 1952 that damages of moral kind can not be compensated in money. (Albu, 1996)

Moral damages are those resulting from injury to a personal non-patrimonial interest. They are not capable of monetary assessment. Examples of such damages are: death, attacks upon the physical integrity, health or other attributes of personality, such as honor and reputation, privacy, freedom of thought, conscience and religion, freedom of expression.

Moral damages are therefore consequences of non-patrimonial nature caused to the person by acts contrary to law, culpable, in the form of personal attacks upon his physical, mental and social personality, by violating a right or non-patrimonial interest recognized by the Convention or its Protocols.

Having the judicial practice as a starting point, the Romanian doctrine classified moral damages as follows: moral damages in the form of physical pain or mental pain called *pretium doloris*; mental suffering caused by the infliction of death of a beloved person or a close relative, or its injury, mutilation, disfigurement or serious illness (called indirect damages), the compensation due to repair them is called *pretium affectionis*; aesthetic injury includes all injuries and damage that bring harm to the

personal harmony or to his/her physical appearance, the compensations due to repair them being called "*pretium pulchritudinis*". (Boar, 1996)

Recreational prejudice is the restriction of the victim's opportunities to enjoy life, to full material and spiritual satisfactions that life can offer. This injury has been qualified as hedonist damage. (Jourdain, P., 1995,)

Recreational damage compensation was the subject of discussion in our law literature even during the period when the repair of damage morale was not allowed. (Urs, I, 1999) Thus, was shown that "together with work, it must necessarily be taken into account other aspects that give color and value to life such as culture, sports, disinterested work related to family and society, because the inability to work can not represent all damage that it may exist, and so, it should also be taken into account the so-called recreational injury".

The notion of leisure injury is more comprehensive, including the notion of aesthetic injury, both with the possibility to be compensated according to the Recommendation made by the Council of Europe and the European Court of Human Rights (Protocol 11 of the European Convention on Human Rights 1994). The right to compensation is established by resolution no. 75-7 of the E.C., which recommends compensation for corporal injury represented by physical pain, sleeplessness, feelings of inferiority, or in case of limiting certain recreational activities (theater, sports, hobby-type activities, etc.).

Damage which affects the honor, dignity, prestige of a person consists of uttering insulting expressions, broadside, defamation or disparagement to a person and can be done orally, by addressing in public directly, in writing, by advertising in the press or the media in general. (Albu, I and Ursa, V., 1979)

Regarding the assessment of moral damages, the Romanian Supreme Court of Justice, through decision nr.3812 of 5 December 2000, showed that, although it's true that the establishment of the amount of compensations equivalent to a non-injury includes a dose of approximation, the court should take into consideration a number of criteria such as the negative consequences suffered by the person concerned at the physical and psychological level, the importance of moral values affected, the extent to which these have been damaged and the intensity with which were perceived the consequences of injury, the extent in which it has affected the family, professional and social situation. In this way, the Court rallied with the jurisprudence of the European Court of Human Rights.

For the court to be able to apply these criteria is necessary for the one who claims the moral damage to produce a minimum of arguments

and evidence that show in what extent the personal non-patrimonial rights, protected by the Constitution, have been affected by an illegal act and, as a consequence, to proceed to an assessment of compensations which will balance the damage.

If the case of a victim of a judicial error, through arrest and conviction with imprisonment - after which he/she has been exonerated - claims can be formulated for moral damages, whose amount is determined by approximation. The court will consider a number of criteria such as the negative consequences suffered by the person concerned, from the physical and psychological level, to the importance of the moral values affected, the extent to which these have been damaged and the intensity with which the consequences of injury were perceived. (High Court of Cassation and Justice, Civil Section, decision no. 4790 of 18 November 2003). As for the credibility of the plaintiff's demand, concerning moral injury, it should be borne in mind always that the damage consists of injury to moral values that define human personality, values that pertain to the physical existence of man, to health and bodily integrity, to the honor, dignity, honor, professional prestige and other similar values.

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