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HARMONISATION OF EUROPEAN CONTRACT LAW: SLOWLY BUT SURELY?

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Abstract

This paper deals with the harmonisation of European Contract Law from a gradual point of view. The main objective is to show the different academic and official steps carried out in this field. The so called Commission on European Contract Law under the leadership of Professor Ole Lando was the starting point in 1982. Some international research teams set up by European scholars and lawyers have been devoted to this aim for two decades. Time and effort have been made in the academic level to get a serious advance on bringing closer contractual national rules. This bottom-up approach met a stronger support in the last years although the European Parliament had "requested" the creation of a European Civil Code already in 1989. The momentous time comes in 2010 with a Green Paper from the European Commission on policy options for progress towards a European Contract Law for consumers and businesses. This Green Paper opened a public consultation period in 2011 and afterwards an expert group was appointed to draft a feasibility study for a future Instrument in European Contract Law. After all, a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law was adopted in October 2011 arising not few doubts, worries and misgivings from different points of view. This will be not the last step in this process.

Keywords: *Harmonisation, European Contract Law, Private Law, Common Sales Law, Consumer Acquis.*

Introduction

In the next pages we will try to give an overall impression of the harmonisation of European Contract Law from a gradual perspective from the beginning to the current proposal for a Common of European Sales Law. Academic works and European official rules have paved the way for more than two decades since the well-known Principles of European Contract Law were published. These Principles were drafted by an international research team under the leadership of Professor Ole Lando. It started in 1982 and later on some international research teams set up by European scholars and lawyers have devoted time and effort to this aim in several projects. We will track these academic works interrelated with the European Commission initiatives. The paper deals with the most relevant academic literature on these initiatives.

This issue is relevant now, more than ever, because it is drawing the attention of every European Private Law jurist since a Green Paper from the European Commission on policy options for progress towards a European Contract Law was published in 2010. A public consultation period was launched for a short period of time. In a few months European Commission decided to appoint an expert group to draft a feasibility study for a future Instrument in European Contract Law and soon we all could read a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law in the European Official Journal (October 2011). It is the first time we are before an initiative of this kind: a set of European Common rules on sales law (including related services such as instalment or repair, and digital content supply). As a Regulation the Proposal is considered a relevant step forward

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in this field. This Proposal offers a single set of rules for cross-border contracts in all 27 EU countries. CESL will work as a second national legal system in all European countries, not as the 28th regime and Member States could be able to extend it for domestic contracts.

This Proposal is currently under debate. The voting during the Justice and Home Affairs Council meeting held in 7-8th June 2012 was the starting shot and it is still on-going. Eleven Member States were for and 10 against in that meeting. This implies that Member States look at the Proposal as a controversial issue. Great divergences among the European traditions may complicate its success. Even more, the optional instrument itself arises so many doubts and misgivings that its future is by now uncertain.

1. First steps in European Contract Law harmonisation

The background of the European Contract Law harmonisation began in the eighties with two important projects. First and most important were the "Principles of European Contract Law" (PECL). The PECL were prepared by the Commission on European Contract Law under the leadership of Professor Ole Lando since 1982. These Principles are divided in three parts and they have been published between 1995 (Part I and II, revision in 1998) and 2002 (Part III in 2002). The harmonisation work in Europe has an important weight of academic work (bottom-up) from the very beginning. This perspective helps to understand the way harmonisation tries to make progress in a multilevel framework, official and no official or academic. On the other hand, the insight of the Contract Law harmonisation from this first approach does not deal with special rules on consumer rights. This will change in the future.

Secondly, and with lower influence, the "Contract Code" drawn up on behalf of the English Law Commission by Professor Harvey McGregor must be mentioned. In this case, it was a personal commitment, not a team work, which was published in 1993 and it has been translated into different language.

In 2001 a Communication on "*European Contract Law"* by the European Commission launched a process of extensive public consultation on the problems arising from differences between Member States' Contract Laws and on potential actions in this field. This moment may be considered as the "official starting point" for European Contract Law harmonisation although the European Parliament had "requested" the creation of a European Civil Code already in 1989.

In the light of the responses the European Commission issued an "*Action Plan*" in 2003 proposing on one hand, to review the *acquis* in the area of Consumer Contract Law, to remove inconsistencies and to fill regulatory gaps. On the other hand, to improve the quality and coherence of European Contract Law by establishing a Common Frame of Reference (CFR) containing common principles, terminology and model rules to be used by the Union legislator when making or amending legislation. We can say that this is the moment when both, Consumer Law versus Contract Law harmonisation, take two different tracks:

2. Consumer acquis: review and harmonisation

To start with the consumer acquis review, it was important to make a comparative analysis of the Member States legislation on Consumer Law in order to know how Directives had been implemented in (then) 25 Member States. It was an academic work known as Compendium prepared for the European Commission by an international research group directed by Prof. Schulte-Nölke in co-operation with Dr. Christian Twigg-Flesner and Dr. Martin Ebers (University of Bielefeld, Germany, February 2008)[1]. The scope of the study was not arbitrary. It covered eight of the most important Directives:

[1] http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf

- The Doorstep Selling Directive (85/577/EEC);
- The Package Travel Directive (90/314/EEC);
- The Unfair Terms in Consumer Contracts Directive (93/13/EEC);
- The Timeshare Directive (94/47/EC);
- The Distance Selling Directive (97/7/EC);
- The Price Indication Directive (98/6/EC);
- The Injunctions Directive (98/27/EC); and
- The Consumer Sales Directive (1999/44/EC).

Apart from that, from 2004, another academic group, the "Acquis Group", was created to focus on existing European Community Private Law. Its work has been published under the title Principles of the Existing EC Contract Law (*Acquis Principles*) in three editions already, *Contract I* (2007); *Contract II* (2009) and *Contract III* (2013).

In October of 2008, the European Commission submitted a Proposal for a Directive on Consumer Rights[2], a measure designed to boost the retail internal market focused only on four Directives:

- Doorstep Selling Directive 85/577/EEC
- Distance Selling Directive 97/7/EC
- Consumer Sales Directive 99/44/EC
- Unfair Contract Terms Directive 93/13/EEC

The planned Directive merged these four Directives (and only these four, not eight, as it was the original aim) into one single horizontal instrument regulating common aspects (such as the definition of "consumer" and "trader", information duties and rights of withdrawal) in a systematic way. In contrast to the existing Directives, the proposal moved away from the minimum harmonisation approach introducing instead the controversial principle of full harmonisation. It means that Member States could not maintain or adopt provisions diverging from those laid down in the Directive.

But after four years a Directive on Consumer Rights was published in 2011[3] merging in the end only two Directives:

- Doorstep Selling Directive 85/577/EEC
- Distance Selling Directive 97/7/EC

Therefore the scope of the proposal had been limited in a huge proportion compared to the original purpose and not maximum harmonisation, except for some aspects, had been implemented. It is not difficult to understand the disappointment.

Perhaps because of this unsatisfactory result and also owing to the effort to increase confidence in the Digital Single Market about consumer protection when acceding and using online services, a kind of "code" of online rights was published in December 2012. The "Code of EU online rights" is one of the 16 initiatives of the Digital Agenda for Europe. This "Code" is not a real Code. It only summarizes the existing digital consumer rights scattered across various European rules in a more clear and understandable way. The complexity of the legal framework makes many online consumers not be aware of them. This is the way to make citizens aware of their rights and principles recognised in EU law when entering into contracts online.

3. Contract Law harmonisation on "bottom-up effort"

On the other hand, the Communication of October 2004[4] that followed the Action Plan 2003, abovementioned, outlined the plan for the development of a CFR intended to be a

[2] Brussels, 8.10.2008. COM (2008) 614 final.
[3] OJ L 304/64, 22.11.2011.

"toolbox" for the European Commission when drafting proposals to improve the Contract Law. Once again, an international academic network was created by the Study Group on a European Civil Code (successor of the Lando Commission) and the Research Group on EC Private Law (Acquis Group) in 2004 to carry out a preparatory legal research in view of the adoption of this Common Frame of Reference (CFR)[5]. The research work was the "Draft Common Frame of Reference" (DCFR). It was handed in 2008. The final version was published in 2009 as an outline edition and as a full edition of six volumes containing comments and notes by national reporters. It is an overwhelming work which is being translated into some European languages. The DCFR covers principles, definitions and model rules of Civil Law including not only Contract Law but also Tort Law. DCFR contains provisions for both B2B (Business-to-Business) and B2C (Business-to-Consumer) contracts.

The DCFR was built on the several projects previously undertaken at European and international level. Not only PECL but also the UNIDROIT Principles drafted by the International Institute for the Unification of Private Law for international commercial contracts and strongly inspired by Vienna Convention 1980 (CISG), a creation by the United Nations Commission on International Trade Law (UNCITRAL), the almost worldwide standard for commercial contracts of sale. This CISG applies only by default whenever the parties have not chosen another law (opt out). At the moment there is no mechanism (i.e. supranational Court) to ensure their uniform interpretation.

Meanwhile, the *Association Henri Capitant des Amis de la Culture Juridique Française* and the *Société de législation comparée* joined the academic network on European Contract Law in 2005 to work on the elaboration of a "common terminology" and on "guiding principles" as well as to propose a revised version of the PECL (see supra).

Another important project was outlined since 1999 to 2004: the "Code européen des contrats" drafted by the *Accademia dei Giusprivatisti Europei*. It was the Pavia Project directed by Prof. Giuseppe Gandolfi[6]. This Code contains no principles but "only" 173 articles strongly inspired in the Roman and civilian tradition and outlined as a Civil Code. There is no specific regulation for consumers unlike DCFR. It is currently «rot in oblivion».

In addition to all these projects, we should mention the "Common Core of European Private Law"[7]. The first general meeting held in Torino in 1995 and annually over two decades European lawyers and scholars have been working together, and still they are, on different topics related to Contracts, Tort and Property. They try to seek the "common core" of European Private Law. The methodology is inspired by Schlesinger's monumental work on formation of Contract in the seventies based on cases and discussion and it is a very good example of the informal European approach in the harmonisation task.

4. Green Paper on policy options for progress towards a European Contract Law: A "toolbox" or anything else?

A momentous time comes in 2010. A Green Paper from the European Commission on policy options for progress towards a European Contract Law for consumers and businesses[8].

[4] 11.10.2004, COM (2004) 651 final.
[5] The European Commission financed it through a grant under the 6th Framework Programme for Research.
[6] http://www.accademiagiusprivatistieuropei.it The original version was French. It is translated also into English, German and Spanish.
[7] For more information: See http://www.common-core.org . The general editors are Ugo Mattei and Manuro Bussani. Rudolf B.Schlesinger as the Late Honorary Editor and Rodolfo Sacco as Honorary Editor.
[8] COM (2010) 348 final.

This Green Paper opened a public consultation period (from 1 July 2010 to 31 January 2011) on seven options:

Option 1: Publication of the results of the Expert Group to be used by European and national legislators as a source of inspiration when drafting legislation and by contractual parties when drafting their standard terms and conditions, also useful in higher education or professional training as a compendium drawn from the different contract law traditions of the Member States. However, if there is not endorsement at European level, the divergences would not be significantly reduced.

Option 2: An official "toolbox" for the legislator. This could be seen as a "toolbox" for the European Commission when drafting proposals for new legislation or when revising existing measures. Such an instrument would be effective immediately upon adoption by the Commission, without the approval of the Parliament and Council. It could be seen also as an inter-institutional agreement on a "toolbox" between the Commission, Parliament and Council to make consistent reference to its provisions when drafting and negotiating legislative proposals bearing on European Contract Law.

Nevertheless, a "toolbox" does not provide immediate, tangible internal market benefits since it will not remove divergences in Law and it cannot ensure a convergent application and interpretation of Union contract law by the courts.

Option 3: Commission Recommendation on European Contract Law addressed to the Member States, encouraging them to incorporate the instrument into their national laws. In this case, the disadvantage comes from considering a European Recommendation not having any binding effects on the Member States.

Option 4: Regulation setting up an optional instrument of European Contract Law. The Green paper considered a regulation setting up an optional instrument as "a second regime" in each Member State, thus providing parties with an option between two regimes of domestic contract law. It would insert into the national laws of the Member States as a self-standing set of contract law rules which could be chosen by the parties as the law regulating their contracts. It may be applicable in cross-border contracts only (internal market primarily, also useful in international private law), or in both cross-border and domestic contracts. Two important challenges arise from this solution: the rules must be very clear to the average user (consumer, specially) and secondly, it should provide legal certainty.

Option 5: Directive on European Contract Law. This option could harmonise national Contract Law on the basis of minimum common standards. Nevertheless, harmonisation through directives based on minimum harmonisation has not led to uniform implementation so far. The existing consumer *acquis* shows that. Therefore, harmonisation should be pursued through Regulations because directives can help decreasing legal difference among national legislations but this is not enough to get a major degree of European convergence.

Option 6: Regulation establishing a European Contract Law. This option would replace the diversity of national laws with a uniform European set of rules, not upon a choice by the parties, but as a matter of national law and for cross border transactions and domestic contracts. Subsidiarity and proportionality principles may be a problem in order to justify this option because replacing national laws on domestic contracts does not seem at least initially a proportionate measure to deal with the obstacles to trade in the internal market.

Option 7: Regulation establishing a European Civil Code. A Code includes not only Contract Law but also other types of obligations such as tort Law or benevolent intervention. A Civil Code is always a very extensive instrument. Subsidiarity and proportionality principles may be even more serious handicaps than for option 6.

Some of these options were ruled out at the first moment (i.e. European Civil Code). Other policy options, as we have said, were presented as binding or non-binding "toolbox" for

European politicians or legislators to be used in the adoption of new rules ensuring a more coherent and better regulation. The final option was done for setting up an optional instrument of European Contract Law (option 4) in 2010. An Expert Group was appointed by the European Commission in April 2010 to draft a Feasibility Study for a future Instrument in European Contract Law (published in May 2011)[9].

5. The choice for an optional instrument: CESL

Finally, a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) was adopted in October 2011[10]. The Proposal includes an Annex (I) of 186 articles focused only on sales, related services (installment, repair) and digital content supply. Not every contract or other civil rules are included. After a voting during the Justice and Home Affairs Council meeting held in 7-8th June 2012[11]) the debate on this Proposal started and it is still on-going. Eleven Member States were for and 10 against in that meeting.

This Proposal offers a single set of rules for cross-border contracts in all 27 EU countries. Member States will be able to extend it for domestic contracts. This may be very convenient otherwise sellers will have to be available in two models of contracts. CESL will work as a second national legal system in all European countries, not as the 28Th regime.

Some worries, doubts and misgivings arise from this optional instrument. For instance,

1. The *material scope* is very limited.

Many important contracts for consumers like service contracts; leasing and insurance contracts are not included. On the other hand, sales are already regulated in CISG, therefore ¿what need for more rules on sales? However, CESL implies maximum harmonisation and incorporates the regulation of the whole life of the contract and a regulation of contractual damages. We can say that CESL scope is broader than CISG (e.g. defects of consent, period of time and unfair terms control –these three aspects were not regulated in CISG) and it has an added value.

2. The *personal scope* is for Business-to-Consumer (B2C) and Business-to-Business (B2B) where at least one party is an SMEs (small and medium enterprises)[12].

This is the way to break down trade barriers and to benefit consumers by providing increased choice and a high level of protection. CESL contains a high level of consumer protection, it implies maximum harmonisation usually higher than the consumer national Law of most European countries. Nevertheless, the choice for the Common European Sales Law requires an agreement of the parties to that effect (opt-in, unlike CISG) and the choice in B2C contracts is valid only if the consumer's consent is given by an explicit –written- statement separate from the contract indicating the agreement to conclude a contract. This is strongly criticized because it might complicate the legal environment by adding a parallel system[13]. In addition to that, can consumers choose CESL given that consumer contracts are usually standard term contracts? Consumers will not be able to choose for CESL, only if business gives them that option. Therefore the legal contract system will be likely be chosen by the trader (*take it or leave it*). And at last and non least, to think that consumers are able to choose between two legal systems is not real.

[9] http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf A second non-official version was uploaded in the European Commission website in August 2011.
[10] COM (2011) 635 final. 2011/0284 (COD).
[11] http://europa.eu/rapid/press-release_PRES-12-241_en.htm
[12] Maximum 250 persons or annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million.
[13] If the contract is concluded by phone, consumers will not be obliged. The contract will not be binding.

3. The consistency with Rome I Regulation provisions (Art.6)[14]:

The Rome I Regulation will continue to apply and will be unaffected by the CESL. Under the conditions of Article 6(1) of the Rome I Regulation: If the parties in B2C transactions do not choose the applicable law, that law is the one of the habitual residence of the consumer under the normal operation of the Rome I Regulation. However, if the parties choose the law of another Member State than the consumer's law, such a choice may under the conditions of Article 6 (1) of the Rome I Regulation not deprive the consumer of the protection of the mandatory provisions of the law of his or her habitual residence according Article 6 (2). Therefore where the mandatory consumer protection provisions of the consumer´s Law provide a higher level of protection, these rules need to be respected. As a result, traders will need to find out in advance whether the law of the Member State of the consumer's habitual residence provides or not a higher level of protection and ensure that their contract is in compliance with all requirements. If the parties choose CESL within the applicable national law, this will be by definition the same in every Member State and only in very few occasions CESL consumer rules give not so high level of protection than the national rules.

In consequence, Member States should agree the level of protection really wanted for their national consumers and how to ensure the same (and high, of course) level of protection. A high level of consumer protection considering his/her position as the weaker party does not mean the same at the moment for all Member States.

4. Language

Not a minor problem is the language because legal terminology is rooted in every national legal tradition. This may be a very important handicap to Private Law harmonisation. A major effort will be done in the next future on this issue.

5. The legal basis

Legal basis is also controversial on the provisions of the TFEU such as Article 114.

Conclusion

It is plain to see that European Commission tries to meet its economic goals and recover from the economic crisis[15]. A European Contract Law instrument can help the Single market of more than twenty million companies open to five hundred million consumers. The abovementioned projects and combined efforts have paved slowly the way.

A strategy for making easier and less costly for businesses and consumers to conclude contracts may work with European model contract rules and clauses such as the abovementioned CESL. However, many doubts arise from this proposal and it must be said without any doubt that European Contract Law harmonisation is after three decades a work still in progress but more attractive than ever. The future optional instrument is a step forward towards a future unification of European Contract Law but for sure not the last one. Its future is uncertain and we will see which will be the next stage.

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LEGAL ASPECTS OF THE TRANSPOSITION OF DIRECTIVE 2001/23/EC REGARDING THE SAFEGUARDING OF EMPLOYEES' RIGHTS IN THE EVENT OF TRANSFERS IN THE ROMANIAN LAW

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Abstract

The transfer of undertakings, businesses or parts of undertakings or businesses by legal transfer or merger determine important changes in the structure of the participant entities. The change of their juridical organisation has significant consequences on the employees' rights, reason why, both nationally and internationally, normative acts that would regulate appropriate safeguarding mechanisms have been adopted. The paper aims to analyse the transposition into national law of the communitarian norms in the field. As a result, the legal aspects with regards to which the legislator chose a restrictive transposition, as well as the additional rights established by them in favour of the employees, in comparison to the directive are identified. At the same time, the study emphasizes the aspects with regards to which the Romanian law requires to be changed and therefore makes some proposals de lege ferenda, so that the transposition of the communitarian normative act into national law would be a precise one and consistent to the other dispositions regarding national law.

Keywords: *transfer, employees, labour contract, enterprise, transposition.*

1. Introduction

The objective of the European regulations regarding the employees' protection in the event of transfers is that of offering them a juridical framework that would safeguard them from illegal measures affecting the rights they won, such as the modification of the working conditions, or the individual or collective dismissal.

The consecrated principle is that of the employees' labour contracts continuity, under the same conditions they were concluded, in the event of employer change as a result of a transfer process by legal transfer or merger. **The employees' safeguarding mechanisms in the event of the stock company reorganisation aim at guaranteeing the respect of the employees' rights, those previously gained, within the new juridical structure.** The dispositions regarding the maintenance of the employees' rights in the event of transfers of undertakings, businesses or parts of them by legal transfer or merger have to become legal guaranties for the stability of the labour report and the content of the labour contract between the employees and the employers involved in this kind of operations.

The Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[1] was transposed into national law by Articles 173-174 of the Law 53/2003 of the Labour Code[2] and the Law 67/2006 concerning the

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[1] Published in the Official Journal, nº L 82/2001, p. 6-20.

[2] Republished in the Romanian Official Journal, 1st Part, nº 3445, the 18th of May 2011.

safeguarding of the employees' rights in the event of transfers of undertakings, businesses or parts of these ones[3].

With regards to the relation between the two articles in the Labour Code and the norms of the Law 67/2006, the doctrine states that these are "general norms, placed at the same legislative level"[4]. The way in which the national framework regarding the employees' safeguarding in the event of transfer of undertakings leads to the same conclusion, being shown that "in accordance with the Directive 2001/23/EC, Articles 173-174 of the Labour Code and the Law 67/2006 concerning the safeguarding of the employees' rights in the event of transfers of undertakings, businesses or parts of these ones[5] have been adopted. As to what we are concerned, we agree with the current opinion and we consider that the provisions of the Labour Code, by their general content, are meant to complete the legal framework regarding the employees' safeguarding regime.

The Law 67/2006 is divided into three chapters, the number of legal norms present in its articles being rather few. Of course, the quantitative criterion cannot be determinant within the qualification of the regulation activity, but it might be an appreciation factor for this one, namely if it applies to a normative act whose role is to introduce into national law communitarian norms and, therefore, it can be the object of a comparative analysis.

The study of the provisions of the Law 67/2006 compared to those provided by the Directive 2001/23/EC emphasizes to which level the transposition into national of the communitarian norms, has a restrictive or an extensive character.

2. Aspects with regards to which the Law 67/2006 is restrictive compared to the Directive 2001/23/EC

In accordance with the Directive 2001/23/EC that it transposes, the Law 67/2006 has as object of regulation the conditions under which the safeguarding of the employees' rights is accomplished, as provided in their individual labour contracts and in the collective labour agreement, in the event of transfers of undertakings, businesses or parts of these ones towards another employer, as a result of a legal transfer or merger process, according to the law (Article 1). Unlike the Directive, the national regulation is more restrictive under the following aspects:

[3] Published in the Romanian Official Journal, 1st Part, nº 276, the 28th or March 2006. It entered into force once Romania became a member of the European Union. Previously, the regulation in the field was realised by the dispositions of Articles 169-170 of the Labour Code and the Government Ordinance 48/1997 regarding the establishment of measures of social protection for employees in the event of transfer of shares or social parts of stock companies, repealed by the Law 67/2006.

[4] Uluitu, *Drepturile salariatilor in cazul transferului intreprinderii, al unitatii sau al unei parti ale acestora*, in Revista Romana de Dreptul Muncii nr. 1(2006),29. The author expressed this opinion in an analysis he wrote regarding a different point of view, contained by the doctrine, concerning the relevant provisions about the safeguarding of employees following the transfer of the undertakings in the former regulation prior to the Law 67/2006. Before, the regulation in the field was realised by the dispositions of Articles 169-170 of the Labour Code and the Government Ordinance 48/1997 regarding the establishment of social protection measures for employees in the event of transfer of the property right on shares or social parts of stock companies. The legal analysis is topical, although meanwhile there have been legislative modifications. The opinion we discussed stated that the juridical situations regulated by the Government Ordinance 48/1997 were different from those considered by the legal norms of the Labour Code, though both normative texts regard the employees' protection. (C.Galca-R*eorganizarea intreprinderilor. Analiza dispozitiilor noului Cod al muncii in raport cu legislatia europeana,* Editura Rosetti Bucuresti, 2005).

[5] I.T. Stefanescu, *Tratat teoretic si practice de drept al muncii*, (Bucharest: Universul Juridic Publishing House, 2012), 467.

a) If according to the Directive 2001/23/EC the juridical regime regarding the safeguarding of the employees' rights applies to any transfer of undertakings, businesses or parts of these ones, conforming to the Law 67/2006, the norms regarding the maintenance of the employees' rights are applicable only in case of a transfer resulting in the passage of the transferred unit property right from the cedent to the legal transferor.

It is true that according to Article 1, paragraph (1), letter (a) of the Directive 2001/23/EC, the provisions of the communitarian normative act "apply only in the case of any transfer of undertakings, businesses or parts of undertakings or businesses towards another employer, as a result of a conventional legal transfer or a merger".

Similarly to the Directive, the national law establishes that its provisions apply only in case of a transfer resulted from a legal transfer or a merger process, but, unlike the Directive, in a restrictive way compared to the transposed communitarian act (the above mentioned Directive), it defines in Article 4, letter (d) the notion of "transfer" as "the passage of undertakings, businesses or parts of these ones from the cedent's property to the legal transferor's property".

Such a limitation does not affect the employees' protection if the transfer takes place by a merger process. On the contrary, it can apply in case of an entity's legal transfer that doesn't result in a property transfer.

However, given that the underlying reasoning of the Directive is that the structural reorganisations by legal transfer, involving the employer's change, take place with the safeguarding of the employees' rights, and considering that such a structural modification happens in other juridical situations than those characterised by a property transfer, it is obvious that the Romanian law is contrary to the communitarian normative act.

On the other hand, the jurisprudence of the Court of Justice constantly showed in its decisions that the notion of "legal transfer" has a larger understanding than that of operation meant to ensure the transfer of an entity property right from one employer to another one. Thus, the Court stated that the communitarian directive applies not only when the owner of the enterprise remains the same, as it is the case of a rent contract, a legal transfer contract or a leasing contract. In one of the cases assigned to the Court, it was shown that "the Directive applies once the change of the physical or moral person responsible with the exploitation of the enterprise takes place, and which, under this consideration, assumes the obligations of the employer towards the employees working in the factory, whether the transfer of the enterprise ownership takes place or not[6].

It is true that these opinions of the Court of Justice were formulated with regard to the previous regulation in the matter (Directive 77/187/EEC), but the amendments contained in the Directive 2001/23/EEC do not change at all the given interpretation. Our conclusion is confirmed by the 8th consideration of the current regulation, according to which "Because of security reasons and legal transparency, it was necessary to clarify the notion of transfer, according to the jurisprudence of the Court of Justice. This clarification didn't change the application field of the Directive 77/187/EEC, as interpreted by the Court of Justice".

Thus, due to a deficient transposition activity, in full contradiction with the goal of the Directive and the jurisprudence in the matter of the Court of Justice, the Romanian legislator introduced an unacceptable limitation in the application field of the regulation[7]. The restrictive

[6] The *Allen* Decision from the 2nd of December, point nº 8 among the considerations, case C-234/98.

[7] For a more detailed analysis of the regulation regarding the employees' safeguarding according to the Law 67/2006, read O. Tinca, *Observatii critice la Legea nr. 67/2006 privind protectia drepturilor salariatilor in cazul transferului intreprinderii, al unitatii sau al unei parti ale acestora*, in Dreptul nr. 2(2007), 22-27.

regulation of the transfer notion allows a limited protection to the employees in all the situations when, despite a transfer of undertakings, it doesn't result in a property transfer.

It is the role of the jurisprudence to provide a larger understanding of the notion of company transfer. The national courts, within their interpretation competency, are the ones responsible to apply the national law according to the text and the finality of the directive.

De lege lata, finding a solution to cases regarding juridical issues related to the application of the Law 67/2006 can be based on the principle of primacy of the European Law on the member states' national law, and on the principle of precise interpretation. Therefore, given the inconsistency of the Romanian law with the communitarian Directive, national instances are obliged to give priority to the latter and to leave the national law unenforceable. Additionally, according to the principle of precise interpretation, they "must do everything related to their competence, while taking into consideration the entire national legislation and applying interpretation methods it knows, in order to guarantee the full effectiveness of the concerned directive and to reach to a solution in accordance with the final objective pursued by this one[8].

De lege ferenda, we propose the express abrogation of the provision of Article 4 of the Law 67/2006 stating that „the passage from the cedent's property in the legal transferor's property of undertakings, businesses or parts of these ones"

Of course, there is also the alternative of the quoted text reformulation, meaning that the enumeration of the juridical act or the juridical effects resulting from the transfer should be an illustrative, and not an exhaustive one.

We consider that such a regulation solution is useless and rather formal with regards to the inclusive notion of transfer, as it is provided by the Directive 2001/23/EC. Given the diversity of the juridical acts by means of which the transfer can be realised, and, implicitly, of the juridical effects it can generate, any terminological clarification can lead to a restriction of the application field of the norms concerning the employees. Moreover, the abrogation solution is consistent with the European principle of loyal cooperation.

b) If according to the Directive 2001/23/EEC, it can be considered as transfer of undertakings, businesses or parts of these one, the transfer of "an entity that preserves its identity, understood as organized assembly of means, whose objective is to undertake an economic activity, irrespective if that activity is central or auxiliary" (Article 1, letter (b)), the transposition of the communitarian disposition into the Law 67/2006 provides that the transfer's "aim is the continuation of the main or the secondary activity, regardless of whether it follows or not obtaining a profit" (Article 4, letter e).

The juridical literature expressed the opinion according to which the wording of the Romanian law is also more restrictive compared to that of the communitarian normative act. By defining the transfer, the national law provides that the cessionary's goal has to be that of developing the cedent's main or secondary activity, contrary to the directive which provides that the cessionary's objective has to be the undertaking of an economic activity, regardless if it continues the cedent's previous activity or not.

The faulty transposition of the directive is obvious, given that its dispositions didn't mention as an application condition the maintenance or the remission of the cedent's activity. *De lege ferenda*, the modification of the Article 4, letter (e), in terms of eliminating the condition of the development of the activity contained by the transfer notion, is required.

In our opinion, the interpretation possibility that the formulation of the legal text allows can lead to solutions contrary to the rationale of the regulation. More precisely, from the *per a*

[8] The *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos* (ELOG) Decision from the 4th of July 2006, case C-212/04.

contrario interpretation of the transfer definition provided by national law, it appears that the provisions of the Law 67/2006 regarding the employees' protection don't apply if the legal transferor's activity is different, but similar to that of the cedent. The absence of the goal for a main or secondary activity to continue within a transfer realised by legal transfer or merger excludes the operation in question from the application field of the Romanian law. Therefore, the accomplishment of the transfer without any obligation on the cedent or the cessionary regarding the employees is perfectly legal, so it won't lead to any penalty. In other words, the text we analysed allows both the cedent and the cessionary to take unfavourable decisions towards the employees and to avoid therefore the rights protection norms that concern them.

On the other hand, from the legal transferor's perspective, that, by hypothesis, wants to follow exactly the law 67/2006, being part of a transfer procedure implicitly means taking upon itself the obligation of preserving the cedent's activity. Or, certainly, this solution isn't consistent with the communitarian legislator's rationale either.

c) The Romanian legislator excluded from the application field of the Law 67/2006 those cases in which the cedent is the subject of a juridical reorganization process or bankruptcy, without any derogation. According to the Romanian law, in such situations, the entire transfer of the cedent's rights and obligations resulting from the individual labour contract and the collective labour agreement at the moment of the transfer aren't applicable. The fact that the cedent's insolvency procedures are or not established in order to liquidate its goods is unimportant for the solution chosen by the Romanian legislator.

From a purely technical point of view, this transposition method is in accordance with the provisions of Article 5 of the Directive, which gives the Member States the freedom to establish by internal dispositions, the juridical regime applicable to those situations when the cedent is the object of a bankruptcy procedure or other similar insolvency processes.

On the other hand, we consider that the transposition is criticisable because paragraph (2) of Article 5 of the Law 67/2006 is not correlated with Article 238 (4) of the Law 31/1990, according to which "The merger or the division, as defined in paragraphs (1) or (2), can be made although dissolved companies are in liquidation, provided that they hadn't started the liquidation process".

Thus, although the Romanian legislator considers as acceptable a transfer by merger if the cedent stock company knows a liquidation process, the same legislator doesn't appreciate as necessary to establish a safeguarding procedure for the employees of that company in terms of obliging the participating parts to the transfer to inform and consult the employees, on the one hand, and of forcing the legal transferor to preserve the employees' rights, on the other hand.

However, the meaning of the directive transposition is precisely that of giving the Member States the possibility to answer to the object of the communitarian normative act, taking into consideration at the same time the particularities of the legal national system regarding the regulated matter. We tend to believe, nevertheless, that this lack of systematization of the Romanian legislator is due to the lacking harmonization experience at that moment, and to the fear of being wrong. We affirm this as from the entire regulation one can observe that the national law avoids to establish any rule for the atypical hypotheses, preferring to keep quiet or to offer a blurry interpretation in such cases.

De lege ferenda, the Romanian legislator has to correct the inconsistency between the two normative acts, so that their law subjects can benefit from a clear and coherent juridical framework.

d) With regards to the juridical responsibility, the Law 67/2006 states that the inobservance by the cedent or the cessionary of the obligations provided by the law represents a contravention and is sanctioned with a fine between 1,500 (RON) and 3,000 (RON).

The competency for the contraventions establishment and the fines impositions belongs to the labour inspectors. We are in presence of a single article that regulates a sanction for the breaking of a law.

It is true that the provisions of the directive regarding the sanctions are, in what they are concerned, generally expressed, the reason why we cannot talk about its improper application.

In the literature the opinion was expressed according to which the text writing requires a high degree of generalisation, which is inadequate for the sanction of some contraventions. On the other hand, we believe that the European legislator's intention was to allow the Member States the possibility of choosing the most suitable sanctions.

It is our belief that beyond the possible justifications concerning the incomplete character of the legislative text, the little quantum of the fine raises big questions with regards to the efficiency of such a sanction. *De lege ferenda,* we consider as necessary a clear description of the circumstances under which sanctions are applicable, a differentiation of the sanctions according to the importance of the contravention and a rise of the fine quantum.

3. Aspects with regards to which the Law 67/2006 is extensive compared to the Directive 2001/23/EC

In the juridical literature it was considered that "the legislator didn't want to offer additional rights to the employees"[9]. Unlike this viewpoint, we identified some aspects with regards to which the Law 67/2006 offers an additional protection to the employees compared to the Directive 2001/23/EC:

a) The Romanian law does not provide any limitation to the employees' information and consulting obligation that the Directive provides. Under this aspect, the Romanian legislator understood to offer equal protection to all the employees concerned by the transfer.

Article 7, paragraph (5) of the Directive regulates the capacity of the Member States to limit the information and consulting obligations by the enterprises and units that, depending on the number of employees, fulfil the necessary conditions for the election or the establishment of a collegial body that would represent the employees.

Despite the possibility offered by the Directive, but also considering that, according to the Labour Code, in the units with more than 20 employees, workers' representatives can be designated, the Law 67/2006 doesn't introduce any difference regarding the content of the information and consulting obligations, depending on the number of employees. Thus, the information and consulting obligations have to be accomplished without any exception, both in the enterprises with less than 20 employees, and in those with more than 20 employees, and which fulfill therefore, from the point of view of the number of workers, the necessary conditions for the election or the establishment of a representative body.

Moreover, unlike the Directive, which established that in case there is no employees representative, due to causes independent from their will, the information process will be directly addressed to them, the Romanian law regulating the obligation to inform the employees, without making any distinction between the situation when the absence of a representative body is due to independent or dependent reasons from their will. Consequently, including the situations when the lack of a representative body can be attributed to the employees' choice, they have the right to be informed about the transfer process.

According to our national law, the employees' representatives are the representatives of the syndicates or, if there are no syndicates, the people chosen and delegated to represent the

[9] A.Uluitu, Drepturile salariatilor in cazul transferului intreprinderii, al unitatii sau al unei parti al acestora, in Revista Romana de Dreptul Muncii nr. 1(2006), 35.

workers according to the law (Article 4, letter e) of the Law 67/2006). If the undertakings, the business or parts of these lose their autonomy following a transfer, the transferred employees will be represented, with their expressed agreement, by the representatives from the legal transferor's enterprise, until the establishment or the nomination of new representatives, according to the law (Article 10, paragraph 2 of the Law 67/2006).

b) The Romanian law provides a special term during which the obligation to inform and consult the employees' has to be accomplished by the cedent, respectively by the legal transferor, eliminating therefore the failures possibly generated by the expression "in due time", that the directive contains.

According to the provisions of Article 12 (1), informing the representatives of, or the employees themselves, by the cessionary or the legal transferor has to be performed at least 30 days before the transfer. Beside this certain term, the Romanian legislator expressly demands for a written form of the information to exist. Concerning the content of the information, apart the transfer date, or the date suggested for the transfer, the reasons of the transfer, the juridical, economic and social consequences of the transfer for the employees, the envisioned measures concerning the employees as provided by the directive, the Law 67/2006 requires that the written form should also contain information regarding work conditions and work qualification.

Finally, according to Article 11 of the Law 67/2006, the same 30-day minimum term has to be respected also with regards to the obligation to consult with the employees' representatives, with the goal of reaching an agreement, whenever the cedent or the legal transferor envisages taking measures with regards to their own employees. In the juridical literature it was shown that the obligation of reaching an agreement is an obligation of means, and not an obligation of result, therefore this will be considered as accomplished irrespective of the conclusion of an agreement between the cedent, respectively the legal transferor, and the employees, agreement whose object should the envisaged measures[10].

c) The Law 67/2006 contains some provisions more favourable to the collective labour contract compared to the Directive.

Just like the directive, national norms regulate the legal transferor's obligation to respect the rights given to the employees through the collective labour contract existing in the moment when the transfer takes place and in force until its call-off or expiration, respectively the application of a new convention as a result of a new negotiation of the contract; a new contract cannot enter into force before a minimum of one year after the transfer, even if the contracting parts agree to renegotiate before the expiration of the one-year term.

In the juridical literature, there is an opinion according to which, as an exception to Article 133, paragraph 2 of the law 62/2011, according to which in every unit only one collective labour contract is to exist, in situations when both the cedent and the legal transferor apply a collective labour contract, " in the same unit will temporarily coexist two collective labour contracts (until the annual renegotiation of one of them)"[11].

Additionally to the directive, the Romanian law establishes rules in the matter in case the transferred entity doesn't preserve its autonomy. Therefore, according to Article 9, paragraph 3, if, as a result of the transfer, the undertakings, the business, the unit or parts of these ones don't keep their autonomy, and the collective labour agreement applicable to the legal transferor's level is more favourable, the transferred employees will benefit from the collective labour agreement that is more favourable to them.

[10] I.T. Stefanescu, ibidem, p. 473.
[11] I.T. Stefanescu, ibidem, p. 472.

4. Conclusions

The study of the transposition into national law of the communitarian norms regarding the employees' protection in the event of transfers of undertakings, businesses or parts of these ones revealed important disparities between the two normative acts. From this point of view, we consider the opinion expressed in the juridical literature according to which "the Law 67/2006 represents a proof of progress in the field, by catching up with the most important provisions of the Directive 23/2001/EC and having only one default, which is however an important one, that of including within its application sphere only the situations concerning the property transfer"[12], as being wrong

Unlike other harmonization normative acts, Law 67/2006 is rather an unsuccessful experience. If, commonly and naturally, national transposition laws are more practical and more detailed compared to Directives, in this case the contrary is true. For a better understanding of the national law, the prior study of the Directive is necessary; this most certainly is not the way to go for the beneficiary of the law. The Romanian legislator lost sight of the fact that Directives addresses Member States, and that every Member State has the obligation to transpose it correctly, clearly in the interest of those benefiting from it. Furthermore, given that a directive's provisions can be invoked directly only in a limited number of situations and conditions, the transposition activity has to be characterized by rigor, and national norms have to be self-assured and efficient.

In our opinion, *de lege lata*, the criticised aspects can lead in practice to inequitable solutions, starting with the narrowing, for various reasons, of the application field of the dispositions contained in the Law 67/2006, up to an inefficient sanctioning when breaking its provisions. As we have shown in our *de lege ferenda* proposals, a future revision of the legislative text requires modifications, as to the purpose of the transposed Directive to be reached no matter the interpretation.

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[12] P. A. Levente, Protecţia angajatilor in cazurile de schimbari intervenite in persoana angajatorilor în UE si in Romania, in Studia Universitatis Babes-Bolyai nr.1(2007) 10.

"AGREEMENTS", "DECISIONS" AND "CONCERTED PRACTICES": KEY CONCEPTS IN THE ANALYSIS OF ANTICOMPETITIVE AGREEMENTS

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Abstract

In their economic activity, undertakings conclude many agreements between them. But agreements between undertakings which can distort the competition -anticompetitive agreements- are prohibited. The Romanian and EU law prohibit "all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition". However, the terms "agreements", "decisions" or "concerted practices" are nowhere defined in the EU Treaties or in the Romanian law. These terms are key concepts in the analysis of anticompetitive agreements which can distort the competition. In the lack of a legal definition, these concepts have generated a complex body of jurisprudence, which has to be identified. The analysis of these key concepts necessarily entails the conceptual delimitation of the notions. On this purpose, the relevant legal provisions will be identified in the Romanian and EU law, as well as the decisions of the European Court of Justice in this matter. The present paper intends to present the conceptual evolution of the analysed notions, paying special attention to concerted practices and to parallel behaviour in price fixing on the market.

Keywords: *anticompetitive agreements, agreements between undertakings, decisions by associations of undertakings, concerted practices, parallel behaviour.*

Introduction

The purpose of this paper is the analysis of the notions "agreements", "decisions" and "concerted practices", which represent key concepts in the analysis of the anti-competitive agreements which can distort the competition. The desire to maintain themselves on a particular market, at a higher level of profitability or at a reasonable level at least, can lead the undertakings to adopt an anticompetitive behaviour more easily. This may result from the existence of anticompetitive agreements and concerted practices, especially in light of recent economic crises. Agreements between undertakings which can distort the competition - anticompetitive agreements- are prohibited. The analysis of any anticompetitive practice begins necessarily with the identification of the conduct of undertaking and the verification whether or not the conduct at hand represents an "anticompetitive agreement" to which the competition rules address.

The Romanian and EU law prohibit all "agreements between undertakings", "decisions by associations of undertakings" and "concerted practice" which have as their object or effect the prevention, restriction or distortion of competition. The study of these notions is important because they are key concept in the analysis of anticompetitive agreements which restrict natural competition. Also, these notions are nowhere defined in the EU Treaties or in the Romanian law; as such, the concepts has generated a complex body of jurisprudence, which has to be identified.

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With the purpose of determining the meaning of anticompetitive agreements, we will analyse the special significance of each of these three notions, ”agreements”, ”decisions by associations of undertakings” and ”concerted practices” in the context of competition law, we will identify and analyse the main normative dispositions with regard to these aspects, both at national and European levels, and we will present many jurisprudential solutions of the European Law Court, from which are resulted the criteria that have to be taken into consideration for the identification of anticompetitive agreements.

In comparison with other already existent specialty literature on competition law, the present paper intends to present the conceptual evolution of the analysed notions, paying special attention to concerted practices and to parallel behaviour in price fixing on the market.

Content

1. The notion of “anticompetitive agreements”.

The existence of a competitive and undistorted milieu is a fundamental condition for the existence of a functional market economy. Thus, it is necessary to protect the market against acts or facts that could lead to the prevention, restriction or distortion of competition. Among these, the anticompetitive practices of undertakings are especially harmful, irrespective of the way in which they take place: anticompetitive agreements or the abuse of dominant position on a certain market.

There are two main types of anticompetitive practices: the anticompetitive agreements concluded between two or more undertakings in order to coordinate their market behaviour and the undertaking’s abuse of dominant position on a certain relevant market. The object of the present analysis is represented by the anticompetitive agreements within the activity of undertakings as the main form of anticompetitive practice. In their economic activities, undertakings conclude naturally a large number of agreements between them, without becoming illicit in this manner. However, those anticompetitive agreements within the activity of undertakings whose object or effect is the prevention, restriction or distortion of competition are prohibited. In these circumstances, it is necessary to analyze the notion of “anticompetitive agreement” in order to determine whether or not the agreements concluded in the activity of undertakings become illicit from a competitive point of view. In order to become competitively illicit, the agreements between undertakings must regard a coordination of the undertaking’s behaviour on the market, to the detriment of free competition.

In the European Union Law, The Treaty on the Functioning of the European Union (EU Treaties/TFEU)[1], contains the primary legal regulation with regard to competition, which applies to undertakings and associations of undertakings. According to article 101 TFEU, “The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market”.

Similarly, in the Romanian Law, the Competition Law no. 21/1996[2] prohibits ”any agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or may have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it”.

[1] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union C 83/1, 30.3.2010. *Brevitas causa*, throughout the present study, it will be indicate by the abbreviation TFEU.

[2] Official Gazette no. 88/30.04.1996.

As a result of the abovementioned regulatory provisions, the European and national legislation prohibit, without expressly defining: agreements between undertakings, decisions of associations of undertakings and concerted practices. These are forms in which one can express the anticompetitive behaviour of undertakings prohibited by art. 101 paragraph 1 TFEU and art. 5 alignment (1) of Law no. 21/1996 which we will designate in a general concept of *anticompetitive agreement* that includes any and all forms of expression, whether it is an agreement/understanding between undertakings, a decision of the association of undertakings or a concerted practice of two or more undertakings.

Moreover, from the same regulatory provisions revealed we may conclude that an anticompetitive agreement is prohibited if the following conditions are met: i) the existence of an anticompetitive agreement between undertakings, whether it is an "agreement between undertakings", a "decision of an association of undertakings" or a "concerted practice"; ii) the anticompetitive agreement brings prejudice to the competition: through its object or its effect, the anticompetitive agreement hinders, restricts or distorts the competition; iii) if the anticompetitive agreement reached distorts the competition in the internal market thus affecting trade between Member States, the provisions of the TFEU become applicable.

Concluding, the **anticompetitive agreements** are *any agreements between two or more undertakings, regardless of their form of expression, concluded in order to coordinate their market behaviour and having as their object or effect the prevention, restriction or distortion of competition*.

2. Forms of expression of anticompetitive agreements.

The anticompetitive agreements may take various forms:

a) Depending on the undertakings' market level, whether or not they are competing with each other, we distinguish between: horizontal anticompetitive agreements and vertical anticompetitive agreements.

The *horizontal anticompetitive agreements* are agreements concluded between undertakings that operate on the same market level and compete with each other, for example the agreements between two manufacturers or two distributors.

The *vertical anticompetitive agreements* are agreements concluded between undertakings that operate on different levels of the manufacture - distribution chain and do not compete with each other.

b) Depending on the materialization of the agreement of the involved undertakings, we distinguish between express anticompetitive agreements and tacit anticompetitive agreements.

The *express anticompetitive agreements* are proper agreements concluded between undertakings for the purpose of meeting their expression of will, irrespective of their way to externalize the expression of will (it is irrelevant whether or not the expression of will is materialized through a document *ad probationem*).

The *tacit anticompetitive agreements* represent a coordination of the prohibited behaviour, concluded between two or more undertakings, such practice being initiated by an undertaking and subsequently followed precisely by another undertaking.

c) Other forms of expression of anticompetitive agreements.

No matter if they are express/tacit or horizontal/vertical anticompetitive agreements, the anticompetitive agreements may be represented in 3 main forms of expression: *proper agreements between undertakings, decisions of associations of undertakings or concerted practices.* Since they are fundamental concepts in the analysis of anticompetitive agreements, they will be specifically described below.

3. Conceptual distinctions between the forms of expression of the anticompetitive agreement.

The analysis of any anticompetitive practices begins necessarily with the identification of the conduct of undertaking and the verification whether or not the conduct at hand represents an "anticompetitive agreement" to which the competition rules address.

Both the European and the national legislators govern three main forms of expression of an anticompetitive agreement – "agreements between undertakings", "decisions of associations of undertakings" and "concerted practice of undertakings" – without, however, defining them. An extensive jurisprudence of the European Courts allows, however, the observation of the main definitive notes of these concepts and thus the determination of the scope of the interdiction governed by art. 101 paragraph 1 TFEU and art. 5 of Law no. 21/1996.

According to a general principle formulated in the jurisprudence of the European Courts, any undertaking must determine autonomously the behaviour it intends to adopt on the market[3]. Given this fact, the European Courts have defined the "agreements", "decisions" and "concerted practices" as European law concepts which allow a differentiation between the unilateral behaviour of an undertaking and the coordination of behaviours or the collusions between undertakings[4]. The unilateral behaviour falls under article 102 TFEU and art. 6 of Law no. 21/1996 on the abuse of dominant position.

The type of coordination of behaviours or collusion between undertakings that falls under article 101/1 TFEU consists in the situation in which at least one undertaking binds itself in relation with another undertaking to adopt a certain behaviour on the market or in which, following the relations between the undertakings, any uncertainty concerning their market behaviour is removed or at least significantly reduced[5]. The coordination does not have to be necessarily express but it may also be tacit. In order to be able to consider that an understanding has been concluded by tacit consent, an undertaking must expressly or tacitly invite another undertaking to achieve a common goal[6].

The forms of manifestation of an anticompetitive agreement can be extremely diverse. As suggestively underlined in the doctrine, the only important question is whether or not more undertakings had a common will to behave in a manner that would bring prejudice to competition[7]. In this context, we distinguish the main forms of expression of an anticompetitive agreement:

3.1. "Agreement between undertakings".

The concept of "agreement between undertakings" is not legally defined in the European law. In the Romanian law, article 5 of Law no. 21/1996 only prohibits it, however without defining it by correlation with article 49 of the same Law[8]. It appears that it regards "any commitments, conventions or contractual clauses that relate to an anticompetitive practice".

[3] As an example, we will cite the Anic Partecipazioni Case, C-49/92, consideration 116; The Suiker Unie joined cases, C- 40- 48/73, consideration 173. This case, like the other to which we refer throughout this paperwork is published on the website of the European Union Court of Justice, *www.curia.eu.int*.

[4] Consideration 108 of the decision of Anic Partecipazioni, cited in the above note and Sandoz Prodotti Case, C-277/87.

[5] Cimenteries joined cases CBR, T-25/95, considerations 1849 and 1852; British Sugar joined cases et al., T-202/98, considerations 58 – 60.

[6] Bundesverband der Arzneimittel-Importeure joined cases, C-2/01 and C-3/01, consideration 102.

[7] André Decocq, Georges Decocq, *Droit de la concurrence*, 4th edition, L.G.D.J., 2010, p. 305.

[8] According to art. 49 of Law no. 21/1996, "Any agreements or decisions prohibited by articles 5 and 6 herein, as well as by articles 101 and 102 in the Treaty on the Functioning of the European Union are null

The European case law interprets extensively the analyzed concept. Thus, it includes any type of agreement, written or oral, conditional or gentlemen's agreement, the concept of understanding being centered around the existence of an expression of will between at least two parties, whereas the form in which it manifests itself is not important[9].

Considering the multitude of ways of expression of an agreement between undertakings, in the analysis performed on this concept we distinguish between:

3.1.1. Proper agreements.

An initial definition must be made in the analysis performed: any way to express an agreement between undertakings must be analyzed only if it has an anticompetitive object or effect. In this sense, the doctrine rightfully noted that the term of agreement between undertakings "involves in the competition law a more accurate content than the one in the common law (that includes any agreement regardless of its purpose) and can only regard the agreements whose object or effect would be anticompetitive"[10] and that "therefore are kept in view the condemnable agreements that affect the freedom of the relevant market[11].

As regards the proper agreements, the Court of Justice of the European Union[12] set out a general formula, stating that "in order for art. 101/1 TFEU to be effective, it is sufficient for the agreement to be the parties' expression of will, without the need for it to constitute a valid and binding contract according to the national law"[13] and then underlined that "in order to have an agreement, it is sufficient for undertakings to have expressed their joint will to behave in a certain determined way on the market"[14]. The contract must not necessarily be concluded in writing[15].

Therefore we may conclude that a *proper agreement* represents a *contract* in the meaning of the Civil Code[16], materialized or not ad probationem in a document, in whole or in part (one or more contractual clauses) through which undertakings coordinate their behaviour on the market so as to restrict the competition.

Regardless of the form. The agreements concluded may be bi/multilateral and may be in any *form*: sale-purchase, rent, concession, memorandum of association, etc. Their common denominator is the monopolistic purpose pursued by the concerned undertakings[17].

Regardless of the nature of the contract in which the agreement is stated. Pragmatism - the essence of competition law – implies that the *apparent nature* of the contract must not be

and void, i.e. any agreements, conventions or contract provisions concerning anticompetitive practices, as well as any acts which violate the provisions under article 9 herein".

[9] Bayer vs. Commission Case, T-41/1996.

[10] Azema, Jacques, *Le droit francais de la concurrence*, Paris, 1989, p. 304.

[11] Căpăţînă, Octavian, *Commercial Competition Law. Pathological Competition. Monopolism*, Lumina Lex Publishing House, Bucharest, 1993, p. 41.

[12] *Brevitas causa*, throughout the present study, The Court of Justice of the European Union will be named *The Court* or indicated by the abbreviation *CJEU*.

[13] Sandoz Case, C-277/87.

[14] Petrofina vs. Commission Case, T-2/89; BASF vs. Commission Case, T-4/89; Hüls vs. Commission Case, T-9/89.

[15] The Decision of the Commission of 9 December 1998 on the Greek Ferries, OJ no. L. 109 of 27.05.1999.

[16] According to art. 1166 of the Civil Code, the contract is an agreement of wills between two or more persons with the intent to establish, modify or extinguish a legal relationship.

[17] O. Căpăţînă, *op.cit.*, p. 41.

taken into account. Can therefore be qualified as proper agreements the statute of a company[18], the shareholders' pacts[19], an agreement on intellectual property rights[20].

The apparent nature of the contract does not matter. Thus, the convention on fixing the port services rates in the port of Constanţa, sanctioned by the Competition Council (vertical and horizontal agreements had been concluded between several manufacturers of chemical fertilizers and several service providers), was called "negotiation protocol"[21].

The Court of Justice held that an anticompetitive agreement can be inserted in a transaction, stating that "prohibiting the agreements between undertakings, the Treaty makes no distinction between agreements whose object is to end a dispute and agreements aimed at other purposes"[22].

Regardless of the validity of the agreement. Regarding the validity of the agreement between undertakings (of course, apart from its incompatibility with the competition rules), the Court underlined that it is not necessary for the parties' expression of will to represent a valid contract according to the national law[23]. In this respect, also the European Commission explained that "in a secret agreement, the parties do not expect their collusive arrangement to have contractual force and no enforcement procedure is required, as a civil contract would have"[24].

3.1.2. Apparently unilateral agreements

The general framework of the business relationships between two or more undertakings may confer to a unilateral document, by its content and form, the features of a bi/multilateral agreement. This is the case of an apparently unilateral decision of an undertaking to which another undertaking (generally, part of the distribution network of the first) shall conform its behaviour. Since the conditions set by the issuing undertaking are accepted, usually in a tacit manner (however being put into practice) by the recipient undertakings, we may speak about an expression of will of the parties, so that in reality, there is a genuine anticompetitive agreement, subjected to the provisions of art. 101 TFEU and art. 5 of Law no. 21/1996. The distinction between agreements and unilateral behaviours is important to be made, because agreements fall under art. 101 TFEU, while unilateral behaviours are regulated by art. 102 TFEU.

The more common examples of apparently unilateral agreements met in practice are the documents (letters, circulars, invoices, invitations, etc.) addressed by a manufacturer to its distributors, containing various "directions" concerning the market behaviour, often tacitly accepted by its recipients and which were classified as agreements in the sense of art. 101 TFEU, such as: a circular addressed by Ford - Germany to its resellers, by which it informed them to no longer accept orders for right hand drive vehicles (to be sold in the United Kingdom)[25]; an invoice addressed by Sandoz to its distributors which had printed overleaf the

[18] Hendrik Evert Dijkstra vs. Friesland Cooperation Case, C-319/93.
[19] The Decision of the Commission in the Cegetel 4 Case, 20 May 1999, JOCE L 218 of 18 August 1999.
[20] The Telecom Development Decision, 27 July 1999, JOCE L 218, 18 August 1999.
[21] The Decision of the Competition Council no. 24 of 5 May 1998, in the *Competition Council Report 1998*, p. 89-93.
[22] Bayer vs. Société de constructions mecaniques Rennecke Case, C-65/86.
[23] Sandoz Case, C-277/87.
[24] The Decision in the PVC Agreements Case din 21 December 1988, JOCE no. L 74 of 17 March 1989.
[25] Ford AG vs. Commission Cases, C- 25-26/84, Decision of 17 September 1985.

annotation "prohibited for export"[26]; the "invitation" addressed by BMW to its distributors to stop delivering vehicles to independent leasing companies[27].

We may therefore conclude, based on a constant European case-law[28], that if we can demonstrate the express or tacit acceptance by the other parties of the measures adopted or imposed in an apparently unilateral way by an undertaking, an apparently unilateral behaviour of an undertaking in the contractual relations with its distributors can form the basis of an agreement between undertakings within the meaning of art. 101/1 TFEU. It is however essential to demonstrate the express or tacit accord of the addressee undertakings regarding the behaviour proposed by the issuing undertaking[29].

3.1.3. Informal agreements; gentlemen's agreements.

In order to have an anticompetitive agreement, it is not necessary for it to be legally binding under the applicable rules of the national civil law. What matters is that the agreement represents the parties' expression of will, under which they held themselves responsible. Consequently, simple moral commitments, promises, simple mission statements can therefore be regarded as agreements.

Both the doctrine[30] and the jurisprudence[31] acknowledged to the commitments of honour, *the gentlemen's agreements*, the features of anticompetitive agreements.

The term *gentlemen's agreements* (Anglo-Saxon specific term) designates an informal agreement, whether or not materialized in a document, between two or more parties, whose essence is that the fulfillment of the obligations assumed is based on the honour of the parties and not on the coercive force of the law.

The integration of the agreements of honour in the concept of anticompetitive agreement was justified in doctrine by the fact that every legal system governing the anticompetitive activity must have provisions to sanction the less formal types of agreements. If competition rules would work only when an express, official agreement is concluded then they would have little practical utility, since the undertakings will try to achieve their anticompetitive goals through less formal means[32].

A typical example of sanctionable agreement of honour was illustrated in the Quinine Cartel Case. A Dutch company manufacturing chemical, pharmaceutical and related products signed with other European manufacturers of such products an export arrangement on the price fixing and market allocation, which affected the trade with non-member states. They also concluded a gentlemen's agreement which extended the arrangement to sales within the European internal market and the parties agreed that the breach of the agreement represents, ipso facto, a breach of the export arrangement. The Court held the violation of the competition rules by the gentlemen's agreement concluded according to which the manufacturers were protecting their own national market and were restricting the competition within the internal market. The

[26] Sandoz Case, C-277/87, Decision of 11.01.1990.
[27] VW vs. Commission Case, C-62/98.
[28] Cases 32/78, 36/78 - 82/78 BMW Belgium et al. vs. Commission par. 28 - 30; Ford and Ford Europe, par. 21; Case 75/84 Metro vs. Commission (Metro II), par. 72 and 73; Case C-277/87 Sandoz vs. Commission, par. 7 - 12; Case C-70/93 BMW vs. ALD, par. 16 and 17.
[29] Bayer vs. Commission Case, T-41/96, par.71.
[30] Gavalda, Christian; Parleani, Gilbert, *Droit des affaires de l'Union Européenne*, ed. 6, Litec, Paris, 2010, p. 311; A. Decocq, G. Decocq, *op,cit.,* p. 306.
[31] The Quinine Cartel Case, C- 41, 44 and 45/69.
[32] Craig, Paul; Grainne de Burca, *EU Law*, 4th edition, Hamangiu Publishing House, Bucharest, 2009, p. 1190.

assertion that, in fact, the gentlemen's agreement ceased has been removed, because the analysis of the parties' behaviour demonstrated that they have complied with their agreement (even if it was informal)[33].

Consequently, informal agreements can be sanctioned under art. 101 TFEU and the mere fact that the parties claim to have abolished them will not be considered determinant. It is necessary to carefully analyze the facts in order to establish if it was plausible, in economic terms, for the market behaviour to be achieved in the absence of the secret agreement.

To the same effect, it was decided that informal agreements can be classified as anticompetitive agreements even if they are not compulsory by their nature and the absence of formal measures to monitor the implementation does not necessarily affect the gravity of the violation[34].

Concluding, we can remark that an "agreement between undertakings" means the joint expression of will between two or more undertakings through which they coordinate their market behaviour to the detriment of competition, regardless of the form of the joint expression of will, the nature of the contract in which the joint expression of will is included or the validity of the contract.

3.2. "Decision by association of undertakings".

The association of undertakings is a group carried into effect on professional criteria, of more undertakings that operate on the same relevant market, while its members keep their behavioural autonomy. The European case law held that a professional group will represent an association of undertakings if it adopts rules that are the expression of will of the representatives of members of a profession and that aim to obtain a specific behaviour from the members of the said profession within their business activity[35].

Bringing together undertakings under an associative form in itself is not prohibited by law. However, when, through the decisions adopted by the association of undertakings, the same restricts the competition, this behaviour falls under the rules of competition and is prohibited.

"The decision by association of undertakings" is one of the forms of expression of an anticompetitive agreement. As ensued from the provisions of art. 101 TFEU and art. 5 of Law no. 21/1996, *the decision by association of undertakings represents* any decision of the governing body of an association of undertakings whose object or effect is the restriction of competition. In order to have this object or effect, the said decision should have the power to impose certain behaviours to the association members in their economic activity on the market. The way in which the said decision is formally presented has no relevance and the title or apparent nature of the document is also irrelevant.

If the decision of the association is meant to impose upon its members a certain economic behaviour on the market, it represents a decision prohibited by the rules of competition law, even if formally it takes the form of a simple recommendation, with non-binding features[36]. The decisions of the association should guide the behaviours of its members as an understanding between undertakings[37].

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[33] The Quinine Cartel Case, C- 41, 44 and 45/69.
[34] Henbach vs. Commission Case, T-64/02.
[35] Wouters Case (J.C.J. Wouters, J. W. Savelbergh and PRICE Waterhouse), C- 309/99, the Decision of the Court of 19.02.2001regarding the Netherlands Bar Association, par. 64.
[36] The Commission, 13 Apr 1994, *Stichting Certificatie Kraaverhuurbedrijf*, JOCE, L. 117, 7 May 1994. To the same purpose: Case C-45/85, Verband der Sachversicherer, Decision of 27 January 1987.
[37] Augustin Fuerea, *Business European Union Law*, Universul Juridic Publishing House, Bucharest, 2006, p. 218.

The decisions by associations of undertakings may take various *forms*, such as directives, internal regulations, circulars, etc., which the adherent undertakings apply effectively, complying with the provision sent from the center[38]. Since such decisions (regardless of their name: decisions, protocols, minutes, etc.) of the governing body are mandatory for all the association members, we are virtually reaching a similar result to that generated by a proper agreement. The anticompetitive threat is equally serious, which explains the legal assimilation of decisions with the monopolistic agreements[39].

The foreign doctrine stated that the decision by association of undertakings may be also represented by the association's *articles of incorporation*[40]. The Romanian literature held to the contrary, that the monopolistic decision adopted by the governing body of an association of undertakings must be adopted during its activity, and not before its coming into existence; the decision is issued during the activity of the association of undertakings and should not be confused with the articles of incorporation itself, because if the articles of incorporation would have monopolistic features, it would represent a proper agreement[41].

In my opinion, the articles of incorporation of an association of undertakings may represent both a proper agreement (in the relationships between the undertakings that form the association) and a decision by association of undertakings (towards third party undertakings wishing to subsequently join the association).

In the European Union case-law, the concept of *decision by associations of undertakings* has been broadly interpreted.

A *regulation* such as the one adopted by the Netherlands Bar Association concerning the collaboration between lawyers and other liberal professions was regarded as representing a decision by an association of undertakings[42].

The *resolutions* adopted at a meeting of the association or the *recommendations* of an association may constitute decisions of the association of undertakings when they indicate the decision of the said association to coordinate the behaviour of its members[43]. An act qualified as recommendation can be regarded as violating the provisions of art. 101 of the Treaty, whatever the legal status of this act, if it constitutes the expression of will of the association of economic agents to coordinate its members' behaviour on the market[44].

The *binding* decisions or resolutions of the Board of Directors, of the association or the rules belonging to the association's President that limit to a certain extent the commercial freedom of the members represent decisions by an association in the meaning of the competition law.

Moreover, a *recommendation* of an association of undertakings may constitute a decision of the association when, regardless of its legal status, it is an expression of its policy to coordinate the behaviour of its members[45]. Even if the *recommendation is not binding or it has not been fully applied*, it may constitute a decision of an association and will be prohibited if, in fact, its purpose was to determine, or was able to have the effect of determining the behaviour of

[38] O. Căpăţână, *op.cit.,* p. 44.
[39] Căpăţînă, Octavian, The New Antimonopoly Regulation in Competition Law, in Dreptul no. 7/1996.
[40] Wish, Richard, *Competition Law*, 4th edition, Butterworths Publishing House, London, 2001, p. 82; Jones, Alison; Sufrin, Brenda*, EC Competition Law, Text, Cases & Materials*, 3rd edition, Oxford University Press, 2008, p. 173.
[41] Căpăţînă, Octavian, The New Antimonopoly Regulation in Competition Law, op.cit.
[42] Wouters Case, C-309/99.
[43] IAZ International Belgium NV vs. Commission Case, C-96/82.
[44] Verband der Sachversicherer e.V. vs. Commission Case, C-45/85, Decision CEJ of 27 January 1987; The Decision of the European Commission in the FENEX Case, par. 41 and 42.
[45] Verband der Sachversicherer e.V. vs. Commission Case, *above cited*, note 2.

its members. The non-binding recommendation represents a decision in the meaning under review, if it is implemented by the members of the association[46].

The European courts have ruled that a recommendation of the association of water suppliers addressed to its members, by which they should not have connected "unauthorized" applications (without a conformity tag provided by another association) to the main system, represents a decision capable to restrict competition[47].

In another case[48], the Commission found that the practice of the association to prepare and forward recommended rates to its members falls under the Treaty. Thus, while it is normal for an association/organization to offer assistance to its members, it must not exert any direct or indirect influence over the competition between members, particularly by sending rates applicable to all undertakings, regardless of the cost structure of each of them. An association's communication of recommended rates is a practice likely to determine the involved undertakings to align their own rates, regardless of their costs. Such method determines the undertakings that obtain reduced costs to drop the prices, thus creating an artificial advantage for those undertakings that do not have control over production costs. According to the decision of the European Commission in this case, a recommendation of an association on the application by its members of certain rates is anticompetitive if the following conditions are met: the association members have a common interest in influencing the market by increasing the prices; the nature of the recommendation, which, although described as non-binding, highlights, in binding terms, a collective increase of the rates; the association's statute allows it to coordinate the activity of its members.

Nationally, the Competition Council assessed that the decision of the Board of Directors of the Romanian Grain Storage Merchants Association represents a decision by an association of undertakings, having the object to influence the competitive behaviour of its members and to restrict the competition on the grain storage market in the South - South-East and West of Romania, by communicating certain rates to be applied by its members[49].

Furthermore, a decision adopted by the Board of Directors of the Dental Technicians National Association establishing certain reference rates for dental prosthetic works and their publication in the Association's journal, was regarded as representing a decision by an association of undertakings. It was noted that the recommended rates, even if classified by the association as reference rates, had as an object the coordination within the relevant market of the economic behaviour of dental technicians. And the publication of reference rates is likely to affect the competition on the dental prosthetics market because it allows the players of this market to anticipate with a high degree of certainty the pricing strategy of their competitors[50].

Likewise, it was determined that the decision of the management and governing executives of the Body of Expert and Licensed Accountants of Romania (CECCAR) to adopt a Regulation setting out in mandatory terms virtually all the professional fees and its publication in the Body's journals and, starting with 2009 in the Official Gazette of Romania, part I, reflects their decision to coordinate the behaviour of CECCAR members in conformity with the provisions of the Regulation and represents a decision by association of undertakings within the meaning of art. 5 alignment (1) of the Law and art. 101 of the Treaty. It was held that, although CECCAR argues that the decision to adopt this Regulation represents a punctual work required by its members as a direction in order not to deviate from the quality standards and to protect on

[46] van Landewyck Case, C-218/78.
[47] IAZ International Belgium NV vs. Commission Case, C-96/82.
[48] The Decision of the Commission published in OJ no. L 181/28 of 1996.
[49] The Decision of the Competition Council no. 63 of 7 December 2009.
[50] The Decision of the Competition Council no. 19 of 26 March 2008.

these lines the customers, in reality the Regulation represents more than a guiding methodology for setting the fees, its adoption decision being taken with the purpose of influencing the commercial behaviour of its members and thus falling under art. 5 alignment (1) and art. 101 of the Treaty[51].

Concluding, the "decision by association of undertakings" means any decision: i) originating from the governing body of the association and having an anticompetitive object or effect; ii) regardless of the form it takes and the apparent nature of the act (it may be a regulation, circular, directive, recommendation, protocol, minute, etc.); iii) which is intended to require from its members a certain market economic behaviour; iv) if it is not binding and if it does not have as object the restriction of the competition, it is reprehensible if actually implemented by the associated undertakings because only this way will be fulfilled the requirement that the decision of the association of undertakings must have the effect of restricting competition.

3.3. "Concerted practice"

3.3.1. Concept

The concept of "concerted practice" has its origins in the American antitrust law, section 1 of Sheman Act using the concept of "conspiracy", the name being afterwards widespread as "concerted actions". The concept was taken over by the European legislation and thus is also found in the Romanian law. The term "arrangements", with a similar meaning, is also found in the English law, in the UK Restrictive Trade Practice Act.

Neither the Treaty on the Functioning of the European Union nor Law no. 21/1996 defines the concept of concerted practice. Strictly etymologically, the concerted practice suggests a conscious and deliberate alignment of undertakings to a certain market behaviour.

The scope of the concept has been established in the European Union case-law. The analysis of the concept has its onset in two famous cases, called the "dyestuffs matter" and "European sugar industry", an interpretation that settled and was afterwards constant in the subsequent decisions.

In the Dyestuffs matter case[52], the Court defined the concerted practice as representing *a form of coordination between undertakings that, without reaching the level at which a proper agreement would have been concluded, knowingly substitutes the practical cooperation to the risks of competition*.

In the European sugar industry case[53], the CJEU defined the concerted practice in the same way and concurrently stressed the main principle of the European competition concept: any undertaking must determine autonomously its policy on the market, including the choice of addressees of its own offers and sales. In these circumstances, the Court concluded that that mentioned principle rigorously opposes any direct or indirect contact between undertakings, having as its object or effect either to influence the market behaviour of an actual and potential competitor or to disclose to the competitor its own market behaviour, as such established or only projected.

From the case-law highlighted defining notes, we can conclude that the *concerted practice is a form of coordination between undertakings of their economic behaviour in a certain market which, without reaching the stage of achieving a proper agreement, leads to the*

[51] The Decision of the Competition Council no. 47 of 2 November 2010.
[52] Joined cases C- 48-49 and 57/69 I.C.I. vs. Commission (Dyestuffs), Decision CJCE of 14 July 1972.
[53] Suiker Unie Case, C-40-48, Decision of 16 February 1975.

disappearance or reduction of the competition uncertainties that would have existed if undertakings would have established autonomously their market behaviour.

The doctrine[54] emphasized that the concerted practice requires the gathering of objective and subjective elements, both with a negative condition. The objective element is given by the existence, at a certain time, of a similar and parallel behaviour of the undertakings concerned. Moreover, there must be also a subjective element: the parallel behaviour must be consciously adopted by each undertaking, in exchange for achieving a common goal; the intentions must be convergent and lead to an effective cooperation. The alignment to the common behaviour is usually achieved through the exchange of relevant information between undertakings. The negative condition implies, by assumption, the exclusion of the proper anticompetitive agreement as the basis of the similar behaviour, because otherwise we would return to the first assumption, the proper agreement.

3.3.2. Ways of achievement

The concerted practice results from the knowledge of the economical policy of the opponents and is usually achieved by organizing often secret meetings/*gatherings*, as it happened in the Polypropylene Case[55], or through the *exchange of information* accomplished in any way (through discussions between representatives, by telephone, by fax, by e-mail, even by professional press etc.)[56], without the necessity for the volume and quality of the information provided to be mutually equal[57].

It is however necessary for the exchange of information to be mutual (even if the information exchanged are not of equal value), because only this way we may hold the fraudulent "common arrangement", which, by definition, assumes the participation/involvement of all the undertakings concerned (any anticompetitive agreement, including any concerted behaviour, assumes by definition at least two undertakings), which by the mutual exchange of information on their future economic actions eliminate the risk of competition (when an undertaking knows the future strategy of the competitor, any competition risk is removed because it can "adjust" its behaviour by reference to the one expected by the adversary).

In the European case-law it was noted that the participation at meetings related to price fixing and sales volume level setting, during which information was exchanged between competitors regarding the prices they intended to charge, their profitability thresholds or sales figures constitute a concerted practice. This is because the participating undertakings were unable to disregard such information disclosed in determining their future market behaviour[58]. Furthermore, it was decided that the exchange of information between competitor undertakings regarding their deliveries represents a concerted practice[59].

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[54] O. Căpăţînă, Commercial Competition Law. Pathological Competition. Monopolism, op.cit., p. 45.

[55] The Commission, 23 April 1986, The Polypropylene Case; The Commission, 21 February 1994, *AIE*, JOCE, L. 68 of 11 March 1994, for the exchange of information between the members (oil companies) of an association (The International Association for Energy).

[56] Mihai, Emilia, *Competition Law*, All Beck Publishing House, Bucharest, 2004, p. 73. The author cites a case in which the Romanian Competition Council assessed as "concerted behaviour" the exchange of information between two companies, in order to falsify an auction (Decision no. 66 of 28 Oct. 1998).

[57] Both the participation at meetings and the exchange of information between parties regarding the industrial sugar price were held by the Commission as forms of concerted practice in the sugar case (*above cited*), even if the effects of such anticompetitive behaviours could not be accurately quantified.

[58] Shell International Chemical Company Ltd. Vs. Commission Case, T-11/89.

[59] Trefilunion SA vs. Commission Case, T-148/89.

In the event that an undertaking participates in a concerted practice but, once informed about the future actions of its competitors, decides not to follow the agreed behaviour, the question arises whether it can be sanctioned for being a concertist? The answer is yes, because the concerted practice has removed for the said undertaking the uncertainty that it would have been given by the existence of normal competition.

If an undertaking is present at a meeting where the parties agree on a particular market behaviour, it may be guilty of violating the competition rules even if its own market behaviour does not correspond to the type of behaviour to which the agreement referred to[60]. The European case-law states that "the fact that an undertaking does not follow the decisions taken in meetings with a clear anticompetitive purpose is not of a nature to relieve it of full responsibility for the participation in the cartel, if it has not publicly distanced itself from the object of the agreement". Such delimitation should take the form of a withdrawal from the agreement and public distance from what has been established in the agreement so that the other participants can unequivocally understand the gesture of leaving the cartel[61].

3.3.3. Behavioural parallelism in price fixing – evidence of concerted practice?

As already shown, the concerted practice essentially involves a coordination of the undertakings' behaviours, a form of coordination which does not reach the level of a proper anticompetitive agreement. Therefore, even if we cannot hold the existence of a proper anticompetitive agreement, undertakings are punished for concerting their behaviours. One of the most dangerous anticompetitive agreements is the one whose object is price fixing, because it has particularly important harmful effects on the free competition, to the detriment of the final consumer. Repressed by the European Union legislation and condemned by any national legislation, such anticompetitive practice is generally hidden by its authors.

In this context, since the proper anticompetitive agreement cannot be demonstrated and *idem est non esse et non probari*, obviously, undertakings cannot be sanctioned for concluding a proper anticompetitive agreement on price fixing. Therefore, often, in order to sanction them, must be held the existence of a concerted practice, thus assessing that the fixing of an identical price or the simultaneous increase with the same percentage and in the same periods of time of the prices used by the competitor undertakings demonstrate a concerted practice.

In this sense, the doctrine[62] pointed out that undertakings can be sufficiently astute as to destroy the written evidence or to rely only on verbal agreements; the secret agreement remains however real and the construction of the concerted practice term must be flexible enough to include this fact of the economic life; on the other hand, it was also emphasized the danger of including the parallel price fixing in the concept of concerted practice, which does not operate in oligopoly.

If the price uniformity represents the result of the logical action within an oligopoly and there is no secret agreement, then sanctioning the undertakings is neither rational nor fair. The issue is no longer behavioural in the sense that the parties engage in a behaviour different from that which would exist under normal conditions within the same type of market, but the issue is structural, meaning that this type of market normally generates this type of response[63].

The theory of oligopolistic interdependence has generated criticism. Among the most vehement is the one arguing that the mentioned theory does not explain satisfactorily its essential affirmation, meaning that the members of an oligopoly can get supracompetitive profits

[60] Sarrio vs. Commission Case, T-334/94, par. 118.
[61] ADM Case, T-329/01, par.246, Westfalen Gassen vs. Commission Case, T-303/02, par. 77, 84 and 124.
[62] Craig, Paul; Grainne de Burca, *EU Law*, *op.cit.,* p. 1194.
[63] Craig, Paul; Grainne de Burca, *EU Law*, *op.cit*, p. 1194

without concluding an agreement. The assertion that it is being developed a price leading pattern by which an undertaking increases the price and this fact acts as a signal for the others to follow, is not a very convincing answer that prices remain thus parallel without a conspiracy between the members of the oligopoly[64].

In my opinion, the existence of a parallel behaviour of the competitor undertakings as regards price fixing cannot by itself, *de plano*, demonstrate the concerted practice.

Thus, when in a certain market there is a behavioural parallelism of undertakings in price fixing, there are two possibilities: i) this parallelism is a collusive alignment and if the collusion is demonstrated, we may hold the existence of a concerted practice; ii) it is only the expression of a conscious, intelligent and quick reaction of an undertaking to the challenge of its competitor, without becoming competitively illicit.

The second possibility may exist in several assumptions, such as:

- on a relevant market activates a powerful undertaking that practices a certain price and without any concerting, the other undertakings will practice a similar price, whether they follow the pattern of the first as it turned profitable or they will not be able to charge a price higher than the one of the first undertaking because it will not be paid by the consumers;

- on transparent markets where each undertaking knows the price of the competitors, prices will be equal or roughly similar, without the existence of concerting. The CJEU ruled in this respect in a case where market transparency was determined by the existence of a patent license[65].

- in the case of oligopoly. An oligopolistic competition market is characterized by the existence of a small number of competitors that hold close market shares, without being able to speak about a considerable force of one of them in relation to the others. In such market conditions (for example, the mobile operators market) there is a close link between the competitors behaviour, the action of one of them is followed by a corresponding response from the others and each change of strategy is achieved by taking into account the probable response of the competitors. Consequently, the specific features of the oligopolistic market *can* determine the price alignment (therefore without a concerted practice between competitors).

Especially in cases of oligopoly, it is difficult to determine if the price alignment is a natural result of the oligopolistic market or it represents a concerted practice. This difficulty can be also noticed in the analysis of the Court's decisions.

In the Dyestuffs case[66], it was noted that in the dyestuffs industry there were successive price increases, almost simultaneously, with identical percentages, without having occurred an agreement between the manufacturers. They defended themselves claiming that the price increase was due to the oligopolistic structure of the market in terms of dyestuffs. The CJEU rejected the argument, holding the following: "the successive increases in prices and the conditions under which they were made cannot be explained only by the oligopolistic structure of the market, but are the result of a concerted practice. It is not credible that, without a prior thorough concerting, the major manufacturers supplying the European common market would have increased several times, with identical percentages, the price of the same series of products, at about the same time and in many countries in which the conditions of the dyestuffs market are different:"

In the Wood-Pulp case, the Commission held that a large number of pulp manufacturers imposed similar prices and similarly and uniformly changed them, which proved the concerting and did not hold the argument that the price was given by the oligopolistic market on which they

[64] R. Wish, *op.cit.,* p. 511.
[65] Ahlstrom Osakevhtio Case, no. C-89/85.
[66] ICI Case, Decision of 14 July 1972, *above cited.*

operated. The Court removed a significant part of the Commission's conclusions and judged[67] that the behavioural parallelism can be regarded as proof of concerting only if the concerting is the only plausible explanation for that behaviour. Noting that undertakings have the possibility to intelligently adapt their behaviour to the one of their competitors, furthermore the Court held that prices parallelism and their evolution could be explained accordingly by the oligopolistic market trends. It emphasized that a rigorous economic analysis is necessary in order to determine if there is another plausible explanation for the parties' behaviour.

In conclusion, in the absence of concerting evidence, the simple behavioural parallelism in price fixing cannot be regarded as a concerted practice. The existence of a concerted practice could be held only when the analysis performed will reveal that there is no other plausible explanation for the behavioural similarity visible on the market, as it is impossible to determine, depending on the context, a reason other than concerting.

3.3.4. The concerted practice. The need to implement it on the market

The Romanian doctrine stated that it is not necessary for the illicit joint action envisaged by the concerted practice to be implemented[68]. As far as we are concerned, we believe that, given that the concerted practice is by definition a *behavioural* coordination, it can be observed only in the existence of a certain market behaviour of the undertakings, which implies the need for its implementation. The same conclusion results from the case-law of the Court, which indicated that the concept of concerted practice implies, besides undertakings concerting together, a market behaviour subsequent to this concerting and a cause-effect link between these two elements[69].

Conclusions

The anticompetitive agreements, namely those which have as their object or effect the prevention, restriction or distortion of competition, are prohibited. Therefore to become competitively illicit, the agreements between undertakings must regard, to the detriment of free competition, a coordination of the market behaviour of undertakings.

The European and national legislation, without expressly defining, prohibit: agreements/arrangements between undertakings, decisions by associations of undertakings and concerted practices. These are the forms of expression of the anticompetitive behaviour of undertakings prohibited by art. 101 paragraph 1 TFEU and art. 5 alignment (1) of Law no. 21/1996, which we describe by a general concept of anticompetitive agreement that includes any form of expression, whether it is an agreement/arrangement between undertakings, a decision by association of undertakings or a concerted practice of two or more undertakings.

The "anticompetitive agreements" are any agreements between two or more undertakings, regardless of their form of expression, concluded to coordinate their market behaviour and having as their object or effect the prevention, restriction or distortion of competition.

The forms of manifestation of an anticompetitive agreement can be extremely different, the main forms of expression of an anticompetitive agreement being: "agreement between undertakings", "decisions by associations of undertakings' or "concerted practice".

An "agreement between undertakings" means the joint expression of will between two or more undertakings through which they coordinate their market behaviour to the detriment of

[67] Decision 85/202, OJ no. L 85 of 1985.
[68] A. Fuerea, *op.cit.,* p. 220.
[69] Huls AG vs. Commission Case (Polypropylene), C-199/92.

competition, regardless of the form of the arrangement, the nature of the contract in which the joint expression of will is included or the validity of the contract.

The "decision by association of undertakings" means any decision of the governing body of an association of undertakings which has as its object or effect the restriction of competition. In order to have this object or effect, the said decision should have the power to impose a certain behaviour to the association members in their economic activity on the market. It is not relevant how the said decision is presented in formal terms and the title or apparent nature of the act is unimportant.

The "concerted practice" is a form of coordination between undertakings of their economic behaviour on a certain market which, without reaching the stage of achieving a proper understanding, leads to the disappearance or reduction of the competition uncertainties that would have existed if the undertakings would have established autonomously their market behaviour.

Future research would involve: identifying difficulties in establishing the autonomous behaviour on the market; determining the attribute of undertaking of certain entities that do not have autonomy of decision and act within groups of companies resorting to anticompetitive agreements, in order to establish who is to be applied the sanction; the analysis of the exchange of information as a possible concerted practice.

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PREDECESSORS AND PERPETRATORS OF COOPERATIVE SYSTEMS IN EUROPE

Ștefan NAUBAUER*

Abstract

The study hereby aims to bring forward afresh the cooperative ideas that have animated particularly the last two centuries of the past millennium. In the present context, labelled by the major difficulties the European labour market is facing, the proper knowledge and understanding of cooperative principles provide the premises for their implementation with the view to meet the current economic and social stability exigencies in today's Europe.

Keywords: *cooperative systems; cooperative principles; the European labour market.*

I. Introduction

The area covered by the subject matter of this study is the doctrine of cooperative property developed by the predecessors and perpetrators of cooperative systems in Europe. The study hereby is purposeful as it aims to bring forward afresh the cooperative ideas that have animated particularly the last two centuries of the past millennium. The manner in which we shall deal with the objective undertaken hereunder rests upon the detailed analysis of cooperative concepts that grounded the cooperative systems in Europe. With regard to the state of knowledge in matters dealt with and the contributions already established in the specialty literature, we argue hereunder that the status of legal relations existing within the cooperative system has been disregarded in the Romanian doctrine during the past decades, except for a monograph on labour relations in handicraft cooperative property published in 2012 by the author of this study and several issues reported in some papers released in the field of labour law, though not covering the matters reviewed hereunder.

II.1. France

In the valleys of the Pyrenees, dairy cooperatives[1] were initially established – the so-called "sociétés fromagères" or "les fruitières" - with the aim of jointly selling the milk, to process it into derivatives, respectively.[2] In the 17th century, these existed under this form, but later on were converted into real capitalist enterprises.[3] In addition to dairies, in France also emerged cooperatives – producers' cooperative societies - of viticulturists, with the aim of jointly retailing wine or grapes.[4]

In terms of cooperative ideas, a notable place is vested upon Charles Fourier (1772-1837),

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[1] It was noted that traces of peasant groups established for milk processing have been discovered in France since the early part of the Middle Ages – see G. Mladenatz, *The History of Cooperative Doctrines*, The Romanian Cooperative System National Office, „Lupta" Graphic Arts Institute N. Stroilă, Bucharest, 1931, p. 11.

[2] I.N. Angelescu, *Cooperation and Socialism in Europe*, The Graphic Arts Establishment Albert Baer, Bucharest, 1913, p. 4.

[3] Ibidem.

[4] *Ibidem*, pp. 4-5 and the bibliography quoted thereunder.

thinker who imagined utopia of human association in the so-called "phalanxes" (following the organization of armies led by Alexander Macedon) installed in common colonies, known as "phalansteries".[5] These "social palaces" would be gathering together people from all walks of life, the exponents of each and any human character, while conserving individual property and wealth inequality, hence the conclusion that the phalanstery was not designed as a communist colony. [6] According to Fourier's theory, wage regime would have been replaced by associated work, owner of the means of production, which would be provided in series, each associate moving freely from one job to another, in accordance with the dictum: "harmony follows the series".[7] As it has been noticed, however, the Fourierist phalanstery was not purely cooperative, whereas it would be performed not based on shareholders' equity, but with the help of philanthropists – which, by the end of Fourier's life, failed to be achieved – and, moreover, it preserved equity income, that cooperatives do not accept.[8]

Philipe Buchez (1796-1865), considered the founder of the cooperative in France[9], envisaged a statist and hierarchical organization governed by the Christian belief[10] of love thy neighbour, where the associated work replaces the principle of competition among workers.[11] However, Buchez did not intend to restrain freedom of industry and fostered maintenance of competition, whereas this provided for "the impetus for progress in productivity".[12] Unlike the Fourierist concept, Buchez promoted the idea of the self-help working class, without the intervention of the State or of philanthropists, advocating for the establishment of a permanent capital[13] and the establishment of a "labour State bank".[14] According to his theory, "cooperatives are a kind of brotherhood, of industrial communities, formed by craftsmen within the same branch", Buchez seeking to achieve in industry the trinity of the French Revolution virtues: fraternity, liberty and equality.[15] In 1831, Buchez published a periodical entitled "The Social Sciences Journal", which later became "The European".[16] He himself established two producers' cooperatives: a carpentry (1832, though wound up shortly following its set-up) and a jewellery ("l'association des travailleurs bijoutiers en doré", in 1834, which operated until 1873, continuing to print the periodical named "The European" under the title "The Workshop").[17]

Louis Blanc (1813-1882) outlined his ideas in a booklet entitled "The Organization of Labour", putting forth that the settlement of the social problem related to the modern economic and social order rests with the organisation of labour by means of an association – term designating a real cooperative, in the modern sense of the word, whereas the term "cooperative"

[5] G. Mladenatz, *op. cit*., p. 31.
[6] *Ibidem*, pp. 31-32.
[7] *Ibidem*, p. 32.
[8] *Ibidem*, pp. 32 and 34. However, under the influence of Fourierism, in 1859, Jean-Baptiste André Godin (1817-1888) established in Guise, France, a so-called "familistère", enterprise converted in 1880 into a cooperative - *ibidem*, p. 33.
[9] I.N. Angelescu, *op. cit*., p. 43.
[10] The sole condition for admission to the workshop (cooperative) was that workers are Christians – see I.N. Angelescu, *op. cit*., p. 48.
[11] G. Mladenatz, *op. cit*., p. 36.
[12] I.N. Angelescu, *op. cit*., p. 47.
[13] See also F. Espagne, *Le modèle buchézien et les réserves impartageables*, RECMA, 4/1994, no. 253-254, p. 54.
[14] G. Mladenatz, *op. cit*., p. 36.
[15] I.N. Angelescu, *op. cit*., pp. 46-47.
[16] *Ibidem*, p. 44.
[17] G. Mladenatz, *op. cit*., p. 37; I.N. Angelescu, *op. cit*., p. 49.

was not yet used by that time in France.[18] In his opinion, the economic system cell was represented by the so-called "social workshop" – an association (labour production cooperative) "resting on a democratic basis and on the spirit of fraternal solidarity, formed of workers sharing the same profession (*corporate-support system* – our parenthesis)".[19] Considering, however, that, at the beginning, the workers do not have the capital necessary for the establishment of such associations, Blanc argued that the State should provide finance in this respect, thus becoming the "banker of the poor", taking in charge, however, the management of certain businesses.[20] Interesting is the fact that it was proposed that the workers should be paid out as per the formula "produced according to the abilities and amount of labour invested, and consumed according to their own needs", the solution being judged as a Communist principle in terms of the distribution of the "social product".[21] We should also note that Blanc has picked up the idea put forward by Buchez of setting up an inalienable and indivisible fund whose purpose was cooperative labour perpetration and cooperative system prevalence.[22]

At the end of 1848, a so-called "Chamber of Labour" (*chambre du travail*) was established in France, which served also as industrial court.[23] One year later, a federative of cooperatives was established in Paris (*l'Union des associations fraternelles de Paris*), in order to serve: the mutual exchange of goods between cooperatives; settlement of liabilities and receivables; the propagation of the concept of association; the guidance of cooperatives.[24]

Following the coup d'état dated December 2nd, 1851, and Napoleon III proclamation as Emperor, the cooperative movement is discontinued and a "complete silence stretches over the years, until 1863, when things change and new items make it start a new period in the history of French cooperative movement".[25]

In the Law of July 24th, 1867 on joint-stock companies has been inserted Title III (Articles 48-54) – "Dispositions particulières aux sociétés à capital variable", aiming to foster the development of cooperative societies.[26]

In 1894 was held in Lyon the first National Congress of Agricultural Unions.

Charles Gide (1847-1932), Professor at the Universities of Bordeaux, Montpellier, Paris and, finally, at the Collège de France, put forth the possibility of elimination of the employee regime within cooperatives, namely "a labour organization in which the worker would no longer be a completely passive production tool, but would take within the company his part of initiative, control, responsibilities and benefits, as well"[27]. This idea was developed by Hyacinthe Dubreuil (1883-1971), a member of the Administrative Commission of the General Confederation of Labour, which did not judge producers' cooperatives a solution to the social problem, but removing these cooperatives was not tantamount in his view to the rejection of the cooperative-like principle, but deemed necessary to identify a new form of cooperation – *the*

[18] G. Mladenatz, *op. cit.*, p. 38.
[19] Ibidem.
[20] *Ibidem*, pp. 38 and 39. In terms of this approach, Blanc was in fact considered one of the first creators of the doctrine of State socialism – *ibidem*, p. 39.
[21] *Ibidem*, p. 38.
[22] *Ibidem*, p. 39.
[23] I.N. Angelescu, *op. cit*., p. 55.
[24] Ibidem.
[25] *Ibidem*, pp. 56-57 and the bibliography quoted thereunder.
[26] C.C. Zamfirescu, *The legal regime of cooperative societies under Law of 1929*, "Independenţa" Printing House, Bucharest, 1932, p. 12.
[27] Ch. Gide, Des institutions en vue de la transformation ou de l´abolition du salariat, Paris, 1920, apud G. Mladenatz, op. cit., p. 162.

labour cooperative (limited partnership workshop).[28]

The development of cooperatives was accompanied by strong political claims directed against capitalism and liberalism. Thus, in their theoretical and practical treatise on companies, Houpin and Bosvieux argued that, irrespective of their line of business, cooperatives always aim, eventually, to suppress the intermediaries in order to reduce costs or increase gains. They are characterized by the joining, in one and the same person, of two qualities, generally separate, between which there is a natural antinomy (employer and employee, vendor and consumer, banker and borrowing customer) and by the flat supporting role the capital plays thereunder in relation to personal involvement and members' work.[29]

2. Germany

The oldest forms of cooperative societies of the old German Empire were "the insurance companies for cases of misfortune, death or illness".[30] Early forms of credit cooperatives have been identified since the time of King Frederick II of Prussia (1740-1786), on whose initiative many farmers have set up such companies with the view to get credit on favourable terms.[31]

The founder of the cooperative movement in Germany is considered, though, Hermann Schulze-Delitzsch (1808-1883), the father of a basically cooperative system adopted in other countries as well, in particular by the cooperative organizations of the urban middle-class - small craftsmen employers and traders.[32] Schulze was a supporter of the liberal-individualist economic concept, deeming the principles of the society's capitalist order immutable, the cooperative movement being, in its view, a means of combating state communism.[33] One of the most prominent of his followers – Professor Hans Crüger - stated that "the purpose of the cooperative organization is to offer small businesses the opportunity to enjoy as well the advantages of the modern capitalist system".[34] The first cooperative associations established by Schulze in his hometown - Delitzsch, located near Halle, in Saxony, subsequently incorporated to Prussia - were: a benefit home for sickness and death whose members had equal rights in the General Meeting; an association of carpenters for the supply of raw materials, based on the joint liability of its members.[35] In 1850, Schulze founded the first *credit union* in Delitzsch, which differed from the popular credit institutions previously established in Berlin by the fact that it claimed its members the payment of interest on loans granted, as well as the accumulation of a personal fund to be deducted from loans obtained.[36] The credit unions established by Schulze were not charitable institutions, but were grounded on the idea of the members' *self-help*, the aim of the association being pursued in terms of the paid-up capital of partners and based on a reserve fund set up by taking-overs of the net realized gain, consecrating at the same time the unlimited joint and several liability of partners: all for one and one for all.[37] In addition to credit unions, Schulze also created *consumer cooperatives*, called "associations to purchase the necessities of life", but

[28] H. Dubreuil, *La République industrielle*, Paris, 1924, *apud* G. Mladenatz, *op. cit*., p. 164.
[29] T. II, 1935, no. 1568, apud W. Meynet, L´adoption et l´evolution du statut coopératif en France: les passerelles existantes entre les formes sociales coopératives et les formes sociales non coopératives, in D. Hiez (sous la direction), Droit comparé des coopératives européennes, Ed. Larcier, Bruxelles, 2009, p. 40.
[30] I.N. Angelescu, *op. cit*., pp. 5-6.
[31] *Ibidem*, p. 6.
[32] G. Mladenatz, *op. cit*., p. 64.
[33] *Ibidem*, p. 118.
[34] H. Crüger, Einführung in das deutsche Genossenschaftswesen, Berlin, 1907, apud G. Mladenatz, op. cit., p. 118.
[35] G. Mladenatz, *op. cit*., p. 65.
[36] Ibidem.
[37] *Ibidem*, pp. 65-66.

the last stage of the co-op's development – "the system's peak", in his view, was to be a *producers' cooperative*.[38] A special resonance also had the works published by Schulze: *Assoziationsbuch für deutsche Handwerker und Arbeiter* (1853), *Vorschuss-und Kredit-Vereine als Volksbanken* (1855) and *Die arbeitenden Klassen und das Assoziationswesen* (1858).[39] In 1854, at his initiative was issued the first co-op periodical: Die Innung der Zukunft, later renamed *Blätter für Genossenschaftswesen*.[40] In June 1859 was organized in Weimar the first Congress of Schulze-Delitzsch credit unions, deciding upon the establishment of a Central Office (Zentral-Korrespondenzbureau) headed by Schulze, converted in 1864 in a General Union of Self-Help Co-ops (Algemeiner Verband der auf Selbsthide beruhenden Erwerbs-und Wirtschaftsgenossenschaften), also under the leadership of Schulze, until his death (Potsdam, April 29th, 1883).[41] We also note that, in 1863, Schulze has developed a draft law on the cooperative movement, based on which, on March 27th, 1867, was enacted the first cooperative code of Prussia.[42]

As regards the *rural cooperative* type, it was established by the German Friedrich Wilhelm Raiffeisen (1818-1888).[43] In 1848(9) he set up the "Union in Aid of lmpoverished Farmers" in Flammersfeld, whose main activity was directed against usurious cattle trade, which later turned into a credit and savings institution.[44] In 1854, Raiffeisen founded an aid society in Heddesdorf (Neuwied), shortly replacing it with a credit company (Heddesdorfer Darlehnskassen-Verein), and in 1862 he set up four credit and savings institutions in different towns.[45] These companies were founded on the principle of benevolent assistance of people in distress and joint and unlimited liability: "the spirit of solidarity and love for thy neighbour".[46] Raiffeisen-type credit and savings institutions had a limited number of members[47] who neither submitted capital[48], nor did they receive dividends, the co-op's profit being directed to a reserve fund that preserved its indivisible character at the time of dissolution of the Company.[49] Within these societies, offices were held for free, with the exclusion of the accounting officer secretary, decision justified by the following three reasons: cooperative security, development of the solidarity spirit and economy in expenditure.[50] It is worth mentioning the fact that Raiffeisen intended to even set up a life insurance company, but did not

[38] *Ibidem*, p. 69.
[39] *Ibidem*, p. 66.
[40] *Ibidem*, p. 67.
[41] *Ibidem*, pp. 66-67.
[42] *Ibidem*, p. 66.
[43] *Ibidem*, p. 73.
[44] *Ibidem*, pp. 73-74.
[45] *Ibidem*, p. 74.
[46] *Ibidem*, pp. 75-76.
[47] Between 600 and 3,000 members, regularly the cooperative's territory corresponding to a parish - *ibidem*, p. 78.
[48] Considering that the German law on cooperation, enacted as already shown based on the draft bill proposed by Hermann Schulze-Delitzsch, required cooperatives to have their share capital established by the members' contribution, but did not set a minimum capital, Raiffeisen established for its cooperatives shares almost formal (at times, even sub-units of the national currency) - *ibidem*, p. 79.
[49] *Ibidem*, p. 75. The members had no right over this fund, neither during the operation of the cooperative, nor upon its dissolution when it was transferred to another cooperative - *ibidem*, p. 79.
[50] Ibidem, pp. 75 and 80. Professor Charles Gide noticed, during a course at the Collège de France - finding whose resonances seem more current than ever before – "how the concept of Buchez (see supra - our parenthesis) and of Raiffeisen is absolutely contrary to all financial organizations' practices of today, as well as to all States, that through the contracting of debts repayable on long terms the future generations are to cover the costs made by the present generation (our emphasis)" - ibidem, p. 80, footnote no. 1.

receive an operating permit thereto.[51] In 1866, Raiffeisen published a book that has been successful also outside his country's borders, including on the territory of Romania[52] – *Die Darlehnskassen-Vereine als Mittel der Abhilfe der Not der ländlichen Bevölkerung, sowie auch der städtischen Handwerker und Arbeiter Praktische Anleitung zur Bildung solcher Vereine gestützt auf sechzehnjährige Erfahrung als Gründer derselben*, printed in five editions until his death, occurred in 1888.[53] In 1872 was established the first federal credit union in the Rhineland (Rheinische landwirtschaftliche Genossenschaftsbank), succeeded in 1874 by two similar federal unions for Westphalia and Hesse, and in 1876 the regional federal unions have been grouped in the central credit institute, in the form of a private company limited by shares (Landwirtschaftliche Zentral-Darlehnskasse für Deutschland, later Deutsche Raiffeisenbank A.-G.).[54] One year later was established Raiffeisen Union of Agricultural Cooperatives (Generalverband der deutschen Raiffeisen-Genossenschaften).[55]

Karl Marx (1818-1883), though failing to give too much importance to co-op as a means of introduction of a new social order[56], admitted, however, that the cooperative movement has its own purpose, subordinated though to the political action.[57] In 1864, Marx brought forward before the International Workingmen's Association a reference document – "Inaugural address" – in which he envisaged cooperation as "a great social experiment", which proved that production on a large scale, and in accord with the behests of modern science, may be carried on without the existence of a class of masters employing a class of hands.[58]

Ferdinand Lassalle (1825-1864), influenced in his conception of cooperative property by the ideas of Louis Blanc[59], advocated for the workers' production cooperatives, through which they had the chance to become their own entrepreneurs and thus eliminate the so-called "brazen law of wages"[60]: "*to make of the working class its own master*, here's the way, the only way to repeal this cruel law, the law of brass which determines the salary."[61] As Blanc, Lassalle recognized the important role of the State played in financially supporting these producers' cooperatives, except that the first thinker admitted the State leadership for the period in which the workers were not yet prepared to manage their own "social workshops".[62]

Wilhelm Haas (1839-1913) – whose cooperative property concept has proven to be a compromise between the Raiffeisen and Schulze-Delitzsch systems – set up in Friedberg, in

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[51] Ibidem, p. 81.
[52] Under the influence of this work, Dr. Karl Wolff in Sibiu decided to establish similar cooperatives for the Saxons of Transylvania - ibidem, p. 77, footnote no. 1.
[53] Ibidem.
[54] Ibidem, pp. 76-77 and 83.
[55] Ibidem, p. 77.
[56] The following reasons of Marx's perception on the cooperative movement were identified: the first, in that there were not by that time enough experiments in the various categories of cooperatives to be able to wittingly appreciate the cooperative role in settling the social problem; the second, in that Marx could not be objective in the theoretical research of the cooperative movement, as it had already formed the doctrine of expropriation – Ed. Bernstein, Die Voraussetzungen des Sozialismus und die Aufgaben der Sozialdemokratie, IXth Edition, Stuttgart, 1920, apud G. Mladenatz, op. cit., pp. 138-139.
[57] G. Mladenatz, op. cit., p. 132.
[58] Ibidem.
[59] See supra.
[60] G. Mladenatz, op. cit., p. 128. Here's how Lassalle defined this "law" in the paper Offenes Antwortschreiben an das Zentralkomitee zur Berufung eines Allgemeinen Deutschen Arbeiter-Kongresses zu Leipzig: "regular limitation to essential needs, common to one nation with the view to support the existence and to reproduce thereof".
[61] F. Lassalle, *loc. cit*., *apud* G. Mladenatz, *op. cit*., p. 131.
[62] G. Mladenatz, *op. cit*., p. 132, including footnote no. 1.

1872, a rural cooperative called by him "consumer cooperative" – in reality this being considered rather a joint supply one for performing agriculture.[63] In 1879, it was established the Agricultural Credit Cooperatives Union of Hessa, later on converted into an Agricultural Cooperatives Union in southern and western Germany, led by Haas.[64] A few years later, in 1883, was established under the chairmanship of Haas, the Agricultural Cooperatives Association, which brought together cooperatives other than the credit ones, later on the Haas General Union of Agricultural Cooperatives, judged as "the most powerful Cooperative Union in Germany and in the whole world".[65] In 1904, Haas founded the first cooperative property school for training staff in the field of agricultural cooperatives.[66] Following the withdrawal of the Agricultural Cooperative from the International Cooperative Alliance after the Congress in Budapest in 1904, at the initiative of Haas was born a new International Association of Agricultural Cooperatives (1907), later named the International League of Agricultural Cooperatives, based in Berlin.[67]

3. Italy

Giuseppe Mazzini (1805-1872), politician and hero in the struggle for independence and unification of Italy, reckoned as the forerunner of the cooperative movement, established in 1842 the "associazione nazionale degli operai", the concept of cooperative property in his opinion being expressed by "voluntary free association, organized by people who know, love and look up to each other, not a forced association, not agisted by the governing authority".[68]

Luigi Luzzatti (1841-1927), politician, Professor, and author of works in the field of economy and finance, esteemed rhetorician, is considered "the real founder of the Italian credit union movement".[69] In 1864 and 1865, Luzzatti establishes the first popular banks in the cities of Lodi and Milan, following the Schulze-Delitzsch model[70], which it has adapted, though, to the Italian realities – more precarious than in Germany – diminishing the value of the shares, but giving more importance to the reserve funds.[71] Unlike Schulze-Delitzsch, Luzzatti campaigned to ensure free cooperative governance - idea which approaches him for Raiffeisen[72] - and introduced the interest-free small loans system, "by word of honor"[73]. We also note the fact that he initiated the setting up, in Rome, of a central credit institute, with the participation of the State and of the co-op.[74]

Leone Wollemborg (1859-1932) established in 1883, in the village of Loreggia, Italy's first Raiffeisen-type credit union, without carrying forward the moral and Christian precepts

[63] *Ibidem*, pp. 83-84.
[64] *Ibidem*, p. 84.
[65] Ibidem.
[66] Ibidem.
[67] *Ibidem*, pp. 113-114.
[68] *Ibidem*, pp. 40-41.
[69] In 1863 he published in Padua a work entitled *La diffusione del credito e le banche popolari*, carrying forth his primary ideas in respect of credit unions – *ibidem*, p. 88.
[70] See *supra*.
[71] Thus, if the share in Schulzer popular banks in Germany amounted to at least 100 marks – but, as a rule, ranged between 300 and 500 marks – in Italy the amount was fixed, usually to 25-50 pounds – G. Mladenatz, *op. cit*., pp. 88-89. See *supra*.
[72] See *supra*.
[73] G. Mladenatz, *op. cit*., p. 89.
[74] Ibidem.

involved.[75]

In terms of international concern, it is worth mentioning that, in December 1929, the "Confederazione cooperative italiana" convened the first International Conference in Rome, followed in 1930 by the conferences held in Innsbruck and Zürich, where it was decided upon the establishment of the International Confederation of Cooperatives, also known as the "International White Cooperative".[76]

The inter-war period also saw the development in Italy of a form of labour unions – "di braccianti cooperatives", for the purpose of self-help and savings institution.[77] Their members only performed work, collected capital of small monthly contributions and executed works pertaining to the State and the territorial-administrative units.[78]

4. Great Britain

England is deemed as being the first State to have specifically enacted for cooperative societies, implementing thereof from the outset an autonomous situation (under bills dated 1852, 1867 and 1871); however, until 1893 when it was adopted the "Industrial and Provident Societies Act", England has not had a cooperative encoding in the real sense of the word.[79]

Within the framework of outlining cooperative ideas, we note hereby that, in 1659, Peter Cornelius van Zürickzee (Pieter Cornelios Plockboy on his real name) – Dutch settled in England, published a pamphlet in which he imagined an economic association appreciated as integral cooperative, in order to meet the needs of its members, *i.e.* a "socialistic community with limited private property".[80] Another theorist concerned with the cooperative-related ideas was John Bellers, who in 1695 published a statement that promoted the so-called "cooperative labour colonies" ("a College of Industry"), designed to produce – unlike the entity described by Plockboy - over the members' consumption needs, the proceeds realized by the sale of surplus assets to others being employed for the expansion of the colony: "[…] will make *Labour,* and not money the standard to value all Necessaries by".[81]

The oldest English cooperative associations are consumer stores, the so-called "cooperative shops", which had more of a capitalist nature, established in Gova - 1777, also the birth date of the tailors' cooperative (producers' cooperative) in Birmingham - and in Mongewel (in 1794).[82] In 1795 was established a producers' cooperative – the mill in Hull, in which case, as in the case of those mentioned above, earnings were divided in proportion to the capital paid up by each co-op member.[83]

Robert Owen (1771-1858), regarded as the father of English cooperation and modern cooperation in general, became aware of the fact that the great plague of mankind was – and is – the chase after gain, what makes economic goods to be sold at a price higher than the cost, the latter being reckoned as the fair price.[84] In his view, the profit thus obtained is unfair, and this

[75] Luzzatti, who was himself Jewish, however, proved unlike Wollemborg a moral and Christian precept; in the meantime, the agricultural cooperatives in Italy came under the influence of the Catholic clergy - *ibidem*, pp. 89-90.
[76] G. Mladenatz, *op. cit*., p. 114.
[77] *Ibidem*, p. 165.
[78] Ibidem.
[79] C.C. Zamfirescu, *op. cit*., pp. 14-15.
[80] G. Mladenatz, *op. cit*., pp. 17-19 and the doctrine quoted therein.
[81] *Ibidem*, p. 19.
[82] I.N. Angelescu, *op. cit*., p. 5.
[83] Ibidem.
[84] G. Mladenatz, *op. cit*., pp. 20-22.

gain tool – money – had to be removed, for which Owen has set up a labour exchange of goods, based on cooperative principles, which provided to depositors of goods so-called labour notes which amounted in value to the one of the products submitted for sale.[85] Within this labour exchange, the price was firm in relation to the number of hours of work judged as being required for the production of the property, in consideration of the fact that the value of an economic good is determined by the labour and skills employed, and the purchaser paid the same amount in consideration for labour notes obtained in the exchange for its products offered for sale.[86] This institution was established in London in 1832, but was shut down two years later, in particular due to the fact that speculators, in exchange for goods of questionable quality, took from the exchange worthy goods which they sold on the market at a higher price, thus obtaining profits that Owen sought to remove.[87] From the perspective of international cooperative organizations, it is worth mentioning that Owen formed in 1835, in London as well, the Association of all Classes of all Nations, in order to transpose its social system in lifestyle.[88]

Rated as the foremost theorist of the cooperative movement, William King (1786-1865) established in 1827 a consumer cooperative in Brighton, called "The Co-operative Trading Association", and during the period 1828-1829 he published a monthly periodical called "The Brighton's Co-operator".[89] In his view, deeply Christian – which is why he was considered a forerunner of the social Christians[90], the emancipation of the working class had to be carried out exclusively by its own means, the idea of self-help being thus emphasized and regarded as a fundamental element of the cooperative action programme.[91] According to his theory, the social and economic basis of the cooperative movement is labour organization in the interest of those who provide work, the co-op giving the possibility to the labour factor to be released from the state of dependency relevant for the capital factor.[92]

The most famous substantiation of the cooperative idea remains though the "Rochdale Society of Equitable Pioneers", founded in 1844 by the will of 28 poor flannel weavers, who, in December of the same year, opened the shutters of a consumer store "in the laughter of merchants and street romps gathered to see the "booth of old weavers".[93] This moment remained but one that glitters even today in the history of modern cooperative.[94] The famous system in Rochdale was characterized by the following rules: the sale for "ready money", including to its members, justified by the irrefutable argument that "if the associates would take goods on credit from the common store, it would mean that they lend money to themselves, which naturally is not possible" [95], and, on the other hand, if a cooperative with a modest capital[96] would practice selling on credit as well, "it can easily occur that it may find itself at one point with no cargo and no money"[97]; the sale of goods at the current, retail market price, with the aim that the members

[85] *Ibidem*, p. 22.
[86] *Ibidem*, pp. 22-23.
[87] *Ibidem*, p. 23.
[88] *Ibidem*, p. 93.
[89] *Ibidem*, pp. 25-26.
[90] *Ibidem*, p. 28.
[91] *Ibidem*, p. 26.
[92] *Ibidem*, p. 28.
[93] *Ibidem*, p. 49.
[94] *Ibidem*, p. 45.
[95] *Ibidem*, p. 52.
[96] The Rochdale Society's start-up capital amounted to no more than 28 pounds, a pound from each founder, which the "equitable pioneers" managed to collect only one year following the date on which they decided upon opening their store - *ibidem*, p. 47.
[97] *Ibidem*, p. 53.

achieve savings that were distributed to the same, at the end of the year, in the form of the so-called "consumption bonus" (rebate)[98] representing the difference between the market price[99] and the cost price: "an economy achieved by members of the co-op, on account of the fact that, jointly procuring the necessities of life and by direct means, they appropriate the profit that would otherwise revert to intermediate traders"[100]; each shareholder has the right to one vote, no matter how many shares are purchased: one man – one vote;[101] non-restriction of access within the society, whereas in the Rochdalean cooperative the interest was that "the number of members, therefore of certain customers, be as high as possible, the surplus being distributed in proportion to their transactions;[102] the election of the members was however very carefully undertaken, each newcomer – who was expected "to make prove of a high sense of moral rectitude and perfect honesty" – being recommended by a member and subsequently accepted by the General Meeting;[103] neutrality in politics and religion;[104] the social labour, substantiated by the establishment of a provident sick and burial society, propaganda against alcoholism, care for the unemployed or low-waged, the establishment of a construction company for the benefit of associates,[105] the creation and development of a cooperative library, the establishment of schools for the children of the co-op members.[106] It should also be stressed that the Rochdale Pioneers have established, six years after the opening of the consumer store, a *producers' cooperative* – a cooperative mill, which, however, due to lack of profitability, was sold in 1860 and replaced by a more powerful one – and in 1854-1855 they founded two spinning factories, these cooperatives being established based on the principle of *the participation of personnel in benefits*.[107] However, in 1862, the General Meeting ruled upon, by 502 votes for and 159 against – the removal of the participation to profit of workers within the companies' factories, "with all the arduous opposition of the elderly pioneers".[108]

After the success reported at Rochdale, E. Vansittart Neale (1810-1892) became the leader of the consumer cooperative movement, holding, during the period 1875-1891, the office of Secretary General of the English Cooperatives Union.[109] Vansittart-Neale contributed to the first draft law on cooperatives, and the first cooperative code – "Industrial and Provident Societies Act" was passed by the British Parliament in 1852.

The first International Cooperative Congress was held in London, in 1895, on which occasion it was decided the establishment of the International Cooperative Alliance.[110]

In 1906, Arthur Penty (1875-1937) published in London the paper entitled "The Restoration of the Guild System", advocating for the restoration of the old medieval guilds,

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[98] *Ibidem*, pp. 54, 56, *passim*.
[99] The Rochdale Pioneers sought to influence the market price on the basis of equity, thus contributing to "the establishment of the fair price" - *ibidem*, p. 56.
[100] Ibidem.
[101] *Ibidem*, p. 57.
[102] *Ibidem*, p. 58.
[103] *Ibidem*, p. 59.
[104] Ibidem.
[105] *Ibidem*, pp. 59-60.
[106] I.N. Angelescu, *op. cit*., p. 39.
[107] G. Mladenatz, *op. cit*., pp. 60-61.
[108] *Ibidem*, p. 61.
[109] *Ibidem*, p. 149.
[110] The wording of the proposal for the establishment of an International Cooperative Alliance has been made at the Cooperative Congress from Plymouth, in 1886 by the Frenchman Emil de Boyve - see W.P. Watkins, L'alliance cooperative internationale 1895-1970, London, 1971, apud D. Dângă, D. Cruceru, Cooperation in Romania. Tradition and actuality, Artifex Publishing House, Bucharest, 2003, p. 53.

upgraded and generalized in all branches of economic business.[111] The said author also sought the establishment of an "orderly economic regime, organized on cooperative bases with the view to exclude the economic market and price fixing by economic corporations".[112]

In 1915, George Douglas Howard Cole (1889-1959) founded the Association "The National Guilds League" – branch of guild socialism, according to which the industrialization of the economy was a reality which could not be removed any longer, but laid the stress on the organization of production of the initiative and with the participation of the professional union.[113] In summary, the purpose of guild socialism relates to the "removal of the employee regime, in that the employer is suppressed, and the working class organised on the basis of the principle of self-management".[114] The practical application of this concept resulted in the construction guilds grouped in 1921 into a national organization, and one year later, in an international federation, following the Congress of Vienna.[115]

III. Conclusions

In the present context, labelled by the major difficulties the European labour market is facing, the proper knowledge and understanding of cooperative principles provide the premises for their implementation with the view to meet the current economic and social stability exigencies in today's Europe.

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[111] By that time, the organization in guilds was limited to craftsmen and merchants in urban areas - G. Mladenatz, *op. cit*., p. 166.
[112] *Ibidem*, p. 168.
[113] Ibidem.
[114] *Ibidem*, p. 169.
[115] Ibidem.

SOVEREIGN WEALTH FUND AS A SUBJECT OF THE PRIVATE INTERNATIONAL LAW

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Abstract

This article covers the problem of the legal status of sovereign wealth funds in private international law as a separate branch of the internal law in each jurisdiction.

Keywords: *sovereign wealth fund, private international law, cross-border investment fund.*

Public element in the structure-organizational component of the institutional investors legal status as a legal construction characterizes cross-border investment funds as truly universal tool of accumulation and movement of foreign direct and portfolio capital, which notion is invariantly used in relation to legal persons of private and public law. It's inherent in the individual type of cross-border investment funds called as sovereign wealth funds. By their unique legal status in the private international law stipulated by the intensive implication into the resolution of public law problems they're subject of independent legal research.

We start studying it here from examining of the notion content. Sovereign wealth funds notion is widely used in doctrine and practice nevertheless it is not covered by law. Its legal definition is impeded by the fact that the so-called life goal of the sovereign wealth funds is mainly contained in the canvas of the state one. It's predetermined by the unique public policy and corresponding means for its realization. However its definition if holds, is made on the basis of thorough analysis of independent characteristics in certain private-law or public-law spheres of research or review of the terms used in the name of the notion. In line of the latter we will start our study.

The term "sovereignty" translated from the French means a set of sovereign rights that the state or its head is empowered of in accordance with the unique organizational structure of the political system. The term "fund" is primarily used to the capital for the particular purpose. "Wealth" – is a socio-political notion that determines the terms of sustainable human development. In result of their examine sovereign wealth fund is the public capital used for the sustainable development of the human, society and the state. By reason of its extremely abstract character such definition can't be exclusively used in the present paper. It will be later clarified but even in the present version there is characteristic of the individual type of cross-border investment funds. It's the direct state participation in its creation and realization through placing of certain amounts of all oil, gas and other revenues in corporate or contract form. In the latter case there's no legal capacity for the distinct legal and economic being. These are Equatorial Guinea Fund for Future Generations managed by the Bank of Central African States (BEAC), Macroeconomic Stabilization Fund regulated by the Board of the Central Bank of Venezuela. According to the data of the Sovereign Wealth Fund Institute[1], global organization designed to study government investors in certain commercial and non-commercial areas, there are presently 65 funds. The first (Texas Permanent School Fund) emerged in 1854 with the domicile of origin in United States of America.

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[1] Sovereign Wealth Institute Site. [Electronic resource]. URL: www.swfininstitute.org

Sovereign wealth funds as legal persons form the peculiar type of corporations the title on which exclusively belongs to the national governments, singly or jointly with others. For example, Emirates Investment Authority is the first sovereign wealth fund of seven states that form United Arab Emirates. Special members composition and public goals define theirs qualification but de lege lata in some jurisdictions, particularly in Estonia[2], the main criteria is determined by the character of interests. Such public corporations or as they're also called legal persons of public law are incorporated in public interests in accordance with the procedure prescribed by the law of the chartering state. Unlike legal persons of private law and this has to be underlined separately, in their regard there's a special incorporation procedure. It doesn't provide for a unified legal framework, that determines a uniform corporate-law form construction, but prescribes an issue of the individual legal act for the unique functional organization of the state property management. For example, State Capital Investment Corporation (SCIC), Vietnam sovereign wealth fund, is incorporated under Decisions No.151/2005/QD-TTg of the Prime Minister dated 20 June 2005 to pursue some commercial and non-commercial goals.

In absence of the uniform legal construction of the sovereign wealth fund such organization is characterized by individual set of criteria that determine or not the qualification mainly made in scientific goals. It is caused by the gap in regulating legal status of the persons equally capable in public and private law in collective investment area.

Thus sovereign wealth funds being ideal subjects of law are creatures of the national legal orders that exist starting from the moment their incorporation occasioned. That both characterizes legal persons of private and public law. But unlike the previous the European Union concept of corporate mobility, more precisely its sub-principle of reincorporation, is unusable in this case. The law applicable to the substance of the legal capacity is chosen by the close legal tie with the founder, not the place of incorporation or domicile. This forms another characteristic. Thereupon the tooling of the conflict-of-law rule, applied in the international private law dispute is formed not in traditional construction of the lex societatis but "state affiliation", that fixes the problem of the connecting factor choice. These are widely used incorporation and domicile connecting factors based on the like theories. In some cases - "the place of main activity" and others that are chosen as the most efficient connecting factors to apply to the legal status in an international context.

Irrespective to the terms of incorporation they act as persons distinct from the states in the property turn-over. It is reflected in the right to sue and be sued in court that is ascertained by the analysis of the way of incorporation, legal rights and their execution in regards to the state of national affiliation and third parties. The latter usually derives from such characteristics of corporations as legal capacity, ownership and limited liability of the members.

Nonetheless regardless to the distinct from the states legal and economic being such persons in doctrine and court practice are metaphorically called as arm of the states in the management of the state property and new investments abroad as in the case of SCIC. "Its creation is stipulated by the height of the economic reforms aimed at enhancing the efficiency of state capital utilization. Its main objective is the representation of the state interests in the entities and investment in key sectors and essential industries with a view to strengthening the dominant role of the state sector while respecting markets rules"[3].

In this regards it is important to find out which concept is brought as the major in a certain jurisdiction. Sovereign wealth funds may be considered by the law as alter-ego of the

[2] Part II, Chapter I, § 5 of General Principles of the Civil Code Act. 1994. [Text]: [Electronic resource]: - Access regime: http://www.legaltext.ee/text/en/X0015.htm

[3] State Capital Investment Corporation Site [Electronic resource]. URL: www.scic.vn

government that is characterized by the absolute immunity or persons which jure imperii are protected. The latter provides for the deviation from the absolute to the restricted immunity, that doesn't cover ordinary commercial transactions in an international context the other party of which is represented by the real or ideal private law subject. Such implementation of public interests in private-law field underlines specific legal status of sovereign wealth funds among other subjects of law in general and private law in particular.

Besides profit-making as the main aim to pursue in the management of the state property and the corresponding conformity to the competition rules, is decisive in the matter of qualification. Such aim in terms of the main strategy along with the conditions of its implementation characterizes commercial corporations under which category sovereign wealth funds fall in the present context.

Finally together with other legal entities controlled by the state, sovereign wealth funds as legal persons are widely used tools of the cross-border commercial turn-over that are positively or negatively characterized in foreign doctrine. This way they're sometimes characterized as "unique institutions". "Besides being large investors with an increasing amount of assets under management … SWF invest in equities with the purpose of maximizing the return on their origin country's reserves…Firms with higher ownership by SWF have higher firm valuation and better operating performance…"[4]. But such positive views aren't always shared. By the use of the public funds as foreign direct investment they fulfill the role of the foreign policy instrument that causes concerns of the states that import private or public capital and international community in general. Lawrence Summers, that earlier held office of the United States Secretary of the Treasury said that "…cross-border activities of SWFs and other sovereign investment vehicles have reversed the trend toward privatization that swept over the globe in the past quarter century"[5]. What previously belonged to the real and ideal subjects of private law is presently accumulated in the investment portfolios of the government structures. It comes to the foreign equity securities which holding indicates the refusal from the conservative investment strategy of allocating funds in government securities. In the present context it's also noteworthy that the concerns come not from the simple fact of the equity securities concentration in foreign government structures but their ability to determine the destiny of the corporations and national economies in whole.

As a consequence sovereign wealth funds as legal persons are unique, both private and public law organizations. In the private international law these are independent investment entities established for the effective use of the state property for the sustainable human, society and state growth.

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TRANSITIONAL JUSTICE AND DEMOCRATIC CHANGE: KEY CONCEPTS

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Abstract

This Article proposes a genealogy of transitional justice and focuses on transitional justice as one of the key steps in peace building that needs to be taken to secure a stable democratic future. Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. The paper focuses on key concepts of transitional justice before addressing its traditional components: justice, reparation, truth and institutional reform. This Article meeting point on the transitional process in a society which has experienced a violent conflict and needs adequate mechanisms to deal with the legacies of the past in order to prevent future violence and cover the way for reconciliation and democratic consolidation. It provides key stakeholders with an overview of transitional justice and its different components, while examining key challenges faced by those working in this area. The present paper concludes with some remarks that challenge the traditional concept of transitional justice and its processes in order to initiate important debate on where future work in this field is needed.

Keywords: *Transitional justice, democracy, human rights, institutional reforms, democratic consolidation.*

Introduction

The presumption in much of what has been said about transitional justice is that we can speak in general terms about these real-world practices. Some commentators have spoken explicitly of one common theory of transitional justice.[1] These generalizations concern the dilemmas of dealing with massive human rights abuses and ways to assess and evaluate the practices utilized when confronting such legacies of violence and injustice. Nonetheless, in a diverse world one risk of constructing a general theory is that it can lack sensitivity to different and nuanced circumstances. In particular, it is problematic to utilize a common normative framework that presupposes the liberal democratic nature of an incoming regime, or law's ability to generally further such values. While some case studies of transitional justice have argued that law can also serve to restrict democratization,[2] and while objectives such. As reconciliation, peace, and victims' healing are now increasingly examined in the general literature[3], the fact remains that the scholarship is dominated by the conception that transitional

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[1] See Riti G. Teitel, Transitional Justice (Oxford University Press, 2000): 213.

[2] See Brian Grodsky, "Justice without Transition:Truth Commissions in the Context of Repressive Rule",8 HUM. RTS. L. REV, (2008): 218.

[3] See, Ibid., Supra 1; Carlos Nino, *Radical Evil on Trial* (Yale University Press,1996); Neil J Krotz: *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Country Studies* (US Institute of Peace Press,1995); and James McAdams: *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press, 1997).

justice is about applying a number of legal and quasi-legal processes in democratic political transitions, and that dealing with the past will help consolidate liberal values.[4]

There are significant problems connected to understanding the complex and very diverse instances of transitional justice by depending on a theoretical framework that is heavily influenced by ideas about transitions from authoritarian rule to democracy that were developed in the late 1980s and early 1990s. Though the scholarship analyzes cases that are radically different from "transitions to democracy," the conceptual underpinnings of transnational justice as an academic field continue to be heavily influenced by values and understandings of dilemmas that connect intimately to liberal transitions. In a world where systematical dealing with serious abuses can take place in democratic transitions, in non-liberal transitions, as well as in highly diverse contexts of non-transitions, there is a clear need for "updating" transitional justice theory.

A genealogy of transitional justice indicates that from the post-World War II tribunals at Nuremberg and Tokyo to the proliferation of tribunals and truth commissions in the present, the field of transitional justice has both expanded and normalized. The burgeoning of transitional justice is often associated with the post-Cold War political climate in which a significant number of authoritarian, oppressive and frequently violent nation-states began to transition towards peace and procedural democracy. Particularly, since the end of the Cold-War, the field of transitional justice has metamorphosed from an initially narrow focus on justice and retribution to a much more complex study of how human rights abuses, genocide and other mass atrocities are confronted by societies emerging from violent conflict or transitioning to democratic forms of governance. Transitional justice emerged as both a field of practice and field of scholarly inquiry in the 1980s and 1990s in response to dramatic political changes occurring in Latin America, Central and Eastern Europe, and South Africa. In each case, the transition to democracy included public demands to acknowledge and redress human rights abuses committed by former regimes.

This paper focuses on transitional justice as one of the peace building steps that needs to be taken to secure a stable democratic future. Since the field of transitional justice is very broad and complex, this paper focuses on its key concepts.

1. Defining Transitional Justice

Transitional justice can be defined as the conception of justice associated with periods of political change,[5]characterized by legal response to confront the wrongdoings of repressive predecessor regimes.[6] The origins of modern transitional justice can be traced to World War I.[7] However, transitional justice becomes understood as both extraordinary and international in the postwar, phase of transitional justice. The second, or post-Cold War, phase associated with the wave of democratic transitions and modernization that began in 1989. Toward the end of the twentieth century, global politics was characterized by acceleration in conflict resolution and a persistent discourse of justice throughout law and society. The third phase of transitional justice

[4] Phil Clark: Establishing a Conceptual Framework: "Six Key Transitional Justice" *Themes, in AFTER GENOCIDE 191*(Phil Clark & Zachary Kaufman, 2008).

[5] See Gulljermo O'Donnell and Phillippe C. Schmitter, Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies (1998), 6.

[6] See Neil J. Kritz , Transnational Justice: How Emerging Democracies Reckon with Former Regimes (1997).

[7] See Ibid., Supra 1, pp. 31, 39-40; Michael Walzer, "*Regicide and Revolution: Speeches on the Trial of Louis XVI"* (1992) (providing a historical account).

is associated with contemporary conditions of persistent conflict which lay the foundation for normalized law of violence. [8]

The International Center for Transitional Justice (ICTJ) defines transitional justice as "a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy."[9] This approach emerged in the late 1980s and early 1990s, mainly in response to political changes in Latin America and Eastern Europe—and to demands in these regions for justice. At the time, human rights activists and others wanted to address systematic abuses by former regimes but without endangering the political transformations that were underway. Since these changes were popularly called "transitions to democracy," people began calling this new multidisciplinary field "transitional justice."

It is important to be emphasized that four processes are believed to constitute the core of transitional justice, even if there is disagreement about what each of them entails and the relationship that should exist between them. Usually, a transition encompasses a *justice process*, to bring perpetrators of mass atrocities to justice and to punish them for the crimes committed; a *reparation process*, to redress victims of atrocities for the harm suffered; a *truth process*, to fully investigate atrocities so that society discovers what happened during the repression/conflict, who committed the atrocities, and where the remains of the victims lie; and an *institutional reform* process, to ensure that such atrocities do not happen again (OHCHR, 2009).[10] In addition to these core processes, others have become part of the transitional justice agenda: primarily, *national consultations*, which have been strongly recommended by the Office of the High Commissioner for Human Rights (OHCHR) and the Peacebuilding Commission, which emphasize that "meaningful public participation" is essential for the success of any transition[11]. National consultations should take place in relation to different aspects of transitional justice. Finally, *Disarmament, demobilization and reintegration* (DDR), which usually take place in parallel rather than as part of the transitional justice processes, actively interact with and complement transitional justice mechanisms and policies.[12]

As the field has expanded and diversified, it has gained an important foundation in international law. Part of the legal basis for transitional justice is the 1988 decision of the Inter-American Court of Human Rights in the case of Velázquez Rodríguez v. Honduras,[13] in which the court found that all states have four fundamental obligations in the area of human rights. These are:

- To take reasonable steps to prevent human rights violations;
- To conduct a serious investigation of violations when they occur;
- To impose suitable sanctions on those responsible for the violations; and

[8] See Ruti G. Teitel, *Transitional Justice Genealogy, Harvard Human Rights Journal, I Vol. 16* (2003):. 69-70. Also, there is a rich scholarship on transitional justice. Early analyses reflected mostly Latin American and Southern European experiences of democratic transition. But current thinking about transitional justice is informed by a much broader range of experiences, including post-socialist transitions in Eastern Europe and various post-conflict settings, many in sub-Saharan Africa and Asia.

[9] ICTJ website, http://www.ictj.org/en/tj/. Accessed January 4, 2009.

[10] Office of the High Commissioner of Human Rights (2009), *Analytical Study on Human Rights and Transitional Justice*, A/HRC/12/18, Geneva: United Nations.

[11] (A/HRC/12/18, 2009, and A/63/881-S/2009/304, 2009).

[12] Clara S. Villalba, "Transitional Justice: Key Concepts, Processes and Challenges*", I.DCR, Knowledge for governing the world* BP 07/11 (2011): 3-4.

[13] The Velasquez Rodriguez case, INTER-AM. CT.H.R., June 26, 1987 (preliminary objections), July 29, 1988(merits); see Facts on File, Aug. 5,1988, § A3, at 577; N.Y. Times, July 30, 1988, at I, col. 2.

- To ensure reparation for the victims of the violations.

Those principles have been affirmed explicitly in later decisions by the court and endorsed in decisions by the European Court of Human Rights and UN treaty bodies such as the Human Rights Committee. The 1998 creation of the International Criminal Court was also significant, as the court's statute enshrines state obligations of vital importance to the fight against impunity and respect for victims' rights.

In spite of this impressive evolution, there are still many questions in need of answers. One such question revolves around the role of international organizations, especially United Nations and European Union, in promoting transitional justice.

2. United Nations Approach to Transitional Justice

Over the years, the United Nations has acquired significant experience in developing the rule of law and pursuing transitional justice in States emerging from conflict or repressive rule. Experience has demonstrated that promoting reconciliation and consolidating peace in the long-term necessitates the establishment or reestablishment of an effective governing administrative and justice system founded on respect for the rule of law and the protection of human rights.

For the United Nations system, transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.[14] Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law.

Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof. Whatever combination is chosen must be in conformity with international legal standards and obligations. Transitional justice should further seek to take account of the root causes of conflicts and the related violations of all rights, including civil, political, economic, social and cultural rights. By striving to address the spectrum of violations in integrated and interdependent manner, transitional justice can contribute to achieving the broader objectives of prevention of further conflict, peacebuilding and reconciliation.[15]

The normative foundation for the work of the UN in advancing transitional justice is the Charter of the United Nations, along with four of the pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law. Specifically, various UN instruments enshrine rights and duties relative to the right to justice,[16] the right to truth,[17] the right to reparations,[18] and the

[14] See S/2004/616.

[15] United Nations rule of law and transitional justice activities include developing standards and best practices, assisting in the design and implementation of transitional justice mechanisms, providing technical, material and financial support, and promoting the inclusion of human rights and transitional justice considerations in peace agreements.

[16] See International Covenant on Civil and Political Rights, article 2, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, articles 4, 5, 7 and 12, International Convention for the Protection of All Persons from Enforced Disappearance, articles 3, 6, 7 and 11. See also E/CN.4/2005/102/Add.1, Principle 19.

[17] See International Covenant on Civil and Political Rights, article 2, International Convention for the Protection of All Persons from Enforced Disappearance, article 24. See also E/CN.4/2005/102/Add.1, Principles 2-5.

[18] See Universal Declaration of Human Rights, article 8, International Covenant on Civil and Political Rights, article 2, International Convention on the Elimination of All Forms of Racial Discrimination, article 6, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, article 6,

guarantees of non-recurrence of violations (duty of prevention).[19] In addition, treaty bodies and court jurisprudence, as well as a number of declarations, principles, and guidelines[20] have been instrumental in ensuring the implementation of treaty obligations.

To comply with these international legal obligations, transitional justice processes should seek to ensure that States undertake investigations and prosecutions of gross violations of human rights and serious violations of international humanitarian law, including sexual violence. Moreover, they should ensure the right of victims to reparations, the right of victims and societies to know the truth about violations, and guarantees of non-recurrence of violations, in accordance with international law.[21] Without doubt, transitional justice processes and mechanisms do not operate in a political vacuum, but are often designed and implemented in fragile post-conflict and transitional environments. The UN must be fully aware of the political context and the potential implications of transitional justice mechanisms. The question for the UN is never whether to pursue accountability and justice, but rather when and how.[22]

Finally, transitional justice programmes include the following elements:

- Prosecution initiatives;[23]
- Facilitating initiatives in respect of the right to truth;[24]
- Delivering reparations;[25]
- Institutional reform;[26]and
- National consultations.[27]

International Convention for the Protection of All Persons from Enforced Disappearance, article 24, the Convention on the Rights of the Child, article 39. See also A/RES/60/147.

[19] See International Covenant on Civil and Political Rights, article 2, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, article 2, International Convention for the Protection of All Persons from Enforced Disappearance, article 23. See also LaGrand Case (Germany v. United States), Judgment of 27 June 2001, I.C.J. Reports 2001. See E/CN.4/2005/102/Add.1, Principle 35.

[20] Inter alia, founded on the 1948 Universal Declaration of Human Rights.

[21] These international standards further set the normative boundaries of UN engagement, for example: the UN will neither establish nor provide assistance to any tribunal that allows for capital punishment, nor endorse provisions in peace agreements (See Guidelines for UN Representatives on Certain Aspects of Negotiations for Conflict Resolution ,1 Dec. 2006) that include amnesties for genocide, war crimes, crimes against humanity, and gross violations of human rights (gross violations of human rights include torture and similar cruel, inhuman or degrading treatment; extra-judicial, summary or arbitrary executions; slavery; enforced disappearances; and rape and other forms of sexual violence of comparable gravity).

[22] The UN cannot endorse provisions in peace agreements that preclude accountability for genocide, war crimes, crimes against humanity, and gross violations of human rights, and should seek to promote peace agreements that safeguard room for accountability and transitional justice measures in the postconflict and transitional periods.

[23] See The Rule of Law Tools for Post-Conflict States, http://www.ohchr.org/EN/PublicationsResources /Pages/SpecialIssues.aspx

[24] See E/CN.4/2005/102/Add.1, Principles 6-13 and E/CN.4/2004/88 and E/CN.4/2006/91.

[25] The General Assembly has reaffirmed the right of victims to reparations in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. See A/RES/60/147.

[26] Public institutions that helped perpetuate conflict or repressive rule must be transformed into institutions that sustain peace, protect human rights, and foster a culture of respect for the rule of law. Also See E/CN.4/2005/102/Add.1, Principle 36.

[27] National consultations are a critical element of the human rights-based approach to transitional justice, founded on the principle that successful transitional justice programmes necessitate meaningful public participation, including the different voices of men and women. Effective outreach must address both

Taking into account the emerging developments in international law, the principles and needs of UN, including its field presences, the following approaches should be incorporated into transitional justice activities of the UN:

- Adopt an approach to transitional justice that strives to take account of the root causes of conflict or repressive rule, and address the related violations of all rights, including economic, social, and cultural rights in a comprehensive and integrated manner;
- Take human rights and transitional justice considerations into account during peace processes;[28] and
- Coordinate disarmament, demobilization, and reintegration (DDR) initiatives with transitional justice processes and mechanisms, where appropriate, in a positively reinforcing manner.[29]

United Nations rule of law and transitional justice activities include developing standards and best practices, assisting in the design and implementation of transitional justice mechanisms, providing technical, material and financial support, and promoting the inclusion of human rights and transitional justice considerations in peace agreements.

3. The EU and Transitional Justice: A comprehensive approach to justice and peace building

The UN has led the field in developing norms and standards regarding human rights and peacemaking, and in practice, EU mediators are already actively engaged in these issues. Yet despite this emerging normative framework, the extent to which peace and justice issues are brought to the fore depends very much on the conflict and on the personality and personal experience of the mediator, regardless of his/her institutional affiliation.[30]

Transitional justice is a relatively new area of concern for the European Union (EU). Indeed, until recently it was largely absent from EU policies promoting democracy, the rule of law and human rights. But that does not mean that it was ignored.[31] Moreover, there is no specific reference to transitional justice in the corpus of treaties establishing the European Union. Also, the EU does not have a common definition of "transitional justice" despite its support for and engagement in transitional justice processes in Europe and beyond.[32]On the other hand, transitional justice can contribute to the rule of law by strengthening the legitimacy of public institutions and the processes by which laws are made, including through promoting public participation. Transitional justice can also contribute to changing social norms which in turn strengthen legitimate rule of law and democracy. Transitional justice contributes to public recognition that the abuse suffered by victims was and remains wrong; this recognition can help

specific groups affected by the particular mechanisms involved as well as the broader community. It requires careful planning during the design phase and adequate resources.

[28] See the study on human rights and transitional justice activities undertaken by the human rights components of the United Nations system (E/CN.4/2006/93) and the progress report on human rights and transitional justice (A/HRC/4/87); and the Human Rights Council Resolution, Human Rights and Transitional Justice, No. 9/10.

[29] Guidance Note of the Secretary-General (2010). 'United Nations Approach to Transitional Justice', p.p. 1-10.

[30] Laura Davis, "The EU and advancing justice issues in mediation" Brussels: Initiative for Peacebuilding, (2010), www.initiativeforpeacebuilding.eu

[31] Avelle, M. (2008*) European efforts in Transitional Justice*. Working Paper 58, Madrid:FRIDE, Fundación para las Relaciones Internacionales y el Diálogo Exterior, 9.

[32] This is discussed in detail in Matthew L. Davis (2010). *The European Union and transitional justice.* Brussels: Initiative for Peace-building.

strengthen inclusive citizenship, enabling the excluded and marginalised more generally to become fully rights-bearing citizens who participate in a common political project.[33]

According to the treaty on European Union, 'The Union's aim is to promote peace, its values and the wellbeing of its peoples'.[34] In Stockholm in December 2009, the Council of the EU declared: 'The Union is an area of shared values, values which are incompatible with crimes against humanity, genocide and war crimes'.[35] Moreover, the EU has provided extensive political and financial support to the ad hoc tribunals, including the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), the Extraordinary Chambers of the Courts of Cambodia, and the Special Court for Sierra Leone. It also supports the trial of the former Chadian president Hissène Habré in Senegal,[36] and the Special Tribunal for Lebanon.[37]

Some of the strongest commitments to international criminal justice are found in the EU's Enlargement policy. The European Council meeting in Copenhagen in 1993 laid down conditions for EU membership, which included 'stability of institutions guaranteeing

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[33] Pablo De Grieff, *"Justice and Social Integration"* in P. de Greiff and R. Duthie (Eds.). *Transitional justice and development: Making connections* (New York: Social Science Research Council (2009): 56-62.

[34] Article 3.1., of the Treaty of European Union, Official Journal of the European Union, EN C 321 E/1 (2006).

[35] Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, December 2009 Doc. 17024/09, p.12. The Stockholm Programme, which is concerned with justice and home affairs, is the exception. It outlines how the EU has a three-fold role in combating impunity for the gravest crimes. It does this firstly, by promoting cooperation with the International Criminal Court and other international tribunals and secondly, through exchanging judicial information and best practices in relation to the prosecution of perpetrators of genocide, crimes against humanity and war crimes through the European Network of Contact Points. And thirdly, by acting as a facilitator for Member States' approaches to dealing with crimes committed in their own past, including by totalitarian regimes, for 'in the interests of reconciliation, the memory of those crimes must be a collective memory, shared and promoted, where possible, by us all'. Also See *Report on the implementation of the European Security Strategy – Providing security in a changing world* (December 2008). European Council, S407/08[35] Laura Davis, *"The EU and advancing justice issues in mediation" Brussels: Initiative for Peacebuilding,* (2010), www.initiativeforpeacebuilding.eu

[35] Ibid., Supra 31.

[35] Ibid.

[35] Ibid., Supra 33.

[35] Ibid., Supra 34 ,Article 3.1.

[35] Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, December 2009 Doc. 17024/09, p.12. The Stockholm Programme, which is concerned with justice and home affairs, is the exception. It outlines how the EU has a three-fold role in combating impunity for the gravest crimes. It does this firstly, by promoting cooperation with the International Criminal Court and other international tribunals and secondly, through exchanging judicial information and best practices in relation to the prosecution of perpetrators of genocide, crimes against humanity and war crimes through the European Network of Contact Points. And thirdly, by acting as a facilitator for Member States' approaches to dealing with crimes committed in their own past, including by totalitarian regimes, for 'in the interests of reconciliation, the memory of those crimes must be a, p.12; and Commission Staff Working Document SEC(2009) 932: Accompanying document to the *Annual report from the European Commission on the Instrument for Stability in 2008* COM(2009) 341, p.57.

[36] European Communities (2008). *EU Report on Human Rights 2008*, p.74.

[37] European Commission (2009). Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament and the Council Implementation of the European Neighbourhood Policy in 2008: Progress Report Lebanon COM(2009) 188, p.6.

democracy, the rule of law, human rights and respect for and the protection of minorities'[38] and provided financial assistance for countries in the region to strengthen democratic institutions and the rule of law as a way to 'advance regional cooperation as well as reconciliation'.

Cooperation with the ICTY became a condition for membership candidacy, as spelled out in the Thessaloniki Agenda for the Western Balkans:

'The EU urges all concerned countries and parties to co-operate fully with the International Criminal Tribunal for the former Yugoslavia. Recalling that respect for international law is an essential element of the SAP [Stabilisation and Association Process], the EU reiterates that full co-operation with ICTY, in particular with regard to the transfer to The Hague of all indictees and full access to documents and witnesses, is vital for further movement towards the EU'.[39]

Missing a consistent overarching framework, legal or otherwise,[40] the EU approaches transitional justice from primarily two perspectives. First, transitional justice mechanisms are nested in various policies that promote human rights, development, democracy, and enlargement under what is known as the Community Pillar (First Pillar) of the EU.[41]

Additionally to the Community Pillar, the EU promotes transitional justice as part of its Common Foreign and Security Policy (Second Pillar), filtered through the prism of the European Security and Defense Strategy (ESDP). From this vantage point transitional justice mechanisms are embedded with other peace-building and security-oriented tasks, such as crisis-management, security sector reform (SSR), and disarmament, demobilization and reintegration (DDR).

The EU is committed to promoting peace, to the protection of human rights and to the strict observance and the development of international law.[42] One of the objectives of the Union's common foreign and security policy (CFSP) is 'to consolidate and support democracy, the rule of law, human rights and the principles of international law'.[43]

The Concept on Strengthening EU Mediation and Dialogue Capacities states that:

'Issues such as holding human rights violators accountable in justice for their actions, reparations to victims, reintegration of ex-child soldiers, restitution of property and land … have to be tackled during the peace negotiations and the drafting of peace agreements. Although it is widely acknowledged that it is only through justice to victims that enduring peace can be achieved, there are often tensions between these two objectives, and the EU should consider on a case by case basis how best to support transitional justice mechanisms, including addressing impunity. EU mediation efforts must be fully in line with and supportive of the principles of international human rights and humanitarian law, and must contribute to fighting impunity for human rights violations'.[44]

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[38] European Council in Copenhagen 21-22 June 1993 Presidency Conclusions SN 180/1/93, p.13.

[39] General Affairs & External Relations Council (GAERC). Extracts from successive General Affairs & External Relations Councils 16 June 2003.

[40] See Heiner Hänggi and Fred Tanner, "Promoting Security Sector Governance in the EU's Neighbourhood", Challiot Paper no. 80, (July 2005).

[41] In these instances, decisions are made using the so-called "Community method": the Commission holds a monopoly on the right of initiative; the Council employs the qualified majority voting rule; and the European Parliament takes a moreactive role in co-legislating with the Council.

[42] Ibid., Supra 34, Article 3 paragraphs 1, 5.

[43] Ibid., Article 21.2 (b).

[44] Doc. 15779/09 II. 4 (d), p.8; Council Common Position 2003/444/CFSP; European Communities (June 2009). *The European Union and Central Asia: The new partnership in action*, pp.16-17; Agreement between the International Criminal Court and the European Union on cooperation and assistance, ICC-PRES/01-01-06; and The Rome Statute of the International Criminal Court (July 2002), Preamble.

Peace-building and human rights agendas are pushed by activist Member States (usually Sweden, Denmark, Finland, the Netherlands, Belgium and sometimes the United Kingdom, plus others depending on the issue) and by activist officials in the national capitals and in Brussels. The extent to which these issues are prioritised in dealing with third countries depends on Member States' other interests there, or indeed the interests of third countries. In the Western Balkans, by

contrast, human rights and justice are seen as integral to the EU's interests in the region and cooperation with the ICTY is a condition of furthering relations with the EU. Yet even there, Member States set the bar at different heights.

Moreover, civilian crisis management is a central focus of the European Security and Defense Policy (ESDP) and is now considered the "core" of a human security based approach (Dwan 2006: 265). Increasingly, the most overt expression of the EU's support for transitional justice occurs in the context of EDSP, but without additional support provided by communitarized programs "winning the peace" would be that much more difficult. In examining how the EU's ESDP capabilities and missions have evolved, as well its first pillar instruments dedicated to the promotion of democracy, development and human rights, we observe an expanding EU international role that explicitly integrates the importance of ethical and normative concerns in formulating foreign policy, particularly in the areas of human rights and the security of individuals. Such concerns animate, indeed permeate, the EU's newly launched efforts in the area of transitional justice. The ethical power Europe model emphasizes what the EU does, and what the EU does in promoting transitional justice is to help establish the conditions for legitimate political authority, legitimate institutions, and the rule of law, all of which are preconditions for ensuring human security.

Lastly, transitional justice is recognised as an important policy area in the Mediation Support Concept, and indeed, the transitional justice element of the concept was the subject of most substantive debate during the drafting process. The concept also states that 'the EU should consider on a case by case basis how best to support transitional justice mechanisms, including addressing impunity'.[45]

Conclusion

Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. The approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.[46]

Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. The approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.[47]

[45] Doc. 15779/09 II. 4 (d), p. 8.

[46] For example, the UN main role is not to build international substitutes for national structures, but to help build domestic justice capacities. See UN Doc S/2004/616.

[47] Ibid.

Furthermore, despite the fast development of transitional justice as a field and of the processes described, such mechanisms are not always based on consistent normative foundations, simply because in periods of radical change different political forces and goals can be incompatible.[48] Also, the goals of each individual process (truth, justice, reparations and institutional reform) are not always achievable in parallel.

New practical challenges have forced the field to innovate, as settings have shifted from Argentina and Chile, where authoritarianism ended, to societies such as Bosnia and Herzegovina, Liberia and the Democratic Republic of Congo, where the key issue is shoring up peace. Ethnic cleansing and displacement, the reintegration of ex-combatants, reconciliation among communities and the role of justice in peace-building have become important new issues.

Ultimately, there is no single formula for dealing with a past marked by large-scale human rights abuse. All transitional justice approaches are based on a fundamental belief in universal human rights. But in the end, each society should—and indeed must—choose its own path.

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[48] Bell, C. (2009), „Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"", *International Journal of Transitional Justice*, 3(1): 5-27.

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THE RECONFIGURATION OF THE JUDGE`S ROLE IN THE ROMANO-GERMANIC LAW SYSTEM

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Abstract

The role assigned to the judge varies from one legal system to another. In the Anglo-Saxon legal systems, in the context of the absence of an independent legislative body, judge is the one who creates law; his mission consists in solving a specific case, given the existing judicial precedents; if he can not find an appropriate rule of law, the judge has to create one and to apply it. On the other hand, in the continental system, creation of law is the mission of the legislator. Evolving under the influence of Roman law, the continental law systems differ from the Anglo-Saxons by: the assuming of Corpus iuris civilis; the tendency to abstraction, leading to the creation of a rational law; the rule of law, with the consequence of blurring the role of jurisprudence.In spite of these essential differences, the last decades of the twentieth century have found out the convergence of the written coded system and the common law system. Thus, the increasing of the legislature`s role in common law system is accompanied by the reconsideration of the judge`s role in the Roman-Germanic legal system. While Anglo-Saxons accept the "compromise" of coding, Continentals shyly step towards rethinking the status of law source of the jurisprudence. History has shown that, one by one, law and jurisprudence have disputed the the role of prime creator of law.Emphasizing the creative force of jurisprudence, Vladimir Hanga wrote: "The law remains in its essence abstract, but the appreciation of the jurisprudence makes it alive, as the judge, understanding the law, examining the interests of parties and taking inspiration from equity, ensures the ultimate purpose of the law: suum cuique tribuere"[1]*. However, as we shall see below, in the Roman-Germanic law system, the creative role of jurisprudence still raises controversy.*

Keywords: *creative role of jurisprudence, controversy, common law system, continental system, judicial precedents.*

Introduction

By analyzing several opinions of academic commentators on the expansion of the role of continental jurisprudence in postmodernism, we notice that the phenomenon is often qualified as a danger threatening the rule of law. Thus, amongst the symptoms of the crisis of the current juridical universe, Ioan Vida also includes the government by judges, who transfer their own decision in legal precedents, creating legal regulations (norms established by way of appeal in the interest of the law) or removing from the legal system certain norms declared as unconstitutional. All these, shows the author, "undermine the fundamental architectonics of the law and its enforceable nature" and render the reconstruction of the law, "the rebuilding of the legal universe", necessary[2].

Dana Apostol Tofan notices that the interpretation of legal texts, with such confuse and imprecise renditions, has become difficult, and blames the judges for an increased consideration

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[1] Vladimir Hanga, *Dreptul şi tehnica juridică*, Lumina Lex Publishing House, Bucharest, 2000, pag. 80.

[2] Ioan Vida, *Orientări post-moderniste în procesul de creare a dreptului*, in Studii de Drept Românesc, year 12 (45), no. 1-2/2000, page 28.

margin, which also increases their discretionary power[3]. In the same train of thought, Sofia Popescu deems the current role of judges as paradoxical, considering that, sometimes, they must settle cases "near the limit of the mandate granted to them by the position they fill"[4].

From the above considerations, it would result that the Romano-Germanic legal system is still anchored under the domination of the law, and any additional consideration given to judges seems to open the way to their discretionary power. Within this orientation, an "abusive" nature seems to be ascribed to jurisprudence.

However, as one will further notice, this theory does not constitute *communis opinio doctorum*. The postmodernist law is a controversial law. Today, an extensive part of the doctrine considers that jurisprudence can no longer be denied the nature of formal sources in the Romano-Germanic legal system. Since the purpose of law resides in aligning the aspirations to fairness with society's exigencies, the presence of judges in the legal order is absolutely necessary. While the moral relation unfolds within an individual's innermost self, and the religious relation involves two entities, man and God, the legal relation is triangular in nature: it requires the presence of a judge[5]. Thus, the judge has evolved from a mere servant of the law to that "impartial and detached" servant, authorized to construe the law in a creative sense.

Content

The ***formalist school*** founded by Kelsen placed law in a strictly normative area, the only entity which may be associated with law being the State. The reduction of law to a system of hierarchized norms, within which each norm draws its compulsory force from its compliance with the next higher norm, resulted in the exclusion of jurisprudence and common law from the sources of law.

In the 19th century, the so-called "interpreters" of the French Civil Code raised against the normative formalism, creating, however, a theory as formalist as the Kelsian one. They believed that the law is the only source of law, thus, neither the common law, nor jurisprudence can introduce in the legal order new regulations, derogating from the legal provisions. All the other sources, which didn't derive from the law, were ignored. By exaggerating the importance of codification, these jurists claimed that the entire civil law could be found in the Napoleonic Code, which succeeded in covering all legal situations. By identifying the law with the statute, a perfect, complete, faultless statute, the role of the judge was exclusively limited to interpreting the statute. However, interpretation was seen as a purely logical action, beyond any political or moral considerations, the only duty of a judge being that of extracting legal consequences from legal texts.

In time, the exegetic interpretation proved to be overpowered by the practical necessities: Paul Roubier asks himself what purpose could an interpretation which, although it is in harmony with the lawmaker's view, is in complete disagreement with the judicial practice, serve?[6]

The first steps to freeing the judge from the strict letter of the law were taken by the ***School of Free Will***. In the paper *Méthodes d'interprétation et sources en droit positif*, Gény reacted against the doctrine at that time, which considered the law as the sole source of law. Through its scientific works, Gény wished to put an end to the "fetishism of written law" and to

[3] Dana Apostol Tofan, *Puterea discreţionară şi excesul de putere al autorităţilor publice*, All Beck Publishing House, Bucharest, 1999, page 350.

[4] Sofia Popescu, Continuitate şi discontinuitate, din perspectiva integrării europene în domeniul dreptului, in Studii de Drept Românesc, year 15 (48), no. 1-2/2003, page 19.

[5] François Terré, *Introduction générale au droit,* 7th edition, Dalloz Publishing House, 2006, page 45.

[6] Paul Roubier, Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales, 2nd edition, Dalloz Publishing House, 2005, page 69.

the belief in its sufficiency, considering that it is incomplete and that "no matter how much sharpness we assign to it, the mind of an individual is not able to completely grasp the image of the world in which it moves"[7]. Thus, the lawmaker must examine the given, in order to create the construct. The given of law means that reality external to the positive law, which confers upon it the substantiality need to exist. The given must "phrase the legal norm as it results from the nature of things and as much as possible in rough form".

The school of free will explained the sources of law from a sociological perspective, in complete opposition to the Kelsian normative school. The formal sources of law, the law and jurisprudence, are only means of ascertaining the law. They are static in nature because the law precedes them. The law is, first of all, that living, spontaneous, dynamic law, product of social forces. It is the work of society and not of the state[8]. It stems from the social reality, hence, it cannot be deemed as being the creation of certain state authorities. The state holds the monopoly of coercion due to its superior public power. However, it does not hold monopoly over the creation of the rules of law.

The law cannot satisfy all the requirements of the social life. It cannot keep up with the dynamics of society. Therefore, when the law fails to offer any solutions, the judge, helped by the doctrine, must discover them through a free scientific research, in custom and in what Gény called "la nature des choses positives". Philippe Malaurie writes about Gény: "No work and no author symbolized an intellectual revolution so profound in the existence of law. From the Revolution and until him, the law represented exclusively the statute; according to him, the law no longer represented only the statute"[9].

In the free will doctrine, there are several alluring aspects, shows Paul Roubier, especially the reaction against "this outrageous fiction" according to which the judge is a mere interpreter compelled to abide by the law[10]. This school overstates, however, the role of a judge, assigning to it as main duty a real work of creation of law and establishing that this is the rule and not the exception. If it were to be accepted that the judge is entitled to thrust aside the law and jurisprudence, for the mere reason that such sources are static, the notion of rule of law itself would be altered. Therefore, the author concludes that we cannot believe that the law may be completely free, because the need of security, which commands the entire social order, requires, to some extent, that the normative power of a judge be restricted.

According to Paul Roubier, the law expresses itself through formal and informal norms. The authority of the formal norms stems either from the legislation or from jurisprudence. Informal norms are divided into two categories: customary rules based on experience and rules "based on rationality, which correspond to a certain ideal of justice"; the latter are the general principles of law, rules which Roubier calls "doctrine rules", since they are discovered by doctrine[11]. The system of legal norms founded on formal sources is, to some extent, virtual in nature; there can't be an absolute overlapping between the law of the sources and the actual practiced law. The real sources exist behind the formal sources of law, and the validity of the formal sources of law depends on their compliance with the real sources[12].

A judge's main duty consists in applying the formal sources. At the same time, a creative role must be given to the judge, if there is no rule of law applicable to the dispute pending

[7] *Apud* Philippe Malaurie, *Antologia gândirii juridice*, Humanitas Publishing House, Bucharest, 1996, page 316.
[8] *Apud* Paul Roubier, *op. cit.*, page 76.
[9] Philippe Malaurie, *op. cit.*, page 315.
[10] Paul Roubier, *op. cit.*, page 80.
[11] *Idem*, page 12.
[12] *Idem*, page 76 and the following pages.

settlement: "he/she must find the best solution and, thus, to release a rule of law which may constitute the principle of a new jurisprudence"; this issue, shows Roubier, is not a subject up for debate, since the law itself forces him/her to adjudicate the case, regardless of its silence or insufficiency. The difficulty occurs when the law of formal sources, being static in nature, no longer meets the needs of society or the ideal of justice of that era. How is the renewal of the law possible, when a greater freedom of consideration is not granted to a judge?[13]

William Dross proposes the examination of the sources of law from a Jusnaturalist perspective as well, as manifestations of the law and not causes thereof[14]. From a philosophical point of view, the law cannot be a source of law, but a manifestation thereof, thus, the true source of law is found way upstream. Since any source of law is essentially an authority which constructs legal phrases, the author analyzes the sources of law based on the authority which creates them. The main issue here is finding an answer to the question: **which authorities are legitimately authorized to create law**? The real source of law, reveals Dross, is the sovereign, i.e. the Nation. Behind the apparent trilogy of the sources of law, law, jurisprudence and custom, comes into prominence the monist ideology of the sovereignty of the Nation, the only one authorized to create the law. In this light, the law is undoubtedly the source of law, since it derives from the sovereign, expressing the general will of the nation.

But the time of exegetic interpretation has ended in the era of Gény, says the author. Today, no professor can teach civil liability, without taking into account the decisions delivered by the Court of Cassation. Jurisprudence protrudes *in fact* as a source of law, and those who qualify it as "abusive" may criticizes its legitimacy, but not its nature of formal source of law.

Therefore, if the normative power of jurisprudence is undisputable, its legitimacy gives rise to controversy. Certain authors consider that the principle of separation of powers in the state transforms the judge into a mere "servant" of the law, the creation of law being the exclusive preserve of the Parliament and Government. In this light, the creation of law by a judge would represent usurpation. Other authors believe that, pursuant to the principle of delegation of powers, the judicial power, being a key element of a state's organization, is legitimated to create law.

In the same train of thought, François Terré notices that debates on the status of jurisprudence of formal source of law have outlined two orientations[15]. As a first mindset, based on the revolutionary ideologies and on the principle of separation of powers in the state, it is believed that a judge cannot participate in the act of creating law, since it would acquire a power which pertains only to the nation's chosen ones. Since the written law is able to foresee all situations, the judge must only apply it. To this effect, the Court of Cassation was established for the purposes of protecting the law against the usurpations of judges, and not of imposing the law interpretation unit.

As another mindset, the opposite is revealed. The law cannot cover all legal situations, sometimes being obscure, at other times incomplete or even obsolete. Portalis is one of the people who emphasized the undisputable role of a judge, consisting in interpreting, supplementing and adapting the law: "When the law is clear, it must be followed, when it is obscure, its provisions must be further refined. If there is no law, one must turn to custom and equity. Equity is a return to natural law, in the silence, obscurity or opposition of the laws".

For that matter, the lawmaker expressly admits the possibility of the law's insufficiency and implicitly acknowledges the power of the judge of supplementing the law, of extensively

[13] *Idem*, page 85.
[14] William Dross, *Retour aux sources*, in Pandectele Române, no. 2/March 2007, pages 183 and the following pages.
[15] François Terré, *op. cit.*, page 283 and the following pages.

interpreting it and even of changing its meaning, when this is required for dispute settlement. The obligation imposed on the judge by Article 4 of the French Civil Code, reveals the author, has a general scope; it is not set forth only in the interest of the litigant, nor to fill in the voids of the law or to characterize the legal system as being closed or open; this obligation contributes to the definition of the law: "this obligation to adjudicate certifies, as concerns the judge, the presence of an immediate given of the law"[16].

As concerns us, we believe that the interpretation given by a judge does not consist in the mechanical application of certain methods and procedures; it is an act of creation, within which the interpreter lays the entire extent of its creative spirit. A judge cannot be restricted to the literal application of the law. He/she must reveal its spirit. Each case is unique and requires innovative solutions, and the judge must possess the art of distinguishing the meanings of the objective law. He/she must feel the law, so that he/she may resort to general principles, to mysterious presumptions and fictions, to other regulations referring to similar cases and last, but not least, to the values he/she introduces into the rule of law, because any interpretation implies an objective consideration, a valorization.

The judge interprets the law and applies it to real cases. This is his/her key purpose. However, by way of interpretation, the judge does not accomplish a mechanical action, in fact, he/she reveals the truth, adapts and particularizes the law, shapes it according to needs, fills in its voids, remedies its various obscurities, so that the law becomes more supple. When the texts no longer meet the requirements of a particular time, the judge attempts to elude the law and to apply the solutions imposed by the new circumstances of social life. When interpreting the laws, the judge must refer not only to the meaning of words and the intention of the lawmaker, but also to the spirit of the law. Otherwise, supreme justice would only be a supreme injustice: *summum jus, summa injuria*. Since the Roman age, one knew the principle according to which "it infringes the law to remove its spirit, only by considering the words used by the lawmaker", principle included in the *Code of Justinian*.

Jurisprudence is, undoubtedly, the formal source of law. However, its creative nature sparked many disputes. Terré emphasizes the fact that jurisprudence exercises an overwhelming influence on creation in law, however, it cannot be self-legitimating. Although it offers innovative solutions to various law issues, jurisprudence cannot directly create rules of law, fact which clearly differentiates the judge's power from the lawmaker's power. Therefore, jurisprudence remains subordinated to the law.

We notice that one of the arguments underlying the theory of those who refuse to designate jurisprudence as a source of law, is the principle of separation of powers in the state, developed by Montesquieu in its work *L`ésprit des lois*, published in 1748. Montesquieu was distrustful of judges, with "their frightful power over people", insomuch as it chose to subordinate them to the law: judges are only "the mouth that speaks the words of the law, lifeless beings who cannot temper its force or its severity"[17]. After the French Revolution, pursuant to the principle of separation of powers, the law was predominantly asserted as stemming from the Nation and the right of judges to deliver decisions by way of general and regulatory orders denied.

The exegetic approach, identifying the law with the statute, the revolutionary theory of the separation of powers, as well as the codification phenomenon, have minimized the role and natural evolution of jurisprudence in the Romano-Germanic legal system. By postulating on the uniqueness of the law as a source of law and its completeness, the law was kept on hold, and the creative role of jurisprudence denied. According to Robespierre, "the word jurisprudence must

[16] *Idem*, page 48.
[17] *Apud* Philippe Malaurie, *op. cit.*, page 123.

be removed from the language set; in the new regime, it stands for nothing. In a state which holds a Constitution, a legislation, jurisprudence is none other than the law itself"[18].

We believe that the separation of powers cannot be brought up as an argument today, since the lawmaker itself understood to implicitly empower the judge to interpret the law in a creative manner, when the law is silent, obscure or insufficient. For the authors of the French Civil Law, the law is not infallible, perfect, on the contrary, it is a human creation, imperfect by definition. Therefore, custom and jurisprudence will cover the gaps of the law. The idea of the authors of the Code is expressed in the preliminary Book, which was suppressed: the judge, in the absence of a precise text of law, is a "minister of equity", hence, his/her power to supplement the law, by resorting to customs and equity, is acknowledged[19].

On the European continent, we also find such "empowerment" in the Italian, Belgian, Austrian, and, of course, Romanian Civil Code. Complete freedom of consideration is granted to judges by Article 1 of the Swiss Civil Code, according to which: "The law determines all matters to which the letter or spirit of one of its provisions refers. In the absence of applicable legal provisions, judges issue a decision based on the customary law and, in the absence of a customary law, based on the rules they would establish, if they were to act as a lawmaker. They draw upon the solutions established by the doctrine and jurisprudence". Acknowledging the imperfection of the legislative work, the Swiss Code expressly proclaims the creative role of judges. In spite of this generous regulation, which was applied in the first 30-40 years upon their drafting, the federal court of law found it convenient to considerably reduce the creative power of the Swiss judges, placed under the continuous pressure of the doctrine.

Another argument, whereby it was attempted to discourage jurisprudence as a creative source of law, was that, given the principle of separation of powers, only the Parliament represents the nation, hence, judges, not being empowered to this effect, have no legitimacy in creating laws. This argument was argued against in the specialized literature through the fact that: justice presents a certain form of representativeness, since the judges of supreme courts of law, as well as those of constitutional jurisdictions, are appointed by a court established through vote, fact which grants them a certain degree of legitimacy; by ensuring free access to justice and by the publicizing of hearings, the courts ensure the representation of the interests of the citizens, a minority class from a political point of view; through the control of the constitutionality of laws, exercised *a posteriori*, justice guarantees the "participation" of citizens to the law-making process[20].

"In theory, one may easily discuss the legitimacy of the actions of the courts of law, when they drift away from the sources of law", writes Mircea Djuvara. However, "to the extent that such debate is not effective and a difference remains between the *proposed* law and the *practiced* law, surely only the law applied to real life is the positive law. The order of sources remains a mere desideratum. If it is not listened, it remains only at a theoretical level until it succeeds in asserting itself: until then it is yet to be a real law"[21].

J.L. Bergel believes that, today, the creative role in law of judges can no longer be denied[22]. Beyond the application, interpretation and filling out of legislative voids, a judge's

[18] *Apud* Alexandru Vălimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex Publishing House, Bucharest, 1999, page 166.
[19] Quote from Alexandru Vălimărescu, *op. cit.*, page 364.
[20] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006, page 151.
[21] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedia juridică)*, All Publishing House, Bucharest, 1995, page 473.
[22] Jean - Louis Bergel, *op. cit.*, page 311.

mission also consists in adapting, animating or obscuring it, sometimes being able to ignore or argue against it. Even if judges must remain subordinate to law, they must also ensure its effectiveness. Although court orders contain rules of law only binding upon the parties participating in a trial, nevertheless, given the hierarchy of courts of law, precedents "may have a certain authority and, in fact, cannot be ruled against by lower courts".

Conclusions

In the Roman-Germanic system, the pursuit of knowing to what extent jurisprudence contributes or does not contribute to the creation of law, still sparks controversy. History has shown that, successively, law and jurisprudence have fought over the role of first creator of law. Those who acknowledged the creative force of jurisprudence have based their opinion on its more receptive nature compared to the law. While, as Ihering noticed, "in the field of law, as anywhere else, history never stops", jurisprudence has the ability to promptly meet the needs of social life, while the law has a slower rhythm, disconnected from the evolution of law.

From the matters discussed above, it results that jurisprudence is undoubtedly a formal source of law, the debates being about its creative nature. By emphasizing the creative force of jurisprudence, Vladimir Hanga wrote: "The law remains essentially abstract, but the consideration of jurisprudence makes it a natural law, because judges, by understanding the law, taking into account the interests of the parties and taking inspiration from equity, ensures the final purposes of the law: suum cuique tribuere"[23].

In our opinion, the paradox of post-modernism does not reside in the creative power of the continental judges, in full expansion. The paradox consists in the fact that judges is trapped between the obligation to pass judgments in strict compliance with the letter of the law, on the one hand, and the absolute requirement to settle the case, under the penalty of denial of justice, irrespective of its insufficiency. It would seem that we would rather hide behind certain theoretical and traditional rigors, instead of attempting to expand our horizons to a free drafting of the law, by means of jurisprudence. Similarly, judges, meeting the needs of the age, also maintain the appearance of fully abiding by the letter of the law. However, in reality, they depart from it or create new legal norms. For these reasons, the doctrine rightfully places continental jurisprudence, in terms of creative role, between two limits: ***de jure*** **denial** and ***de facto*** **acknowledgement**[24].

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[23] Vladimir Hanga, *Dreptul şi tehnica juridică*, Lumina Lex Publishing House, Bucharest, 2000, page 80.

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AMBIGUITY OF THE COLLOCATION "STATE SUBJECT TO THE RULE OF LAW"

Iulian NEDELCU [*]

Abstract

This work has as purpose the analysis of the notion of "State Subject to the Rule of Law", considered within the doctrine as being ambiguous due to the fact that there are several methods to understand the base of state being subject to the rule of law, on one hand and on the other hand because, similarly to the concept of democracy, the abusive use of the concept to describe political and legal regimes which are completely different from one another voids it of any meaning. The concept of state subject to the rule of law is a doctrinary creation. Although normativised by many current constitutions, its contents mostly remains uncertain, precisely due to its origin which makes it an incessant debate theme, a theme upon which a generalised agreement has not been possible up to presently.The analysis of this notion shall approach the visions upon the state subject to the rule of law expressed within the doctrine: formalist, functionalist and material which provide three different types of organisation of the state subject to the rule of law which are complementary instead, not antagonistic ones.

Keywords: *stat subject to the rule of law, constitutionality, formalist vision, functionalist vision, material vision.*

Introduction

The notion "*state subject to the rule of law*", within the doctrine, is appreciated to be ambiguous due to the fact that there are several ways of understanding the basis of subjecting the state to law, on one hand and on the other hand, because, as in the case of the concept of democracy, the abusive use of the concept to describe political and legal regimes which are radically different from one another, voids it of any meaning. Its symbolic charge renders its structure too fluid, and its contents too little determined. This is why we find it useful to very synthetically survey a few of the state subject to the rule of law theories, on this occasion shaping its features, so that subsequently we should see its functions.[1]

The state subject to the rule of law concept is a doctrinary creation. Although normativised by many current constitutions, its contents greatly stays uncertain, precisely due to its origin, which turns it into a continual them for debate, a theme upon which a generalised agreement has not rather been possible so far. Created in Germany, under the name of "rechtsstaat", the concept has been taken over by the French doctrine under a critical but also constructive form under the name of "l'etat de droit" and it has penetrated even in the specific legal Anglo–Saxon world, even if the concept of rule of law, greatly stays distinct. We actually have three concepts, which although they seem to express the same thing, they are distinct in many regards, being tributary to a certain particularity of the legal culture using them.

If the objective of all theories which are the basis of these concepts is to enframe and limit the power of the state through law (this being the basic feature that we can find in all the theories), the manner to attain this objective is different, the state subject to the rule of law being

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[1] Dan Claudiu Dănișor, *Constitutional Law and Political Institutions*, Volume I – General Theory (Craiova: Sitech Publishing House, 2006), 170.

for some people a state which acts through the law, that is under its legal form, for others a state which is subjected to law or, as a third category of doctrines considers, a state of which law shows certain inner traits. These three visions – formal, functional and material – provide three different methods of the state subject to the rule of law organisation, but which are complementary instead, not antagonistic. If for the formalist vision, the state subject to the rule of law is reduced to a hierarchisation of the legal order, which has as purpose to limit random due to the fact that the different state's bodies can act only based on a legal empowerment given by a higher legal standard in the normative hierarchy as compared to those that the respective body can adopt, if for the functionalist vision the state not only that it acts using the law but also, it is subjected to it, although the basis of this subjection of the state to a law which is superior to it, is conceived in very different manners, for the material vision upon the state subject to the rule of law the law contents becomes more important than the form of the controlled normative hierarchy, the idea on which this vision is focusing being the one of freedom, and not the one of authority asserting organisation.

1.The concept of state subject to the rule of law

The concept of state subject to the rule of law was elaborated and substantiated by the German doctrine from the second half of the XIth century. The idea of state subject to the rule of law represented, beginning with the VIIIth century, the pattern of fundamental guarantee for the citizens' rights and liberties. The philosophic and legal doctrine on the human natural and imprescriptible rights[2] represents the primordial source of the principles of the state subject to the rule of law.

The state subject to the rule of law means the subordination of the state to law, the approaching of this notion being made from two perspectives:

- the power of the state as coercive force;
- relation between normality and power.

With regard to the state's power as coercive force, what it is interesting is the freedom-power relation.

The feeling of freedom appeared simultaneously with the human kind. For the human kind, freedom has been and will remain as natural and as legitimate as his very existence. Relation between freedom and coercion must be rational. Freedom without authority is altered[3] as authority without freedom is degenerated. Law models, through behavioural rules expressing the general will, human tendency, which is a natural one for that matter, to complete, unconditional freedom. It is still law that institutes and legitimates coercion, enframing it within a system of means and proceedings.

Power and normality are in a mutual interconditioning relation, thus power creates the standards which limit power. The problem of defining state subject to the rule of law or the legality state seems simple at a first view. Most of authors claim that the state subject to the rule of law is characterised through the fact that it accomplishes law reigning in its whole activity, either through relationships with the citizens, and either with the different social organisations on its territory[4].

[2] Universal Declaration of the Human and Citizen's Rights - 1789: "The purpose of any political partnership is to preserve human's natural and imprescriptible rights: freedom, proprietorship and resistance to oppression".
[3] John Locke, Essay on Civil government, Dalloz Publishing House, p.53.
[4] To see German Constitution, Spain Constitution, Romania's Constitution.

2. Formalist vision upon the state subject to the rule of law

Formalist vision upon the state subject to the rule of law was imposed in Germany in the XIXth century, even if initially it encountered a substantial vision due to a liberal perspective and was consolidated under the impulse of the Kelsenian Normativism. Thus, the state subject to the rule of law is opposed to the police state. "*The police state is that in which administrative authority can, in a discretionary way and with a freedom of decision making more or less complete, apply to citizens all the measures they consider useful on their own authority, to cope with circumstances and to attain each moment the purposes they propose*".[5] Unlike this type of state, the state subject to the rule of law is "*a state which, in its relations with its subjects and in order to guarantee their individual status, it is subjected itself to a law regime, because it enframes its action upon them through rules, some of them determining the rights reserved to citizens, some others establishing in advance the methods and means which can be used to achieve state purposes*".[6] **Which is in the centre of this theory of the state subject to the rule of law is administration being subjected to the laws**. The administration cannot act but ***secundum legem***, that is based on a legislative empowerment and, certainly, it cannot act ***contra legem***. **This fact entails on one hand that any administrative coercion should be accepted by citizens, for they participate in the laws creation through Parliament elections and, on the other hand, it should be predictable, non arbitrary, for laws are not only general, abstract and impersonal, but also presumed to be known by everyone.** This vision upon the legal enframing of the administrative action is doubled in Germany by a material understanding of the law, which requires to the constitution "*to ask for any « material law», - that is any prescription regarding a rule of law applicable to citizens* - a *«formal law», which excludes ordinances based only on the monarch's will or only on the administrative regulating power*"[7]. Therefore, contrary to the French vision, the administration actually misses its own regulating power. This is one of the reasons for which theory could not be fully accepted in the French legal environment which is generally attached to a formal vision of law and which reserves to the administration an own normative power. Therefore *"Rechtsstaat" means that administration not only that it cannot impose by its own force legal duties to its subjects, but also that it must be limited to making that application specific and individual of the legal rules, being limited to the law application: to create norms, would mean, indeed, intromission upon the legislative function; despite all this*, ***a contrario***, *administration has available a decision making and initial action power with regard to its own affairs, its internal organisation – field in which it can take the specific or general required measures, without being necessary to be based on a law text. Through this it is manifested the political force of the* Rechtsstaat *theory which at the same time represents a barrier in the way of random, requiring an intervention of* ***Landtag*** *for everything that cause prejudice to individual rights and keeps the Administration prerogatives, placing the state itself outside the law application*"[8].

This vision upon the state subject to the rule of law starts from a trust out of principle in laws and in representation which is not at all unanimously shared. On the contrary, for some people "*normativism does not produce, essentially, but one result: it carries at the legislative level the dynamism of adaptation of Law which otherwise would have made the state to act in*

[5] Rene Carré de Malberg, Contribution à la théorie générale de l'Etat, Tome II, Sirey, Paris, 1920-1922, p. 488.
Jacques Chevallier, *L'Etat,* (Paris: Dalloz, 1999), 17-18.
[6] Idem.
[7] Jacky Hummel, Etat de droit, libéralisme et constitutionnalisme durant le Vormärz, in Figures de l'Etat de droit, p. 144.
[8] Jacques Chevallier, *L'Etat,* (Paris: Dalloz, 1999), 17-18.

the administrative field". Overall, there will not exist either more or less change, as we find ourselves within a state subject to the rule of law or within a «*random*» one; there is only one difference of state's bodies obliged to make the adjustment in the two cases. This is not the essence of the Rechtsstaat (the state subject to the rule of law) to guarantee the predictability through a normative immobilism. What a citizen grains before inosculated administration, he/she will lose because of a law maker which «*breaks out within the norms*».

This theory settles the relation *state – law*, which is addressed in terms of priority/primordiality, claiming that the *state precedes law*. Therefore there is no previous right which is also superior to the state. If the state is subjected to law, it will make it voluntarily. The theory is based on an overreaction of sovereignty doctrine. A sovereign state does not know other limits apart from those placed by itself. Only prescriptions punished or ordered by the state can have the status of legal norms. Precisely due to the fact that the state is the only holder of the coercion force, it is the ***«only source of law»***. The contents of the legal order, which is structured so as to be organised as a state subject to the rule of law, is determined by the state. This does not mean that the state's power does not have any limits, but that the state establishes itself limits within which its power is asserted through legal norms. It can amend these norms, but as long as they are in force, it is held to strictly comply with. And yet, law represents for the state a true coercion, even if not an external one.

A first coercion results from the fact that state cannot suppress the very legal order, that it is obliged to act based on a legal title. A second one results from the social pressure asserted on behalf of the idea of law which substantiates the feeling of affiliation to a state. These barriers that the self-limitation theory places in the way of the state's power are yet fragile. State creates a limit of its power assertion, creating a legal order which is structured, hierarchised, stable and coherent, but the contents of this order is indifferent, which makes that the state subject to the rule of law should remain a mere form, of which contents is too handiest for the ruling power.

3. Functionalist vision upon the state subject to the rule of law

In the functionalist vision upon the state subject to the rule of law, the state not only will act through law, but it is subjected to it. The nuance is very important, for law becomes not only a means of the state's action, but an outer limit of this action. From an instrument of power, law turns into a guarantee of freedom. Not only administration is limited by law, but the very law maker who finds his/her action enframed by the existence of a law which escapes to a certain extent to its direct and exclusive control. Therefore, this time it is about a limiting from outside of the state's power. The basis of this subordination of the state to law is instead conceived in different manners depending upon the basis found for this right which in order to limit the state, should be anterior and superior to the latter*: God, Nature, Reasoning, Society*. But regardless of the basis, the state is held to comply with this right, not based on its own will, but based on a will which is superior to it. Since the creating fact of this right is found outside the state, it cannot modify it. Essentially, it is the idea transposed into the constitutional revision procedures which implies the direct intervention of the people or into the procedure of control of the constitution revision projects constitutionality.

The state subject to the rule of law becomes more complex from the formal perspective. If formalist theories of German origin instituted only a law priority before the administration, instituting a legal state, the state subject to the rule of law institutes a priority of law before the state overall, not only before its bodies and it cannot be conceived without the Constitution's supremacy in relation with the laws. Thus, the constitutionality control becomes mandatory for the existence of the state subject to the rule of law. But the very Constitution does not have an indifferent contents, it is not a mere postulate as in the normativist theories, which requires from

law a certain contents. Thus, this vision tends to become material, but it remains inaccurate, for the contents of the natural law, of the objective law, of social consciousness is too vague, too difficult to be transpose in accurate legal terms.

4. Material vision upon the state subject to the rule of law

For the material vision upon the state subject to the rule of law, *"if the state subject to the rule of law would be only a technical device which made the laws be subjected to the Constitution and which manifested the triumph of the norms hierarchy, it would not have at all a different excellence but to provide the intellectual satisfaction of Hans Kelsen's disciples"*.[9] For this vision the notion upon which the state subject to the rule of law is focused is that of freedom, not the norm one. Fundamental rights are in the centre of this construction, which keeps the benefits of the normative hierarchy, of the jurisdictional control of its compliance with the latter, but it gives them a new purpose, requiring the laws of the state subject to the rule of law the qualities necessary to guarantee the individual freedom by providing the legal security of the law subjects.

Conclusions

In the context of the state subject to the rule of law, "the state must be a state governed by the law. The state must establish with accuracy the limits of its competences under the form of laws, as it does with regard to the citizens' liberties, it must not act more than its legal competence."[10]

Romania's Constitution revised in 2003, proclaims in art. 1 paragraph (3) that Romania is a state subject to the rule of law, opting for the collocation "state subject to the rule of law", the literal translation of the word "Rechstaat" proposed by the German doctrine, and not for that of "legal state", preferred by the French doctrine, being considered that the legal state is only one of the levels of the state subject to the rule of law, which does not provide enough guarantees as compared to the random, the law-marking remaining uncontrollable.[11]

The laws of the state subject to the rule of law must first of all not only be structured as an hierarchy, but it must be certain, which requires the public character of the legal norms, a certain clarity of prescriptions, their non-retroactivity and stability, that is the predictability of the amendments that might be operated, qualities which make law provide the legal security of the subjects and their legitimate trust in the continuity of the state's action. Subsequently, law must be based, so as to be in the presence of a state subject to the rule of law, on certain values inherent to the human person (dignity, freedom), inherent to the democratic society (participation, pluralism) and to the liberal society (justice, compliance with the individual's rights and liberties, the state's intervention subsidiary and proportional). This axiological law subordinates its state through contents, the formal means being subordinated to the achievement of the values founding the juridical order.

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[9] Dominique Colas, *L'Etat de droit*, (Paris: P.U.F., 1987), p. VIII.

[10] Ioan Alexandru, *Administrative Law in the European Union,* Lumina Lex Publishing House, Bucharest, 2007, p. 150.

[11] Ion Deleanu, M. Enache, *State subject to the rule of law,* in the Law no. 7/1993, p. 10; Marie Joelle Redor, *de l,Etat legal a l'Etat de droit,* Economica, PUF, 1982, p. 14.

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ONLY STATE PRESIDENT?

Marius VĂCĂRELU[*]

Abstract

Last 4 years showed to Romania that is impossible to deny the national feeling of passionately activism in politics: for sure, we are Latin and we remain Latin. All this big debate was related to a person and to his position in Romanian state.However, no one was able to be totally independent in his/her analyze, and, if he/she was totally independent, the press take hundreds of attacks against every person who wrote any opinion in this special problem: what kind on republic want we? Politicians want to change this year our Constitution, but I believe they won't be able to do this. In this context, we must start a real national debate of public law specialists, about this institutional problem: we want one president and one prime-minister with powers, or a prime-minister with powers and a president like a puppet? This kind of speech appears now because in 2012 and the key-word of our politics was the legitimacy. In this case, when this political concept become too strong, it is necessary to offer a legal answer. Our text tries to be one of them.

Keywords: *President of Romania, Constitution, state institutions, legitimacy, government.*

Introduction

For Romania, the 2012 year was one of the hardest, since the movements of December 1989 brought us the liberty.

That year was not very dangerous because of snow, but it becomes more dangerous because in Romanian legislation are not settled some specific regulations against the politicians, cause their power to make bad for the society is not limited. In this case, even the small medical examination - mainly psychiatric - will be able to stop some "characters" who perform now, without any control, in national and sometimes European politics.

Romanian Constitution is not very good of its institutional part, because the purpose of its regulations was made by the same president, on 1991 and 2003, who had a strong influence on the commission who wrote the project. Thus, the main problem is that no institution is completely well defined by the constitutional norms, and starting with this truth, we can watch that the their functioning was bad from the beginnings.

The author try to analyze and describe where is the limit of state president powers in Romania and abroad, trying to understand what is the main solution for Romanian state and society.

The author intends to answer underlining few ideas who are still available in legal science, especially in their relation with new socio-political paradigm. In the same time, we must offer a perspective for the future: the dispute between national ideas about state framework and world ideas about the executive power must be finished in one way; we must choose one direction and step forward.

On a normal society, this kind of scientific articles are analyzed with deep attention, because it might offer some directions for future, just because - for example - one of the authors can become after a while judge on Constitutional Court and his/her ideas about state framework can produce a lot of result for the daily practice of executive institutions.

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We try to answer to all these question *sine ira et studio*, remembering the historic facts and some specific characteristics of Romanian nation. A real comparative description - which are the regulations on Romanian Constitutions, but also on another ones. After that, we made a small conclusion: in fact, this debate cannot be solved in 10 pages or less, it is necessary to write a treatise about public law and its dimension.

There is a lot of literature for this subject: less in Romanian doctrine, more in Western Europe and other developed part of the world. What is bad - is mainly written by the political scientist, and less by the lawyers, or, in the best cases, professors of law are read, but not followed. And is almost unanimously proportion, politicians don't read law professor's work, because they can find there the legal obstacles against their wishes - which are not always according with the law.

The author believes that is time to come back to normal logic in public law and politics, because the good ideas cannot be replaced by propaganda.

Paper content

1. If we want to remember the constitutional year of 2012, we must note that lawyer had spoken about the legal framework of state stronger than in any other year, because the context was in that way, but they was not listen - the public agenda on constitutional law solutions was made by the politicians and foreign journals.

There is a problem: Constitution of every state is translated into English - so, if the internal debate of Romanian regulation is quite complicate for foreigners, because they don't know Romanian language, the fundamental law is easy to analyze by anyone.

The consequence is related to the national public image, because a bad image affect the national economy, foreign investments and offers a bad image, which is not good for citizens and state. A bad image today means unemployment, means lost of a lot of money and if forced state institutions to make age of lobby and PR to solve this problem.

In the same time, we must understand that the Constitution means "the rule of law" and its dimension is huge now, when internet is able to describe very fast the main activities of politicians. As we can see, in many countries the main public enemy for citizens are the politicians and their unlimited power; just one example, on Cyprus, where the banks was hit and controlled by the politicians, and all society must pay now for the ruler's mistakes.

2. Last year for Western Europe press was full with subjects about Romanian problems, that the executive branch of powers feel even today the power of any articles published by The Economist, by Spiegel, Le Figaro or The London Times, as example. Their article described Romanian Constitutions and the political facts made by some stupid categories of people, who was almost able to send back to the anarchy times the Romanian state.

Few examples are here:

a) "Romania is divided into two political tribes," says Dimitar Bechev, who runs the Sofia office for the European Council on Foreign Relations. "It isn't a principled political disagreement, it is a dirty war. And it has become very personal."

The nationwide vote on whether Basescu should be allowed to remain in office became necessary after the Romanian parliament suspended the president from his office in early July. The Ponta government accuses Basescu of overstepping his authority to interfere in the daily running of the country and preferring loyalists when making important judiciary appointments.

Disregard for the Constitution

But Ponta's energetic efforts to discredit the president have landed him in hot water with the European Union. Indeed, the prime minister was called to Brussels early this month for a

dressing down from European Commission President José Manuel Barroso. Specifically, the EU is concerned with what critics have described as Ponta's disregard for his country's constitution.

For one, Ponta ignored a high court decision regarding who was constitutionally authorized to represent Romania at European Union summits. After the court ruled that the president alone was authorized, Ponta travelled to Brussels for a summit anyway. In addition, Ponta has indicated that he intended to defang the Constitutional Court and replace some of the justices.

"Events in Romania have shaken our trust," Barroso said two weeks ago, underlining his concern. "Party political strife cannot justify overriding core democratic principles." The EU's progress report on Romania was likewise scathing, saying that "exceptional events" in the country were a "major source of concern."

Ponta had likewise attempted to change the rules governing national referenda of the kind that took place on Sunday. He issued a decree casting aside the requirement that half of registered voters take part in referenda before it became valid. Under EU pressure, however, he reversed course recently.

Still, Ponta seems intent on seeing the back of the president. In a recent interview with SPIEGEL, in which the prime minister was eager to present himself as a committed democrat, he was asked: "If only 45 percent turn out, but there is a clear majority against Basescu, do you think he should remain in office?" Ponta replied: "That would then be his decision if he remains in office or not. He would have to ask himself in such a situation who he represents, but certainly not the majority of the people."[1]

b) Is Romania worse than Hungary?

Victor Ponta, the prime minister, ignored a ruling of the Constitutional Court on who should represent Romania at EU meetings. The court was stripped of its powers to overrule the parliament's decisions, judges were threatened, and the ombudsman, Gheorghe Iancu, replaced with a party loyalist. The official journal, which publishes court rulings and laws, was moved under government control to delay inconvenient rulings by the Constitutional Court - such as the one about who represents Romania at EU meetings.....

Nobody in Brussels really understands why the Ponta government is so blatant in ignoring current legislation and in moving swiftly to get institutions - especially the judiciary - under party control. It is even more difficult to comprehend as Mr Ponta is poised to win the general elections later this year. "We were flabbergasted. But it is a mistake for them to think they can pull it through, these are not the 1990s," the EU official said. Romania is still under EU monitoring for guaranteeing an independent judiciary and for effectively fighting corruption and other crimes. A report is due later this month .....

Another sanction against Romania that is envisaged in Brussels is a freeze of EU funds. Payments are already suspended since July 1st on technical grounds such as faulty public procurement rules. This could be made permanent and linked to the political situation.

The most likely outcome of all this is that Romania's bid to join the borderless Schengen area will be completely derailed. The Netherlands were the only country opposing the move so far. Earlier this year the Dutch indicated they may lift their reservation if the EU commission's report is positive. (The decision to let Romania has to be taken with unanimity among member states.) Now the Dutch position seems to gain Germany's support. On July 8th, Guido Westerwelle, Germany's foreign minister, said "serious violations of the letter and spirit of EU values may raise question about the last steps to Romania's full integration in the EU."[2]

[1] http://www.spiegel.de/international/europe/basescu-survives-referendum-in-romania-a-847178.html, consulted at 27th of March 2013.

[2] http://www.economist.com/blogs/easternapproaches/2012/07/romanian-politics-2, consulted on 27th of March 2013.

c) The ruling coalition, of Social Democrats and Liberals, had passed a law earlier this week to ease the impeachment procedure. They had also replaced the heads of both chambers of Parliament, (both allies of Mr Băsescu) with politicians close to the Prime Minister, Victor Ponta. One ally, the Liberal leader Crin Antonescu, was appointed president of the Senate. That move will make him the country's interim president if Mr Băsescu is suspended.

In another important move, an emergency ordinance shifted control of the Official Gazette, a bulletin that gives formal publication to laws and regulations, from parliamentary to government. Civil society groups are concerned that this could enable instant lawmaking. .....

The Cabinet also replaced the Ombudsman with a former Social Democrat lawmaker. That has sparked another round of controversies. The Ombudsman is the only Romanian public body who can challenge the emergency ordinances of the Government before the Constitutional Court.

Mr Ponta has also tried to change some of the judges from the Constitutional Court, accusing them of political bias. According to the Constitution, the judges are irremovable during their time in office. The Court said Mr Ponta's government is trying to threaten its independence with such potential dismantling acts.[3]

As we can see, the main vectors of Western Europe press presented state institutions - mainly the government - as an aggressor, who don't respect the Constitution and who lost its respect abroad. In fact, even a single article about this problem can create problem for a weak economy, but on June, July and August the number of articles was huge; a map from that time underline that Romanian case of war between President and Parliament + Government - with all legal context described - was present of 98% of states.

3. Is not our job to solve the image problems, there are a lot of institutions able to do that, a lot of PR companies ready to work for this subject.

We must analyze which are the main conditions to put in form on Romanian Constitution, to fulfill the main purpose of state: increasing its power, offering satisfaction to every citizen.

For this, we must imagine a real and coherent legal framework for our country. On this hypothesis, we must imagine a national way of solving problem, but watching carefully to other states examples - good practices are always necessary to be known, because their importance is huge of juridical battles of arguments.

There are two global models in fact, because both of them are the main expression of a special kind of legal culture:

French one, who is a representation of former times, when Paris was the intellectual center of the world, and where the ideas were followed with passion. Its role was huge for many countries, because the cultural domination of XIX corresponds to the national state creation on many continents; in this case, the global time of ideas was good not only for writers, but also for lawyers, and many codes and constitutions had as main influence French legislation.

The second example is the United States of America's example, because after World War II its power becomes the single pillar of democracy - and, for this, their legal concepts started to be spread on world: first, on the commercial branch, after that, one many other cases.

There is something very special on both cases: France is based by the national and historical loyalty, but the US are based by the loyalty for Constitution.

4. French president powers - which are closer by the Romanian regime - are described by few articles, as they are:

[3] http://www.economist.com/blogs/easternapproaches/2012/07/romanian-politics-1, consulted on 27th of March 2013.

Article 5:

The President of the Republic shall see that the Constitution is observed. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State.

He shall be the guarantor of national independence, territorial integrity and observance of treaties.

Article 8:

The President of the Republic shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government.

On the proposal of the Prime Minister, he shall appoint the other members of the Government and terminate their appointments.

Article 9:

The President of the Republic shall preside over the Council of Ministers.

Article 10:

The President of the Republic shall promulgate Acts of Parliament within fifteen days following the final adoption of an Act and its transmission to the Government.

He may, before the expiry of this time limit, ask Parliament to reconsider the Act or sections of the Act. Reconsideration shall not be refused.

Article 11:

(1) The President of the Republic may, on a proposal from the Government when Parliament is in session or on a joint motion of the two assemblies, published in either case in the Journal Officiel, submit to a referendum any government bill which deals with the organization of the public authorities, or with reforms relating to the economic, social, or environmental policy of the Nation and to the public services contributing thereto, or which provides for authorization to ratify a treaty that, although not contrary to the Constitution, would affect the functioning of the institutions. .....

Article 12:

The President of the Republic may, after consulting the Prime Minister and the Presidents of the assemblies, declare the National Assembly dissolved.

A general election shall take place not less than twenty days and not more than forty days after the dissolution. The National Assembly shall convene as of right on the second Thursday following its election.

Should it so convene outside the period prescribed for the ordinary session, a session shall be called by right for a fifteen-day period. No further dissolution shall take place within a year following this election.

Article 13:

The President of the Republic shall sign the ordinances and decrees deliberated upon in the Council of Ministers. He shall make appointments to the civil and military posts of the State. [...]

Article 14:

The President of the Republic shall accredit ambassadors and envoys extraordinary to foreign powers ; foreign ambassadors and envoys extraordinary shall be accredited to him.

Article 15:

The President of the Republic shall be commander-in-chief of the armed forces. He shall preside over the higher national defence councils and committees.

Article 16:

Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted,

the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the assemblies and the Constitutional Council.

5. United States president is considered - by the force of the American economy and military power - the most powerful man in the world. For sure, from the military point, but the legal doctrine underline other things:

The basic features of the U.S. presidency noted above are part of what distinguishes presidential systems of government from other systems. By definition, in a presidential system the president must originate from outside the legislative authority. In most countries such presidents are elected directly by the citizens, though separation of origin can also be ensured through an electoral college (as in the United States), provided that legislators cannot also serve as electors. Second, the president serves simultaneously as head of government and head of state; he is empowered to select cabinet ministers, who are responsible to him and not to the legislative majority. And third, the president has some constitutionally guaranteed legislative authority: for example, the U.S. president signs into law or vetoes bills passed by Congress, though Congress may override a presidential veto with a two-thirds majority vote in both houses[4].

Article II, Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows: .....No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States. .....

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public

[4] Brian Duingan, The executive branch of the federal government: purpose, process, and people (New York: Britannica Educational Publishing, 2010), 34.

Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Analyzing these disposition, we can see that the French president is much close by the royal powers of history, because - we must remember, France is the country of monarchic absolutism.

6. Romanian history is connected - as almost good part of the European continent - to this paradigm. In fact, we can see that only after strong wars, where the national power was deeply affected, European states renounced to the absolutist power for chief of state.

Romania is a territory where wars were too much present, only in the last century we participated on 4 wars. Everyone was strong and with deep traces on Romanian map and Romanian citizen number, because our neighbors were not very positive in their attitude related to Romanian interests.

Thus, it appears the main and single question, who speaks about also about the president legitimacy against the government legitimacy: for what is he elected: mainly for economic powers or mainly for military dimension of presidential position?

The answer is very simple in Romania, and somehow it is shown by the public social investigations about the trust for state institution, when the church and the army are on the first position.

The church and the army are the state pillars (with the family). In this hypothesis, we must note that the citizens want to see a strong president, able to protect the state against any other aggression. This answer is the consequence of history and not of a paternalist mentality, because every state teaches its pupils national history. The Romanian history is complicate, but if offers a red wire: when the ruler was strong, the borders and citizen's life was better defended.

The legitimacy is given not only by the elections, there is more important to understand the history, to understand why a state acts in its way (for example, the Hungarian politics is almost no woman policy) - and laws cannot change in one day of vote (the referendum for Constitution approval) decades and centuries of history.

In the same time, the same social research wants to see the prime-minister more involved in economic problems - in fact, his career depends in almost complete proportion by the economic results, rather the military aspects.

In the same time, Romanian citizens watch every day without too much satisfaction to the borders, and they are not satisfied - they always consider that the main dangers come from the power and hate of some neighbor countries rather than the internal state framework.

For these arguments - who must be developed on a special book, but only after 2014 elections - we consider that is much better to not have a prime-minister, because, however, two important positions occupied means - naturally and without any other hesitations - an institutional conflict between persons (first) and institution (after).

Conclusions

Our text tried to describe better the main issues for a new regulation of executive power in Romania, presenting the French and United States regulation on this case.

In the same time, we presented some ideas about legitimacy and constitutional framework of Romania, underlining that the whole context is more close by the strong position for president, because the Romanian history send us to this conclusion, who don't show much options for prime-minister.

These kind of ideas are not totally welcomed today and a good part of readers will accuse me as being a partisan in internal politic war. In the same time, if the angry people will try to think with a "cold mind", they cannot ignore two things: history and map of Romania, especially our neighbors.

On this context, we consider that is necessary to understand much better the future on a correct line of history; if we cannot ignore geography and history, is better to deep our research on this part of public law. For sure, the author will continue this study, trying to present the best results for Romania and its nation.

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THE SITUATION OF MOLDOVAN MINORS AS VICTIMS OF TRAFFICKING FOR SEXUAL EXPLOITATION, ASSISTANCE AND LEGISLATION CONCERNING TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF SEXUAL EXPLOITATION IN EU MEMBER STATES

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Abstract

The research, examines the phenomenon of trafficking of moldavan minors for sexual exploitation in the European countries. Also, in order to realize the best prevention and contrast of the trafficking of minors, the research underlines the necessity of harmonization of all the national legislations (up to now 27 different approaches pertaining to each EU member states) according the numerous directives formulated and reproposed by the European authorities.

Keywords: *trafficking, sexual exploitation, European legal system, national legislation armonization, Moldovan minors trafficked; victim assistance and protection.*

1. The Situation of Moldovan Minors as Victims of Trafficking for Sexual Exploitation in the European Context.

In order to have a knowledge of trafficking in Moldovan children for sexual exploitation in the whole European context (and not just in the two requested countries), we have started to require data to all the European official organizations and NGOs operating in the field of human trafficking, with the aim to elaborate them by adopting the same methodology used for the Italian research.

The data we have obtained need serious reflection.

From a quantitative point of view, we only got a reply from Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, Estonia, Ireland, Luxembourg, Netherlands, Poland, Portugal, Romania, Spain and United Kingdom.

As regards a qualitative evaluation, gathered data are quite poor and disappointing, and they have not allowed us to use the methodology applied in the Italian research.

Austria[1]

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[1] The organizations addressed by us in Austria are the following: **Ministry for European and International Affairs** National Coordinator on Combating Human Trafficking; Federal Ministry of the Interior/Criminal Intelligence Service Austria Central Service Combating Alien Smuggling and Trafficking in Human Beings; Adesuwa Initiatives; Crisis centre for victims of child trafficking run by the city of Vienna; ECPAT Austria; IBF Intervention Centre for Trafficked women; IOM Österreich (IOM); LEFÖ Counselling Education and Support for Migrant Women; Ludwig Boltzmann Institute of Human Rights.

Austria offers a varied statistical picture depending on different data sources. In 2008 the Caritas shelter assisted three Moldovan minor girls strongly suspected of being victims of child trafficking. According to data from the Judiciary Police, and regarding the year 2010, Moldovan minors involved in criminal activities have been 206 (193 males and 13 females): nobody of them was involved in child trafficking but in other criminal activities like crimes against property and drug crimes. Three minors have been sheltered for a short period but quite immediately they escaped. At present (23 march 2011) only a fourteen years old boy is still assisted and he has not the intention to go back to his country of origin.

Belgium[2]

According to the indications coming from SPF Justice (Service de Politique Criminelle) and the connected NGOs, no information about Moldovan trafficked minors is now available.

Bulgaria[3]

Bulgaria only has to face the problem of Bulgarian citizens coming back to their country of origin.

Czech Republic[4]

According to official data coming from Ministry of Interior, during the last six years (2006-2011) only two Moldovan minors have been sheltered in a centre for foreigner minors, but the cause of their victimization is unknown.

Denmark[5]

The Danish Centre against Human Trafficking has never had contacts nor received warnings concerning Moldovan children / minors identified as victim of trafficking.

Estonia[6]

[2] The organizations addressed by us in Belgium are the following: **Ministry of Justice** Department of Criminal Policy Bureau of the Interdepartmental Coordination Unit for the Fight against THB; Board of Prosecutors General, Federal Public Service Justice; Caritas International; Centre for equal opportunities and opposition to racism; Child Focus – Foundation for missing and exploited children; Churches' Commission for Migrants in Europe (CCME); Department of Criminal Police; European Women's Lobby; Immigration Service - FPS Home Affairs; PAG-ASA; Payoke; Save the Children Alliance; Sürya; Terre des Homme Liaison Office with the European Union.

[3] The organizations addressed by us in Bulgaria are the following: Ministry of Interior – Chief Directorate "Combating Organised Crime"; National Commission for Combating Trafficking in Human Beings; Animus Association Foundation; Bulgarian Gender Research Foundation; Caritas Russe; Civil Foundation"Alternativa 55"; Foundation"Centre Nadja"; Foundation"Ekaterina Karavelova"; Foundation "SOS – Families at Risk"; International Organisation for Migration(IOM); PULSE Foundation; Resource Centre "New Alternative"; "Samariani" Association; State Agency for Child Protection.

[4] The organizations addressed by us in Czech Republic are the following: **Ministry of Interior** Security Policy Department Analyses and Strategies Unit; Ministry for Foreign Affairs; Ministry of Labour and Social Affairs; International Organisation for Migration (IOM); La Strada Czech Republic; Office for International Legal Protection of Children.

[5] The organizations addressed by us in Denmark are the following: Danish Anti-Trafficking Centre; Danish National Police; Danish Immigration Service; Danish Red Cross; Department for Gender Equality; Pro Vest; Save the Children Denmark; The Nest International.

[6] The organizations addressed by us in Estonia are the following: Estonian Women's Associations Roundtable Foundation; Estonian Women's Studies and Resource Centre (ENUT); Living for Tomorrow; **Ministry of Justice** Criminal Policy Department Criminal Statistics and Analysis Division; **Ministry of Social Affairs** Labour Market Department, Social Welfare Department, Gender Equality Department; **Ministry of Foreign Affairs** Legal Department, Human Rights Division, Consular Department; **Ministry of Interior** Law Enforcement and Criminal Policy Department; Tartu Child Support Centre.

According to data coming from Ministry of Justice and covering the recent years, no minors appear to have been involved in human trafficking cases.

Finland[7]

The National Rapporteur on THB declares that any kind of protection measure for sexual trafficking has been applied to minors from Moldova or Romania.

Ireland[8]

Irish official organizations and NGOs declare the complete absence of Moldovan minors as victims of trafficking.

Luxembourg[9]

According to the Judiciary Police, *Section Crime Organisé,* the problem of child trafficking does not exist in Luxembourg.

Netherlands[10]

According to the Dutch Rapporteur on THB and the connected NGOs, no data concerning Moldovan minors as victims of trafficking are available.

Poland[11]

According to an excellent report of the year 2010 concerning 171 unaccompanied minors (from Afghanistan, Armenia, Belarus, Georgia, Iran, Kazakhstan, Russian Federation, Turkey, Vietnam), no Moldovan minors are present among them.

Portugal[12]

The Observatory on Trafficking in Human Beings has not data on Moldovan children, but underlines the presence of a quantity of Romanian children.

Romania[13]

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[7] The organizations addressed by us in Finland are the following: Ministry of the Interior; Monika – Multicultural Women's Association; National Rapporteur on Trafficking in Human Beings.

[8] The organizations addressed by us in Ireland are the following: Department of Justice, Equality and Law Reform Anti-Human Trafficking Unit; Ireland National Police Service; Migrant Rights Centre Ireland; Ruhama- Supporting women affected by prostitution and human trafficking.

[9] The organizations addressed by us in Luxenbourg are the following: Ministry of Justice;**LUXEMBOURG NATIONAL CONTACT FOR EXPERTISE IN THE FIELD COMBATING AND PREVENTING OF TRAFFICKING IN HUMAN BEINGS;** Femmes en Détresse a.s.b.l.

[10] The organizations addressed by us in Netherlands are the following: Dutch National Rapporteur on Trafficking in Human Beings; Ministry of Justice; Comensha (Coordinating Centre for Human Trafficking); Defence for Children-ECPAT Netherlands; Dutch Foundation of Religious against Trafficking in Women; Foundation Federation of Shelters; La Strada International.

[11] The organizations addressed by us in Poland are the following: **Criminal Bureau of the General Headquarters of Police** Central Unit for Combating Trafficking in Human Beings, Human Organs, Child Pornography and Paedophilia; Centrum Pomocy Prawnej im. H. Nieć; La Strada - Foundation against Trafficking in Women Ministry of Interior and Administration Unit for Trafficking in Human Beings in the Migration Policy Department National Intervention and Consultation Centre for Victims of Trafficking (KCIK) Foundation against Human Trafficking and Slavery; Nobody's Children Foundation.

[12] The organizations addressed by us in Portugal are the following: National Rapporteur for Trafficking in Human Beings; Observatory on Trafficking in Human Beings; Associação "O Ninho".

[13] The organizations addressed by us in Romania are the following: Ministry of Interior and Administrative Reform National Agency against Trafficking in Persons; Arad County Council - Centre for assistance and protection of the victims of trafficking in persons; Botosani County Council - Centre for assistance and protection of the victims of trafficking in persons; Galati County Council - Centre for assistance and protection of the victims of trafficking in persons; Iasi County Council - Centre for assistance and protection of the victims of trafficking in persons; Mehedinti County Council - Centre for assistance and protection of the victims of trafficking in persons; SatuMare County Council - Centre for assistance and

According to Ministry of Interior (National Agency against Human Trafficking), Moldovan minors victims of trafficking have not been identified, except for one single case detected in Iasi (General Directorate of Social Assistance and Child Protection Iasi), concerning a Moldovan minor at risk of trafficking.

Spain[14]

The Spanish situation is quite complex and data are unclear. The *Plan Oficial contra la trata de seres humanos* has identifed 13 minors victims of trafficking in 2009, but without knowing their nationality.

United Kingdom[15]

According to the statistical data received from the Home Office and concerning the period 1.4.2009 - 31.12.2010, on a total of 917 victims of human trafficking, 93 are minors trafficked for sexual exploitation but no indication about their nationalitiy is provided, allegedly for security reasons.

From all the other countries we have not received any information.[16]

As already affirmed, the obtained data have not allowed us to realize an in-depth research, similar to the Italian one.

protection of the victims of trafficking in persons; The National Authority for the Protection of the Children's Rights; Centre for assistance and protection of the victims of trafficking in persons.

[14] The organizations addressed by us in Spain are the following: Ministry of Equality; Ministry of Foreign Affairs; Ministry of Interior; ACCEM; International Organization for Migration (IOM); La Red Española contra la Trata de Personas.

[15] The organizations addressed by us in United Kingdom are the following: UK Human Trafficking Centre; Home Office; AFRUCA - Africans Unite Against Child Abuse; Amnesty International - International Secretarial; Anti-slavery International; Child Exploitation and Online Protection Centre OFCU, OIC Team; POPPY project; The Gangmasters Licensing Authority.

[16] Cyprus: Ministry of Interior; Cyprus Police Headquarters – Office of Combating Trafficking in Human Beings; Migrant and Refugee Center, Limassol; Migrant and Refugee Center, Nicosia; FRANCE: ALC - Service de Prévention et de Readaptation Sociale (SPRS); Association «Les Amis du Bus des Femmes»; Autres Regard; Comité Contre l'Esclavage Moderne; ETZ Esclavage Tolérance Zéro; Ministry of Interior; GERMANY: Ban Ying Counseling and coordination Center against trafficking in Persons; Federal Ministry of the Interior; Federal Ministry for Family Affairs, Senior Citizens, Women and Youth; Federal Ministry of Justice; Federal Ministry of Labour and Social Affairs; KOK - German nationwide activist coordination group combating trafficking in women and violence against women in the process of migration; GREECE: ARSIS-Association for the Social Support of Youth; Hellenic National Committee for UNICEF; International Organization for Migration (IOM); Ministry of Interiors - National Coordination; Mechanism to Monitor and Combat Trafficking in Human Beings; HUNGARY: Ministry of Justice and Law Enforcement; State Secretariat for Law Enforcement; NANE Women's Rights Association; Terre des Homme; Latvia: Ministry of the Interior; Office of Citizenship and Migration Affairs; Resource Center for Women "Marta"; State Police; Society Shelter "Safe House" - NVO biedrība "Patvērums "Drošā māja"; Lithuania: Ministry of Interior of Republic of Lithuania; Thb Investigation Unit of the Lithuanian Criminal Police Bureau; Office of the ombudsman for children; Lithuanian Caritas; Lithuanian Human Rights Association; Lithuanian Human Rights League – Lhrl; Missing Persons' Families Support Centre (Mpfsc); Klaipeda Social And Psychological Services Center; Malta: Police General Headquarters; SLOVAKIA: Ministry of Interior; IOM Bratislava national office; Slovak Crisis Center DOTYK; SLOVENIA: Ministry of the Interior; European Affairs and International Cooperation Office; Caritas Slovenia; **Society Ključ**, Centre for the fight against trafficking in persons; SWEDEN: National Rapporteur on THB; The Crime Victim Compensation and Support Authority; Ministry of Integration and Gender Equality; National Coordinator against Prostitution and Trafficking; County Administrative Board of Stockholm; ECPAT Sweden; Nationellt centrum för kvinnofrid (NCK); Save the Children Sweden; Terrafem.

As a conclusion, we can affirm that according to the obtained data, the phenomenon of trafficking Moldovan minors in Europe appears to be somehow resized and indeed from the report released by La Strada International, it is possible to infer how trafficking in Moldovans follows extra-European routes.

Nevertheless, other two more explanations are possible: either Moldovan minors make use of the Romanian nationality, or the Italian system is, as it has been defined, the more effective in measuring the phenomenon.

This consideration appears in line with the invitation, made in the last EU directive 2011/36/EU , and addressed to all Member States, to adapt themselves to the model of unconditioned assistance and protection, experimentally adopted in Italy since 1998.

A last remark must be done: the present research clearly shows that the efforts put in place by organizations must be implemented in order to realize a deep evaluation and quantification of the phenomenon of trafficking in minors.

2. Assistance and Legislation Concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member States

The efficacy of the European policies against human trafficking for sexual exploitation depends mainly on the harmonization of national legislations, which should be adapted to the standards included in the three pillars of prevention, prosecution of traffickers, and protection of victims, that European Union considers as fundamental and basic principles in the fight against this transnational and organized criminal phenomenon.

Actually, the analysis of the different domestic legislations of Member States highlights the existence of considerable gaps with respect to the European norms, particularly in regard to the assistance and protection of trafficked persons, but also between the law and its concrete implementation.

Even the "Council Framework Decision on Combating Trafficking in Human Beings" of 19 February 2002, which represents the first complete formulation of the problem, has not always been completely translated in domestic norms: and this is so true that in some countries the same definition of human trafficking is not clear, while in some cases it does not cover all the facets of this crime. This situation, of course, weakens at local level the activity of law enforcement and prosecution of traffickers, as well as, at transnational level, the fight against criminal groups and the international cooperation.

According to the following "Council Directive on the Residence Permit issued to Third-Country Nationals Who Are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, Who Cooperate with the Competent Authorities" of 29 April 2004, the member states should subordinate the issuing of a residence permit, as well as the assistance to the victims of trafficking, to their cooperation with law enforcement agencies and the judiciary in the investigation and prosecution of traffickers. Up to now, only few countries correctly implemented the directive, and many national laws present important gaps in fixing an adequate reflection period, regulating the access to the residence permit, and offering general assistance to the victims of trafficking, mostly provided by NGOs, which prove to be more effective than state agencies. Besides, it is worthy to emphasize how the subordination of the residence permit to the cooperation of the victims, has often proven to be a poor and inadequate stimulus.

The following tables show the different approach followed by the 27 EU member states:

	Reflection period and eventual assistance	**Criteria for granting of residence permit**	**Duration of residence permit**	**Assistance and protection**	**Legislation**
AUSTRIA	30 days with assistance	The cooperation of the victim is not a condition to obtain the residence permit	6 months for victims of trafficking, extensible to children	State and NGO	Criminal Code Amendment Act 2004 article 104 and 217; Settlement and Residence Act 2005, amended 2009; Security Police Act 1991 amended 2006, 2009; Asylum Act 2005 amended 2009; Aliens Police Act 2005
BELGIUM	45 days with assistance and monitoring	The cooperation with the authorities entails a 3 months residence permit and the possibility to work. During the process right to remain for 6 months, renewable. If the victim is in danger the permit can turn to permanent	3 months 6 months Permanent	State	Criminal Code - Modified by the Law of 10 August 2005; Law of 10 August 2005; Royal Decree of 16 May 2004; Royal Decree of 27 April 2007; Act of 15 September 2006
BULGARIA	30 days with assistance	The cooperation with the authorities entails a residence permit of 6 months or equivalent to the duration of the process and the possibility to work.	6 months or all the process	State	Combating Trafficking in Human Beings Act, Criminal Code (CC), State Gazette (SG) 32/2009; SG 92/2002 - Trafficking for sexual exploitation, article 159 a, b, d, Trafficking for labour exploitation, article 159 a, b, d, Trafficking in children, article 159 a, b, d,Trafficking in organs, article 159 a, b, d, Trafficking in pregnant women for selling their children, article 159 a, Using the sexual services of victims of trafficking, article 159 c, Crime Victim Assistance and Financial Compensation Act , State Gazette, No. 105/22.12.2006, Law for the Foreigners in the Republic of Bulgaria.
CYPRUS	30 days with possibility to a renewal and assistance	In case of cooperation temporary residence permit free of expenses		State	Law for Combating Trafficking, Exploitation of Human Beings and for the Protection of Victims N.87 / 2007

CZECH REPUBLIC	30 days with assistance, extensible to 60 days	In case of cooperation, residence permit of 60 days renewable and possibility to obtain a permanent residence permit and the possibility to work	60 days or permanent	State	Act No. 325/1999 Coll.on Asylum and Amendment to Act No. 283/1991 Coll., on the Police of the Czech Republic, as amended (the Asylum Act); Act No. 326/1999 Coll. on the Residence of Foreign Nationals and on the Amendment to Some Other Acts, as amended; Act No. 40/2009 Coll., the Criminal Code as amended by Act No. 306/2009 Coll.;Act No. 141/1961 S Coll., the Code of Criminal Procedure, as amended; Act No. 435/2004 S Coll., on Employment, as amended; Act No. 262/2006 Coll., the Labour Code, as amended; Act No. 209/1997 Coll., on Financial Assistance to Victims of Criminal Offences and on the Amendment to Some Other Acts, as amended; Act No. 108/2006 Coll., on Social Services, as amended; Act No. 513/1991 Coll., the Commercial Code, as amended
DENMARK	30 days with assistance extensible to 100 days, preliminary to the repatriation. Assistance	Permit allowed till the repatriation. If the victim is in danger asylum is granted for humanitarian reasons			The Criminal Code, Order No. 1034 of 29 October 2009; The Danish Aliens Act, Order No. 785 of 10 August
ESTONIA	30/60 days	In case of cooperation temporary residence permit of one year with guaranteed testimony			Penal Code 2001, consolidated text April 2008; Obligation to Leave and Prohibition on Entry Act (October 1998, came into force on 1st April 1999; consolidated text April 2004) Aliens Act (passed1993, consolidated text April 2005)
FINLAND	30 days / 6 months	The demonstrate victimization entails the residence permit from 6 months to 1 year. The permit is extended for humanitarian reasons. Judicial cooperation not requested. Possibility to obtain a permanent residence permit	6 months / 1 year		Criminal Code, Law no. 1889-39 (Chapter 25 chapter 3 and 3a), Act on the Integration of Immigrants and Reception of Asylum Seekers (493/1999), Act on the Ombudsman for Minorities and the National Discrimination Tribunal (660/2001 and amendment 1109/2008) Aliens Act (301/2004)

FRANCE	6 months	For cooperating victims: residence permits of other 6 months, residency card of 1 year renewable every 6 months	6 months	State	Criminal Code, Act No. 2003/239 on Internal Security of March 18, 2003
GERMANY	30 days. Assistance and support	In case of cooperation the victims obtain a temporary residence permit of 6 months with possibility of a renewal	6 months	State	Criminal Code as amended February 2005; Trafficking in human beings, art 232, 233 a, 236, 180 b, 181; Residence Act 2004 (art. 25, par.4)
GREECE	30 days	In case of cooperation the victims obtain a temporary, renewable residence permit	Temporary residence permit	State	Law 3064/2002**,** Combating trafficking of persons, crimes against sexual freedom, pornography of minors and the financial exploitation of sexual life in general and providing assistance to victims of such acts, Presidential Decree 233/2003 Protection and assistance to victims of crimes pertaining to articles 323, 323^{A}, 349, 351 and 351 of the Penal Code, according to Article 12 of Law 3064/2002, Law 3386/2005 on Entry, stay and social integration of third country nationals on Greek territory, Law 2928/01on criminal organizations and other provisions.
HOLLAND	90 days	In case of cooperation, residence permit of 1 year renewable till 3 years for the trial phase, extensible if the process is concluded. If the cooperation does not lead to the conviction of the trafficker it is possible a residence permit for humanitarian reasons.	1 / 3 years		Penal Code, Article 273f valid from 1st July 2009; Trafficking in Human Beings for Sexual Exploitation, Article 273f; Trafficking in Children, Article 273f; Aliens Circular 2000; B-9 Regulation.
HUNGARY	30 days with assistance	In case of cooperation the victims obtain a temporary residence permit of 6 months	6 months	State	Penal Code, act No CXXI/2001 Article 175 b, entered into force on 1 March 1999; Act of Entry and Stay of Third Country Nationals: Act No. 2. of 2007; Act on Support and Compensation of Victims: Act No. 135 of Act on Witness Protection: Act No. 85 of 2001.

IRELAND	45 days and assistance	In case of cooperation the victims obtain a temporary residence permit of 6 months	6 months	State	The Criminal Law (Human Trafficking) Act 2008; Child Trafficking and Pornography Act 1998; Illegal Immigrants (Trafficking) Act 2000; Criminal Law (Sexual Offences) Act, 1993: sections 7, 8, 9, 10 and 11; Criminal Justice (Public Order) Act, 1994: Part IV Section 23;The Criminal Law Amendment Act, 1935; Criminal Law (Sexual Offences) Act, 2006; The Children Act, 2001; Sexual Offences (Jurisdiction) Act, 1996
ITALY		the residence permit may be obtained by the victims of trafficking regardless of a judicial complaint, in that it provides the so-called "dual track": a process of social integration with a judicial nature and a second one with a social nature. The permit lasts six months and is renewable for another six months or for a longer period if the protection program so requires	6 months renewable for another six months or for a longer period	healthcare services, study, training, enrolling in unemploy ment lists and actual employment	Law n. 108 of July 2, 2010, Law n. 146 of March 16, 2006; Law n. 38 of February 6, 2006; Law n. 228 of August 11, 2003 as amended by law 108/2010 and Article 18 of Legislative Decree 286 of 1998, Law n. 46 of March 11, 2002 ; Law n. 269 of August 3, 1998; Article 12 of Legislative Decree no. No 286 of July 25, 1998 Article 3 of Law No. 75 of February 20, 1958
LATVIA	30 days	In case of cooperation the victims obtain a temporary residence permit of 6 months	6 months		Criminal Law (as amended 25 April 2002) Section 154 Human Trafficking and Section 165 Selling a Person for Sexual Exploitation, Code of Criminal Procedure of Latvia; Immigration Law; Latvian Administrative Violations Code; Law on Pornography Restrictions; Law on Protection of the Rights of the Child, Law on Residence of Victims of Trafficking in Human Beings in the Republic of Latvia; Law On State Compensation to Victims; Special Protection of Persons Law ; Social Services and Social Assistance Law.
LITHUANIA	Residence permit and assistance	In case of cooperation the victims obtain a temporary residence permit of 6 months renewable		State, NGO and IOM	Criminal Code of the Republic of Lithuania; Administrative violations code of the Republic of Lithuania; Law on the Legal Status of Aliens

LUXEMBOURG	90 days and assistance	Temporary residence permit of 6 months and invitation to cooperate. Eventual renewal if the immigration law allows it			The law of 31st May 1999 reinforcing measures against trafficking in human beings and sexual exploitation of children modifying the Penal Code and Code of Criminal; The law of 13th March 2009 concerning trafficking in human beings; The law of 29th August 2008 concerning the free movement of persons and immigration; The law of 8th May 2009 concerning the assistance, protection and security of victims of trafficking in human beings.
MALTA	60 days	In case of cooperation the victims obtain a temporary residence permit of 6 months renewable		State	Criminal Code (Cap. 9) Sub-title VIII bis entitled 'Of the traffic of Persons'; Immigration Act (Cap. 217) The Permission to Reside for Victims of trafficking or Illegal Immigration who Cooperate with the Maltese Authorities Regulations; White Slave Traffic (Suppression) Ordinance (Cap. 63).
POLAND	60/90 days	In case of cooperation the victims obtain a temporary residence permit of 6 months renewable, with possibility to work	6 months	Right to work	The Code of Criminal Procedures, 6 June 1997; Trafficking in Human Beings for Sexual Exploitation Art. 253; Trafficking in Children Art. 253; Act on Aliens, adopted on 13 June 2003 (amended 2005 and 2009); Permission for residence for a specific period Art. 53(1) (15); Permission for residence for a specific period – reflection period Art. 53(a) (2) and Art. 56(2); Law of 16 February 2007 amending the Law on social assistance.
PORTUGAL	30/60 days	Residence permit of 1 year allowed case by case, renewable even if the victim does not cooperate	1 year	State	Law no 23/2007 of July 4: Art.109-112 Approves the legal system for entry, stay, exit and removal of foreigners from national territory; Law no 59/2007 of September 4: Art. 160 Traffic in persons; Decree law no. 368/2007 of November 5 establishing the authorization of residence permits of foreigners who are victims of human trafficking.
ROMANIA		Residence permit not foreseen but tolerance regime till 6 months		Initial *accommodation* and assistance for 10 days. Renewal subordinate to	Law No. 678/2001 on the Preventing and Combat of Trafficking in Human Beings; Law No. 287/2005 for the approval of Government Emergency Ordinance no. 79/2005 which amends Law No. 678/2001 on the Preventing and Combat of Trafficking in

				cooperation	Human Beings; Criminal Code (updated 2000)Trafficking in adults, Art. 204 Trafficking in minors, Art. 205 Law No. 682/2002 on witness protection; Law No. 211/2004 on measures to ensure protection of victims of offences; Law No. 705/2001 on the national system of social assistance; Law No. 302/2004 on international cooperation of the judiciary on criminal issues; Law No. 272/2004 on the protection and promotion of the rights of the child
SLOVAKIA	40 days	In case of cooperation, residence permit and possibility to work		NGO and IOM	The Criminal Code – Act No. 300/2005; Trafficking in Human Beings for Sexual Exploitation, Article 179,Trafficking in Children, Article 180-181
SLOVENIA	90 days	In case of cooperation victims can beneficiate of a temporary residence permit and remain for the duration of the process or even more in case of study or work		State	Aliens Act 2006; Criminal Code Paragraph 113.
SPAIN	30 days	In case of cooperation temporary residence permit. In exceptional cases, connected to the personal situation of the victim, it can be granted even without cooperation. Residence and work permit of 1 year, renewable for 1 year more.		State	Organic Law 13/2007 of 19 of November 2007, on the extra-territorial prosecution of the smuggling of migrants or clandestine immigration, amending LO 6/1985; Penal Code - Law 10/1995 of 23 November 1995 modified by LO 4/2000; LO 15/2003; LO 13/2007; Trafficking in Human Beings for Sexual Exploitation, Art. 318; Trafficking in Children, Art. 318 bis; Organic Law 2/2009, 11 December, reforming Organic Law 4/2000, 11 January, on the rights and liberties of aliens in Spain and their integration into society.
SWEDEN	30 days	In case of cooperation the victims obtain a temporary residence permit of 6 months renewable	6 months		The Criminal Code (2004:406) Chapter 6; Chap. 4, section 1 a Trafficking in Human Beings; Chap. 6, section 11, The Purchase of a sexual service; Chap. 6, section 9, The Purchase of a sexual act from a child; The Act Prohibiting the Purchase of Sexual Services (SFS 1998:408) The Act entered into force on 1 January 1999, but was revoked in April 2005, when the provision was

					made a part of the Penal ;Aliens Act (2005:716); The Act entered into force on 31 March 2006 Chap. 5, para. 15; Social Services Act (2001:453).
UNITED KINGDOM	45 days	In case of cooperation the victims obtain a temporary residence permit of 1 year	1 year		Asylum and Immigration Act of 2004 (Treatment of Claimants, etc.) - Section 4, Borders Citizenship and Immigration Act 2009 – Section 54, Gangmasters (Licensing) Act 2004, Gangmasters (Licensing) Act 2005 amendments, Immigration and Asylum Act, 1999,Immigration, Asylum and Nationality Act 2006, Proceeds of Crime Act 2002, Sexual Offences Act 2003 - Sections 57-59

Learning from the experience and bearing in mind the critical remarks advanced towards the 2002 Framework Decision and the 2004 Directive, the European Commission presented in 2009 a new proposal, which was then negotiated, but subsequently re-elaborated, further to the entry into force, on 1 December 2002, of the Lisbon Treaty.

The European Commission, in order to achieve its purpose to intensify the fight against human trafficking, presented on 29 March 2010 a new "Proposal for a Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting Victims" (as well as a second "Proposal for a Directive on Combating Sexual Abuse, Sexual Exploitation of Children and Child Pornography"). This Directive, whose proposal has been approved by the European Parliament on 14 December 2010, is intended to repeal all the previous legislation, starting from the 2002 Framework Decision. It will finally be possible to monitor and sanction the bad implementation of the Directive, given that its adoption takes place in the frame of the Lisbon Treaty, according to which, in the field of Justice and Home Affairs, issues such as asylum and immigration, criminal law and police cooperation, will be decided by majority vote at the Council, and not any more by unanimity: one single nation will not be able to block a proposal advanced by the Commission, but could give up to the Court of Justice another member state not complying with the obligations deriving from the new Directive.

In particular, the new Directive on human trafficking (in some way a filiation of The 2000 Palermo Protocol and of the 2005 Council of Europe Convention), will allow to operate on different fronts, as for example:

- Criminal law (common definition of human trafficking, aggravating circumstances, sanctions, not punishability of victims for illegal activities as, e.g., the use of false documents imposed by traffickers)
- Criminal procedure (international jurisdiction and consequent possibility to pursue criminals in another member state for the commission of transnational crimes)
- Protection of vulnerable victims with the aim to avoid the re-victimization
- Victims' support (fast identification, legal, medical, social assistance)
- Prevention of human trafficking (awareness campaigns towards potential victims of trafficking and training provided to law enforcement and other public officials.
- Monitoring of the phenomenon (institution in member states of specific bodies appointed to check the correct implementation of the anti-trafficking legislation)

It goes without saying that knowing the defects of the system will be useful in order to develop and improve all the initiatives which will be undertaken in the future.

Conclusion

The phenomenon of trafficking Moldovan minors in Europe appears to be somehow resized and indeed from the report released by La Strada International, it is possible to infer how trafficking in Moldovans follows extra-European routes. Nevertheless, other two more explanations are possible: either Moldovan minors make use of the Romanian nationality, or the Italian system is, as it has been defined, the more effective in measuring the phenomenon.

The efforts put in place by organizations must be implemented in order to realize a deep evaluation and quantification of the phenomenon of trafficking in minors. Also, the necessity of harmonization of all the member states' national legislation in the field of trafficking in human beings has triggered a response at European level, in proposing new legislation with vertical effect.

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AGAIN ABOUT GENDER BASED VIOLENCE IN ROMANIA LEGISLATIVE MODIFICATIONS PROMULGATED ON MARCH 2012

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Abstract

The article continues our last year article, presented in the same conference, on the evolution of the legislation on domestic violence in Spain and in Romania. This new study shall approach only the legislative modifications of the Law No 217/2003 inserted in March 2012 after the shooting at "Perla" Hairdresser in Bucharest, which influenced not only the lives of those involved, but also legislative changes, as an attempt from the Government to offer a better protection for women, who are usually the victims of this type of violence. The present study is dedicated to these new modifications ad their social and legal impact.

Keywords: *gender based violence, new regulation, restraining order.*

I. Introduction.

Regarding our preoccupation of the past few years in knowing and study the issue of gender based violence we drafted this article. Though in our previous study we have presented the evolution of the Romanian and Spanish regulation after 2000, we have not approached the latest modifications brought to the Law No 217/2003 after the shooting at "*Perla*" Hairdresser in Bucharest, inserted in March 2012. The present study is dedicated to these new modifications and their social and legal impact, especially the impact on those women subjected to gender based violence.

Despite that in Romania there are few statistics on gender based violence, and the existing ones are not very recent, it has resulted that this plague is one of the most present in Romanian society. According to the Statistical Bulletin on Labor and Social Protection – 2009, presented by the Ministry of Labor, Family and Social Protection[1], in South-Muntenia Region (formed by Argeş, Călăraşi, Dâmboviţa, Giugiu, Ialomiţa, Prahova and Teleorman counties) were registered most cases of domestic violence (3262), followed by South-East Region (formed by Buzău, Brăila, Constanţa, Galaţi, Tulcea and Vrancea counties) with 1759 cases, the fewest cases being registered in the Western Region (formed by Arad, Caraş-Severin, Hunedoara and Timişioara counties) with 1109 cases. From another Romanian study called "*National Research on Domestic and Work related Violence*", research conducted in 2003 by the Partnership for Equality Center[2] stated that between 2002-2008, 827.000 women were frequently subjected to acts of domestic violence in one of its many forms, thus:

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[1] Available on the Ministry of Labor, Family and Social Protection official website: http://www.mmuncii.ro/pub/imagemanager/images/file/Statistica/Buletin%20statistic/2009/protectiafamiliei2009.pdf

[2] The information was taken from the study *National Research on Domestic and Work related Violence* published on the Partnership for Equality Center official website: http://www.cpe.ro/romana/index.php?option=com_content&task=view&id=27&Itemid=48 p.132.
The research was conducted by the IMAS – Marketing and Polls in July-August 2003, on a representative sample group: 1800 persons aged 18 and above, from who 1200 were women and 600 men; 182

- 695.000 women were insulted, threatened or humiliated;
- Over 316.000 women were physically abused and a similar number suffered different abuses resulted in forced restriction of social relations;
- Over 227.000 women had not their personal money or were striped of money without their consent by other family members;
- Over 70.000 women were abused in different ways, including sexually.

This shows that violence against women is a wide spread phenomenon which must be closely researched in order to be fully understood and to find the most adequate regulation, in the conditions of a deficient analysis and research, both from the deciders local and central public administration) as well as from the judicial system.

The analysis of the new regulation is a first important step in the understanding of this phenomenon, in order to evaluate the social and legal impact of the existent legislative modifications and inconsistencies even after they occurred.

II. Modifications promulgated on March 2012 of the Law No 217/2003 and their social and legal impact.

The modifications of March 2012 were the result of a case which tends to become well known, namely the shooting at *"Perla"* Hairdresser in Bucharest. In this case, a woman noticed the police in many times regarding the possibility that her husband is trying to murder her, because they were separated and he continuously threatened her with physical violence, and the police did nothing. The silence of the police allowed her husband, who has a firearm license, to come at the victim's working place – a hairdresser – and, in broad daylight to fire without discrimination in all the persons who were there, employees and customers. The victim and other persons deceased, while others were seriously injured.

A human sacrifice not without result, but totally useless!!! In its aftermath the legislative adopted Law No 2/2012 which modified Law No 217/2003 on domestic violence[3].

The modifications are very important, but are still uncorrelated with other provisions, and sometimes inefficient. So, in a brief analysis we shall see the novelties brought by the modifications inserted in March in Law No 217/2003.

The concept of "domestic violence", as defined by Law No 217/2003, on its prevention and combat, is circumscribed, as shown in Art 2 *"...any physical or verbal action deliberately perpetrated by a family member against another member of the same family that causes a physical, psychological, sexual suffering or a material prejudice, including threats of such actions, arbitrary coercion or deprivation of freedom*". In our opinion, all these are forms of **direct violence** perpetrated by a family member against other members of that same family. Outside this form, the law states **a form of assimilated violence** namely, "*the hindering of the woman to exercise her fundamental rights and liberties*"[4]. From this definition were excluded the offences committed by negligence, being contradictory with the opinion of some authors, who include this type of offences in the definition of the concept[5].

representatives with decision attributions in public institutions; 190 experts from local authorities, Police, Institutes of Legal Medicine, generalist doctors, emergency hospitals and NGOs. The PCE promoted this project with the support of the Center for Legal Resources, with funds from the Open Society Institute.

[3] Law No 25/2012 for amending and supplementing Law no. 217/2003 on prevention and control of family violence published in the Official Gazette No. 165 of March 13, 2012.

[4] According to Art 3 Para 2 of the Law No 217/2003 amended.

[5] Ortansa Brezeanu, Aura Constantinescu, *Violența domestică. Reflecții*, in the Romanian Penal Law Review, No 2/2007, p.75.

Also, at a national level, the issue of domestic violence was defined as *a problem of public health*[6], which made the law to state its solving within the attributions of four (now five) ministries which must collaborate, but have specific roles, in this institutional mechanism: Ministry of Labor, Family and Social Protection, Ministry of Administration and Internal Affairs[7], Ministry of Public Health, Ministry of Education, Research, Youth and Sport.

In this context, the Ministry of Labor, Family and Social Protection received the attribution to draft the social assistance policy, to promote the rights of the victims of domestic violence, as well as to draft and apply, by its central and territorial specialized structures, special measures to integrate the victims on the labor market[8]. In the actual structure of the Government, the Ministry of Public Health and the Ministry of Administration and Internal Affairs drafts and spreads documentary on the causes and consequences of domestic violence[9]. The Ministry of Education, Research, Youth and Sport implements educational programs for parents and children in order to prevent domestic violence, with the support of other ministries and in collaboration with different NGOs[10]. These attributions cover different sides of the phenomenon: the Ministry of Labor, Family and Social Protection creates the general policy and aims the labor reintegration of the victims; the two ministries, namely the Administration and Internal Affairs and Public Health aim to nationally recognize the cause-effect of the phenomenon by informing the population; the Ministry of Education, Research, Youth and Sport aims to stop from the root this phenomenon, in that after the causes and effects were discovered, the childhood education of citizens, especially in the relation with their parents, shall lead to its substantial diminish. So: application program, victims' integration, information on cause-effects, perseverance in canceling causes. We appreciate that such a vision is auspicious for stopping the phenomenon and healing the wounds it might have caused already.

With these ministries, the law understood to assign attributions also to the *probation service*, which has the possibility to manage the social reintegration of the *persons convicted for domestic violence*, closing the cycle of those involved in the phenomenon[11].

Another positive aspect of this law is the fact that it states *a series of principles* which should be as a "*bible on domestic violence*" for those who apply the law: principle of equality, principle of respecting human dignity, principle of preventing domestic violence, principle of celerity, principle of equal opportunities and treatment[12]. Even though nowadays human dignity is protected only by civil means (granting compensations in the limits of the Civil Code), other laws are adopted, beside the Constitution[13], declaring it as a reality which deserves to manifest and to be protected.

The framework for applying the law, according to Art 5, and in the meaning of the special law, refers to:

- *Close relatives*, as defined by Art 149 of the Criminal Code, namely ascendants, descendants, brothers and sisters or their children, as well as the persons who by adoption became such relatives. We can notice that Art 5 Point a) of the law on domestic violence *no longer states the condition that close relatives must live or household with the aggressor*, thus

[6] According to Art 1 Para 2 of the Law No 217/2003 amended.
[7] In the actual governmental structure there are two ministries: Ministry of Administration and Ministry of Internal Affairs. It would be desirable that the attributions be shared by both of them.
[8] According to Art 8 of the Law No 217/2003 amended.
[9] According to Art 9 of the Law No 217/2003 amended.
[10] According to Art 10 of the Law No 217/2003 amended.
[11] According to Art 11 of the Law No 217/2003 amended.
[12] According to Art 2 of the Law No 217/2003 amended.
[13] According to Art 1 Para 3 of the Romanian Constitution revised.

the term "family member" of the special law is broader than the one stated in the actual Criminal Code (Art 5 Point a)).

- *Husband/wife*, as well as *ex-husband/ex-wife* (Art 5 Point b)). Adding on the list of persons protected by law or authorities the ex-spouses, expresses the integration of the new ideas on domestic violence and on the persons who can be considered "*close*".

- To these categories are added those who have established a relation similar to marriage (*paramours*) or to those between parents and children, if they cohabit (Art 5 Point c)).

- The tutor or other person exerting, de facto or de jure, the rights in the name of the child (Art 5 Point d)). The provision aims to protect the child against violence manifested by his protectors. It is a novelty compared to the previous provision.

- The legal representative or other person who cares for the person mentally ill, with intellectual disability or physical handicap, except those who perform these as professional duties (Art 5 Point e)). It is a new concept that the law integrates showing the legislator's preoccupation for persons with disabilities against violence that may be provoked not only from blood or civil relatives, but also by those who must take care of them, a premiere in Romania.

A positive aspect of the law is that it encourages NGOs to support the programs for assisting the victims of domestic violence[14], as well as public-private partnership[15].

In order to assist the victims of domestic violence, also of the aggressors, the law created 4 types of institutions, called *units for the prevention and combat of domestic violence*, namely: domestic violence shelters (women's shelters), centers for the rehabilitation of victims of domestic violence, centers for assistance destined to aggressors and domestic violence awareness centers. All these types of units can be founded and sponsored by public or private funds or in a public-private partnership, the institution financing being responsible for spending these funds. Founding these units can be made only by social services providers, accredited according to the law. These units offer free assistance for victims of domestic violence, based on *a contract for performing social services*[16].

The centers for sheltering victims of domestic violence, further on called shelters, are social assistance units, with or without legal personality, which provide protection, accommodation, attendance and counseling to the victims of domestic violence, forced to resort to this social assistance service. Shelter units offer assistance both for the victim, as well as for the minors in his care, for free and for a determined period protection against the perpetrator, medical care, food, housing, psychological and legal assistance. The location of the shelter units is secret to the public[17]. Beside the shelter units, the law stated the foundation of *recovery centers*, which ensure, in addition to housing and care, social rehabilitation and reinsertion for the victims. The law does not forgot the aggressors, for whom it stated the foundation of assistance centers, created as units of social assistance with or without legal personality working as daycare centers, ensuring social rehabilitation and reinsertion for them, educational, counseling and family mediation measures. For them, the measures of family mediation are supplemented by specific treatment, namely psychiatric or rehab performed in medical units with who were concluded agreements. Regardless of the situation, the assistance and hospitalization of victims or aggressors in the above mentioned units is made only with their consent. For juveniles the consent belongs to the non-violent parent or legal representative[18].

[14] Ortansa Brezeanu, Aura Constantinescu, *Violența domestică. Reflecții*, in the Romanian Penal Law Review, No 2/2007, p.75.
[15] According to Art 16 Para 1 and 6 of the Law No 217/2003 amended.
[16] According to Art 15-16 of the Law No 217/2003 amended.
[17] According to Art 17 of the Law No 217/2003 amended.
[18] According to Art 16 of the Law No 217/2003 amended.

The fourth type of assistance units are the *domestic violence awareness centers*, providing information and education services, social assistance and an emergency hotline for information and counseling.

The law states *mediation* as a mean of solving domestic conflicts, without being mandatory. In exchange, the law states for convicts for domestic violence to participate in special counseling and social reinsertion programs implemented by the institutions where they are executing their penalties[19].

Legally, for the first time in our legislation, the law states *the restraining order*, as a mean designed to estrange the victim from the perpetrator and to ease other legal measures, including solving the children's situation, if necessary.

The restraining order can be issued if the victim's life, physical or physical integrity, freedom are endangered by an act of violence from a family member.

It consists in the implementation of one of more measures:

- Temporary evacuation of the perpetrator from the family home, regardless if he is the owner;
- Victim's and his children reintegration in the family home, if they were cast away from the common home;
- Ordering the perpetrator to maintain a minimal distance from the victim, his children or other relatives, his residence, working place or school of the protected person;
- Banning all kind of contact, including by phone, mail or other type with the victim;
- Ordering the perpetrator to hand over the police any weapons he owns, even if are legally owned;
- Entrusting minors or establishing their place of residence elsewhere than the residence where they suffered or witnessed domestic violence;
- Ordering the perpetrator to pay the rent and/or maintenance of the temporary residence where the victim, children or other family members reside, or are about to reside due to the impossibility of remaining in the family home.

The *Recommendation Rec (2002)5 of the Committee of Ministers to Member States on the protection of women against violence*[20] splits these measures in two, the court may order two types of orders: a *restraining order*, which prohibits any contact of the aggressor with his victim for a certain period of time and a *protection order* aiming the other types of measures. Such distinction is necessary only in the hypothesis in which in first allowed to issue the restraining order for the protection of the victim against a possible physical contact with the aggressor, and after that, in a more elaborated procedure, to issue the protection order.

The procedure to issue the protection order should be performed with celerity. The competent court is the first instance tribunal; the procedure has short terms and can be appealed within 3 days from its issuance if the parties were summoned or from the communication, if the parties were not summoned. The prosecutor's presence is mandatory in both trials and also, the aggressor's legal assistance. The order can be issued for a maximum period of 6 months. The protection order is applied by the police and its non-abidance is the offence of non-abidance by court decisions, being sanctioned by imprisonment from one month to one year, for this penalty the conditional suspension not being possible[21].

[19] According to Art 22 of the Law No 217/2003 amended.

[20] The document is available on the Council of Europe official website: https://wcd.coe.int/ViewDoc.jsp?id=280915&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

[21] According to Art 23-35 of the Law No 217/2003 amended.

III. Conclusions and proposals for a new regulation, correlated with a case study. Although all analyzed legislative modifications were major, they are also subjected to critics and to the need of improvement.

1. A first critic brought regards the way in which the texts referring to the Criminal Code are drafted. Due to the scanty legislative technique chosen by the legislator, this law is not considered a special criminal law. It is not even a civil law with criminal provisions[22], but just another law regarding a social area, tangential with criminal law. This is why it is not reflected in the Criminal Code[23], being only completed by it. These allegations are not hazardous. In the "*Explicații teoretice ale Codului penal român*" published under the auspices of the Romanian Academy and of its Legal Research Institute, the authors consider that a provision from other law than the Criminal Code, has a penal feature only if it incriminates an offence for which Art 53-54 state a penal sanction or that provision is related to one of the Code, which Law No 217/2003 does not do[24]. In this context, Law No 217/2003, even after the 2012 modifications, must be in accordance with the Criminal Code, as well as with the new Criminal Code, so that such an atypical situation will cease to exist.

2. Another critic refers to the fact that even though the law states the offence of domestic violence convicting the aggressor, Law No 217/2003 amended does not state these offences; the previous regulation (before March 2012) stated over 25 offences from the Criminal Code[25]. With the legislator itself withdrawing the listing can we be able to relate to these? In the same context, it must be noticed that the actual Criminal Code does not define the offence of domestic violence nor connects it to a certain offence (in the meaning that there is no title, chapter or section regarding domestic violence or to have a similar name as it is – for example – in the new Criminal Code on 2009). There are only four offences committed with violence, which clearly refer to the subjects of the offence as family members (Art 180 Para 1^1 and 2^1 – hitting or other forms of violence and Art 197 Para 2 Point b) – rape) or to the spouse and close relatives (Art 175 Para 1 Point c) – first degree murder), but according to the definition of domestic violence – offences committed in these situations are many more, the range covered by the previous Art 1 Para 2 being wider. In addition, these four offences have as main object the social relations on

[22] In accordance with the Romanian doctrine, the streams of the criminal law are: Constitution, Criminal Code, special penal laws, civil laws stating penal provisions. Lavinia Vlădilă, Olivian Mastacan, *Drept penal. Partea generală*, Universul Juridic Publishing-House, Bucharest, 2012, pp.33-35.

[23] V. Dongoroz, I. Fodor, S. Kahane, N. Iliescu, I. Oancea, C. Bulai, R. Stănoiu, V. Roșca, *Explicații teoretice ale Codului penal român. Partea specială, vol. IV*, 2nd Edition, Romanian Academy Publishing-House and All Beck Publishing-House, Bucharest, 2003, pp.859-861; the authors consider that a provision from a law other than the Criminal Code has penal feature only if it incriminates an offence punishable by a penal sanction, from those stated by Art 53-54 of the Code, or if that provision is expressly connected to one of the Criminal Code, which Law No 217/2003 does not state.

[24] V. Dongoroz, I. Fodor, S. Kahane, N. Iliescu, I. Oancea, C. Bulai, R. Stănoiu, V. Roșca, *Explicații teoretice ale Codului penal român ...*, op. cit., pp.859-861.

[25] Former Art 1 Para 2 of the Law No 217/2003 stated as forms of domestic violence the following types of offences: Art 175 – first degree murder, Art 176 – particularly serious murder, Art 179 – determining or facilitating suicide, Art 180 – hitting or other forms of violence, Art 181 – bodily harm, Art 182 – serious bodily harm, Art 183 – hitting or injury causing death, Art 189 – illegal deprivation of freedom, Art 190 – slavery, Art 191 – subjection to forced or obligatory labor, Art 193 – threat, Art 194 – blackmail, Art 197 – rape, Art 198 – sexual intercourse with a minor, Art 202 [*Art 205 – insult and Art 206 – slander – abrogated*], Art 211 – robbery, Art 305 – desertion of family, Art 306 – ill treatment applied to minors, Art 307 – non-abidance by measures for child custody, Art 309 - venereal contamination and transmission of the acquired immune deficiency syndrome (AIDS), Art 314 - jeopardizing a person unable to look after him/herself, Art 315 – leaving persons helpless, Art 316 – leaving persons helpless by failure to notify and Art 318 - preventing the freedom of the cults.

the life and physical or psychical integrity or health of the person, and in subsidiary affect family relations, which in the case of a special regulation dedicated to domestic violence, the situation would be reversed.

3. The experience of a case in which I have studied the application of the new provisions on the protection order revealed the existence of other dysfunctions of the actual regulation. According to Art 17 Para 4 of the Law No 217/2003 amended, the state must endorse the setting up of secret centers for sheltering victims of domestic violence. In fact they are the same with the ones used for other social cases and can be found on the websites of the local Directions for Social Assistance and Child Protection or in Bucharest, the information regarding them being public.

4. Knowing the legislation in the area of domestic violence is limited and interpreted in a restrictive manner, without understanding the **urgent need of solving the cases**. Despite Art 27 Para 1 of the analyzed law, the case[26] had in view was delayed for over more than four month (was initiated at the end of August and the solution became irrevocable in mid-January next year), both in first instance and in appeal, which in the terms of a precarious situation of the victim would have made the legal provisions be ineffective. The pressures of the aggressor-defendant, the lack of a support from the state, of specialized free assistance determined the victim to call off the action.

The study "*Protecting women against violence*" published in 2007 under the auspice of the Council of Europe by two teachers from the German University of Osnabruck[27] determined immediate measures, in the so called "golden hours" after the conflict started. But it is necessary that the police are empowered to act, even in the absence of a court decision (for instance, separating the aggressor from the victim, evacuating him from the common house or supporting the victim in finding a shelter which provides psychical counseling). This study offers as a positive example the Austrian situation, which by a law in 2007 incremented the police powers, its actions being independent from the victim's consent, being able to issue a restraining order for maximum 10 days, the police managing the situation for the first three days. Based on the new law, the aggressor must hand over the police the keys from the common residence, and if he is caught violating the restraining order (which assumes his evacuation from the common residence) shall be punished by fine or can be arrested. If the victim allowed him to enter the common residence, she as well can be fined.

5. Despite the fact that Romania informs in some European reports[28] that it has ensured the training of magistrates, policemen, media personnel and social assistants on the phenomenon of domestic violence, in fact just a small number of magistrates enjoyed such training, and the next two categories did not. Regarding the training of magistrates, from our knowledge, it was a local project concluded in 2007, resulted from the cooperation of the American Bar Association with the Ministry of Labor, Social Protection and Family (with its previous name), together with other Romanian partners, which involved as a working group only two judges, two attorneys, one prosecutor and one representative from the National Agency for Family Protection, National Coalition for Domestic Violence and the Ministry of Justice and whose activity included complex seminars in Alba Iulia, Braşov, Bucharest, Craiova, Iaşi, Ploieşti and Timişoara. The trainers in the program were three judges from the Courts of Appeal of Bucharest, Braşov, Iaşi

[26] The case was trialed by the Târgovişte First Instance Court, File No 7873/315/2012 and the appeal was trialed by the Dâmboviţa Tribunal.

[27] Protecting women against violence – Analytical study on the effective implementation of Recommendation Rec (2002)5 on the protection of women against violence in Council of Europe member States, study published in 2007 on the Council of Europe website http://www.coe.int//equality/, p.21.

[28] Ibid., Annex of the Table No 16, p.78.

and a prosecutor from the Iaşi Territorial Office of the Directorate for Investigating Organized Crime and Terrorism[29]. But even so, there still are many professional categories with no training in this area such as: attorneys, medical staff involved in helping the victims, psychologists, teachers in schools, high-schools or universities. Until today in Romania there is not a master degree program dedicated to this subject, and the media, written or audio-video, has not promoted a commercial or a message informing about the dangers, effects and cases of domestic violence, just limited themselves in presenting news, unaccompanied by necessary legal comments. Regarding the police, they still consider the issue of domestic violence a private one, the simple draft of a criminal complaint solving the case from their perspective. Though the Criminal Code states their direct involvement, but just in cases of physical violence[30], in fact it is expected the "alarm signal" triggered by the victim, which is very rare, or just in extreme cases, when nothing can be done (as the case of the "*Perla*" Hairdresser in Bucharest).

6. From the medical staff's perspective, even though they provide immediate medical care for more serious cases for the victims of domestic violence, without discrimination or priority, they are not required to report milder cases (where the victim can file a prior complaint) to the police, social assistants or shelter units to take the victim and offer her specialized assistance, according to her case.

When medics face psychological violence the situation is vaguer, because without a qualification in this area, these cases are treated as usual, and the results are a partial efficiency and the waste of precious time waiting for the problem to be solved. In the case above mentioned, the victim, who requested a protection order against her husband, has been previously treated twice in psychiatry, the doctor recommending "*family support*" for her emotional state, knowing the fact that her psychic disorder was caused by relationship with her husband. The question was from where should the victim had family support, as long as the relationship with her parents was tensed, she rarely saw her brother to whom she sometimes talked about her family situation, she only had a close friend, and the conditions of her working place did not allowed to talk about her family situation? Only her children would have been a real support in this case, but the children who stayed with the husband started with his "help" to detach themselves from their mother unwilling for a relationship with her.

Thus, even though every possible professional category involved in this type of cases – medics, nurses, social assistants, police, magistrates, attorneys – can act as good professionals in their activity, the lack of coordination between these institutions determining the lack of efficiency in these cases.

7. From a procedural perspective, in the analyzed case in appeal was raised the issue of the mandatory presence of the defendant and of the plaintiff. In our standpoint, from the correlative interpretation of Art 27 Para 3 and 4 with Art 30 of the Law No 217/2003 amended, legal assistance is mandatory for the defendant only in first instance tribunal, not in appeal, and for the victim the law states the principle of legal assistance. The provisions of the law are interpretable regarding the situation of the defendant, this is why we consider that a clear and general statement – where Art 27 refers to first instance trial, and Art 30 to appeal – would be welcomed. In addition, as shown before, if the victim waved her defender, because she wanted to cease the litigation and filed a motion for withdraw, the appeal court ensured mandatory legal assistance and registering the motion for withdraw established the judicial expenses to be paid

[29] See the Final Report of the Project Domestic Violence in Romania: the law, the court system – American Bar Association, Central European and Eurasian Law Initiative and USAID.

[30] We are talking about the offences stated by Art 180 Para 1^1, 2^1 and Art 181 Para 1^1 of the Criminal Code, which state the initiation of the criminal proceedings ex officio, not just by the lodging of a prior complaint from the victim.

by the victim, though Art 6 Para 1 Point e) of the Law No 217/2003 states the principle of free legal assistance.

8. Another lack in the law is detailing the mean of allowing and administrating the evidences. The law should expressly state the possibility for the court to admit the interrogation of the parties or witnesses because in the lack of such a provision Art 189 of the former Criminal Procedure Code or Art 315 of the present Criminal Procedure Code is applicable. Due to the nature of the case often such cases are known first in family and sometimes by different friends of the parties. Also, regarding management of such cases the law should state the possibility of hearing the witnesses earlier than a week, in court in order to ensure both the celerity and continuity of the trial.

9. In procedural terms, another inconsistency with the existing legislation is found in the case of admitting the request for protection order, simultaneously with the file for divorce, very possible in these cases. Art 614 of the former Civil Procedure Code, still applicable for cases filed before 15 February 2013, the obligation of the victim to be present in first instance hearings could cause problems in respecting the protection order (because it states the mandatory presence of both parties in first instance hearings). The new provisions of Art 920 mostly reiterate Art 614 and state the representation by attorney without a special order in the four cases above mentioned (imprisonment, a serious illness, placing the plaintiff under interdiction, residing abroad), but does not entirely solve the special case stated by the special legislation on domestic violence. In the absence of an express text, we consider helpful Art 921 of the new Civil Procedure Code stating that the unjustified absence of the plaintiff, in first instance court, correlated with the presence of the defendant, can lead to the rejection of the file for divorce as untenable. Therefore, if the plaintiff (man or woman) can prove that his/her absence is justified by the protection order, the court can continue the hearings in his/her absence, only by legal representative.

10. Ultimately, but not less important, it must be mentioned that in May 2011, in Istanbul, the Council of Europe drafted and subjected for approval and ratification by the Member States a Convention on preventing and combating violence against women and domestic violence. Until today, Romania has not signed or ratified this Convention. But, in the case of a hypothetic ratification, its provisions may bring new legislative modifications, especially if our country has no reserves, though in some cases, would be grounded. The analysis of the compatibility between the actual legislation and the Istanbul Convention will be the subject of a future study.

All these observations have an exhaustive feature. The practice shall prove the logic of our arguments and the need to adopt the proposed improvements, but also the existence of other possible irregularities or misinterpretations of the current legislation.

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IV. Legislation used

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- Law No 217/2003 amended and republished.
- Law No 25/2012 for amending and supplementing Law no. 217/2003 on prevention and control of family violence published in the Official Gazette No. 165 of March 13, 2012.
- The new Civil Procedure Code.
- The former Civil Procedure Code.

THEORETICAL AND PRACTICAL ASPECTS REGARDING THE NULLITIES IN THE ROMANIAN CRIMINAL TRIAL

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Abstract

In the present study we are going to analyse the regime of the nullities in the Romanian criminal trial. This presentation will take into consideration the Criminal Procedure Code in force (adopted in 1968), the doctrine and the practice of the courts. Also, we took into consideration the new provisions of the Criminal Procedure Code which is going to enter into force in 2014. This study is focused on analysing the distinctive regime of the absolute and relative nullities and illustrating the situation in which absolute nullities do not lead ope legis to the annulment of the acts set up without respecting the requirements. In this way, we are going to analyse the situation in which in spite of absolute nullities existence, this sanction can be disregarded and the criminal trial will follow its course.

Keywords: *criminal procedural sanctions, criminal trial, absolute nullities, relative nullities, initiation of proceedings before the court.*

1. Introduction

In the Romanian criminal trial, the most frequent situations which imply procedural errors are met in relation to the sanctioning of nullity, in both its forms, i.e. relative nullity, respectively, absolute nullity. It is true that there are numerous legal hypotheses which imply the sanctioning of delay or inadmissibility and which imply that, however, nullities represent the most frequent cases of sanctioning illegal pursuance of processual or procedural acts. Thus, in criminal trials, not only nullities, but also forfeiture of rights is *expressis verbis* regulated (forfeiture of rights sanctions delayed exercise of certain rights), as well as the sanction of inadmissibility (which takes into consideration the hypotheses that certain processual rights are exercised by persons who do not have a processual quality or the situation in which certain acts of disposal are appealed although there is not legal framework for exercising those means of appeal).

Nullity, as a procedural sanctioning, in its two regulatory forms, is provided by Article 197 of the *Criminal Procedure Code* (hereinafter referred to as *C. pr. c.*). The two categories of nullities are defined differently; thus, the criminal processual law points out a set of particularities that will be detailed in our study. In this section we only make reference to the fact that absolute nullities pose a nullifying character and are explicitly provided by the law, whereas relative nullities are not explicitly set forth and, in many circumstances, may be covered, which means that they actually produce no legal effects.

In the present research we intend to prove that even if absolute nullities cannot be covered, considering the presumption of damaging certain processual interests, in practice, in several hipotheses, the existence of absolute nullities does not lead to the annulment of the acts that were accomplished in this manner, while these acts continue to produce legal effects. In most cases, as we are going to see in our analysis, the possibility of "ignoring" the sanctioning of absolute nullity is legally grounded. Similarly, we are going to point out the existence of hypotheses that may convert absolute nullities into relative nullities (as regards the produced

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effects), cases in which processual damage, even if presumed, is effectless, while the trial continues; we are also going to point out hypotheses that may lead to the convertion of relative nullities into absolute nullities (as well as the consequences that derive from this convertion).

2. Nullities: concept and classification. Particular aspects of absolute and relative nullities

According to Romanian specialty literature[1], nullities are the most important procedural sanctions and they may occur during the criminal trial (and even after the trial is over, through an extraordinary means of appeal) any time a processual or procedural act is pursued without strictly observing the law.

The sanctioning of nullities affect procedural or processual acts that were pursued without observing the law. According to specialty literature[2], the existence of nullities as procedural sanctions in Romanian criminal processual law is closely linked to an act of processual damage, which must have been produced by pursuing a particular act under illegal conditions. In this respect, Article 197 § (1) of the *C. pr. c*. stipulates that the infringements of legal provisions that regulate the pursuance of the trial produce the nullity of the act only when they result in damage which cannot be removed unless that act is cancelled.

Under these conditions, one can infer that not any infringement of the criminal processual law can lead to the annulment of the act that was pursued in an improper manner.

As we have mentioned above, nullities can be classified, in relation to the effects that they may generate, into absolute and relative nullities.

Absolute nullities occur in those cases that are explicitly provided by criminal processual law, i.e. by Article 197 § (2) of the *C. pr. c*. (from this perspective, they are also known as *express nullities*) and can be invoked at any time during the trial and by anyone. Absolute nullities can also be invoked ex officio.

Relative nullities are incidental, and they occur whenever a legal provision – apart from the ones stipulated by Article 197 § (2) of the *C. pr. c*. – is infringed, for they are not explicitly set forth by criminal law (under these circumstaces, they are considered *virtual nullities*).

Those presented above reveal a first particular difference between absolute and relative nullities. Thus, if absolute nullities are explicitly regulated – through a limitative enumeration – by Article 197 § (2) of the *C. pr. c*., relative nullities reflect any infringements of the criminal processual law apart from those mentioned in Article 197 § (2) of the *C. pr. c*.[3]

Thus, absolute nullity sanctioning is applied for: the infringement of norms regarding subject matter competence or the competence of the person, as well as the infringement of norms regarding the notification of the court of law and the composition thereof, the public character of the trial, the prosecutor's participation, the presence of the accused or of the culprit, the assistance offered to the accused / culprit by the defense counsel, whenever these are compulsory according to the law, and, finally the infringement of the norms regarding the drawing up of the assessment report in juvenile cases. Apart from these provisions, the regime of relative nullities lacks an explicit regulation in Article 197 § (1) *C. pr. c*., according to which the infringements of legal provisions regarding the pursuance of the trial (provisions that are different from the ones stipulated by § 2) generate the nullity of the act only when the produced damage cannot be removed except for annulling that act.

[1] I. Neagu, *Tratat de drept procesual penal. Partea generală*, second edition, revised and completed, Editura Universul Juridic, Bucureşti, 2010, p. 668; see also, N. Volonciu, *Tratat de procedură penală. Partea generală, vol. I*, Editura Paideia, Bucureşti, s.a., p. 266.
[2] I. Neagu, *op. cit.*, p. 669.
[3] Gr. Theodoru, *Tratat de drept procesual penal*, Editura Hamangiu, Bucureşti, 2007, pp. 498-499.

We would also like to underline that the Romanian lawmaker does not use, in Article 197 § (2), the expression "absolute nullity"; however, both specialty literature and judicial criminal bodies unanimously state that the norms which regulate the institutions provided by Article 197 § (2) fall under the category of absolute nullity.

Secondly, the regime set up for the damage caused through the infringements of legal provisions is a distinctive element as regards the two forms of nullity. Thus, absolute nullity leads to the identification *de plano* of the processual damage, which is presumed *juris et de jure.* Thus, the one who invokes nullity does not have to prove the existence of the damage, while proving the infringement of the legal norm which falls under absolute nullity sanctioning regime is sufficient. If damage is presumed for absolute nullity and its existence is beyond doubt, damage must be proved for relative nullity. Thus, for the infringement of other legal provisions than the ones set forth by Article 197 § (2) to lead to relative nullity sanctioning it is necessary to adopt a supplementary measure whose role is to prove the existence of processual damage, which was caused either through the aggrievance of the parties' rights during the trial or through the wrongful pursuance of the trial.

Thirdly, the difference between the two categories of nullities is also due to the regime of the criminal processual law infringement. Thus, relative nullities are considered only if they were invoked by the person whose processual rights were aggrieved. The person who invokes nullity must prove the damage caused through the infringement of the law during the pursuance of the processual or procedural act. As regards absolute nullities, they can be invoked by any party in the trial and are taken in consideration even ex officio.

Last but not least, absolute and relative nullities are differently regulated as regards the moment when they can be invoked during the trial. Thus, relative nullities can be invoked only while the act is pursued, when the party is present or at the first trial date with full procedure. One can identify, consequently, a temporal confinement of the right to invoke the infringement of criminal processual norms, while it is presumed that by effectively getting over these processual moments the damage that could have been retained was covered by the silence of the party interested in invoking it.

On the contrary, absolute nullities can be invoked at any time during the trial and cannot be removed in any way.

3. Processual hypotheses in which procedural flaws provided under absolute nullity do not determine the occurrence of the sanction

In the next lines we are going to make reference to situations in which, according to the criminal processual law provisions, identification of absolute nullities does not determine the removal of the acts which were pursued improperly, while the trial continues and is not affected by absolute nullity.

3.1. Infringement of norms related to subject matter competence and the quality of the person

Defined as the fundamental form of competence whereby trials are distributed between criminal judicial bodies of different degrees, subject matter competence falls under absolute nullity, as a consequence of the fact that it must ensure a legal administration of the act of justice as regards the nature and seriousness of crimes.

As regards the competence in relation to the quality of the person, this is defined as the legal criterion according to which certain judicial bodies settle certain criminal causes depending

on the qualities that the wrong-doers have[4].

The regime set up by Article 197 § (2) of the *C. pr. c*. as regards subject matter competence, respectively competence in relation to the quality of the person, is also provided by Article 39 § (1) of the *C. pr. c*., according to which the exception of material non-competence and the non-competence related to the quality of the person may be invoked in the whole course of the trial until the judgement is delivered.

The provisions that set forth subject matter competence are both the norms that regulate the jurisdiction of courts of law and the norms that regulate the competence of criminal investigation bodies. In consequence, when it is found that the criminal investigation and the judgement of the case infringed the norms related to subject matter competence, the acts pursued by the investigation body which lacked competence in the matter are subject to annulment.

However, even if processual damage is presumed *juris et de jure*, the Romanian lawmaker, in order to confer trials a more dynamic nature, has included in the criminal processual law provisions that are meant to render effectless the infringement of legal provisions related to subject matter competence. Thus, first of all, in conformity with Article 42 § (2) of the *C. pr. c*., if declining was due to subject matter competence or to the quality of the person, the court of law that is trying the cause may use the accomplished acts and maintain the measures imposed by the dismissed court. In other words, the acts pursued by the court of law that did not have subject matter competence will be maintained for the cause insofar as the competent court of law decides so even if absolute nullity occurs. The provision stipulates that criminal investigation bodies must apply these acts, as well, according to Article 45 § (1) of the *C. pr. c*. related to Article 42 § (2) of the *C. pr. c*.

In this respect, one can also analyse the provisions of Article 268 of the *C. pr. c*., which sets forth the procedure that is applied in case the file is sent by the prosecutor to the competent criminal investigation body if it is found that the criminal investigation was pursued by a non-competent body. Thus, in such cases, the measures that were taken remain valid, as well as the processual acts or measures that were confirmed or approved by the prosecutor; the same is true for processual acts which cannot be pursued again. In comparison with Article 42 § (2) of the *C. pr. c*., the context described by Article 268 *C. pr. c*. only maintains acts or measures that comprise the prosecutor's decision, respectively those measures and acts that cannot be pursued again. We also took into consideration the assurance measures that can be enforced only by the prosecutor during the criminal investigation stage.

The provisions of Article 332 § (1) *C. pr. C*. also set forth the legal hypotheses in which the occurrence of absolute nullity does not lead to the annulment of pursued acts or enforced measures. Thus, this legal text stipulates the possibility of dismissing the file of the cause by the court to the prosecutor insofar as it is found that in that cause the criminal investigation was pursued by another body and not by the one which had competence and on condition that judicial investigation is not completed. *Per a contrario,* if during oral debates it is found that the criminal investigation was pursued by infringing the norms regarding subject matter competence or the quality of the person, the sanction of absolute nullity cannot intervene. In this case, absolute nullity is covered through the complete pursuance of the judicial investigation.

We can notice, by analysing Article 332 § (2) of the *C. pr. c*., the inconsistency of legislation which makes it possible for a file to be dismissed and for the criminal investigation to be pursued again if subject matter competence or competence related to the quality of the person are not observed, even if the two cases of absolute nullity are regulate in § (1) of Article 332 *C. pr. c*. as well.

[4] I. Neagu, *op. cit.*, p. 360.

3.2. Infringement of norms related to the notification of the court of law

This instance of absolute nullity refers to the infringement of legal provisions that regulate the notification of the court of law [accomplished through indictment or the aggrieved person's complaint or through the complaint of any other person whose interests were aggrieved as provided by Article 2781 § (9) of the C. pr. c.] or the supplementary notification of the court (which is accomplished by extending criminal action to new material acts).

According to specialty literature the following provisions on subsequent notification[5] are considered relevant for the hypothesis of „court notification": action for annulment [Article 379 § 2 letter c)]; declining of jurisdiction (Article 42); judgement for settling the jurisdiction conflict [Article 43 § (9)]; change of venue [Article 55 § (1)].

Subsequent to confirming the infringment of norms related to subject matter competence or to the quality of the person, there are regulated exceptions for court notification, according to which absolute nullity does not have an incidental nature even if norms regulating notification were infringed.

Thus, according to Article 300 of the *C. pr. c*., if the court finds that the notification was not legally conceived and that this inconsistency cannot be removed at once, neither by establishing a deadline for this purpose, the file is resent to the prosecutor for the latter to draw up again the notification act. In other words, absolute nullity does not intervene *ope legis*, since it is necessary for more chronological stages to be pursued: 1) identifying the improper nature of the notification act; 2) finding that it is impossible to remove the identified inconsistency at once (at the moment when the consistency of the notification act was discussed); 3) identifying the impossibility to remove the inconsistency by establishing a trial date. Absolute nullity is enforceable only if it is found that the procedure flaw cannot be removed unless the file is submitted again.

In this respect, in the Supreme Court jurisprudence we identify the same manner of settling appellate review in the interest of the law. Thus, it has been held, when enforcing provisions of Art. 264 § (3) of the *C. pr. c*., that the indictment must contain the reference „verified as regards legality and grounds". The lack of this reference makes the notification act inconsistent with the law, under Article 300 § (2) of the *C.pr.c*.; thus, the notification may be removed, as the case may be, immediately or at an established term. Consequently, in such a situation, the court will enforce the procedure set up by Article 300 § (2) of the *C. pr. c*.; absolute nullity can be invoked only insofar as the procedural flaw cannot be removed[6].

3.3. Infringement of norms regarding the drawing up of the assessment report for juvenile causes

The obligation to draw up an assessment report is one of the special dispositions which are enforced for the investigation and judgment of juveniles.

Prior to the modifications brought by Law no. 356/2006, the drawing up of the assessment report was compulsory both for the criminal investigation stage and for the trial stage. Thus, in the light of the provisions that had been set forth before 2006, the criminal investigation of juvenile crimes could not lead to a trial without the juvenile assessment report. The presumption according to which the lawmaker imposed the obligation to draw up the assessment report required that it was compulsory for the juvenile to undergo this assessment before being summoned. In other words, the prosecutor's decision to serve a writ of summons

[5] N. Giurgiu, *Cauzele de nulitate în procesul penal,* Editura Ştiinţifică, Bucureşti, 1974, pp. 242-245.
[6] The High Court of Cassation and Justice, United Sections, Decision no. 9/2008, published in the Official Gazette of Romania, no. 831/2008.

had also to be grounded on the results of this assessment process. If the criminal investigation file is submitted to the court in the absence of the assessment report, the court of law will have to deal with this omission and the judge has the obligation to impose the drawing up of the assessment report.

In conformity with Article 12 of the Ordinance no. 92/2000[7], the assessment report contains data about the accused or the culprit, his / her level of training, behaviour, factors that influence / might influence his / her behaviour, as well as his / her chances to be socially reintegrated. When the report is drawn up, the probation service may collaborate with psychologists, educators, sociologists, physicians or other specialists according to the recommendation of competent authorities.

The authority which has competence to assess the juvenile, i.e. probation services, is considered to lack the functional capacity to provide these reports to the criminal investigation bodies; according to Law no. 356/2006, the assessment report is compulsory during the trial, because it provides the court of law an instrument which individualizes the punishment. Consequently, the drawing up of the report for the assessment of the juvenile criminal has become facultative during the criminal investigation stage and its use depends on the prosecutor.

Subsequent to these modifications, one can notice that the violation of norms related to the drawing up of the assessment report for causes that imply juvenile offenders brings about the sanction of absolute nullity only insofar as the assessment report is absent during the trial. In consequence, according to the legal provisions (Article 482 of the *C. pr. c*.), criminal investigation for juveniles may be pursued in the absence of this assessment, and the sanctioning does not apply.

4. Hypotheses in which relative nullities are transformed into absolute nullities

According to the regime of relative nullities the sanction can be invoked whenever any legal provisions apart from those laid down by Article 197 § (2) *C. pr. c*. were infringed on condition that the produced damage cannot be removed outside the annulment of that act. Nullity can be invoked, as we have pointed out, only if it was invoked during the pursuance of the act, when the party is present or at the first trial date with complete procedure if the party was absent during the pursuance of the act.

However, the last part of Article 197 § (4) of the *C. pr. c*. stipulates that the court of law considers ex officio the infringements that occur at any time during the trial if the annulment of the act is necessary for finding out the truth and for fairly settling the cause.

According to this norm relative nullity can lead to invoking the application of absolute nullity. Thus, even if procedural flaws are not provided in the explicitly limited framework of Article 197 § (2) of the *C. pr. c*., absolute nullity of the act or of the measure can be invoked provided that *it is found that the annulment act is necessary for finding the truth and the fair settlement of the cause.*

In this respect, for example, procedural flaws – which are identified when the criminal investigation material is presented – fall under the sanction of relative nullity since this type of infringement is not provided by Art. 197 § (2) of the *C. pr. c*. However, insofar as the criminal

[7] See Ordinance no. 92/2000 on the organization and functioning of social services for the reintegration of criminals and the surveillance of non-custodial punishments (Official Gazette of Romania no. 423/2000). This normative act was altered by Law no. 123/2006 on the statute of probation service personnel (Official Gazette of Romania no. 407 / 10th May 2006), in the sense that this institution was to have a different name (probation service instead of service for protection of victims and social reintegration of criminals, probation directorate instead of directorate for the protection of victims and social reintegration of criminals).

investigation material is not presented to the culprit and this procedural flaw is corroborated with the extension of criminal investigation for a new crime and the culprit is not informed about it, one can invoke the aggrievance of the right to defence during the criminal investigation. In this situation, we appreciate that it is possible for the absolute nullity to be invoked.

5. Conclusions

In the present study we have attempted to prove that relative and absolute nullities may overlap as a consequence of the fact that the legal regime set up by the provisions of the Criminal Procedure Code is different for the two categories of sanctions that imply numerous particularities.

Thus, from a legal point of view it is possible – under certain conditions – for absolute nullity to be converted into relative nullity and, in other cases, for relative nullity to be converted into absolute nullity. By making reference to criminal processual norms and jurisprudence, we have proven that absolute nullity does not necessarily lead, even when identified, to the disposal of the performed acts or of the illegally adopted measures. From the same point of view, i.e. the perspective that points out the way in which relative nullity may be invoked under the regime of an absolute nullity, one can notice that there are situations (indefinite situations that are ruled by the need to settle the cause in a fair way and to find out the truth) in which procedural flaws that fall into the category of relative nullity lead to the disposal of processual acts or measures.

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THE RELATION BETWEEN THE CRIMINAL ACTION AND THE CIVIL ACTION

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Abstract

In Romania, the free access to the law is considered a fundamental human right, enriched by the Constitution itself. In practice, the committing of an illegal act may cause prejudice, being described as a civil offense, but at the same time may create a report of criminal law, attracting the criminal liability, in which case it is called offense. This is how we find in the jurisprudence, both civil action and criminal action, so that, in this study we try to present some singularities of these two types of actions, and of the relation between them.

Keywords: *free access to law, legal action, criminal action, civil action, the Criminal Procedure Code.*

1. The Legal Action

The Romanian Constitution, in art. 21 enshrines the right of every person to have free access to law for protecting the rights, freedoms and legitimate interests of the persons, such right being qualified by the constitute legislator as a fundamental human right. Internally, the free access to law is not provided only in the Constitution; we also find it in the Law no. 304/2004 on the judicial organization.[1] Law no. 304/2004 contains 4 articles in Chapter II entitled "*the free access to law*", from which contents is revealed the legal frame of the exertion of this right, namely art. 6-9. For example, art. 6 has the following content: "*any person can address to the law for protecting his rights, freedoms and legitimate interests in exerting his right to a fair trial*". Also we note that the access to law is also consecrated internationally, such as the Universal Declaration of Human Rights art. 10: "any person is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, which will decide on his rights and obligations or on any criminal charge against him", European Convention on Human Rights in art. 6, the Charter of the Fundamental Rights in art. 47, paragraph (2). Thus, according to the European regulations, the free access to law requires the fulfillment of there conditions: the validity of law, the independence of law and the impartiality of law.

The procedure whereby any person may defend his harmed rights and interests is the legal action. From the perspective of the civil law, the legal action has been defined as: "the way of law, the ability, the faculty, the legal power, conceded to anyone, of obtaining with the forms and in the conditions required by the law, the recognition and realization of a personal right, thus, it represents his social protection in its most expressive and effective form[2]". According to

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[1] Law no. 304/2004 on the judicial organization, published in the Gazette no. 576/2004, with the latest amendment by the Government Emergency Ordinance no. 23/2012 for the amendment and completion of the Law no. 303/2004 on the status of the judges and the prosecutors and on the extension period provided in art. III from Title XVI of Law no. 274/2005 on the property and justice reform and several additional measures, published in the Gazette no. 383/2012.

[2] Herovanu, E. „*Teoria exeucuţiunei silite" (The Theory of Forced Executive),* R. Cioflec Library Publishing, Bucharest, 1942, p. 18. Ciobanu V. M., „*Tratat teoretic şi practic de procedură civilă*",

another opinion, from the perspective of the criminal law, the legal action is "*the mean by which the law conflict is submitted to be solved by the justice*[3]*"*. As the quoted author rightly states "*the legal action may also be, as the case, civil action, criminal action or offence action, but it has to be delimitated the harmed right by the illegal perpetration of the legal demand as a mean of exploitation of the right of action"*.

The two actions, the civil and the criminal one have been analyzed, both from the perspective of the legislator but also from the perspective of the legal literature, in terms of the common elements, namely the factual and the legal basis or the cause, the parties or the subjects, and the object of the action. In addition, the case of the criminal action is also analyzed as the *"functional ability of the legal action"*[4], which refers to all procedural documents that may be incurred by exerting the action within the legal frame, specific to the branch of law where this action is part of.

2. The Criminal Action

The criminal action has been defined in the doctrine of specialty as *"the legal instrument by which the conflict of criminal law is submitted to be solved by the criminal judicial bodies."*[5]

2.1. The Exerting of the Criminal Action within the Criminal Trial

The exerting of the criminal action in the criminal trial requires the clarification of general procedure issues such as: the object of the criminal action, the subjects of the criminal actions, but also the specific features concerning it performance in due time, such as: the initiation of the criminal action, the exerting of the criminal action, the termination and depletion of the criminal action. According to the doctrine[6], the criminal action is customized according to its specific object and the legal frame in which is performed through the following, is a social action, belongs to the society and is performed through the state bodies invested in this respect; it is obligatory and must be necessarily performed whenever a crime has been committed; is indivisible, and it is extended to all those that have participated in the offense; as a result of the personal criminal liability, the criminal action is individual.

In accordance with art. 9 paragraph (1) of the Criminal Procedure Code, the criminal action has as its object "the criminal liability of the persons that have committed offenses". In one opinion, "the object of the criminal action, namely the liability of the persons that have committed offenses should not be confused with the criminal trial purpose that concerns the trial and the punishment of those who are guilty of violating the criminal law".[7] In the specialty literature has been appreciated that "within the criminal procedural law, the lack of legal norms on the purpose of trial determines the arbitrariness and the uncertainty in the performance and the solution of the criminal trials; the legal rules relating to the purpose of the criminal trial have

(Theoretical and practical Treaty of Civil Procedure), Vol. I, „*Teoria generală" (General Theory),* National Publishing, Bucharest, 1996, p. 248.

[3] Ion Neagu, „Tratat de procedură penală", (Criminal Procedure Treaty), Pro Publishing, Bucharest, 1997, p. 159.

[4] Neagu Ion, quoted work, p. 160.

[5] Dongoroz, V., Kahane, S., Antoniu, G., Bulai, C., Iliescu, N., Stănoiu, R., "*Explicaţii teoretice ale Codului penal român. Partea generală"(Theoretical explanations of the Romanian* Criminal Procedure Code. *The General Part".* Vol. I, Academiei Publishing, Bucharest, 1975, p. 61.

[6] Neagu Ion, quoted work, p. 163-164.

[7] Damaschin, M., „*Drept procesual penal"*, (*Criminal Procedure Law*), Wolters Kluwer Publishing, Bucharest, 2010, p. 109.

their own importance: they represent a summary statement of reasons for the need and the purpose of the regulations from the Criminal Procedure Code".[8]

Concerning the subjects of the criminal action, we also find in the case of the criminal action the active subject and the passive subject. As rightly stated in the doctrine, "the subjects of the criminal actions are in fact the main subjects of the criminal procedural legal report, namely the state as an active subject of the criminal action and the person of the offender, as a passive subject of this action".[9]

The performance of the criminal action is explained by the doctrine[10] in the sense that it means: "the performance of the procedural document provided by the law whereby the charge of committing an offense is made against a particular person and is triggered the criminal liability of this person." Thus, art. 9, paragraph 1 from the Criminal Procedure Code provides that the criminal action is performed through the act of indictment required by the law. The act of indictment required by the law may be: the decree, the indictment, the oral testimony, the court decision, according to the moment of triggering the criminal trial or to the moment of performance of the criminal action. As stated in the doctrine of specialty, "the criminal prosecution may be commenced *in rem*, it is said only on the offense even if the perpetrator is unknown, while the criminal action can be performed only within the criminal trial and is made *in personam".*[11] "The performance of the criminal action against a person confers this one the status of defendant, this procedural quality having specific resonance on the department of the rights and obligations within the criminal procedural legal report".[12]

In what concerns the exerting of the criminal action, according to art. 9, paragraph (3) the Rule of criminal procedure, this one "can be exerted all through the criminal trial", having the meaning of "*supporting it in order to achieve the criminal liability of the defendant (...) involving the implementation of activities related to the performance of the taking of evidence in the criminal case, taking certain procedural measures, application forms, the raising of exceptions, etc."*[13] Therefore, as shown from the Romanian legislator conception, the exerting of the criminal action in the judgment phase is done only by the prosecutor, and in the cases in which his participation in judgment is not mandatory, the criminal action is exerted by the injured person, in both situations the law allowing such holders, under certain situations and to waiver this right.

In what concerns the termination of the criminal action, the Romanian legislator has provided in detail the two points in time, namely before and after the performance of the criminal action. In what concerns the causes that prevent the performance of the criminal action or that terminate the criminal action, art. 10 the Criminal Procedure Code specifically details 11 cases, classified as impediments arising from the lack of cause of the criminal action (art. 10 letters a-e) and impediments arising from the lack of purpose of the criminal action (art. 10 letters f-j). The cases where the criminal action is unfounded are the following: the offense does not exist, the offense does not present the degree of social danger of an offense, the offense was

[8] Dongoroz, V., Kahane, S., Antoniu, G., Bulai, C., Iliescu, N., Stănoiu, R., quoted work, p. 39-40, 1975; Grofu, N., *„Unele reflecţii asupra procesului penal"*, (Several Reflections on the criminal trial), the Dreptul Journal 1/2012, p. 264.

[9] Neagu Ion, quoted work, p. 163.

[10] Theodoru, G.G, „Drept procesual penal. Partea generală",(Procedural Criminal Law. The General Part), Cugetarea Publishing, Iasi, 1996, p. 177; Damaschin M., quoted work, p. 113.

[11] Neagu Ion, quoted work, p. 165; Damaschin M, quoted work, p.114.

[12] Volonciu, N. ,Tratat de procedură penală, Partea Specială", (Criminal Procedure Treat, The Special Part), Vol II, Paideia Publishing, Bucharest 1999, p. 235.

[13] Neagu Ion, *quoted work,* p. 168.

not committed by the accused or the defendant, the offense lacks of one of the constitutive elements of the contravention and there is one of the causes that eliminates the criminal nature of the offense. The second group of cases, those relating to situations in which the criminal action may be exerting only in certain conditions or lacks of object, includes: the prior complaint of the injured person is missing, the authorization or notification of the competent body, or other condition required by the law, necessary for the performance of the criminal action; there have interfered the amnesty, the prescription or the death of the perpetrator or, if the case, the removal of the legal entity when it has the capacity of perpetrator; the complaint has been withdrawn or the parties have reconciled, in the case of the offenses for which the withdrawn of the complaint or the reconciliation of the parties abolishes the criminal liability; it was disposed the replacement of the criminal liability with the liability which attracts a penalty with an administrative nature, there is a case of non punishment provided by the law; there is a judgment authority.

3. Civil Action

The civil action was defined in the literature of specialty as "all procedural means by which within the civil trial, is added the protection of the civil subject right – through its recognition or realization, if it is violated or challenged, or of legal situations protected by law".[14]

3.1. The Exerting of the Civil Action within the Civil Trial

The Romanian legal scenery is richer, in the sense that, since October 2011 it has new Criminal Procedure Code, which represents a new conception of the legislator on the institutions of law. Thus, the new Civil Code regulates a range of new institutions, such as for example the unification of the legislation on civil liability that includes both the civil tort liability (art. 1349) and the contractual liability (art. 1350), the defining of guilt, the introduction of new liability form, new forms of prejudice, such as prejudices by rebound (art. 1390-1393), prejudice for the loss of chance (art. 1385) etc.

If previous to the occurrence of the new Civil Code, the legal basis of the civil action was considered art. 998-999, nowadays we can talk about art. 1349. In what concerns the cumulative conditions of the civil tort liability, they are referred to in art. 1357 the new Civil Code which provides: the prejudice, the illegal offense, the causal and the guilt report of the perpetrator who has created the prejudice. We have also noted that the new Civil Code, for the determination of the subject that can be liable, in case of civil liability for the prejudice caused by animals (art. 1375) or things (art. 1376) has been defined the concept of legal security in art. 1377 the new Civil Code, which has the following content: "in accordance with the provisions of art. 1375 and 1376, *has the custody of the animal or the thing the owner or the person who, according to a legal provision or an agreement or even only in fact, exerts independently the control and the supervision of the animal and thing and use it for its own.*"

According to art. 19 the Criminal Procedure Code, the injured person who has not been constituted as a civil party within the criminal party, may introduce in the civil court an action to redress the prejudice caused by offense, and according to art. 20, paragraph (1) Criminal Procedure Code, the injured party constituted as civil party in the criminal trial may proceed an action before the civil court, if the criminal court, through a final judgment, has left unresolved the civil action. Also, the legislator expressly regulates the auxiliary exerting of the civil action

[14] V.M., Ciobanu, "*Consideraţii privind acţiunea civilă şi dreptul la acţiune*" (Considerations on the civil action an don the right of action), in S.C.J. no. 4/1985, p. 330; V.M. Ciobanu, 1996, *quoted work*, p. 250.

in case that the claimant is a person without exerting capacity or with a limited exerting capacity, the court being obliged to auxiliary decide on the correction of the prejudice and of the moral prejudice, even if the offended party is not a civil party, according to art. 17, paragraph (3) Criminal Procedure Code.

Another problem that we have identified from the jurisprudence is the one questioning the relation between two types of liability; it refers to the situation where the liability is attracted by a traffic accident. Thus, in a case, the Huedin Court has decided that: "from the analysis of the legal provisions and of the law principles regulated by the Civil Code, the Criminal Procedure Code and the special Law no. 136/1995, issues that, in case of a traffic accident, that have resulted in a prejudice causation, for which it has been concluded a compulsory insurance contract of civil liability, coexists the civil tort liability, based on art. 998 from the Civil Code, of the person who, by his offense, has caused harmful effects, with contractual liability of the insurer, based on the insurance contract, concluded under the conditions regulated by the Law no. 136/1995."[15]

As it has been revealed in the study of the jurisprudence, in case of the civil liability, the court allows the correction of the prejudice, both concerning the material side and the moral side, recognizing both forms of the prejudice, namely the *damnum emergens* and the *lucrum cesans*, of course, under the condition of proving them. Consequently, the applicable legislation of the civil action within the civil trial is the civil one.

3.2. The Exerting of the Civil Action within the Criminal Trial

The Romanian law allows that, within a criminal trial, the civil action may be joined to the criminal action, by way of constitution the offended person as a civil party. The Criminal Procedure Code details in art. 14 the object and the exerting of the civil action and in art. 15 the constitution of the civil party. Thus, the object of the civil action is the civil liability of the defendant, and of the responsible party from the civil point of view; the constitution of civil party can be done during the criminal prosecution but also during the court examination, until de reading of the act of referral. In this situation the civil action is exempt from the stamp duty. Another provision of the Criminal Procedure Code applicable to the subject in question is the one that regulates the situation in which the court has the obligation to call to be answered, the person who suffered an offense through a criminal action, and the responsible person from the civil point of view. "The offended person is put in mind that (...) Whether a material or moral offense has suffered, the person may be constituted as a civil party." As has been shown in the doctrine, for the exerting of the civil action within the civil trial, are required to be *cumulative* fulfilled the following conditions: "the offense needs to produce a material or a moral prejudice; between the committed offense and the claimed offense has to be a casualty relation; the prejudice has to be certain; the prejudice has not been corrected; it has to be a manifestation of will from the offended person in relation to his indemnity."[16]

The exerting of the civil action within the criminal object has been the object of the European Court of Human Rights jurisprudence. Thus, we note that, the optics of the Court concerning the applicability in art. 6, paragraph (1) when it constitutes as a civil party within the criminal trial, in case Perez versus France (Decision on 12.02.2004), for example, is in the sense that: "while the constitution as civil party equates a civil call in a lawsuit, it does not matter that there is not a formal request of correction of the caused prejudice. Even if the criminal procedure concerns the decision of criminal culpability of a person, through the constitution as civil part,

[15] The Criminal Decision no. 66/R/03.02.2010
[16] Damaschin M, *quoted work,* p. 131.

the procedure has also a civil element. Consequently, although the Convention does not guarantee the right of any person of starting a criminal procedure, an area where art. 6 is not applicable, art. 6 becomes applicable if it has been started a criminal procedure and the victim of the offense has been constituted as civil party." Previous to the European Court f Human Rights, in the case Matthies Lenzen versus Luxembourg (Decision on 14/06/2001), has stated that: "once the constitution as a civil party within a criminal trial, the victim of an offense becomes party of a civil dispute." Also, on the same occasion, the court has concluded that: "once the constitution as a civil party within a criminal trial, the victim of an offense becomes party of a civil dispute. So that art. 6 is applicable, irrespective of the value of civil indemnities that the party requires. Therefore, the court considers, in this case art. 6 is applicable, even if the claimant has been constituted as civil party with a token amount of 1 franc."

4. The Relation between the Criminal Action and the Civil Action

The Civil Procedure Code in Chapter II, entitled "*the criminal and the civil action",* analyses the two types of actions, also observing the correlations between them. As we have previously mentioned, concerning the civil action which arises as a consequence of committing an offense that may be qualified both as crime and offense that produces civil prejudices, the two areas, the civil and the criminal are intertwined. It should be noted that, according to the legal provisions, the offended person has the right to opt, for the value of his civil claims, of the civil or the criminal way. In the following, we shall present several types of situations that may arise concerning the relation between the two actions.

4.1. The Exerting in Different Moments in Time of the Two Legal Actions

We distinguish two situations in which can be examined whether there is a relation between the two actions, as follows: the criminal action is resolved separately before the civil action, in which case, according to the doctrine[17] (there is no question about the relation between the two actions owing to the fact that the criminal action has been solved). On the contrary, there arises the question of existence of a relation between the two actions in case that the civil action is resolved separately and before the criminal action, according to the afore quoted author. The solving of the relation between the two actions is done according to art. 22 of the Criminal Procedure Code, in the sense that the final decision of the criminal court has authority before the criminal prosecution bodies and of the criminal court, concerning the existence of the offense, of the person who has committed it and of the guilty of this person.[18] The legislator also foresees the conversely situation, in the sense that the final decision of the civil court through which the civil action has been solved, does not have authority before the criminal proceeding body and of the criminal court, concerning the existence of the offense, of the person who has committed it and of the guilty of this person. In other words, the doctrine states: "even if the civil court has finally decided that the offense has not been committed by the defendant, this one may be sent by the prosecutor to the criminal court, a court that may convict him, bearing in mind that he has committed the offense incriminated as criminal offense if this thing arises from the evidence gathered in the criminal case."[19] Consequently, continues the quoted author, "as long as the offended party has appealed in the civil court and there is no criminal trial in which the offense that has caused the prejudiced is incriminated as criminal offense, the civil action has not any

[17] Neagu Ion, *quoted work,* p. 203.
[18] Damaschin M, *quoted work*, p. 139.
[19] Verdeş, E. C., „Răspunderea juridică. Relaţia dintre răspunderea civilă şi răspunderea penală", (The legal liability. The relation between the legal and the criminal liability), Universul Juridic Publishing, 2011, p. 448.

particularity; (…) it is addressed to the civil court, according to the civil procedural provisions and it is judged under the conditions of the same procedure." In what concerns the topic we are presenting, another author has stated that: "the authority of the fact judged in the criminal procedure on the civil, represents only the application of the positive effect of the criminal decision regarding the offenses discussed: the existence of the offense, the person who has committed the offense and the guilty of that person. In other words, according to the idea we have shared, in this case, it is also valid the imputability of the verification and jurisdictional debate on the common denominator between the two types of litigation."[20]

If, however, after the party has appealed the civil court, the criminal action is being started and the offended person, exerting his right of option provided in art. 14, paragraph (2), Criminal Procedure Code, understands that it has to follow the civil way for correction of the prejudice suffered by criminal offense, and not to join the civil action to the criminal action within the criminal trial, the provisions of art. 19, paragraph (2), become conflicting and the trial in civil court is suspended.[21] The quoted author also states that: "after the criminal court has decided through a final judgment in the criminal trial, at the request at the parties the civil trial is resumed and the civil action is solved, within the limits of the compliance with the principle inserted into the text of art. 22, paragraph (1) Criminal Procedure Code". Moreover, through these provisions, the civil court is practically required to solve the case so that the solution is not in contradiction with the criminal judgment, concerning the existence of the offense, of the person who has committed the offense and of the guilty[22] of that person.

4.2. The Simultaneous Exerting of the Criminal Action and of the Civil Action:
4.2.1. Within the Same Procedural Frame

In this case, the incident texts from the Criminal Code are: art. 346, 347 and they refer to the situation in which the two actions are concurrently performed before the same courts or in two different courts. Thus, according to art. 346, entitled "*the solving of the civil action*", which concerns the situation in which the two actions are performed within the criminal trial, the court is required to decide also on the civil action, the cases expressly provided by the legislator refer to: conviction, exoneration, termination of the criminal trial. The legislator specifies when the court may call upon the correction of material and moral damage, namely: when the exoneration has been pronounced for the case provided in art. 10, paragraph (1), letter b^1, or because the court has observed the existence of a case that eliminates the criminal nature of the offense because one of the constitutive elements of the offense is missing. Civil indemnifies can not be awarded in the case that the exoneration has been pronounced owing to the fact that the alleged offense does not exist or has not been committed by the defendant. There can also be the case in which the court does not solve the civil action, case regulated by art. 346 paragraph (4), namely: when the court pronounces the exoneration for the case provided in art. 10, paragraph (1), letter b) or when the court pronounces the termination of the criminal trial for any of the cases provided in art. 10, paragraph (1), letter f) and j), but also in case of withdrawal of the prior complaint.

Another hypothesis regulated by the legislator concerns the civil action dissociating and the postponement of its judgment in another session, in case that the solving of the civil claims would cause the delay of the criminal action solving, according to art. 347 and under art 348^1, unless the constitution of the civil party, the court decides on the correction of the material and

[20] Deleanu, I., "*Tratat de procedură civilă*", (*Civil Procedure Treaty),* vol. II, All Beck Publishing Bucharest, 2005, p. 93, Verdeş E.C., *quoted work,* p. 447.
[21] Verdeş E.C., *quoted work,* p. 449.
[22] The same.

moral damage in the cases provided by art. 17 (the auxiliary exerting of the civil action) and in other cases only considering the reversion, the eradication of a register and the restoration of the situation previous to the offense. Consequently, in the doctrine, the legal action has been defined in terms of the two actions, the criminal and the civil one, as follows: "the legal mean by which the law conflict arisen from committing an offense is submitted before the judicial bodies, in order to determine the criminal and the civil liability of the guilty person and to apply the state coercion on that person, and the person's obligation to correct the prejudice committed by criminal offense, when the case".[23]

According to the High Court of Cassation and Justice, "the civil tort liability is governed by the principle of the full correction of the material and moral prejudice, caused by the offense committed, and therefore, the value of the indemnities can not be limited according to the payment possibilities of the defendant".[24] On the other hand, in the layout of the new Criminal Procedure Code[25] is expressly provided that: "the civil action is solved within the criminal trial, if it is not overdrawn the reasonable duration of the trial, art. 19, paragraph (4)", therefore observing the tendency of the Romanian legislator to join the European legislator conception. Another novelty element in the new Criminal Procedure Code refers to: the waiver of the civil claims, the transaction, mediation and recognition of the civil claims by the defendant, these representing only some of the institutions regulated by this act.

4.2.2. Within Different Procedural Frame

Another situation existing in practice which may question the relation between the two actions refer to the situation in which the two actions are simultaneously, separately and in different courts regulated. In this sense, art. 19, paragraph (2) shows that the judgment before the civil court is suspended until the final resolution of the criminal case, this rule being known as: "the criminal action holds back the civil action".[26] The reason of this rule is to grant to the criminal court a complete independence in solving the problems submitted for judgment, in investigating and deciding without being influenced by what has been established before in the Civil.[27] In the Civil art. 244, paragraph (1), point 2, Criminal Procedure Code, provides a case of legal optional adjournment: when there appear the clues of a criminal offense, which determination would have a decisive effect on the decision to be given.

In what concerns the aforementioned articles, from the Civil Procedure Code and the Criminal Procedure Code, the Constitutional Court has noted in a decision (Decision no. 262/2002) that between the two texts, there is no identity from the point of view of the norm nature. Therefore, the court estimates that while the text from the criminal procedure art. 19, paragraph (2) includes a mandatory norm that requires the suspension of the civil case until definitely solving the criminal action, the text from the civil procedure – art. 244, paragraph (1) point 2 contains an optional provision, the court may suspend the solving of the civil action until the date of a final judgment in the criminal trial.

As stated in the doctrine, "in the content of art. 244, paragraph (1), point 2, Civil Procedure Code, there are three possible hypotheses: the civil and the criminal court have been notified at the same time with the solving of the civil action, respectively of the criminal action;

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[23] Mateuţ, Gh., „Tratat de procedură penală. Parte generală", (Criminal Procedure Treaty. The General Part). C.H.. Beck Publishing, Bucharest 2007, p. 536.
[24] The High Court of Cassation and Justice, The Criminal Department, Decision no. 2617/July 9th 2009.
[25] The New Criminal Procedure Code, published in the Gazette no. 486/2010.
[26] Neagu Ion, *quoted work,* 1997, p. 204.
[27] Anghel, I.M., Deak, F., Popa, M.F., „*Răspunderea civilă*", *(The Civil Liability),* Ştiinţifică Publishing, Bucharest, 1970, Verdeş E.C., *quoted work*, p. 435.

before the performance of the civil action, the offended person has appealed to the civil court, prior to this, the criminal action has started; in what concerns the civil side, the person has chosen to promote a separate action after it has started the performance of the criminal action or has given up the capacity of civil party in the criminal trial and has formulated a separate action before the civil court, as enable the provisions of art. 19 Criminal Procedure Code or it has been decided the disjunction of the civil action by the criminal action, observing that the solving together the two actions would determine the delay of the judgment in the criminal case".[28] The practice of the Supreme Court is in the sense that, according to art. 224, paragraph (1), point 2, Civil Procedure Code, the court may suspend the judgment of the case if it is proved that the notification of the criminal proceeding body has been made for an offense that would have a direct effect on the solving of the pendent civil action, and not when simple assumptions are presented, without having been ordered the prosecution.[29] Given that, from the material point of view, for both actions the justification is the offense, it is natural that the criminal action to take precedence over the civil action, and the final judgment of the criminal court to have authority before the civil court.[30] In the same sense, there is also another opinion, according to which, "the criminal action takes precedence over the civil action, the unique material cause of the two actions is the commitment of the offense, and on the other hand, the solving of the civil action is subject to the solving of the criminal case in what concerns the existence of the offense, of the person who has committed the offense an of the person's guilty."[31]

As stated in the doctrine, "if the civil trial continues and there is pronounced a final irrevocable judgment which is in contradiction with the decision pronounced in the civil action, it has to be submitted the solution of promoting a new civil action under the findings made in the criminal judgment."[32]

Conclusions

A very current problem discussed both in the doctrine and in the jurisprudence refers to the applicability of the rule "the criminal action holds back the civil action", situation regulated by the provisions of art. 22 Criminal Procedure Code namely, what happens when there is not possible to proceed the criminal trial from different reasons and when subsequently there will be performed a criminal trial, the civil court invested with authority concerning the civil tort liability for the same illegal act, to have irrevocably solved the civil action. The doctrine has also identified the answer to the question: "does the civil judgment have any effect on the criminal trial; the answer is being given by the limits of art. 22, paragraph (2) Civil Procedure Code."[33] Also in the specialty literature of law has been identified another situation concerning the following: what happens when the criminal court pronounces a judgment that is in contradiction with the civil judgment pronounced in what concerns the existence of the offense, the person who has committed the offense and the guilty of that person, owing to the fact that the criminal court is not entitled to cancel the judgment pronounced by the civil court. In this respect, the literature of specialty states that: "the contradictory of the two judgments can be solved at the request of the interested party, by promoting before the civil court an extraordinary way of

[28] Verdeş E.C., *quoted work,* p. 438-439.
[29] The Supreme Court, The Administrative Disputed Claims Office, decision no. 392/1996.
[30] Damaschin M, *quoted work,* p. 140.
[31] Neagu Ion, *quoted work,* 1997, p. 204.
[32] Boroi, G., Rădescu, D., „*Codul de procedură civilă comentat şi adnotat*", (The Civil Procedure Code Commented and Annotated"), All Publishing, Bucharest, 1994, p. 330.
[33] Dongoroz et all, *quoted work,*2003, p. 81-82.

appeal through a revision based on the provisions of art. 323 point 7, the Civil Procedure Code".[34]

Consequently, in this study we have tried to present the subtleties of both action, civil and criminal, promoted separately or together, both within the criminal trial, but also within the different procedural frame. The jurisprudence is the one that has observed the difficulties encountered in each concrete case, so that, at this point, we observe the significant efforts of the national legislator for updating the Codes, Civil, Criminal and Criminal Procedure. Not least, we note the excellent contribution of the European Court of Human Rights jurisprudence, in what concerns the topic, in fact, being the one that, in the recent years, has established itself as an active presence, likely to inspire the national judge.

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[34] Deleanu, I. „*Fundamentul revizuirii pentru motivul prevăzut de art. 323 pct. 7 Cod procedură civilă* (The Basis of the Revision for the Reason Provided in Art. 323, poin 7, Civil Procedure Code), Curierul Judiciar Journal, no. 3/2007, p. 57.

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