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THE REQUIRED FORM OF A PRE-CONTRACT ALLOWING FOR A COURT JUDGMENT TO STAND FOR A SALE CONTRACT

Delia Narcisa THEOHARI*

Abstract

A bilateral promissory agreement for sale needs no notarial deed to constitute, in case of non-fulfillment, grounds for the delivery of a judgment which takes the place of a sale contract, a private agreement being sufficient whereas the judgment itself represents the sale contract and both the substantive and formal conditions are therefore satisfied.

Keywords: *pre-contract, sale, judgment taking the place of a contract, formal requirements*

1. Introduction

This article provides an analysis of the form which a bilateral promissory agreement for sale should take so that, unless fulfilled, it allows for a judgment to be delivered and stand for of the sale contract. This analysis is important because it is a matter of non-unitary judicial practice due to the ambiguity of the legal regulation of the issue at debate.

1.1. The legal regulation

According to Article 1669 (1) Civil Code, if one of the parties to a bilateral promissory agreement for sale unreasonably refuses to conclude the promised contract, the other party may apply for the delivery of a judgment which would stand for a contract, provided that all the other validity conditions are fulfilled.

Furthermore, in accordance with Article 1.279 (3) Civil Code, if the promisor refuses to conclude the promised contract, the court, upon the request of the party that did perform its own obligations, the court may deliver a judgment to stand for a contract, where the nature of the contract allows that and the legal requirements for its validity are fulfilled.

1.2. Legal solutions adopted in judicial practice

By the civil sentence no. 267/2016 delivered by the Court of Blaj in the case no. 173/191/2016, the application of applicant A against respondents B for the delivery of a judgment to take place of the sale contract, was dismissed as unfounded. Among the grounds for its judgment, the first instance court basically held the following: "In accordance with the 1st sentence of Article 1270 (3) Civil Code and the final sentence of Article 1669 (1) Civil Code, the pre-contract subject to examination should have been concluded in notarial deed, given that it envisaged the conclusion of a contract for the transfer of a right in rem in immovable property. Article 1179 (2) Civil Code stipulates that, in so far as the law provides a certain form of the contract, that form should be respected subject to the sanction provided by the applicable law. Article 1244 Civil Code stipulates that, except other cases provided by law, any agreement for the transfer or constitution of rights in rem to be

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registered with the Real Estate Register should be concluded in the form of an authentic document, under penalty of absolute nullity. Therefore, the respective contract should fulfill all the validity conditions if a judgment to stand for a pre-contract is aimed at. Practically, the notarial deed is not a validity requirement for a pre-contract, but a requirement which, if fulfilled, allows for a judgment to stand for the contract to be obtained."

The Alba County Law Court, before which the appeal against the above-mentioned judgment was pending rule, referred the matter to the High Court of Cassation and Justice for preliminary ruling on certain points of law, based on Article 519-521 Code of Civil Procedure. In support of its referral, the court held the following: "The bilateral promissory agreement for sale is a contract based on which the parties undertake to conclude the sale contract in future, under the terms and with the content already established in the document proving the promise. The parties agree upon their commitment to contract, but they also pre-establish the basic content of the contract to be concluded (the nature, object and price of the contract). However, the two legal transactions cannot be intermixed. The bilateral promissory agreement for sale is not an alienation document and does not transfer any property rights, but generates personal obligations to do, respectively to conclude the promised sale contract. As for the form which a promise of sale should take, the Civil Code does not provide the notarial deed *ad validitatem*."

At the time of this writing, the High Court of Cassation and Justice had not given a decision on the above-mentioned issue.

2. The form of a bilateral promissory agreement for sale

The opinion I share is that a bilateral promissory agreement for sale needs no notarial deed to constitute, in case of non-fulfillment, grounds for the delivery of a judgment which would stand for the sale contract, for the following specific reasons:

1. The law does not derogate from the principle of consensualism in the case of bilateral promissory agreements for sale and neither does it introduce any specific difference as regards the form required for such agreements to produce effects (for obtaining damages, respectively for the delivery of a judgment which would stand for the sale contract).

According to Article 1178 Civil Code, a contract can be merely concluded by the will agreement of the parties unless the law requires a certain formality for its valid conclusion.

The exceptions from the principle of consensualism, among which the notarial deed *ad validitatem*, are required to be expressly provided by law, as it results from the text specified.

No specific exception is established in respect of the form of a promise of sale and no derogation from the principle at issue is provided.

However, a sale contract for the transfer of a right in rem in immovable property should be concluded as an authentic document, the form being *ad validitatem* required by Article 1244 Civil Code, which thus regulates an exemption from the principle of consensualism.

Since the promise of sale and the sale itself are two distinct legal transactions, the exception established with regard to the form of the sale cannot also be extended to another legal transaction being not subject to it, because such exception must be applied strictly (*exceptio est strictissimae aplicationis*).

Moreover, no distinction can be made in the interpretation of the relevant legal texts regarding the required form of the promise of sale so that it could produce each separate legal effect, as no such differentiation is provided by law (*ubi lex non distinguit, nec nos distinguere debemus*).

Therefore, the opinion[1] according to which, in case of non-fulfillment of the promise to contract, it is sufficient that the agreement takes the form of a document under private signature for the beneficiary to obtain damages, but for the delivery of a judgment to stand for the contract it is mandatory that the promise is made in the form of an authentic document, finds no solid legal support to give the interpreter the right to differentiate.

Thus, according to Article 1669 (1) Civil Code, if one of the parties that concluded a bilateral promissory agreement for sale unreasonably refuses to conclude the promised contract, the other party may apply for the delivery of a judgment to stand for the contract, provided that all the other validity conditions are fulfilled.

At the same time, in accordance with Article 1.279 (3) Civil Code, if the promisor refuses to conclude the promised contract, the court, upon the request of the party that fulfilled its own obligations, may deliver a judgment to stand for the contract, where the nature of the contract allows that and the legal requirements for its validity are fulfilled.

From the interpretation of the correlation of the two legal texts it results that the court may deliver a judgment to stand for the sale contract, if at the time of such delivery the validity conditions of the sale are fulfilled.

The validity conditions for the sale of an immovable property refer to the consent, object, cause, capacity and form, but other special requirements expressly provided for certain types of sale could possibly exist.

The specified text uses the words "if all the other validity conditions are fulfilled" while in its content it mentions the "refusal" of one party to conclude the promised contract (the refusal being related to the condition of consent), as well as the right to obtain a judgment with the value of a contract (judgment which gives the form of the contract).

Therefore, the "other validity conditions" include the remaining requirements provided by law for the valid conclusion of a sale contract, with the exception of those which the text already refers to, namely the respondent's consent to sell and the form of the sale contract.

As a consequence, there was no need for the legislator to make any distinction as regards the substantive conditions and, respectively, the formal conditions of the sale, since the text subject to analysis contains the reference to the form which is given by the judgment itself, all the other conditions remained to be analyzed being substantive.

2. When the legislators wanted to impose the notarial deed of a promise to contract, they expressly regulated this requirement; *per a contrario*, in the other cases, such as the promise of sale, there was a certain intention of derogation from the principle of consensualism.

According to Article 1014 (1) Civil Code, under penalty of absolute nullity, the donation promise is subject to formalization in notarial deed.

Therefore, the Civil Code established the notarial deed *ad validitatem* only for

[1] D. Chirică, Is the authentic form mandatory for the conclusion of a bilateral promissory agreement for the sale-purchase of an immovable property, so that a judgment could be delivered to stand for of an authentic document? – a study published on www.juridice.ro.

donation promises, there being no specific regulation in the case of promises of sale.

Since both the sale of an immovable property and the donation constitute formal legal transactions and the legislator understood to regulate derogating formal requirements only for the donation promises, the argument raised by the relevant literature[2] - in the sense that, in the case of formal contracts, the validity of promises to contract is conditional on the fulfillment of the same formal requirements as the promised contract, as it would result from the provisions of Article 1014 (1) Civil Code – cannot be accepted, as these provisions, interpreted *per a contrario*, constitute an argument in favor of the opinion I am supporting.

3. Regulating the right to obtain a judgment that takes the place of a sale contract, the Civil Code essentially provided another means to conclude sales, different from a notarial authentic document, which makes irrelevant the fact that a certain judgment may or not be fully treated as an authentic document.

Since the Civil Code expressly allows for the delivery of a judgment which takes the place of a sale contract, while Article 888 of the same code lists, among other documents (together with the notarial authentic document), the final judgment as grounds for the right to register a title to property, it is useless to analyze if such judgments can or cannot be qualified as authentic documents.

The sale is equally valid and the right in rem may as well be registered with the Real Estate Register where the parties conclude a sale contract in a notarial deed or a judgment is delivered to stand for a contract.

Therefore, under the law, the judgment is sufficient in itself, whether it qualifies or not as an authentic document, to constitute a valid sale contract that can allow for the registration of the right in rem with the Real Estate Register.

Taking into account that the judgment takes the place of the contract, the judgment itself also constitutes the form established by law for the contract concluded in a specific manner.

4. The judgment taking the place of a sale contract is a transfer of rights, not s declaration of rights document and the legal action for which it was delivered is an injunction, not a declarator, so that the terms of the sale will be analyzed by reference to a time different from the time when the promise of sale was concluded.

This argument results from the fact that the rights and obligations of the parties, deriving from the sale contract, arise out of the judgment taking the place of the contract, as they were absent at the time of its delivery.

A sale contract is considered concluded at the time the judgment remains final, not at the expiry of the deadline established in the promise of sale for the conclusion of the contract.

The judgment taking the place of the sale contract constitutes the in-kind remedy for the enforcement of the obligation to do (to conclude the sale contract), arising out of the promise of sale.

Based on the above, the court before which the matter was brought for the delivery of a judgment to stand for the contract checks the validity of each of the two legal transactions (sale and promise of sale) by reference to the time of conclusion of each transaction, as follows:

a) the existence of the validity conditions of the sale by reference to the time when the judgment was delivered, on the one hand, and

[2] D. Chirică, *op. cit.*

b) the existence of the validity conditions of the promise of sale by reference to the time of its conclusion, on the other hand.

c) From the first category of conditions required to be fulfilled for the conclusion of the sale, the court checks the object, the cause of the sale in the applicant's view, the capacity of the parties, and possibly other special conditions established for the sale.

Within such examination, the court does not check:

- the respondent's consent to the sale, as it is this consent which is judicially substituted, the respondent expressing his refuse to conclude the sale;
- the cause of the sale in the respondent's view, as this and the consent are part of the complex phenomenon of legal agreement and they cannot be dissociated one from another in this particular case;
- the form of the sale, as it is the judgment the court is going to deliver that will give the form of the contract.

Even if the derived object of the sale (immovable property) is indicated in the promise of sale, it does not mean that the objects of the two legal transactions are identical. On the contrary, the object of the promise of sale refers to the future conclusion of the contract, for the sale of an immovable property, while the sale refers to the transfer of the ownership right over that property. The derived object of the sale constitutes only a fine-tuning of the object of the promise of sale.

If all the validity conditions of the sale were evaluated at the time the promise of sale is concluded, it would mean, for example, that the court can also deliver a judgment to stand for the sale contract in the case the property was removed from the civil registry and declared inalienable after the conclusion of the transaction, which cannot be admitted.

As regards the capacity of the parties, the court will evaluate, in a manner similar to that of a notary public, if the parties can sell, respectively purchase at the time of the sale conclusion, not at the time of the promise of sale.

This entire reasoning given for each separate condition is only reminded to show that the form of the sale can neither be related to the time the promise of sale is concluded.

The mere notarial deed of the pre-contract cannot substitute the notarial deed of the sale. If the parties had concluded the promise of sale in an notarial deed and the sale contract in the form of an authentic document under private signature, such a sale would also have been null due to the lack of the form established by law *ad validitatem*.

In the case subject to analysis, the form of the sale is given by the judgment, whether or not the pre-contract was concluded in an notarial deed; this is similar to a conclusion of the sale by the parties before a notary public, in which case the legal form of the pre-contract has no relevance.

d) From the second category of conditions necessary for the conclusion of a promise of sale, the court examines all the requirements established by law for the conclusion thereof, in terms of consent, object, cause, capacity, form and possibly special conditions.

As for the form of the promise of sale, as indicated above, the law does not lay down any exceptions from the rule of consensualism.

As far as the respondent's consent requirement is concerned, the court may check the validity of the consent at the time the promise of sale was concluded, as it is

substantively shown in the relevant literature[3], as absolute nullity can be invoked by way of substantial law exception, whose appropriateness could lead to the unfounded rejection of the application for the delivery of a judgment to stand for the contract. The respondent is also entitled to invoke, besides the absolute nullity, the relative nullity arising from the existence of some vices of consent, either by means of a counterclaim or a nullity defense on the substance of the case.

5. The consent given at the time of the conclusion of a sale is different from the consent given upon the conclusion of the promise of sale, therefore one cannot hold that the failure to respect the notarial deed at the time of the conclusion of the promise of sale shall result in the invalidity of the consent to the sale[4].

At the time the pre-contract of sale is concluded, the parties express their consent to the future conclusion of a sale contract, but at the time of the sale conclusion the parties give their consent to the transfer of the ownership right over a property form one patrimony into another.

The existence and validity of the respondent's consent to the sale conclusion is not examined at the time of delivery of a judgment taking the place of a sale contract, as the respondent has already refused to conclude the contract, his consent to the sale being totally absent. Instead, the court will check the respondent's consent at the time the promise of sale was concluded, as representing his agreement for the future conclusion of a sale.

6. The reasons doctrinally referred to, for which the notarial deed *ad validitatem* is established by law for certain legal transactions do not subsist in the case of a pre-contract of sale.

Thus, the reasons for the establishment of the notarial deed *ad validitatem*, deduced in the legal doctrine, are intended to remind the parties of the special importance of certain legal transactions for their own patrimonies and to exercise a control of the society, by the state bodies, in respect of the civil law transactions whose importance exceeds the strict interests of a party.

However, these reasons do not maintain in the case of a pre-contract of sale, because:

− a pre-contract of sale creates just a claim, as no effect of property transfer being produced based on such pre-contract;

− - if in the promise to sale document the parties established a confirmatory deposit as penalty for the refusal to conclude the sale contract, while the beneficiary of the promise claims a specific deposit, in which case the form of a document under private signature is sufficient for the promise, and if implicitly there is no warning from the notary public, the loss of the party that fails to respect the pre-contract is higher than in the case of a judgment delivered to stand for the contract, when the party refusing the conclusion thereof receives the full price of the immovable property in exchange to the property and could possibly be obliged to only pay the legal expenses;

− - there is no requirement for a pre-contract to stipulate the risk of a judgment being delivered to stand for the contract in case the pre-contract is not respected, therefore even if the parties are not warned about such a risk (either orally by the notary public, or in the text of the document), the court will still be entitled to deliver a judgment, the lack of warning making no difference;

− - the control of the society in terms of a sale contract is exercised through the

[3] R. Dincă, *Promise of sale an agricultural land located outside a built-up area*, in the Romanian Private Law Magazine no. 3/2015, p. 53.

[4] In this respect – D. Chirică, *op. cit*.

courts.

7. The argument deduced from the claimed similarity between the case subject to analysis and the real contract would not be admitted as long as the real contract cannot be created without the transfer of a property and through a judgment no such condition would be substituted; instead, the form of the sale contract may be represented by the judgment itself which, according to law, not only takes the place of the contract, but is also able to allow for the registration of the ownership right with the Real Estate Register.

Since the transfer of property is assimilated to a formal requirement for the real contract and this requirement cannot be substituted through the judgment which takes the place of the contract, as in the case of real estate sales, it was normal for the legislator to lay down the obligation that such requirement be fulfilled at the time the judgment is delivered.

8. The amendment of Article 5 (1) of Law no. 17/2014 cannot constitute, in itself, an argument to unambiguously establish the intention of the legislator at the time the notarial deed requirement was removed from its text.

Article 5 (1) of Law no. 17/2014, as unamended, established a condition additional to those of the Code, namely the notarial deed of pre-contracts for the sale of lands located outside a built-up area.

It cannot be considered with certainty that the amendment of this text in the sense of removing the notarial deed requirement is based on grounds related to the avoidance of tautology, whereas:

- the initial form of the text indicated Article 1669 Civil Code even in the provision, for which it seems that the text rather imposed a condition additional to those stipulated in the Code;
- in the absence of other arguments, the removal of the provision on the notarial deed cannot be justified on the assumption that the legislator initially breached the legislative technique rules, but rather that the article at issue imposed an additional condition which was then waived, as there was no reason for a derogation from the Code.

3. Conclusions

For all these specific reasons, I believe there is no need that a bilateral promissory agreement for sale takes an notarial deed in order to be able, in case of failure, to constitute grounds for the delivery of a judgment taking the place of the sale contract and that the form of a document under private signature is sufficient.

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- D. Chirică, "Is the notarial deed mandatory for the conclusion of a bilateral promissory agreement for the sale-purchase of an immovable property, so that a judgment could be delivered to stand for an authentic document?" - a study published on www.juridice.ro.
- R. Dincă, "Promise of sale an agricultural land located outside a built-up area", in the Romanian Private Law Magazine no. 3/2015, p. 53.

THE POSSIBILITY OF CONVENTIONAL REPRESENTATION OF A CREDITOR LEGAL ENTITY BY ANOTHER LEGAL REPRESENTATIVE IN THE ENFORCEMENT PHASE

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Abstract

We aim to answer the following question if possible creditor legal representation by proxy another person, during enforcement. The need to find a solution for this issue arose as a result of delivery of Decision No. 9/2016 issued Î.C.C.J., panels for a dispensation of law in civil matters. Part of the answer to this question are undoubtedly of Decision No. 9/2016, specifically the fact that the incidents of enforcement before the judge in court on representation of the legal person is possible only through legal adviser or advocate, within the law, not by an authorized person. Since the Decision. 9/2016 covers only representation before the court shall consider the possibility of this studio extinţe considerations set out decision and the facts constituting the premise of this article.

Keywords: *representation, enforcement phase, legal entity* .

1. Introduction

The issue for discussion is based on Decision No. 9/2016 issued Î.C.C.J., panels for a dispensation of law in civil matters. This decision Î.C.C.J., stated that "the interpretation and application of art. 84 para. (1) of the Civil Procedure Code, the application for summons and conventional representation of the legal person before the courts can not be done by proxy legal person or by legal counsel or lawyer up".

We present some of the reasons on which it based its decision mentioned above.

Decision No reasons were invoked. XXII of June 12, 2006, delivered by the High Court of Cassation and Justice - United Sections in the outcome of the appeal on points of law, namely the argument that "the activities of legal consultancy, representation and legal advice and drafting of legal documents, including introduction of actions in court, with the possibility of certifying the identity of the parties, content and date of documents, defense and representation by legal means the rights and interests of individuals and businesses in relations with public authorities, institutions and any Romanian or foreign constitute, where appropriate, specific activities of the legal profession, regulated in art. 3 of Law no. 51/1995 on the organization and the profession of lawyer, republished (2), as amended, the profession of notary public [Art. 8 9:10 in law notaries and notary activity no. 36/1995, republished (3)] or the bailiff (art. 7 of Law no. 188/2000 on bailiffs, republished, with subsequent amendments)". In paragraph no. 28 was held, referring also to Decision No. XXII of June 12, 2006, that "certain legal activities such as legal representation, drafting of legal documents, formulating actions, exercising and justifying legal remedies may be performed by legal advisors, but the provision of such activities are permitted

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only as regulated by art. 1-4 of Law no. 514/2003 on the organization and the profession of legal advisor, with completions, ie their capacity as civil servants or employees with individual labor contract, a legal entity of public or private ".

Also in paragraph no. 29 High Court of Cassation and Justice continued playing the reasoning of Decision No. XXII of June 12, 2006 that "since the activities referred not qualify as acts of trade, by reference to the provisions of art. 3 and 4 of the Commercial Code (effective from date of the decision on points of law) (...) they can not be exercised by companies incorporated with such an object, applications for authorization of such companies is inadmissible ".

In its decision stated there was a legal practice in that representation of the legal person by proxy legal person before the bailiff is not admissible and the justification of this case was the need to ensure consistency throughout the proceedings, given that such a prohibition It has already been stated by HCCJ decision to stage the proceedings before the court.

2.1. General considerations on legal representation during enforcement person

By paragraphs 31-34 of Decision No. 9/2016 issued by Î.C.C.J., panels for absolution matters of law, is established that the courts for the legal entity may opt for conventional representation or can stand by the legal representative. In this respect, High Court of Cassation and Justice noted that the situation representation in court legal person can choose only the categories specified in art. 84 para. (1) Civil Procedure Code., legal counsel or attorney, respectively. On the other hand, pursuant to paragraph no. 33 of the decision under review "mandate agreement concluded between two legal effect only in terms of substantive law, not in terms of procedural law governed the matter of representation of mandatory legal rules." Following the arguments above, paragraph no. 35 of the decision states that "the activity of conventional representation before the court is a non-commercial activity reserved by lawyers and legal advisors. Or, if they agree on the idea that a legal person to be represented by another person, it concludes, unacceptable, that the representation itself could be object of the trustee.

For the reasons set that decision analysis concerns the situation representation legal person before the court, which follows naturally from the fact that the notification of the application for a ruling to unlock one point of law was made by the Brasov Court strictly on this. However, according to art. 521 par. (1) Civil Procedure Code., complete absolution of points of law only to pronounce on the question of law subject to dispensation.

Regarding the interpretation of Decision No. 9/2016 issued Î.C.C.J., panels for a dispensation of law in civil matters, was put in question whether it is possible creditor legal representation by proxy another person, during enforcement. Part of the answer to this question are undoubtedly of Decision No. 9/2016, specifically the fact that the incidents of enforcement before the judge in court on representation of the legal person is possible only through legal adviser or advocate, within the law, not by an authorized person.

2.2. Considerations on legal representation during enforcement person in front bailiff

Since the Decision 9/2016 covers only representation before the court the question arises whether it is possible to expand its content and representation before the bailiff.

To this end it is necessary to analyze the scope of art. 84 para. (1) Civil Procedure Code which provides that legal entities can

be represented conventionally before the courts only through legal adviser or lawyer. The rule established by art. 84 para. (1) Civil Procedure Code is interpreted and applied strictly, so that it can not be extended to the conventional representation of the legal person in situations other than in court. For these reasons, we believe that before the bailiff representing the legal entity is not limited to a lawyer or legal adviser. Moreover, in the absence of the rule laid down in art. 84 para. (1) Civil Procedure Code. Or before the court would not be there any restrictions regarding representation of the legal person.

Of course, we can say on the one hand, the reasons which led to the delivery of Decision. 31-34 of Decision No 9/2016. 9/2016 issued by Î.C.C.J. Such are the reasons underlying the decision delivery mentioned above are the non-commercial character of conventional representation activities and that these activities are reserved by law for lawyers and legal advisers. This key and retain their validity before the bailiff which could lead to the conclusion that even before the bailiff legal person must be represented by a lawyer or adviser only conventional legal considerations applying by analogy Decision no. 9/2016 pronounced by I.C.C.J On the other hand, as was pronounced and practice, there is a need for consistency in the application of rules on corporate representation.

2.3. Considerations on representation legal person consent enforcement and appeal to execution.

Since the notification of the court with the request for a declaration of enforceability is made by the bailiff, the question arises as to what conditions might censorship as a representative of the legal person which in practice acts as intermediary between the legal person-creditor and attorney / legal counsel who signed the request for enforcement to the bailiff. In this respect, it was noted that as long as the notification of the court is carried out by the bailiff, such a vote can not be achieved by means of a plea lack of representative, but only during checks on a declaration forced, which include checks on the request for enforcement.

However, checks that the court can do during enforcement are limited to checking that the reasons provided by art. 666 par. (5) pt. 1-6 Civil Procedure Code[5]. From reading the text of the law said that application for a declaration could be rejected for the existence of other impediments stipulated by law, under art. 666 par. (5) pt. 6 Civil Procedure Code, for lack of proof of the quality of conventional representative signatory of the application for enforcement. Of course it is debatable whether the absence of proof to the quality of representative conventional application for enforcement is a real impediment provided by law according to the real meaning of 666 par. (5) pt. 6 Civil Procedure Code.

[5] Cited legal text provides that the court may reject the application for a declaration of enforcement only if:
1. the application for enforcement is the responsibility of another organ of execution than before it;
2. decision or, where appropriate, the document does not, by law, enforceable;
3. document other than a judgment, does not meet the formal requirements required by law;
4. The amount is not certain, liquid and due.
5. debtor enjoys immunity from execution;
6. Title contains provisions which can not be brought out by enforcement;
7. There are other impediments provided by law.

The doctrine[6] consistently stated that the text envisages strict impediments and provided by law ie special legislation temporarily suspending the right to seek or continue enforcement of certain executory contracts[7]. In light of such an interpretation, without proof quality representative is such an impediment that would result in the rejection of the application for a declaration only by an interpretation in full and in any case strictly required by art. art. 666 par. (5) pt. 6 Civil Procedure Code.

Regarding appeal to execution, we appreciate that there may be a reason for its admission that the request for enforcement was filed legal person as proxy another person. The reasons are the same as we have shown above, recitals Decision No. 9/2016 issued Î.C.C.J. It can not be extended to the conventional representation of the legal person before the judge.

At the end of this brief analysis we express our hope that the judicial practice uniform will solve the problem at hand, even if the solution would appear to be without a fracture consistent corporate representation rules. Would like in this context to a possible legislative amendment or decision I.C.C.J legally binding, legal persons may be represented exclusively by a lawyer or legal adviser only before the courts, not before the bailiff. We appreciate that this is the solution that respects equally the letter and spirit of the law, even if a solution contrary there are many arguments opportunity.

We believe that our solution is consistent with those stated by the High Court of Cassation and Justice Decision no. 9/2016. The Court stated in that decision that the reasoning contained in recitals Constitutional Court Decision no. 485 of June 23, 2015, which was declared unconstitutional the provisions of Art. 13 para. (2) sentence II, art. 84 para. (2) and art. 486 par. (3) of the Code of Civil Procedure with respect to claims arising from mandatory preparation and presentation of the appeal by legal persons by a lawyer or legal adviser, can not be applied mutatis mutandis to the provisions of art. 84 para. (1) of the Code of Civil Procedure because, in the latter case, the text concerns only the limiting conventional legal person before the court, without prejudice to the legal status of legal representation and without turning obligation representation and assistance councilor legal or lawyer in a condition of admissibility of the action or a barrier to access to justice. Also art. 209 par. (1) of the Civil Code provides that a legal person exercises its rights and fulfills its obligations through its management as of the date of their creation. In the absence of the administrative, until the date of their exercise rights and obligations concerning legal entity shall be made by the founders or by individuals or legal persons appointed for this purpose, as required by art. 210 par. (1) of the civil code. Since the limit in art. 84 para. (1) of the Code of Civil Procedure shall act only where the legal person opts for

[6] G. Boroi (coord.), O. Spineanu-Matei, D. N. Theohari, A. Constanda, M. Stancu, C. Negrilă, D.M. Gavriș, V. Dănăilă, F.G. Păncescu, M. Eftimie, Noul Cod de procedură civilă. Comentariu pe articole, vol. II, Ed. Hamangiu, 2016, p. 430.

[7] It considered such a failure impediment requirements of article. 603 par. (3) NCPC, as amended by O.U.G. no. 1/2016. According to art. 603 par. (3) NCPC "if the arbitral award concerns a dispute relating to the transfer of ownership and / or the establishment of another real right on immovable property, arbitration award will be presented the court or notary public to get a decision court or, where appropriate, a notary authentic. After verification by the court or by the notary public to the conditions and following the procedures required by law and paid by part of the tax on transfer of ownership, it will proceed to registration in the land and will be transferred property and / or the establishment of another real right over immovable property in question. If the arbitration award is forecloses checks referred to in this paragraph shall be made by the court in the proceedings for a declaration of enforcement (Idem, p. 430).

conventional representation in court, in which case they can choose the only category referred the text said that, without representation conventional procedural rights of legal person may be exercised by the legal representative.

The decision considerations set Î.C.C.J. showed that a mandate agreement is concluded between two legal entities, this effect only in terms of substantive law, not in terms of procedural law governed the matter of representation of mandatory legal rules. The use of the adverb "only" label art. 84 para. (1) of the Code of Civil Procedure exclusive highlights how conventional corporate representation before the courts, which can be achieved only two categories of representatives nominated by text. This conclusion follows from the phrase "under the law", referring to laws governing the professions of legal adviser and lawyer.

The activity of conventional representation to the court is a non-commercial activities reserved by law lawyers legal counsel. Or, if they agree on the idea that a legal person to be represented by another person, it concludes, unacceptable, that the representation itself could be object of the trustee. Given the mandatory nature of the procedural rules, the interpretation that legal person could be represented in court by another person, including as regards the application for summons is legally unfounded.

The Court's reasoning in the foregoing considerations lead to the conclusion that the problem itself is not legal entities representation by another person in general, but to the courts. High Court made no finding on conventional representation of legal persons before the bailiff as notification was not given this object. Consequently, it must extend to other situations, principles stautuate the decision cited, especially since in the spirit of the Code of Civil Procedure in force, enforcement, the latter is no longer a part of the civil trial, but a Skin distinct phase resulting in further formulation of the Code of civil procedure and Law no. 76/2012 on the implementation of the Code of Civil Procedure.

3. Conclusions

Since the response to the above, we believe that if a declaration of enforcement, the application for enforcement was lodged legal person by proxy legal person, they will not be rejected for this reason. Notification is perfectly valid executor in case of representation by another person, and a declaration of enforcement shall be made by the bailiff, according to art. 666 par. (1) Civil Procedure Code. That the law assigns bailiff standing in a declaration of enforcement removes any question about the representation of the legal person in the process. It is therefore removed a possible discussion on the lack of representative trustee legal person as bailiff is formulating a declaration of enforcement, and the latter has been duly informed, for the above reasons, and if request for enforcement was submitted by the legal person by legal representative.

The same solution also applies to the appeal to execution. While it is possible to represent the legal person in front executor by proxy legal person, this can not be invoked as grounds for illegality of enforcement.

Finally, legal representation by proxy legal person is prohibited only in front of the court, regardless of the procedure, so including incidents that may occur during execution.

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CONSIDERATION REGARDING THE LAW NO 77/2016 IN VIEW OF DECISION OF THE CONSTITUTIONAL COURT NO 623/2016

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Abstract

The forced giving in payment regulated by Law no 77/2016 has created a lot of polemics which are not necessarily solved by the Decision of the Constitutional Court. The present study represents an attempt to clarify some of the implications of the Constitutional Court Decision upon the Law no 77/2016.

Keywords: *giving in payment, hardship theory, loan, constitutionality, court.*

1. Introduction

Adopted upon the existence of a conflict, significantly emphasized by economic events – the global economic crisis, but especially that of the real estate market, the evolution of the exchange rates of some currencies, between consumers and banks, Law no. 77/2016[1] sparked ample controversy. The controversy manifested mainly socially, while law professionals were almost unanimously critical towards the said Law[2]. The present study, however, does not intend to analyze the said Law but only the implications upon it of Decision no. 623/2016 of the Romanian Constitutional Court[3].

The aforementioned Decision, which is by no means safe from any criticism, brought, both legally and socially, a satisfactory solution for all envolved interests. Without preventing the application the dispositions of the Law it criticised, as some authors had anticipated[4], the Constitutional Court established the interpretation, probably the sole possible one[5], by which these could be enforced without transgressing constitutional priciples and , also, without injuring the rights of one of the categories of subjects involved in the relations sought by the Law.

Below we wish to analyze some of the aspects involved by the passing of this Decision, both regarding civil substatial law and civil procesual law, but only, as the

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[1] Published in M.Of. no. 330 of April 28th 2016 and enforced on May 13th 2016.

[2] See, e.g. Law on Giving for Payment: arguments and solutions, Valeriu Stoica, Marian Nicolae, Marieta Avram; Bucharest, Hamangiu Publishing House, 2016.

[3] Published in M.Of. no. 53 January 18th 2017.

[4] M. Nicolae in Law on Giving in Payment: arguments and solutions, op. cit., page 96; C. Pintilie, D. Bogdan in Law on Giving in Payment: arguments and solutions, op. cit., page 121-147; L. Mihai, Amicus Curiae regarding giving in payment, https://www.juridice.ro/474428/amicus-curiae-cu-privire-la-darea-in-plata.html; C. Birsan, S. Tirnoveanu, I. Craciun, Law on Giving for Payment – critical exam of some (un)constitutionality and (un)convenyionality elements, https://juridice.ro/essentials/499/legea-privind-darea-in-plata-examen-critic-al-anumitor-elemente-de-neconstitutionalitate-si-neconventionalitate.

[5] The solution had already been brought forward by doctrine. See V.Stoica in Law on Giving for Payment: arguments and solutions op. cit., pages 22-29 and, a different view, M. Avram, About the Law on Giving for Payment: between juridical folklore and the reason of law, pt. 3, https://www.juridice.ro/455084/despre-legea-privind-darea-in-plata-intre-folclorul-juridic-si-ratiunea-dreptului.html.

Constitutional Court did, with regard to loan contracts placed prior to the coming into force of the Law hereunder.

2. Content

Essentially, decision no. 623/2016 of the Constitutional Court provides that in order to enforce the dispositions of Law no. 77/2016 a court should verify the conditions regarding the existence of the hardship theory[6]. Starting from the premise that we are only looking at contracts placed prior to the coming into force of Law no. 77/2016 and targeting a rather practical approach, we will try finding answers to three questions, two of them regarding substantial law and one regarding procesual aspects.

2.1. Can the provisions of Law no. 77/2016 be applied to loan contracts placed prior to its enforcement?

Constitutional Court Decision no. 623/2016 (published January 18th 2017), analyzing the issue of the Law's constitutionality (of some of its provisions) exactly with regard to pre-existing contracts, did not deem it unconstitutional. Therefore, the Law will also be applicable to these contracts but only if the court (CCR analysis and disposition on art.11 of the Law) verifies the conditions regarding the theory of the conditions regarding the hardship theory. For that matter, pt. 121 of the Decision clearly states that, in the hypothesis in which the conditions of the hardship theory are met, the court can rule either the adaptation or the ceasing of the contract, as the application of the hardship theory cand be made "to the upper limit provided by Law no. 77/2016 (handing over the estate and erasing the main and accesory debt)". A counter argument invoking the dispositions of art. 3 of the Law, which refers to the derogation from the provisions of Law no. 287/2009 regarding the Civil Code, cannot be taken into account, because an eventual giving in payment, even if it pertains to a juridical relation risen prior to enforcement of the New Civil Code, would have been governed by its dispositions (and not by the old regulations) as long as it took pplace after October 1st 2011 (art. 112 of Law of application no. 71/2011). And, by hypothesis, an operation of giving in payment based on Law no. 77/2016 would be ulterior to the enforcement of the New Civil Code.

2.2. What is the effect of the RCC decision on the application of Law no. 77/2016 for the pre-existing contracts upon enforcement of this Law ?

We have already established that this Law is applicable to these contracts. But only in the hypothesis in which it is established (case by case) that the requirements of the hardship theory are met. That cannot be if there is only the possibility that the parties could bring the hardship theory into matter in front of the court, but it will be necessary for the court to effectively establish if the conditions of the hardship theory had been met. Surely, if the court is invested by one of the parties regarding giving in payment based on the provisions of Law no. 77/2016 (we will see to the procedural matters separately).

The existence of the conditions of the hardship theory determines the constitutionality of the Law upon application to pre-existing contracts. The possibility of such application is provided in art. 11 of the Law, but this disposition was

[6] For an analysis on this cause of waiving the *pacta sunt servanda* principle see, prospective to the old law, C.E. Zamsa, The Hardship Theory. Study of Doctrine and Jurisprudence, Bucharest, Hamangiu Publishing House, 2006, and, prospective to the New Civil Code, G. Boroi, C. Anghelescu, Course of Civil Law. General Part, 2nd Edition, Bucharest, Hamangiu Publishing House, 2012, pages 212-215.

deemed by the RCC decision to only be constitutional "as far as the court verifies the conditions referring to the existence of the hardship theory". In the minutes, the Court did not refer to the possibility of verification but to the actual verification (grammarly interpretation – mode of the used verb). Surely, in the reasons of the Decision there are points referring to the possibility of the judicial control, but overall the reasons regard the necessity of verifying the hardship theory (pt. 119 and 120 of the Decision). The Court deems Law no. 77/2016 as being an application of the hardship theory to loan contracts (pct. 115 of the Decision) and, therefore, it will not be applicable if the conditions of the hardship theory are not met. Furthermore, the Court considers unconstitutional "the hardship theory *ope legis*" which the legislator had in mind when adopting Law no. 77/2016, and the elimination of this trait (ope legis) requires actually establishing the existence of the conditions of the hardship theory (either by parties' agreement – but this option is not of interest, as the parties are free to decide to modify the elements of the contractual relations between them even if there is no special regulation -, or by ruling of the court).

Thusly, for the application of Law no. 77/2016 to pre-existing contracts it will be necessary to verify the fulfillment of the admissibility requirements provided in the Law (art. 4) but also the existence of the conditions of the hardship theory. In the hypothesis in which the existence of the conditions of the hardship theory is not established in one particular case, the solution (of admittance of the creditor's contestation, or rebuttal of thr debtor's claim for ascertaiment) will be also based on the inadmissibility of the procedure of giving in payment ruled by Law no 77/2016. Practically, the premise for the application of Law no. 77 to pre-existing contracts is the very identification of the conditions of the hardship theory.

As it is the case with the admissibility conditions provided by art.4 of the Law, with regard to the existence of the conditions of the hardship theory the debtor will also have their own view by which they will decide wether or not they can follow the procedure of giving in payment ruled by Law no 77/2016. If the debtor's evaluation has a positive outcome, they will send their creditor a notice, as provided by art. 5 of the Law. In turn, the creditor will assess the admissibility requirements under art. 4 but also on the hardship theory. This is where the lagislator's intervention might be necessary, as to modify art. 5, align. 1 in order to establish an obligation for the debtor to also detail in the notice the conditions of the hardship theory, thus making it possible for the creditor to fairly assess the situation. On the other hand, we think that, given the RCC decision, the debtor would already be forced to take on the hardship theory matter in their notice, or at least would be interested to. According to their evaluation's outcome the creditor will decide wether to lodge a contestation as provide by art. 7 or to give effect to the notice (surely there is a third option, respectively the creditor could wait, keeping the possibility of defending themselves in court in the case regarding the claim for ascertainment made by the debtor, however such a position would not serve their interests, given that the effect of the loan contract would remain suspended). Should the debtor not refer to the hardship theory in their notice, the creditor could lodge the contestation (surely, should they have assessments regarding the admissibility requirements under art.4 of the Law, they will mention them in the contestation) settling to affirm the inexistence of the conditions of the hardship theory.

Finally, should the parties fail to reach an agreement, the court will also assess the admissibility requirements under art.4 of the Law and the existence of the conditions of the hardship theory. To be mentioned that, as it is the case with admissibility conditions under art.4 of the Law, the existence or inexistence of the conditions of the hardship theory, as a premise for the application of the procedure ruled by Law no. 77/2016, (if the parties fail to agree) the court will assess either upon contestation by the creditor (as per art. 7), or upon claim for ascertaiment mad eby the debtor (as per art. 8 of the Law).

The debtor's notice sent as provided by art. 5 of the Law will produce the effects provided by this law even if in one particular case the hardship theory conditions are not met (similar to the situation in which the admissibility conditions under art. 4 of the Law are not met). Surely, those effects would be removed when the ruling that establishes that the hardship theory conditions are not met remains definitive. The effects of the notice could only be avoided by priorly lodging a claim for ascertainment by the creditor, by which they ask for the establishment of the inexistence of the conditions of the hardship theory (but in such a claim, a matter of interst[7] would rise – as it would only be eventual – and, moreover, it is hard to imagine that a bank would lodge such claims regarding each contract placed rior to the enforcement of Law no. 77/2016).

Surely, we cannot exclude the hypothesis in which the debtor lodges a claim, distinct from the procedure of Law no. 77/2016, by which they ask for the verification of the conditions of the hardship theory. But such a claim's object could not be to ascertain the existence of these conditions (the rule of subsidiarity of a claim for ascertainment would be breached) but the effective application of the hardship theory, which would presume a course of action in accordance with common law, with no ties to the procedure under Law no. 77/2016. This would probably not serve their interests, given they would lose the advantage of by law suspension under Law no. 77/2016 and, on principle, also of exemption from paying court fees. Moreover, the court's ruling, assuming they establish the existence of the conditions of the hardship theory, would not be predictable, as it is highly unlikely it would exceed the advantage given by the giving in payment based on the Law hereunder.

And, as we have reached this point of the analysis, we must take into account pt. 121 of the RCC Decision. Therein the RCC hints that the court, establishing the existence of the conditions of the hardship theory (and of the admissibility requirements under art.4 of the Law) could rule any measure deemed necessary (adaptation or ceasing of the contract) to the upper limit provided by Law no. 77/2016 (handing over the estate and erasing the main and accesory debt). This option of the court could only be in the hypothesis in which they were invested with a claim based on common law.

If the debtor chose to follow the procedure under Law no. 77/2016, then either their step would be considered inadmissible (either because the conditions under art. 4 are not met, or those of the hardship theory) and it would remain without effect (in the end, after the courts decision remains definitive), or, should al the requirements for this procedure be fulfilled, it would have the outcome provided by law. The mention under pt. 121 of the Constitutional Court's Decision cannot have any actual effect, art. 2, align.3 of Law no. 47/1992 clearly stating the

[7] For this requirement for lodging a civil claim see G. Boroi, M.Stancu, Civil Procedural Law, 3rd Edition, Bucharest, Hamangiu Publishing House, 2016, page 36.

impossibility for the Court to alter or complete the legal dispositions submitted to their control. Thusly, a consequence of following the procedure under Law no. 77/2016 (assuming it is admissible) can only be the one mentioned in its provisions (giving in payment, respectively the extinction of the debt rising from the loan contract, accessories included, no supplementary costs, by the transfer towards the creditor of the ownership to the mortgaged asset)[8].

Besides, the principle of availability[9] precludes the court from ruling otherwise. As for the steps taken by the debtor under Law no. 77/2016, the court will be invested by claim made by either the creditor or the debtor. The creditor could file the claim under art. 7 , by which they contest the fulfillment of the requirements needed for the application of the procedure ruled by Law no. 77/2016. Should the court consider they were not fulfilled it will admit the creditor's claim without raising the matter of application of the hardship theory. And if they consider the coditions for application of the procedure are fulfilled they will reject the creditor's claim, without disposing any other measures (a counterclaim made by the debtor would lack interst and, anyway, if it would aim othe consequences, it would be subject to common law). In their turn, the debtor could file a claim provided by art. 8of the Law, but its object is pre-established by this provision (should they have other claims, the debtor would exceed the dispositions of Law no. 77/2016, choosing the way of the common law). So the court would either admit the claim (within the boundries of the expressed claims, the same provided under art. 8, align.1 of the Law), or reject it, in neither case could they rule other measures.

Surely, imposing a certain solution is not entirely in accordance with the idea of equity which stand as grounds for the hardship theory. And, indeed, it is possible that the solution chosen by the legislator reverses the situation, respectively generating an imbalance in reverse to the one they wished to remove (the value of the mortgaged asset could be clearly lower than that of the debt). But these are the provisions of Law no. 77/2016 (art. 3, art. 5, art.6, align. 6, art. 8, align.1 and art. 10), disposisions which have not been declared unconstitutional.

2.3. How can the court be invested to rule on the existence of the conditions of the hardship theory ?

We start from the premise that we are looking at the application of the procedure under Law no. 77/2016, thus we will not address eventual claims made by the parties on different grounds (as per common law).

In this procedure, the court is invested by either the creditor, by claim as per art. 7 of the Law, or the debtor, by claim as per art. 8.

Let us first assess the case of the claim made by the creditor, as per art. 7, distinguishing between the situation in which the creditor refers to the hardship theory and that in which he makes no such reference.

Should the creditor, lodging the claim provided by art. 7 of the Law, contest the existence of the conditions of the hardship theory (we must include the case in which the creditor invokes reasons in which the court could include the inexistence of the hardship theory conditions, e.g. if the creditor invokes the inapplicability of the

[8] For a different opinion see M. Avram, Does forced giving for payment still exist after Constitutional Court's Decision no. 623/2016?, https://juridice.ro/essentials/760/mai-exista-darea-in-plata-fortata-dupa-decizia-curtii-constitutionale-nr-6232016.

[9] For an analysis of this principle see G. Boroi, M. Stancu, op.cit., pages 12-17.

procedure under Law no. 77/2016) two hypotheses become possible.

In the first one the court will assess that the hardship theory conditions are not met and, consequently, will admit the creditor's claim. Of course there could be a discussion on the qualification of the creditor's claim's threads and on the solutions the court might give on each of them. On principle, the creditor will lodge a claim for ascertainment (to be ascertained that the hardship theory conditions are not met, that the procedure of giving for payment under Law no. 77/2016 is not applicable, that the debtor's notice of giving for payment lack effect or, as proposed based on the provisions of the Law, the ascertainment of the failure tu fulfill the conditions necessary for the debtor's right to extinguish the debt to arise). We do not think lodging any other claims makes sense. For example, *restitution in integrum* is an effect of the admission of the claim, it is not necessary for it to be object of a different thread (of course, here it would be necessary to establish the contents of *restitution in integrum* and, given the result, to be decided if such a claim in a different thread is necessary, but detailed – should it be deemed interest can be requested for the period the contractual effects were suspended, or if the debtor could be asked to immediately pay all the instalments which would have been due during the suspension).

In the second hypothesis, should it be deemed that the hardship theory conditions are fulfilled, the court will proceed to verify the other admissibility requirements (art. 4) contested by the creditor and will rule accordingly (admit the claim if the admissibility conditions are not met or reject it if they deem they are fulfilled).

Further, let us analyze the situation in which the creditor, filing the claim under art. 7, does not refer to the hardship theory (probably the case of claims filed prior to the ruling of the Constitutional Court).

Firstly, we must assess if the court could or could not analyze the fulfillment of the hardship theory conditions.

We deem that the court is called to check the existence of the hardship theory conditions even if the claimant (here, the creditor) fails to invoke they were not fulfilled.

This idea arises from the reasons for the RCC Decision (pt. 116, 119, 120), but also from its minutes.

Then, when solving the claim by which it was invested, the court must apply the dispositions of Law no. 77/2016 (art. 4 mainly), but their applicability (and that of the entire procedure ruled by the Law hereunder) to pre-existing contracts depends on art. 11 of the Law, and this article's constitutionality presumes establishing the existence of the hardship theory conditions. In other words, in order to assess the applicability of Law no. 77/2016 to a certain case, the court will have to firstly check the existence of the hardship theory conditions.

Therefore, the issue of breaching the availability principle cannot be taken into account by analyzing the hardship theory conditions, this analysis is necessary to establish the applicability of the procedure ruled by Law no. 77/2016. Doing so, the court does nothing more than checking the applicability of the special procedure to the contract regarded by the claim (and by the prior notice from the debtor).

And an eventual counterclaim from the debtor (notwithstanding litigation risen prior to the passing of the Constitutional Court's decision in which the moment by which a counterclaim could be filed could very well have passed – of course we could talk about a request for reinstatement within term in the 15 days following the passing of the RCC decision) would be hard to admit. Because we either appreciate that the court would have to check the existence of the hardship theory conditions anyway and then the

counterclaim would lack interest, or we deem the court could not proceed to that matter and then it could not admit the claim based on the lack of the hardship theory conditions (or on the failure to prove them).

In the end, taking into account the Constitutional Court's decision, there are two possible solutions: either the hardship theory conditions are met and the application of the procedure under Law no. 77/2016 to pre-existing contracts does not breach constitutional provisions, or the hardship theory conditions are not fulfilled, in which case the procedure ruled by Law no. 77/2016 cannot be applied to pre-existing contracts. And the court not only can, but is forced to act for a correct application of the law, and in order to do that it must first establish the norms applicable to the case. And that presumes, as per the RCC decision, verifying the existence of the hardship theory conditions. The judge's active role principle[10] (art. 22 C.p.c.) prevents any doubt on an eventual breach of the availability principle (art.9 C.p.c.).

Thusly, even if the creditor (claimant) fails to invoke the failure tu fulfill the hardship theory conditions, the court will, however, proceed to analyze their existence.

Difficulties arise as for the solution the court should pass in the hypothesis in which, after analysis of the hardship theory conditions, they will not establish they exist (if it is assessed the hardship theory conditions have been met, then the court will rule according to the solidity of the creditor's contestation of the admissibility requirements under art. 4). In such case, the procedure ruled by Law no. 77/2016 would not be applicable to the contract under matter.

But let us see what are the possible solutions in case the creditor fails to invoke the lack of the hardship theory conditions.

Should the court fail to verify the existence of the hardship theory conditions three solutions are possible.

Thus, without checking the existence of the hardship theory conditions, the court could reject the creditor's claim verifying and assessing that the admissibility requirements under art. 4 are met (those contested by the creditor), with no reference (analysis) to the hardship theory. However, in such case, the court would pass a ruling regarding a pre-existing contract (by hypothesis, such contracts are subject of the matter here) based on art. 11 of the Law, though this article would only be constitutional if the hardship theory conditions are met (according to RCC decision). Without verifying the fulfillment of these conditions the court cannot apply art. 11, and if this article does not apply, the procedure ruled by Law no. 77/2016 cannot pertain to contracts placed prior to its coming into force.

In a second hypothesis, without checking the existence of the hardship theory conditions, the court could admit the creditor's claim, verifying and deeming that the admissibility conditions under art. 4 have not been fulfilled (those contested by the creditor), making no reference (analysis) to the hardship theory. But this situation is similar to the aforementioned. The court would rule in accordance with legal norms that might not be applicable to the contracts under matter, and they could not find base in the dispositions of art. 11 without checking the fulfillment of the hardship theory conditions. Surely, the interest of discussing such a hypothesis is fairly low, because, either the hardship theory conditions were met or not, the application of the giving for payment procedure ruled by Law no. 77/2016 would still be inadmissible.

[10] See G. Boroi, M. Stancu, op. cit., pages 20-25.

Finally, without proceeding to effectively checking the existence of the hardship theory conditions, the court could admit the creditor's claim on grounds that the debtor failed to invoke and prove the existence of the hardship theory conditions, an aspect on which the admissibility of the applicability of the procedure ruled by Law no. 77/2016 to pre-existing contracts depends. However, if we were to consider that the court is prevented from analyzing the existence of the hardship theory conditions because of the availability principle, even more so we could not accept the passing os a ruling based on an aspect upon which the court had not been invested (and which was not brought into matter with the parties). And we must not omit the fact that the court's ruling (assuming it is mentained in appeal) would be *res judicata*, therefore there would be no more means to verify the existence of the hardship theory conditions in a new step based on the provisions of Lawu no. 77/2016.

Given the aforementioned, we deem the court will be forced to proceed to checking the existence of the hardship theory conditions. In this case there are also multiple possible outcomes.

Thusly, it is possible that the court verifies the existence of the hardship theory conditions and to assess they do exist, in which case they will also check the other admissibility requirements (art.4) contested by the creditor and will pass a solution accordingly (admits the claim if the admissibility requirement are not fulfilled and rejects it if it deems they are met).

In a second hypothesis the court may check but assess that the hardship theory conditions are not established. In which case the court should not proceed to analyze the fulfillment of the admissibility requirements under art. 4. Therefore solutions of admitting or rejecting the creditor's claim based on the failure tu fulfill the admissibility requirements should be excluded.

Two more possible solutions remain.

The court could admit the claim based on the inexistence of the hardship theory conditions. But this would mean admitting the claim based on a reason the creditor has not invoked. If the court would do so they would breach the availability principle, by changing the cause of the claim.

That is why we consider that the court should reject the claim, mentaining, though, in the reasons the inapplicability of the procedure ruled by Law no. 77/2016 (this is where the solution of rejecting the claim without analyzing the admissibility requirements contested by the creditor arises from). By such a ruling the court would abide by both principles under matter, the availability principle and the active role principle.

This last solution presumes an analysis of its consequences.

Although their claim has been rejected, the creditor wil be able to request payment of the amounts due according to the contract and can start or continue forced execution. The by law suspension of contractual effects will be deemed, in view of the passed ruling's reasons, as inoperable. Any opposition on behalf of the debtor, in any way, will be removed by *res judicata* which will include the reasons (decisive) for the solution[11] by which the creditor's claim was solved (including an eventual debtor's claim upon art. 8 of the Law).

The only unsolved issue for the creditor remains that of litigation costs. However, in case their claim was filed prior to the Constitutional Court's ruling, we deem that, assessing the matter of procesual guilt, although their claim was rejected, they

[11] G. Boroi, M. Stancu, op.cit., pages 586-587.

should not be forced to pay for litigation fees.

Finally, in case the creditor did not file a claim based on art. 7, or they have filed such a claim but it has been rejected and, in all cases, did not follow the debtor's notice, tha later could lodge the claim under art. 8 of the Law. We consider that, no matter if the debtor has or has not invoked the fulfillment of the hardship theory conditions, the court must check their existence, as well as that of the other admissibility requirements. Of course, the debtor's claim was preceeded by the one of the creditor (which has been rejected), *res judicata* of the ruling by which the creditor's claim was solved will be taken into account (for that matter, we think it should be considered that, in a litigation having the debtor's claim as object, the creditor will be able to invoke the failure to fulfill any admissibility or hardship theory condition, if those have not been invoked by their prior claim).

From the perspective hereunder (the hardship theory) the creditor will have to contest:

a) the fact that the execution of the contract has become excessively burdensome for the debtor;
b) the fact that the situation under pt.a) is due to exceptional changes of circumstances;
c) the fact that the change in circumstances took place after the conclusion of the contract;
d) or they should prove :
e) the fact that the change in circumstances, and also thir extent were or should have been taken into account by the debtor upon concluuin of the contract;
f) the debtor took the chance of changing circumstances or it could reasonably be considered that they took that chance;

As for the burden of proof, we think the debtor will have to prove the existence of the hardship theory conditions mentioned above under pts. a), b) and c) and the creditor should have to prove the aspects mentioned under pts. d) and e). Given that the failure to meet any of these conditions makes the procedure under Law no. 77 inapplicable (as the hardship theory conditions do not exist)and they can only be assessed consecutively (on principle, in the aforementioned order) it results that the debtor will firstly prove aspects under pts. a), b) and c) and only after that the creditor, in order to win the case, will have to prove the aspects under pts. d) and e).

Regarding the condition for applying the hardship theory consisting of the debtor having tried to negotiate a reasonable an equitable adaptation of the contract, we think the failure to do that cannot be taken into matter (in the procedure ruled by Law no. 77/2016) given that the solution of modifying the contract is mentioned by the legal dispositions and, moreover, the procedure starts by notice given by the debtor.

3. Conclusions

Therefore, the Constitutional Court's Decision cannot be deemed to generate the inapplicability of the procedure under Law no. 77/2016 to pre-existing loan contracts.

Thus, the necessity to set the terms in which the procedure ruled by the Law hereunder will be applied and these have been the very object of the present study.

Of course, we do not pretend to solve all the difficulties that might arise upon application of the law according to the conditions set by the provisions of the Constitutional Court's Decision, nor do we consider our proposals to be absolute. This article represents an attempt to help practitioners, courts or representatives of

involved parties, which will be called to answer the questions above.

Naturally, as per the matter's actuality, it will be subject to far more ample anlyses in the specialty literature and the solutions brought forward will be either confirmed or denied by jurisprudence of courts which have already been invested with a significant number of claims under Law no. 77/2016.

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CLASSIFIED DOCUMENTS IN CIVIL LAWSUITS

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Abstract

The purpose of this study is to approach classified documents from a very specific perspective: that of using them as evidence during a civil lawsuit. In this sense, we provide the definition of classified documents, give details about the way in which classification operations are performed, as well as the conditions that have to be met so that these documents could become declassified in case parties wanted to have access to the documents submitted to the case file. Moreover, we deal with the issue of submitting classified documents to court, with the way in which these documents could be accessed, considering the right to a fair trial.

Keywords: *classified documents, civil lawsuit, the right to have access to evidence, the right to have access to court*

1. Introduction

With Book II, Chapter II, Section 2, Subsection 3 of the Romanian Civil Procedure Code (RCPC)[1], the legislator regulated the legal status of documents in terms of their use as evidence in civil proceedings. We recall in this connection that, according to the provisions listed in art. 250 RCPC, the burden of proof as far as a legal document or fact is concerned lies with the documents, witnesses, presumptions, testimony of one of the parties, given on its own initiative or obtained either by interrogation or expertise, the material objects, the investigation made or any other means provided for by law.

A document is defined by the provisions of art. 265 RCPC as any piece of writing or other record that contains information about a legal document or fact, regardless of its physical support or the preservation and storage means.

In a civil lawsuit, parties may use both authentic documents and documents under private signature, as well as electronic documents, for each of these categories being necessary to comply with the terms expressly provided for by the legislator. The documents can be electronically processed, and, in this situation, when the details of a legal document are electronically processed, the evidentiary instrument of this document is the document that reproduces these details, provided that it is comprehensible and incorporates sufficiently serious guarantees so that its contents, as well as the identity of the person who has produced it, could prove to be of good faith[2].

Regarding the proposal and management of documentary evidence, based on the provisions of art. 249 RCPC, according to which the party who makes a claim during the civil lawsuit must prove it,

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[1] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.

[2] Boroi Gabriel, Stancu Mirela – *Drept procesual civil* (Civil Procedural Law), Hamangiu Publishing House, 2015, p.438.

except for the cases stipulated by law, parties are required to submit all the documents they intend to use in order to resolve the dispute taken to court once they file the petition form, the statement of defense or the counterclaim, as appropriate, under penalty of preclusion.

Nevertheless, there are situations where parties, to the extent they are not state authorities or public institutions, are not in possession of the documents that are necessary to resolve the disputes. In this case, the provisions of art. 298 RCPC are to be followed, whereby, at the request of a party or ex officio, the court shall order that the given documents are to be made available by the public authorities or institutions holding them. The public authority or institution holding the documents has the right to refuse submitting the document when national defense, public security or diplomatic relations are at stake.

In other words, the public authority or institution holding the document could, for instance, refuse to send the document when it is classified, this right of refusal not being unconditional. Under these circumstances, we have to ask ourselves whether the right to a fair trial, provided for by art. 6 RCPC, as well as the principle of equality of arms, regulated by art. 8 RCPC, are observed in civil lawsuits.

In order to understand the legal status of this category of documents, we need to define this type of document. Additionally, by briefly analyzing how the information becomes classified or not, a more comprehensive perspective on this topic will be provided.

According to art. 15 of Law no. 182 of 2002 on the Protection of Classified Information[3], classified information is information, data, documents of interest to national security[4], which, due to the levels of importance and consequences that would occur as a result of unauthorized disclosure or dissemination, shall be protected[5].

[3] Law no. 182 of 2002 on the protection of classified information, as amended, was published in the Official Gazette of Romania no. 248 of April 12, 2002.

[4] According to art. 1 of Law no. 51/1991 on the national security of Romania, republished in the Official Gazette of Romania no. 190 of March 18, 2014, Romania's national security means the state of legality, social, economic and political stability and balance, necessary for the Romanian national state to exist and develop as a sovereign, unitary, independent, indivisible state, to maintain the rule of law, and necessary for the Romanian citizens to unrestrainedly exercise their rights, freedoms and fundamental duties, according to democratic principles and norms enshrined in the Constitution of Romania.

[5] According to art. 17 of Law no. 182/2002, "The category of state secret information comprises information representing or relating to: a) the national defense system and its basic elements, military operations, manufacturing technologies, armament and combat characteristics used exclusively within the national defense system elements; b) plans and military devices, personnel and missions of the forces engaged; c) the state cipher and other encrypting elements established by the competent public authorities and the activities related to their implementation and use; d) the organization of the protection and defense systems for the objectives, sectors, as well as the special and military computer networks, including their security mechanisms; e) data, schemes and programs relating to communication systems, as well as the special and military computer networks, including their security mechanisms; f) the intelligence activity carried out by public authorities established by law for national defense and security; g) means, methods, techniques and equipment, as well as the specific information sources used by public authorities that carry out intelligence activities; h) maps, topographical plans, thermograms and air flight records performed at scales larger than 1: 20,000, which exhibit the elements of content or the objectives classified as state secrets. i) studies, geological surveys and gravimetric analysis with density higher than one point per square kilometer, which assess national reserves of radioactive, disperse, precious and rare metals and ores, as well as data and information related to the material reserves that are the competence of the National Administration of State Reserves; j) systems and plans to supply electricity, heat, water and other utilities necessary for the operation of the objectives classified as state secrets; k) scientific activities, technological and economic activities and investments related to national security or national defense or which have special importance for the economic, technical and scientific interests of Romania; l) scientific research in nuclear technologies, besides the fundamental ones, as well as the programs for

The categories of classification to which classified information may belong are state secrets and restricted secrets. The information classified as state secret comprises that information concerning national security, which, if disclosed, could compromise national security and defense, whereas the information classified as restricted secret comprises information which, if disclosed, is likely to cause harm to a legal entity of public or private law. Also, within the class of information classified as state secret information, information can be divided into special classification levels, according to the damage that might occur through disclosure: NATO top secret information, NATO secret information and NATO confidential information.

An important aspect is the fact that, in principle, the two classes of classified information are governed by different regulations: the legal status of the class of information classified as state secret is provided for by Government Decision no. 585 of 2002[6], whereas the restricted secret information is protected by the provisions of Government Decision no. 781 of 2002[7]. We used the phrase 'in principle' to refer to the legal regime to be applied to the two classes of classification because, within certain limits, the provisions of Government Decision no. 585/2002 are also to be observed in order to protect restricted classified information[8].

We would like to point out that classified information should not be confused with trade secrets, the reason for restricting access to classified information pertaining to the protection of information related to national security and defense and not to the protection of certain secrets in relevant industrial areas, which has to do with the freedom of trade and industry, as it is enshrined in the provisions of art. 135 para. (2) a) of the Constitution of Romania[9].

In this context, it might prove useful to specify that trade secret[10] is defined as information which, wholly or partly, is not generally known or easily accessible to people dealing usually with this kind of information and which acquires commercial value because of the fact that it is secret, for which the legitimate holder took reasonable steps under the circumstances, to be kept

the protection and security of the nuclear materials and installations; m) issuing, printing banknotes and minting coins, the mockups of the monetary issues of National Bank of Romania and security features of banknotes and coins for detecting counterfeits, not for advertising, as well as printing securities such as government securities, treasury and government bonds; n) external relations and activities of the Romanian state, which by law are not meant for publicity, as well as intelligence belonging to other States or international organizations, to which, through treaties or international agreements, the Romanian government has committed itself to protect.".

[6] Government Decision no. 585 of June 13, 2002 approving National Standards for Protection of Classified Information in Romania, was published in the Official Gazette of Romania no. 485 of July 5, 2002.

[7] Government Decision no. 781/2002 for the Protection of Restricted Information was published in the Official Gazette of Romania no. 575 of August 5, 2002.

[8] According to art. 1 of Government Decision no. 781/2002 "The national standards for the protection of classified information in Romania, approved by Government Decision no. 585/2002 shall apply accordingly to the restricted classified information regarding:

a) classification, declassification and minimum protection measures; b) the general rules of evidence, preparation, storage, processing, copying, handling, transport, transfer and destruction; c) the obligations and responsibilities of the heads of public authorities and institutions, business entities, as well as other legal entities; d) the access of foreign citizens, of Romanian citizens who have another citizenship and of stateless persons to classified information and to places where activities unfold, objects are exposed and activities are performed related to this type of information; e) control over safeguards.".

[9] The Constitutionof Romania of November 21, 1991, republished, was published in the Official Gazette of Romania no. 767 of October 31, 2003.

[10] To analyze the concept of "trade secret", see Răzvan Dincă, *Protecția secretului comercial în dreptul privat* (Trade Secret Protection in Private Law), Volume 10, Universul Juridic Publishing House, 2009.

under secrecy; trade secret protection operates as long as the previously mentioned conditions are cumulatively met[11].

2. Classification and declassification of documents[12]

When labeling a piece of information as classified, the originator must take into account a number of objective and subjective criteria resulting from the way the legislator intended to regulate this area. In this regard, all authorities / institutions that draft or work with classified information are obliged to draw up guidelines for classification on which proper and uniform classification could be carried out.

Besides the previously mentioned guidelines, public authorities and institutions are obliged to draw up their own lists comprising the categories of state secret information in their fields, lists that are approved and updated by Government decision. Moreover, the units holding restricted secret information are required to draw up lists comprising these categories of information, lists which shall contain information relating to that unit's activity and which, while not constituting state secrets, within the meaning of the law, should be only known by the persons who need it to perform their official duties.

In this respect, for instance, when drafting a document, the originator is obliged to consult the guidelines and the lists of state secret information, or the list of restricted secret information, respectively, in order to assign the appropriate class and level of secrecy to the document, as these are the tools which basically provide objective criteria for the originator to classify or not the information included in that document.

Nevertheless, the originator might draw up a document containing data and information from different classes of classification, or data and information from the same class of secrecy but with different classification levels, or data and information taken from both classified and unclassified documents. Usually, if the document reproduces information belonging to different classes of secrecy, the resulting document will bear the highest level of secrecy. But, at the same time, without violating any legal provision in force, in this situation, classification may also be performed considering the content criterion, which is subjective. Thus, if the information is not reproduced exactly, but it is processed or partially reproduced, the resulting information may or may not be classified, according to its actual content. The originator is the one who assesses the features to be assigned to the document, as the legislator allows him/her to assign the appropriate level of secrecy according to the content of that document.

Consequently, in practice the following situations may arise:

a) the originator[13] consults the

[11] See Law no. 11/1991 regarding unfair competition, published in the Official Gazette of Romania, no. 24 of January 30, 1991, as amended and supplemented.

[12] For more details see Chapter II - *Classification and declassification of information. Minimum safeguards specific for secrecy classes and levels*, in Government Decision no. 585/2002.

[13] According to art. 19 of Law no. 182/2002, "The individuals occupying one of the following offices are empowered to assign documents one of the classification levels, during their drafting: a) for NATO top secret information: 1. the President of Romania; 2. the President of the Senate and the President of the Chamber of Deputies; 3. the members of the Supreme Council of National Defense; 4. the Prime Minister; 5. Government members and the Secretary General of the Government; 6. the Governor of the National Bank of Romania; 7. directors of the national intelligence services; 8. the Director of the Protection and Guard Service; 9. the Director of the Special Telecommunications Service; 10. the Secretary General of the Senate and the Secretary General of the Chamber of Deputies; 11. the President of the National Institute of Statistics; 12. the Director of the National Administration of State Reserves; 13. other authorities empowered by the President or the Prime Minister; b) for

classification guidelines and the lists of classified information, he/she finds that the information contained in the drafted document falls within one of the categories included in the list, he/she considers that it is mandatory to protect information due to its content and he/she assigns the document a class and a level of secrecy;

b) the originator consults the guidelines and the lists of classified information, he/she finds that the information contained in the drafted document falls within one of the categories included in the lists, however, he/she considers that, by referring to the content of the document, there is no need to protect it and no level of secrecy is assigned to that document;

c) the originator consults the guidelines and the lists of classified information, he/she finds that the information contained in the drafted document doesn't fall within any of the categories mentioned in the lists of classified information, but in relation to its content, it is mandatory to protect information, and thus that document is submitted for classification.

Another aspect should be outlined here: if the document has several annexes, they will be classified or not, depending on their content, but as long as the document will be treated as a whole, annexes cannot be separated in terms of their content and the document will benefit from protection measures relating to the annex / document bearing the highest level of secrecy. It is also necessary to mention in this context that each originator is required to establish the periods of classification, depending on the importance of information and the consequences that might arise in case of unauthorized disclosure or dissemination.

As far as declassifying information is concerned, according to provisions in art. 20 of Government Decision no. 585/2002, this operation is authorized when the classification period has expired, disclosure shall not endanger national security, defense, public order or the interests of public or private persons holding the information or the classified character of the respective information and when that information was classified by a person who was not empowered by law.

Declassification can be done by the originators, who must obtain the prior approval of institutions that coordinate and control the safeguards for the protection of classified information, according to their material competences. Thus, it is inferred that the originator has the option to declassify information whenever he/she considers that disclosure or dissemination would not cause damage to national security, national defense, public order or the interests of public or private persons holding the information.

3. Using classified documents in civil lawsuits

As shown in the first section, the parties have the duty to submit all the documents they intend to use in order to resolve the dispute, and, in case the documents are held by public authorities or institutions, the court may order the

NATO secret information – those empowered referred to in subparagraph a), as well as officials with the rank of secretary of state, according to their material competences; c) NATO confidential - those empowered referred to in subparagraphs a) and b), as well as senior officials with the rank of subsecretary of state, secretary general or director general, according to their material competences."

submission of documents in court, if it considers this piece of evidence to be admissible and useful.

Insofar as the document concerns national defense, the authority may refuse to submit the document. In this context, one word of caution is necessary: essentially, based on the analysis of how the legislator defined classified information, making express reference to national security, it follows that the documents relating to national defense are usually labeled as classified. Under these circumstances, by systematically analyzing legal reference texts, we find that by means of the final thesis statement in paragraph (2) of art. 298 CPC reference is made to art. 252 CPC, according to which the substantive provisions contained in classified documents can be proven and consulted only as provided for by law.

Given these arguments, we consider that only the label 'classified' assigned to a document may not constitute a reason *per se* for refusing to submit the respective document to court, while courts have not only the right of access to classified information but also powers to control the overstatement or understatement of the secrecy level and the duration for which they were classified. Additionally, one has to underline the fact that, in order to achieve this purpose, the phrase "*those related to national defense and security*", contained in art. 5 para. (3) of Law no. 554/2004[14], was declared unconstitutional, contrary to the provisions of art. 126 para. (6) of the Constitution of Romania, as on the basis of this phrase the administrative acts related to national defense and security[15] could circumvent the judicial review of the contentious administrative court.

Thus, we consider that the provisions of art. 298 in relation to art. 252 CPC are derogatory with respect to the need-to-know principle, whose fulfillment is checked only by the originator, who is held liable for unauthorized disclosure or dissemination. Therefore, public institutions or authorities holding the document may not refuse to submit the classified document at the request of the court only by invoking its classified nature. On the other hand, we consider that the submission of such a document may be refused to the extent that such refusal is duly justified (for instance, refusal to submit to the administrative court documents that formed the basis for issuing an adverse opinion for some individuals to enter the national territory, motivated not only by their classified nature, but also by using reference documents by the authorities with jurisdiction in criminal matters).

As for the way courts deal with classified information, this activity is regulated by the provisions of the decision of the Superior Council of Magistracy no. 140 of February 6, 2014 approving the Regulation on the access of judges, prosecutors and assistant magistrates of the High Court of Cassation and Justice to information classified as state secrets and

[14] According to art. 5 para. (3) of Law no. 554/2004 "administrative acts issued to enforce the state of war, the state of siege or of emergency, as well as those related to national defense and security or those issued to restore law and order, to eliminate the consequences of natural disasters, epidemics and epizooties, can be contested only for abuse of power." Law no. 554 of December 2, 2004, on the administrative contentious, with amendments and supplements, was published in the Official Gazette of Romania no. 1154 of December 7, 2004.

[15] In this respect, see the Constitutional Court Decision no. 302 of March 7, 2011 regarding the exception of unconstitutionality of the provisions in art. 7 para. (4), art. 17 (f), art. 20 and art. 28 para. (1) of Law no. 182/2002 on the protection of classified information, as well as art. 5 para. (3) of Law no. 554/2004 on administrative contentious, published in the Official Gazette of Romania no. 316, of May 9, 2011.

restricted secrets[16]. At the same time, we would like to emphasize the fact that this act was issued due to changes in the provisions of art. 7, para. (4) of Law no. 182/2002, in terms of providing access to classified information for all judges, provided they have been appointed and taken the oath. Prior to this legislative change, only certain judges had access to classified information, an aspect that has aroused lively controversies especially in terms of ensuring the random distribution of cases.

According to art. 11 of the decision of the Superior Council of Magistracy no. 140/2014, classified documents shall be kept in separate volumes, which are not publicly available. Classified documents may be made available to court staff or, where appropriate, to prosecutors, parties, their defenders, experts, interpreters, according to the procedures stipulated by Law no. 182/2002 and Government Decision no. 585/2002, Government Decision no. 781/2002, respectively, as appropriate, and only if they have security clearance for access to classified information or access authorization corresponding to the class or the secrecy level of each of the given documents and provided they give arguments for the need-to-know principle.

Analyzing the provisions mentioned, we have demonstrated that they cannot be fully enforced and that they are ineffective in terms of parties' access to classified documents in the file, being inconsistent with the higher level rules of law included in the Government Decision no. 585/2002. Thus, one could notice that the authorization of access to classified information is defined as a document issued by the competent institutions, the head of the legal person holding such information, which confirms that***, by performing professional duties***, the holder can have access to state secret information of a certain level of secrecy, complying with the need-to-know principle; additionally, the security certificate is defined as a document issued to the person ***with direct responsibilities in the protection of classified information***, to the security officer or to the employee belonging to the security structure, who proves verification and accreditation to hold, to access and to work with classified information of a certain level of secrecy. Or, obviously, one party in a lawsuit cannot obtain authorization to access classified information / certificate security, as these authorization documents are to be issued only when they are necessary to carry out job duties.

In such circumstances, we consider that, since the resolution of a dispute involves examining classified documents, to ensure the right to a fair trial, first it is necessary to verify the conditions under which reference documents might be declassified. In this regard, the court assigned to resolve the dispute should notify the originator to consider the opportunity of declassifying reference documents, as such a procedure is possible in terms of art. 20 and art. 21 of the Government Decision no. 585/2002.

Moreover, the issuing authority is able to make and communicate declassified partial extracts, from the original document, as such a measure is expressly provided for by art. 298 CPC. In case the documents may not be declassifed, the dispute will be resolved appropriately, as these documents are kept in separate volumes, access being provided only to those who hold proper authorization and who will justify the need to know the reference documents.

[16] Available at http://www.csm1909.ro/csm/linkuri/07_02_2014__65245_ro.PDF accessed 17/02/2017. Constitutional Court Decision no. 1120 of October 16, 2008 regarding the exception of unconstitutionality of art. 2 para. (2) art. 7 para. (1), Art. 25 para. (1) and Art. 34 lit. j) of the Law no. 182/2002 on the protection of classified information and art. 3 and art. 13 of Law no. 51/1991 on the national security of Romania, published in the Official Gazette no. 798 of November 27, 2008.

It is appropriate to mention in this context that, over time, the parties have invoked the constitutional challenge of art of the provisions on access to classified information, arguing that the contested legal texts infringe the right to a fair trial under one, impartial and equal justice for all. Nevertheless, the Romanian Constitutional Court was constant as far as its case law is concerned and dismissed the constitutional challenge of art as unfounded, stating that it is natural that Law no. 182/2002 contain specific rules on certain persons' access to such information, that is persons who are parties in a lawsuit, as well as their representatives, on condition that the security clearance certificate be obtained, for which it is necessary that the requirements and the procedure, provided for by the same law, be complied with beforehand. Since the legal provisions under criticism do not have the effect of effectively and absolutely blocking access to certain information, but, on the contrary, they make it conditional upon taking certain procedural steps, stages justified by the importance of such information, one cannot advocate the infrigement of the right to a fair trial or of the principle that justice shall be one, impartial, and equal for all. On the other hand, the Constitution of Romanian itself provides for, according to art. 53 para. (1), the possibility to restrict the exercise of certain rights - including guarantees related to a fair trial - for reasons of safeguarding national security[17].

3. Conclusions

In civil lawsuits documents occupy an important place in terms of evidence and ensuring the parties' access to the case file is a key issue when respecting the right to a fair trial and exercising procedural rights equally without discrimination. It is to be noted, however, that there are situations where access to certain documents cannot be provided, or at least cannot be provided to all persons involved in the settlement of the dispute, as some of them do not have the effective opportunity to obtain the authorization documents required for consulting the documents.

We appreciate, however, that, in such a situation, the possibility of declassifying the documents to ensure access for all parties to all parts of the file should be thoroughly analyzed for each particular case. But in the event that such an operation is not possible, the dispute shall be settled by reference to all the documents submitted, even if not all the parties have access to them. We do not consider, however, that the existence of an ongoing lawsuit might constitute a pertinent reason to declassify a document as, usually, in a civil lawsuit two or more private interests are in opposition, because documents are assigned a classification level to protect certain general interests as it is widely accepted that individual rights must be exercised consistent with collective rights.

Finally, the restrictions related to the access to information have always been accepted, even in the practice of the European Court of Human Rights, on condition that they be provided for by law, have a legitimate aim and be necessary in a democratic society.

[17] Constitutional Court Decision no. 1120 of October 16, 2008 regarding the constitutional challenge of art for provisions in art. 2 para. (2), art. 7 para. (1), art. 25 para. (1) and art. 34 lit. j) of the Law no. 182/2002 on the protection of classified information, as well as art. 3 and art. 13 of Law no. 51/1991 on the national security of Romania, published in the Official Gazette of Romania no. 798 of November 27, 2008.

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MEDICAL MALPRACTICE. THE MALPRACTICE INSURANCE

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Abstract

Increasingly, complaints about medical malpractice ocure extreme situations such as the death of the person or the occurrence of irreparable injuries. Professional misconduct in the exercise of the medical or medical-pharmaceutical act generating harm to the patient implies the civil liability of medical personnel and the provider of medical, sanitary and pharmaceutical products and services. Law no. 95/2006 on the health reform stipulates the obligation of the medical staff to conclude a malpractice insurance for the cases of professional civil liability for the damages created by the medical act, the indemnities being the responsibility of the insurer, within the limits of the liability established by the insurance policy.

Keywords: *medical, malpraxis, insurance, liability, sanction*

1. Introduction

From the etymological point of view, the word malpraxis defines an inappropriate practice, being an internationalized, self-governing word, used only in the medical field, and currently spreading to other professions such as lawyer, notary public, Bailiff, etc. Also included in the explanatory dictionary of the Romanian language, it defines malpractice as an "improper or negligent treatment applied by a doctor to a patient, which causes him harm of any nature in relation to the degree of impairment of physical and mental capacity." In the Romanian legal system, any person has the duty to observe the rules of conduct which the law or custom of the place requires, and not to interfere with his actions or inactions, the rights or legitimate interests of others. The one who, having discernment violates this duty, is liable for all the damages caused, being obliged to repair them fully. At the same time, the person who contracts obligations is held to execute them, otherwise being responsible for the damage caused to the other party, being obliged to repair it. Specific malpractice is even the existence of rules of conduct imposed by the profession and the professional body, which establish competences and attributions in the field, rules that are violated by the professional, attracting his responsibility.

Professional misconduct in the exercise of the medical or medical-pharmaceutical act generates harm to the patient, involving the responsibility of the doctor or the medical staff. Like civil liability, the malpractice also seeks to repair the damage caused by committing an illicit act in a pre-existing legal relationship between a professional and a patient. Thus, medical malpractice is interested in determining who is to respond to the action or inaction, establishing the extent of the damage created and the limits to which the responsible person can answer.

Title XVI of Law no. 95/2006 on Health Reform establishes the extent of the civil liability of medical personnel, as well

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as the procedure for determining the cases of professional liability. At the same time, the same normative act imposes the duty of those who grant medical assistance, to conclude a malpractice insurance for the cases of professional liability for damages caused by the medical act.

2. Medical practice

The legal notion of medical malpractice is defined by art. 653 par. (1) letter b) of the Law no. 95/2006 on the health reform as being professional misconduct in the exercise of the medical or medicopharmaceutical act generating harm to the patient, involving the civil liability of medical personnel and the supplier of medical, sanitary and pharmaceutical products and services. Within the same normative act, medical staff is the doctor, dentist, pharmacist, nurse and midwife who provides medical services. Starting from this definition, we note that engaging civil liability in malpractice-specific conditions occurs when the individual violates a rule of professional conduct. At the same time, one of the conditions of malpractice is that there is a legal relationship of the professional nature (doctor-patient) between the victim of the injury and the victim[1].

However, it is well known that the basis of civil liability is either the law or the parties' contract. Regarding the subject of this article, according to the legal provisions (art.653 corroborated with art.660 et seq. From Law no 95/2006), we may consider that the basis of the doctor's responsibility for failure or poor fulfillment of the professional obligations has its source both in Law, but also in the medical agreement (patient informed consent).

However, the informed patient's consent implies that, prior to being subjected to any method of prevention, diagnosis and treatment with potential for patient risk, the physician has the duty to explain in reasonable terms the patient's ability to understand, will be subjected.In turn, the patient gives his written consent for the medical procedures.

In fact, written consent is only a guarantee that the patient has agreed to perform a particular medical procedure, without totally or partially exonerating him from a responsible physician in case of a professional error[2].

Thus, we can not consider the patient's informed consent as a genuine contract, as the doctor's obligations are not established. The main consequence of this circumstance is that, in the case of malpractice, we can not speak of a contractual civil liability, but exclusively of civil tort liability, the doctor's obligations stemming from the law.

Medical civil liability is always a criminal liability because life, health, physical or mental integrity can not be the subject of a convention, and if such legal acts were concluded, they should be considered null and void under Art. 1229 Civil Code, according to which, "only goods that are in the civil circuit may be the subject of contractual provision"[3].

As a form of tort law, malpractice, in most cases, is found in the form of civil liability for its own deed, as a form of tortuous civil liability. Even though the law also governs other forms of tort / delict liability, liability for other person's deeds and damage caused by things, these are atypical for malpractice.

[1] Dan Cimpoieru, *The malpractice*, Ed. C.H.Beck, Bucharest 2013 p. 27.
[2] Dan Cimpoieru, *The malpractice*, Ed. C.H.Beck, Bucharest 2013 p. 86.
[3] Roxana Maria Calin, Malpraxis - Liability of medical staff and healthcare provider. Judicial Practice - 2nd Edition, Ed. Hamangiu, Bucharest, 2016., p. 87.

2.1. Conditions of Liability for Own Deed

The provisions of art. 1357 paragraph (1) of the Civil Code state that "the one who causes another to suffer an offense by an offense committed with guilt is obliged to fix it." Therefore, the general conditions regarding tort liability in the sense that there must be an unlawful deed, injury, causality and guilt must be met.

Liability for own deed is the principal area of liability based on the fault of the perpetrator, the fault not presumed, but must be proven by the victim.

As far as the professional error (illicit deed) is concerned, it has not been given a legal definition, but the legislator[4] has exemplified the forms of this error. Medical staff is civilian responsible for:

- professional error;
- insufficient medical knowledge in the exercise of the profession;
- preservation of legal regulations on confidentiality, informed consent and the obligation to provide medical assistance;
- depending limits of competence, except in the case of emergency where no medical personnel with the necessary competence is available.

Nonetheless, the lawyer also provided for the medical staff not to be liable for damages and damages in the exercise of the profession, namely when these damages:

a) is due to working conditions, insufficient equipment with diagnostic and treatment equipment, nosocomial infections, adverse effects, complications and generally accepted risks of investigation and treatment methods, hidden vices of sanitary materials, medical equipment and devices, sanitary equipment used;
b) acting in good faith in emergency situations, respecting the competence granted [5]

In the provision of health care and / or health care, medical staff is required to apply therapeutic standards established by nationally approved practice guides or, failing that, standards recognized by the medical community of that specialty, which What could enable the circumstance of the illicit medical offense.

Injury, as an essential element of medical civil liability, consists in the negative result suffered by the patient as a user of medical services as a result of the illicit act committed by the physical or legal person providing medical services[6].

According to art. 1385 Civil Code, the damage shall be fully rectified, unless otherwise provided by law. Compensation will also be granted for future damage if its production is unquestionable. Compensation must include the loss suffered by the injured person, the gain he would have been able to make and which he was deprived of under normal conditions, and the expenses he has incurred for the avoidance or limitation of the damage. If the illicit act also determined the loss of the chance to gain an advantage, the reparation will be proportional to the probability of obtaining the advantage, taking into account the circumstances and the victim's concrete situation.

In the case of injury to a person's bodily integrity or health, the compensation must include, as the case may be, the gain from the work that the injured person was deprived of or prevented from acquiring through the loss or reduction of his / her work capacity. In addition, the indemnity must cover the costs of medical care and, if

[4] Art. 653 par. (2) of Law no. 95/2006 on health reform with subsequent amendments and completions.
[5] Art. 654 par. (2) of Law no. 95/2006 on health reform with subsequent amendments and completions.
[6] Roxana Maria Calin, *Malpraxis - Liability of medical staff and healthcare provider. Judicial Practice - 2nd Edition*, Ed. Hamangiu, Bucharest, 2016,p. 91.

applicable, the expenses related to the increased life needs of the injured person, as well as any other material damage[7].

If the person who suffered harm to bodily integrity or health is a minor, the established disparity will be due from the date when the minor would normally have completed his / her professional training. . Until that date, if the minor had a win at the time of the injury, the compensation would be determined on the basis of his lost earnings, and if he did not have a win, he shall be determined according to the provisions of art. 1388 Civil Code, which applies accordingly[8].

The damage may be of a patrimonial (economic) or non-patrimonial (moral) nature. Even if the damage is not susceptible to a pecuniary assessment, the compensation to be awarded for this damage will have a patrimonial character.

As regards the moral prejudice, as its difficult assessment, the courts, when granting moral damages, do not operate with predetermined evaluation criteria, but proceed to an appreciation subjective of the particular circumstances of the case, namely the physical and psychological sufferings suffered by the victim[9], as well as the adverse consequences that the event under consideration had on the particular life, taking into account the evidence to be administered.[10] Thus, the judge is placed in the situation of estimating such damages, on the basis of estimated criteria that can highlight the limits of appreciation of the amount of the indemnities.

It is necessary that there is a causal relationship between the illicit act and the damage, namely the damage caused as a consequence of the illicit deed. The causality report includes both the facts that are the necessary and direct cause, as well as the facts that have made the causal action possible, or have ensured or aggravated its harmful effects. In order to establish the causal relationship between the illicit medical act and the damage, it is necessary to establish, on a scientific basis, all the correlations between the facts and the circumstances[11].

Article 1358 The Civil Code differentiates the particular situations of appraisal of guilt. Thus, in assessing the guilt, account will be taken of the circumstances in which the damage occurred, which is foreign to the person of the perpetrator, and, if so, of the fact that the damage was created by a professional in the operation of an enterprise.

Since medical liability, as a civil liability, is based on the classic guilt (fault), professional misconduct could be defined as a form of guilt where the physician did not foresee the outcome of his deeds, although he could have foreseen it , Or predicted the results of his actions, but he considered it to be easy that they would not appear.

Medical professional misconduct consists of non-observance of the rules

[7] Art. 1387 Civil code.

[8] Art. 1389 Civil code.

[9] In the case of the trial, the applicant suffered psychological trauma as a result of the fetus' death, but also because she had to look for answers for 5 years, as all those involved constantly refused to offer it. The court held that, in the context of the circumstances of the case and taking into account the actual suffering of the applicant, the amount of 200,000 lei claimed for moral damages is a fair satisfaction – *Jud.Sect.1 Bucuresti, sent.civ. nr. 11541/ 26.06.2013.*

[10] Roxana Maria Calin, Malpraxis - Liability of medical staff and healthcare provider. Judicial Practice - 2nd Edition, Ed. Hamangiu, Bucharest, 2016, p. 97.

[11] Regarding the causal link between the illicit act and the injury, the court noted that the doctors' inaction triggered, favored and did not in any way prevent the constitution of the causal chain that resulted in the fetal death of the fetus and the danger of the mother. The guilt of the doctors constantly in the form of omission, manifested in some inactions by not performing some necessary actions, namely not knowing the correct diagnosis and not taking the necessary treatment measure - *Jud.Sect.1 Bucuresti, sent.civ. nr. 11541/ 26.06.2013*.

regarding the exercise of the medical profession by failing to adhere to or deviations from the usual rules recommended and recognized in the practice of this profession, resulting from negligence, lack of attention or non-observance of specific methods and procedures.

Any form of professional misconduct can be identified by reference to the following:

- *culpa in adendo* – adherence to professional misconduct, imprudence, incomprehension, non-indifference to the requirements of the profession or the risks to which a person is exposed, the inappropriate use of working conditions, or an ease in medical activity that calls for special attention and caution;
- *culpa in eligendo* – consists in the wrong choice of technical procedures, in a delegation to an inappropriate person of obligations or in the delegation of their own obligations to others;
- *culpa in omitendo* – when the patient loses the chance of healing or survival due to the failure to carry out necessary gestures;
- *culpa in vigilando* – which resides in the breach of a duty of confraternity on a request for the request and the obligation to answer it, the failure to ask for help, the failure to inform the patient about the fate of the patient[12].

When establishing the guilt, the objective criterion of average diligence will be taken into account. If the physician's obligation to treat the patient is a means of diligence, caution, the doctor - without guaranteeing the outcome (healing), assumes the obligation to have the necessary conduct and to apply the most suitable medical remedies for the purpose of patient's recovery[13]. The result has a random nature, being influenced by the specific reactivity of the patient, the particularities of the disease, false or incomplete information obtained from the patient, or the limited technical and scientific resources available at the time of treatment[14].

2.2. Legal Liability of Medical Service, Sanitary Materials, Appliances, Medical Devices and Medicines Providers.

Along with the civil liability of medical personnel for the professional misconduct in the exercise of medical or pharmaceutical medicine, Law no. 95/2006 also regulates the civil liability of the providers of medical services, sanitary materials, appliances, medical devices and medicaments for damages to the patient.

Thus, healthcare providers are responsible for their own deed, for the deed of another person, but also for the damage caused by things.

Regarding the responsibility for their own deed, the public or private sanitary units as providers of medical services are liable civilly according to the law for the damages caused by the prevention, diagnosis or treatment activity, if they are the consequence of:[15]

a) nosocomial infections, unless it is proven to be an external cause that could not be controlled by the institution;
b) known defects of abusively used devices and medical devices without being repaired;
c) the use of sanitary materials, medical devices, medicinal and sanitary substances, after the expiry of the warranty period or the term of their validity, as the case may be;

[12] Dan Cimpoieru, *The malpractice*, Ed. C.H.Beck, Bucharest 2013 p. 90.
[13] Gabriel Adrian Nasui, *Medical malpractice*, Universul Juridic, Bucharest 2016, p. 103.
[14] Gabriel Adrian Nasui, *Medical malpractice*, Universul Juridic, Bucharest 2016, p. 103.
[15] Art. 655 of the Law no. 95/2006 on healthcare reform with subsequent amendments and completions.

d) acceptance of medical equipment and devices, sanitary materials, medicinal and sanitary substances from suppliers, without the insurance provided by the law, as well as the subcontracting of medical or non-medical services from providers without civil liability insurance in the medical field.

Public or private healthcare providers providing healthcare services are civilly liable for damages caused, directly or indirectly, to patients by failure to comply with the internal regulations of the sanitary unit.

Besides the responsibility for their own deed, the providers of medical services - public or private sanitary units - are also responsible for the deed of another, respectively for the deed of medical personnel.

Art. 655 par. (2) of Law no. 95/2006 stipulates that the medical units are liable under civil law for the damages caused by the hired medical personnel, in solidarity with him.

Therefore, we are in the presence of the commissioner's responsibility for the deed regulated by art. 1373 Civil Code.

With regard to liability for damage caused by things, public or private healthcare providers, and medical device and medical device manufacturers and healthcare manufacturers are responsible under civil law for harm to patients in the prevention, diagnosis and Treatment, generated directly or indirectly by hidden defects of medical equipment and devices, medicinal substances and sanitary materials during the warranty / period of validity, in accordance with the legislation in force.

2.3. The procedure to be followed in order to establish malpractice cases

2.3.1. Establishing cases of malpractice has two procedures, an extrajudicial and a judicial procedure. As regards the out-of-court procedure, as regulated by the Law on Health Reform, the Methodological Norms of Law no. 95/2006 and the Regulation on the organization and functioning of the monitoring committee and the professional competence for the cases of malpractice, approved by Order no. 1343/2006. This is a voluntary procedure, not compulsory.

Thus, the procedure for establishing cases of malpractice does not prevent free access to justice under common law. The optional nature of this procedure is manifested not only by the possibility of the person interested in choosing between the two ways - the extrajudicial and the judicial procedure - but also by his right to leave the special procedure for the determination of the cases of professional civil liability and to address of the court[16].

The minimum mandatory elements that a referral to the Commission must contain in order to be subject to verification are:

- the first and last name of the person making the referral;
- the quality of the person making the referral;
- the name and surname of the person who considers himself the victim of a malpractice case, if different from the person making the referral;
- the name and surname of the perpetrator of the act of malpractice perceived, committed in the performance of a prevention, diagnosis and treatment activity;
- the date of the act of malpractice;
- the description of the deed and its

[16] Dan Cimpoieru, *The malpractice*, Ed. C.H.Beck, Bucharest 2013 p.118.

circumstances;

- the damage caused to the victim;

In the proceedings before the Commission, the interested person will participate, that is, the person or, as the case may be, his legal representative who considers himself the victim of a malpractice committed in the course of a prevention, diagnosis and treatment activity or the deceased's successor As a result of an act of malpractice imputable to a prevention, diagnosis and treatment activity.

Besides the injured person, they have the status of parties to the extrajudicial procedure and the insured person (the person who committed the malpractice act - the medical staff) and the insurer (the insurance company with which the person accused of malpractice has concluded the civil liability insurance contract). Also, there may be medical experts who can be consulted by the Commission in cases of medical malpractice.

Within 3 months of referral, the Commission must take a decision on the case, a decision that will be communicated to all concerned, including the insurer.

If the insurer or any of the parties disagrees with the Commission's decision, it may appeal to the competent court within 15 days from the date of the communication.

2.3.2. The entitled person may at any time leave the administrative jurisdictional procedure before the Commission and may address the court. In all these cases, the court acts as a court of full jurisdiction, invested with the resolution of an action in tort. At the same time, the court also acts as a judicial review body when verifying, in terms of its soundness and legality, the Commission's decisions.

The competent court to resolve malpractice litigation is, according to art. 687 of the Law no. 95/2006, the court in whose territorial jurisdiction took place the alleged malpractice.

By indicating the court an exclusive competence, both material and territorial, is established.

In the case of a tort action for malpractice, addressed directly to the court, it will not be possible to resolve the case in the absence of a forensic expertise.

Insofar as criminal acts and deontological norms have been violated by the same act in its materiality, legal liability accumulates, both criminal responsibility and tort liability.

Malpractice acts within the medical activity of prevention, diagnosis and treatment are prescribed within 3 years from the occurrence of the injury.

3. The malpractice insurance

In all situations, professionals are required by law or by their own body regulations to end malpractice insurance.

Regarding the compulsory insurance of the initiated medical personnel, this was regulated by the law on insurance and reinsurance in Romania but was later introduced in Law no. 95/2006 on health reform.

The malpractice insurance is in fact insurance for civil tort liability, which means that, in addition, civil law regelations will be applied regarding the liability for the offense and the other legal norms with the incidence in the matter[17].

Ensuring malpractice has an important role in the work of professionals. On the one hand, he assures the professional against the risk of civil liability and, on the other hand, confers on the victim the certainty that his prejudice will be covered to a greater extent even though the author of the damage would be insolvent.

[17] Vasile Nemes, *Medical malpractice insurance* in Romanian Journal of Business Law no. 2/2009, p. 2.

Moreover, ending insurance is also a sine qua non condition for the doctor who is to be employed, being obliged to submit a copy to the employing unit[18].

Even if the doctor has the obligation to present insurance when concluding the contract of employment, insurance must be maintained throughout medical practice. Moreover, the failure to conclude the medical malpractice insurance or to ensure the legal limit is a disciplinary offense. The jurisprudence also established that[19] since the Romanian law expressly regulates the provision of malpractice to healthcare personnel as a form of insurance against it, individually concluded, distinct from any form of insurance concluded by the medical institution, it is obvious that the insurance contract concluded between the medical institution and the insurer does not include insurance for malpractice.

At the same time, with regard to professional liability insurance, the legislator[20] provided for the possibility of coexistence of more valid insurance, in which case the indemnities due will be borne in proportion to the amount insured by each insurer.

Regarding the damages, the legal provisions establish that the insurer pays damages for the insured persons who are liable, under the law, to third parties who are found to have been subjected to a medical malpractice act, as well as to the costs of the injured party Through the medical act.

Art.669 par. (1) of Law no. 95/2006 provides that damages are to be paid in respect of amounts which the insured is obliged to pay by way of compensation and legal costs to the person or persons injured by the application of inadequate medical assistance, which may have the effect of including personal injury or death.

Compensation to be granted when healthcare has not been granted, although the status of the person or persons who have applied for or for whom healthcare was required implied this intervention.

The medical malpractice insurance does not cover the damages that the doctor, pharmacist, nurse or midwife who provides healthcare services will incur in the medical act.

For such damages, medical staff will have to cover the risk of accidents and occupational diseases as any other employee[21].

An important aspect of interest in the provision of medical liability is the place where the risks and damages specific to this form of insurance are incurred.

Involved activity and health care is given in hospital units, but there are cases when given outside these units, does the question arise whether the doctor's responsibility can be drawn in such situations? The answer is affirmative. The responsibility of the medical staff and, implicitly, the liability of the insurer, regardless of the place where the assistance or medical services were provided, may be attracted.

The Law on Health Reform, by the provisions of Art. 668, provides for indemnity to pay regardless of where the care was given. In conclusion, the medical malpractice insurance operates only if the inadequate assistance has been voluntarily granted outside the specially designated areas[22].

[18] Art. 667 para. (2) of Law no. 95/2006.
[19] Decision no. 2658 of September 24, 2014, rendered in appeal by the Civil Division of the Supreme Court of Justice.
[20] Art. 671 of Law no. 95/2006
[21] Vasile Nemes, *Medical malpractice insurance* in Romanian Journal of Business Law no. 2/2009, p.9.
[22] Vasile Nemes, *Medical malpractice insurance* in Romanian Journal of Business Law no. 2/2009, p.9.

Relevant to medical liability insurance is the quality of the persons to whom the indemnities will be secured.

Thus, the insurer pays the indemnities directly to the injured party, insofar as he was not compensated by the insured. If the insured proves that he has compensated the injured party, the indemnity shall be paid to the insured. In case of death, the indemnities are granted to the successors of the patient who have requested them. As far as the patient's rights successors are concerned, they have to do so in this regard. Moreover, the insurer will not pay compensation ex officio, but only at the express request of the patient's successors.

The settlement and award of damages usually takes place amicably, when the insured's liability is clearly established.

The certainty of the insured's liability may result from a court decision or may be set by the Monitoring and Professional Competence Commission for malpractice cases.

4. Conclusions

The responsibility of the holders of liberal professions is an instrument at the fingertips of rights holders, against those who violate professional obligations and deontological principles. Thus, mistakes committed during the exercise of the profession attract the civil assassination of the culprit. The need to engage medical and medical staff in general is warranted by guaranteeing the right to health. Certainly, the civil liability of medical staff does not remove criminal responsibility, and they can coexist.

As a form of civil tort liability, the responsibility of the medical staff to be drawn must meet the legal requirements in the matter, so there must be an illicit deed, an injury, a causal link and guilt.

Having the legal obligation to close malpractice insurance for professional civil liability for injuries caused by the medical act, malpractice insurance plays an important role in the work of the professionals, the lack of which can distort the activity of the professional who, for fear of being sued for the potential harm that would cause its patients, would be extremely reluctant to take any risk.

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CONSTITUTION AND CONSTITUTIONALISM CONTEMPORARY ISSUE

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Abstract

In a democratic society, the judicial legitimacy of the state and its power, of its institutions, but also the social and political grounds are generated and determined by the Constitution, defined as expressively as possible as being: "The fundamental political and judicial settlement of a people" (I. Deleanu).
The supremacy of the Constitution has as main effect the conformity of the entire system of law with the constitutional norms. Guaranteeing the compliance with this principle, essential for the state of law, is first of all an attribution of the Constitutional Court, but also an obligation of the legislative power to receive, through the adopted normative acts, in content and in form, the constitutional norms. Altering the fundamental law of a state represents a political and judicial act extremely complex with major meanings and implications for the socio-political and national systems, but also for each individual. This is why such measure should be very well justified, to answer certain socio-political and legal needs well shaped and mainly to match the principles and rules specific to a democratic constitutional and state system, by insuring its stability and functionality.
These are a few aspects of the Romanian contemporary constitutionalism that this study shall critically analyse in order to differentiate between the constitutional ideal and reality.

Keywords: *Constitution, constitutional supremacy, constitutional ideal and reality, fundamental rights, discretionary power of the state, constitutional reform.*

Introduction

For any people, for any form of modern social state organization, the Constitution was and is an ideal given by the meanings and role of the fundamental law especially for each one's social existence.

In modern history, starting with the 18th century, the constitution has been imposed along with other major institutions created with the purpose of expressing the political, economic or legal structural transformations as the fundamental law of a state. Towards the importance and meanings of the Constitution, of the practices in this area, it is considered as the fundamental political and judicial settlement of a state. This is why the Constitution was and is created in a broader vision, exceeding the politics, not only as a fundamental law, but also as a political and state reality identifiable with the society it creates or shapes and for whom its adoption has the meaning of a true revolution.

The constitution states the fundamental principles of the economic, political, social and legal life, in accordance with the fundamental values promoted and protected by the state. The people, according to Hegel, must have, for his constitution, the feeling of his law and state of fact, thus it may exist, in an exterior form, but without

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meaning and value. How current are the words of the great philosopher saying that "The constitution of any given nation depends in general on the character and development of its self-consciousness"?

The value, content and meanings of the constitution as an ideal of a democratic society were clearly stated by the constitutional acts and constitutions opening the way for the constitutional process. Thus, the French Declaration of the Rights of Man and of the Citizen of 1789 stated that "Any society, in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution". The United States Constitution, the first written constitution in the world, in 1787, stated in its preamble that "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America". As stated by the American legalists the spirit of constitutionalism has found its climax in the American Constitution. Therefore, right from its apparition, the constitution has been considered and analysed in opposition to absolutism, as a limitation in the arbitrary performance of power. Once this purpose has been fulfilled, the constitutionalism continued to play an important and, most of all, progressive role in history, aiming the efficient guarantee of the fundamental rights and freedoms for citizen.

Paper Content

The ideal of constitutionalism is best expressed by the notion of the state of law. Moving from the state's law to the state of law was and still remains a long and difficult process enlisted between the poles of contradictory values. Conceptually, on the foundation of the construction of the state of law is the idea of rationalizing the system of law and of emphasizing its efficacy. The essential requirement of the constitutional ideal of the state of law is represented by the subordination of the state towards the law and the limitation of the state's power using the law. The supremacy of the law and, implicitly, of the constitution, forces the state authorities to comply with the fundamental rights and freedoms of the citizens, to withheld from any arbitrary interference in their performance, moreover to adopt politically and legally appropriate and necessary means for the preservation and affirmation of the fundamental rights.

Indeed, the constitutions, in a state of law which assumes the compliance of legality and the rule of law, the protection of the individual and of the citizen in his relations with the power, the performance of the entire state activity based on and within the strict limits of the law, are or might be an obstacle in the way of the arbitrary, if they express the general will and their respect becomes a "religion" for the governors.

The ideal of the constitution, as well as of the constitutionalism, is also expressed by the concept of the supremacy of the constitution. We may say that the supremacy of the constitution is one of its qualities placing it on top of the politico-legal institutions of a state and makes the constitution the source of all regulations in the political, economic, social and legal areas. The most important consequences of the supremacy of the constitution are the conformity of the entire legal system with the constitutional norms and the fundamental obligation of the state authorities to perform their attributions within the limit and in the spirit of the constitution.

Of course, the constitution's supremacy would represent only an ideal if

there were not any specific guarantees which mainly allow the control of power and the avoidance of its evolution towards the arbitrary. Among these guarantees, only two of them are more important: the control of the constitutionality of the laws which represent an important counterweight to the parliamentary and governmental powers, while the second one refers to the establishment of the principle to free access to justice. In a constitutional system based on the constitution's supremacy, the control performed by the courts represent an important guarantee of the compliance with the citizens' rights and freedoms, especially in their relations with the executive authorities.

The essence and finality of the constitution, as well as of the constitutionalism as a historic process consists in the achievement of a balance between different realities and forces, but which must coexist and harmonize to insure the social stability, the individual freedom, but also the legitimacy and functionality of the state's authorities. In other words, the purpose of a democratic constitution consists in the achievement of a fair and rational balance between different realities, between individual and public interest. In the meaning of the above mentioned, Prof Ioan Muraru stated that "In socio-legal and contemporary state realities, the constitutionalism must be seen as a complex politico-legal status, expressing at least two aspects: a) on the one hand, the constitution must reflect the demands of the movement of ideas (originating in its evolution) on the state of law and the democracy, public freedoms, organization, functioning and balance of powers; b) on the other hand, the large reflection of the subjects of law regarding the constitutional provisions. This mutual reflection is the only one able to insure the efficiency and viability of the constitution; it may insure the concordance between the constitutional rules and the political practice".

We have discussed about what could be considered as the ideal of the constitution and the constitutionalism. The reality of a constitution mainly represents the interpretation and application of the fundamental law, but especially the compliance with its provisions by the public authorities. There cannot be an ideal, perfect and immutable constitution. The constitution, as fundamental law, in order to be efficient, must be adjusted to the social, economic and political realities of the state. The dynamic of these factors shall eventually determine alterations of the constitutional norms. The achievement of an adequate relation between the constitution and the political, ideological, economic and state's realities is a complex matter, which must not be formally understood. We emphasize the fact that strictly juridical, the constitution may define both a liberal regime, as well as dictatorial one. If in any type of state, either democratic, or totalitarian there is a constitution, one cannot state that there is a real constitutional regime everywhere. The features of the constitutional regime existing at some point in history in a state, but also the way in which is perceived and complied with, the constitution determines the reality of the fundamental law and of the constitutionalism.

The differences which may arise between the constitutional ideal above expressed, and on the other hand, the reality of the constitutionalism existing in every state is justified by objective and subjective factors. Among the objectives factors, we identify:

a) the dynamic of the social life in relation to the stability of the constitution. The inevitable transformations in the social, economic, political or legal life of a

state led to a distance between these realities and the viability and efficiency of the constitutional norms. This situation is one of the factors determining the revision of the fundamental law;

b) the constitution has all the features of a normative act, therefore the application of the fundamental law requires an interpretation of the public authorities, which may imply a different reception of the constitution;

c) there may be cases in which the constitutional regulations, though democratic in their essence are in contrast with the socio-economic realities of the moment, inferior towards the democratic constitutional principles. Such situation inevitably leads to a reduced reception of the constitutional norms among the population and to its inefficiency. The history of the Romanian constitutionalism offers a conclusive example in this meaning, if we consider the period between 1866-1938, in which the reality of the Romanian constitutionalism was inferior to the values and principles stated by the Constitutions of 1866 and 1923.

There are also subjective factors we might determine a difference between the constitutional values, and on the other hand the way in which are respected and applied. The tendency of the central authorities to abuse the power, attempting to authoritatively exercise powers, sometimes in disregard with the constitutionals norms, represents an important subjective factor denaturising the norms and spirit of the constitution, with the consequence of building a political, economic and social reality obviously contrasting with the fundamental law.

We shall exemplify the above mentioned with brief mentions to the Romanian Constitutions of 1866, 1923 and 1991.

The Constitution of 1866 was mainly a liberal constitution which stated in the area of the legal and political practice the Romanian liberalism, emphasizing the "historical role and purpose" of the Romanian bourgeoisie in the creation of a form of government and of democratic institutions based on the creative valorisation of our traditions in this area. The functionality of the Constitution raised a controverted issue regarding the incapacity of the monarchy and of the central authorities of that time to adjust to the social realities of the country. From a socio-economic perspective, the Romanian society was polarized, the middle class being extremely thin as average (formed only by clerks and liberal professionals). In exchange, the majority of the peasantry recently released from servitude, mostly analphabetic, was in contrast with the reduced average of large landowners, many of them having received a good education in western schools. Under these conditions, the Romanian monarchy system and the Romanian state system were compelled to adjust the political parliamentary regime to the existent social and political structure, and from here on sprang most of the limits of the Romanian constitutionalism, because the general interests of society interfered and were contradictory with the interests of the landowners, amid a weak economic power of the bourgeoisie crumbled into several factions and political groups. To all these, were added the personal ambitions of the politicians who, often, have seriously complicated the nature of the political area, hardening the acceleration of reforms and the amplitude of the modernization.

Analysed from a historical-political perspective, the Constitution of 1923, as an expression of the real balance of forces during 1919-1923 has represented the main legal settlement on whose base functioned the fundamental institutions of the united Romania, offering the Romanian state the monarchism, but based on the democratic parliamentary regime. The Constitution of 1923 maintains most of the structure of the Constitution of 1866, taking and deepening a series of principles offering the feature of modernity, as well as the real possibility for democratizing the interwar Romanian state and society. In this meaning, under the empire of this Constitution, the principles of representativeness, the separation of powers, the principle of legality and legitimacy of the laws, of the control of constitutionality, as well as the principles regarding the elective system and of the regime of property were much stronger than the one mentioned by the settlement in 1866. So, the Constitution of 1923 has represented a progress in the democratization of the Romanian society.

The application of the Constitution of 1923 has beard the mark of two trends: on the one hand, a series of subsequent legislations have tried to develop the democratic content of some provisions, and on the other hand, certain laws have narrowed the rights and fundamental freedoms. The position of the monarchy in the political practice has led to the reality that the appointment of the Government by the king, followed by the dissolution of the legislative bodies and the organization of new elections was, first of all, the expression of certain deals between the monarch and the representatives of the main parties, consultations which in most cases were the result of subjectivism and personal ambitions represented by the governmental changes. During the interwar period, 11 legislative bodies succeeded, representing their development within half the legal time stated by the Constitution.

Undoubtedly, the Romanian Constitution in force, adopted on 1991 has represented the rebirth of the Romanian constitutional life. The fundamental law of the state represents the fundamental legislative framework for the organization and functioning of the Romanian state and society on democratic bases. Nevertheless, the reality of the contemporary Romanian constitutionalism proves, in most cases, an abandonment of the values and spirit of the Constitution from certain central authorities, through their obvious intent to evolve towards the discretionary performance of the attributions given to them by the law and the biased interpretation of certain constitutional norms. We shall present two examples:

- The right to a decent living is stated by Art 47 of the Romanian Constitution, which states that: "The State shall be bound to take measures of economic development and social protection, of a nature to ensure a decent living standard for its citizens". It is a fundamental human right based in the feature as "social state" of the Romanian state, mentioned by Art 1 Para 3 of the Constitution which entails constitutional obligations for the state, namely to adopt political and legislative decisions in the political, economic and social areas, whose finality to be represented not only by the guaranteeing, but also the achievement of this fundamental right. This obligation is more of a constitutional and political ideal, than a legal obligation, because there are no normative criteria based on which it could be evaluated by the constitutional court, if the legislative measures adopted by the state have as result the material, effective, and not theoretical, abstract insurance of decent living for all citizens. The only sanctions if the state does not comply with these positive obligations have a preponderant political

nature, and indirectly a constitutional one, such as the adoption of a motion of no confidence for the Parliament.

– According to Art 80 of the Romanian Constitution, the President has the obligation to guard the observance of the Constitution and the proper functioning of the public authorities. In this purpose, the president is the mediator between the state's powers, but also between state and society. It is a constitutional provision which may remain in the area of the constitutional ideal, or a political principle, because it is not concretized under the aspect of the means and procedures for achievement, nor is accompanied by specific constitutional sanctions. The Romanian political practice of the last decade proved that there is the possibility of a discretionary manifestation of power from the Chief of state based on this constitutional text.

Obviously, the examples could continue. We aim to emphasize that the constitutional norm, even if in most cases it has the value of a principles, it imposes in its logic the compliance with the syllogism hypothesis – disposition – sanction, to not only stay within the area of the constitutional ideal.

The modification of the Constitution could be necessary if the social and political realities impose it. We consider that the state authorities should be more concerned by the appropriate application of the fundamental law and only in subsidiary by its possible modification. Further, we shall analyse certain legal aspects and aspects of other nature entailed by the initiatives to revise the Romanian Constitution.

The decision to initiate the revision of the Constitution of a state is, without any doubt, a political one, but in the same time it must have legal basis and to correspond to a historical need of the social system organized as a state from the perspective of its subsequent evolution. Therefore, the revision of the constitution must not be subordinated to political interests at that time, no matter how beautiful they are wrapped, but to the social general interest, well-shaped and possible to be legally expressed.

The late Prof Antonie Iorgovan rightfully stated that "In terms of the revision of the Constitution, we dare to say that where there is a political normal life, one shall express cautious restraints, the imperfections of the texts in their confrontation with life, with subsequent realities are corrected by the interpretations of the Constitutional Courts, namely by the parliamentary customs or traditions, reason for which the western literature does not longer talks about the Constitution, but about the constitutional block"[1].

The revision of the Constitution cannot have as result the satisfaction of the political interests of the temporary holders of power. In the direction of strengthening the discretionary power of the state, with the inadmissible consequence of damaging certain democratic values and principles, unlike the political and institutional pluralism, the principle of the separation of powers or the principle of the legislative supremacy of the Parliament. Also, the limitations of the Romanian constitutional revision are stated by Art 152 of the Constitution, though the political interpretation of these constitutional provisions may denaturise their meaning and finality.

The two and a half decades of democratic constitutional life in Romania proved that the political power, by its decisions, numerous times it has denaturised the constitutional principles and rules using interpretations contrary to the democratic

[1] Iorgovan, A. (2001). Revizuirea Constituţiei şi bicameralismul. Revista de drept public (1), p. 23.

spirit of the fundamental law, for political purposes and the support of conjectural interests. The consequences were and still are obvious: the limitation or violation of certain rights and fundamental freedoms, the generation of social tensions, non-compliance with the constitutional role of the state's institutions, in other words political actions, some dressed with a legal aspect, contrary to the constitutionalism which must characterize the Romanian state of law.

Under these conditions, a possible step in revising the fundamental law should be focused on the need to strengthen and enhancement of the constitutional guarantees for complying with the requirements and values of the state of law, to avoid excessive power specific to the politics exclusively subordinated to group interests, mostly conjectural and contrary to the Romanian people's interests, which according to Art 2 Para 1 of the Constitution has the national sovereignty.

In our view, the concern among politicians and state authorities in the current period compared to the current content of the fundamental law should be guided not so much towards the change of the Constitution, but especially towards the correct interpretation and application of it and respect of the democratic purpose of the constitutional institutions. To strengthen the rule of law in Romania, it is necessary that political parties, especially those in power, all state authorities to act or perform their duties within a loyal constitutional behaviour involving respect for the democratic meanings and significance of the Constitution.

Some proposals to revise the Romania fundamental law aim to modification of the constitutional system of bicameralism to unicameralism and strengthen the executive power, especially the presidential institution.

We consider that the Romanian bicameralism is appropriate for the state and social system of this historic moment, better reflecting the need to achieve not only the efficiency of the legislative parliamentary procedures, but especially "norming" and the quality of the legislation. Bicameralism is a necessity for Romania, for the Parliament to represent a viable counterweight to the executive, in the context of the exigencies and balance of the powers in a democratic state. Rightfully, late Prof Antonoe Iorgovan pointed out: "It should represent a high political risk, in that post-revolutionary tension, that in Romania be projected a unicameral Parliament, such risk still being present at this hour, under the conditions in which we can no longer talk about a political life established on the normal aisles of the democratic doctrines accepted by the West (social-democratic doctrine, Christian-democratic doctrine, liberal doctrines and ecologist doctrines)[2].

Unicameralism in a semi-presidential constitutional system, such as the Romanian one, in which the powers of the head of state and generally of the executive are significant, also considering the current excessive politicking, would have as consequence the serious deterioration of the institutional balance between the legislative and executive, resulting in the increase of the discretionary power of the executive and the minimization of the Parliament's role as a supreme representative organ and of the Romanian people, as single legislative authority of the state, as stated by Art 61 Para 1 of the Constitution. The evolution to a unicameral Parliament must not be considered as a simple act as unfortunately it results from the project law on the revision of the Constitution drafted by the

[2] Iorgovan, A. (2001). Revizuirea Constituţiei şi bicameralismul. Revista de drept public (1), pp. 18-19.

Government, but it requires a general modification of the Romanian constitutional system, a reconfiguration of the role and attributions of the state authorities, in order to preserve the balance between legislative and executive and to not create the possibility of an evolution towards an overrated preponderance of the institution of the head of state in relation to the Parliament. We emphasize the fact that all European states with a unitary structure which have a unicameral Parliament also have a constitutional parliamentary system in which the head of state has limited attributions regarding the governing.

We do not aim to perform a thorough analysis of this issue, underlining only the conclusion that the Romanian unicameralism could be justified both politically and constitutionally, and appropriate to the democratic values in a state of law only if the legitimacy and role of the Romanian Presidency, as constitutional institution, is fundamentally altered. The election of the President should be performed by the Parliament. Also, in the case of a unicameral parliamentary structure, it is necessary to significantly reduce the attributions of the President in relation to the executive. Such reconfiguration of the state institutions should increase the role and attributions of the Constitutional Court and of the justice, representing guarantees of the supremacy of the law and of the Constitution also avoiding the abuse of power of the other state institutions. In Romania, the unicameralism could only be associated with the existence of a constitutional system. The unicameralism has the nature to generate a disproportion between the Parliament and the executive, by that that a single chamber of the Parliament, in Romania, does not represent a satisfactory guarantee to represent an efficient counterweight for the executive, especially that the constitutional attributions of the President as participant in the governing are obviously significant. The dispute between bicameralism and unicameralism with application to the case of Romania is very well presented by the late Prof Antonie Iorgovan: "…any bicameral or unicameral parliamentary system could generate serious dysfunctionalities, as expressed by Prof Tudor Drăganu, no matter how good the constitutional solution might be, if the parliamentary practice shows politicking, demagogy and irresponsibility"[3].

Does the current Romanian parliamentary system correspond to the exigencies of the democratic requirements of the bicameralism and is it fit for the performance of the role and functions of the Parliament? The late Prof Tudor Drăganu, in a large study of flawless argumentative logic answered this question: "The revised Constitution establishes a system claiming to be bicameral, but currently functioning as a unicameral one, convicted to break, by some of its aspects, certain elementary principles of the parliamentary regime and which embraces the danger of future serious dysfunctionalities in the performance of the legislative activity"[4]. The illustrious professor considered that the law amending the Constitution contains no explicit reference to the number of deputies and senators; it questions the substantial legitimacy of the two chambers because their members are appointed by the same body and by the same type of electoral system and electoral scrutiny; the chambers' legislative powers are not sufficiently differentiated; exercising the right for a legislative initiative by senators and

[3] Iorgovan, A. (2001). Revizuirea Constituţiei şi bicameralismul. Revista de drept public (1), p. 16.

[4] Drăganu, T. (2003). Câteva consideraţii critice asupra sistemului bicameral instituit de legea de revizuire a Constituţiei adoptată de camera Deputaţilor şi în Senat. Revista de drept public (4), p. 55-66.

deputies, as it is stated, generates constitutional contradictions.

We support that the prospect of a constitutional revision to regulate the differentiation between the two chambers using particular types of representation. The comparative law provides sufficient examples of this kind (Spain, Italy and France) and even the Romanian Electoral Law of 27 March 1926 provides a benchmark in this regard. The Senate may represent the interests of the local communities. Thus, Senators could be elected by an electoral college consisting of the elected members of local councils. Interesting to note is that in the draft of the Constitution in 1991, the Senate was designed as a representative of the local communities, grouped in counties and in Bucharest.

The criticism of Prof Tudor Drăganu is fair, according to which the current constitutional regulation does not provide a functional difference between the two chambers. This aspect was also noticed by the Constitutional Court, which referring to the parliamentary legislative procedure inserted by the project for revising the Constitution underlined that: "The cascade examination of the draft laws, in a chamber of first lecture, and in the one the second lecture, transforms the bicameral Parliament into an unicameral one"[5]. Therefore, a new initiative for the modification of the fundamental law should also consider this aspect and to perform a real and functional differentiation between the two Chambers.

The final part of this study shall refer to certain aspects that we consider necessary to be stated by a future procedure for revising the Constitution.

As above mentioned, unlike the excessive politicking and discretionary use of power from the executive contrary to the spirit and letter of the Constitution, with the consequence of violating certain rights and fundamental freedoms, manifested during the past two decades of democracy in Romania, we consider that the scientific approach and not only in the area of the revision of the fundamental law should be oriented towards solutions guaranteeing the values of the state of law, limiting the violations of the constitutional provisions for the purpose of particular interests and to avoid the excessive power of the state authorities.

1. Art 114 Para 1 of the current regulation states that: "The Government may assume responsibility before the Chamber of Deputies and the Senate, in joint sitting, upon a programme, a general policy statement, or a bill".

The responsibility of the Government has a political feature and is a procedural means by which it is avoided the phenomenon of the "dissociation of majorities"[6] for the case in which the in Parliament the majority necessary for the adoption of a measure proposed by the Government was not gathered. In order to determine the legislative forum to adopt its measure, the Government, using the procedure of assuming the responsibility conditions the performance of its activity by requesting a vote of trust. This constitutional procedure guarantees that the majority required for the dissolution of the Government, in the case of a censure motion to coincide with that for rejecting the law, the programme or the political statement to which the Government connects its existence.

Adjusting the laws as effect of invoking the political responsibility of the Government has as important consequence the absence of any parliamentary debates or deliberations on the draft law. If the

[5] Decision No 148 of 16 April 2003, published in the Official Gazette No 317/12 May 2003.
[6] Iancu, Gh. (2010). Drept constituţional şi instituţii publice. Bucharest: All Beck, p.482.

Government is supported by a comfortable majority of the Parliament, this procedure could result in the adoption of the laws by "bypassing the Parliament", which could have negative consequences on the compliance with the principle of the separation of powers, but also regarding the role of the Parliament, as it is defined by Art 61 of the Constitution. As consequence, using such constitutional procedure by the Government for the adoption of a law must have an exceptional feature, justified by a political situation and a social imperative very well shaped.

This aspect of extreme importance for the compliance with the democratic principles of the state of law by the Government was well emphasized by the Romanian Constitutional Court: "This simplified means of legislation must be used in extremis, when the adoption of the draft law using the common or the emergency procedure is no longer available or when the political structure of the Parliament does not allow the adoption of the draft law using one of the above mentioned procedures"[7]. The political practice of the Government for the past years has been contrary to these rules and principles. The Executive frequently assumed its responsibility not only for a single law, but also for packages of laws, without any justification in the meanings stated by the Constitutional Court.

The Government's politicking clearly expressed by the frequency of using this constitutional procedure seriously harms the principle of the political plurality, which is an important value of the system of law stated by Art 1 Para 3 of the Constitution, but also of the principle of the parliamentary right stating that "the opposition shall express and the majority shall decide" [8]. "Denying the right of the opposition to express itself is synonym with denying the political plurality, which according to Art 1 Para 3 of the Constitution represents a supreme and guaranteed value". The principle "the majority shall decide, the opposition shall express itself" refers to that throughout the organization and functioning of the parliamentary Chambers be assured that the majority is not obstructed especially in the performance of the parliamentary procedure, and on the other hand that the majority rule only after the opposition has spoken"[8]. The censorship of the Constitutional Court proved to be insufficient and inefficient in order to determine the Government to comply with these values of the state of law.

Conclusions

In the context of these arguments, we propose that in the perspective of a constitutional revision to limit the right of the Government to entail its responsibility for a single draft law in a parliamentary session.

1. All post-December Governments have massively used the practice of the emergency ordinances, practice blamed by the literature.

The conditions and interdictions stated by the Law No 429/2003 for the revision of the Constitution of Romania regarding the constitutional regime of the emergency ordinances, proved to be insufficient in order to limit this practice of the Executive, also the control of the Constitutional Court proved insufficient and even inefficient. The consequence of such practice is the violation of the role of the Parliament as single "legislative authority of the state" (Art 61 of the Constitution) and the creation of an imbalance between executive and legislative by accentuating the discretionary power of

[7] Decision No 1557 of 18 November 2009, published in the Official Gazette No 40/19 January 2010.
[8] Muraru I., Constantinescu M. (2005). Drept parlamentar românesc. Bucharest: All Beck, pp.55-69.

the Government, which in most cases turned into excessive power.

We propose that in the perspective of a future revision of the fundamental law, Art 115 Para 6 be modified in the meaning of prohibiting the adoption of emergency ordinances in the area of the organic laws. In this meaning it is protected an important area of social relations considered by the constitutional legislator as essential for the social and state system, from the excess of power of the executive by issuing emergency ordinances.

2. In the current conditions characterized by the executive's trend to profit from the obvious politicking and to unduly and dangerously force the limits of the Constitution and of the democratic constitutionalism it is necessary to create mechanisms for the control of the executive's activity in order to really guarantee the supremacy of the Constitution and the principles of the state of law.

According to our opinion, it is necessary that the role of the Constitutional Court as guarantor of the fundamental law be amplified by new attributions with the purpose of limiting the excess of power of the state's authorities. We do not agree with the statements made by the literature that a possible amelioration of the constitutional justice could be achieved by reducing the attributions of the court of administrative contentious[9]. It is true that the Constitutional Court has ruled certain questionable decisions under the aspect of compliance with the limitations of its attributions according to the Constitution, by assuming the role as positive legislator[10]. The reduction of the attributions of the constitutional court for this reason is not a legally fundamental decision. Of course, the reduction of the attributions of a state authority has as consequence the elimination of the risk for deficient performance. This is not the way to achieve the perfection of the activity of a state authority in a state of law, but by the continuous search for legal solutions for better conditions for the performance of such attributions, which proved to be necessary for the state and social system.

The attributions of the Constitutional Court might as well include the one about ruling upon the constitutionality of the administrative acts exempted from the control for legality of the courts of administrative contentious. This category of administrative acts, to which Art 126 Para 6 of the Constitution and the Law No 544/2004 on the administrative contentious refer to, are extremely important for the entire social and state system. Therefore, it is necessary a control for constitutionality, because in its absence the discretionary power of the issuant administrative authority is unlimited with the consequence of a possible excessive limitation of the rights and fundamental freedoms or of the violation of certain important constitutional values. For the same arguments, our Constitutional Court should be able to control under the aspect of constitutionality the presidential decrees establishing the referendum.

The High Court of Cassation and Justice has the competence to adopt decisions using the procedure of the appeal in the interests of the law, which are mandatory for the courts. In the absence of any form of control for legality or constitutionality, the practice proved in numerous situations that the Supreme Court

[9] Decision No 356/2007, published in the Official Gazette No 322/14 May 2007; Decision No 98/2008, published in the Official Gazette No 140/22 February 2008.

[10] Vrabie, G. (2010). Natura juridică a curţilor constituţionale şi locul lor în sistemul autorităţilor publice. Revista de Drept Public (1), p. 33.

overcame its attribution to interpret the law, and by such decisions it modified or completed normative acts, acting as a real legislator, thus violating the principle of the separation of powers[11]. With the purpose of avoiding the excessive power of the Constitutional Court, we consider necessary the establishment for the Constitutional Court of the competence to rule upon the constitutionality of the decisions of the High Court of Cassation and Justice, adopted using the procedure of the appeal in the interests of the law.

3. The proportionality is a fundamental principle of the law expressly stated by constitutional and legislative regulations and international legal instruments. It is based on the values of the rational law of justice and equity and expresses the existence of a balanced or appropriate relation between actions, phenomena or situations, also being a criterion for limiting the measures ordered by the state authorities to what is necessary for the achievement of a legitimate purpose, thus guaranteeing the fundamental rights and avoiding the excessive powers of the state authorities. The proportionality is a basic principle of the European Union, being expressly stated by Art 5 of the Treaty on the European Union[12].

We consider that the express statement of this principle only by Art 53 of the Constitution, with application in the area of limiting the exercise of certain rights is insufficient for the valorisation of the entire meaning and importance of the principle for the rule of law.

It is useful the addition to Art 1 of the Constitution of a new paragraph stating that "The performance of the state power must be proportionate and indiscriminate". This new constitutional statement could represent a true constitutional obligation for all state authorities to perform their attributions so that the measures adopted to be within the limits of the discretionary power recognized by the law. Also, it is created the possibility for the Constitutional Court to sanction using the control for constitutionality of the laws and ordinances the excess of power in the Parliament's and Government's activities, using as criterion the principle of proportionality.

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THE ECJ CASE-LAW ON THE ANNULMENT ACTION: GROUNDS, EFFECTS AND ILLEGALITY PLEA

Augustin FUEREA*

Abstract

For practitioners in the field, but also for academicians it is equally important to know that there exists, under certain circumstances, the possibility of bringing an action for annulment, having as object the legally binding EU acts. All questions concerning the action for annulment have their significance in the theory and practice of the field, but a consistent case-law is offered by the grounds for annulment, the plea of illegality and correlatively by the effects of the decision ruled within the action in for annulment, and these are some issues to which we shall refer further.

Keywords: *the ECJ case-law, annulment for action, grounds, effects, the plea of illegality.*

1. General aspects

The European Union's status of special subject of international law is given, in particular, by the atypical non-classic institutional system, special and different from the extremely known classic structure of Montesquieu type and its own legal order, by the legal system belonging to it, through its features that send to immediate, direct and imperative implementation of the rules of EU law. In the third place, especially in the latter stage of European construction, we notice a peculiar system of European diplomacy[1]. All the three issues above mentioned, taken as a whole, give a special character (status) to the European Union, as subject of international law. This special status is given equally by similarities of the European Union both to states and international organizations, and also by the differences between the European Union and states, respectively international organizations, in terms of their status as subjects of international law.

It is relevant for our analysis, the normative component which, at a closer look, has the same atypical and non-classic character, likely to confer, together with the other two, a special status to the European Union. Notable are the European Union's (ordinary and special) procedures for adopting rules of law, in terms of drafting (the initiative) and their adoption (institutions directly involved send, as bicameral rule, to the decision-making triangle - Commission, Council, Parliament) - and as an exception, we note the special procedures under which the executive, as an institution that owns the lead in the ordinary legislative procedure, is alternatively replaced either by the Council or the Parliament, in the special legislative procedure.

By symmetrically researching issues related to the adoption of rules of EU law, the annulment of the same rules is highlighting distinct features aimed at: acts

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[1] Ion M. Anghel, *Diplomaţia Uniunii Europene (şi regulile acesteia)*, Universul Juridic Publishing House, Bucharest, 2015, p. 310.

that may be subject to an action for annulment; subjects of law that may bring an action for annulment (who may have active trial legitimisation); subjects of law against which an action for annulment (who may have passive trial legitimisation) may be brought; the time limit in which an action for annulment may be brought and the grounds (causes) for which an action for annulment may be brought. All these aspects are correlative with the effects of the decision ruled in the action for annulment to which other issues can be added.

For practitioners in the field, but also for academicians, it is equally important to know that there exists, under certain circumstances, such a possibility regulated in EU law, similar to the one existing in national law, with the cumulative fulfilment of certain conditions[2].

All questions listed above concerning the action for annulment have their significance in the theory and practice of the field, but a consistent case-law[3] is offered by the annulment grounds, the plea of illegality and correlatively by the effects of the decision ruled in the action for annulment, issues to which we shall refer further.

2. Grounds (causes) for annulment

The main and fundamental premises of the matter are provided by art. 263 TFEU, which in par. (1) states that the Court in Luxembourg (the Court of Justice of the European Union) „reviews the legality of legislative acts, of acts of the Council, the Commission and the European Central Bank, other than recommendations and opinions (only the legally binding acts, according to art. 288 TFEU) and of regulations of the European Parliament and the European Council intended to produce legal effects towards third parties. „According to the same paragraph, CJEU controls the „legality of acts of the bodies, offices or agencies, as entities operating in the EU, under the condition above formulated, namely that the acts in question" take legal effects (give rise to rights and obligations) to third parties".

Enlightening for our approach is the second paragraph of art. 263 TFEU according to which „the Court has jurisdiction to rule on actions brought (...), for reasons of lack of competence, infringement of essential procedural requirements, infringement of the Treaties or of any rule of law relating to its application, or abuse of power".

Summarized, we note that, according to the matter premises cited above, there are four grounds that can determine the action for annulment of a legal act of the European Union, namely: the absence/ lack of competence („non-competence"); the infringement of essential procedural requirements; the infringement of the Treaties or of any rule of law relating to its application and the abuse of power.

Even if we were inclined to operate with some similarities existing also in national law (with the unconstitutional actions, i.e. contentious matters in the competence of the administrative courts), we shall not do this, however we cannot stop the reader to have such thoughts. The compared look represents to us the subject of a future approach.

[2] Elena Emilia Stefan, *Drept administrativ. Partea a II-a*,, University Course, second edition, revised and updated, Universul Juridic Publishing House, Bucharest, 2016, pp. 68-111.

[3] On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp. 182- 188; Laura-Cristiana Spătaru-Negura, *Dreptul Uniunii Europene – o nouă tipologie juridic,* Hamangiu Publishing House, Bucharest, 2016, pp. 156-165.

Having a rich case-law on the matter, we reserve the possibility to rely, for each situation, only on those decisions that we consider relevant, noting that the historical case-law[4] of the Court of Justice of the European Union is extremely generous.

The lack of jurisdiction. One of the reasons very well known in the field, which has been dating from 1994, but it is important also nowadays, refers to the quite controversial field of competition, which knows new approaches, especially after the presidential elections from 2016 which were held in the US and after the European Brexit. Specifically, in the case of *France v./ Commission*[5], the Luxembourg Court ruled the annulment of an act of the EU executive (European Commission), act through which the foundations were laid for an agreement with the US to enforce competition law. The reason given by the court referred to the absence of the EU executive's jurisdiction to conclude such an agreement. On substance, the agreement had the purpose of „promoting cooperation, coordination and reducing the risk of disputes between the parties in the application of laws concerning the competition or of reducing their effects"[6].

The EU executive found that the legal nature of the agreement was different, meaning that" in reality, an administrative arrangement for the conclusion of which it is[7] „competent and „the failure to comply with the agreement would not determine the liability of the Community, but simply the termination of the agreement"[8]. The Court in Luxembourg, on the contrary, said that „the agreement is binding on the Community and it creates obligations, this is why it cannot be qualified as administrative agreement"[9], which is why it decided to cancel it. The cause of cancellation of the agreement was based on the fact that the EU executive had no power to its conclusion, established expressly by the Treaties.

From the doctrine in the field[10], it results that the lack of jurisdiction may arise in the case of delegation of powers from the Council to the Commission or to the Member States, but this issue arises also in the case of making decisions in the Commission, through the empowerment procedure.

The infringement of essential procedural requirements. By adopting the same logic of presentation, we find that the premises of the matter are art. 296 and 297 TFEU.

According to art. 296 par. (1) TFEU, „in the case where the Treaties do not specify the type of act to be adopted, the institutions shall select it from case to case with the compliance of the applicable procedures and the principle of proportionality". This is the general framework, as the second paragraph of art. 296 TFEU customizes, by sending to an essential procedural requirement, namely: „legal acts shall be justified and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the

[4] The historical jurisprudence is made available to all, including in Romanian as official language of the European Union (according to the translation of the European Institute of Romania, for the jurisprudence until 2007, the year of Romania's EU accession and to the translations made at EU level, after 2007).

[5] Decision *French Republic v./ European Communities Commission*, C-327/91 ECLI:EU:C:1994:305.

[6] Ibid, pt. 5.

[7] Ibid, pt. 21.

[8] Idem.

[9] According to Roxana-Mariana Popescu, Competențele Curții de Justiție a Uniunii Europene în materia controlului realizat cu privire la acordurile internaționale la care Uniunea Europeană este parte, Post-doctoral Thesis, „Acad. Andrei Rădulescu" Legal Research Institute of Romanian Academy, Bucharest, 2015, p. 54.

[10] Gyula Fábián, *Drept instituțional al Uniunii Europene*, Hamangiu Publishing House, Bucharest, 2012, p. 376.

Treaties". In this regard, the Court, in Case *Sytraval*[11], considered that „the Court of First Instance failed to draw the necessary distinction between the requirement to state reasons and the substantive legality of the decision. On the basis of an alleged insufficiency of reasoning, it criticised the Commission for a manifest error of assessment attributable to the inadequacy of the investigation carried out by that institution".

The doctrine of the field[12] is considerable, highlighting the following situations in which this plea may be invoked: 'non-compliance of rules with regard to drafting and adopting EU legal acts (e.g. how to vote in the institutions, the obligation to consult other institutions, bodies, agencies of the Union or Member States where the Treaties provide this); disregarding the rules concerning the compliance with the right of defence (it involves those rules ensuring the consultation with those concerned (...) before adopting a decision likely to seriously impair their interests); a failure of the obligation concerning the grounding of EU legal acts".

Article 297 section (1) para. 3[13] puts spotlight on the publicity issue, respectively on the notification of the Union's legal acts, which does not mean it is a breach of an essential procedural requirement, however, the consequences of the absence of publicity or notification in the field of bringing the action to court, lead to the ignorance of the date from which the deadline begins to run.

The infringement of the Treaties or of any rule of law relating to their application. There are two causes relevant for this ground of lack of competence, namely the case *Portugal v./ Council*[14] and *Germany v./ Council*[15].

The first cause for dismissal of an action, *Portugal v./ Council* aims at an important matter for that period, the '90s (more precisely 1996), but also for now, concerning the market access for textile products. The legal document that made the object of the invalidation claim, by Portugal to the Court, was Decision 96/386/EC of the Council, of 26 February 1996 on the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products. The grounds that Portugal invoked, were related „on the one hand, to the infringement of certain fundamental WTO rules and principles and, on the other hand, to the infringement of certain fundamental rules and principles of the Community legal order"[16].

Contrary to previous decisions, in that particular case, the Court in Luxembourg said that „the claim of the Portuguese Republic according to which the contested decision was ruled by breaching certain rules and fundamental principles of the Community legal order, was unfounded"[17] and dismissed the action in its entirety[18].

[11] Decision European Commission v./ Chambre syndicale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL, C-367/95, ECLI:EU:C:1998:154, pt. 72.

[12] Sean Van Raepenbusch, Drept instituțional al Uniunii Europene, International Rosetti Publishing House, Bucharest, 2014, p. 506.

[13] „The legislation acts are published in the Official Journal of the European Union".

[14] Decision Portuguese Republic v./ Council of the European Union, C-149/96, ECLI:EU:C:1999:574.

[15] Decision the Federal Republic of Germany v./ Council of the European Union, C-122/95, ECLI:EU:C:1998:94.

[16] Decision the Portuguese Republic v./ Council of the European Union, ECLI:EU:C:1999:574, pt. 24 of the decision.

[17] Ibid, pt. 94 of the decision.

[18] For details see Roxana-Mariana Popescu, Competențele Curții de Justiție a Uniunii Europene..., op. cit., p. 55.

In the second case, *Germany v./ Council*, the Court in Luxembourg annulled art. 1 para. (1) first indent of Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community concerning its fields of competence, of the agreements of multilateral negotiations of the Uruguay Round (1986-1994) according to the request of Germany, on the fields of competence of the Council. It's about the conclusion, on behalf of the European Community, of the agreements of multilateral negotiations of the Uruguay Round (1986-1994), the Council approving the conclusion of the Framework Agreement on Bananas with the Republic of Costa Rica, Colombia, Republic of Nicaragua and the Republic of Venezuela. Germany argued that „the regime established by the Framework Agreement affected the fundamental rights of operators in categories A and C, namely the right to free exercise of the profession and property rights and discriminated in relation with the operators of category B"[19].

The specialized literature[20], by resorting to systematizing these violations of Treaties or of any rule of law relating to their application, highlights the following: „the error of law (concerning the applicable rule of law, the misinterpretation of the rule, the absence of any legal basis); the error of fact (on the facts that affect the application of the rule or assessment of the facts); the error of the facts to which the rule of law applies".

The misuse of law. It is not the same as the misuse of dominance, governed by article 102 TFEU, as anti-competitive practice. The consecration of this cancellation ground belongs to the Court's case-law according to which such an abuse acquires real dimension if an institution of the European Union „pursued (...) through the lack of caution which is tantamount to breaking the law, purposes other than those for which it has been assigned powers provided by the Treaty"[21].

3. The effects of the decision ruled in an action for annulment

We are capitalizing, according to the research system followed, the legislation and case-law specific to the matter.

From the point of view of legislation, the primary premises of the matter are provided by art. 264 TFEU, article in which it is stated that „in the case where the action is well founded, the Court of Justice of the EU declares the act null and void". In other words, the legal act in question ceases its legal effects, even after the entry into force. The effects are to the past and also to the future (*ex tunc* and *ex nunc*).

The jurisprudence accompanies the effects of such a judgment, thus resulting that the „Community court decision to cancel the contested act produces the disappearance retroactively of the act, to all litigants. Therefore, the parties should be put in the state before the adoption of the act"[22].

On the same subject is the *P & O European Ferries decision (Vizcaya) SA v./ Commission*, where the Court states that „the annulment lead to the retroactive disappearance of the [act] (...) with respect to all litigants"[23]. Moreover, in this case, the court stated that „such an annulment

[19] Decision the Portuguese Republic v./ Council of the European Union, ECLI:EU:C:1999:574, pt. 48 of the decision.

[20] Sean Van Raepenbusch, op. cit., p. 506.

[21] Decision *Chambre syndicale de la sidérurgie française et autres v./ Haute Autorité de la CECA*, C-3/64, ECLI:EU:C:1965:72, pt. 4 of the Court's reasoning concerning the admission of the claim.

[22] Decision Centre d'exportation du livre français Centre (CELF) and Ministre de la Culture et de la Communication v./ Société internationale de diffusion et d'édition (SIDE), C-199/06, ECLI:EU:C:2008:79, pt. 61.

[23] Decision P & O European Ferries (Vizcaya) SA v./ Commission, C-442/03P, ECLI:EU:C:2006:356, pt. 43.

decision takes *erga omnes* effect, which gives it res judicata authority"[24].

Other issues stemming from the interpretation of art. 264 par. (2) TFEU[25] refer to the fact that an annulment decision may result in the total or partial nullity of a legal act of the Union.

Regarding the temporal effects of such a decision, in order to avoid prejudices that could be caused to individuals, the Court can order, including the remaining in force of the attacked legal act until the entitled institution adopts another act likely to replace the annulled one[26].

As a corollary of these effects, for reasons of pragmatism and timely manner, in full compliance with art. 266 par. (1) TFEU, „the institution, body, office or agency issuer of the void act or of which failure was declared contrary to the Treaties, shall take measures to comply with the decision of the Court of Justice of the European Union".

4. The plea of illegality

The current premises of the matter are provided by art. 277 TFEU.

From conceptual point of view, we see that art. 277 TFEU establishes what the practice called „plea of illegality". Thus, „under the reserve of the deadline stipulated in art. 263, sixth paragraph [TFEU - two months - our note], in the case of a litigation concerning an act of general application adopted by an institution, body, office or agency of the Union, any party is entitled to grounds specified in art. 263, second paragraph, in order to invoke before the Court of Justice of the European Union, the inapplicability of that act". In term of procedure, although the 2 month term expired and the legal act cannot be challenged anymore by an action for annulment, under the circumstance of a litigation which has as object, a regulation, for example, the plea of illegality can be invoked at any moment. In this situation, the Court will not annul the contested act, but it can declare it inapplicable. Consequently, the plea of illegality „is not a self-contained action, but it depends on a main action within which it may be exercised. (...) it is an ancillary action and the dismissal of the main action entails the inadmissibility of the exception"[27].

Article 277 TFEU establishes „the possibility for the Union court, that in the case of a main legal contest over the legality of an enforcement measure of an act with general application, to exercise an incident control over the legality of the mentioned act. For this purpose, any party to the dispute can invoke - either through the appeal against the enforcement measure or as a means of defence - all grounds provided in the action for annulment, even after the deadline for bringing an action against the act with general application"[28]. However, the same article 277 TFEU „reinforces the principle according to which the illegality of

[24] Idem.

[25] Art. 264 par. (2) TFEU: „However, the Court shall indicate, if it considers it necessary, what are the effects of the void act that must be considered as definitive".

[26] For example, the Council of Ministers decided, in agreement with the unions for European civil servants, a pay rise by 10%. Finally, the Council adopted a regulation which stated only a 5% increase in salary. The Court therefore annulled the Council Act, but nevertheless it maintained it until the Council adopted an act which replaced it. Otherwise, the European civil servants would not receive any salary percentage (pt. 15 of the Decision Commission des Communautés européennes v./ Conseil des Communautés européennes, 81/72, ECLI:EU:C:1973:60).

[27] Gyula Fábián, op. cit., p. 380.

[28] Sean Van Raepenbusch, op. cit., p. 574.

a rule entails the illegality of the measures taken for the enforcement thereof"[29].

This time from the European Union's case-law, art. 277 TFEU „reflects a general principle conferring upon any party the right to challenge, to obtain the annulment of a decision directly and individually concerned, the validity of previous institutional acts which represent the legal basis of the contested decision, if the party has no right to bring, under art. 230 TEC[30], a direct action against acts that have prejudiced, without being able to request cancellation (...). The article aims at protecting the individual against the application of an unlawful legislative act, provided that the effects of the decision finding its inapplicability, are restricted to litigants and that the ruling does not affect the content of the act itself"[31].

Trying a definition, the specialized literature shows that the plea of illegality is „an incident remedy that serves to implement a general principle that refers to due process, and when it is invoked before a national court, it acts to compensate for the absence of direct action for annulment brought by individuals, in principle, against acts of general application"[32].

After analysing **the documents that can be the object of the plea of illegality**, it is still the case-law that supports our approach.

Thus, according to the Court, to the extent that art. 277 TFEU „is not intended to enable a party to contest the applicability of any general act in favour of an action, the content of a plea of illegality must be limited to what is essential to resolving the dispute. Therefore, the general act, of which unlawfulness is claimed, must be applicable, directly or indirectly, in the case which represents the object of the action and there must be a direct relationship between the contested individual decision and the general act in question. The existence of such a connection may, however, be inferred from the finding that the contested decision is based essentially on a provision of the act whose legality is in dispute, even if the latter does not formally represent its legal basis"[33].

For practitioners, but not only, very important are the following two aspects: **the legal subjects that may determine the plea of illegality and the effects of the admission of the plea of illegality**.

Referring to the first point, according to art. 277 TFEU „any part" of a litigation that has as object to contest a mandatory legal act of the Union can introduce the plea of illegality.

Regarding the possibility of states to invoke the plea of illegality, the Court has initially ruled that they cannot resort to such a remedy against a *decision* (as a legal act of the EU) that they have not attacked within the deadline set by art. 263 TFEU: „to allow a Member State, addressee of a decision (...) to challenge its validity (...), without taking into account the time limit laid down in art. 173 par. (3)[34] of the Treaty, would not be compatible with the principles governing the remedies imposed by the Treaty and would undermine the stability of the system and of the principle of legal certainty on which it is based"[35]. Subsequently, the Court revised its opinion to the effect that „the trenchant position in the matter of not attacking the Court's decisions was" tamed „by other actions under art. 263 TFEU, where the

[29] Gyula Fábián, op. cit. p. 380.
[30] The current art. 263 TFEU.
[31] Decision *Francesco Ianniello v./ Commission of the European Communities*, T-308/04, ECLI:EU:T:2007:347, pt. 32.
[32] Sean Van Raepenbusch, *op. cit*., p. 574.
[33] Decision *Francesco Ianniello v./ Commission of the European Communities* (ECLI:EU:T:2007:347), pt. 33.
[34] The current art. 263 TFEU para. (6).
[35] Decision *Commission v./ the Kingdom of Belgium*, 156/77, ECLI:EU:C:1978:180, pt. 23.

court *ex officio* verified whether the decision whose failure was attributed to a Member State had failed or not, the scope of competence of the State, if there were legal grounds for its adoption in order to avoid that that decision would be non-existent from the legal point of view"[36]. Referring to the possibility of the state to invoke the plea of illegality against *a regulation*, the specialized literature[37] ruled that „Member States should have the right to invoke [it] (...) against [this legal act of the European Union] that was not attacked (...) but which, because of its generality reveals its „shortcomings" only at the moment of its concrete application. Thus, these shortcomings cannot be discovered immediately, as in the case of regulations with individual addressee".

For the second issue, regarding the effects of the admission of the plea of illegality, this time, both the doctrine[38] and the case-law are relevant. From the point of view of the doctrine, the act under the grounds of which, the decision has been ruled, will be declared inapplicable in those precise circumstances. From the perspective of the case-law, the inapplicability of the European Union's legal act, established by the plea of illegality „has binding effect only between the parties to the dispute"[39].

5. Conclusions

We conclude by assessing that the Court of Justice of the European Union, supplemented by the doctrine of the field, both based on the application of EU legislation, contribute, obviously, to understanding the status of EU member state of over 10 years, by our country, with all that this status implies, in terms of rights and obligations.

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[36] Gyula Fábián, *op. cit.* p. 381.
[37] Idem.
[38] According to Sean Van Raepenbusch, *op. cit*., p. 578.
[39] Decision *EU Council v./ Busacca* et C-434/98, ECLI:EU:C:2000:546, pt. 26.

- Decision Centre d'exportation du livre français Centre (CELF) and Ministre de la Culture et de la Communication v./ Société internationale de diffusion et d'édition (SIDE), C-199/06, ECLI:EU:C:2008:79;
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THE HUNGARIAN REGULATION ON THE EMISSION TRADING SYSTEM

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Abstract

Nowadays the role of the environmental protection is increasingly becoming one of the main topics in the politics. During the last decades several emission trrading systems were established around the world. The study analyses the importance of the Paris Climate Conference, the development of the most significant systems and the current situation on the field of the emission trading system. The study highlightes also the problems relating to the emission trading systems. The second part of the study deals with the Hungarian emission trading system. It introduces the legislative framework and the sanction system.

Keywords: *environmental protection, emission trading system, cap and trade system, greenhouse gases, Hungarian regulation on the emission trading system*

1. Introduction

The issues connecting to environmental protection and global warming are the most significant challenges of the 21st century. The decesion - makers are dealing with those challanges both at international and national level. In this paper the authors focus on the legal aspects of the emission trading systems and intend to introduce both the European Union's and the Hungarian regulations on the emission trading system. The subject of the paper is mainly the introduction of the emission trading systems. These systems play a very important role in the fight against climate change. The European Union is at the forefront in this fight and its system provided as an example for the world. Hungary is a Member State of the EU, so the The Hungarian regulation on the emission system forms an integral part of the Europram Union's emission trading system. Therefore the examination of the EU's regulation is essential in order to be able analyse the Hungarian regulation. The emission trading systems were analysed by many other authors too, but this paper endeavours to introduce the EU's, the Hungarian system and the other emission trading systems around the world.

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2. The European Union's Regulation

In the framework of the European Climate Change Program the Commission has developed its own regulation for the EU's own trading system. The legal basis of the system is the Directive 2003/87/EC, which came into force on 1 January 2005. This system is the world's biggest cap and trade system, it covers 12.000 businesses and consists of the following elements: authorisation of emission, follow up for

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emission, monitoring, national allocation, report about emission, calibration, national registry and the supervision of the system.

The businesses belonging to the system are allowed to do their activity in case if they have greenhouse gas permit. Accoring to the abovementioned Directive the Member States have the right to lay down the merits of the allowance units. The national units were allocated between sectors.

The operators shall have an account at the national registry and this registry contains the registration of the obtaining, transfer and cancellation of the emission units. The operators are entitled to sell their units freely[1].

Before the adopting of the Directive there were several professional debate about the greenhouse gas emission allowance trading scheme of the Community. The consultation has started on the grounds of the Green Paper, which contains the main elements of the system. The European Climate Change Plan also deals with this problem. The Council recognised the importance of the trading and the fact, that a trading system should be introduced in the Community, but the Sixth Community Environment Action Programme ordered to set up the emission trading scheme till 2005[2].

According to the Directive the Member States have to define the annual top emission of the industries, which are subjets of the Directive. The emission allocation is divided between the polluters. The national allocation plan should contain the maximum amount of the overall emissions and the distribution of the emission units. The polluters have to transmit emission units to the state and they are entitled to sell the remaining units freely. In case if they did not use their whole units, they can sell it in the EU or they can reserve it.

The basis of the system is the emission unit, which is a marketable financial assets and it enables to emit one tonne of carbon dioxid within a specified time limit[3].

The Directive includes the following requirements:

- the emission unit entitles the polluter to emit one tonne of carbon dioxid
- it is valid for a specified period of time
- it can be used only as a compensation after the emission
- it can be sold to everybody
- it is a financial asset
- the mutual recognition of the emission unit between the Member States

According to the Directive the Member States have to establish the registry system, which is public and it registers the sales of the units and the owners.

The system includes sanction for the breach of the rules. If an operator does not fulfill its obligations , than it has to pay a fine and in case of a repeated breach the Environmental Protection Agency has the right to limit, suspend or withdrawn the permission. Furthermore if the polluter does not fulfill its obligation to notify or register, the polluter can sell its emission units till it will fulfill its obligation.

Three phases can be distinguish since the operation of the cap-and rade system:[4]

Phase 1: 2005-2007:

The phase one was a three years long pilor period aiming to preapere for phase two, when the EU ETS would need to

[1] Fodor László: A kibocsátási egységek kereskedelmi rendszerének bevezetése Magyarországon: Sectio Juridica et Politica, Tomus XXV/ 1. Miskolc, 2007 p. 293-296.

[2] The Sixth Community Environment Action Programme confirmed a 8 % cut during the period of 2008 and 2020.

[3] Ludwig Krämer: Az Európai Unió környezetjoga, Dialóg-Campus Kiadó, Budapest- Pécs, 2012. p. 5-65.

[4] EU ETS 2005-2012 http://ec.europa.eu/clima/policies/ets/pre2013/index_en.htm (5.1.2016.)

function effectively to help ensure the EU and Member States met their Kyoto Protocol emission targets. During these years the infrastructure of the trading system was established. It is important to emphasize that during the phase one the system was based on conceptions, because of the lack of factual informations.

Phase 2: 2008-2012:

In 2008 the EFTA Staates joined the EU's system and the scope of the system was widened through the inclusion of nitrous oxide emissions from the production of nitric acid. The penalty for the exceedings was increased to 100€ per tonne. During this phase several auctions were held by the Member States. The phase two coincided with the first commitment period of the Kyoto Protocol. The global financial crisis had impact on the emission trading too, because it led to larger and growing surplus and affected the price of the carbon heavily.

Phase 3: 2013-2020[5]

Because of the financial crisis short- and long-term measures were introduced by the European Commission. The reason of these measures was that the financial crisis affected the emission trading scheme worst than expected. The surplus build-up slowed down from 2014 and the long term aim of the phase three is to achieve that the number of the emission units should not decline significantly.The short term aim is to stabilize the operation of the carbon market. As a short-term measure the Commission postponed the auctioning of 900 million allowances until 2019-2020.

The auction volume is reduced by

- 400 million allowances in 2014
- 300 million in 2015
- 200 million in 2016.

As a long term solution a market stability reserve will be introduced and its aim to address the market imbalance. The system will be operated from 1. January 2019. The postponed 900 million allowances will be disposed in the Market stability reserve and if the surplus will reach a certain treshold, than these surplus will be transferred automatically to this system. An other aim of the reserve is to achieve a faster reduction of the annual emissions cap.

Phase 4: 2021-2030[6]

The European Commission presented in July 2015 a legislative proposal to revise the EU emissions trading system for the period after 2020. To be able to achieve the EU's target: the 40 % cut in the emission, from 2020 the EU has to reduce its emission anually by 2.2 % (currently this rate is 1.74 %). The proposal contains a more predictable, robust and fair rules to address the risk of carbon leakage[7]. According to the expectations 6.3 billion allowances will be allocated for free to companies over the period 2021-2030. The proposal contains several support mechanisms, targeting to help the industry and the power sectors meet the innovation and investment challenges of the transition to a low-carbon economy. Two new funds will be established:

- Innovation Fund – extending existing support for the demonstration of innovative technologies to breakthrough innovation in industry

[5] http://ec.europa.eu/clima/policies/ets/reform/index_en.htm (5.1.2016.).
[6] http://ec.europa.eu/clima/policies/ets/revision/index_en.htm (7.1.2016.).
[7] Carbon leakage is the term often used to describe the situation that may occur if, for reasons of costs related to climate policies, businesses were to transfer production to other countries which have laxer constraints on greenhouse gas emissions.

- Modernisation Fund – facilitating investments in modernising the power sector and wider energy systems and boosting energy efficiency in 10 lower-income Member States

3. The impact of the EU's regulation

It has been a decade since the European Union started its own emission trading scheme. The EU's system provided an example for the world and several other countries developed its own trading system on the basis of the EU's system. At present there are several cap-and trade systems and the level of the CO_2 emission is increasingly reduced. The following examples will show what kind of effect played the EU's cap-and trade system around the world.

Switzerland introduced its cap-and trade system in 2008, in the first 5 years the accession to the system was voluntary and the accession was an alternative option instead of paying taxes for carbon dioxide. But from 1 January 2013 the accession to the system is compulsory for the energy-intensive industries and the medium size companies have the opportunity to join the system. For the period between 2013-2020 the participants are released from the obligation to pay taxes relating to the emission. Currently Switzerland conducts negotiations with the EU about the possible connection between the two systems[8].

The first emission trading scheme in China was established in 2013 in Shenzhen city. This city is the first special economic zone in China. Between 2013-2015 this emission trading system had 635 participants. In 2012 (before the system was established) the first law was adoptated relating to the emission trading. After this several emission trading systems were established in different cities for example in 2013 in Beijing and in Shanghai.

In North-America the first regional initiative for limiting greenhouse gas emissions began in 2007 and as a result of this the first emission trading scheme[9] was established. From 2015 the aim of the system is to reduce the emission with anually 2,5 %, and from 2018 with 10%.

In California the emission trading system came into effect in 2013 and currently the second trading period takes place (2015-2017). The system contributes that the state could achieve 80% emission cut between 1990-2050.

It is clear from the aforementioned examples and dates that the EU and its 28 Member States and the 3 EFTA States are at the forefront in this field and they have a decade of benefits in this field compared to other countries around the world.

4. The Paris Climate Conference

The COP 21, also known as the 2015 Paris Climate Conference took place between the 30 November and 11 December 2015 in Paris. The aim of the UN's negotiations was to achieve a legally binding and universal agreement on climate, with the aim of keeping global warming below 2 C and to discuss economical, financial and environmental protection aspects. The 195 countries adopted the first-ever universal, legally binding global climate deal and accepted full responsibility to limit global warming to well below 2 C and to limit the increase to 1.5 C because this would significantly reduce risks and the impacts of climate change. The agreement will enter

[8] The basis of the negotiations is that the Swiss system is based on the EU's cap-and trade system and a substantial part of the Swiss system was established so that it can fit to the EU's system.

[9] The system operates in Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island and in Vermont.

into force in 2020[10]. In order to achieve this aim from 2023 the countries come together every 5 years to review the set goals. The Paris Climate Deal contains a long term goal, naimly from 2050 the CO2 emissions need to got to zero, with other words the long term goal of the deal is to achieve carbon neutrality.[11] Towards to achieve these set goals it is obvious that there is need for a huge amount of money. The developed countries will continue to support the developing countries to reduce their emissions and to this the developed countries intend to mobilise USD 100 billion per year until 2025. The Paris Climate Deal opens a new chapter in the use of renewable energy. According to the concept from 2050 the renewable energy sources will cover the energy demand of the humanity[12].

It is clear, that the Climate deal will influence the emissions trading scheme too, but there are no informations according to that connection yet.

5. Problems relating to the emission trading schemes

The developed emission trading systems raise several regulatory problems. The formation of the system got several critics worldwide and the literature discovered other problems too. One of these problems is the allocation of the rights. From the point of view of the operating of the system it makes no difference how the rights will be allocated but the allocation is a very important thing for the participants. Each participant is interested in getting as many rights as they can get. Hereby they can reduce their costs and get more incomes from the selling of the rights. The developing countries can get resources and these plus incomes can be spent to develope the country.

The theory distinguished ten allocation principles[13]:

- The horizontal allocation allocates the pollution rights in order to achieve that the net costs of the pollution reduction should be equal to GDP ratio between the countries.
- The vertical allocation allocates the pollution right in a progressive way, namely the net pollution costs should be directly proportional to the GDP per capita indicators.
- The principle of the ability to pay allocates the gross costs on the ground of GDP indicators.
- According to the principle of sovereignty the rihgts should be allocated on the ground of the amount of emission.
- The egalitarian principle allocates the pollution rights between the countries on the gound of the ratio of population.
- According to the market principle the pollution rights should be auctioned and those will receive the rights, who pays the most for them.
- The allocation of the pollution rights should depend on political agreements according to the consensual principle.
- According to the compensation principle the countries, which suffered economical losses after the allocation should get compensation.
- The Rawls's principle means the maximization of the nett adventages of the poorest countries.
- An environmental protectional aspect emphasizes the protection of the environment and according to this it limits the allocation of the pollution rights.

An other problem is the question of the complementarity and the compulsory

[10] http://ec.europa.eu/clima/policies/international/negotiations/paris/index_en.htm (20. 1.2016)
[11] http://www.carbonbrief.org/explainer-the-long-term-goal-of-the-paris-climate-deal (5. 1.2016.)
[12] http://europapont.blog.hu/2015/12/16/parizsi_klimacsucs (5. 1.2016.)
[13] Adam Rose: Equiti considerations of tradeable carbon emission entitlements, UNCTAD 1992. In.: Kiss (2005.): p.188.

membership. The system does not cover the low-value and diffuse polluters (transportation, households, services). If the system applies wide-ranging exemptions and reductions in that case the system won't be effective. It is important to apply the system in wider-range. It is clear, that the emission trading system is a supplement to the system of energy taxation.

The influence of the climate change can be effective if the greenhouse gas emission reduces continually. To achieve this anually fewer and fewer rights will be allocated and this effects the market of pollution rights significantly[14].

A lot of criticism was voiced concerning the income from the sale of the pollutin rights. Besides of the free allocation of rights the rest will be sold on auctions and this will result income. But the decreasing tax revenues could reduce the money for environmental protection programs.

An other question is the use of proceeds. The total proceeds of the sale of the pollution rights won't be used for environmental purposes. According the system a theoretical question arrised, namely the Ambient Permit System (APS) or the Emission Permit System (EPS) should be established. The APS allocates the rights according to the receiving compartment, and the system is based on complex norms and geographical conditions. The EPS operates easier and it allocates the rights on the basis of emission sources. But this system could cause that on a smaller territory a more serious pollution can come into being while the average contamination will not change[15].

Despite of the problems the literature set up the criterias for the optimal functioning of the emission trading systems. According to this the market needs for the optimal functioning a sufficient number of sellers and buyers and adequate regulations. The significant difference between cost benchmarks of reduction of pollution means problems in connection with the emission trading systems but hopefully the aforementioned Paris Climate Deal will contribute in order to solve this problem[16].

6. The Hungarian regulation

The Act XV. of 2005 on the the greenhouse gas emission allowance trading scheme and the relating regulations were framed on the basis of the EU regulation[17]. Currently the Act CCXVII. of 2012[18] regulates the emission trading system in Hungary, it came into force on 31 December 2012 and there is the Decree No. 410 of 2012 (XII. 28.) Korm. of the Government, which contains rules for the implementation of the aforementioned Act. The preamble of the Act emphasizes that the aim of the Act is to mitigate the climate change by reducing the emission of the greengouse gases and in order to achieve this aim Hungary takes part in the emission trading system of the EU. The subject of the Act is the greenhouse gas emission and the Act considers not only the CO_2 as greenhouse gas.

The operators can carry out activities, affecting the environment, if they get greenhouse gas emission permit from the

[14] Kiss Károly: Zöld gazdaságpolitika, BKÁE, Budapest, 2005. p.195-196.

[15] Kerekes Sándor: A környezetgazdaságtan alapjai, Budapest, 1998. www.mek.niif.hu (7. 11. 2015.) p. 103.

[16] Nagy Zoltán: Környezeti adózás szabályozása a környezetpolitika rendszerében, Miskolci Egyetem, Miskolc, 2013. p.73-78.

[17] Act No. XV. of 2005.Decree No. 213/2006. (X. 27.) Korm.

Fodor László: A kibocsátási egységek kereskedelmi rendszerének bevezetése Magyarországon: Sectio Juridica et Politica, Tomus XXV/ 1. Miskolc, 2007. p. 293-292.

[18] Act No. CCXVII of 2012 on the participation in the scheme for greenhouse gas emission allowance trading within the Community and in the implementation of the Effort Sharing Decision.

Environmental Protection Agency[19]. The aim of the proceeding is to check whether the pollutant emission can be traced or not. The operator has to trace its own emission and report about it. The speciality of the permission is that it does not determine emission limit. It creates obligations for the operators to transfer back emission allowances on the basis of the amount of the annual emission.

Between 2008 and 2012 the datas of the permission served as a basis for the National Allocation Plan and Allocation List. The National Allocation Plan was the basis of the allocation of the emission allowances and the Government sets out the allocation list for trading periods[20].

According to the measures currently in force the National Implementation Measures contains the amount of the annually free emisson allowances. The draft about that is created by the Minister and submitted for approval to the European Comission. The Measures will be published by the Government after the approval[21]. The National Allocation Table is created by the Minister on the basis of the National Implementation Measures and submitted for approval to the European Commission. After the approval of the Commission the Minister takes care about the crediting of the allowances on the operators' registry[22]. The Act contains further provisions for the new entrants. It defines how the new entrants can get free allowances. The new entrants have the opportunity to submit an application to the Minister in order to get free allowances. It is very important and according to the provisions of the aforementioned Act this application should be submitted after 1 year initial operation. The application will be transmitted by the Minister to the European Commission and the Minister will decide on the basis of the Commission decesion.

The emission allowance comes into being through the regisration in the National Registry. The allowance is a marketable financial assets and the owner of the allowance is the Hungarian State. The National Registry is a public registry, it contains datas about the allocation of allowances, trading, return and deletion of the allowances.

The owner of the allowance is the Hungarian State, but the right of the asset management belongs to the Minister responsible for energy policy. The allocation of the allowances can be free of charge and onerous. According to the Act 95 % of the allowances have been allocated free of charge during the first and second trading periods.This allocation means transfer and this means that the owner of the allowance will be the operator.

Currently there is the third trading period in Hungary and according to the Act the half of income of the sales of the allowances should be invested in measures dealing with reduction of greenhouse gas emission[23].

The operators have to return emission units to the Hungarian State on the basis of their annual emission. If the operator can not return the adequate emission unit the Act contains sanctions for this case. There are three main area of the sanctions:

- penalty payment
- in case of repeated breach of the terms, the Authority can limit or suspend the operator's functioning

[19] In Hungary this is the Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség.

[20] Nagy Zoltán: Környezeti adózás szabályozása a környezetpolitika rendszerében, Miskolci Egyetem, Miskolc, 2013. p. 70-73.

[21] under ss. 4 of s. 15 of Act CCXVII. of 2012.

[22] under ss. 5 of s. 15 of Act CCXVII. of 2012.

[23] under ss. 1 of s. 26 of Act CCXVII. of 2012.

– or at least the Authority can withdraw the licence

After the returning the remaining emission units can be sold in the area of the European Economic Area.

7. Conclusion

The measures correntlly in force in Hungary are complied with the EU's Regulation. On 1 Januar 2012 the third trading period has began in the European Union and it has brought a number of changes. The emission trading system is centralised and there is a coherent regulatory environment at EU level concerning the system. From 4 May 2013 the Decision No 280/2004/EC of the European Parliament and of the Council concerning a mechanism for monitoring Community greenhouse gas emissions, Decesion No 406/2009/EC of the European Parliement and of the Council on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 are in force. The 389/2013/EU Regulation allows the simplification of the national regulation[24].

Currently several implementing measures are regulated at government regulation level. Its relevance is that this government regulation could insure a coherent regulation on this field.

According to an impact assessment of 2013 it is clear that the new Act brings several administrative burden and obligations of notify for the operators. Accoding to the EU ETS Directive the Member States are obligeted to sell their allowances not allocated free of charge on auction. The amount of tradeable allowances on auction are specified by the Commission. The amount of allowances free of charge are reduced anually and therefore the amount of transferable allowances are increased. Since the amount of greenhouse gas units will grow, this would mean a certain and continuous income for the central State budget. The impact assessment highlightes that the competitiveness of a country can be deteriorated or improved by the emission trading system and this factor will be ifluenced by the quotas' market price. Furthermore the currently regulation influences the reduction of the greenhouse gas emission and this is a definietly positive environmental impact. Hungary is part of the EU ETS system and so Hungary contributes to achieve the EU's climate policy.

Currently the EU has its third trading period. The phase 4 will begin from 2021 and the Paris Climate Deal will enter into force in 2020, so the outcomes of the future will give several oppurtinity for further research in this field.

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CONFLICT OF INTERESTS' REGULATION ON ELECTED OFFICIALS

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Abstract

This article sheds an overview of the different perspectives that judicial courts grant regarding the same concept, namely the conflict of interest in relation to the elected officials. We will also analyze the ambiguous and contradictory interpretations that the Romanian legislation has to offer on the issue.

Keywords: *conflict of interests, elected officials, local council, personal interests, patrimonial interests.*

1. Introduction

This study aims a short analysis of the concept of conflict of interest in what concerns local elected officials. We will take into account the types of conflicts and the expression of the interest, according to its personal or patrimonial nature.

Furthermore, we will refer including to the relevant case law of the courts, in order to show the ways in which one can interpret the law applicable to the concept of conflict of interest.

The legislation applicable to local elected officials who find themselves in the situation of a conflict of interest is the following: Law no. 215/2001[1] of the local public administration, Law no. 161/2003[2] and Law no. 393/2004[3].

The aforementioned normative acts were adopted in order to establish the general framework for corruption preventing and combating, by establishing special measures, of substantive and procedural law, both in terms of incompatibility and in terms of the concept of conflict of interest[4].

It is indisputable that persons who may be in conflict of interest or incompatibility situation will have either to avoid such a situation or to undergo legal sanctions[5]. Public interest shall always prevail, therefore private interest of a person shall

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[1] Published in Official Journal no. 123 of February 20th, 2007, as further amended and supplemented.

[2] on certain measures to ensure transparency in the exercise of publicly appointed offices, public functions and in business environment, to prevent and sanction corruption, published in Official Journal no. 279 of April 21st, 2003, as further amended and supplemented.

[3] on the Status of local elected officials, published in Official Journal no. 912 of October 7th, 2004, as further amended and supplemented.

[4] Aspects which result not only from the content of the legislation, but also from the related recitals, material available on the following internet address, in pdf format:
http://www.cdep.ro/proiecte/2004/400/80/4/em484.pdf, site consulted on March 10th, 2017.

[5] See Verginia Vedinas, "*Drept administrativ*", edition IX, revised and updated, Universul Juridic Publishing House, Bucharest, 2015, p. 481 and the following: there are several types of liability of the local officials, namely: administrative –disciplinary liability, administrative – patrimonial liability and criminal liability. Furthermore, several disciplinary sanctions for councilors were introduced by Law no. 393/2004, such as warning, removal from the meeting, temporary exclusion from the works of the council and of the specialized commission, as well as the withdrawal of the meeting allowance for a term between 1-2 months.

suffer a „censorship" at least psychologically and morally.

The purpose is to ensure the exercise of public functions and publicly appointed offices by using impartiality, integrity and transparency, while observing the primacy of public interest[6].

Therefore, the lawmaker sought the protection of social relationships in what concerns the good performance of the activities of local elected officials, activity which requires a fair and transparent conduct.

Notwithstanding, we cannot accept broader interpretations of the legislation even in situations where the existence of personal and/or patrimonial interest cannot be proved, in the end, the targeted person undergoing the penalties provided by the law.

2.1. The concept of conflict of interest.

Unlike the state of incompatibility, which is more clearly defined and explained by the lawmaker, the conflict of interest requires a special attention from the National Integrity Agency, and especially from the courts of law.

Therefore, according to the legislation in force[7], the *conflict of interest* represents the situation where the person exercising a publicly appointed office or a public function has a personal interest of patrimonial nature, which could influence the objective fulfillment of the duties incumbent on him/her, according to the Constitution and to other normative acts.

Furthermore, Recommendation 10/2000[8] of the Committee of Ministers of the Council of Europe includes a similar definition of the conflict of interest in what concerns public officials: *Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence or appear to influence the impartial and objective nature of his or her official duties*[9].

This notion was required to be included in the legislation, in order to sanction private interests, which is usually contrary to the public interest. Private interest varies, so that it can include a benefit for himself/herself, family, close relatives, friends, persons or organizations with whom he or she has business or political relations. In what concerns personal interest, this one can refer to any obligations against the aforementioned persons.

Therefore, following the assessment of art. 70 of Law no. 161/2003, two conditions have to be fulfilled in order to have a conflict of interest:

1. the participation in the making of a decision
2. the existence of a personal interest or a patrimonial interest[10].

We believe that these conditions should be met cumulatively, so that the mere participation in the adoption of a resolution does not lead to the sanction provided by the law, if personal and/or patrimonial interest did not exist, was not expressed and could not be proved.

[6] These are the principles underlying the prevention of conflict of interest, according to art. 71 of Law no. 161/2003.

[7] *Idem*, art. 70.

[8] Recommendation no. 10/2000 of the Committee of Ministers of the Council of Europe, document available on the Council of Europe site: https://wcd.coe.int/wcd/ViewDoc.jsp?id=353945&Site=CM, site accessed on March 1st, 2017.

[9] According to art. 13 of Recommendation no. 10/2000.

[10] The legislation provides a variant at least interpretable, by cumulating two notions, namely, personal interest, respectively patrimonial interest, the following expression resulting: „*personal interest of patrimonial nature*". We believe that the two types of interest should be treated separately, because there is no reason to require such an overlap.

2.2. Types of conflict of interest.

The legislation in force does not provide a classification of the conflicts of interest, but they can be of different types, namely: *potential, actual and real*, according to the National Integrity Agency[11].

Therefore, if a local official has interests likely to cause a conflict of interest, if a public decision would have to be made, it could be deemed as a potential conflict of interest.

The actual conflict of interest can occur if the local official finds himself in the situation to make a decision that would create advantages either for himself or for another person, regardless if we talk about a business partner or a close person of the official.

The third type of conflict of interest is the real one, highlighted by the situation where the local official participate in the making of a decision on which he/she has a personal interest, thus violating the legal provisions.

Similarly, even if concerning public officials and not local elected officials, Recommendation no. 10/2000 of the Committee of Ministers of the Council of Europe provides a similar classification in what concerns the concept of conflict of interest. Therefore, art. 8 reveals these types of conflicts as being actual, potential or apparent.

We believe that the category of persons for which the conflict of interest is regulated is not relevant, due to the fact, from the conceptual point of view, this notion has the same defining features, regardless of where it is expressed, either in local public administration, or at central level.

For example, although the provisions of art. 87 – 91 of Law no. 161/2003 take into account the incompatibilities on local elected officials, since they fall in the section on incompatibilities, these provisions are also applicable in case of public functions[12].

Notwithstanding, we believe that the differences between the modalities of expression of the conflict of interest should be based only on the social danger level, depending on the position conferred to the concerned person. It is obviously more serious the existence of a conflict of interest at the level of a minister or parliamentary, than at the level of a local councilor or mayor.

Therefore, in the assessment of the de facto situation and the reality of the existence or inexistence of an expression of the conflict of interest, the elements of mitigating circumstances shall not be omitted, so that an improper application of the legislation in the field is not reached.

Given the aforementioned classifications, we believed that they should be developed and assessed by the lawmaker, and included in the legislation *de lege ferenda*, in order to avoid abuses. On the contrary, an uneven and inconsistent interpretation of the purpose of the law can be reached, both from the National Integrity Agency[13], and from the courts of law called to rule on the lawfulness of the assessment reports of NIA, due to the fact they have so great discretion that it can become subjective.

[11] According to „*Guide on incompatibilities and conflict of interest*", edition 2016, issued by the National Integrity Agency. The document is available in pdf. format on the following internet address: https://www.integritate.eu/Files/Files/Ghiduri%20utile%20alegeri%202016/GhidIncompatibilitatile &Conflicte%2010.10.2016.pdf, site accessed on March 1st, 2017.

[12] Ovidiu Podaru, „*Drept administrativ. Practică judiciară comentată. Vol. I. Actul administrativ (II) Un secol de jurisprudență (1909-2009)*", Hamangiu Publishing House, Bucharest, 2010, p. 203 and the following.

[13] Hereinafter referred to as „*NIA*".

2.2. Personal interest and patrimonial interest, related to the relevant case law.

After reading the legal incident texts, it can be noted that there is a mismatch, two notions being included in the relevant legislation, namely: patrimonial interest, respectively personal interest.

In this respect, on the one hand, Law no. 215/2001 of the local public administration uses the term of „*patrimonial interest*", while, on the other hand, Law no. 161/2003 uses the expression of „*personal interest of patrimonial nature*". Furthermore, Law no. 393/2004 uses the term „*personal interest*".

Therefore, we want to show that the lawmaker is not constant in defining, respectively in using these notions. Therefore, they end to be capable of various interpretations.

Therefore, if we were to place related laws in chronological order, the first regulation of this kind was Law no. 215/2001, the concept of "*patrimonial interest"* being found for the first time in its content.

Notwithstanding, although the concept of patrimonial interest was initially used, about 2 years later a second regulation emerges, the latter enshrining the concept of „*personal interest of patrimonial nature*", namely Law no. 161/2003.

Subsequently, the notion is restricted again to the formulation of personal interest in Law no. 393/2004, the lawmaker giving up the notion of „*personal interest of patrimonial nature*".

In what concerns the local elected officials, they have a personal interest in a certain matter, if they have the possibility to anticipate that a decision of the public authority they are part of could represent a benefit or an advantage for themselves or for other categories of persons, according to the law[14].

As it can be noted, due to the fact they have to anticipate and not to effectively participate in the making of a decision, the legislation is rather related to a potential conflict of interest.

Notwithstanding, this interpretation modality can also be used against persons to whom the existence of a personal / patrimonial interest cannot be proved, for the mere reason that a potential benefit / advantage could have been anticipated by them.

Furthermore, the case law showed that, in certain situations, the simple presence of a local elected official is sufficient in order for the court to consider that the person in question finds himself/herself in a conflict of interest, even if there is no personal and/or patrimonial interest proved by ANI.

It is true that the incidence of the conflict of interest is obvious, therefore there is no other way to interpret correctly the legislation and the de facto situation.

For example, the High Court of Cassation and Justice[15] showed that, in what concerns the provisions of art. 70 of Law no. 161/2003 and of art. 75 of Law no. 393/2004, the appellant, in the capacity of local councilor, found himself in a conflict of interest, provided that he participated in the approval of certain decisions of the local council whereby the lease, by public tender, of certain assets belonging to public and private domain of the city by a company in which he is shareholder, was decided.

The High Court of Cassation and Justice noted that, in this case, the party had a personal interest of patrimonial nature which could have

[14] See the list of art. 75 of Law no. 393/2004: „a) husband, wife, relatives or up to second degree relatives including; b) any natural person or legal entity they have engagement relation with, regardless of the nature; c) a trading company where they have the capacity of sole shareholder, director or they derive income from; d) another authority they belong to; e) any natural person or legal entity, other than the authority they belong to, which performed a payment to them or which incurred any expenses of them; f) an association or foundation they are members of".

[15] Hereinafter referred to as „HCCJ".

influenced the objective fulfillment of the duties incumbent on him as local councilor, the claims of the plaintiff having no legal relevance, namely that the specialized department within the city hall established the rent for the disputed space and that a public tender was organized for the award of the use of this commercial space[16].

Furthermore, HCCJ also develops the concept of conflict of interest in relation to patrimonial interest. Therefore, the case law[17] of the Supreme Court notes that there have to be reasons that can be taken into account when establishing not only the existence, but also the possibility to influence the decisions of a person.

Art. 72 of Law no. 161/2003, provides that „the person exercising the function of member of the Government, secretary of state, deputy secretary of state or functions assimilated to them, shall be bound not to participate in the making of a decision in the exercise of the authority public function which cause a material benefit for himself/herself, for his/her spouse or first degree relatives".

Following the corroboration of the aforementioned provision with art. 70 of the same normative act, in order to have a conflict of interest, the condition on „*personal interest of patrimonial nature*" or „*material benefit*" for himself/herself, for his/her spouse or first degree relatives has to be fulfilled. This interpretation is the vision of the HCCJ, substantiated by Decision no. 5036 of April 18th, 2013.

Notwithstanding, the legislation grants the courts of law the possibility to appreciate that there is a conflict of interest if the targeted person physically takes part in the meetings where certain decisions/resolutions are adopted.

Although it could be argued that by means of the mere presence, even if the person abstained from voting, the person could influence the decision of the other members of the collegial body, it is required to make a distinction.

Therefore, there are cases where the existence of a personal or patrimonial interest or of other benefits which could result following the adoption of a resolution cannot be proved.

Therefore, we believe that we cannot equate such a circumstance (*physical participation followed by voting abstention*) and the situation where the existence of a conflict of interest is clear, the benefits being obvious.

Therefore, on the one hand, we take into account aforementioned decision no. 451/2014 of the HCCJ, where the allegations of NIA and the deductions of the courts are fully justified. On the other hand, Civil sentence no. 152/F of June 26th, 2014 pronounced by the Court of Appeal of Galați shows different interpretation of the conflict of interest in what concerns local elected officials.

In the aforementioned case, the existence of a conflict of interest of a local councilor could not be proved by reliable and credible evidence, as regulated by art. 70 – 71 and art. 77 of Law no. 161/2003.

Furthermore, there are no elements which fall under the scope of the legal definition of the conflict of interest, which refers to a personal interest of material nature or personal material benefit.

Notwithstanding, the court did not take into account the de facto actual situation or the personal circumstances of the case, noting the applicability of art. 75 letter f) of Law no. 393/2004: „*Local elected officials have a personal interest in a certain matter, if they*

[16] Decision no. 451 of January 31st, 2014 pronounced in second appeal by the Division of contentious administrative and fiscal of the High Court of Cassation and Justice.

[17] Decision no. 5036 of April 18th, 2013 pronounced in second appeal by the Division of contentious administrative and fiscal of the High Court of Cassation and Justice.

have the possibility to anticipate that a decision of the public authority they belong to could represent a benefit or an advantage for themselves or for: (...) lit. f) – an association or foundation they are members of".

In what concern the incident legal text, we would like to show the following:

We cannot equate the capacity of representative of the Local Council in a non-profit foundation, and a situation where a local elected official is a shareholder in a company, by benefiting directly or indirectly, by representatives, from the decisions he took part in.

The court of merits noted the participation of the local councilor in the meetings of the Local Council where two decisions on the increase of public contribution to the foundation budget were discussed and approved unanimously.

Notwithstanding, one of the founding members of the foundation is the Local Council, the function of vice-president being honorary, without any impact on the actual activity of the foundation. If he had been a member on own behalf and not by means of the capacity of local councilor, we would have accepted the thesis on the existence of the conflict of interest.

We hereby mention that, according to art. 75 of Law no. 393/2004, the conflict of interest exists if the local councilor votes in favor / against a foundation he is a member of in own behalf and not in the capacity of the representative of an entity, such as the Local Council.

A plurality of capacities results from the recitals of the resolution, namely the one of local councilor, respectively the one of vice-president of the foundation. However, this capacity is held under the office of local councilor and ends with the completion of the term of office.

The scope of the respective foundation is to support young talented, special skills people, inclined towards one of the following areas: education, culture, arts and sports.

Furthermore, art. 35 of the foundation by-laws provides the following: „The capacity of representative within the Foundation is lost with the de jure termination of the elected official's term of office".

It is interesting that the conflict of interest was not noted in connection with a potential capacity of member of the foundation, but only in relation to the function of vice-president, a function held in the capacity of representative of the Local Council[18], as a founding member[19] within the respective foundation.

This assumption does not meet the legal requirements, as the noted conflict of interest concerns the plurality between the function of local councilor and vice-president of the foundation, in which respect the local councilor would have participated in the adoption of certain decisions.

As we have already mentioned, the finding of the participation in the adoption of a decision is not sufficient, as long as the expression of personal and/or patrimonial interest is not proved, all the more so as the

[18] See **Anton Trăilescu**, "*Drept administrativ*", edition 4, C.H. Beck Publishing House, Bucharest, 2010, p. 42: "Local councils are deliberative authorities of public administration through which local autonomy is achieved, having the role of managing public affairs in communes and cities, under the terms of the law". We believe that the appointment of a representative within a philanthropic foundation fits to the idea of managing "public affairs", aiming to develop and help talented people from the respective commune and not to raise a conflict of interest.

[19] See **Ioan Alexandru**, "*Drept administrativ*", Lumina Lex Publishing House, Bucharest, 2005, p. 253: "*The Local Council has the initiative and decides in all matters of local interest*", unless otherwise provided by law. Besides that the foundation has a philanthropic nature, it does not perform economic activities, the Local Council is one of the founding members, therefore it is natural to have decision power on the allocated budget. The fact that one of the councilors is the representative of the Local Council in the respective foundation, in our opinion, cannot fall under the scope of the concept of conflict of interest, regardless we speak about potential, actual or real conflict of interest.

existence of any type of interest had not be proved in any way.

In case of incompatibilities, the existence of a plurality of capacity is sufficient. Therefore, an important aspect in what concerns the statute of councilor is the concept of incompatibility itself[20]. In this regard, the legislation21 is certainly clearer compared to the regulation of the conflict of interest.

Incompatibilities affect the principle of transparency and integrity of public authorities and institutions, there being a high risk that decision-making powers are exercised under non-impartiality, bias, under the violation of equal and non-discriminatory treatment principle. They represent obvious, serious situations, which cannot be said in case of conflict of interest.

If in case of incompatibilities the mere plurality of capacities is sufficient to apply legal penalties, conflict of interest requires special attention, meaning that the existence and expression of personal and/or patrimonial interest are required to be proved, by noting the elements of mitigating circumstances of a situation which corresponds to reality.

Given the aforementioned, we consider that there are no preconditions likely to threaten social values in the case where it was noted that a local council would have been in conflict, due to the fact it held the function of vice-president of a foundation, in the capacity of representative of the Local Council, the latter being one of the founding members of the respective foundation.

Another matter which will have to be subject to a short analysis is the penalty provided by the law for the ascertainment of the conflict of interest in what concerns the person in question. Art. 25¹ of Law no. 176/2010[22] provides that the person who was found in conflict of interest or incompatibility shall be deprived of the right to perform a public function or a publicly appointed office which is subject to the provisions of this law, except the electoral ones, for a term of 3 years as of the removal from the respective function or publicly appointed office or as of the de jure termination of the term of office.

There were different opinions and interpretations in what concerns this sanction, leading ultimately to their „*cutting*" by means of Decision no. 418 of July 3rd, 2014[23], pronounced by the Constitutional Court of Romania[24].

Phrase „*same function*" of art. 25 para. (2) thesis II of Law no. 176/2010 raised totally different interpretations. Therefore, on the one hand, it could be considered that the phrase concerned only the function on which the conflict of interest was ascertained, respectively the state of incompatibility. On the other hand, according to another opinion, if things had been so, the respective sanction would have been meaningless. Therefore, the limitation of the exercise of the right to be elected, both in case of the conflict of interest, and

[20] See Verginia Vedinaș, *op. cit*., p. 477.

[21] Section IV, Chapter III, Title IV, Book I of Law no. 161/2003.

[22] on the integrity in the exercise of public functions and publicly appointed offices, for the amendment and supplementation of Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency and for the amendment and supplementation of other normative acts, published in Official Journal no. 621 of September 2nd 2010, as further amended and supplemented.

[23] Published in Official Journal no. 563 of July 30th, 2014, available on: https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx., site accessed on March 12th, 2017.

[24] Hereinafter referred to as „*CCR*".

especially in case of incompatibilities, would consider all electable functions[25].

The reasoning of CCR consist in the following: „in the interpretation according to which a person on whom the state of incompatibility or conflict of interest was found can held another electable function than the one which generated the state of incompatibility or conflict of interest, the legal text is obviously contrary to the meaning contemplated by the lawmaker, who, by means of Law no. 176/2010, aimed to ensure the integrity and transparency in the exercise of all functions and publicly appointed offices and the scope of whom is to sanction the person in question by establishing the prohibition to hold any other electable functions[26]".

Notwithstanding, we consider that the interpretation according to which by means of phrase „same function", the lawmaker would have considered any electable function is contrary to the will of the lawmaker. Therefore, not only that the right of a person to be elected is unduly restricted, but it is added to the law.

In conclusion, these provisions should not have benefited from an extensive interpretation, therefore, we consider that a genuine constitutional control was not performed[27].

3. Conclusions

Although a conflict of interest does not mean *ipso facto* corruption, there is an increasingly acknowledgment of the fact that the occurrence of certain conflicts between personal interests and public obligations can lead to corruption[28].

Notwithstanding, given all the aforementioned, one of the most important consequences of the conflict of interest acknowledgment is the sanction itself, namely the limitation of the exercise of the right to be elected for three-year term.

Given the severity of the restriction for the violation of the conflict of interest regime, we consider that the applicable legislation consists in the interpretation of the facts.

Therefore, there are several approach possibilities. On the one hand, the theory on the existence of personal and / or patrimonial interest can be applied, in order to establish whether a person was in a conflict of interests. Therefore, it might be possible to resort to the analysis of the case subject to judgment by means of the existence of actual premises which effectively threaten the defended social values.

On the other side, the lawmaker could provide a clarification or development of the criteria based on which the persons in question are punished, in order not to exist cases where the persons in question are punished, but cases are significantly different.

Therefore, as an intermediate way, both the courts of law and the National Integrity Agency shall refrain from the unduly extension of legal text interpretation.

It would neither be appropriate to apply them mechanically, therefore it is required that the actual circumstances of the case subject to judgment are taken into account.

In this way, the pronunciation of contrary rulings, which do not take into account the

[25] For a detailed perspective on the restrictive, and extensive interpretation, see Elena Mădălina Nica, "*Considerații despre efectul constatării incompatibilității instituit de art. 25 alin. (2) teza a II-a din Legea nr. 176/2010 asupra exercitării dreptului de a fi ales*", article published on site www.universuljuridic.ro on March 8th, 2017, site accessed on March 12th, 2017.

[26] Paragraph no. 39 of Decision no. 418 of July 3rd, 2014.

[27] See Elena Mădălina Nica, *op. cit.*, last but one paragraph.

[28] OECD Guide for the settlement of conflict of interest in public administration, drawn up by the Organization for Economic Co-operation and Development, in June 2003, material available in pdf format on internet address https://www.oecd.org/gov/ethics/2957377.pdf, site accessed on March 5th, 2017.

actual facts of the case, the elements of mitigating circumstances, thus causing damage to the persons in question by means of the prohibition to exercise a public function or a publicly appointed office for three-year term, will be avoided.

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CERTAIN ISSUES ON THE DETENTION OF AN INDIVIDUAL

Andrei MURARU*

Abstract

The dynamics of the law is natural in the existence and evolution of the state legal system. The law has to be actual, always actual, if not in a perfect harmony, at least in an efficient harmony with the social status of a country. The constitution, by being itself a law, more precisely a fundamental law, has to comply with the existences of the system dynamics. But not in any way. In order to fulfill its regulating and especially, civilizing role, constitutional revisions have to meet certain substantiations of content and legislative technique, but also certain demands of constitutionalism. One of these demands is that the revision (amendment, supplementation, etc.) of a constitutional text is not a step backwards as regards democracy and rule of law. The efficiency of constitutional revisions is questionable if they restrict or remove classic rules and principles such as: freedom respect, property respect, free access to justice, earned rights, presumption of innocence.

Keywords: *constitution, constitutionalism, constitution primacy, revision, fundamental rights and freedoms, guarantees*

1. Introduction

1. The re-discussion of theoretical and practical issues on the detention of an individual, as a preventive measure, is relevant because we find ourselves in a period where one of the important matters which are in the attention of public authorities and public opinion is the revision of the Constitution.

There is no doubt that proposals for improvement of Title II of the Constitution, called Fundamental rights, freedoms and duties are also targeted by the efforts on the Constitution revision.

In what concerns the place of the regulations on the detention of an individual, in Title II, we recall some of the literature findings[1], namely:

a) Art. 23 of the Constitution regulates individual freedom and security. There are two categories in close connection expressing distinct legal realities. Individual freedom is human freedom to move freely, to think and speak freely. If the individual violates the laws of the state, the state repression is entitled to act. Notwithstanding, the action of the state against the individual is conditioned by certain rules which protect the individual and stop arbitrary actions of public authorities. These rules are provided by art. 23 and concern the detention of an individual, the

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[1] See Andrei Muraru Protecția libertății individuale a persoanei prin mijloace de drept penal (The protection of individual freedom of a person by criminal law means) PhD thesis, 2009, Manuscript. The paperwork shall be hereinafter referred to as the Thesis; Ioan Muraru, Elena Simina Tănăsescu (coordinators), Constitution of Romania, Comment on articles, CH Beck Publishing House, Bucharest 2008, pag.217; Ioan Muraru, Elena Simina Tănăsescu, Drept constituțional și instituții politice, Edition 15, Vol. I, CH Beck Publishing House, Bucharest, 2016, pg. 165.

arrest of an individual, the presumption of innocence, certain rules on criminal trial. All these are in fact guarantees in favor of the freedom of individual and form the category of individual security.

b) The security of individual in the constitutional context is traditionally considered as being part of the guarantees of the fundamental rights. And art. 152 para. (2) of the Constitution provides that „ no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof". Therefore, we will note that certain provisions of the constitution revision drafts which try to amend current rules on the detention of an individual have to be removed.

c) The detention of an individual, as a theoretical and practical matter, concerns both criminal science and constitutional law due to the fact it is a dimension of human rights and human rights are by excellence a subject of study for constitutional law, and of course, a subject of study for other disciplines. This explains why detailed explanations are found both in criminal science and in constitutional law books. No doubt, constitutional explanations must largely prevail due to the fact that, in the legal pyramid, the Constitution ranks the supreme position.

2. Concepts, correlations, doctrine

Therefore, it is shown that detention is a preventive measure, including deprivation of freedom, which can be ordered by the prosecutor or by the criminal investigation body[2].

Furthermore, the detention as a preventive criminal procedural measure is explained, being a measure whereby the person suspected of having committed an offense provided and punished by the law, is deprived of freedom by the competent authorities, on a strictly limited term[3].

The explanation of the detention is performed with details in the criminal procedure books.

Therefore Grigore Theodoru, under title the concept of procedural measures and their importance[4] establishes, among others, the following: public authorities may use coercive means in order for the normal performance of the criminal trial and for the fulfillment of its scope; the constraint may consist in the deprivation of freedom of these individuals, in the restriction of their freedom or of other rights and freedoms; these measures prevent absconding prosecution and trial, as well as execution of prison sentence; although individual freedom is established by the Constitution, art. 53 of the Constitution allows, in order to protect national safety, public order, criminal investigation performance, the restriction of its exercise, subject to proportionality and to the guarantee on the existence of the right or freedom; procedural coercive measures can only be taken during criminal trial; by representing a deprivation or restriction of the rights guaranteed by the Constitution, criminal procedural measures have an exceptional nature; the law has to establish their maximum term, to provide the

[2] Crişu, Constituţia României, op. cit. p. 217.
[3] Ioan Muraru, Elena Simina Tănăsescu, Drept constituţional şi instituţii politice, op. cit. p 166-167.
[4] Grigore Theodoru, Tratat de drept procesual penal, Hamangiu Publishing House, 2007, p. 425 and the following.

possibility of withdrawing them and to regulate the cases when they cease de jure; in case of flagrant offenses, the detention measure adoption is mandatory. The same author[5] classifies criminal procedural measures in personal and actual, and the first category includes: deprivation of freedom (detention, arrest), the obligation of not leaving the locality or country, to undergo a medical treatment.

By analyzing the concept and the categories of preventive measures, Grigore Theodoru[6] shows that: according to art. 136 (Code of Criminal Procedural of 1968) para. (1), preventive measures are coercive instruments provided by the law which can be taken by criminal prosecution bodies, judges and courts of law, in order to ensure the good performance of the criminal trial or to prevent the absconding of the defendant from criminal prosecution, trial, or from the execution of sentence; this is why they are called preventive measures and exist in all law systems; the establishment of measures with different individual freedom restriction is recommended in the adoption of preventive measures; the law has to establish the legal guarantees required in order to prevent any abuse in taking and maintaining preventive measures; such guarantees are provided by art. 23 of the Constitution, in art. 5 of the Code of Criminal Procedure (1968), etc.

In what concerns the procedural nature of preventive measures, Grigore Theodoru concludes that: deprivation of freedom as preventive measure has a procedural nature; it is taken only within criminal trial; preventive detention is optional; deprivation of freedom is an exception to freedom rule[7].

Ion Neagu și Mircea Damaschin analyze the detention in the large context of procedural measures[8], in section on preventive measures. By analyzing critically the opinions already expressed in the doctrine, Ion Neagu and Mircea Damaschin formulate a more concise definition according to which preventive measures are coercion institutions which can be ordered by criminal judicial bodies, for the good performance of criminal trial and the fulfillment of the scope of the actions carried out in the criminal trial[9]. The author believes that procedural measures: have a nature adjacent to the main activity; have a temporary nature; have coercive purpose although not all measures entail the existence of coercion (protection measures or safety measures of medical nature); in special situations they have protective and not coercive purpose.

In what concerns the classification[10] of procedural measures, Ion Neagu notes the existence of the following: personal or actual procedural measures (on the basis of values); measures which concern the person of the suspect or defendant (detention, arrest) and measures which can be taken on other individuals (sequestration, protection of minors) – on the basis of the individual; measures which can be taken only in the criminal prosecution stage (detention); measures which can be taken only in the judgment stage (removal from the court room); measures which can be taken in both situations (arrest, sequestration) – on the basis of the stage of the criminal trial; coercive measures (arresting, sequestration) and protection measures (notification to the protection authority) – on the basis of the

[5] Theodoru, op. cit. p. 427.
[6] Theodoru, op. cit. p. 428-429.
[7] Theodoru, op. cit. p. 429-430.
[8] Ion Neagu, Mircea Damaschin, Tratat de procedură penală, Partea generală, Edition II, Universul Juridic Publishing House, 2015, pg. 592 and the following.
[9] Neagu, Damaschin, op. cit. p. 595.
[10] Neagu, Damaschin, op. cit. p. 594.

scope. By analyzing the preventive measures, Ion Neagu and Mircea Damaschin note that their legal regulations led to cases of non-unitary application of the criminal procedural law, causing the High Court of Cassation and Justice to make certain decisions in the settlement of second appeals in the interest of the law promoted in this field[11]. The detention is deemed a preventive measure, together with the arrest.

Due to the fact preventive measures entail individual freedom, they can be ordered if the following general conditions are met at the same time:

- there are substantiated evidence or indications which lead to the reasonable suspicion that an individual committed a crime;
- preventive measures are required for the good performance of the criminal trial, for the prevention of suspect's or defendant's absconding from criminal prosecution or judgment or for the prevention of another offense;
- there is no ground to prevent the initiation or pursuing of the criminal action;
- the preventive measure should be proportionate with the gravity of the accusation brought to the person this measure is taken against and should be required for the fulfillment of the scope pursued by ordering this measure;
- the suspect or defendant must be heard in the presence of a lawyer of their own choosing or appointed ex officio.

According to all the criminal procedural rules, these general conditions must be fulfilled for any of the preventive measures provided by the law[12].

By analyzing the detention, Ion Neagu and Mircea Damaschin[13] believe: this is the easiest of the measures involving freedom deprivation; as a preventive measure differs from three similar concepts, namely: criminals capturing under art. 310^2 and art. 61 para. (2); the individual detention by the police either for identity checking or for the fulfillment of an warrant for arrest under art. 266 para. (1); the prohibition to leave the courtroom until the end of the judicial investigation (in this respect, art. 381 para. (9) provides that heard witness shall remain in the room at the disposal of the court until the completion of the judicial investigation carried out in the respective session)

The conditions which must be fulfilled at the same time in order for this measure to be adopted are, according to art. 209 para. 1, in connection to art. 202, the following:

- there are substantiated evidence or indications which lead to the reasonable suspicion that an individual committed a crime;
- preventive measures are required for the good performance of the criminal trial, for the prevention of suspect's or defendant's absconding from criminal prosecution or judgment or for the prevention of another offense;
- there is no ground to prevent the initiation or pursuing of the criminal action;
- the preventive measure should be proportionate with the gravity of the accusation brought to the person this measure is taken against and should be required for the fulfillment of the scope pursued by ordering this measure;
- the suspect or defendant must be heard in the presence of a lawyer of their own choosing or appointed ex officio.

The detention can be ordered both by the criminal investigation body and by the prosecutor. If the detention was ordered by the criminal investigation body, this is bound to notify immediately and by any means the prosecutor on the preventive measure adoption.

[11] Neagu, Damaschin, op. cit. p. 595.
[12] Neagu, Damaschin, op. cit. p, 597-599.
[13] Neagu, Damaschin op. cit. p. 619-623.

As a transposition of the fundamental principle of the right of defense in this field, the judicial body which adopted the measure is bound to notify the suspect or defendant, before the hearing, that he is entitled to be assisted by a lawyer of his own choosing or appointed ex officio and that he is entitled to make no statements, except the provision of information on his identity, by making him aware of the fact that what he says may be used against him. According to the provisions of art. 209 para. (2), the detained person shall be promptly informed in a language which he understands, on the crime he is suspected for and the reasons of the detention.

The detention measure can take no more than 24 hours. According to previous regulation, the term throughout which the person was deprived of freedom following the administrative measure of being taken to the police department, provided by art. 31 para. 1 letter b of Law no. 218/2002 on the organization and functioning of the Romanian Police was deducted from the aforementioned term.

According to current regulation, art. 209 para. (3), the term required for taking the suspect or defendant to the office of the judicial body is not included in the term of the detention.

According to art. 209 para. (10) the detention measure shall be ordered by ordinance, which shall include the grounds of the measure, day and time when the detention begins, as well as day and time when the detention ends.

Throughout the term of the detention, the criminal prosecution body can conclude that the conditions for preventive detention are concluded, case in which the prosecutor shall notify the judge of rights and freedoms in order to take the preventive detention measure in what concerns the detained suspect, at least 6 hours before the expiry of the retention term.

3. Constitutional regulations

In what concerns the detention of an individual, the Constitution, in art. 23, establishes the following:

- it shall be permitted only in the cases and under the procedure provided by law;
- it shall not exceed 24 hours;
- any person detained shall be promptly informed, in a language he understands, on the grounds for his detention;
- the release of a detained person shall be mandatory if the reasons for such steps have ceased to exist, as well as under other circumstances stipulated by the law.

The rule of art. 24 of the Constitution according to which all throughout the trial, the parties shall have the right to be assisted by a lawyer of their own choosing or appointed ex officio shall be added.

The constitutional text is clear and definite. No detention can last more than 24 hours. Upon the expiry thereof, the authority which ordered the detention has two options: the release; the obtaining of a preventive detention warrant.

It is important to note that the constitutional provision establishes the maximum term of the detention, but this does not mean that the person must be retained the respective number of hours, regardless of the situation. The authority which ordered the detention shall be entitled to maintain this status only for the time required to clarify the circumstances leading to it.

Therefore, the detention can last one hour, seven hours, etc. The legal liability of the authority for an unjustified term of the detention is out of question.

This is the reason why we will note the legal details in the field.

Legal regulations

We can add here several rules provided by the Code of criminal procedure, namely:

the conditions which have to be fulfilled for the ordering of this measure are provided by art. 143 para. 1 and 2; the detention can be ordered both by the criminal prosecution body and by the prosecutor; it is required to notify the defendant that he is entitled to hire a lawyer and not to make any statement, by drawing his attention on the fact that what he declares can be used against him; the grounds of the detention are made available; the detention measure is ordered by ordinance, which has to provide the day and hour the detention began, and the release ordinance has to provide the day and hour the detention ceased; preventive detention measure can be taken throughout the detention term, under the terms of the law; the deputy or senator cannot be retained without the consent of the Chamber he is part of, after hearing him; in case of flagrant offense, they can be retained and the Ministry of Justice shall notify immediately the President of the Chamber on the detention; if the Chamber thus notified finds that there are no grounds for detention, it shall order the annulment of this measure (Ion Neagu criticizes this regulation in op. cit. p. 466).

4 Certain references to the Constitution revision draft which was discussed by the Constitutional Court of Romania and then in the doctrine[14] are also of great interest.

Art. 23 of the Constitution regulates individual freedom, thus establishing in para. (1) that individual freedom and security of a person are inviolable.

Paragraph (3) of this article establishes that „Detention shall not exceed 24 hours"

The President of Romania, in the exercise of the right provided by art. 150 (1) of the Constitution, upon the proposal of the Government, initiated the revision of the Constitution[15], and in this context the revision of art. 23 para. (3). Therefore, the legislative proposal established that paragraph (3) shall read as follows: "Detention shall not exceed 48 hours." Therefore, the extension of the term of the detention from 24 hours to 48 hours was proposed.

Under art. 146 letter a) final thesis of the Constitution, the Constitutional Court pronounced on the revision initiative in favor of the legislative proposal, namely: the new wording of the constitutional text, by regulating the maximum term of detention, cannot be construed as resulting in the suppression of the guarantees of a fundamental right under art. 152 para. (2) of the Constitution; the proposed amendment responds to the obligation of the state to ensure a fair balance between the interest of defending fundamental rights of the individual and the interest of defending the rule of law, by taking into account the issues raised in practice by the current detention term, in what concerns the activity of the criminal prosecution bodies; the detention of a maximum term of 48 hours is justified for the effectiveness and efficiency of the measure.

The view of the Constitutional Court can not be deemed as resulting from a thorough examination of the doctrine, legislation and case law in the field. We will try to motivate this statement.

We hereby recall that personal freedom represented the subject of thorough analyses in the drafting of art. 23 of the Constitution (1990-1991), as well as in the

[14] The information and documentation for this issue are taken over from Ioan Muraru, Examinare critică a unor aspecte rezultate dintr-o decizie a CCR. Curierul Judiciar, no. 11/2011, pg. 590-593.

[15] We will use the text of the Constitution revision proposal as it is provided in Decision no. 799 of the Constitutional Court.

Constituent Assembly[16]. This should be recalled because the historical method was and remains one of the main methods of interpretation of legal regulations.

In the Theses of the Constitution Draft submitted to the Constituent Assembly (Thesis 2) the Drafting Committee proposed the following wording:

"The right to personal security and freedom is guaranteed.

Prosecution, detention or arrest of an individual shall be permitted only in cases expressly provided by the law and in strict compliance with the legal procedure established for this purpose.

Detention shall not exceed 24 hours."[17]

The Constitution Draft submitted to the Constituent Assembly established the following:

"(1) Individual freedom and security of a person are inviolable.

(3) Detention shall not exceed 24 hours."

The debates held on the content of individual freedom and safety of a person explain history and motivate solutions. We believe that the maintenance of the view of the Drafting Committee submitted by one of its reporters presents undoubtedly an historical interest, meaning that: "It may be that in 2-3 years, when we improve justice apparatus, prosecution apparatus, therefore, everything that works in the judicial systems, these terms are exaggerated. We may ask the judges to pronounce a ruling in less than two months, for example. This may happen when we have everything required for a good functioning of justice. Therefore – this observation must be considered from now on– we do not have to brake, by means of the Constitution, the possibility that the legislation responds as best as possible to the requirements for the protection of life and freedom of person. This is why we, the committee, we dare to ask you to keep the text proposed by us"[18]. Therefore, basically, these discussions explained the constitutional provisions and opened perspectives for public freedoms.

Conclusions

I always considered that the provisions of art. 23 are earned rights, a victory of reason against abuses and dictatorship, a victory against the police state. The aforementioned legislative proposal has to be regarded as a step forward or as a step backwards?

A potential convincing answer to this question entails the elucidation of two issues:

1) Which is the legal nature of reason; 2) If the provisions of art. 152 para. (2) of the Constitution are applicable in this case[19].

1.1 After a thorough examination of art. 23 of the Constitution, it can be noted that two legal categories are regulated, which are undoubtedly connected but not the same, namely individual freedom and security of person. If freedom concerns physical liberty of a person, his right of acting and moving freely, of not being held in slavery or in any other servitude, of not being detained or arrested, except in cases and according to the forms expressly provided by the Constitution and laws, the security of a person represents all the guarantees which protect the person in cases where public authorities, in the application

[16] See Romanian Constitution Genesis. 1991. Works of the Constituent Assembly. Autonomous Administration „Official Journal", 1998, especially p. 196-198; 211-256; 293-334; 341-434; 440-445. The work shall be hereinafter referred as **Genesis**.

[17] Genesis, p. 191.

[18] Ioan Muraru, in Genesis, p. 347.

[19] According to this article, para. (2) no revision can be performed if it results in the suppression of fundamental rights and freedoms of the citizens or of the guarantees thereof (subl. ns.).

of the Constitution and the laws, take certain measures which concern individual freedom, guarantees which make sure that these measures are not illegal. This system of guarantees allows the repression of antisocial acts, but, at the same time, provides innocents the required legal protection[20].

A first finding is required: the content of the security of a person includes all the rules in the field of art. 23 of the Constitution: detention, arrest, hearings, procedures, presumption of innocence, etc. Therefore, art. 152 para. (2) of the Constitution concerns the security of the person as a whole, any revision of components being prohibited.

By analyzing briefly the doctrine we find that a valuable work[21] shows, among others, the following: the right to freedom and security is an inalienable right, which no one can give up, which concerns all persons; the European Court of Human Rights often stated in its case law, among others, that the main scope of art. 5 is the protection of individual against arbitrary actions of state authorities; the circumstances under which a person can be legally deprived of freedom have to receive a narrow and rigorous interpretation, due to the fact they are exceptions on a fundamental guarantee of individual freedom; deprivation of freedom can have direct and adverse consequences on the exercise of other individual rights and freedoms; the detention of the persons to be prosecuted should not be a rule; the right to freedom and the right to security, taken together, represent a fundamental right that takes no alternative – there is the status of freedom or the status of deprivation of freedom, etc.

Another successful work shows that "the guarantee of the substance", the respect of the essential content or of the essence of fundamental rights and freedoms is a major idea of comparative constitutional law which is recorded in modern constitutions[22]. The thesis according to which the security of the person falls into the category of guarantees of individual freedom is generally recognized, in this respect, the scientific works of real value being interesting and showing among others, the following: "The concept of security does not mean that the state can never prejudice individual freedom, but it does mean that guarantees have to be granted in this field to the individual in order for these prejudices not to be illegal... . Protective principles mainly consist in the organization of a criminal procedure which ensures not only the repression of crimes and offenses, but also grants innocents certain guarantees[23]. "Together with the term of individual freedom, the constitutional text also uses the expression of security of person. The security of the person consists of all the guarantees provided by the law whereby the person is protected if the state takes measures of deprivation of freedom against the respective person"[24]; "the meaning of the concept of security of person expresses the guarantees which protect the person in case the state orders measures of deprivation of freedom"[25].

[20] Cf. Ioan Muraru, Elena Simina Tănăsescu, Drept constituțional și instituții politice, Edition 14. Vol. I, C.H.Beck Publishing House, 2011, p. 166

[21] Corneliu Bîrsan, Convenția europeană a drepturilor omului, Comentariu pe articole, vol. I, All Beck Publishing House, 2005, p. 277, 278, 279, 283.

[22] Louis Favoreu, Patrick Gaïa, Richard Ghevontian, Jean-Louis Mestre, Otto Pfersmann, André Roux, Guy Scoffoni, Droit Constitutionnel, 13e edition, Dalloz, Paris, 2010, p. 887.

[23] Claude-Albert Colliard, Libertés publiques, Dalloz, Paris, 1982, p. 234.

[24] Ștefan Deaconu, Drept constituțional, C.H.Beck Publishing House, Bucharest, 2011, p.237.

[25] Anastasiu Crișu, Comentariu, p. 213.

The Charter of Fundamental Rights of the European Union must also be taken into account, by providing in art. 6 the following: "any person has the right to freedom and security". The security of a person is therefore considered a fundamental right[26].

Given all these brief remarks, we can conclude the following: the security of a person which is often considered a fundamental right represents a guarantee of the fundamental rights in the Romanian Constitution system; all components of the security of person, as provided by art. 23 of the Constitution, form a single and indivisible block, therefore, the revision of a component is not allowed due to the fact it affects the whole block; the legislative revision proposal comes into conflict with art. 152 para. (2) and therefore it cannot be performed.

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[26] For the explanation of the text, see Guy Braibant, La Charte des droits fondamentaux des l'Union Européenne, Edition du Seuil, 2001, p.107-109.

THE ROLE OF REMOTE SENSING IN COMBATING TERRORISM AND ENSURING STATE SECURITY

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Abstract

This study aims at analyzing remote sensing which represents a scientific activity by means of which information related to the use of satellites is obtained and processed. The procedure used to obtain this information is becoming increasingly important, even vital, when it comes to ensuring state security against external aggression, against all forms of terrorism, and, especially, against cyber terrorism. Thus, regional conflicts and security crises are on the rise, leading to the emergence of global risks and threats. This can be counteracted by remote sensing, a science which is in significant progress, due to technological development characterizing the 21st century. Under these circumstances, the aerospace component has become critical in the conduct of the latest armed conflicts, as the information on the movements of large groups of people is a key element in carrying out military operations.

Keywords: *remote sensing, national security, terrorism, self-defense of national territory, cyber-terrorism*

1. The concept of remote sensing

Remote sensing is the science that deals with the receipt of information related to elements located at a certain distance, starting with multi-spectral or radar images obtained by means of remote sensors (satellites). The term remote sensing indicates obtaining information about an object situated at a distance, without any material contact between the observed object and the observer. Remote sensing does not only include the processes and the apparatus that allow obtaining an image of the earth's surface from a distance, but also further processing, in the context of certain determinations.

Remote sensing is an applied science, dependent on the state of technological development existing at a certain moment.

In legal doctrine, the concept of remote sensing comprises the same basic elements, but sensitively interpreted, given that the method of remote sensing involves high resolution technology concepts.

However, all definitions have as reference the definition included in the UN General Assembly Resolution no. 41/65 of December 3, 1986.

In Romanian doctrine, remote sensing is defined as a method that can determine the nature and condition of the natural resources of the Earth environment, through observations and measurements made from space objects, or 'space activity through which information about geophysical phenomena, human activities, natural resources from the Earth surface or underground, both in the territory under the sovereignty of states, and in areas not subject

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to their sovereignty, is collected and stored'[1].

'*Teledetecție*' is the Romanian translation of the English phrase '*remote sensing*', used ever since the 1960s to define this specific technique for obtaining information, once the first Earth observation satellites were launched into their orbit[2].

In fact, remote sensing comprises any method of obtaining and recording information from a distance, including not only the processes and the apparatus that allow obtaining a remote image of the earth surface, but also the necessary processing in the context of certain determinations.

From this point of view, remote sensing activities include the procedures subsequent to obtaining satellite information, as listed in the UN General Assembly Resolution no. 41/65/1986. The UN document provides that the term 'remote sensing' is different from the technical term and it has two limitations: the goals and objectives that have military use are limited and airborne remote sensing is excluded.

Corpus iuris spatialis, which is regulated in the Space Treaty opened for signature simultaneously in Moscow, London and Washington on January 27, 1967, as well as the entire body legislation in this area, provide that the activities of states in outer space are subject to international law and include the phrase national territory 'self-defense'.

If, initially, remote sensing implied remote observing all natural resources, their changes and their role in the productive and economic processes of the states, today, remote sensing supplements its functionality by observing the actions of the states considered to represent a threat to the international community.

2. The concept of national security

One definition of the term 'national security' refers to the body of all political, economic, diplomatic, military, administrative, legislative processes, actions and measures by means of which national-state existence, as well as human rights and fundamental freedoms are guaranteed.

Characterized by multiple dimensions, security involves a complex structure, comprising various elements among which information security is included. Information security represents the body of all measures dealing with identifying and storing information for determining risk and establishing measures to protect the processing, storage and transmission thereof.

As far as the defining scope of the NATO security concept is concerned, the domain was updated within the Istanbul Summit (June 2004), when the organization highlighted the following objectives: collective defense; applying the principle of indivisibility of allied security; creating a 'multilateral bridge' across the Atlantic; and countering threats to allied territory, whatever their source (considering that security challenges are global, NATO opts for global cooperation as the only effective response). At present, one of the most important partners of NATO is the European Union. In the last decade, the EU has faced the need to complete the objectives of the Maastricht Treaty, through a security strategy of its own.

3. The concept of terrorism

The concept of 'terrorism' was first used at the second Conference for the unification of criminal law in Brussels, in

[1] Raluca Miga Beşteliu, *Drept internațional. Introducere în dreptul internațional public* (International Law. Introduction to International Public Law), All Publishing House, Bucharest, 1997, p. 260.

[2] http/coello.ujaen.es

1930, and it was defined as 'the intentional use of means capable of producing common danger represents acts of terrorism consisting in crimes against life, liberty and physical integrity of persons or which are directed against private or state property.'

Terrorism is defined in the literature as 'deliberate and systematic use of means likely to cause widespread terror to achieve criminal purposes.' Terrorism is a different kind of war – new in terms of intensity, ancient as origin – a war of guerrillas, rebels, assassins; a war by ambush, not combat, by infiltration, not aggression, in which the victory is obtained by eroding the enemy and not by getting them involved[3].

'Contemporary terrorism' well exemplifies the main types of terrorism: nationalist / ethnic-separatist terrorism, religious terrorism, ideological terrorism (far left or far right), anarchic terrorism, terrorism sponsored by states.

According to some authors, terrorism can be international, 'when seeking to complicate or to cause to break peaceful relations between states, to remove certain politicians undesirable in foreign circles or to influence domestic or foreign policy of a given country, through intimidation.'

In Romania, Law no. 535/2004, art. 4 para. 7, defines terrorist actions as 'preparing, planning, promoting, committing, directing, coordinating, controlling a terrorist act, as well as any other activities unfolding subsequent to terrorist act being committed, if related to the terrorist act.'

4. Remote sensing and state security

We have been able to refer to space activities and remote sensing itself, as it is defined at present, ever since the launch of the Soviet satellite Sputnik 1, on October 4, 1957, when Korolev (a researcher, space enthusiast) showed Khrushchev the first satellite project for approval.

In response, the United States of America launched the satellite Vanguard 1 in 1958 and then placed into orbit the first geostationary Earth observation satellite, equipped with an optical sensor, the satellite being manufactured for military purposes.

Subsequently, the production of reconnaissance satellites developed, as they were used by space powers in armed conflicts: in the war between Israel, Egypt and Syria, after the attack of the Egyptians on the Suez Canal on October 6, 1973 (the so-called Yom Kippur war). In the seventh decade of the 20th century, other states started to develop space programs in order to reach strategic goals, especially in their specific geographical area. China has developed space programs since 1975, launching reconnaissance satellites, being followed by France and Israel.

Nowadays, outer space is no longer dominated by few countries (USA, Russia). Almost 150 countries, many of them belonging to the so-called 'third world' are directly or indirectly involved in space activities for the benefit of national development.

However, the privatization and commercialization of space activities, including those related to remote observation, have not remained entirely under state supervision. Thus, prior to 1984, in the US, only NASA was entitled to launch civil remote sensing satellites.

In France, remote sensing has been regarded as a business activity, in which the public and the private sectors have been associated. The Spot satellite was given to CNES (the French Space Agency), which is a public entity with industrial and commercial character[4].

[3] www.arduph.ro – General considerations on terrorism.
[4] V. Crețu, *Drept penal internațional* (International Criminal Law), Tempus Publishing House, Bucharest, 1996, p.245.

Commercial activities have unfolded by means of transferring and selling the data obtained by remote sensing to the states concerned, as well as by exchanging or transferring the data, under various forms, between the countries possessing space technology.

In the past, in the military, remote sensing proved its value through the results obtained from processing data received from the ground. The exchange of information between the member states of the North Atlantic Treaty, as well as the data from the former USSR, useful for member states of the Warsaw Pact, had an important role in maintaining a military balance in Europe. The capacity of the reconnaissance satellites on the state of war was proved in the 1991 Gulf War, carried out as an operation under the name 'Desert Storm'. In this regard, the French Defense Minister, Louis Joxe, pointed out that 'the outcome of the war in favor of the allies was due to the reconnaissance satellites, which provided valuable information, thus the war being extremely dependent on the American technology.'

The responsibility of the states, regulated by international incomplete rules, in terms of globalization, privatization and commercialization of remote sensing activities, should also be viewed in terms of ownership, through this technology, of military data obtained by a state or a private entity, which, if disseminated, can affect the national security of the state being observed.

The existing legal regulation in this area is obsolete, considering the fact that the states, being responsible for space activities developed and operated by an entity under their jurisdiction, cannot fully control the information obtained by remote sensing.

Another issue is that, once the 'Cold War' ended, the number of states which have artificial satellites in the geostationary orbit has significantly increased due to the production of ballistic missiles.

In 1969 only the US and the former USSR had ballistic missiles. In 1989, 15 countries had such weapons: France, Britain, Germany, and countries in Eastern Europe such as Poland, Hungary. In Asia, China had such weapons, and subsequently countries in Africa and Asia added to the list.

The importance of producing and possessing such military arsenal lies in the fact that this type of weapon penetrates both the atmosphere and the outer space, and in order to detect these missiles it is necessary to possess sensing and remote sensing technology, the interception being made in the outer space[5].

Therefore, at present, remote sensing and the operations carried out using this technology play a significant role in the missile system designed to defend the security of states, but they can also be used to attack another state.

The principles of such systems, in the outer space, refer to the right of self-defense of the state in danger. The provision in the Space Treaty, as well as the entire legislative body in this field, provides that the activities of the states in the outer space are subject to the provisions of the rule of international law, which include the phrase 'self-defense of national territory.'

On this particular aspect, the International Court of Justice, being notified in 1996 with a request for the use of nuclear weapons, could not decide the legitimacy of their use when the existence of states is in danger.

As by means of remote sensing, one could see not only the areas and the spaces

[5] Jorje Guttierez del Olmo, Miguel Victoriano Moreno Burgos, INDRA Espacio - Departamento de Teledeteccion, Pasado, Presente y Futuro de la Teledeteccion de Alta Resolucion,conform www..mappinginteractivo.com.

outside national sovereignty, but also those under the jurisdiction of states, legal and political issues debated at the UN were thorny and numerous. Thus, the legal Subcommittee of COPUOS within the UN became responsible for finding solutions to the divergent points. Institutionally, they proved that it is impossible to ban to remotely observe the territories of the states, others than those states launching the satellites. Some theorists[6] believe that the states do not comply with the recommendations of the UN General Assembly in that they relate outer space to military activities and use technology as a means of strengthening security at national, not international level. Although as far as disarmament is concerned, multilateral, bilateral treaties have been signed or resolutions of the UN General Assembly have been adopted, in the context of developing and placing remote sensing satellites in outer space, the international community is concerned about the use of this high-resolution technology for military purposes, even under the pretext of 'self-defense' or 'preemptive strike', concepts which have long been debated in the institutional framework or doctrine[7].

In space law, disarmament is reserved an important place as principle, but with the advent of remote sensing technology, we estimate that the current provisions in the treaties require reconsideration. Thus, as long as space technologies have a dual use (civil and military), defense strategies of the states will also use them for dual purpose. Currently, the global satellite navigation system is not illegal, as long as it does not spread nuclear weapons, but it can be categorized as a weapon, if it provides data and information for military purposes.

5. Remote sensing in the fight against terrorism

The effort to determine the current threats to international security is closely related, in the view of most NATO member states, to the existence of non-military threats: terrorism, proliferation of weapons of mass destruction, corruption, organized crime, border insecurity, trafficking and illegal trade (weapons, drugs, persons), illegal migration, ethnic and religious conflicts, depletion of natural resources, which can affect the security status by having a huge impact on the political and economic security, as well as other fields.

The complexity of the current security environment has numerous implications for the aerospace component. Because of the multiplication of regional conflicts and security crises (terrorist, environmental, economic, food, health, human trafficking, weapons and drugs, the needs to extract third-country nationals and civilians, cyber-threats), which have resumed their international character and require multipolar management, in tune with the architecture of the geopolitical powers of the 21st century, new risks and threats have emerged, and thus the importance of the aerospace power has grown to reach a new dimension[8].

The current security environment, characterized by fragmentation and major danger represented by terrorists, armed clans, cartels, mafias, extremists and criminals, gives way to a new type of

[6] Yasuaki Hashimoto, Missile Defence and International Law Tokio, 2002, p. 149, in Proceeding of the Forty-Fifth Colloquium on the Law of Outer Space, Houston, 2002.

[7] André Lebeau, *L'espace en héritage*, Paris, 1986, Editions Odile Jacob, Seuil, p.148.

[8] Loren B. Thomson, Satellites over Iraq: A report Card on Space-Based ISR during Operation Iraqi Freedom, în Intelligence, Surveillance and Reconnaissance Journal, mars 2004, p. 20, apud William B. Danskine, ISR offensif dans la guerre contre le terrorisme, Air & Space Power Journal en français – Printemps 2006.

conflict, without a battlefield and without clearly identified armies, with an opponent ready to use chemical, biological or nuclear weapons against populations. In a new war, waged in such conditions, marked by nonlinearity and uncertainty, by the chaos strategy, the role of the aerospace component becomes paramount. The experts, belonging to those states dominating aerospace, use the aforementioned arguments to structure their demonstrations about the importance of this field, acknowledging that this domain has developed in line with the 21st century technology[9].

State terrorist threat – by hosting terrorist networks and providing them access to weapons of mass destruction – was the basic motivation for the outbreak of current wars, which have definitely capitalized on the aerospace component[10].

Remote sensing is mainly working either on movement of certain larger groups of people, considered to be related to terrorist groups, or on combating terrorist actions in certain countries that host groups which are well known to be conducting terrorist related acts.

Space activities have developed a vast network of satellite telecommunications, which constituted the first recognized application of space activities with real social and economic benefits. Through satellites, useful information is disseminated to all participants in the international society, but, in some cases, it may also have a criminal component.

The defining elements of terrorism are also manifested by means of telecommunications networks, by satellites and by the Internet.

The cyber-terrorism field covers many definitions, many of them attempting parallelism with the classical definition of terrorism. Essentially, according to the definition of the Federal Bureau of Investigation of the United States of America, we are dealing with 'a premeditated, politically motivated attack against information, computer systems, programs and data operations, leading to violence against civilian objects and non-combatants, an attack exercised by subnational groups or clandestine agents.'

Nowadays, cyber attacks represent a means to maintain an electronic terror on governments, business environments or persons, even if only on the grounds that they are cheaper than any other established, traditional method.

From this perspective, electronic terrorism is to be limited by means of locating the sources of distribution of these activities, by exchange of data and information, by using means of logistical, institutional investigation[11].

Although satellite telecommunications was regulated by a series of international agreements and treaties, the globalization and privatization of this industry, by increasing the number of companies that launch satellites and provide cheaper services to consumers, have led to the separation of regulatory functions from the operating ones. Because of the gaps created in this manner, satellite telecommunications can be used to propagate terrorist acts.

Taking into account the brief considerations on the phenomena affecting the security of states, the possibilities offered by technological developments in the fight against terrorist acts and given the globalization of international society, it is

[9] Vasile Popa, Evoluția mediului de securitate, riscuri, amenințări și elemente acționale în dimensiunea aerospațială, Editura Universității Naționale de Apărare „Carol I", București, 2009.
[10] Loren B. Thomson, ibidem
[11] http://www.airpower.maxwell.af/

mandatory to adopt viable rules, well adjusted to current needs, at both national and international levels.

However 'the battle is waged by man, not rifle or revolver. The will to win represents the strength and makes the victory possible. War is a struggle between two wills eager to win; the one stronger in its action becomes victorious. Being a winner means being able and willing to fight when the opponent neither can do it nor want it. The stake of the battle is to destroy the enemy's will to fight, while maintaining one's own will up[12].'

6. Conclusions

The considerations on the role of remote sensing in the fight against terrorism are important due to the developments of cyber terrorism, as a form of attack on the states and their security. Counteracting these actions requires improving the states' information security systems, therefore it is necessary to continually develop satellite technology, legislation and regulatory framework on outer space law, as well as international rules on satellite telecommunications that should meet the needs of the new world order and the circumstances that currently require strategies attuned to the process of reconfiguration and adaptation in order to successfully deal with the methods used to threaten the stability of the international society.

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[12] Loghin, M., Pregătirea fizică în armată – factor de creștere a eficienței pregătirii de luptă în condițiile respectării tipologiei solicitărilor psiho-fizice ale câmpului tactic de luptă ((Physical training in the army - factor increasing the efficiency of the combat preparedness under the circumstances of complying with the typology of the psycho-physical requirements of the tactical battlefield), PhD Thesis, ANEFS, Bucharest, 2001.

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THE CRIMINAL CHARGE

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Abstract

The process of criminal prosecution against a particular individual is ordered by the prosecutor or law enforcement investigator by ordinance. After the decision to carry on with the criminal investigation, the suspected person, the perpetrator acquires a legal standing which allows a full spectrum of rights and obligations stipulated by law. This project is focused on the link between our national criminal law regulation regarding the criminal investigation and the demands of the European Convention for human rights.

Keywords: *criminal prosecution; European Convention on Human Rights, criminal law, reasonable suspicion, criminal charge.*

1. Introduction

The start of the criminal investigation proceedings has undergone significant changes under the provisions of the new Criminal Procedural Code over the old regulations of 1968.

Thus, according to art. 305 of the Criminal Procedural Code, "when the preliminary criminal complaint fulfils the conditions stipulated by law, the investigator begins criminal proceedings regarding the committed or prepared illicit act, even if the author is indicated or known".

Compared with the provisions of the Criminal Procedural Code of 1968, which in art. 228 stated that " the investigator notified by resolution, begins criminal proceedings when from the content of the complaint or from the preliminary investigatory acts does not result any legal impediment stipulated in art. 10" we may ascertain the occurrence of two major changes in the national criminal policy.

2. Content

Firstly, according to the Former Criminal Procedural Code, after notification the prosecution could commence proceedings regarding both the offense (*in rem*), and on one particular person (in personam). Nowadays, authorities are required to begin with the in rem phase, even if in the complaint the offender is indicated or enough information exists to allow his identification in order to concentrate the investigation on a particular individual prosecution (initiation of the in personam phase).

The new Procedural Code thus establishes the obligation of the prosecution to be initiated only regarding an offense, so initially it can capitalize only on the *in rem* part of the process.

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Secondly, the prosecutors are obligated to initiate in rem proceedings every time they were seized legally and have established the document meets the form and substance and in the case self-notification. Consequently, the new Code of Criminal Procedural vision has eliminated the Preliminary acts of criminal prosecution, previously covered by art. 224 of the old C.p.p.

The immediate start, quasi-automatic prosecution after formulating a notification enables the creation of a procedural framework necessary for the investigators can effectively manage the evidence relevant to verifying the merits of the complaint and, further on, to identify and prove the act was committed by the perpetrator. Thus, the message stemming from the start of the criminal investigation concerning a crime means that the investigators have been lawfully notified, are legally invested and are currently analysing evidence to verify the complaint[1].

In order to indict after receiving the complaint, the criminal investigator (prosecutor or law enforcement official) should first verify their competence, in accordance with art. 294 C.p.p. In case they consider that they are generally, materially and territorially competent, they then proceed to check the notification act (criminal complaint, denunciation, acts signed by other authorities) in terms of form and content. During this "regulatory" stage the alleged criminal complaint is verified if it is described in a clear and sufficient manner, and if not it shall be resent to the complainant, in order to be completed.

By analyzing art. 305 par. 1 C.p.p., as amended by Ordinance No. 18/2016, one can notice the elimination of the condition that none of the cases that prevent the criminal action stipulated by art. 16 par. 1 C.p.p. should be applicable[2].

The elimination of this negative condition is useful because at the beginning of *in rem* investigations, an analysis of legal impediments to the criminal indictment related to a person's criminal liability is not necessary. This condition was apt to lead to difficulties at the start of investigations, especially in cases in which criminal action was conditional upon prior complaint of the victim who was in a physical or moral impossibility to formulate preliminary the complaint (as an example road accidents which caused a bodily injury leading to a period in which the victim was unconscious and in intensive care, given that the offense provided by art. 196 penal Code, the criminal proceedings required the previous complaint the injured person to be set in motion)[3].

However, judicial practice has provided cases in which even if the criminal complaint met the content and form conditions, the prosecutor found evidence of one of the cases stipulated by art. 16 par. (1) C.p.p., certain situations which require the dismissal of a case, without the criminal proceedings *in rem* can be identified.

Also, if the investigator finds nonessential errors that can be corrected by

[1] Nicolae Volonciu, Andreea Simona Uzlau, Noul Cod de procedura penala, Bucuresti, Editura Hamangiu, 2014, p. 765.

[2] According to art. 16 para. (1) C.p.p., criminal action cannot be set in motion, and if it was set in motion cannot be exercised if: a) the act does not exist; b) the act is not provided by criminal law or was not committed with guilt established by law; c) there is no evidence that a person has committed the offense; d) there is an explanatory; e) lack of preliminary complaint, authorization or notification by the competent body or another condition stipulated by law, required in support criminal action; f) amnesty or prescription, the death of the suspect or accused person or suspect legal termination in a case of a business; g) withdrawn prior complaint, so that criminal liability is removed, reconciliation, agreement or mediation under the law; h) legal impediment to punishment; i) there is res judicata; j) transfer procedure with another state.

[3] Mihail Udroiu, Procedura penala.Partea speciala, Editura C.H. Beck, Bucuresti, 2016, p. 37.

complainant, he may decide to return it for completion. In case the deficiencies are major, essential and cannot be rectified, the case is to be closed, in accordance with art. 315 par. 1 letter. a C.p.p.

After verification of the formal conditions of the notification act and upon establishing their competence, the *in rem* phase can commence. In this regard it should be noted that in the process of finding the applicable law, the investigator is not bound by initial complaint.

From a procedural standpoint, the criminal investigation shall be ordered by the law enforcement investigator or by the prosecutor by ordinance. The procedural act of commencement of prosecution *in rem* must include the particulars set out in art. 286 par. (2) letter a-c and g: name of the prosecutor's office and date of issue; full name and position of the person making it; the object of the prosecution, the applicable legal frame, data on the suspect or accused person; signature of the person who wrote it.

By analyzing art. 286 par. 2 letter a, C.p.p., in relation to art. 305 par. 1 C.p.p., a mismatch can be found. Thus, considering that the order of commencement of prosecution *in rem* must be made by the law enforcement investigator (be it by the police as part of the structures of the judicial police or special criminal investigation unit), the name of the police unit in which the law enforcement official is enrolled should also be mentioned.

Therefore, in the vision of the New Penal Code, the law enforcement investigator is not obliged to submit the ordinance for confirmation by the prosecutor who supervises the activity, but merely to inform the prosecutor, as stated in art. 300 par. (2) C.p.p .: " the law enforcement investigation units are required to inform the prosecutor concerning ongoing or future activities."

Even if the in rem stage is quasi-automatic, it should be subjected to thorough analysis and legal rigor, as required by art. 5 C.p.p., which states that the authorities have the obligation to find the truth concerning the facts and circumstances of the case, and also regarding the suspect or accused person, but by reference to art. 97 and art. 100 C.p.p. we can conclude that the process of finding evidence should be conducted after creating the necessary procedural framework. There are of course exceptions to this rule, such as art. 111 par. (10) which states that the injured person's statement provided during a hearing conducted immediately after registration of the complaint, constitutes evidence even if it is administered before the start of in rem criminal proceedings.

After starting the in rem criminal investigation, authorities may proceed to administering evidence in order to achieve the objectives under art. 285 C.p.p.

Thus, according to art. 285 par. 1 of the C.p.p., "the prosecution is to gather the necessary evidence regarding the existence of the crime, to identify those who have committed a crime and to establish criminal liability, in order to assess whether or not it should be sent to trial ".

When concerned in conducting research that there is evidence proving the reasonable suspicion that a particular person has committed the offense for which prosecution has begun and there is one of the cases mentioned in art. 16 par. 1 C.p.p., the criminal investigation shall order, under art. 305 par. 3 C.p.p., making further prosecution against the suspect (*in personam*).

The process of criminal prosecution against a particular individual is ordered by the prosecutor or law enforcement investigator by ordinance.

The ordinance of the law enforcement investigator against the suspect is subject to confirmation by the prosecutor within three

days from the date of issue. The procedural term stated in art. 305 par. 3 is not mandatory.

However, the confirmation act by the prosecutor is of particular importance. Thus, if the law enforcement investigators administer evidence which requires the existence of a suspect in the case (reconstruction[4] or hearing of the suspect), in case later on the prosecutor overseeing the prosecution cancels the ordinance, this will entail the exclusion of the evidence outside the procedural framework as unlawfully. In addition, after further criminal investigation, law enforcement investigators have apprehended the suspect and the case prosecutor cancels the ordinance, the revocation of detention is also a direct consequence. According to art. C.P.P. 209, in conjunction with art. 203 par. 1 and art. 202 par. 4, letter a, C.p.p., the arrest can be done only against the suspect or defendant, which requires the confirmation by the prosecutor. If the prosecutor should cancel the ordinance, under art. 304 par. 1 C.p.p. the positive condition instituted by art. 209 par. 1 C.p.p. is no longer fulfilled, which stipulates that law enforcement investigators may make an arrest if the conditions of Art. 202 C.p.p. are met. art. 202 C.p.p. stipulates that preventive measures can be arranged if there is evidence or reasonable suspicion that a person has committed a crime, as a minimal standard of proof that would lead to a reasonable charge against the suspect or defendant.

After the decision to carry on with the criminal investigation, the suspected person, the perpetrator acquires a legal standing[5] which allows a full spectrum of rights and obligations stipulated by law.

Thus, in accordance with art. 77 C.p.p. and art. 83 C.P.P., the suspect has the following rights:

a) the right not to give any statement during trial, bearing in mind that should he refuse to testify, he will not suffer any negative consequences, and he should give statements, it can be used as evidence against him;
b) the right to be informed of the offense of which he is suspected of and its legal qualification;
c) the right to see the file, in a accordance with the law;
d) the right to have a lawyer of his choice, and if should not not designate one, in cases of compulsory legal assistance the right to be appointed one;
e) the right to propose evidence in accordance with the law, to raise exceptions and draw conclusions;
f) the right to make any other claims related to the settlement of civil and criminal side of the case;
g) the benefit of an interpreter free of charge when he does not understand, isn't able to express himself well or cannot communicate in Romanian;
h) the right to appeal to a mediator in cases permitted by law;
i) the right to be informed of his rights;
j) other rights provided by law.

The legal doctrine has stressed out the importance of this particular stage in which the prosecution efforts are confirmed which has the significance of formulating a criminal charge against a person when the prosecutor or the law enforcement

[4] According to art. 193 par. 1 of the C.p.p., the investigator or the court, if it is necessary for the verification and accurate data or to determine circumstances which are important to solving the case, can reconstruct, in whole or in part, the manner and conditions in which the offense was committed.

[5] Art. 33 C.p.p. states that the main subjects in the criminal proceedings are the suspect and the injured person.

investigator, after evaluating the existing evidence in question comes to a reasonable suspicion that a particular person committed the act stipulated by criminal law[6].

The term criminal charge is an autonomous one, judicially established by the E.C.H.R.[7]. This means any official notification, issued by a competent authority, which is attributed to a person committing a crime, is able to bring forth significant repercussions on the rights and freedoms of the individual.

We appreciate that the disclosure of the criminal charge should not be confused with the disclosure to the accused that he is a suspect, the criminal act that he is suspected of and the legal classification under art. 307 C.p.p.

The E.C.H.R. ruled that the notion of the "formal notification" is in direct correspondence to the moment when the accused person becomes liable for prosecution (for example when a house search is carried, which under art. 158 of the C.P.P. can be performed even in the in rem stage of the criminal proceedings[8]).

It is essential to accurately establish the time of the criminal charge, because from that moment on the rights and guarantees provided by art. 6, E.C.H.R. become applicable.

The Criminal Procedural Code established in Article 307 the obligation of the prosecution to bring to the attention of the suspect before his first hearing, the procedural capacity he has acquired, the act he is suspected of, it's legal classification and the procedural rights he is entitled to.

However, in judicial practice interpretations differ substantially regarding the moment of the prosecution is confirmed, with the disclosure of the accusation and the actual time when the criminal charge against a person is brought forth in the autonomous meaning established by the E.C.H.R..

To analyse the importance and effects of these issues we shall endeavour to address some cases with a proven applicability of the concept.

Thus, the moment at which the prosecution is confirmed against a person he consequently becomes the suspect indicated in art. 305 par. 3 C.p.p., which states that when the law enforcement investigator considers that there is enough evidence leading to a reasonable suspicion that a person has committed a crime, further investigation may be carried out.

Although there isn't a strict and rigorous method of separating the in rem stage and the in personam phase, the prosecutor and law enforcement investigators must, when there is evidence leading to a reasonable suspicion of an offense by a determined subject to confirm the criminal proceedings. This obligation stems from the wording of the law itself, which does not provide an option for the law enforcement investigator, but firmly establishes it as a rule by using the imperative verb "has" and not "may"[9].

However, in order to come to this particular stage, enough evidence should be administered, thus establishing a factual basis for prosecution of a person, since the criminal complaint itself has no probative value.

That way in which the evidence was administered during the stages of the criminal prosecution in rem stage has a

[6] Mihail Udroiu, op. cit., p. 46.

[7] ECHR ruled in the Engel v. The Netherlands case, para. 81, three alternative criteria in order to ascertain the concept of the criminal charge: qualification as a crime by the domestic law, the nature of the offense and the severity of the sanction that can be applied to the defendant.

[8] ECHR, Rulling Hozze c. Pays-Bas, 25.05.1998.

[9] See in this regard the decision of the Constitutional Court of Romania, no. 236 19.04.2016, published in O.M. no. 426 of 07/06/2016.

significant bearing on the rights granted in this stage and the fairness of the criminal investigation.

In support of this statement, there are instances where the very nature of offenses for which criminal proceedings have been triggered may maintain a balanced procedural process and ensure a fair trial, the right to defense of the person suspected, but nonetheless involves certain difficulties.

For example, the case of injury committed by a doctor. At first in rem proceedings shall commence, by administering preliminary evidence. Most times, the evidence necessary for building a reasonable suspicion of an unlawful medical fault is limited to the hearing of the injured, witness testimony and an expert report which establishes malpractice. But in this case the prosecutorial in rem efforts are directed against a particular person, the only one that could have committed the crime under investigation. Even so, the person under investigation (perpetrator), not until the confirmation of the investigation can he participate effectively in the administration of evidence. The right to propose evidence and the right to hire a lawyer become functional only after the *in personam* stage. Moreover, the right to see the file of the criminal investigation, granted pursuant to art. 83 par. 1 letter b C.p.p. may be exercised by the suspect and not the perpetrator. If he should formulate requests for the administration of evidence or to consult the file, they can be easily dismissed after a purely formal interpretation of the legal provisions that stipulate the necessity of acquiring the quality of the suspect in order to enjoy the rights and guarantees.

Also, in such cases it is necessary that the authorities to weigh in very carefully the evidence, so that the in rem stage isn't prolonged more time than necessary. Infringement of this obligation once the evidence leading to a reasonable suspicion of committing a crime by a particular individual may cause injury of the right to a fair trial, which may attract in case of real and substantial harm, the cancelation of procedural acts and procedural samples obtainted after this time.However, it should be stressed that to establish a possible injury to the right of the accused persons to defense, the proceedings must be examined in their entirety[10].

After confirmation of the in rem prosecution, the suspect may propose more evidence. The European Court of Human Rights determined that the admissibility of evidence is primarily based on nation law and appreciation about the usefulness of evidence remains the attribute of the investigators with the added necessity to motivate their decision.

Another vulnerability stems from the existence of an unusual lag time between the start of the investigation and the disclosure of the accusation. Although art. 307 C.p.p. does not set a time frame, but merely states that the obligation must be fulfilled until the first hearing of the suspect, considering the fact that in some cases the evidence should be taken expeditiously, the authorities must inform the suspect in the shortest possible time. Only this way can he understand the charge, prepare his defense and in doing so the process does not stagnate or threaten the administration of evidence[11].

Doctrine has encountered another potential problem, namely the examination of a witness with the right to refuse to testify[12]. Namely, the husband and former spouse, relatives up or down in a direct line, brothers and sisters of the suspect or persons as nominated by art. 117 par. 1 C.p.p.

[10] Case of Van Mechelen c. Olandei, ECHR rulling 23.04.1997.
[11] See also Penal Decision no. 242 of 12/03/2012 of the High Court of Cassation and Justice.
[12] Nicolae Volonciu, op. cit. p. 767.

Strictly procedurally speaking, these people do not have the right to refuse to testify in cases when a criminal investigation is underway in order to document the alleged criminal activities of a specified perpetrator, but during the in rem stage.

3. Conclusions

In conclusion, it should be noted that both the prosecutor but also the law enforcement investigators have the difficult task of administering the evidence in order to establish the judicial truth and to carefully weigh in on the value of the evidence to meet the obligation of confirming the investigation without undue delay .

We appreciate that between the notion of confirmation of the investigation and the criminal charge is a part-whole relation, the second incorporating the first one both in terms of extended warranties provided and, in some cases, from the perspective of the occurance during the criminal trial.

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ACTUAL ISSUES REGARDING THE ENFORCEMENT OF LEGAL STANDARDS OF THE DEED OF INTIMATION LODGED WITH THE COURT OF LAW IN THE ROMANIAN COURT PROCEEDINGS

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Abstract

The dynamic evolution of the new fundamental law in criminal matters triggered serious challenges in the adaptation process to the new legal realities of the Romanian legal system, as a whole.
Within the seeming conclusion of the transition period given by the profound change of the criminal substantial and procedural regulations, the new dimensions of the functional relation between the two classes of authorities who perform main judicial functions have been clarified: prosecutors and courts of law. The action that refers to the way functional competency is transferred from the investigating authorities to decisional authorities and through which the progressive route of the criminal trial passes from the preliminary stage, the investigation stage, to the trial stage and that of the actual dispute settlement is an essential element of this relation.
The study aims to identify and analyse some of the most important court trial matters or issues that might occur in the recent practice with regards to observing the legal standards of form and contents of the deed of intimation lodged with the court of law.
Equally, the theoretical analysis and the jurisprudence tackles to identify certain actual resources in order to render efficient mechanisms submitted to assessment.

Keywords: *deed of intimation, form, effects, limits, legality*

1. Introduction

The exercise of any function with judicial nature is subject to a prior formal authorisation, materialized in a legal document whose form and content are confined to a strict regulatory regime.

Especially in the case of the jurisdiction on the merits, the principle of *ne procedat iudex ex officio* prevents the self-authorisation and forces the subject performing that function to manifest only within the limits of his investiture, even if the judicial context is of criminal nature. As jurisdiction implies both the authority to resolve and decide on the conflict submitted to settlement *(cognitio)* as well as the power to have the decision taken being executed *(imperium)*[1], the modality in which the apparent excess power may be tempered is to draw a predetermined frame for its manifestation.

In the criminal trial, the act that initiates the exercise of the judgment function and contributes mainly to set the procedural framework in which the scope of the judgment shall be accomplished is the indictment drafted by the prosecutor who conducted the prosecution. It has the nature of an act characterized not only through the provision it contains and in which the prosecution function is focused - the arraignment, but also in terms of its content, regulated in an imprecise manner through the provisions of article 327 of the Criminal Procedure Code.

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[1] *G.Theodoru*, Treaty of criminal procedure, 3rd edition, Hamangiu Publishing House, Bucharest, 2013, p. 195.

2. General considerations concerning the form and functionality of the indictment

Regardless of the way how the current structure of the type of Romanian criminal trial[2] is perceived and addressed, it is undisputed that within the major subdivisions of the trial an essential place is occupied by the prosecution. Even abandoning the autonomous concept of procedural stage and rallying to the current trend developed in continental systems that were the main inspiration of the present Code, the importance of the investigative stage of the trail is obvious. Thus, in the French system, there are two main phases of the criminal trial. A preparatory phase that includes the monitoring, the investigation and the instruction, and a decisional phase, which includes the court's proceedings[3]. In the Italian system, a distinct system amongst continental mixed systems due to the preponderance of adversarial elements, the jurisdictional phase (the actual trial) is preceded by an investigative phase (non-procedural - *indagini preliminari)* and the decisional power is characteristic only to the jurisdictional phase[4].

Having the role to mark the beginning of the criminal trial, in the opinion of the current Criminal Procedure Code, the prosecution represents the procedural phase suitable for the gathering of the evidence material required to solve the criminal cases. Moreover, considering the recent changes in the procedural manner through which the initiation of the prosecution is ordered[5], this phase is the only context allowed by the law in which evidence able to lead to the establishment of a person's guilt or innocence can be administered. Although it knows exceptions [the statements taken from the person that formulated the criminal complaint is considered evidence even if it was administered before the initiation of the prosecution, under article 111 paragraph (10) CPP, the objects collected by the extra-judicial bodies in case of new offenses ascertained under article 61 and 62 CPP may be used as evidence even if they were won for the case prior to the initiation of the prosecution, etc.] this rule is able to highlight the object of the prosecution. Expressly prefigured through the provisions of article 285 CPP in a form taken from the former regulation[6], the object of the prosecution captures the essence of the activity corresponding to the scope of this phase, which constitutes as well the main or qualified activity of the prosecution *"the*

[2] In the specialized literature, once with the entry into force of the new Criminal Procedure Code, the majority opinion was expressed that the actual criminal trial is composed of 4 stages: the prosecution, the preliminary chamber, the judgment and the enforcement of criminal judgments (*B. Micu, A. Păun, R. Slăvoiu*, Criminal Proceedure, 2nd edition, Hamangiu Publishing House, 2015, p. 248; *M. Udroiu*, Criminal Procedure, special part, 2nd edition, CHBeck Publishing House, 2015 , p.120-121; *C. Voicu* in The New Code for Criminal Procedure, commented, group of authors, coordinator *N.Volonciu*, 2nd edition, Hamangiu Publishing House, 2015, p.945, etc.). In favour of this opinion the Constitutional Court ruled in the recitals of the Decision no. 641 / 2014 from November 11, 2014 (Official Gazette no. 887 of December 5, 2014). In a different opinion, appreciating that the proceedings in the preliminary chamber do not have the nature of a procedural stage, it is considered that the current Romanian criminal trial knows only three stages (*I.Neagu, M. Damaschin*, Treaty of Criminal Procedure, Special Part, Universul Juridic Publishing House, 2015, p.196-203.

[3] *J. Pradel*, Criminal proceedings, 16th edition, Cujas Publishing House, Paris 2011, p.298, p.339-723, p.739-839; *J.C. Soyer*, Criminal law and Criminal Procedure, 21st edition, Lextenso Publishing House, L.G.D.J., Paris 2012, p.282, p.359-427.

[4] *M. Mercone*, Criminal procedure, 11th edition, Edizioni giuidiche Simone, 2003, p.66-67, p.298-306, p.505-512; *F. Izzo*, Manuale de Diritto procesuale penale, XXI edizione, Edizioni giuidiche Simone, 2013, p.12, p.175-228, p.427-433.

[5] The Emergency Ordinance no. 18/2016 (Official Gazette no. 389 from May 23, 2016) simplified this mechanism, so that currently the only necessary condition required for the initiation of the criminal proceedings is a positive one – the existence of a deed of intimation complaint from the perspective of the conditions regarding the form and content, per article 305 paragraph (1) Code for Criminal Procedure.

[6] See for details *I.Neagu*, Treaty of criminal procedure, Special Part, Global Lex Publishing House, 2008, p. 32-33.

prosecution has as object to gather necessary evidence of the existence of crime, to identify the persons who have committed a crime and to establish their criminal liability, in order to ascertain whether it is appropriate to order an indictment". As pertinently shown in the relevant literature[7] the collection of evidence means in fact a series of activities without which it would not be possible to know whether an act that was committed is a crime – and that means first and forehand to conduct a research *in rem.* These activities involve operation of discovery, gathering and preserving evidence, involving specific tasks in the probation activity: identifying, managing and appreciating the evidence. To this respect, article 99 paragraph (1) CPP stipulates that the burden of administrating the evidence (proof) in criminal proceedings lies mainly with the prosecutor. The exclusivity of the judicial body in terms of evidence administration is tempered by the recognition of the right to propose evidence administration, right that belongs to distinct parties in the proceedings (suspect, injured party and parties) and cannot be refused unless the observance of the restrictive conditions of article 100 paragraph (4) CPP. The existence of crime means on one hand the material existence of an offense and, on the other hand, if the respective offence constitutes a punishable attempt or a *fait accompli*. "Identifying the persons who committed a crime" means that the administrated evidence must provide as well the needed data to know the perpetrators (the person who committed the crime, the instigators, the accomplices), both regarding their person (natural or legal) as regarding the identity, activity corresponding to a *in personam* research.

"Establishing the liability of the perpetrators" means that the necessary evidence should concern not only the facts but also enough data to be able to know whether the perpetrators acted or not guilty, if they can be held criminally liable for acts committed and whether it is appropriate that they are prosecuted. This activity of collecting evidence, specific to the prosecution, is subordinated to a precise purpose - *to ascertain whether it is appropriate to order the indictment*, purpose which in turn comes under the general purpose of criminal trial, as foreseen by the article 8 CPP[8].

Therefore, the criminal prosecution may determine primarily a positive finding, when the indictment and thus the passing into a new stage of the trial are necessary. As a judicial disposition, the indictment is the result of a triple findings, namely that the crime exists, that it was committed by the defendant and that it is criminally held liable. Also, the result of the main activity of prosecution may result in a negative finding, in the sense that the indictment is not necessary, in which case the criminal trial is interrupted, either *temporarily* (if subsequently the prosecution is resumed) or *permanently* (if the solution of the non-indictment is confirmed by the judge). This finding occurs in a distinct stage of the prosecution, in the stage of the finishing the criminal prosecution and the case's solving by the prosecutor, that does not mean the exhaustion of the criminal prosecution phase but only the finishing of the investigation activities. Since the function and the purpose

[7] *V. Dongoroz, and others*, Theoretical explanations of the Romanian Code for Criminal Procedure, Special Part, volume VI, Romanian Academy Publishing House and All Beck Publishing House, 2003, p. 25.

[8] Per article 8 CPP the judicial bodies are obliged to carry out the prosecution and the judgment with the respect of the procedural guarantees and rights of the parties, so as to ascertain, in due time and completely, the facts constituting the offense, not to prosecute an innocent person, and anyone who has committed an offense to be punishable by law in a reasonable time.

of the criminal prosecution have a significant impact, the result it incorporates is submitted to a preliminary verification, which is transposed by the establishment of preliminary filters: the presumptive end of the criminal prosecution, in which, according to article 321 CPC, the criminal investigation body shall prepare a report on the solution it considers appropriate, the actual termination of the prosecution, in which, according to art. 322 and 327 CPP, the prosecutor proceeds to a review of the works of the criminal prosecution and gives the case a solution through one of the means provided by the law, plus possibly the further verification of the indictment by the prosecutor hierarchically superior to the one who drafted it, according to article 328 paragraph (1) CPP.

In considering these preliminary explanations, the procedural positive act - the indictment - represents the document that focuses the entire judicial function of criminal prosecution, representing the solution through which the prosecutor decides to institute the proceedings and the passage, in a progressive manner, to another stage of the criminal trial. To dispel any arbitrary assessment, the law conditions the indictment to the prosecutor's belief, formed following the assessment of the evidence legally administrated and materially supported by them that the crime exists, it was committed by the accused and that it is criminally responsible. The only legal instrument by which the arraignment is made is the indictment drafted by the prosecutor. The indictment is the deed of intimation of the court, through which the prosecutor asks the court to apply the law whereas the defendant is concerned[9]. The indictment and its processual consequence, the court's referral, are acts placed under the exclusive competence of the prosecutor as the main organ to carry out the prosecution. Having the ability to determine the procedure in which the judgment will take place, the indictment is materially funded on the same elements that the court may use to found its verdict of guilt, being obvious a functional symmetry between the act ordering the indictment (act of essence of the criminal prosecution) and the procedural act through which a person is prosecuted (act of the essence of the judgment). In this sense, both acts of disposition are materially grounded on the same essential elements of the report of conflict: fact and person.

Through the act of disposition that it incorporates, the indictment, when expressed under the procedural form established by the law, simultaneously produce two types of legal consequences, with positive character (the court's referral) and with negative character (the end of the formal authorisation of the criminal investigative body regarding the case). Therefore, accomplishing further criminal prosecution activities about the fact and the person for whom the indictment who issued appears as an unlawful way to proceed whereas through the indictment, a transfer of functional competence occurred between organs exercising different judicial functions. After that moment, the prosecutor cannot take any action and, in the continuation of the trial, he no longer has the powers he had as investigating authority[10].

In consideration of its specific nature, the indictment is an act characterized, both by the particularity of the main procedural act it includes as by its shape. As an exception to the rule foreseen in article 286 paragraph (1) CPP, the procedural act (the

[9] *I. Neagu, M. Damaschin*, op. cit., special part, p. 101, the authors explain the etymology of the term starting from the Latin principle *requisitus* (investigated, required, solicited).

[10] *N. Volonciu*, Treaty of criminal procedure, Special Part, 2nd volume, 3rd edition, Paiedeia Publishing House, 1997, p. 99; *V. Dongoroz, and others*, op. cit., 2nd volume, p. 62.

content) – *the arraignment* is not materialized in an ordinance but in one type of written procedural act (the form) – the indictment. Being a complex act, the indictment may include several acts of disposition since it ensures a multiple functionality but the main and binding disposition that it contains and that customizes its nature, is the arraignment. By reference to this disposition, the indictment is the main court's deed if intimation, through which the matters to be judged upon are to be set. The court's referral can be achieved as well through other legal means but they do have the main character. Thus, in accordance with article 341 paragraph (7) point 2 letter c) CPP, the judge sitting in the preliminary chamber referred with a complaint against the solution of not to indict in a case in which the criminal proceedings were initiated, whilst granting the complaint, may order the initiation of the judgment when the evidences lawfully administrated during the criminal investigations are sufficient. In these circumstances, the conclusion (resolution) of the judge sitting in the preliminary chamber who ordered the initiation of the judgment[11] is the deed of intimation for the court. Also, within the special procedure of plea bargaining agreement (article 478-488 CPP) the court's referral is accomplished by the convention (agreement) concluded between the subjects of the criminal proceedings: the Public Ministry and the defendant.

To accomplish its function as deed of intimation, the indictment must conform to a predetermined format, with mandatory content elements, that must be limited to the fact and the person for which the criminal investigation was conducted and must meet national and conventional standards aimed at ensuring both the effective exercise of the judicial functions as the effective protection of the defendant. Thus, by the formal removal of the active role, the court is required to deploy the activity specific to its judicial function within mandatory specific limitations, drawn following its legal investiture. The possibility of extending those investiture's limitations by appropriate means, known to the old legislation (the extension of the criminal proceedings, the extension of the criminal trial) as well as the possibility of refusing the benefits of the investiture (the return of the case to the prosecutor's office during the judicial investigation) are no longer currently allowed. Therefore, per article 349 paragraph (1) CPP, the court *is obliged to resolve the case submitted to trial*, within the mandatory limits of its investiture.

The responsibility for the accurate and complete setting of these limits (boundaries) lies therefore with the judge sitting in the preliminary chamber, to whom has been transferred the functional competence to verify the legality of the prosecution and to ensure the remedy of the irregularities in the deed of intimation. The judge sitting in the preliminary chamber contributes actively to the court investiture as this is achieved by the combined action of two distinct acts: the indictment for the arraignment, establishing the *object of judgment* (by indication of the fact and person to be judged) – the deed of intimation, and the conclusion of the judge sitting in the preliminary chamber who finalizes *the limits of the judgment* (through

[11] In disagreement with the opinions expressed in the specialized literature *(M. Udroiu*, Criminal procedure. Special Part, 3rd edition, CHBeck Publishing House, 2016, p.131, etc.) I consider that, although the law does no longer expressly qualifies it as deed of intimation, the complaint submitted to the judge against the not-to-indict solutions remains the main factor in accomplishing the atypical deed of intimation, as per article 341 CPP. This complaint, as an unofficial act, together with the resolution of the judge sitting in the preliminary chamber for the initiation of the judgment will determine the factual elements of the investiture.

the remediation of the material required to solve the case) - the investiture act.

But even in the context of this joint action, the deed of intimation lodged with the court of law remains the exclusive prerogative of the prosecuting authorities. In this regard are as well the provisions of article 329 paragraph (1) CPP, which provides that the indictment is the deed of intimation lodged with the court of law. Therefore, the legal and the complete referral of the court must be reported to the mandatory content of the deed of intimation, as foreshadowed by the provisions of article 328, with reference to article 286 paragraph (2) CPP, in which the requirement to indicate the offense incriminating the accused is specifically mentioned. The fact must be indicated in its materiality as the court is not vested with a legal qualification (determination) but with a fact. *The fact* is the material premise of the criminal proceedings, which terminates when its object has been accomplished – the criminal liability. Consequently, the fact, in its material dimension, is the first element to be set for a proper solution of the criminal proceedings. A symmetry is relevant, in this respect, between the procedural act ordering the prosecution (article 327 letter a) of the CPP and the act through which the criminal proceedings is solved in first instance, in the sense of the conviction [article 396 paragraph (2) CPC], acts that are materially based on the same three elements: *offense (fact)*, *person* and *guilt.*

The requirement to indicate the actual offense incriminating the defendant, by mentioning the time and place elements, by describing how the offence was committed (especially with alternative incriminations), by specifying the number of material actions, by identifying the separate elements and the type of connection existing in case of plurality of crimes has an essential character, serving not only to meet the requirements related to the establishing of the object of judgment but also the requirements related to the exercise of procedural rights, guaranteed as fundamental principle. Moreover, beyond the explicit and implicit guarantees of the right to a fair trial and the right to defence, the solving itself of a criminal case is accomplished by the court, under the article 349 paragraph (1) CPP, with the guarantee of the compliance with the procedural rights. This is the reason why the material description of the offense incriminating the defendant requires both a complete individualization of the facts which compose the content allegedly criminal as an indication of the correspondence between each factual element and evidence on which it is based.

Regarding the obligation to describe in full the facts that form the content of the criminal charge brought against the defendant, beyond the national regulation, the deed of intimation lodged with a court of law must also comply with a conventional standard designed to ensure the fairness of the proceedings and the effective exercise of the right to defence. In this regard, the European Court of Human Rights[12] held that article 6 paragraph 3 of the Convention recognizes the right of the accused to be informed in detail not only regarding the cause of the accusation, meaning the material facts of which he is charged with and on which the accusation is grounded, but also regarding the nature of the accusation, meaning a legal qualification of the facts.

Also, the European Court of Human Rights[13] held that the right to a fair trial was violated because the information contained

[12] The Judgment from March 23, 1999, *Case of Pelissier and Sassi v France*, recital 51, as well as in the Decision from January 23, 2001, *Case of Dallos v. Hungary.*

[13] The Judgment from July 25, 2000, *Case of Mattoccia v. Italy*, recitals 59 and 61.

in the accusation regarding the essential details on place and time of the offense was vague and contradictory so that the defendant has not been able to prepare a practical and effective defence.

The Court held that an accurate and full information on the facts incriminating the accused and a legal qualification represent an essential condition for the fairness of the judicial proceedings, and this must be done including throughout the indictment that must not be characterized by vagueness about the essential details. In its jurisprudence[14] the European Court of Human Rights explained what it means by the cause and nature of the accusation against a person throughout the indictment, showing that they relate to the material facts on which the accusation is grounded, to the legal qualification of the accusation as well as to the existing aggravating circumstances, and that the detailed information on the facts being charged and on their legal qualification should not be, in any circumstance, follow the indictment. Such findings determined the doctrine[15] to appreciate in a pertinent manner that the requirements under which the ability of the indictment to apprehend and validly invest the court is assessed should start from the same criteria under which the European Court has ruled on the quality of the law to be predictable. To this regard, taking into consideration the need to ensure real and effective protection for the defendant in relation to the acts he is being charged, the description of the fact in the indictment must be sufficiently precise to enable the defendant (who can call for specialized consultancy/advice of a lawyer, either chosen or appointed ex officio) to understand the fact of which he is accused, its legal qualification and the punitive treatment[16]. Moreover, even in a case rendered against Romania[17] the European Court recalled that fairness is determined in relation to the procedure as a whole. The provisions of article 6 paragraph 3 express the need to pay special attention to the notification of the "charge" brought to the concerned person. The deed of intimation plays a decisive role in the prosecution: after the notification, the person prosecuted is officially notified in writing on the legal and factual basis of the charges against him. Article 6 paragraph 3 letter a) recognizes for the accused the right to be informed not only about the cause of the accusation, meaning the material facts of which he is charged with and on which the accusation is grounded, but also regarding the legal qualification of the facts, and this in a detailed manner. In criminal matters, an accurate and precise information about the charges against a person therefore on the legal qualification the court may hold against him is a prerequisite condition of the fairness of the proceedings. Finally, there is a connection between letters a) and b) of article 6 paragraph 3 and the right to be informed of the nature and the cause of the accusation must be considered from the perspective of the accused's right to prepare his defence *(Pelissier* and *Sassi* v. France recitals 52-54). The clarity in describing the facts as acknowledged in the deed of intimation lodged with the court falls within broader requirements, regarding the right to information in criminal proceedings, the standard accepted at the national level

[14] Through the Judgment from October 24, 1996, *Case Salvador Torres v. Spain*, recital 28.
[15] *M. Udroiu*, Special Part, op.cit., p.152-153.
[16] Judgment from July 13, 1995, *Tolstoy Miloslavsky v Great Britain*, recital 37, cited in *M. Udroiu*, op cit., P.153
[17] *Adrian Constantin v. Romania*, judgment from April 12, 2011, www.echr.coe.int.

transposing provisions imposed at the European level[18].

In this context, the constant case-law[19] the High Court of Cassation and Justice (both before and after the entry into force of the new Code of Criminal Procedure) held that the fact described in the deed of intimation lodged with the court of law must not represent only the mere reference to a given action mentioned in the sequence of the defendant's activities, but a detailed description of that action in a manner likely to produce legal consequences, namely to invest the court.

Finally, in terms of the finality of the indictment it should be noted that the in the new regulation this act has lost its ability to cause the indictment of the accused, its issuance being subjected to the preliminary initiation of the criminal proceedings. Even if it is not expressly provided for, in terms of the drafting technique, the indictment retained the tripartite structure consisting of an introductive, expositive and operative part. It is no doubt that the expositive part of the indictment is prefigurating its operative part and, naturally, the prosecutor, whilst drafting the indictment, will indicate, in the expositive part, the evidence of the prosecution, and the operative part will materialize the will's manifesto of the representative of the Public Ministry to order the arraignment[20]. The indictment has a subpoena part, in which the persons that must be subpoenaed are indicated, mentioning their quality in the trial and the place where they are subpoenaed. Any irregularities identified in this segment cannot determine the impossibility to establish the object and the limitations of the judgment. In subsidiary, depending on the possible acts of disposition that it may include, the indictment may also contain provisions as to not to indict, in complex cases involving a plurality of facts and perpetrators. In this context, the provision not to indict may be accompanied by complementary measures determining the initiation of different procedures. Thus, if the same indictment is ordering the arraignment, the waiver of prosecution as well as the apprehension of the judge sitting in the preliminary chamber regarding the confiscation or the closure of a document in case of dismissal, considering that the judicial procedures being initiated involve different rules [on the procedure of preliminary chamber under the articles 344-346 CPP, on the confirmation of the waiver of prosecution under the article 318 paragraph (12) - (16) and on the issuance of an order by the judge sitting in the preliminary chamber, under the article 549^1 CPP], these provisions, although embedded in the same act must be handled administratively as three different complaints and assigned to different judges sitting in the preliminary chamber. Also, the indictment may incorporate proposals for preventive measures, precautionary or safety, in which case, per articles 330 - 331 CPP it is no longer required to draw up separate documents. In all these situations, considering its main purpose – the apprehension of the court, the indictment remains a *unique act* being always drafted in a single copy, even if the prosecution's activities concern several facts or more

[18] Per article 3 from the 2012/13 / EU Directive on the right to information in criminal proceedings, "...Member States shall ensure that no later than at the presentation of the merits of the prosecution in court, *detailed* information is provided on the accusation, including the nature and the legal qualification of the offense and the form of participation of the accused."

[19] Supreme Court of Justice - panel of nine judges, Criminal judgement no.74/2001, High Court of Cassation and Justice – Criminal judgment no. 389/May 22, 2004, High Court of Cassation and Justice – Criminal judgment no. 892/2014, www.scj.ro.

[20] *I. Neagu, M. Damaschin,* op.cit., p.102.

persons and even if they get different solutions. However certified copies are made of the indictment, which are communicated to the defendants regardless of their status (free or in custody). To satisfy the requirements of an efficient information, the indictment must be translated if the accused does not speak Romanian or it must be communicated as well in a mother-tongue translation if the accused, Romanian citizen belonging to a different nationality, requests it. The provision, provided by article 329 paragraph (3) CPP, transposes into national law the provisions of the Directive 2010/64/EU of the European Parliament and of the Council, on the right to interpretation and translation in criminal proceedings, as pertinently noted in the literature[21].

3. Practical issues regarding the types of types of irregularities of the indictment

Overall, to achieve its function act deed of intimation, the indictment must be verified in terms of legality and validity by a prosecutor of higher-level to the one who drafted it. This requirement is a form of transposition of the principle of the hierarchical control governing the activity of the Public Ministry and involving a functional subordination and not an administrative one. The generation of the legal effects of the indictment shall be subject to the submission of this procedural act to a form of *enablement*[22] from a higher-level prosecutor. This verification concerns equally the observance of the legal provisions in the work of drafting the deed of intimation as the validity of the solutions it incorporates in relation to all prosecuting acts performed in the case and the evidence being administrated. In accordance with the article 328 paragraph (1) CPP, the verification is performed by the head of the office (first prosecutor or general prosecutor) where the prosecutor who drafted it belongs, and when the indictment was drafted by the latter the verification of the indictment is performed by a higher-level prosecutor. When it was prepared by a prosecutor within the prosecutor's office attached to the High Court of Cassation and Justice, the indictment is verified by the prosecutor chief of the section, and when the indictment was drafted by the latter, the verification is accomplished by the general prosecutor of this office. The law does not establish a term for the indictment to be verified by the higher-level prosecutor, pointing out only that in cases with arrested persons, the verification is accomplished urgently and before the expiry of remand in custody. From the material point of view, the legal operation of the verification is realized by applying on a mark *checked in terms of legality and validity* on the indictment, accompanied by the signature of the prosecutor who conducted the verification[23]. The lack of mention attracts the irregularity of the deed of intimation that can be invoked and remedied within the preliminary chamber procedure, without determining the

[21] *I. Neagu M. Damaschin*, op cit., P.103.According to the provisions of Article 3 of the Directive, "Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.".

[22] *N. Volonciu*, op.cit., 2nd volume, p.101-102.

[23] The absence of an express provision indicating the nature of the act in which the result of the verification is materialized determined the doctrine to appreciate, still under the rule of the previous regulation, that the act confirming the indictment translates into a written resolution on the indictment - V. Dongoroz, and others, op. cit., 6th volume, p.71.

impossibility to establish the object and the limitations of the judgement[24].

The verification of the indictments prepared by the prosecutors within the National Anticorruption Directorate is made under the terms of article 22^2 of Government Emergency Ordinance no. 43/2002 – *the indictments prepared by the prosecutors within the territorial services of the National Anticorruption Directorate are verified by the chief prosecutors of these services, those drafted by the chief-prosecutors of the territorial services as those drafted by the prosecutors within the central structure of the National Directorate Anticorruption are verified by the chief-prosecutors of the sections and when the indictments are drafted by the chief prosecutors of the sections within the National Anticorruption Directorate, their verification is made by the chief prosecutor of this directorate.* The application of this provision in the causes in which the indictment was drafted by a chief prosecutor of a territorial service (but in which, amongst prosecution acts, there are also orders issued by the Chief Deputy Prosecutor of the directorate which infirm some dismissal solutions) involves the establishment of an exclusive competency for the chief prosecutor of the directorate in accomplishing the verification of the legality and validity of the deed of intimation.

In practice and in the specialized literature as well a question was raised on how to accomplish the verification of the indictment when the prosecutor hierarchically superior to the one who drafted the indictment was the one who conducted criminal proceedings in the cause. In doctrine[25] it was validly considered that in these circumstances the hierarchically superior prosecutor is obliged to submit statement of abstention based on article 65 paragraph (1) reported to article 64 paragraph (1) letter f) CPP as there is a reasonable suspicion that his impartiality in evaluating the legality and validity of the deed of intimation might be affected. But since in practice[26] this solution was not always shared a few additional clarifications are required.

Per article 62 paragraph (2) of the Law no. 304 / 2004, the prosecutors are deploying their activity within the Public Ministry, in accordance with the principles of legality, *impartiality* and hierarchical control. This general provision is implemented as well on the particular plan and on the work carried out by the prosecutors of the National Anticorruption Directorate which, in accordance with the article 2 of the Emergency Government' Ordinance no. 43 / 2002 exercise their powers only under the law and for its enforcement. The legality of the acts being accomplished in carrying out the judicial functions of prosecution supposes as well, inter alia, the absence of any prejudice or any preconceived ideas on the solution ordered by the prosecutor during at the termination of the criminal prosecution, issue that doesn't concern the independence but the impartiality of prosecutor. In terms of justice, the existence of a reasonable suspicion that the impartiality of the prosecutor is affected determines the occurrence of the incompatibility as provided by article 64, letter f), applicable to the prosecutor under the article 65 paragraph (1) CPP. If the incompatibility was not remedied by internal

[24] In this regard, there are still applicable the judgements issued by the High Court of Cassation and Justice in resolving appeal in the interest of the law under the old regulation – High Court of Cassation and Justice, the Joint Chambers, Judgement no. 9 / February 02, 2008 (OJ no. 831 of December 10, 2008).

[25] *M. Udroiu,* op.cit., Special Part, 2nd edition, p.74.

[26] The resolution of the judge sitting in the preliminary chamber within the High Court of Cassation and Justice through which the commencement of the judgement was ordered in the case no. 292 / 1 / 2015, not published.

tools (restrain) or external (disqualification) provided to that end, *the act* accomplished by an incompatible prosecutor it is affected by a legality vice (flaw).

Thus, in the said cause, the judge sitting in a preliminary chamber circumscribed the reasons invoked for the support of the criticism regarding the incompatibility of the prosecutor who verified the indictments to the case of incompatibility as foreseen by article 64 paragraph (1) CPP, *"in the current cause he conducted the criminal prosecution or he participated as a prosecutor in all proceedings before a judge or a court"* case that obviously is not applicable to the prosecutor in accordance with the article 65 paragraph (1) CPP. According to the opinion of the judge sitting in a preliminary chamber these arguments cannot be extended to the broader incompatibility case, as foreseen by article 64 paragraph (1) letter f) CPP, which had been raised expressly, given that article 6 paragraph 1 ECHR covers only an *independent and unbiased court.* In disagreement with this assertion, we consider that the incompatibility status of the chief prosecutor of the territorial service, proven by the direct involvement in accomplishing the criminal prosecution and in making accusations against the defendant sued, based in part on the same material elements cannot be circumscribed to another incompatibility case than the one foresee in article 64 paragraph (1) letter f) CPP, having the nature to allow to retain a reasonable suspicion that the impartiality of its extremely important work of control of legality and validity of the deed of intimation was affected.

The regulation under the form of a distinct case of incompatibility, applicable to the prosecutor, as established in article 5 paragraph (1) CPP, *of the suspicion of lack of impartiality* implements in the matter of incompatibility the constitutional principle of impartiality of the activity of the Public Ministry, provided for in article 132 paragraph (1) of the Constitution. In the case-law of the Constitutional Court[27] the *impartiality* was analysed as a corollary to the principle of legality, and which generates the requirement for any prosecutor to perform his duties in an objective, without any other predetermined general purpose and without bias. In the current regulation, the incompatibility case based on the reasonable suspicion of lack of impartiality was designed as a *general case,* in which, depending on the particularities of each case, multiple circumstances can be assimilated, some of which have been covered in previous Code as distinct cases (article 48 of the CPP from 1968 - circumstances out of which result the interest, in any form, enmity result) while others must be justified.

Therefore, it was an option assumed by the legislator to extend the concept of impartiality from the conventional area corresponding to the notion of *court* as well to the judicial bodies exercising the other main function, the function of prosecution, due to the nature and consequences of acts in which this exercise is materializing.

Secondly, in a wrong manner, the judge sitting in the preliminary chamber considered that the direct accomplishment of criminal prosecution in the pending case or in another case (but to a degree of connection that allowed the judicial body to take measures and evidences) by the prosecutor who is required to verify the legality and validity of the deed of intimation issued in the case shall not have the nature as to create a reasonable suspicion that his impartiality could be affected. In our opinion, the incompatibility status of the chief prosecutor of the territorial service is

[27] *The Decision of the Constitutional Court* no.311 / 2005, Official Gazette 749 of August 17, 2005.

of an obvious nature, the materials prerequisites that generated it being in fact recognized even by the prosecutor who drafted the indictment. It is undeniable the risk of bias of the prosecutor who not only conducted criminal prosecution that led to obtaining important evidence but also expressed *in a judicial context* his opinion on the factual circumstances envisaged in this case as well as to the possible guilt of the defendant being prosecuted.

Thus, examining the prosecution performed in another case (in which he is the prosecutor of the case), the chief prosecutor of the territorial service expressed his opinion on the *"the extensive criminal activity of the defendant, which is actual and presents a particularly high social danger".* To this respect, by the ordinance through which the criminal proceedings against the same defendant were extended, the prosecutor who subsequently verified the indictment expressed clearly his opinion also with regard the activity that constitutes the object of the current case, pre-constituting his opinion on circumstances and statements which represents as well the foundation of the charge for which the defendant was indicted. Therefore, the concrete modality in which the chief prosecutor of the territorial service involved himself in performing the criminal prosecution and in ordering procedural measures against the defendant justifies the retention of the reasonable suspicion that, at the verification of the indictment for the same defendant, his impartiality was affected. To this respect, the doubt or suspicion about the lack of impartiality, as element of subjective nature, covered a reasonable form since it was objectified in materially verifiable elements, having the nature to confirm the state of inadequacy in which the head of the prosecutor's office finds himself.

Thus, the conviction of the chief prosecutor of the territorial service about the criminal activity of the accused who guided and controlled in fact companies that he no longer had any stake and which, moreover, are estimated to be the instruments through which in this case the defendant committed the offense of bribery, materialized in acts and measures ordered in the case in which he acted as prosecutor of the case. Or, all these measures were based on the pre-constituted opinion of the chief prosecutor of the territorial service that the defendant carried out during 2000-2015 a comprehensive criminal and extremely dangerous activity, which include the facts for which he was indicted in this case.

In essence, the reasonable suspicion that the impartiality of the chief prosecutor of the territorial service was affected is supported both by the direct involvement and coordination in conducting the proceedings that deliberately targeted the defendant being indicted, as through the fact that, in reality, the prosecutor called to verify the legality and validity of the deed of intimation filed *criminal charges* against the defendant (in the opinion of article 6 paragraph 1 ECHR) due to the expansion of the prosecution and the criminal proceedings in the case in which he acted as prosecutor of the case, circumstance which is likely to infringe the procedural rights of the defendant and the fairness of the proceedings. Third, the judge sitting in the preliminary chamber wrongly considered that no procedural harm was produced, due to the verification of the indictment under the mentioned condition and that, anyway, if such harm would exist, it might be remedied directly before the judge or the court.

In our opinion, in the absence of the verification with impartially, the indictment drafted by the prosecutor's office of the National Anticorruption Directorate is in fact an indictment unconfirmed, that was not

subject to an effective control of legality and validity, being unable to perform, in accordance with the article 328 paragraph (1) CPP the function of deed of intimation to be lodged with the court of law. The processual damage caused by the non-observance of the provisions governing the impartiality of the prosecutor [article 132 paragraph (1) of the Constitution, article 62 paragraph (2) of the Law no. 304 / 2004, article 65 paragraph (1) reported to article 64 paragraph (1) letter f) CPP] consists in depriving the defendant of internal, effectively control performance on the legality and validity of the deed of intimation. By the will of the law, the functionality of the deed of intimation to be lodged with the court of law (to determine the investiture and to set the limitations for the judgment) is subject to *implicit confirmation* (after verification) issued by a prosecutor hierarchically superior to the one who drafted and that thus materializes *in conditions of impartiality*, the principle of the hierarchic subordination governing the activity of the Public Ministry.

This internal control of the deed of intimation, even if it does not exclude the judicial review performed in the procedure of preliminary chamber cannot be exercised *omisso medio*, directly by the judge or the court as this is contrary to the requirements of the principle of separation of the judicial functions, provided for by article 3 CPP, and affects the independency in the functioning of the Public Ministry. The verification of the deed of intimation to be lodged with a court of law does not represent a formal requirement but it is a guarantee for ensuring the legality and validity of the prosecuting proceedings, being instituted as an essential prerequisite for the operation of the functional transfer of competence between different categories of judicial bodies. In fact, in the special procedures of the plea agreement as well, the compulsoriness of the internal control is materialized in the requirement for the endorsement - by the prosecutor hierarchically superior - of the agreement concluded by the prosecutor of the case, in accordance with the article 478 paragraph (2) CPP. Consequently, given the situation of incompatibility described above, we consider that for the proper application of article 22^1 paragraph (1) of the Emergency Government Ordinance no. 43 / 2002 in relation to article 328 paragraph (1) CPP, the verification of the indictment drafted in the current case should have been accomplished by the prosecutor hierarchically superior to the head of the prosecutor's office where the prosecutor who drafted the indictments was functioning, namely the prosecutor chief of section within the National Anticorruption Directorate - the central structure.

Perhaps the most common form taken in practice by the irregularity of the indictment is the one related to the incomplete or unclear description of facts, which prevents delimitation of the contribution of each defendant or the identification of all material acts, the impossibility to establish, in cases of offenses with alternative content, the modality incriminating the defendant[28]. In this regard we consider to be appropriate to present a solution in which, without justification, the commencement of the criminal trial was ordered in the conditions in which the indictment unequivocally presented such an irregularity[29].

Regarding this issue, the judge sitting in the preliminary chamber found that the indictment in the mentioned case has 387

[28] *I.Kuglay* Code of Criminal Procedure. Comment on articles, coordinated by *M.Udroiu*, CHBeck Publishing House, 2015, p.918.

[29] The resolution of the judge sitting in the preliminary chamber of Brasov Court of Appeal ordering the commencement of the judgment in the case registered under the no. 345/64/2016, unpublished.

pages, out of which 234 are dedicated to describing the actual state of affairs, with reference to the evidences from which the prosecutor considers that this state of affairs results, and appreciated that there is, in the indictment, a detailed description of the facts charged to the defendant, containing all circumstantial elements necessary for the identification of the accusations brought against the defendant. The judge sitting in the preliminary chamber took into consideration as well the fact that the defendant did not invoked the problem throughout the entire prosecution, although at the time of the initiation of the criminal proceedings the accusations were brought to his knowledge and the defendant, during the prosecution, gave the statement regarding the accusations.

In matters related to the insufficient description of the offense of traffic of influence in a repeated form, the judge sitting in the preliminary chamber invoked the case-law in accordance to which, in case of the objective impossibility to describe all the material acts of a continued offense, it is sufficient to indicate a period of time during which the material acts composing the offense were committed, if in this way it is possible to determine the object (scope) and limits of the judgment. It was also shown that the issues regarding the compliance of the elements of a continued offense, of a natural unity of crime or of a plurality of offenses are a matter of legal qualification of the fact, which cannot be questioned during the procedure of preliminary chamber. Similarly, the existence or the inexistence of the actions which the prosecution claim to constitute the material acts of the continued crime or if there are evidences proving their existence are matters regarding the merits of the case and not the regularity of the deed of intimation.

In our demurral, made against the resolution of the judge sitting in the preliminary chamber within the Court of Appeal Brasov, we show – *in advance* – that by invoking some problems related to the incomplete description of the material facts incriminating the defendant it was not aimed to provoke an anticipated evaluation of the evidences nor to attempt to discuss questions as to whether the allegations made against the defendant are valid. This is the reason why the issues related to the legal qualification given to the facts through the deed of intimation were not discussed, aspect that exceeds the processual framework of the preliminary chamber[30]. We invoke the fact that the deed of intimation is imprecise in terms of correspondence between legal qualification, as held by the prosecutor, and the facts described, which takes the form of an *irregularity* of the deed of intimation. This irregularity must be remedied in the preliminary chamber procedure - and not through a possible change of the legal qualification, submitted for the parties' discussion during the judicial inquiry, under the article 386CPP 386 - since it determines the *impossibility to establish the object (scope) and the limitations (boundaries) of the judgment*, affecting as well requirements related to the exercise of procedural rights guaranteed as fundamental principle. The description of the fact must not be confounded with the reproduction only of the constitutive content of the offense, as described in the criminality norm. The description of the offense within the indictment must consider all circumstances of place, time, means, mode, aim to which the offense was committed, with consequences on the constitutive elements of an offense and on its qualification in a specific criminality text. To meet the legal

[30] For the same interpretation, *C. Voicu* in The Code for criminal procedure commented, coordinator N.Volonciu, 2nd edition, Hamangiu Publishing House, 2015, p.927.

requirements for the establishment of the object of judgment it is necessary that the fact is presented in the indictment with all elements of criminal relevance, thus creating the possibility for the court to rule on that fact and for the defendant to defend himself efficiently[31].

Per article 371 CPP, *the judgment is limited* to the facts *and persons shown in the deed of intimation*. The deed of intimation is the indictment. Per article 328 paragraph (1) CPP, the indictment is limited to *the fact* and the person for whom the criminal investigation was conducted and contains *factual data* adduced against the accused and its legal qualification. Therefore, the indictment must contain a description in a reasonable manner of the facts incriminating the defendant. The judgment on the merits cannot take place unless the indictment describes in a clear, understandable and concise manner the facts which the defendant presumably has committed, so the court may understand from the beginning what are the charges being brought, may provide clarifications and explanations to the defendant in the early phase of trial under the article 374 paragraph (2) CPP and, at the same time, to be able to assess in terms of the article 100 paragraph (4) letters a) and b) CPP whether the claims made by the defendant to administer new evidence are justified (assessment that requires a full understanding of the subject of the evidences in relation to the facts indented to be proven).

Beyond the need for the court to precisely determine the procedural framework, a clear description of the facts is important for the defendant as well. He can effectively exercise his right to defence only if, as a priority, he understands the charges being brought, at least at the level of factual situation. Through the indictment no. 259 / P / 2015 from May 17, 2016, the defendant was indicted for the offense of trading in influence, *"foreseen in article 291 paragraph (1) Criminal Code, with the application of article 35 paragraph (1) Criminal Code and article 5 Criminal Code".* This offense was placed in the charge of the defendant as being committed in a continued form, during September 2006 - spring of 2013. As it can be seen, there is no indication whatsoever of the number of material actions that are part of this continued crime. The judge sitting in the preliminary chamber appreciated that the situation was determined by an objective impossibility to describe all the material actions, invoking practice to this respect.

In our opinion, this appreciation is wrong, because the deed of intimation lacks not the *description* of the material actions, but their very individualization in space and time. The indictment contains a state of facts covering a long period, subsequently qualified as traffic of influence in a repeated form. The reproach brought to the indictment consists in the circumstance that, while retaining the repeated form of the offense, it does not individualize the material actions falling within the content of the continued offense in relation to the facts described. Therefore, what we understand to submit to the analysis is not the status quo, but the circumstance that, although it refers to the continued form of the offense, this status quo was not shared by the prosecutor in any way, so that the defendant can understand primarily how many material actions (in terms of numbers) he is being accused from, what are they, when were they committed, each of them (at least the approximate time). In these conditions the defendant cannot build an effective defence because he cannot determine whether a factual circumstance that the Public Ministry

[31] Court of First Instance Constance, the resolution no. 156 from April 30, 2014 cited in *C. Voicu*, the New Code for Criminal Procedure commended, op cit., P.927.

encompasses within the described status quo is being charged to him as a distinct material action in relation to another circumstantiated fact. Moreover, this type of irregularity of the indictment is expressly indicated by the legal doctrine as likely to affect the establishment of the object of the judgment[32]. The jurisprudence invoked by the judge sitting in the preliminary chamber in the resolution being challenged is undoubtedly justified. It is difficult to ask the prosecutor, from obvious reasons related to the extent of the indictment, to describe each individual material action, especially if their number is high and the similarities between them are major. However, we consider that these cited judgments *have no relation with the issue being addressed* in the cause because, as noted above, it is not the description of the facts that is missing, but its individualization based on the different material actions. The description of these material actions was not possible because, in fact, they were not separately identified by the prosecutor (which is why their number was not listed), and they were appreciated as an overall factual situation.

Without the indication of the *number* of the material actions, of the elements relating to the *time of occurrence* of each of them (for which temporal coordinates are not indicated, but only the whole period of the continued offense, as legal unity), of the *specific ways of committing the offenses* (act committed or omitted, alternative or successive committed personally or through intercessor etc.), we appreciate that the object of the judgment cannot be legally established, as the acts of judicial inquiry can be made only regarding the issues completely defined. This incomplete way to describe the offense of traffic of influence affects as well the right of defence of the defendant guaranteed not only in the form but also in its exercise because he is being rendered unable to prove the unreal appearance of an argument if it is not individualized. Only in relation to a precise fact a real defence can be made, and one of the core tasks in the work of the prosecutor is to formulate clear, rigorous accusations *"and not to create a puzzle that would eventually be settled by the defendants"*[33].

We underline as well that the need for such additional indications is justified by the fact that, from the material point of view, the offence of traffic of influence involves *demanding, receiving or accepting the promise of money or other benefits,* and on the other hand, in accordance with article 35 paragraph (1) Criminal Cod, one of the conditions of the continued offence is that *each action or inaction taken as material action has to present the content of the same abstract pattern of criminality.* Or, if the material acts - to which the prosecutor refers implicitly when holding the continued form of the offense - are not individualized separately, the defence also cannot analyse the accomplishment in relation to each part of the condition foreseen in article 35 paragraph (1) Criminal Code. The continued offense represents a form of the legal unity of offense, through which criminal actions capable by themselves to achieve the content of the offense are joined by the will of the legislator in a single offense (because they are committed under the same criminal intention). The material actions entering the content of the continued offense, being themselves criminal actions, must be presented in the indictment with all the elements having criminal relevance under the content of the offense, whilst being necessary that the will of the prosecutor to manifest in

[32] *I. Kuglay* in M. Udroiu (coordinator), *The Code for criminal procedure. Comments on articles*, CH Beck Publishing House, 2015, p.906.

[33] Suceava Court of Appeal, Criminal Division and for cases involving minors, resolution of the judge sitting in the preliminary chamber no. 36/2014, cited in *C. Voicu* The New Code for Criminal procedure commented, op.cit., p. 926.

the sense of the arraignment. If the material actions are not individualized it cannot be verified if each of them meets the standard of the norm of criminality, and the defendant cannot thus defend against the charge being brought to him. Finally, we show that the exercise of the two antagonistic procedural functions (accusation -defence) before the court of law is inextricably linked to the object of the judgment which is however unilaterally established by the accusation. Or, in this case, the object of the judgment cannot be established, the charge brought against the defendant being a formal one, unspecified from the material point of view, which sets the defendant unable to formulate an effective defence.

For the support of the denial of the requests for irregularity of the resolution, the judge sitting in the preliminary chamber argued using the fact that the defendant did not invoked, throughout the prosecution, the problem of the insufficient description of the facts he was held with, although at the time of the initiation of the criminal proceedings he was informed about the accusations and he gave a statement regarding the accusations during the criminal proceedings. In our opinion, this argument adds to the law. To invoke problems regarding the unlawful referral of the court is not subject to the procedural attitude of the defendant during the criminal investigation, since the law does not contain any indication to that effect. On the other hand, the initiation of the criminal proceedings by the prosecutor is not the procedural act setting the object and the limitations of the judgment. Therefore, it is irrelevant to determine whether the allegations are understood upon indictment. The object of the judgment is fixed through the indictment, which is the deed of intimation. So, based on this act, it is essential to determine if the action has been fully described.

In relation to the issues presented, the description in a reasonable manner of the facts being apprehended represents a prerequisite for the regularity of the deed of intimation, since the establishment of the object of judgment depends, in a determinate manner, on the clarity of presentation of the accusation, the court losing in the current processual system the capability to reconfigure the object of the judgment and thus complement the initial shortcomings of indictment. The importance of ensuring a regular notification of the court was still observed under the old regulation when, anyway, the court, under its active role expressly recognized[34], had at its disposal the appropriate procedural remedies to help during the proceedings to the extension or the abbreviation of the object of the judgment. In this sense, in the specialized literature it has been appreciated that the verification of the regularity of the deed of intimation has priority over the verification of the courts' competence, being possible to accomplish or provoke the remedy of the irregularities by a court of law that did not have jurisdiction to resolve the merits of the case in question[35].

4. Conclusions

The national regulation is undoubtedly deficient in terms of implementing the conventional standards established in the field of requirements that must be met by the main act in which the accusation formulated

[34] In accordance with article 287 paragraph (1) CPP from 1968, the Court shall exercise its powers actively to find the truth and to achieve the educational role of the judgment. The provision was confirming one of the primary principles of the criminal procedure, *the obligation*, that had as important consequence the procedural rule to promote *ex officio* – "the task for the judicial bodies to work on own initiative by performing all acts and formalities prescribed by the law of criminal procedure" *(Tanoviceanu I.,* Treaty of Criminal Law and Criminal Procedure, 4th volume, 2nd edition of the Course of criminal law and criminal procedure, reviewed and completed, doctrine by *V. Dongoroz,* Curierul Judiciar Publishing House, 1926, p.38-39).

[35] see to that sense *V. Dongoroz, and others,* op.cit., 6th volume p.149.

against a person in criminal proceedings is materialized. The absence of provisions that would develop the minimum requirements in relation to which the function of verification of the legality of the indictment is exercised was most of the time compensated by the courts.

Taking into consideration the functional relation between the subjects applying the procedural norms and the authorities establishing them, this circumstance do not remove the need to improve the regulatory framework in the domain.

A legislative intervention aimed at ensuring not only the guarantee of the rights of the participants in the trial and a fair trial as well as the effective exercise of the powers of the judicial bodies will help to strengthen the safeguards of a modern process system.

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SHORT REFLECTIONS REGARDING PRECAUTIONARY AND PREVENTIVE MEASURES ORDERED IN THE CRIMINAL TRIAL AGAINST AN INSOLVENT LEGAL PERSON

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Abstract

The judicial realities have shown us that the field of the precautionary and preventive measures ruled in the criminal trial against the insolvent judicial person is not correctly and efficiently regulated. There are a series of peculiarities that should be attentively analyzed in order to eliminate the negative effects of the interference of the criminal procedures with those of insolvency. The lack of a specific package of standards that help managing such a situation, but also, sometimes, the misinterpretation of the existing regulations in the field may generate situations that go almost beyond the legal persons in such a position.

Keywords: *insolvency, procedure, legal person, precautionary measures, preventive measures, order, trial/ law suit.*

Introduction

This study is intended to approach some aspects implied by the interference of the insolvency procedure with the criminal trial and since the most frequent question of the experts in insolvency has become if, the criminal trials may block the insolvency procedure, it seems convenient to start with the conclusion itself, that criminal trials should not hold back the insolvency procedure.

The lack of clear judicial provisions and especially enacted for managing such issues and sometimes the misinterpretations of the existing provisions may generate situations that the legal persons may find hard to go beyond.

1. Economic measures taken against the insolvent legal person

During a criminal trial, several categories of economic measure can be taken against a legal person and it is important to make a clear-cut distinction between measures that may be taken during the criminal trial and those taken by final criminal judgement.

If the respective legal person is in an insolvency procedure, as a debtor, the distinction above is very important since the existence of an ongoing criminal trial or, on a case to case basis, of a final criminal judgement influences in different ways the insolvency procedure, as follows.

1.1. Measures taken during the criminal trial

The measures that may be ordered during the criminal trial that have economic

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consequences for the legal person and for the insolvency procedure, are:

- precautionary measures meant to remedy the damages caused by the offence;
- preventive measures;

These two categories of measures raise significant problems with respect to the interpretation of the law and to the correct and efficient management of the two procedures.

1.1.1. Precautionary measures that can be inflicted on a legal person during the criminal trial

Precautionary measures have as a result the preservation of the assets or real estate belonging to the suspect, defendant or to the liable person, with a view to a special confiscation, to an extended confiscation, to the execution of the fine sentence or of the judiciary expenses or to covering the civil damages.

During a criminal trial, against the legal person the court may rule precautionary measures in three situations:

- the legal person has the quality of defendant in a criminal trial in which it may undergo precautionary measures in order to offer the guaranty of executing the fine sentence, the judiciary expenses, the warranty of the special confiscation and of the extended confiscation, the warranty of repairing the damages resulting from the offence;
- the legal person is liable in the civil lawsuit, case in which it may undergo precautionary measures that guarantee the recovery of the damage resulting from the offence, in order to cover the judicial expenditures;
- finally, the legal person may not have any of the qualities above, but it may be imposed precautionary measures, as a third party, in whose custody or possession are the goods that may be affected by the safety measures of the special confiscation or of the extended confiscation, stipulated in art. 112 and 112 [1] of the Criminal code.

A. The legal person, defendant in a criminal trial

The provisions regulating the criminal liability are contained in art.135 of the New

Criminal code, and from the way of regulating this liability, we can easily conclude that a legal person may frequently be considered liable from the criminal point of view, be it only for offences committed while achieving its own objectives, to its benefit or in the name of the legal person.

Still, as it is, the criminal liability of a legal person is a problem of law that cannot be solved only by the simplistic interpretation of the provisions in the criminal laws, but also by corroborating them with the stipulations of Law 31/1990 on companies, regarding liabilities and the mandate of managers and other persons representing legal persons, and with the stipulations of the Civil code, that are particularly relevant from this point of view.

Thus, according to art. 219 of the Civil code, lawful or illegal acts committed by the representatives of the legal person, are incumbent upon the legal person itself, but only if they are connected to the attributions or to the purpose of the positions it was entrusted with.

At the same time, according to the provisions of art. 72 of Law 31/1990, the obligations and liabilities of managers are regulated by provisions regarding the mandate and by those especially mentioned in this law.

As a result, even in situations when an executive, an agent, the representative of the legal person commit an offence within the sphere of activity developed by the legal person in carrying out the object of its activity, according to the law or to the articles of incorporation, or to the benefit of the legal person (the offence to the benefit of the legal person is that when the profit resulting from

the offence goes wholly or partly to the latter or when the profit consists in avoiding a loss)[1] or in the name of the legal person (we must stress the fact that in the name of the legal person, offences may be committed only by the persons officially appointed for representation attributions)[2], in my opinion, the legal person cannot be automatically, ope legis, held liable, except when material evidence shows that the natural person who committed the offence did not exceed the limits of the mandate or the attributions or purpose of the position the legal person entrusted him/her with.

That is why I consider faulty the opinion formulated in the doctrine[3], according to which if hypothetically a natural person commits an offence to his/her exclusive benefit, but in connection with the object of activity of the legal person or even against its interests, given the fact that at least one of the hypothesis alternatively stipulated by the law is met, the legal person may be considered criminally liable.

Accepting the thesis of the criminal liability of the legal person only as a result of meeting only one of the three alternatives stipulated by art. 135 of the Criminal code (the offence was committed while carrying on the object of activity, to the benefit or in the name of the legal person) would mean denying the principle of criminal personal liability, but also a dilution of the criminal and civil liability of natural persons – actual authors of the offences- who, under the umbrella of the liability of the legal person may continue the criminal activities.

The problem of the criminal liability of legal persons is very sensitive in the case of the legal persons whose objects of activity are very complex, who have many employees, multiple shareholders, many executives and it cannot be approached in the same way with the situation of the companies with limited liability, where the manager and the associate are usually taken for the legal person.

Without enlarging upon the issues connected to the criminal liability of the legal persons, the opinion in the doctrine[4] is worth mentioning: the legal persons in the phase of compulsory liquidation may be held criminally liable for offences committed exclusively during this phase, for the reason that the liquidated legal persons maintain the legal capacity necessary for capitalizing goods as money and for the payment of the liabilities.

B. Legal person, a party with civil liabilities

The legal person may undergo precautionary measures with a view to the remedy of the damage resulting from the offence committed by its agent and of the judicial expenditures made during the criminal trial, when it has the quality of a party liable in the civil lawsuit.

Regulations on the tort, in a criminal trial, regarding the legal person as a party liable in the in a civil lawsuit, are to be found in the provisions of the procedural criminal and civil law.

According to art 19. Par 2 of the Criminal code procedure , the civil action in a criminal trial is exercised against the defendant and, on a case to case basis, against the party liable in a civil lawsuit.

According to art. 86 of the Criminal procedure code, a party liable in a civil lawsuit is that person who, according to the civil law, is liable to remedy, wholly or partially, single or jointly, the damages resulting from the offence.

According to art. 1373, par. 1 of the Civil code, the principal is liable to remedy

[1] F.Streteanu, R. Chirita, *Criminal liability of legal person*, ed. a II-a, Editura C.H.Beck, 2015.
[2] Ilie Pascu, Vasile Dobrinoiu ș.a,, *New Criminal Code annotated, vol I, General section*,Ed. Universul Juridic, 2012, p.696.
[3] Dobrinoiu, ș.a *New Criminal Code annotated, general section, vol. I*, Ed. Universul Juridic, București, 2012.
[4] Jurma, *The legal person – active subject of civil liability*, Editura C.H. Beck, București,2010.

the damage caused by his/her agents anytime the offence committed by the latter is connected to the attribution or to the purpose of the positions they were entrusted with, while according to par. 2 of the same article, the principal is the person who, by virtue of an agreement or by law, exercises direction, supervision and control of the person who has positions or assignments to his interest or to another person's interest.

It goes without saying that the legal person, as the party liable in the lawsuit, will be held responsible for the remedy of the damages caused by its agent only to the extent the latter committed the offence in connection with his attributions or functions he was assigned.

The principal will be held liable for the damage caused by his agent(s), according to art.1373 in the Civil code, only when the agent causes damages to a third party as a result of an illicit action outside the field of the agreement, that is tort. The principal will always be held responsible for cases when the agent committed the illicit action to his own interest or upon his request to another person's interest, within the strict limits of the attributions entrusted to him, by complying with the instructions and orders the principal gave him. The principal will also be held responsible for damages caused by the agent when the latter acted by deviation from his assignment, by exceeding his limits and even by abuse of office, if the offence committed was connected to his/her assignment or with the purpose of the entrusted position"[art.1373 par. (1) final part of the Civil code] or, if at least apparently the agent acted – when the harmful event was committed – in connection with the assignment or with the purpose of the entrusted position [art. 1373 par. (3) in the New civil Code][5].

Art 1373 par. (3) stipulates that this condition is not fulfilled and, consequently, the principal will not be held liable in case he "proves that the victim knew, as the case may be, or could know – at the moment of the harmful event was committed – that the agent acted in no relation to the assignment or with the purpose of the entrusted position"; in the New Civil code, bona fide is presumed by the law to the benefit of all the natural and legal persons until proven otherwise; thus, the principal may dispute the relative legal presumption of the victim's bona fide, proving the contrary.

In the New Civil code, the liability of a legal person, as a principal, is regarded as an objective liability, based on the idea of the principal's obligation of guaranteeing everyone's safety in connection with the activity it organizes and develops, by association with or by hiring agents, and it manages it to his own direct or indirect interest. The obligation of guarantee is sustained by the risk of activity which also includes the authority's risk, since between agents and principals there are subordination relations that give the principal the right to give orders, instructions to the agents and to supervise, guide and control them[6].

C. The legal person, third party in the criminal trial

Precautionary measures may be inflicted to legal persons, third parties in the criminal trial who own or have in custody goods that may be subject to a special or extended confiscation.

The goods stipulated by law that can be subject to special confiscation and according to art. 112 in the Criminal Code that, thus, may undergo precautionary measures, are the following:

- goods obtained by committing actions stipulated in the criminal law;

[5] Oana Andreea Motica, Special Conditions of Tort Liability of the Principal for Damages caused to Third Parties by Illegal Acts of Agent, avaliable at https://drept.uvt.ro.

[6] www.legeaz.net/noul cod civil, principal's liability for the agent's action.

− goods that were, in any way, used or meant to be used to commit an offence stipulated by the criminal law, if they belong to the offender or if, belonging to another person, the latter knew the purpose to which they were used;

− goods used immediately after committing the offence, in order to ensure the offender's escape or keeping the profit or the product obtained by offence, if they belong to the offender or if, belonging to another person, the latter knew the purpose to which they were used;

− goods that were given to determine committing the offence stipulated by the criminal law or for rewarding the offender;

− goods acquired by committing the offence stipulated by the criminal law, if not returned to the injured person and to the extent they do not serve to the latter's remedy/compensation;

− goods whose possession or holding is forbidden by the criminal law.

The precautionary measures with a view to the special confiscation may be taken, as shown above, in most of the cases, when the legal person has the capacity of defendant (or suspect) and less in cases where it has the capacity of third party in the criminal suit. An exception is the situation in which, although a third party and owner of the goods, the legal person was aware of the purpose to which the offender used them, be they goods used to commit the offence, or goods that ensured the offender's escape or the keeping of the benefits or of the product obtained by offence. The incidence of these cases in practice is rare, since we speak about a psychological, cognitive element, that is, about the legal person's awareness of the fact that its goods are used to a certain purpose by the offender, and, in most of the times, it is hard to be proved.

As regards the extended confiscation, according to art. 112¹ in the Criminal code, this measure can be taken only if there is a decision of conviction for one of the offences mentioned by the legislation and, given their peculiarities, only certain of them can be committed by the legal person, for example: offences against the patrimony, tax evasion, violations of the customs regime, disclosure of classified economic information, unfair competitions, offences against the financial interests of the European Union.

According to art.112¹ in the Criminal code, the extended confiscation may also be decided if the value of the goods (obtained by the convicted person during the previous 5 years, and, if necessary, after the offence was committed, until the issue of the referral note) is obviously exceeding the income obtained illicitly by the convicted person and if the court has the firm belief that the goods were obtained by offences of the kind stipulated in the same judicial text.

According to art 112¹ of the Criminal code, the value of the goods transferred by the convicted person or by a third party, to a member of the family or to a legal person controlled by the convicted person will also be taken into account.

According to par. (7), money and goods obtained from the service or use of the goods confiscated as well as the goods produced by the latter, will also be confiscated[7].

At present, the measure of extended confiscation, as per criminal laws, may be taken in several cases against a legal person, as compared to the special confiscation, at least in its capacity of legal person controlled

[7] By the decision of the Constitutional Court no. 11/2015, they found out that the dispositions under art. 1121par.. (2) letter. a) din of the Criminal Code are constitutional to the extent to which the measure of extended confiscation will not apply to assets acquired prior to coming into force of Law no.. 63/2012 on amending and supplementation of the Criminal Code of Romania and Law no.. 286/2009 on the Criminal Code.

by a convicted person, but criminal laws, as conceived by the law makers, are rather vague and the law maker did not establish a procedure to be followed for determining the incomes during the 5 years before and after committing the offence, the incomes that exceed the licit amounts, as, for example, stipulates Law no. 176/2010 regarding integrity in public offices. At the same time, the too vague wording of this legal text, according to which the confiscation may be decided if the court "firmly believes" that the goods result from offences, has been received with a grain of salt. During the criminal suit, all the decisions of the court, both criminal and civil law decisions, are based only on firm proofs, on material evidence and not on presumptions and, on the other hand, the question arises if by these decisions, the law maker did not deviate from the constitutional principle of the licit acquirement of property, stipulated in art.44 par. (8) of the Constitution.

The Constitutional Court's jurisprudence states that "regulating this presumption of innocence does not impede the investigation of the illicit character of the acquirement of property, the task of presenting the proof being incumbent on the part invoking it. To the extent the interested party proves that some goods, part of, or all the property of a person was acquired illicitly, for those goods or for the property acquired illicitly, confiscation may be decided, "under the conditions stipulated by the law'. The Constitutional Court's jurisprudence also states that "regulating the presumption of innocence does not impede the primary or authorized legislator to implement the provisions of art. 148 of the Constitution – European Union integration, to adopt regulations that allow the full compliance with the legislation of the European Union in the field of fighting criminality", with direct reference to the Framework- Directive of the Council of February 24th 2005 regarding the confiscation of products, instruments and goods connected with the offence[8].

Still, due to the lack of regulations in a probation system, the lack of a procedure defining clear rules for overturning this relative legal presumption, but also appropriate procedural guarantees for the owners of goods, the legal provision regarding the extended confiscation may be regarded as an interference in the right to a private property, according to art.1 of the Protocol no.1, additional to the Convention for the defense of human rights and fundamental liberties.

The court's firm belief that the goods or money owned by the convicted person might result from offences committed before the one for which the conviction was decided, can be based only on evidence, the criminal trial being governed by the principle of finding the truth based on evidence, or speaking about previous actions that are not the subject of the *pending* judgement and for which, as a result, no evidence has to be produced, this firm belief cannot be but subjective, arbitrary. The arbitrary will also be found in the quantification of the sums of money that will be confiscated, in distinguishing the licit from the illicit incomes. Not very clear is also the way of establishing the sums of money transferred to the legal person controlled by the convicted person, but, most probably, the law maker had in mind the contribution/ shares within the legal person, under the form of goods or sums of money, equities or interests owned by the convicted person.

Cautiousness in applying these rules regarding the extended confiscation is even more necessary as we also speak of goods

[8] published in the official Gazette of Romania, Part I, no. 440 / 23.06.2011.

belonging to third parties that have the constitutional right to have their property rights protected. Any interference with the exercise of this right can be justified only by strong beliefs, based on material evidence, on the respect of all the procedural guarantees and of the right to defense, including the third parties, meaning that their goods, all or part of them, result from offences of the type stipulated in art.112¹ Criminal code – provisions that are also to be found in art.8 par.(8) of the 2014/42/EU Directive.

It is also important to mention that according to the Constitutional Court's decision no. 365/June 25th 201, the precautionary measures connected to the extended confiscation can be taken only for goods acquired after Law no.63/2012 took effect, while the offences should have been committed after that date.

1.2. Measures taken as a result of a final criminal judgement

If the criminal trial is over and the legal person, be it convicted, or a party liable in a lawsuit, was deemed to pay damages to the civil parties, the judiciary expenses or condemned to a criminal fine (as defendant), or if a special or extended confiscation was inflicted on the legal person, according to art 112 or 112¹ of the Criminal code, we will face certain and exigible claims in favor of common creditors or, on a case to case basis, in favor of the State. Within the insolvency procedure for legal persons, these certain and exigible claims do not differ much from the rest of the competing claims, the only difference being that they are decided by final judgement and can no longer be challenged in court. Moreover, they are not subject to the trustee's or liquidator's verification, according to art 58, par (1) let. K and art 64 let. f of Law no. 85/2014.

The fact that these claims have the judicial regime of the common receivables or of tax receivables results from the provisions of the criminal procedure that regulates the way the claims are executed.

Thus, civil damages and judicial expenditures due to the parties and established by criminal judgement, will be executed according to the civil law, as stipulated in art.581 of the Criminal code procedure.

As regards the safety measures connected to the special or extended confiscation, according to art. 574 of the Criminal code procedure, the confiscated goods will be handed over to the bodies lawfully appointed to take them over or to capitalize them. If the confiscation regards sums of money that are not registered in banks, the judge appointed for the execution will send a copy of the operative part of the judgment to the tax bodies, the execution being performed according to the legal provisions on budgetary debts.

As a result, in case the criminal trial is over, the claims resulting from the final criminal judgement will be capitalized against the insolvent debtor, just like any other claims, in a collective procedure and having the priority conferred by the insolvency law.

2. Interference of safety measures with insolvency procedure

Against a legal person under the insolvency procedure they can order security measures, in the criminal trial, for the purposes already above presented. Naturally there is this question arising: what is going to happen with the assets affected by the safety measures, in relation to the ongoing insolvency procedure?

We should seek the answer in the definition given by the law in connection with establishment of the safety measures, respectively to avoid hiding, alienation or removing the assets from investigation, this

is, assure the creditors' chance to obtain enforcement of the enforceable title against the debtor, at the time of delivery of the final judgment, and also in respect of the definition given by the law for the actual safety measure, and also the definition of the safety measure itself, according to art. 249 par. 2 of the Criminal code procedure, respectively preservation of movable and immovable assets by establishing a seizure on them.

Preservation of the movable or immovable assets means for the owner of the assets loss of the right to dispose of them, execute deeds on the disposition of the assets, according to the meaning of the word preservation itself.

Such preservation may not have the effect of, in principle, blocking the insolvency procedure, yet with certain nuances. To the question whether the criminal investigation can hold down the insolvency procedure, there is no simple answer: the criminal investigation cannot hold down the insolvency procedure since there is no legal disposition in this respect, yet at the same time, it does not allow the procedure to take place normally, according to the provisions of the Insolvency code.

We should point out that at this time, the criminal procedure no longer holds down the civil procedure, absolutely and unconditionally, as provided by former criminal procedure provisions.

According to the provisions of art. 27 par. (7) Criminal code procedure, when the victim of an offense decides to initiate an action before a civil court, the lawsuit before the civil court shall be suspended after initiation of the criminal action, yet solely until settlement of the criminal case by the court of first instance, and no longer than one year.

Setting aside the fact that suspending the law suit before the civil court, in carrying out the right of indemnification, may not exceed one year, and the civil law suit may continue unimpeded even when there is no final decision in the criminal procedure, we should add that , if suspending of a civil action before the civil court is grounded on the fact that the object of civil action itself is based on the damage caused by an offense, the insolvency procedure is not a civil action, and the object thereof is not to *establish the claims* of various creditors, which are usually preexistent, but its object is *to capitalize* such claims, by a *collective procedure* and following a certain order as provided by the law, and also *set up a collective procedure in order to cover the liabilities of the debtor under the insolvency procedure.*

The legal provisions in this matter make few references and definitely are not helpful in the settlement of this issue.

Thus, according to art. 75 of Law no. 85 / 2014, " starting with the date of commencement of the procedure, all judicial and extrajudicial actions or enforcement measures for *establishment of the claims against the debtor's assets will be lawfully suspended.* Recovery of their rights will only take place within the insolvency procedure, by filing the request for registration of the claims.

According to par. (2) , the lawful suspending provided under par. (1) will not operate for: (1) the debtor's appeals against the actions of one/several creditor/s commencing before starting of the procedure, and also the civil actions brought in the criminal trials against the debtor".

According to art. 91 of Law no. 85/2014, "(1) the assets alienated by the judiciary administrator or judiciary liquidator, in carrying out its attributes as provided under this law, are acquired free of any encumbrances, such as privileges, mortgages, pledges or detention rights, seizures, of any kind. The precautionary measures ordered in the criminal trial for the

purpose of special and / or extended confiscation are excepted from this regime.

(2) By way of exception from the provisions under art. 85 par. (2) of the Civil code, removal from the land book of any encumbrances and interdictions as provided under par. (1) will be carried out in compliance with the deed of alienation signed by the judiciary administrator or judiciary liquidator."

According to art. 102 par. (8) of the Insolvency code, the claim of a damaged party in the criminal trial falls under the suspensive condition, until the final settlement of the civil action in the criminal trial in favor of the damaged party, by filing a request for registration of the claim. In case the civil action in the criminal trial is not settled until closing of the insolvency procedure, either due to the success of the reorganization plan, or the liquidation, any claims resulting from the criminal trial will be covered by the properties of the re-organized legal person or, where necessary, from the amounts obtained in the action of joint patrimonial liability of the persons having contributed to the insolvency of the legal person, in compliance with the provisions of art 169 and the subsequent ones.

The above provisions, beside the fact they do not settle the issue, are somehow contradictory.

The interpretation of the provisions under art. 75 of the Insolvency code reveals the fact that, the civil action brought in the criminal trial and the insolvency procedure are taking place at the same time, and the insolvency procedure can block any other civil actions on the *establishment of claims* against the debtor's property, *less the civil action initiated in the criminal trial.*

Upon the systematic and grammatical interpretation of the dispositions of art. 91 of the Insolvency code it results that they can sell also the assets under criminal seizure, with only one exception concerning thereof , namely they will not be sold free of encumbrances (respectively precautionary measures ordered in the criminal trials, in view of the special confiscation and extended confiscation)

The text of art. 91 of the Insolvency code is criticizable. We can see that, although art. 75 of this code seems to grant a certain protection to the potential creditor in the criminal trial, which could be the person suffering damage by the offense, in case his claim for damages is accepted, but this can be the state as well, when the special or extended confiscated is ordered, art. 91gives up the protection of the ordinary creditor and preserves solely the right of the state, maintaining solely the seizures established in view of confiscation.

Nevertheless, it is essential to retain that, by maintaining the seizure in favor of the state, even after selling the assets, the lawmaker indirectly admits that the assets can be sold prior to the completion of the criminal trial.

Thus, according to jurisprudence[9], they appreciated that, "establishment of preventive seizure will not prevent selling of the assets in the insolvency procedure, and will not affect the distribution order of claims in the procedure, the only scope of the seizure being preventing the debtor to alienate his property in detriment of creditors, for whom it might be impossible to recover the damage caused by the alleged offense imputed to the debtor.

Blocking the recovery in the insolvency procedure, similarly with blocking the enforcement, would signify non compliance with the principle of proportionality between the demands of the

[9] Resolution dated 10.02.2017 of the Court of Appeal Bucuresti, First Criminal Section, delivered on case no. 1022 / 2/ 2017.

general interest and individual rights imperative defense.

(…). The text of art. 91 of Law 85/2014 refers to the pre-existing situation of alienating, by the judiciary administrator or judiciary liquidator of the assets under seizure, therefore the measures taken in the criminal trial are compatible with the insolvency procedure, and the assets under seizure are not overlooked. The criminal law establishes an interdiction for the suspect, accused or civilly liable party to carry out activities of voluntary disposal of the assets making the object of seizure.

In the hypothesis of the assets under pre- existing warranty, the mortgagee has priority even when there is a preventive seizure established in connection with the asset, noted prior to the mortgage, since the mortgage is a real accessory right granting its holder a pursuing right, whoever is holding it, and a preferential right in order to satisfy his claim against the other creditors (in this respect see also the Decision of the High Court of Cassation and Justice, Criminal section, no. 1392/2013)".

We consider that, in principle, the precautionary measures in the criminal trial should not block the insolvency procedure, nevertheless, when prior to the time of distributing the amounts of money resulted from the liquidation of the debtor's property the criminal trial has not been completed, at least this distribution should be postponed until obtaining an executory title. Otherwise, the persons suffering damages caused by the offense, and the state, in case of confiscation, would be definitively deprived of the right to recover their claims against the debtor, the more so as the law allows that their civil action continue against the debtor under insolvency procedure.

Conditioning the claim settlement of the civil party in the criminal trial by the decision of personal liability of the administrator or the person having contributed to the insolvency of the legal person is opposed to the provisions of art. 75 which allow continuation of the civil action in the criminal trial, since this personal liability is totally unsure, both regarding the existence and the amount thereof.

As regards the opinion expressed in practice, according to which it is impossible to sell the assets under seizures, during the insolvency procedure, taking into account that the state, following the confiscation , would be granted a preferential right, and I consider, being in agreement with the experts in the field of commercial and insolvency law, that such right cannot be granted.

Special confiscation and extended confiscation represent economic safety measures , having direct effects on the property regime, and representing a specific way of acquiring properties by the state, as a consequence of Court decisions, and , implicitly, a means to put out the property right of the subject, as of right, suffering this sanction.

There is no legal disposition which confers such preference to the state, the claim acquired by it being a budgetary, tax claim.

3. Preventive measures ordered during the criminal trial

As regards the preventive measures that can be ordered during the criminal investigation, and also during the Preliminary Chamber procedure, and during the trial, against the legal person; there are five measures according to art. 493 of the Criminal Procedure Code and can be ordered:

- if reasonable doubt exists that the legal person committed an action falling under the criminal law;
- solely in order to ensure the good procedure of the criminal trial.

Mention should be made that the law does not condition taking the preventive measure of the nature of the offense, or seriousness thereof, which means that theoretically, the preventive measures against legal persons can be taken for any kind of offenses, solely on the condition that they are necessary for the good performance of the criminal trial.

Unlike the preventive measures taken against natural persons, for which the criminal procedure law provides conditions relating to the seriousness of the offense, resulting from the punishment limits or enumeration of the offenses for which they can order the preventive measures (art. 223 par. 2 of the Criminal procedure code), and the offender's behavior (the defendant ran away, went into hiding, in order to avoid the trial, tried to influence finding out the truth, continued to commit offenses), conditions related to protection of public order – letting the defendant go free may endanger the public order, for the legal persons the lawmaker no longer provided such conditions, and only stipulated that preventive measures can be ordered for the good performance of the criminal trial. According to the modality of setting the conditions, we may draw the conclusion that the lawmaker was more permissive, reagrding the preventive measures against legal persons, which can sometimes lead to arbitrary measures against them and prejudices to the good performance of their activity.

We should point out that, in the case of legal persons, the legal dispositions (art. 493 of the Criminal procedure code) do not provide a maximum limit of the preventive measures, which obviously contravenes the prevention regime that applies to natural persons. Nevertheless, by Decision no. 139/2016, the Constitutional Court turned down the constitutional challenge of the dispositions of art. 493 of the Criminal procedure code, holding that " If a maximum limit up to which they can extend/maintain the preventive measures against the legal person would be set up, then the scope of the criminal action itself is denied, which is to hold the legal person liable for criminal offense, since, by allowing the dissolution, liquidation, merger or splitting thereof, the object of the criminal action, thus defined by art. 14 of the Criminal procedure code, would be left without purpose, Thus, although when the criminal trial has ended, the Court would order the punishment of the accused, this could no longer be held liable for criminal offense, since it lost its identity due to the legal disappearance thereof and removal from the Trade Registry"

Nevertheless, there is a legitimate question arising: what is happening with the activity of a legal person , the accused in a criminal trial, when certain activities thereof have been forbidden, as a preventive measure, and the criminal trial would last for several years. Although the legal person enjoys the presumption of innocence, and theoretically is innocent until being sentenced by final judgment, extended preventive measures may lead to the liquidation *de facto* thereof, prior to being found guilty.

3.1. Interdiction to initiate or suspend the procedure of dissolution or liquidation of the legal person

In fact, this preventive measure includes two hypothesis: first, interdiction to initiate or suspend the procedure of dissolution or liquidation of the legal person, when such procedure was not yet initiated, secondly, suspending the procedure of dissolution or liquidation, when it was already initiated.

Since the terms used are rather clear, I consider the issue refers strictly to the dissolution and liquidation, and not the insolvency procedure, which the lawmaker

did not understand to forbid, as a preventive measure, specifically taking into account the declared scope of this procedure.

The reason for which the lawmaker provided this preventive measure is obvious. Any legal person suspected for having committed an offense cannot cease to exist at the time of its investigation, since not only that this would any longer hold the capacity of a legal person, and therefore the passive subject of the criminal action, but it might lose its patrimony as well, and the consequence would be the impossibility to be held liable for a criminal offense, as the case may be.

3.2. Interdiction to initiate or suspend the merger, splitting or decrease of the registered capital of the legal person, which started prior, or during the criminal investigation

The above reason also applies in the case of this preventive measure, since they are interested in preventing the risk that the legal person ceases to exist by merger with other legal person, or by absorption by other legal person, or by distributing the patrimony of the legal person terminating its activity, between two or among several legal persons that already exist, or which are established as such. The measure does not apply to a legal person under insolvency.

3.3. Forbid certain asset transactions that may cause a significant decrease of the patrimony or the insolvency of the legal person

This is the preventive measure usually taken against the legal persons in criminal trials, leading to many discussions regarding the generic character of the text.

For instance, in a criminal case on the dockets of the Court of Appeal, Bucharest[10], Second Criminal Section, concerning the appeal filed by a trading company, accused in a criminal file, against the Court resolution ruling the extension of the preventive measure of forbidding the asset transactions that may cause the decrease of the patrimony or insolvency of the legal person, for another 60 days, they had ordered against the company investigated for several tax evasion offenses, the preventive measure of forbidding the asset transactions that might cause the decrease of the patrimony or insolvency of the company, without actually specifying which asset transactions were forbidden.

The Judge of Rights and Liberties of the Court of first instance ordered this measure while he actually held by the resolution for extending the preventive measure that the company was already under the insolvency procedure, but that, there was the risk that the company assets were decreased within the general procedure of the insolvency, prior to the final settlement of the criminal trial.

As a consequence of the preventive measure ordered in the case, the company could no longer carry out any kind of activity, or any kind of operations, all the accounts thereof being blocked, and even the salaries could not be paid, on the grounds that all the company's economic and financial transactions had been forbidden.

The legal person appealed against this resolution, by the judicial administrator, who essentially, besides the argumentation on the non existence of guilt in perpetrating the acts of which the company was accused, also showed that the text of law specifically provides that solely those asset transactions that may cause the negative results provided by the law can be forbidden, and not all the economic and financial transactions, and that the legal person carries out solely the activity for which it was established, according to Law no. 31/1990, while totally forbidding the asset transactions will

[10] file 2573 / 93 / 2014.

represent the dissolution *de facto* of the legal person, prior to the delivery of the solution on criminal grounds, and by the unlawful deprivation of property, and that it is impossible for the company to perform the preservation and management of the assets, and also to support the legal procedures for the recovery of the claims from its own debtors.

The Judge of Rights and Liberties of the Court, having assessed the resolution against which the appeal was filed, ruled that it did not comply with the legal demands:

"According to art. 493 par. 1 of the Criminal procedure code, the Judge of Rights and Liberties can order, if reasonable doubt exists to justify the reasonable suspicion that the legal person has committed a criminal offense as provided by the criminal law and only in order to provide a smooth operation of the criminal trial, one or several preventive measures be taken, among which forbidding certain asset transactions, that may cause the decrease of the company's patrimony/assets or the insolvency of the legal person (letter c).

According to par. 4 of the same article, the measure can be extended during the criminal investigation, and each extension may not exceed 60 days.

According to par. 5 the preventive measures shall be ordered by the Judge of Rights and Liberties by reasoned judgment; this demand being also provided by art. 203 par. 5 of the Criminal procedure code.

The Court resolution challenged in this case does not meet the prerequisite condition of its motivation, which entails consequences both legally and as regards the impossibility of controlling thereof, in this appeal. The judgment includes solely one motive, which represents the grounds for extending the measure of forbidding the transactions that may cause the decrease for the company's assets or the insolvency of legal person , respectively, "the risk continues that the company assets be decreased during the insolvency procedure prior to the final settlement of this criminal file". This sole argumentation will not cover the non-existing motivation and it is not compatible with the exceptional character of the preventive measures.

(…) The existence of the reasonable doubt that the company committed the offense provided by the criminal law is not sufficient itself to take/extend the measure, but the measure shall be taken solely to assure the good operation of the criminal trials, and this condition was not analyzed at all by the Judge of Rights and Liberties of the Court of First Instance, and no specification was given regarding the reason for which such measure was deemed necessary for the good operation of the criminal trial, and not to what extent the good operation would be prevented in the absence of this measure.

Although in the judgment it was specified that there was the risk that the assets be decreased during the insolvency procedure, the judge did not show the circumstances based on which he concluded that there was the risk of decreasing the assets, and this while preventive measures were applied to the company assets and the insolvency procedure against the company was controlled by the syndic judge.

As regards the other operations, as correctly presented by the accused person in the appeal, such operations were not individualized, since there are many categories of operations which, in either way, can decrease the assets, yet it is important to know whether they belong to the category of preservation actions, or management or disposition. Forbidding all the operations as a whole equals with the interruption of the company activity, and liquidation in fact thereof, while this is not the scope of the provisions of art. 493 of the Criminal procedure code. No actual specification of the

grounds making it necessary, in the opinion of the judge of first instance, extension to the measure, non identification of the operations forbidden for the accused party, make the control of the resolution of the appeal impossible.

In this case, the argumentation of the accused was not at all examined, and the forbidden operations were not specified, and the accused party was thus faced with the impossibility of carrying out its activity any more.

At the same time, we find that the connections between the two procedures in which the accused is a party were not clarified, respectively the criminal procedure and the insolvency procedure, taking into consideration that, according to art. 46 of Law no. 86/2005, all the acts, operations and payments performed by the debtor are null except for the operations and payments authorized by the syndic judge. Therefore, it is not clear, what was allowed by the syndic judge to the debtor and what was forbidden by the judge of rights and liberties"

Consequently, in view of the above considerations, according to art. 282 par. (1) of the Criminal code procedure and art. 6 of ECHR, the Instance – Judge of Rights and Liberties admitted the appeal filed, annulled the court resolution challenged and sent the case for retrial to the same instance.

3.4. Forbid signing of certain legal acts, as established by the judicial body.

This measure is similar to the above one, referring to legal acts strictly determined, and deemed by the judicial body that might influence the proceedings of the criminal trial.

3.5. Forbid activities of the same nature as those on the occasion of which the offense was committed.

This preventive measure seeks to prevent repetition of the material criminal acts, although actually it is an ancillary punishment.

4. Conclusion

The criminal liability of the legal person in general, and of that under insolvency procedure , in particular, represent a rather complex issue, which definitely requires a more accurate regulation, especially concerning the area of confluence of the two procedures , and which, according to the law seem to be parallel although in reality they intermingle with each other and represent an inconvenience for each other.

The preventive measures that may be ordered against the legal persons need revaluation, in order they may not lead to the dissolution *de facto* of the legal person, prior to settlement of the guilt thereof by means of the judgment.

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THE PROBATION MEASURES – THE REASONS FOR THE REGULATION

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Abstract

For a proper understanding of the law institution, it is necessary to understand the reasons that gave rise to the its regulation. By reasons of regulations, we understand the social, economic, political, legal, moral justifications, but also of any other nature that established the legislation adoption represents a positive source of the institution in question. Trying to find reasons for the regulation is a useful step, even under stronger word, if the institution researched is relatively new in the normative context, character that can be easily subject to error, assigned to the probation measures into Romanian law. The utility of teh step is to know the circumstances that caused, encouraged or even imposed the settlement of the probation measures in our country, but also of the goals that the new institution will answer them.

Keywords: *probation measures, restorative justice, the treatment of the offenders in the community, the prevention of the repeated offense, social reintegration, the compensation for the victim's damage, international and european legal on probation measures*

Introduction

In order to facilitate the understanding of the institution of probation measures, we believe it is useful to start by knowing the circumstances which led, encouraged or even required regulation of the measures in question, as well as social, economic, political, legal, moral justifications, but also of any other nature that established the legislation adoption represents a positive source of the institution in question.

Subsequently, we will refer to the purposes more spcific pursued by the lawmaker through the probation measures establishment and we may discover that the main purposes related thereto are reducing the risk of repeated offense, increasing the chances of rehabilitation and social reintegration, excluding extrapersonal and long-term harmful effects, specific to inprisonment, increasing the chances of compensating the prejudice caused by the offense and reducing the financial costs of administrating the criminal justice in its executing phase.

1. The context of imprisonment

As in other countries, in our country a first context that favored introducing the probation measures was the one for an overwhelming increase in the number of people sent to prison. Thus, during the communist regime, a maximum of 60,000 inmates was reached, out of which a significant proportion of serious crimes committed reduced[1]. The maximum noted was close to being reached and after the social, economic and political turmoil after

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[1] I. Chiș, The prison reform in Romania, Ando Tours Publishing House, Timișoara 1997, mentioned in I. Chiș, The penal law execution, Universul Juridic Publishing House, Bucharest 2015, p. 85.

the anti-communist revolution in December 1989, in 2001 the number of the detainees reached 49.840[2].

In this context one of the main reasons for enacting the probation measures was a significant reduction in the number of people who were sent to detention. Of course, reducing the number of the detainees at one time conducted the operations in the period before and after the anticommunist revolution in December 1989, with a multi-anual[3] regularity sometimes, but these reductions intervened through acts of pardon or amnesty.

Unlike the acts of pardon or amnesty, the reduction that was intended by the introduction of the probation measures could operate in parallel with the provision of minimum guarantees to ensure social reintegration of those who were not sent to prison and to preserve public order.

Thus, although in the Romanian legislation the probation measures in a similar form to the way they are outlined in the current legal sense were introduced by the Criminal Code from 1969[4], which established the educational measure of the supervised release and later, the correctional work[5] transformed in execution of the sentence in the workplace, the first institution to provide oversight of the measures in the true sense of the word was the suspended sentence of imprisonment under surveillance, introduced by Law no. 102/1992.

The institution of suspended sentence of imprisonment under surveillance began, however, to operate effectively and efficiently only after 2001 when the entire country, exceeding the experimental level the first specialized service in supervising the execution of the probation measures was set up and established by the Government Ordinance no. 92/2000 on the organization and functioning of the social reintegration of the offenders and the enforcement of non-custodial sanctions.

Upon the establishment of the first state organizations specialized in supervising the execution of the probation measures, we believe that we can talk, rightfully, of a system of probation in our country for the development of this system anywhere in the world, and it depended naturally on the development of the services designed to implement it.

The last and most important legislative step in terms of probation measures was conducted when the current Criminal Code entered into force, which introduces a number of institutions based on the probation measures such as the conditional sentence, suspended sentence under supervision, release on conditional supervision.

The importance and the substance of the penal reform made by the current Criminal Code is also underlined by the adoption and entry into force of the simultaneous laws of the criminal custodial[6] and non-custodial[7] sanctions and of a new law for the organization and functioning of the probation services[8].

We can not state, in the most definite way that reducing the number of people subject to detention is due mainly to the introduction of the probation measures in our

[2] According to data from the Activity results on 2009 of the National Administration of the Prison, available on the website www.anp.gov.ro, section About ANP, subsection Reports and studies.

[3] I. Chiș, Executing the punishments, Universul Juridic Publishing House, Bucharest, 2015, p. 86.

[4] Penal Law, adopted thorugh Law no. 15/1968, entered into force on 1st of January 1969.

[5] The correctional work was introduced by Penal Law through Law no. 6/1973.

[6] Law no. 254/2013 regarding the execution of the punishments and of the custodial measures ordered by the court during the criminal trial.

[7] Law no. 253/2013 regarding the execution of the punishments, of the educational measures and of other non-custodial measures taken by the judicial bodies during the criminal trial.

[8] Law no. 252/2013 regarding the organization and functioning of the probation system.

country, but we can see that since 2001 until now, the number of the detainees registered a permanent downward trend, reaching 27.455 people in 2016, according to data from the Annual Activity Report of the National Administration of Penitentiaries in 2016[9]. Of course, the decline in the number of persons in detention is based on multiple causes, but the introduction of the probation measures and of the specialized services in monitoring their enforcement has undoubtedly a significant contribution.

2. The context of civilizing the punishment

A broader context, which also facilitated the emergence and development of the probation measures in our country was represented by the so-called current *civilizing punishment*[10], a special manifestation of the overall progress of human society over its existence.

This trend started in the modern era, with a gradual reduction of the application cases of capital punishment or corporal under the influence of the thoughts of Cesare Beccaria. In his well-known work *Dei delitti e delle pene*, the famous enlightened, criticizing the death penalty, wrote: *Not the intensity of the punishment produces the greatest effect on the human soul, but its extent... The strongest brake against crimes is not the terrible, the passing show of a wicked death, but the long and arduous example of a person deprived of liberty, which turned into beast of burden, compensates with its toil that harmed her*[11].

Under the influence of Beccaria, a number of enlightened leaders abolished, in fact, corporal punishment and death penalty. Among them a famous author[12] reminds the Prussian King Frederick II, who abolished torture in 1756 and whom Catherine II oppossed the barbaric punishment in 1767 and, throughout his reign, could not admit the execution of any death sentences, but also Leopold of Tuscany, who banned in 1786, torture and death penalty, and Joseph II of Austria, who issued the Criminal Code in 1787, which punished with death only certain military crimes and the Criminal Procedure Code in 1788 prohibiting torture.

It followed the generalization of the prison sentences, all laws adopted since the late eighteenth century until the late nineteenth century providing that the main method of punishment the imprisonment in various ways: forced labour, reclusion, imprisonment, solitary confinement, prison[13].

Although the process of civilization of the sentences also registered the professionalization and humanization of prisons, in the late nineteenth century the system of prison punishments has increasingly become subject to criticism, leading to the conclusion that, instead of reducing the crime and reintegrating the offenders into society, it produced an opposite effect[14].

Finally, the civilizing process of the punishments culminated in the emergence of the probation measures. Moreover, other authors[15] consider that in the trend of the civilizing punishments can be framed even

[9] Available on the website *www.anp.gov.ro*, section About *ANP*, subsection *Reports and studies*.

[10] Civilizing punishments is conceptualized by the English criminologist John Pratt within his paper *Punishment and civilization: penal tolerance and intolerance in modern society*.

[11] C. Beccaria, *About crimes and punishments*, ALFA Publishing House, Iaşi 2006, p. 44.

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[13] A.V. Iugan, The judicial individualization of the punishment. Alternatives to imprisonment, PhD thesis developed in the PhD School of the Faculty of Law of the University "Nicolae Titulescu" Bucharest, unpublished p. 14.

[14] Idem, p. 15.

[15] G. Oancea, *Probation in Romania*, C.H. Beck Publishing House, Bucharest 2012, p. 31.

the emergence of the probation and the community sanctions.

We express our opinion that the process of civilization of the punishments will continue in the era of advanced technologies, as the possibilities for remote control and supervision of the offender will be developed and accepted as useful tools in the execution of criminal sanctions. However, we can not fail to notice that technological progress, materialized by the exponential growth of the means of mass communication, can produce a negative effect in terms of analyzed, namely to induce among the population a sense of fear by publicizing exacerbated crimes.

However, we can not fail to notice that technological progress, resulted in exponential growth of the means of mass communication, can cause a negative effect in terms of analyzed perspective, namely to induce among the population a sense of fear by publicizing exacerbated crimes[16]. Paradoxically, this culture of fear can determine a stream of *uncivilizing punishment*[17], because globally crime is substantially declining as the economic progress raises the standard of living of the population, such as a process of tightening the sanctioning that the political factor can impose when trying to give a signal, sometimes populist, of intransigence to anti-social manifestations.

3. The legal international context

Another context which favored the development of the probation system and thus the introduction of the probation measures as an alternative to imprisonment, it was the need to adapt national legislation to the Council of Europe recommendations and normative acts of the European Union.

In the explanatory memorandum[18] that accompanied the projects and that have resulted in Law no. 253/2013 on the execution of penalties, of the educational measures and of other non-custodial measures ordered by the court during the criminal proceedings and in Law no. 252/2013 on the organization and functioning of the probation system, it shows explicitly that the drafts envisaged, inter alia, the Council of Europe's recommendations, namely Recommendation No. R(92)16 on the European rules on the community sanctions and measures; the Recommendation of the Council of Europe No. R(97)12 on staff involved in the implementation of the community sanctions and measures; the Recommendation of Council of Europe No. R(99)22 on reducinng the number of persons imprisoned and overcrowding them; Recommendation of teh Council of Europe No. R(2000)22 on improving the implementation of the European rules on community sanctions and measures; Recommendation of teh European Council No. R(2003)22 on the release on parole; Recommendation of the Council of Europe No. R(2006)2 on the European Prison Rules; Recommendation of the Council of Europe No. R(2008)11 on the European rules for juvenile offenders subject to criminal sanctions and measures, Recommendation of the Council of Europe No. R(2010)1 on the European probation rules.

Also, by drafting Law no. 200/2013 amending and supplementing Law no. 302/2004 on judicial cooperation in criminal matters, the proceeding to the adoption of EU

[16] In the current media culture there are some well known news broadcast on national television at a time of great audience, who has as favorite theme to present in detail the most heinous crimes committed in the country; this show was the inspiration for other TV channels, thereby contributing to the proliferation of the genre and even imposing in the vocabulary a phrase that identifies this type of shows, *Headlines at 5 o'clock.*

[17] G. Oancea, *op. cit.*, p. 32.

[18] Available on the website of the Chamber of Deputies *www.cdep.ro*, section *Pursuing the legislative process.*

instruments for cooperation in the enforcement matters of the probation measures, among other acts, the Framework Decision 2008/947/ JHA of 27 November 2008 on the principle of mutual recognition to judgments and probation decisions with a view to supervising probation measures and alternative sanctions, as resulted from the explanatory memorandum, was implemented[19].

4. The jurisprudence context of the European Court of Human Rights

A context, still very current, which has boosted and will continue to spur concern for identifying alternatives more and more diversified and viable for the custodial sentences and thereby to the development of the probation system, is the European Court of Human Rights, which finds a breach by the Romanian State of the article 3 of the European Convention on human rights and fundamental freedoms, as a result of placing detainees in irregular detention conditions (including overcrowding).

One of the most relevant causes[20] from the analyzed standpoint related to our country, the European Court mentions a report following its visit to Romania, drafted by the Commissioner for Human Rights, which, inter alia, urged Romanian authorities to develop a system of alternative punishments, an effective dispensation of the release on parole and one judicial policy involving the use of sparingly custodial sentences[21].

In this context, the reason for which the probation system will be developed in our country is to avoid future convictions for the conditions of detention which can be considered as inhuman or degrading treatment.

5. The purpose of reducing the risk of a repeat offense

In favor of the probation measures, among others, it pleads the argument through which it is ensured a better protection of the society and of the offender towards the risk to relapse into the criminal conduct.

Although even the custodial sentences ensure a protection of the society against a repeat offense and, throught the incapacity in itself, even of the offender, this protection is only on a short term (it lasts only as long as the offender is effectively incarcerated), and in terms of the offender, the protection is illusory.

Since the imprisonment runs in detention where, in spite of the separation criteria, the offenders freely communicate with each other, the prison contagion occurs and thus, the risk of a repeat offense increases significantly. Besides, the fact that penalty prison is running, as a rule and in the most significant part, it is in common, as a famous author noted[22] an obvious and insurmountable disadvantage of the possession by the fact that it allows the enraged and savvy criminals to exercise one bad influence on those who make first contact with the prison and who, although do not have one criminal culture, thus they acquire it and they release from prison much more prepared to conduct a criminal activity than they were following the entry into the prison.

The probation measures being performed into the community, are more protected from the risk of crime contamination because the community in

[19] Available on the website of the Chamber of Deputies *www.cdep.ro*, section *Pursuing the legislative process.*

[20] Cause *Iacov Stanciu against Romania*, Decision from 10.07.2012 of the third section, available on the website http://www.echr.coe.int.

[21] Cause Iacov Stanciu against Romania, paragraph. 128;

[22] I. Chiș, *Executing the punishments*, Universul Juridic Publishing House, Bucharest, 2015, p. 22;

which the performance takes place is an open, generally it represents the society that is fundamentally different from the closed and pernicious community prisons. We can say, in antagonism with the prison sentences that the probation measures are performed individually.

Moreover, even if serving the prison sentences is intended to be as individualized as possible[23], the execution of the probation measures allow a deeper administrative individualization, which can reach up to the level of customization for each individual[24]. It is this level of customization up to the convicted individual which is considered legal doctrine able to reduce to a significant extent the risk of recurrence[25].

6. The purpose of increasing the opportunities for rehabilitation and social reintegration

By that the probation measures leave much of the burden of re-education and re-socialization into the responsibilities of the offender, their execution increases the chances of effective reeducation and a real social reintegration.

Even if serving a prison sentence resulted in an exemplary rehabilitation of the offender who, during execution, acquired, let's say, a new job, that he could practice freely, he will carry for the rest life "the convict stigma", of the person imprisoned, who served a custodial sentence and, for that, in the collective mind, must have committed an abominable act.

This stigma is an almost insurmountable obstacle in the way of real and effective social reintegration after release, and he is not in case of executing the probation measures. The person whom were applied such measures is so much requested to work towards reintegration, knowing that he/she does not bear the stigma of convict, than the person who serving a custodial prison and knowing that it will be more difficult reaccepted by the society is not at all stimulated to act towards reintegration.

In most of the cases, after executing the probation measures, the perpetrator is not even subjected to a ban, fall or incapacity[26] or his rehabilitation will be more easy and, usually, earlier than the persons imprisoned[27], thereby having much greater chance at reintegration.

Moreover, the process of social reintegration of the persons performing the probation measures starts from the final judgment decision when the probation measures are imposed, which is another advantage over the assumption of prison punishment when the reintegration process can begin, actually, at the earliest when released from the prison.

[23] In this respect, art. 89 para. (4) of Law no. 254/2013 regarding the enforcement of the sentences and the custodial measures, requires preparation, after the period of quarantine and observation by the provisions of art. 44 of an *Individualized Assessment and Therapeutic and Educational Intervention Plan*;

[24] In this respect, art. 1446-1450 from its Rules of application of Law no. 252/2013 on the organization and functioning of the probation service, approved by Government Decision no. 1079/2013, as amended and supplemented by Government Decision no. 603/2016, requires preparation of the *Monitoring Plan*;

[25] I. Chiș, *Executing the punishments*, Universul Juridic Publishing House, Bucharest, 2015, p. 22;

[26] This is the case, for example, of the person to whom it was given the solution of postponing the enforcement of the sentence when, according to art. 90 para. (1) Criminal Code, one is not subject to decay, prohibition or impairment that would result from such an offense if a crime committed back to the expiration of the supervision, it was decided to dismiss the delay and no cancellation policy cause has been found.

[27] This is the case, for example, of the convict whose surveillance sentence was suspended and according to art. 165 Criminal Code it is rehabilitated by law, with the only condition that no other offense be committed within three years from the expiry of surveillance.

7. The purpose of excluding extrapersonal and on long-term harmful effects, specific to the prison sentences

In addition to the strict legal orders effects and that are always borne by the individual who served a prison sentence under detention leave other traces, of different nature than the legal ones, within the family, or the relatives of the offenders. The legal doctrine referred to the fact that custodial sentences also affect the caregivers of the prisoner and that these effects extend far beyond the term of the release from prison[28]

The family and the inner circle of the persons serving a sentence in detention are required to make contact with the prison when they visit the prisoner or if providing packages, they are obliged to pay, sometimes more than significant, in order to keep in touch with the prisoner and to make his prison life bearable. After release, the impact of the acquired skills of the person that served the sentence in detention is often difficult to be resorbed by the kindred with substantial costs or even impossible for both sides. The negative effects of the prison detention spread like the shock waves in the community (family, entourage) of origin where the prisoner returns.

All these negative aspects can not be found if the probation measures, involving lower costs for the person who serves them and that allows them during the execution, to have a family, social life, almost the same as before acquiring the statute of person subject to surveillance measures.

8. The aim to increase the chances of compensation for damage caused by crime

Lately, it has been noticed an important change of paradigm, moving from a vindictive to one restorative justice, whereby to increase the chances of compensation for damage caused by the offense.

The probation measures as an alternative to detention, have this purpose, to increase under a double aspect, the chances to compensation for damages.

Under a first aspect, the objective reality is as obvious as possible that a person incarcerated has significantly fewer opportunities to make money from covering the damage caused by the offense than the person who is subject to the probation measures and that can lawfully earn income as a person who had contact with the criminal justice system.

Under the second aspect, of the legislative reality, this part of the probation system purpose has a normative consecration, both internationally and domestically.

At international level, repairing the damage caused by the offense is among the first targets in the Council of Europe Recommendation no. R (92)16 on the European rules regarding the community sanctions and measures.

The purpose of the current national legislation in question is guaranteed by lifting the compensation for the damage to a rank of imperative condition to achieve the full effects of serving all measures of probation in case of disposing different forms of individualization of punishment without imprisonment[29]. Likewise, the new law on the organization and functioning of the probation

[28] I. Chiș, *Executing the punishments*, Universul Juridic Publishing House, Bucharest, 2015, p. 21.

[29] Pursuant to art. 88 para. (2) and art. 96 para. (2) of the current Criminal Code, the disobeyance of reparing thedamage during the term of supervision is case to revoke the penalty postpone or of the suspended sentence under supervision.

service obliges the probation officers to carry out steps to boost the damage repair[30].

We believe that even a more conspicuous emphasis on the purpose of repairing the damage caused by the offense can be achieved through a brief analysis of the historical perspective of the name that the probation service had it for over a period of its existence. Thus, by Law no. 211/2004 on the protection of victims[31], the name „social reintegration services for offenders and supervising the execution of non-custodial sentences" under the Government Ordinance no. 92/2000 was replaced by the suggestive name of "services to protect victims and social reintegration of offenders", which it has been maintained until the entry into force of Law no. 123/2006 on the probation staff statute[32].

9. The purpose of reducing the financial costs on the administration of criminal justice during its execution

Talking about the social costs of the monitoring measures, we can not just make reference to the financial resources that the state, through its specialized organs, must allocate to enable monitoring on the persons subject to the measures in question. And because these absolutely costs considered *ut singuli* may not provide much relevant information, we focused on a comparative analysis between the costs of the state probation measures and of the custodial sentences.

According to data from the Annual Activity Report of the National Administration of Penitentiaries in 2016, the average monthly cost for a person imprisoned was in reporting year of 3.532,42 lei. Analyzing data from the Annual Activity Report of the National Probation in 2016 and the budget for the same year for this institution[33], it results that dividing the budget (28.744.000 lei) to the number of monitored people (57.814 people), the monthly cost of a monitored person is about 41,43 lei.

As it can be seen from statistic data which we referred above, a conclusion downright shocking can be drawn: the cost of implementing the probation measures is over 85 times lower than the cost of the execution of the custodial sentences.

However, this conclusion is somewhat distorted by the fact that the probation system in our country works to a level of the ratio of people monitored by a a probation officer that we can call inappropriate and that is likely to cause a shock so powerful: 153 people monitored by a probation counselor[34]. This ratio can not be one according to the Tokyo

[30] Pursuant to art. 65 of Law no. 252/2013 on the organization and functioning of the probation system in order to check the compliance of the supervised person with the civil obligations established by the judgment, six months before the expiry of the supervisory probation period, the probation counselor - case manager requests information regarding the steps taken by the person to fulfill these obligations, requiring proof of completion that is attached to the probation file if the person under observation did not fulfill the civic obligations, the probation officer checking the reasons for failure and, if necessary, directing the person to perform civil obligations three months before the expiry of surveillance; according to art. 67 para. (2) of the same law, if the monitored person does not fulfill civil obligations by no later than three months before the monitoring expiry, the probation officer prepares a report assessing, recording the reasons for failure and informs the court to revoke the benefit of individualizing the penalties without imprisonment.

[31] Law no. 211/2004 on the protection of victims was published in the Official Gazette no. 505 / 04.06.2004.

[32] Law no. 123/2006 on the staff regulations of the probation services was published in the Official Gazette no. 407/10.05.2006.

[33] Available on the electronic address http://www.just.ro/wp-content/uploads/2015/12/anexa-2.3.1-buget-DNP-16.03.2016.pdf.

[34] The report was based on the number of people monitored and of the number of the probation counselors out of the plan for the National Probation Directorate, as they appear in the annual activity report of the institution in 2016.

Rules[35], which in art. 13.5 establishes the number of cases assigned to each agent shall be maintained as far as possible at a reasonable level in order to ensure the effectiveness of the treatment programs.

Of course, there are efforts to normalize the numerical ratio between the monitored probation counselors and people under surveillance by recruiting a large number of advisers[36]. Although these efforts will lead to a cost increase that the state should support it for each person monitored, we assume without fear of making mistakes, that he still remains much lower than that the one involving a person imprisoned. Moreover, this increase in the number of probation counselors will bring not only an increase in the cost but also improved quality of the monitoring activities, which is the premise of the need to leave any political development of the probation system.

Conclusion

The conditions that favored in our country the emergence and development of the probation system in general, and the probation measures as a viable alternative to imprisonment, in particular, they were various and acted, although starting in different historical stages, in collaboration, thus creating a positive pressure on those responsible for drafting the criminal policy.

Thus, the context of over-imprisonment of civilizing penalties, of the international normativity, of the jurisprudence of the European Court of Human Rights provoked finding viable sanctioning alternatives to the custodial sentences, which in the historical period we are facing now proved not to be the most suitable to ensure the goals of rehabilitation and reintegration of the offenders, especially for those that comit crimes to a certain degree of hazard.

We believe that all those responsible for the development of the probation system, resulting in the analyzed contexts above continues to exert pressure on further development of how the probation system is structured and operates, thus working togheter to shaping a professional and efficient probation service.

Moreover, as I stated above, the need for closer monitoring and characterized of the persons performing the criminal sanctions in the community is a prerequisite for achieving the goals that the probation proposes: reducing the risk of repeat offenses, increasing the chances of rehabilitation and social reintegration, exclusion of extrapersonal and long-term adverse effect, specific to the imprisonments, increasing the chances of compensation for the damages caused by crimes and, not least, reducing the financial costs of administrating the criminal justice during its execution.

Of course, the probation can not be the universal response for the treatment criminal sanctions in case of committing any crime, its limit being represented by a certain threshold of gravity of the facts and of the perpetrators, above which the probation measures can not be assessed as effective.

However, the actual social reality showed that there are real possibilities of recovering a significant number of people who come into conflict with the criminal law, without requiring their imprisonment, while the social deviance that they manifest is of a certain severity and the possibilities for

[35] The United Nations Minimum Rules for the development of non-custodial measures, known as the Tokyo Rules were adopted in the 68th plenary session of 14 December 1990.

[36] The Government Decision no. 328/2016 amending and supplementing the Government Decision no. 652/2009 on the organization and functioning of the Ministry of Justice and amending certain legislative acts, supplemented the probation services plan with 565 positions of probation counselors and support staff, which further fulfilled one of the strategic objectives which are included in the *Strategy for 2015-2020 for developing judicial system,* namely *Strengthening the administrative capacity of the Ministry of Justice and the institutions under its subordination and coordination.*

treating this deviance are more and more diversified.

In other words, if we draw a parallel with the medical community and the developments registered, we could compare the treatment of the offenders in the community with the treatment of the patients in ambulatory, the imprisonment of the offenders, similar to hospitalization of the patients and it must be a final answer, only applicable to the worst deviant.

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