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AU DROIT CITOYEN[1]

Koen LENAERTS[*]

M. le Président,
M. le Recteur,
M. le Doyen,
Messieurs les représentants des pouvoirs publics,
Mesdames et Messieurs les professeurs,
Chers étudiants,

C'est un grand honneur pour moi de me voir décerner le titre de *docteur honoris causa* de l'Université Nicolae Titulescu, une université empreinte d'une réputation d'excellence académique et scientifique, notamment dans le domaine du droit de l'Union.

À l'instar de cette université [fondée en 1990], le droit de l'Union est jeune. Il s'agit, en réalité, d'un droit éternellement jeune, car il se renouvelle constamment avec les modifications successives des traités et les élargissements progressifs des domaines de compétence de l'Union européenne. Il s'agit d'un droit « positivant » car il est fondé sur la conviction profonde que les peuples européens, pourtant ennemis du passé, peuvent unir leurs forces et leurs atouts pour construire ensemble un avenir meilleur. Il s'agit d'un droit humaniste, car il est profondément ancré dans les valeurs fondamentales inhérentes à la protection et à l'épanouissement de toute personne humaine.

À la différence du droit international classique, le droit de l'Union place l'individu au centre du projet d'intégration européenne. Les traités sur lesquels l'Union est fondée ne sont pas de simples accords qui régissent les relations entre États membres, mais ils visent à conférer aux individus des droits qu'il incombe aux juges nationaux de protéger, si nécessaire avec la collaboration de la Cour de justice de l'Union européenne. Dans cette optique, l'Union européenne est, avant tout, une Union qui est faite pour et par les citoyens.

Pour bénéficier au mieux de ces droits, les citoyens européens ne peuvent pas rester étrangers au processus de construction européenne, ni se replier sur eux-mêmes, mais doivent être prêts à défendre leurs droits quand il le faut. Les juristes jouent un rôle essentiel en ce sens.

Les avocats, en tant que collaborateurs de la justice, ont vocation à aider les citoyens à faire valoir leurs droits. Les juges protègent ces droits en toute indépendance et en toute impartialité, à l'abri d'interventions ou d'influences politiques. Pour leur part, les professeurs ont une mission fort noble : celle de préparer la nouvelle génération de juristes qui deviendront les avocats et les juges de demain.

Permettez-moi d'illustrer cette idée du « citoyen européen engagé » à l'aide de trois exemples ayant trait à différents aspects de la vie quotidienne, à savoir, le citoyen qui entend protéger sa vie privée à l'ère du numérique, le citoyen « consommateur » et le citoyen défenseur de l'environnement.

[1] Discours à l'occasion de l'attribution du titre de Docteur Honoris Causa de l'Université Nicolae Titulescu, le 6 novembre 2017.

[*] Président de la Cour de justice de l'Union européenne. L'auteur s'exprime à titre personnel.

Comme nous le savons tous, dans un monde globalisé où le partage d'informations se fait par un simple « click », il est extrêmement important de garantir une protection efficace de nos données à caractère personnel. Cette protection, qui est assurée, par différents instruments juridiques, sur le territoire de l'Union européenne, serait fortement affaiblie si les responsables de traitement de données à caractère personnel étaient libres de transférer ces données vers des pays tiers n'ayant pas un niveau de protection équivalent à celui en vigueur au sein de l'Union. À cet effet, le droit de l'Union prévoit que la Commission européenne peut adopter une décision attestant qu'un pays tiers constitue un « safe harbor » en ce qu'il offre un tel niveau de protection équivalent.

Dans la célèbre affaire *Schrems*, un étudiant de la faculté de droit de Vienne, inquiet des rumeurs concernant la surveillance en masse des communications électroniques mise en place par l'agence américaine de sécurité, la « NSA », a demandé à Facebook, dont le siège se trouve en Irlande, d'arrêter de transférer ses données à caractère personnel vers les États-Unis. Facebook ayant rejeté sa demande, il s'est dirigé vers le contrôleur irlandais à la protection des données qui, à l'aune d'une décision de la Commission européenne de 2000 ayant reconnu la qualité de « safe harbor » aux États-Unis, a estimé que le transfert de données personnelles vers ce pays était conforme au droit de l'Union. M. Schrems a alors contesté l'avis de ce contrôleur devant un juge irlandais, qui a posé à la Cour de justice une question portant sur la validité de cette décision de la Commission. Dans un arrêt du 6 octobre 2015, la Cour de justice a invalidé la décision de la Commission, au motif que celle-ci ne tenait pas compte du fait que les agences américaines de sécurité pouvaient avoir un accès illimité et généralisé aux données européennes transférées vers les États-Unis, ce qui était de nature à priver de sa substance même le droit fondamental des citoyens de l'Union à la protection de la vie privée et de leurs données personnelles. Les démarches judiciaires de cet étudiant autrichien ont, en définitive, conduit à revoir la façon dont les données à caractère personnel peuvent être transférées vers l'autre côté de l'Atlantique.

À titre purement informatif, je signale qu'une nouvelle affaire *Schrems* est actuellement pendante devant la Cour de justice. Celle-ci ne concerne toutefois pas le droit à la vie privée mais le droit international privé et, notamment, la question de savoir si un « data activist », tel que M. Schrems, peut être considéré comme étant un consommateur au sens du règlement Bruxelles I sur la compétence judiciaire en matière civile ou commerciale.

C'est précisément cette dimension du « citoyen - consommateur » que j'aimerais évoquer par mon deuxième exemple. Comme vous le savez bien, la crise économique qu'a subie le continent a eu des effets très négatifs sur le marché immobilier de certains États membres, notamment celui de l'Espagne. Privées de revenus professionnels, de nombreuses familles espagnoles n'ont pas pu honorer le remboursement de leur emprunt hypothécaire, ce qui a conduit à la multiplication de procédures d'exécution de garanties immobilières et partant, à l'expulsion de ces familles de leur foyer. C'est dans ce contexte socialement difficile que le droit de l'Union a joué un rôle important en faveur des consommateurs pour les protéger contre les clauses abusives insérées par des banques dans des contrats de crédit hypothécaire.

Dans l'affaire *Gutiérrez Naranjo*, par exemple, le *Tribunal Supremo* (Cour suprême espagnole) avait, dans un arrêt du 9 mai 2013, jugé que, conformément à la directive de 1993 sur les clauses abusives, les clauses dites «plancher» – à savoir des clauses figurant dans

des contrats de prêt à taux variable qui limitaient les fluctuations à la baisse du taux débiteur – étaient abusives. Toutefois, le *Tribunal Supremo* a limité l'effet temporel de cet arrêt, de sorte que les sommes, correspondant au trop-perçu d'intérêts, dues par les banques aux consommateurs avant son prononcé, à savoir avant le 9 mai 2013, ne pouvaient pas faire l'objet d'une réclamation. Ayant des doutes sur la compatibilité de cette limitation temporelle avec le droit de l'Union, plusieurs juges espagnols d'instances inférieures ont demandé à la Cour de justice de se prononcer sur cette question. Dans un arrêt du 21 décembre 2016, la Cour de justice a jugé que, dans la mesure où cette limitation temporelle touchait à la substance même du droit que les consommateurs tirent de la directive sur les clauses abusives – à savoir le droit à ne pas être liés par des clauses jugées abusives –, ladite limitation n'était pas conforme au droit de l'Union.

Les actions de M. Gutiérrez Naranjo et de consommateurs se trouvant dans une situation analogue à la sienne ont eu un impact très important en Espagne. Suite à l'arrêt de la Cour de justice, le gouvernent espagnol a, en effet, adopté un décret-loi visant à faciliter la restitution aux emprunteurs des montants d'intérêts indument perçus par les banques en application de clauses « plancher ».

Je souhaiterais illustrer cette dimension du citoyen européen engagé par un troisième exemple, tiré, cette fois, de la politique de l'environnement. Cet exemple nous est fourni par la récente affaire *Folk*, qui a donné lieu à un arrêt de la Cour du 1er juin dernier. Les faits de cette affaire pourraient faire l'objet d'un film à Hollywood. M. Folk, un ressortissant autrichien, aime pêcher dans la rivière Mütz. En exerçant ce loisir, il a constaté des fluctuations du niveau du cours d'eau qui asséchaient très rapidement des zones habituellement immergées, de sorte que des alevins et des jeunes poissons se trouvaient prisonniers de zones aquifères séparées de la masse d'eau courante sans pouvoir la rejoindre, ce qui se traduisait par un taux de mortalité très élevé. M. Folk a constaté que ces fluctuations étaient liées à l'activité d'une centrale hydroélectrique implantée sur cette rivière. Il s'est alors adressé à l'autorité autrichienne compétente qui, conformément au droit autrichien, a estimé qu'il n'y avait rien à faire. D'une part, ladite centrale hydroélectrique disposait depuis 2002 d'une autorisation pour exercer ses activités et, d'autre part, les détenteurs de droits de pêche, tels que M. Folk, ne pouvaient pas attaquer le refus d'agir de l'autorité compétente devant un tribunal ou un organisme public indépendant et impartial.

Toutefois, M. Folk, probablement assisté d'un avocat, ne s'est pas avoué vaincu et s'est tourné vers le droit de l'Union pour tenter de sauver les alevins et les jeunes poissons de la rivière Mütz. Il faut en effet savoir que, en 2004, le législateur de l'Union a adopté une directive qui permet à des personnes touchées ou risquant d'être touchées par un dommage environnemental, et qui ont un intérêt suffisant ou font valoir une atteinte à un droit, de demander à l'autorité compétente d'agir pour mettre fin à ce dommage. De plus, cette directive dispose que ces personnes peuvent introduire un recours contre la décision de ladite autorité lorsqu'elles estiment que cette décision est mal fondée.

Ainsi, dans cette affaire, se posaient, en substance, trois questions. Premièrement, la directive de 2004 s'appliquait-elle à l'activité d'une centrale hydroélectrique qui a débuté bien avant la date limite de transposition de cette directive, à savoir avant le 30 avril 2007? Deuxièmement, l'existence d'une autorisation administrative, délivrée en application du droit autrichien, avait-elle pour effet d'exclure les dommages causés par la centrale hydroélectrique de la qualification de «

dommage environnemental » au sens de la directive ? Troisièmement, des personnes telles que M. Folk pouvaient-elles introduire un recours ? La Cour de justice a, tout d'abord, estimé que la directive de 2004 s'applique *ratione temporis* à des activités antérieures au 30 avril 2007 mais qui n'ont pas été menées à leur terme avant cette date. Ensuite, elle a jugé qu'une autorisation administrative, délivrée en application du droit national, portant sur une activité à l'origine d'un dommage affectant l'état écologique d'une rivière ne saurait avoir pour effet d'exclure, de manière générale et automatique, que ce dommage soit qualifié de « dommage environnemental » au sens de la directive. Enfin, la Cour a considéré que les détenteurs de droits de pêche, tels que M. Folk, étaient susceptibles de relever des personnes pouvant demander à l'autorité compétente d'agir, de sorte qu'une législation nationale les privant, d'une manière générale, de ce droit d'agir était contraire au droit de l'Union.

Ces trois exemples illustrent que les droits que les citoyens tirent du droit de l'Union ne sont pas inversement proportionnels à la taille de la partie à laquelle ils sont opposés. Que cette partie adverse soit, par exemple, un géant de l'Internet et des réseaux sociaux, une banque ou un producteur d'électricité, le droit de l'Union a vocation à protéger de la même manière les citoyens de l'Union.

Ces trois affaires démontrent également que les citoyens peuvent, à l'aide des avocats, contribuer à faire évoluer la société dans un sens meilleur. En effet, l'impact des arrêts de la Cour de justice dans ces trois affaires va au-delà des victoires personnelles de MM. Schrems, Gutiérrez Naranjo et Folk. Tous les citoyens bénéficient de ces actions judiciaires, car tous les citoyens ont le droit et sont désireux de bénéficier d'une protection efficace de leurs données à caractère personnel, d'un accès plus juste au crédit hypothécaire ou encore de la qualité de rivières cristallines.

À mon sens, l'un des principaux ennemis du progrès, que ce soit au niveau régional, national ou européen, réside dans l'apathie citoyenne. Si les citoyens ne sont pas prêts à défendre leurs propres droits, la flamme de la démocratie, de la solidarité et de la justice risque de s'éteindre lentement mais sûrement. M. Nicolae Titulescu, auquel se réfère le nom de cette prestigieuse université, avait déjà à son époque compris ce message. Au cours des premières décennies du vingtième siècle, il s'est engagé pour l'égalité, la solidarité et la paix.

Nous traversons à l'heure actuelle également des temps d'incertitude. Les trois exemples de la jurisprudence de la Cour de justice que je viens de mentionner démontrent, à l'instar d'autres nombreux exemples jurisprudentiels, que, en dépit de ces temps d'incertitude, il faut rester confiant dans l'avenir car de nombreux citoyens européens sont prêts à s'engager pour faire valoir leurs propres droits et, ce faisant, contribuent au bien commun européen.

Ceci m'amène à mon dernier point, destiné aux professeurs de cette prestigieuse université, qui est fruit des réflexions qui m'ont accompagné tout au long de mon parcours académique. Nous, professeurs, sommes les « sculpteurs de jeunes esprits ». Notre mission dans la société va au-delà du simple transfert de connaissances. Nous devons continuer à éduquer les jeunes universitaires à devenir proactifs dans la défense des droits pour lesquels leurs grands-parents et leurs parents se sont tellement investis. Nous devons leur rappeler que, s'il a été possible de construire l'Europe « pas à pas », c'est parce que, depuis la déclaration Schuman jusqu'au traité de Lisbonne, il y a toujours eu des « citoyens garants » de l'acquis européen, comme en témoignent les noms que portent les arrêts les plus célèbres de la Cour de justice. Ainsi, peut-être un jour, pas si lointain, un de vos étudiants sera à l'origine d'un arrêt de principe de la Cour de justice.

THEORETICAL AND PRACTICAL ISSUES REGARDING THE CHILD'S CARE

Dan LUPAȘCU[*]
Cristian MAREȘ[**]

Abstract

Following the entry into force of Law No. 257/2013 for the amendment of Law No. 272/2004 on the protection and promotion of the child's rights new provisions were adopted in relation with the child's protection whose parents work abroad. This regulation was necessary in view of the increasing number of parents who, due to the need to ensure a decent living for the dependent children, are forced to work outside of Romania, but for this reason they neglect to raise and to care for them. The study examines theoretical issues of the child's care that raise some debates in the doctrine. The research also consists in the analysis of the new regulation related to the child's care both from theoretical and practical perspectives. The authors intend to carry out an analysis of the relevant case law of the courts of law in the matter of child's care. From this perspective, there are some issues in relation to a child's dwelling when his parents do not live together anymore. As far as the change of the child's dwelling is concerned, we have to distinguish between the children entrusted to one of the parents according to the Family Code and the children for whom the parental authority has been ordered to be jointly exercised and to have their place of residence with one of their parents, according to the provisions of the Civil Code. With respect to the child's dwelling, both within the doctrine and the case law, it has emerged the notion of alternative or sharing dwelling of the child.

Keywords: *child's care, child's protection, child's dwelling, custody authority, parental authority.*

1. Introduction

This paper intends to clarify a few issues related to the child's care that raise some debates in the doctrine.

Two years after the entry into force of the Civil Code (Law no. 287/2009, republished)[1], it was adopted the Law no. 257/2013 on the amendment and addition of Law no. 272/2004 on the protection and promotion of the rights of the child, which governed for the first time within our legislation the child's protection whose parents are working abroad. After two more years from the entry into force of the Law no. 257/2013, it was adopted the Government Decision no. 691/2015 approving the Procedure of monitoring the way of raising and caring for the child with parents abroad and the services they can benefit from, as well as approving the Working Methodology on Collaboration between the general directions of social assistance and child protection and public

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[1] Published in the Oficial Journal of Romania no. 505 of July 15, 2011 as further amended.

social services and the standard model of documents developed by them. Therefore, a thorough analysis of these provisions regulating the child's protection whose parents work abroad is important not only for the authors of family law, but also for the legal practitioners.

Additionally, our intention is to examine some main theoretical issues of the child's care and the main authors' opinions of family law already expressed in doctrine.

This paper will provide an analysis of the relevant doctrine, of the main legal provisions and of the jurisprudence in order to outline some options to be considered both by the authors of family law and by the legal practitioners.

2. Content

2.1. The child's protection whose parents work abroad

As of the 3rd of October 2013, it was brought under regulation this new maintenance obligation cathegory, as a novelty, through the last amendments to the Law no. 272/2004 on the protection and promotion of the rights of the child, republished[2], with the following amendments and supplements[3].

As per article 104 paragraphs (1), (2) and (4) of Law no. 272/2004 on the protection and promotion of the rights of the child, the parent who solely exercises the parental authority or with whom the child is living, or the parents, who are about to go work abroad, have the obligation to notify this intention to the public social service from their domicile with at least 40 days before leaving the country, with the mandatory indication of the appointed individual who shall take care of the child during their absence.

According to this provision, the obligation to notify the intention of working abroad shall be beared by the following: either by (i) the parent who solely exercises the parental authority or with whom the child is living, or by (ii) both parents, should the parental authority is jointly exercised or by (iii) the tutor.

These individuals have the obligation to duly notify such intention with at least 40 days prior to leaving the country to the public social service in whose division they are domiciled.

Said notification must comprise all identification data of the individual who shall take care of the child during the parents' absence or of the tutor.

In order to be appointed for the temporary exercise of the parental authority with respect to a child, an individual must cumulatively fulfill the following conditions:

a) to be part of the extended family[4];
b) to be at least 18 years old;
c) to meet all material conditions and moral guarantees necessary for the raise and care of a child[5].

[2] Republished in the Oficial Journal of Romania, Part I, no. 159 of March 5, 2014 under article V of Law no. 257/2013 on the amendment and addition of Law no. 272/ 2004 on the protection and promotion of the rights of the child, published in the Oficial Journal of Romania, Part I, no. 607 of September 30, 2013, giving the text a new numbering.

[3] As amended and supplemented by Government Emergency Ordinance no. 65/2014 for amending and completing certain normative acts, published in the Oficial Journal of Romania, Part I, no. 760 of October 20, 2014 and Law no. 131/2014 for the amendment of paragraphs (1) and (2) of article 64 of the Law no. 272/2004 on the protection and promotion of the rights of the child, published in the Oficial Journal of Romania, Part I, no. 740 of October 10, 2014.

[4] According to article 4 letter c) of Law no. 272/2004 on the protection and promotion of the rights of the child, republished, extended family means "the relatives of the child up to the fourth degree inclusive".

[5] Article 105 paragraph (1) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.

The public social services organised at the level of municipalities, cities, communes assure to the appointed individuals guidance and information with respect to the liability of the growth and development of the child on a period of time of 6 months[6].

The confirmation of the individual that shall take care of the child shall be made by the custody court[7].

The custody court shall rule the temporary delegation of the parental authority with respect to the child, during the parents' absence, but no longer than one year, to the appointed individual[8]. Therefore, said delegation shall regard only the personal aspect of the child's care, and not the parental authority exercice with respect to the child's assets. As far as the child's assets are concerned, as long as the law does not regulate anything, we consider that the custody court shall render, depending on the circumstances, either the joint exercise by both parents or the exercise by one of them, as in the other cases of parental authority delegation to a third person (as in the case of a divorce, the nullity of a marriage etc.).

The individual to whom the parental authority is to be delegated must express his/her personal consent in front of the custody court[9].

At this request shall be annexed documents attesting the fulfillment of the above-mentioned conditions with respect to the appointed individual[10].

The request of parental rights and duties delegation shall be settled in a non-contentious procedure, as per the Civil Procedure Code, in a 3 days term as of its registration to the custody court[11].

The rulling shall comprise the express mention of the rights and duties to be delegated and the period of time for which the delegation takes place, which, as we have already provided hereinabove, can not exceed one year[12].

Once the custody court decides to delegate the parental rights, the individual responsible for the childcare must follow a counseling program in order to prevent conflictual situations, misconduct, or negligence in the relationship with the child[13].

The court shall communicate a copy of the delegation ruling to the mayor from the parents' or guardian's domicile, as well as to the mayor from the domicile of the individual to whom the parental authority has been delegated[14].

As per article 106 of the Law no. 272/2004 on the protection and promotion of the rights of the child, republished, the local authorities through the public social security services can initiate, within the state or local budget provisions and within the revenue and expenditure budget having this destination, information campaigns for parents, in order to:

a) parenting awareness of the risks assumed by going to work abroad;
b) inform the parents with respect to their obligations in case they intend to leave abroad.

Two years after the entry into force of the Law no. 257/2013, the Government

[6] Article 105 paragraph (2) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[7] Article 104 paragraph (3) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[8] Article 105 paragraph (3) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[9] Article 105 paragraph (4) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[10] Article 105 paragraph (5) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[11] Article 105 paragraph (6) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[12] Article 105 paragraph (7) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[13] Article 105 paragraph (8) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[14] Article 105 paragraph (9) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.

Decision no. 691/2015[15] approving the Procedure of monitoring the way of raising and caring for the child with parents abroad and the services they can benefit from, as well as approving the Working Methodology on collaboration between the general directions of social assistance and child protection and public social services and the standard model of documents developed by them[16] was adopted.

2.2. The child's dwelling

As per the provisions of article 496 paragraphs (1) and (2) of the Civil Code, the child lives with his parents, and when his parents are not living together, they shall mutually agree upon the child's dwelling.

Therefore, the rule in relation with the child's dwelling is that the child shall live with his parents and the exception shall be the situation when the parental authority is split, when the child's dwelling shall be established at one of the parents.

According to paragraph (3) of article 496 of the Civil Code, when the parents do not agree upon the establishment of the child's dwelling, the custody court shall decide, taking also into consideration the finding of the psychosocial inquiry report and listening of the parents and the child, in case the latter is 10 years old.

In the divorce matter we have the same regulation, according to which "in the absence of an agreement between the parents or if it is against the best interest of the child, the custody court shall establish, along with the divorce, the child's dwelling with the parent with whom the child usually resides"[17].

The Civil Code does not define the meaning of the phrase "with the parent with whom the child usually resides". We consider that this phrase should be understood as the situation where the child usually lives with one of his parents until the settlement of the divorce request. Such a situation may arise when the parents are living separately before the divorce is pronounced and the child lives with one of his parents.

In case the child has been living before the divorce with both parents, the court shall establish the child's dwelling at one of them, taking into account the best interest of the child[18].

In assessing the child's interest, the court may also consider aspects such as:[19]

a) the needs of physical, psychological developments, education and health, security and stability and family affiliation;
b) the child's opinion, depending on his/her age and maturity;
c) the child's history, taking into consideration, especially, the situations of abuse, neglect, exploitation or any other form of violence against the child, as well as the potential risk situations that may occur in the future;
d) the parents' capacity or the capacity of the persons that shall take care of the child to meet his concrete needs;
e) maintaining the personal relationships with the individuals with whom the

[15] Published in the *Oficial Journal of Romania*, Part I, no. 663 of September 1, 2015.

[16] According to article 107 of Law no. 272/2004 on the protection and promotion of the rights of the child, republished, the procedure for monitoring the way of raising and caring for the child with parents who have left work abroad and the services to which they can benefit is established by a Government decision, at the proposal of the Ministry of Labor, Family, Social Protection and the Elderly, in collaboration with the Ministry of Regional Development and Public Administration.

[17] Article 400 paragraph (1) of the Civil Code.

[18] Article 400 paragraph (2) of the Civil Code. See Court of Appeal of Bucharest, 3rd Civil Section, decision no. 112 of February 1, 2011, in C. Mareș, *Family Law*, Second edition, C.H. Beck Publising House, Bucharest, pp. 217-218.

[19] Article 21 paragraph (1) and article 2 paragraph (6) of Law no. 272/2004 on the protection and promotion of the child's rights, republished.

child has developed attachment relationships;

f) the availability of each of the parents to involve the other parent in the decisions concerning the child and to respect the parental rights of the latter;
g) the availability of each of the parents to allow the other one to maintain the personal relationships;
h) the housing situation of each parent in the last 3 years;
i) the history of parental violence against the child or other individuals;
j) the distance between the domicile of each parent and the institution providing the child's education.

Although there is no express regulation on the criteria to be taken into consideration when establishing the child's home, it is equaly important to maintain the brothers together, by establishing their dwelling at the same parent. The separation of the children is possible in exceptional situations, provided they are in their best interest[20].

Article 400 paragraph (3) of the Civil Code stipulates that "exceptionally, and only if it is in the best interest of the child, the court can establish his dwelling at the grandparents or other relatives or individuals, with their consent, or at a care institution. They exercise the child's supervision and undertake all normal acts with respect to the health, education and teaching of the child".

As previously stated[21], within the case law of several European countries, the appreciation of the child's best interest in establishing his dwelling is also analysed from the point of view of the so-called "Californian Principle", according to which it represents an advantage the capacity of each parent to allow the other one to exercise his parental rights with respect to the child[22].

According to the provisions of article 400 of the Civil Code, the establishment of the child's dwelling must be made at one of the parents, according to his best interest, the law does not foresee whether it is necessary to establish the exact address at which the child will live with the parent. Therefore, it has been considered[23] that, in the silence of law, it is not mandatory to mention the address of the parent with whom the child shall live, given the possibility of changing it even repeatedly[24]. Nevertheless, changing the child's dwelling must be made with the consent of the other parent, should it affect the parental authority exercise or other parental rights, in case of misunderstandings the custody court having the competence to decide. In this case, however, it has been considered that the court must specify where the new home of the child shall be established, at least in terms of the elements affecting the parental rights exercise, such as the country or locality.

[20] See Court of Appeal of Timișoara, 1st Civil Section, decision no. 831/2013, in Săptămâna Juridică 8 (2014), p. 23; Court of Appeal of Craiova, Section for children and family, decision no. 9 of January 24, 2007, www.portal.just.ro; Neamţ Tribunal, Civil Section, decision no. 345/AC/2008, www.portal.just.ro.

[21] Dan Lupașcu and Cristiana Mihaela Crăciunescu, *Family Law*, Third edition, Universul Juridic Publishing House, Bucharest, 2017, p. 363.

[22] In the French Civil Code this principle was introduced in Art. 373 2 11 (3), which states that the judge shall consider: "The ability of each of the parents to assume their obligations and to observe the rights of the other".

[23] See the Conference of the National Institute of Magistracy of February 20, 2012, entitled Provisions of the New Civil Code in the Field of Family Law - Unification of Practice, page 15 (http://www.inm-lex.ro/fisiere/pag_115/det_1506/8453.pdf).

[24] See also Cristian Mareș, *op. cit.*, p. 219; Bogdan Dumitru Moloman, Lazăr-Ciprian Ureche, *The new Civil Code. 2nd Book. About family. Articles 258-534. Commentaries, explanations and jurisprudence*, Universul Juridic Publishing House, Bucharest, 2016, p. 465.

At the same time, it has been shown that the child's dwelling can be also be established abroad, together with one of the parents, if this shall meet the best interest of the child. Whenever possible, it can be decided for a psychosocial inquiry report to be done, in order to know the conditions offered by the parent to whom the child will live.

The change of the circumstances envisaged in the judgment may entail the change of the measure establishing the child's dwelling, which can be settled at the other parent or at other individuals or care institutions if the case may be.

Changing the decision on the child's dwelling can only take place if his interest so requires, that is, only when the parent where the home was established can no longer provide him the necessary conditions for a proper development[25].

As far as the change of the child's dwelling is concerned, we have to distinguish between the children entrusted to one of the parents according to the Family Code[26] and the children for whom the parental authority has been ordered to be jointly exercised and to have their place of residence with one of their parents, according to the provisions of the Civil Code.

Thus, with respect to the child entrusted to one of the parents according to the Family Code, since the Civil Code provisions regulate the parental authority institution, without the institution of entrusting a child to one of the parents, it can be at any times requested changing the measure of his custody and, therefore, changing his dwelling from the parent to whom he was entrusted, even if the circumstances taken into consideration by the court at his entrustment have not changed.

As regards a child for whom the custody court has ruled, under the provisions of the Civil Code, that the parental authority shall be exercised jointly by both parents[27] or, by way of exception, only by one of them[28], being thus established the dwelling at one of the parents, changing said dwelling can only be requested in case the circumstances envisaged by the custody court have changed at the time when the change of the child's dwelling is requested.

Therefore, according to the new regulations, disregard the parent with whom the child's dwelling shall be established, the latter shall benefit from the care of both parents who, in the form of joint parental authority exercise, shall collaborate in taking all important decisions with respect to the child, being actively involved in raising and educating him.

The Family Code provided the possibilty of entrusting the child for his raise and education to one of the parents, which implies that the parent ensures the raising and education of the child, the other parent having the possibility to look after the manner in which these obligations are fullfiled. Therefore, the child lived with the

[25] See Supreme Court of Justice, Civil Section, decision no. 2448/1993, *Buletinul Jurisprudenţei. Culegere de decizii pe anul 1993*, Continent XXI & Universul Publishing House, Bucharest, 1994, pp. 109-112; Court of Appeal of Alba Iulia, Section for children and family, decisions no. 64/R/2008 and no. 35/R/2008, http://www.jurisprudenta.org/; Court of Appeal of Cluj, Civil Section, of labour and social securities, for children and family, decisions no 237/R of January 25, 2008 and no. 1855/R of October 3, 2008, http://www.jurisprudenta.org/.

[26] Law no. 4/1953 entered into force on the 1st of February 1954, published in the Oficial Journal no. 1 of January 4, 1954, as further amended and supplemented.

[27] Article 397 and article 503 paragraph (1) of the Civil Code.

[28] Article 398 and article 507 of the Civil Code.

parent to whom he was entrusted for his raise and education, whithout the court expressily rulling it.

In the application of the previous legislation, when the child was entrusted to be raised and educated by one of the parents, the supreme court has ruled that: "the choice of children to be entrusted to one of the parents does not have a preponderant role in adopting the solution, but can not be disregarded when they are at the age when they can properly appreciate their interest, but must be duly analysed and considered in relation to the other administered evidence"[29]. In this regard, we consider that the children's option regarding the establishment of their dwelling, in relation to their age and degree of maturity could also be envisaged in the current legislation (under article 264 of the Civil Code).

As per the provisions of article 496 paragraph (4) of the Civil Code, the "child's dwelling, established in accordance with this article, cannot be change without the approval of the parents, except in cases expressly provided by the law".

Moreover, article 497 paragraph (2) of the Civil Code stipulates that changing the child's dwelling, together with the parent with whom he lives, cannot occur without the prior consent of the other parent, in case it affects the exercise of the parental authority or other parental rights.

In case of misunderstandings between the parents, the custody court shall decide, according to the best interest of the child, taking into account the conclusions of the psychosocial inquiry report and listening to the parents and to the child[30].

With respect to the child's dwelling, both within the doctrine and the case law, it has emerged the notion of alternative or sharing dwelling of the child.

Together with other authors[31], we consider that the legislator did not regulate the possibility of interchanging the child's dwelling from one parent to the other. Notwithstanding, should the parents agree with interchanging the child's dwelling from one to another and should this be considered in the best interest of the child, the court may rule in this respect based on the parents' mutual agreement and not based on a legal provision that would regulate this. On the contrary, in case the parents do not agree with interchanging the child's dwelling from one to another or in case this measure would not be in the best interest of the child, the court can not establish an alternative dwelling of a child at both parents.

According to another opinion[32], there is accepted the possibility of interchanging the child's dwelling from one parent to the other in case this is in the child's best interest and the parental authority is to be exercised by both parents.

We consider that, as per the provisions of article 400 of the Civil Code, it is not possible to establish an alternative dwelling of a child at both parents, the legislator stipulating under the paragraph (1) that, in case of misunderstanding between the parents or if such understanding shall be against the best interest of the child, the custody court shall determine, along with the divorce, the dwelling of the child at the parent with whom he usually lives and, under paragraph (2), that, if prior to the

[29] See Supreme Court of Justice, Civil Section, decision no. 1848/1991, in *Probleme de drept din deciziile Curţii Supreme de Justiţie 1990-1992*, Orizonturi Publishing House, Bucharest, 1993, pp. 217-219; see also Court of Appeal of Iași, Section for children and family, decision no. 140/R of October 23, 2008, www.portal.just.ro.

[30] Article 497 paragraph (2) Civil Code.

[31] E. Florian, *Family law. Marriage. Matrimonial regimes. Filiation, 5th edition*, C.H. Beck Publishing House, Bucharest, 2016, p. 350; M. Avram, *Civil law. Family*, Hamangiu Publishing House, Bucharest, 2013, p. 161.

[32] C. C. Hageanu, *Family law and the civil status acts*, Hamangiu Publishing House, Bucharest, 2017, p. 205.

divorce the child lived with both parents, the court shall establish his dwelling at one of them, as per his best interest, excluding the possibility of establishing the alternating dwelling of the child.

At the same time, within the case law[33] it was noted that the principle 3.20 paragraph (2) from the Principles of the European Law on Parental Authority, adopted by the European Commision on the family legislation stipulates that " the child may alternatively reside with the holders of the parental authority, either as a result of an agreement approved by the competent authority or of a decision taken by the latter", but this recommendation is not mandatory, by means of a recommendation the institutions disclose their opinion and suggest ways of action, without imposing any legal obligation to the recipients of the recommendation, and the provisions of article 400 Civil Code, under their current form, do not allow the settlement of an alternating dwelling in case of divorce.

2.3. The competent court to settle the request for establishing the child's dwelling

As per article 107 paragraph (1) of the Civil Code, the proceedings undertaken by the Civil Code with respect to the protection of the individuals fall within the competence of the custody and family court, established according to the law. Moreover, according to article 94 point 1 letter a) of the Civil Procedure Code[34], the courts shall rule in trial court the claims provided by the Civil Code under the competence of the custody and family court, unless otherwise expressly provided by law.

Thus, the custody court has the jurisdiction to rule with respect to the relationships between the parents and their children during marriage and also in case of divorce of after their divorce. Futhermore, the court's jurisdiction shall exist with respect to the relationships between the parents and their children outside of marriage.

From the territorial point of view, according to article 114 paragraph (1) from the Civil Procedure Code, the requests for the individuals' protection, provided by the Civil Code under the jurisdiction of the custody and family court, shall be ruled by the court in whose territorial jurisdiction the protected individual is domiciled or resided, unless otherwise provided by law.

According to article 76 of the Law no. 76/2012 for the implementation of Law no. 134/2010 regarding the Civil Procedure Code[35], "until the organization of the custody and family courts, the courts or, as the case may be, the tribunals or specialized tribunals for children and family shall act as custody and family courts, having the jurisdiction as provided by the Civil Code, the Civil Procedure Code, the present law, as well as special regulations in force".

Therefore, as stated within the practice of the courts[36], in accordance with the legal provisions, the jurisdiction for ruling a case having as object the change of the child's dwelling lies with the court in whose territorial jurisdiction the domicile or residence of the protected individual is located, the exclusive competence regulated by the provisions of article 114 paragraph (1) of the Civil Procedure Code having the character of public order competence in

[33] Bucharest Tribunal, 5th Civil Section, civil decision no. 1282A of March 30, 2016, not published.

[34] Law no. 134/2010, republished in the Oficial Journal of Romania no. 247 of April 10, 2015, as amended and supplemented.

[35] Published in the Oficial Journal of Romania no. 365 of May 30, 2012, as subsequently amended and supplemented.

[36] High Court of Cassation and Justice, 1st Civil Section, decision no. 1007 of June 13, 2017, in Săptămâna Juridică 41 (2017), pp. 8-9.

relation to the provisions of article 129 paragraph (1) point 3 of the Civil Procedure Code.

2.4. The summons of the custody authority in the lawsuits with children

According to article 396 paragraph (1) and (2) of the Civil Code, the custody court shall rule, along with the divorce, with respect to the relationship between the divorced parents and their children, taking into account the best interest of the children, the conclusions of the psychosocial inquiry report and, if case, of the parents' consent, whom the court shall listen to, but also of the child's opinion, also heard by the court (the provisions of article 264 of the Civil Code being applicable).

We consider that, within such cases with children, involving the parental authority exercise, establishing the child's dwelling, which falls under the jurisdiction of the custody and family court, it is necessary to summon the custody authority, which must draw up a psychosocial inquiry report, duly taken into consideration by the custody and family court when ruling within said case, corroborating it also with the rest of the evidence administered.

As previously stated[37], according to the provisions of the Civil Code, which regulates the necessity of a psychosocial investigation in cases concerning the dissolution or nullity of marriage, as well as those concerning the exercise of parental authority over children resulting from a concubinage relationship when the parents do not live together, the hearing of the custody authority and, as a consequence, its summons is necessary. Given that the pshychosocial investigation is mandatory in such cases, the custody authority must be summoned by the court in order to draft the psychosocial inquiry report.

According to another opinion[38], based on the provisions of article 396, the custody authority must not be summoned by the court, given that there is no express legal procedural provision in this respect. We consider that without the summons of the custody authority, the psychosocial inquiry report could not be drafted. Therefore, the summons of the custody authority is mandatory in order to inform this authority that a psychosocial inquiry report must be drafted, although a representative of such authority is not necessary to be present in front of the court.

3. Conclusions

In conclusion, the legal provisions on child's care whose parents go to work abroad regulate a social reality with a significant impact on raising and caring for children whose parents are forced to go abroad. This regulation was necessary in view of the increasing number of parents who, due to the need to ensure a decent living for the dependent children, are forced to work outside of Romania, but for this reason they neglect to raise and to care for them. Besides material means of subsistence, a child needs permanent care, which can not be ensured remotely by the parents.

With respect to the child's home, the custody court is obliged to decide where said dwelling shall be established, besides the way of exercise of the parental authority by the parents of a child.

The competent court to settle an application for a child's dwelling is the custody and family court in whose territorial jurisdiction the domicile or residence of the

[37] B.D. Moloman, L.-C. Ureche, *op. cit.*, p. 420; B.D. Moloman, L.-C. Ureche, *Ancheta psihosocială a autorității tutelare – personaj special în distribuția cauzelor aflate pe rolul instanței de tutelă. Act adminsitrativ sau simplu mijloc de probă?*, in Revista Română de Jurisprudență 3 (2013), p. 151.

[38] M. Avram, *Civil law. Family*, Hamangiu Publishing House, Bucharest, 2016, p. 158.

protected individual is located, unless otherwise provided by law.

As regards the evidence to be administrated in a case having as object the child's care, the exercise of parental authority, the establishment of the child's home, we consider necessary to summon the custody authority, given the fact that the court must take into account the conclusions of the psychosocial inquiry report, together with the best interest of the child and, as the case may be, the consent of the parents and the child's hearing.

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SUCCESSORAL CAPACITY PECULIARITIES OF THE ROMANIAN ECLESIASTICAL STAFF – A CASE OF ANOMALOUS INHERITANCE

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Abstract

The present study aims at radiographing the condition of the legal capacity to inherit, situated at the confluence of two domains, the legal and the theological one, with convergence points, but also with some distinct consequences. Thus, the basic benchmark of the study focuses on one of the fundamental conditions of the individual to be able to exploit mortis causa of their cujus patrimony, the ability to inherit. From this perspective, the authors have proposed to analyze the particular situation in which the person called to inherit under the law is a person of a special status, belonging to the ecclesiastical staff. Thus, special situations are identified, which derogate from the common law, with derogatory consequences from the normative character of the successor transfer. This is the case of monk succession, which is subjected, as we shall see, to special rules that generate, in the case of legal devolution, an anomalous succession in favor of the Diocese or the monastery, with the total exclusion of legal heirs.

Using the systemic method, the authors submitted to interpretation both the provisions of the Civil Code and some norms with a special character, which represent a reference point in the analyzed issue. In the absence of any doctrinal assessments as well as jurisprudential solutions, the present study may represent a starting point for the consecration of this anomalous succession case and the different consequences it identifies.

Keywords: *legal inheritance, successoral capacity, church, monk, special law.*

1. Introduction

The question of law to be analyzed derives from an attribute inherent in the human being, materialized and constitutional in that "the right to inheritance is guaranteed"[1]. The imperative of protecting this right also confers the legitimacy and the guarantee of the right to inheritance, thus constituting its intangibility.

The present approach has as a starting point a somewhat special hypothesis of the right to inheritance, that of the capacity to inherit of a category of individuals with a special status, that is, the ecclesiastical staff, a situation which at first sight should not deviate from the rules of common law, the Civil Code making no reference in this case.

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[1] Article 46 of the Romanian Constitution refers to both legal inheritance and testamentary legacy. The Constitution was amended and supplemented by the Law on the Revision of the Romanian Constitution no. 429/2003, published in the Official Journal no. 767 of 29 October 2003 and entered into force on 29 October 2003.

The hypothesis is intended, of course, to interpret the provisions of the Civil Code and some special norms, being subject to provisions of the Functioning and Organization Statute of the Romanian Orthodox Church[2] (Statute of the Romanian Orthodox Church), Part IV, letter D "Provisions on the succession rights of hierarchs and monks", art. 192-194. Is the latter a normative act that implies an atypical character of the well-known principles of the devolution of the inheritance? In particular, did the Statute referred to have and play the role of a special law that removes the applicability of civil provisions in the matter?

In order to answer these questions, a minimum of rigour obliges us to state both the laws that become applicable and, above all, the text that states the special effects, even the ones that are derogating from the legal legacy of the monks, to which we also join a brief presentation of the categories of ecclesiastical staff, which are the subject of this discussion.

Although at first sight an analysis of succession capacity in the context of current civil regulation[3] may seem an easy subject, however, all human activity, regardless of the field, is based on the synthetic concept of civilian capacity, and its exercise according to the legal milestones and boundaries gives the individual the general and abstract ability to have civil rights and obligations through the conclusion of legal acts, an aptitude that has a great influence in the legal life of a person.

Man is the cause and purpose of the law, both of civil and divine law. Claiming a privileged place within the civil law, the succession field reflects, in essence, the completion of a person's life course, as a "legal response to the natural occurrence of death."[4]

"Inheritance", according to jurisconsult Julian, is nothing more than the acquisition of the whole right that the deceased had."[5] In other words, the succession right comes to legitimize the posterity of the deceased person, the accumulated patrimonial values, because the legal norms regard primarily the family of the missing person. On the other hand, the civil life of the person, the earthly life of the individual, is not indifferent to the Church, for the laws established by canons have as sole purpose the "salvation of the faithful"[6]. If in legal terms the death of a dead person implies the cessation of the civilian capacity of the deceased, from a religious point of view, death is only "the separation of the

[2] Text approved by the Holy Synod of the Romanian Orthodox Church by Decision no. 4768/2007 and recognized under Law no. 489/2006 on religious freedom and the general regime of denominations, through Romanian Government Decision no. 53 of 16 January 2008, published in the Official Journal of Romania Part I, no. 50 of 22 January 2008.

[3] The general regulation of the matter of inheritance is ensured by the Civil Code, in Book IV, entitled "On Inheritance and Liberties", art. 953-1163 and is concerned with legal relations that produce their effects at the end of a person's life. Prior to October 1, 2011, there were also other normative acts affecting legacy (for example, Act no. 319/1944 on a surviving spouse inheritance rights). We appreciate that the unitary regulation of the matter is beneficial in a single normative act.

[4] Jozsef Kocsis, Paul Vasilescu, *Civil Law*, Hamangiu Publishing House, Bucharest 2016, p. 1. The authors justify the role of establishing the set of legal rules not in the sense of "patrimonizing death", but in order to provide legal solutions for the fate of the heritage temporarily left without a holder, establishing by their content the destination of the asset and or the successor passive.

[5] *Hereditas nihil est quam successio in universum ius quod defunctus habuit.*

[6] Ioan N. Floca, *Orthodox Canon Law. Church Law and Administration*, Volume I, IBMBOR Publishing House, Bucharest, 1990, p. 43. Starting from the classification of canonical norms as prospective, pastoral, pedagogical and teleological, the author surprises the teleological type with a well-defined purpose: the believers' salvation.

soul from the body", the soul being immaterial and eternal.

According to art. 953 Civil Code, "the inheritance is the transmission of the assets of a deceased individual to one or more persons in existence"[7]. From the interpretation of this text in conjunction with the provisions on property, according to art. 557 par. (1) C. civ., "The right to property can be acquired, under the law, by convention, by legal or testamentary inheritance (...)" it follows that inheritance is a way of acquiring mortis causa property through which *de cujus*, the deceased person, passes his or her heritage to one or more persons in existence[8].

Analyzing the definition given by art. 953 Civil Code, we can state that legacy is the transmission of the de cuius patrimony to one or more natural or legal persons, as acquirers[9]. The patrimony of a natural person - all of the patrimonial rights and obligations - is the permanent companion of the person throughout their life. The patrimony (the patrimonial asset and liability) does not disappear with the individual's termination of life, it is a factual reality in search of a legal subject to be attributed to[10]. Therefore, there can be no patrimony without a subject of right. Inheritance law provides the legal solution to transferring the patrimony of an individual at their time of death.

On the other hand, among the means of "patrimony acquirement," the Church can be the recipient of both inter-vivos and mortis causa liberties. In terms of patrimony, as a form of acquiring church heritage, canonists considered both the testamentary heritage, the most common type and the *ab intestat* one. According to how the Church was or was not recognized at different historical moments, there is much evidence proving the faithful believers desire to write legal documents to churches, monasteries[11]. In addition to these wills, the *ab instestat* form of inheritance is also mentioned, without a testament. This succession took place when someone, capable of having some heritage, dies without a testamentary heir, and the beneficiaries were governed by law. If there were no legal heirs, "the fortune was attributed to the Church, and especially to the monasteries, to serve the salvation of souls"[12].

Thus, in view of the above, the Church, as a legal person, may be the beneficiary of ties, by way of the testamentary inheritance. Throughout the paper, there will be identified atypical situations that have been missed by the legislator in drafting the Civil Code, situations that allow us to appreciate that the Church, through its dioceses and monasteries, may have a "legal" successor capacity, under its own regulations, and not under those of ordinary law. Obviously, we will talk about the situation of an anomalous heritage. In this context, we will refer to the inheritance of ecclesiastical staff and other normative forms of legitimacy in the field. Thus, by distinguishing the succession rights of this category, provisions will be

[7] Art. 1 of the Law no. 71/2011 for the implementation of the Civil Code: "Inheritances opened before the entry into force of the Civil Code are subject to the law in force at the date of the inheritance".

[8] Francis Deak, Romeo Popescu, *Successor Law*, vol. I, Universul Juridic Publishing House, Bucharest, 2013, p. 19.

[9] Veronica Stoica, Laurentiu Dragu, *Legal Heritage*, Universul Juridic Publishing House, Bucharest, 2012, p. 14; Gabriela Lupșan, *Civil Law. Succesoral Law*, Danubius Publishing House, Galati, 2012, pp. 14-15.

[10] D. C. Florescu, T*he Right of Inheritance in the New Civil Code*, Universul Juridic Publishing House, Bucharest, 2012, p. 7.

[11] For details, dates, the role and status of the Church at various historical stages, see I. Floca, *op. cit*., pp. 466-469; Arghiropol Ioan, *What is meant by church wealth*, Bucharest, 1937; Iorgu Ivan, *The Church Goods in the First Six Centuries*, Bucharest, 1937. Along with the simple bonds, universal or private, there were also the pious purposeful links, a real source of wealth.

[12] *Ibidem.*

interpreted in the functioning and organization Statute of the Romanian Orthodox Church[13].

2. Considerations about ecclesiastical staff

In accordance with the canon law, we will highlight and analyze the relevant canonical-legal aspects of the domestic law regarding the ability of ecclesiastical staff to inherit by comparative reporting to Orthodox canonical norms, seen as "legal rules of Christian society[14]."

A. Laity (or layman) is a broad category recognized by the Church, which includes the totality of Christian believers, members of the Church, who do not have priestly status or the status of inferior servants of the Church[15]. From a confessional point of view, in order to have this secular quality as a member of the Church, the person in question must have received the Sacrament of the Holy Baptism. In other words, the layman is similar to the civilian law.

As a mere difference, within the civil law, the person acquires civilian capacity to use and implicitly to inherit, from the very birth or by exception, before birth, during the conception stage (provided that he is born alive[16]), while within canonical law, by receiving baptism, the individual acquires legal capacity of canon law, thus becoming a subject of rights and obligations from a canonical point of view. That difference, on the other hand, does not imply any dependency between the two areas. Thus, although he did not receive the mystery of baptism, the secular can inherit. Even the non-baptized, who do not belong to any ritual church, will not be religiously prevented from exercising their subjective right to inherit.

Thus, the layman - a majority of the ecclesiastical staff and a subject of the canon law, acquires legal succession capacity by applying the rules of civil law without any religious impediment.

B. The Clerics are all the priests established by ordination. Ordination[17] means "stretching out the hand," and ordination is the service through which the Sacrament or ministry of the priesthood is given or transmitted. By ordination, the consecration of the candidates for the steps of the higher clergy is done, namely the consecration to the deacon, the priest and the bishop or the bishop. Therefore, by clergy we understand the bishop, the priest and the deacon.

The Bishop represents the first and highest step of the clergy in the Orthodox Church. The bishop is that person chosen and sanctified through the sacrament of the priesthood, anointed in the upper episcopate by at least two bishops, to whom a diocese is usually given for pastoral care[18].

[13] Part IV of the BOR Statute, letter D "Provisions on the succession rights of hierarchs and monks", art. 192-194

[14] Constantin Dron, *Current Value of Canons*, Doxologia Publishing House, Iaşi, 2016, p. 117.

[15] The inferior servants of the Church are those persons who have received the ordination, consisting of a prayer which grants one of the steps of the lower clergy: the singer or reader and the hypo deacon that is, a lower step than the deacon and who do not represent sacramental function within the church.

[16] According to Article 36 of the Civil Code, "the rights of the child are recognized from the conception stage, but only if the infant is born alive".

[17] Ordination (< gr. *heirotonia* "the power of the hand") female noun (in the Christian ritual) The mystery of the priesthood in which, through the prayer of invoking the Holy Spirit, by blessing and sacramental laying of hands by the bishop (or two or three bishops) on the head of the sacerdotal ministers, they are consecrated into one of the three steps: deacon, priest, bishop.

[18] *Explanatory Dictionary of Romanian Language*, 2nd edition, Univers Enciclopedic Publishing House, Bucharest, 1996, p. 842.

According to art. 130 of the Organization and Functioning Status of the Romanian Orthodox Church, "It is considered to be eligible for the service, the worthiness and responsibility of the Archbishop and the eparhial bishop any hierarchical member of the Holy Synod, starting from the vacant diocese, as well as any archimandrite or priest widow by death, fulfilling canonical conditions, who has a PhD or is a graduate in Theology and has distinguished himself through pure life, theological culture, ecclesiastical dignity, missionary zeal, and household abilities. The list of eligible hierarchs is drawn in descending order, starting with the vacant eparchy. "

It is important to note in the field of succession that the bishop can not be married.

The Priest - The Romanian explanatory dictionary defines the priest as "a person who officiates the religious cult, being, in this posture, a mediator between man and divinity and representing his fellows in the sphere of the sacred without disturbing it."

Article 123 of the BOR Statute stipulates that "ministers and deacons are recruited from doctors, Masters graduates and graduates of theological faculties, specialized in Pastoral Theology, who have held the priestly capacity examination." Among the main attributions of this category we can mention the following: it is the delegate of the chariarch in the parish, charged with the spiritual pastoral care of the faithful believers, and within the administrative activity he is the head of the parish administration, being the president of all the existing fora in the parish, Parochial Assembly, Council and Committee.

In their turn, the category of priests knows a subclassification, the priestly priests, the celibate priests and the monks priests, the last two categories being subject to distinct rules of inheritance and the capacity of inheritance. If the priest is ordained as an unmarried clergy (celib), he will no longer be able to marry after he has joined the clergy.

The deacon is the third hierarchical rank of divine institution, and serves as a helping hand to the bishop and priest in the sacramental and administrative life.

C. Monks are another category of ecclesiastical staff. Monks can be either clergy, or laymen. The monks form the third state of the church together with the clergy and laity. In short, a layman can embrace the monastic state, not necessarily haing to be a cleric[19]. These, through the monastic votes deposited at the entrance to monasticism - the vote of poverty, the vote of virginity, the vote of obedience, give up the worldly things. In ancient times the entrance to the monastic rank was similar to a civil death and a spiritual rebirth, which is one of the reasons why the monks were obliged to give up any present or future property prior to the deposition of monastic votes by donation[20] or by will.

3. Legitimate legacy of ecclesiastical staff as a case of anomalous inheritance

As I have previously argued, if laymen and the priests of myrrh, who are categories of ecclesiastical staff, are subject to civil law on the capacity to inherit, a special category is the monastic rank.

[19] Liviu-Marius Harosa, *Canonic Law*, Universul Juridic Publishing House, Bucharest, 2013, pp. 93-94.

[20] For details on the donation contract and the causes of its revocation, see Mirela Costache, *Civil Law. Contracts. Course notes*, Zigotto Publishing House, Galati, 2013, pp. 66-80.

It is interesting to analyze the interference of the norm with civil law by which the monk renounces the goods he has and to the future goods in favor of others. According to private law, it is forbidden to renounce the personal assets[21].

We can not capitalize the subjective right of the monk's legal inheritance, without briefly specifying the rules of welcoming to the monastic life. Among these conditions, with incidence in the current analysis, we observe the provision in art. Article 16 (g) of the Regulations on the Organization of Monastic Life and the Administrative and Disciplinary Functioning of the Monasteries[22]: "The person wishing to enter the monastic life is obliged to give proof of the military service and the declaration that he renounces his property by donating it to his relatives or monastery[23]." Moreover, according to art. 41 of the same regulations, "it is not permitted for the abbot and for any monk to possess personal goods such as: cars, houses, apartments, studios, plots etc. This state contradicts the rules of authentic monastic life and monastic votes. "

The way in which the Church acquires property over temporal goods[24], through inheritance, is that of the succession of goods belonging to monks and hierarchs, the main source being the provisions of the Regulations and the BOR Statute cited above[25].

The Chapter in the Statute with implication in the matter is inappropriately entitled "Provisions concerning the inheritance of hierarchs and monks". By proceeding to a minimum reading and interpretation of these provisions, no rules are identified regarding the succession capacity of the hierarchs, on the contrary, rules are laid down claiming the succession to their possessions, the specific vocation coming to the eparchies[26]. Thus, the title misleads us as to the deception of the spirit of the established norm.

Regarding the unitary character of the successor transmission that ensures succession equality to those who fulfill the legal conditions to inherit, established by the Civil Code[27], the incidence in the matter and other rules for the award of the patrimony are what

[21] The patrimony is not transmissible through acts among the living.

[22] The Regulation for the organization of monastic life and the administrative and disciplinary functioning of the monasteries drawn up by the Holy Synod is an integral part of the BOR Statute, approved by the Holy Synod of the Romanian Orthodox Church by Decision no. 4768/2007 and recognized under Law no. 489/2006 on religious freedom and the general regime of denominations, through Romanian Government Decision no. 53 of 16 January 2008, published in the Official Journal of Romania Part I, no. 50 of 22 January 2008.

[23] The one who wishes to join the monastic life is obliged to submit to the Chiliarch of the place a written request, accompanied by the following documents: a) the birth certificate; b) the baptism certificate; c) the graduation documents (if the applicant is a minor, they should be a graduate of the Secondary School, should have at least the consent of the parent or guardian; d) the criminal record; e) civil status certificate, which states that they do not have any of the family obligations stipulated by the Civil Code; f) the parish priest's recommendation; g) the military service document and statement that he renounces his property by donating his property and assets to his relatives or to the monastery; h) the medical record regarding the state of physical and mental health.

[24] By temporal good, in a narrow sense, only the thing that offers economic utility and can be approached is meant. For details on the classification of goods, see Liviu-Marius Harosa, *op. cit.*, pp. 108-138.

[25] These norms are based on the provisions of the Apostolic Canon 40, the Canon 24 of the Fourth Synod of Antioch and the canons 22 and 32 of the Local Council in Carthage.

[26] Articles 192-194 of the Statute. Art. 192: "The dioceses have a vocation on all the successions of their hierarchs." Art. 193: "The goods the monks and monasteries brought with them or donated to the monastery when they joined monasticism, as well as those acquired in any way during their life within the monastery remain entirely the property of the monasteries they belong to and can not be subject to any subsequent claims." Article 194: "For the retired or withdrawn hierarchs, the Holy Synod will regulate their rights in accordance with statutory and church regulations".

[27] Veronica Stoica, Laurentiu Dragu, *op. cit.*, p. 21.

the doctrine calls anomalous succession[28]. The competition of the Civil Code texts with those of the BOR Statute imprints an anomalous character in the case of the succession law of the Diocese to the hierarchs / monks' property, but with some reservations regarding their priority application.

As in the case of the civil law and regarding the texts of the Orthodox church law concerning the succession to the hierarchs and monks property, there is a conflict of laws, the reference moment being the year 2008, in which the new Statute entered into force, the old one being abrogated. In this case, according to the principle of non-retroactivity of the law, the devolution of property will be governed by the law in force at the date of its opening. We can therefore talk about:

a) successions to the assets of hierarchs and monks opened under the old statute, prior to January 22, 2008;
b) successions to the hierarchs and monks' assets after January 22, 2008.

In either case, the statute texts do not refer to the rules of inheritance devolution established by the civil norms, nor vice versa. Neither the provisions of the old Code or the Civil Code in force qualify the Statute as a special law. Neither the civil doctrine we have reported will identify as an anomalous succession in our case. We are in the position of finding a "legal fracture" in this case. Moreover, another particularity created by this type of succession refers to the fact that it creates succession rights to a legal person, other than the State or the administrative-territorial unit, in the sphere of legal inheritance, which is the Diocese. This is the result of the autonomous interpretation of art. 192 of the Statute: "The dioceses have a vocation upon all the property of their hierarchs." In the present case, it is a legal legacy, as it is known that the legal heir is recognized as a universal heir.

Thus, we believe that by assigning and recognizing unequivocally the status text of a vocation to all the succession wealth, a successor capacity of the Diocese is created in the legal legacy.

A) The successions to the goods of the hierarchs and monks opened under the old statute, prior to January 22, 2008

The situation of the anomalous heritage has as concrete reflection the provisions of the Statute of the Romanian Orthodox Church of 1948[29]: "The possession of the monks and monasteries brought with them in the monasteries, as well as that acquired in any way during monasticism, remains entirely to monastery of which it holds". As it can be seen, the Monastery, a canonical legal person of public law, has an exclusive vocation to the legal succession of monks and nuns. According to this vocation and the attributed succession capacity, the monastery had the highest inheritance, by excluding both the classes of legal heirs and the categories of heirs reserved by the civil law, the inheritance reserve covering the entire succession. As a consequence, the will attributed by the monk to a person other than the institution to which he belongs does not have legal effects. Can we appreciate that the monastery even became a legal heir with a special status? As an exception, retired hierarchs or returnees at the Monastery, although monks, could test within the available limits of share provided by art. 194 and art. 197 of the BOR Statute of 1948.

B) successions to hierarchs and monks' assets after January 22, 2008

[28] Regarding the typology and specificity of anomalous succession, see also Dan Chirică, *Treaty of Civil Law, Succesions and Liberties*, C.H. Beck Publishing House, Bucharest, 2014, p. 8.

[29] Statute for the Organization and Functioning of the Romanian Orthodox Church in 1948, in force since February 17, 1949, issuing by the Great National Assembly, published in the Official Bulletin of February 23, 1949.

Art. 192 of the current BOR Statute does not bring substantial changes in the content of the legal norm, stating that "the Dioceses have a vocation on all the succession property of their hierarchs." The same exclusive vocation attributed to the Eparchy and the same quality of the "quasi-legal heir". The civilian capacity to inherit is therefore returned to the dioceses. At the same time, art. 193 of the new Statute provides that "Goods monks and nuns brought with them or donated to the monastery entry into monasticism and those acquired in any way while living within the monastery remain totally to the monastery they belong to and may not be subject to subsequent claims."

In this regulation as well we can talk about an anomalous succession of the eparchy, namely of the monastery, over "all" the hierarchs, monks and nuns. At a first glance, it appears that the Eparchy's vocation is on all the goods of the hierarchs[30], but we consider that art. 193 circumscribes the succession only to the goods brought with or donated to the Monastery at the entrance to monasticism, as well as those acquired in any way during monastic life (ie, all goods).

Special attention should be given to the latter article, which provides "the property which the monks and nuns brought with them or donated to the monastery at the entry into monasticism and those acquired in any way while living in the monastery remain totally monastery belonging and they may not be subject to subsequent claims."

The same prohibition is also enshrined in the Law on Cults 489/2006[31], by art. 31 paragraph 1: "the goods which are subject to contributions of any kind - contributions, donations, successions - as well as any other property lawfully entered into the patrimony of a cult, can not be the subject of subsequent claims."

Again, we must negativelly note the major inaccuracy of the text and the legal terms used, as well as the incompatibility with the principles of the civil law, as well as of the constitutional ones[32], in the sense that the text of the fundamental law defends and guarantees the right to property, implying here the possibility of claiming the goods from the hands of any person who unfairly holds them. Thus, if a literal interpretation is given to Art. 193, it would appear that third parties would no longer be able to use the claim, irrespective of the way in which their property became the possession of the monk and later of the monastery.

Neither the provisions of the Civil Code on Inheritance make any mention or refer to any special law governing certain situations, such as the present one, of the inheritance of monks and hierarchs. A legal fracture between the special provisions contained in the canonical rules and the statutes of religious cults and the rules of the civil law is not perpetuated, although the Canonical Codes of the Catholic Churches and the United Church with Rome[33] are part of the domestic law, based on the provisions of the Law of Cults, and the Statute of the Romanian Orthodox Church is new.

In Art. 5 par. 4 the Law of Cults states that "in their activity, religious cults, associations and groups have the obligation to observe the Constitution and the laws of the country and not to prejudice public security, public order, health and morals, as well as human rights and fundamental freedoms."

[30] According to art. 192 of the BOR Statute.

[31] Law no. 489/2006 on religious freedom and the general regime of denominations, published in the Official Journal no. 201 of 21 March 2014.

[32] Art. 44 para. 2 of the Constitution: "Private property is guaranteed and protected equally by law, regardless of the holder".

[33] Regarding the types of norms established by the canonical codes of the Catholic Church and the Orthodox Church, see Liviu-Marius Harosa, *op. cit*., pp. 96-97.

However, the revised Constitution in 2003 states that the State defends and guarantees the right to property, thereby implicitly defending the right to property through the action for revocation. Even if there were no legal norms concerning the special succession of monks and hierarchs and the succession capacity of the Church (through its canons), a reference to canonical norms, an integral part of the Romanian legal system, would have been necessary.

In the silence of the Code, we consider that, given the quality of a hierarch or a monk and the origin of the goods, the eparchies and the monasteries are the beneficiaries of an anomalous succession by virtue of which they have a vocation to the entire mass of the deceased, consisting of the goods brought with it or donated at the entry into monasticism, as well as those acquired in any way during the life of the monastery (as provided for monks, article 193 of the BOR Statute). Consequence that is in the field of the civil law: indirect exertion. We can also discuss here a legal exertion, both in the legal succession and the testamentary succession.

According to the rules of interpretation, the special law applies as a matter of priority. The general derogatory specialty is a legal principle which implies that the special rule is the one which derogates from the general rule and that the special rule is a strict interpretation of the case. Moreover, a general rule can not remove a special rule from application. Thus, the High Court of Cassation and Justice of Romania[34] ruled that the concurrence between the special law and the general law is solved in favor of the special law, even if this is not expressly provided for in the special law , and if there are inconsistencies between the special law and the European Convention on Human Rights, the latter has priority[35].

The conflict between the previous special law and the subsequent general law is solved by the concurrent application of the principles according to which the special rule applies with priority to the general rule - the general special exception - and a special rule can only be changed or abrogated by a special rule, a subsequent general rule.[36]

Therefore, we assume that in the competition between the two, the civil provisions do not apply in the matter of the anomalous succession we are discussing. Thus, strictly related to the goods brought into monachism by the Hierarch or monks donated to the monastery, to the Church (by its legal persons under public law) or to the Pastoral Diocese, or to possessions acquired in any way during the monastic life, and to which the hierarch or monk arranged during his life in favor of other persons, at the time of the opening of the succession, no heir reservist can have a vocation to succession.

4. Conclusions

As we have argued, the open legacies of the Hierarchs, monks, and monks are subject to special rules which, in the case of legal devolution, create an anomalous succession in favor of the Diocese or the monastery, with the complete exclusion of the legal heirs. The general rules established by the Civil Code do not apply, and doctrinal points of view do not yet exist.

Thus, the succession vocation of the legal heirs disappears in the situation where de cujus embraced one of the indicated

[34] High Court of Cassation and Justice, Decision no. 33/2008, published in the Official Journal of Romania, Part I, no. 108 of 23 February 2009.

[35] High Court of Cassation and Justice, Decision no. 27 of 14.11.2011, File no. 28/2011, published in the Official Journal no. 120 of February 17, 2012, http://www.legex.ro/Decision-27-2011-118553.aspx.

[36] High Court of Cassation and Justice, Decision no. 13/2012, File no. 14/2012, accessed online at http://www.lege-online.ro/lr-DECISION-13%20-2013-(146010).html.

forms of monasticism. Even when legal documents or wills are established in favor of the legal heirs, they can not be executed for the same reasons. By its rules, the BOR Statute here plays the role of a special law, in the sense of inadmissibility of the rules of common law established in the case of the successor inheritance of a natural person. .

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PERSPECTIVES ON THE RULE OF LAW IN A MODERN DEMOCRACY

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Abstract

The nurturing presence of law within a state is, in a modern society, not open for debate. In fact, the absence of law or the lack of its enforcement has been considered as the main symptom of failed states. But the concept of "rule of law" has evolved along with society, along with the principles that drive it. Thus, this concept hasn't always been the same and will not be the same in the future. Whilst in the time before the French Revolution, the "rule of law" meant the rule of an absolute head of state anointed by the divine, the people simply abiding by his will, after the French Revolution the concept changed, the state remained powerful, but under a collective rule. The road had been opened for the modern democracies. As the 19th century grew to a close, the modern state had been born in the Western democracies, a modern state which still held a tight grip on the individual. After the devastating effects of the First and the Second World Wars, the state was once again reformed, in a more subtle manner: its strength was reduced in favor of the individual who considered the collective interests of society to be inferior to his personal interests and needs: post-modernism was born, a thought-current which has had influence on all fields of human life, including the concept of "rule of law".

Keywords: *rule of law, democracy, separation of powers, French Revolution, post-modernism.1. The dawn of "law"*

1. Introduction

First of all, we need to define "*law*" as being mandatory guidelines within society set forth by a ruling body.

Secondly, the ruling body that mandates these laws can take many forms in accordance with the development of each society. Thus, looking in our distant or not too distant past, we can identify many ways in which a society and the leaders of that society impose their will on the majority of the population.

Most of history, the ruling classes, governments, leaders have not been elected by the majority, but have either been hereditary (absolute monarchy etc.), theocratic (any form of rule in which the domineering classes are considered to be instated by divinity), dictatorial etc.

In any case, most of human history has seen a manner of leadership or rule that has been absolute, totalitarian. We must not come to the conclusion that single rulers have imposed their will with iron fists and the rest of society was more or less composed of slaves, but we must acknowledge that be it one ruler, a council of rulers or a body of leaders, the ruling minority imposed its will upon the subservient minority.

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This subservient minority along with its unopposed ruling elites (be it the supreme leader, or some form of intermediate aristocrats, nobles, businessmen etc.) generally formed society, formed proto-states or, later, states.

The gradual evolution of human thought, human desires, and human needs brought forth, through the ages, gradual changes in the perception of people of their own society and brought into question the legitimacy of those in power.

The power of these people was called into question and, through violent revolutions, these systems came crumbling down along with the political edifices which brought them to power.

This paper does not and cannot make a summary of human political and social history, but it does want to shine a light on certain events that have permitted the rise of democracy, the rise of the rule of law and the possibility of the current layout of society.

Thus we consider essential to mention the 18th century simply because it is the century in which a great event unfolded which even today has repercussions and will have for centuries to come: the French Revolution.

2. The birth of the modern state and of modern democracy: The French Revolution

Through the Middle Ages humanity has seen a slow evolution, both in terms of technology, as well as in terms of social and political thought.

Of course, the reader will have realized by now, that we are referring, in general, to European society, and in a lesser degree to African or Asian cultures. In that respect, we can assert that in 16-18th centuries Europe has dominated the entire world with its empires, mainly, through the use of its weapons and political intrigue.

In European society political discussion was frozen as whole nations were being controlled by authoritarian hereditary rulers who imposed their will, along with the church, upon the vast majority of the population.

Law, in this effect, was imposed by the ruling elite, which had little incentive to change anything of the *status-quo* which greatly favored their own interests. And the people, in general, having only basic knowledge of life, was not inclined to bring forth any type of meaningful changes, preferring stability.

Through the centuries, however, through western philosophy and thought, the certain aberrations and major disadvantages of such a system became more and more evident[1].

The harsh and unequal enforcement of law, undemocratically elected kings or parliaments meant that all social reform or all new ideas were stifled by a rigid and unwavering class system.

For this reason western thinkers became all too aware of these factors which held back the huge potential of mankind, the creativity of most members of society being channeled only towards the benefit of a few individuals.

Thus philosophers like Voltaire[2] proposed through their writings that this system must be destroyed and a new form of human governance must come into effect.

His writings along with the writing of many others created the premise which was

[1] See also for more references : S. Bullen, *A Critical Examination of the Role of Political Thought in the French Revolution*, http://www.e-ir.info/2011/10/12/a-critical-examination-of-the-role-of-political-thought-in-the-french-revolution/.

[2] For more ideas on the influence of Voltaire see also I. Birchall, *1989: Voltaire and the French Revolution*, http://grimanddim.org/historical-writings/1989-voltaire-and-the-french-revolution/.

necessary for a sudden and much needed revolution.

This revolution came to be in 1789-1799 A.D., the entire French populations revolting against the aristocratic rule (which was viewed as corrupt, unwilling to listen to the needs of the people and unwilling to change), Church rule (which was also seen to be serving its own interest) and, in general, against the make up the system.

Of course, the majority of the members of this revolution had no idea what to put in place of the current system, had no idea of the concepts of rule of law or of democracy, but, as history sometimes creates, certain elements coalesced to produce the sudden spark of revolution.

We cannot place this spark on the usual perpetrators, as people usually do: the extravagance of the court of Marie Antoinette, the high cost of the royal court, the oppressive general regime of land owners.

The spark came from a certain buildup of tension, of ideas, of needs and from the unwavering evolution of humanity.

The revolution is well known for its violence. Indeed many tens of thousands of people found their death in the first years of the revolution.

The revolution is also known for its initial tyranny, bringing forth the Reign of Terror (later used again with "great" results by Lenin) in which thousands of people were put to death without a trial[3].

The revolution is also known to have sparked the ascension of power-hungry individuals such as Napoleon, causing further suffering upon all of Europe.

But, as has been the case often in human history, the revolutions, through 20 years of struggle, produced a new concept of state: one in which the ruling class is not imposed by the will of few, but by the desires of the many.

The revolution also produced equality not between all members of society, but between all ages and both sexes (the revolutions being the instance in which women fought for equal rights) [4].

Moreover, and concerning our topic, the French Revolution produced, after years of intense struggle, the modern concept of "separation of powers", a state in which the rule of law prevailed, law which has been decreed by of the will of the people through a democratically elected legislative body and in which the executive branch is kept in check by a judiciary branch which is also under the control of law.

Like all brilliant ideas, this notion spread throughout Europe and the world, and today most of European society is dominated by the notion of "the rule of law" and "the separation of powers within the state".

3. Democracy and the rule of law

The concept of "rule of law" is vague and is hard to grasp fully even by the most notable scholars.

This vague ideal, thus has been hard to achieve and the road towards it can be fraught with many perils.

This is exactly what we must extract from the 20th century, a century "*of the self*", in which the individual awoke, giving birth to modernity, in which the individual said "no" to the rule of elites, in which the individual said no to the overbearing force of the state, he himself becoming the "center of

[3] See also M. Carey, *Violence and terror in the Russian Revolution*, https://www.bl.uk/russian-revolution/articles/violence-and-terror-in-the-russian-revolution.

[4] For more on this topic, J. Abray, *Feminism in the French Revolution* available at https://www.jstor.org/stable/1859051?seq=1#page_scan_tab_contents.

the universe", and thus creating the premises for post-modernism.

The 20th century represented a century of human suffering as well as human liberation, a century fraught by two world wars in which hundreds of millions of people suffered or died and in which the classical state knew many reforms.

In its stride for democracy, in its stride to achieve equilibrium, humanity more than once slipped into the clutches of dictatorship only to come out reinvigorated, able to restart in a better position and, more or less, with lessons learned.

The rule of law, thus, particularly after the fall of the Soviet Union, became a goal for most countries in the world, realizing that only through the separation of powers within the state, can the individual come to flourish.

But, as we mentioned, there are many perspectives of the concept of "rule of law", "separation of powers" and "democracy".

First, we must note that the "rule of law" system entails that the state has legitimacy in the eyes of the majority, thus the state ensures the rule of law and the rule of law ensures its legitimacy – interdependency of the two concepts.

Secondly, the law becomes a vector of state power, the modern state being formed along the following principles: the ruling body is subservient to the law of the land, free and guaranteed access to a court of law against any administrative, legislative or judiciary abuses, the prevalence of the rule of law against the state itself, means for the state to impose the rule of law and the rule of law to impose itself against the state.[5]

Thirdly, we must define democracy as a system of state organization in which the rule of law is ensured by specific means and in which all aspects of political and social life are dictated by the rule of the majority, through legal institutions.

Finally, fourthly, the concept of "separation of powers" must the defined as the system in which three state powers : the legislative, the executive and the judiciary are in a balance dictated by law and enforced through legal means, in which each branch of the state has the duty and right to oversee the enforcement of the law.

We must emphasize that, as can clearly be seen, the rule of law is as the core of the modern democratic system, in which none of the powers of the state has the upper hand and in which each of the powers balances the "weight" of the other.

Also, it would seem that all the power of the state is under the rule and guidance of society which expresses itself through the direct elective processes, in which the majority of the population dictates the direction of society.

This is the crux of the issue, as some events have shown, the democratic electoral systems having its major inconveniences.

First of all, having the majority of people dictate the direction of society by electing members to establish law has some drawbacks.

Recent events such as *Brexit* and the election of far-right of far-left governments even within well-established democracies proved that, under certain conditions, the general population is inclined to choose paths which are not necessarily the best from a "rule of law" perspective. Sometimes choices appeared to be wholly unreasonable and against the concept of democracy itself. The classical example of this is the coming to power of the Nazi Party in the 1930s in Germany. The Nazis, an extreme right worker's party came to power through democratic means because of the dire economic situation in Germany between the two World Wars, a situation in which the population's savings were wiped out by galloping inflation and in which war

[5] M. Voicu, *Accesul liber la Justiție*, Dreptul Journal no. 4/1997, Bucharest, p. 2.

reparations brought financial despair to most households.

Because of this situation we conclude that the population, willingly voted democracy out of the state, voted for a centralized, authoritarian regime which ended by bringing destruction upon Germany and Europe.

This is not by far the only example of democracy which, through the careful manipulation of politicians in certain periods of despair, has renounced its self, and the people, in a struggle to achieve security and stability, lost not only democracy, but the security and stability which they sought.

Another more recent example would the *Brexit*: a situation in which, by creating fear and in the context of economic downturn, certain politicians have managed to convince the majority of the British people that parting from the European Union is the only method in which they can regain their economic prowess. After a stormy referendum, the majority of the population now, polls show, regrets this decision.

But, as was the case of Germany in the 1930s, the rule of law dictates that the effects of the popular referendum be respected by all the branches of the state, being the direct will of the people.

Thus we move further in our analyses: can the democratic system outvote itself? Can democracy make choices that are undemocratic? Can any of the branches of the state dismiss certain popular choices of the people?

First of all, the checks and balances inherent in a democratic system, theoretically do not permit the people to vote out democracy, as there are certain core values which cannot be changed even by direct vote of all of the members of society. For example, in our own national Constitution it states that Romania is a sovereign Republic, in which the rule of law is of constitutional value and in which all people are equal.

These are values which cannot be altered by any popular vote.

The "forefathers of the Constitution" enshrined these values so that future generations cannot alter them in any way.

However, as history has shown, even withholding these values, a society can slip into an authoritarian system.

Second of all, all laws that can have harmful effects on society must be passed through a legislative process in which politicians who have been elected vote the respective laws into effect. The executive branch is held responsible for enforcing the laws. The judicial branch, which in most states is the only branch of the state who is not elected directly, must overview the way in which the laws are passed and in which the executive branch enforces them.

4. Rule of law in the classical view, modernism and post-modernism

Now we arrive at the crux of the issue: can the judicial branch rescind popular laws passed by the legislative branch or enforcements by the executive branch.

As an example of a situation in which this has occurred, we present the following.

During the 1970s a big debate over abortion was held in the United States, the significant majority of the population being against abortion (except for certain medical reasons) and thus was in favor of passing legislation which banned all abortions (with certain limited exceptions)[6].

The congress of the United States passed the bill and declared abortions illegal.

[6] For details on the case, see also Pew Research Center; http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/.

Following this, this Supreme Court of the United States was petitioned in regard to the Constitutionality and legality of the respective bill, which had been highly appreciated by the general public.

The Supreme Court of the United States, in a historical decision established that the bill was unconstitutional as it was against the rights of the mother enshrined in the Constitution of the United States. The Supreme Court considered that by limiting abortions in such a major way, the legislative branch breached its Constitutional prerogatives.

In hindsight, we can easily observe that the "rule of law" and "separation of powers" within the American state is the so called "*classical*" one, in which the rule of law is imposed upon all walks of life, **the judicial branch having the power to enforce even the most unpopular of rulings**.

Also, it must also be noted that the American people accepted willingly this ruling, even though it was unpopular, as a consequence of its democratic system and a consequence of the independence of the judiciary.

Thus certain observers have stated that this type of "rule of law" that overrules even the majority will is a type of "*dictatorship of the rule of law*" in which the separation of the branches in the state is so absolute, that the judiciary can rescind a popular law passed lawfully by the legislative body.

This dictatorship of the rule of law has been the approach of the classic democracies of the 19th and early 20th century when the state, though democratically elected governments, was dominated by certain fundamental principals who were applied in practice in accordance with the view of the judicial branch (in general, Supreme Courts). Since the judges of the Supreme Courts were few in number and not democratically elected, **it thus became evident that certain decisions by the majority would be rescinded by a small group of individuals who were not elected.**

This system, however imperfect it may seem, was seen as acceptable as the ruling elites still had significant power and acted paternalistic in their belief that society, as a whole, is incapable of addressing important matters and thus a ruling body, the judiciary, should be able to "press the brake pedal" when democracy is threatened even by democratic actions.

However this classic approach towards democracy could not be long lived as the 20th century rolled on, with its many wars and with its many social and political upheavals.

As the two World Wars concluded and as the Cold War ended, the western world no longer trusted the institutions that were put in place to limit the aspirations of the individual.

The old paradigm which asserted the rational man, which asserted that the elites had to rule in a benevolent, but paternalistic manner over the ruled was put into question and eventually abandoned. A new social and political reality was put in its place, postmodernism, in which the individual was supreme, in which the desires of the majority would be passed into law that could not be rescinded by any branch of the state. Indeed, the will of the people would rule supreme in this new form of "rule of law".

Francis Fukuyama, a great historian and thinker of the 20th century concluded in discussing the future of the state that "the state that emerges at the end of history is liberal insofar as it recognizes and protects through a system of law man's universal right to freedom, and democratic insofar as it exists only with the consent of the governed"[7].

[7] F. Fukuyama, *The End of History?*, 1989, https://www.embl.de/aboutus/science_society/discussion/discussion_2006/ref1-22june06.pdf.

Thus the future state envisaged by Fukuyama insured that the liberal state of tomorrow would be democratic insofar as the consent of the governed would be offered. In other worlds, no branch of the state would be able to contradict the direct will of the people, thus the modern (or post-modern) concept of the state, the concept of "rule of law" comes into being.

Although this short essay cannot begin to analyze the complex meanings of such concepts as modernism or post-modernism, the critical difference between human (especially western civilization) society of the early 20th century and of the early 21st century is that the latter is more individually-driven and centered. The individual in the 21st century is centered not on fulfilling his role in society but he sees society and indeed the state and the rule of law only as a prerequisite for his own personal fulfillment. The individual now reigns supreme and does not accept other entities to openly defy his will.

Thus the state has become subservient to the individual and not the other way round.

This has, of course, had dire consequences upon the concept of rule of law and upon the separation of the powers of the state.

None of the branches of state, in the post-modernist mentality, can rescind the decision of the majority however in disregard to the wellbeing of the state, of society in general, it really is.

Thus, the situation of *Brexit* can be explained in terms of a majority which has dictated the course of action which is clearly detrimental to the wellbeing of the nation, but cannot be contested through the judicial system, as it was passed through a direct referendum.

This can have serious repercussions, especially concerning decisions whose consequences shall be felt not in the near future, but in the distant one.

For example, the struggle to implement legislation on a global level for the protection of the environment and, of course, the long term protection of the entire world. In recent years, very little has been done in limiting the extensive damage which has befallen the environment because of emissions, deforestations etc., exactly because popular opinion is not for curtailing this phenomenon, and the population of the world, in general, is indifferent to the destruction of the environment as long as its needs are met in the short term.

5. Conclusion

Living in our post-modern world, in which the notion of "rule of law" has been redefined to better suit the needs of the individual and less the needs of the state and the general society, has produced several imbalances which will have to dealt with in the coming future.

The new "rule of law" concept gives new force to the individual which can dictate the policy of the state, in disregard of the general interest of society.

A balance between the needs of the individual and the needs of the many must always be the goal, but if the balance is extremely difficult, if not impossible to achieve, then we would prefer the needs of the many to prevail over the individual. Otherwise, our whole civilization would be in jeopardy in light of the egotistical desires of the individual.

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PARENTAL AUTHORITY VERSUS COMMON CUSTODY

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Abstract

The notion of parental authority introduced to Romanian legislation by the New Romanian Civil Code is totally distinct from the notion of custody specific to other domestic legislations both in theory, as in practical consequences implied.

The purpose of the article is to make a comparative presentation of the two different notions mentioned above, as they are (still) constantly confused, even though a significant period of time has elapsed since the New Romanian Civil Code entered into force. Confusion comes mainly from the fact that Romanian Civil Code was inspired from Quebec Civil Code, where the legislation formally refers to the notion of parental authority, but in substance this notion presents nevertheless the caharacteristics of the concept of custody.

Therefore, the objectives of the present study are to identify the content and forms regulated in legislation for each of the notions, by studying legal provisions relevant for parental authority in Romanian legislation, respectively custody in national legislations of other states. As a result, the main theoretical resemblances and differences between the two concepts will be decelated.

Furthermore, the study will identify the practical consequences generated by their common points (important decisions are to be taken by agreement of both parents, whereas routine decisions can be made individually) and main differences (domicile of the child/alternate domicile and rights of access).

Keywords: *parental authority, custody, domicile of the child, rights of access, best interests of the child.*

1. Introduction

The present study aims to make a comparative presentation of two different notions – parental authority and custody – by identifying from a theoretical point of view their content and forms prescribed in legislation, but also the practical consequences generated by their differences.

The subject has great importance, as the two notions are still confused by practitioners of law, although a significant period has elapsed since Romanian Civil Code[1] (which introduced to our domestic legislation the concept of parental authority) entered into force.

To reach this aim, the study will identify legal provisions relevant for parental authority in Romanian legislation and custody in national legislation of other states. Furthermore, it wil concentrate on clarifying the content and forms regulated in legislation for each of the notions.

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[1] Law no. 287/2009 concerning Romanian Civil Code, published in the Oficial Journal of Romania no. 511/24.07.2009 and republished per Article 218 from Law no. 711/2011, published in the Oficial Journal of Romania no. 409/10.06.2011, in force from 01.10.2011.

Also, case – law relevant for the subject will be presented, both domestic and foreign, as it reflects how these notions were understood and applied in practice.

Doctrinal opinions will also be identified and systematized, with the necessary mention that preponderence goes to studies from abroad, as in Romanian juridical literature the subject has scarcely been discussed.

Coroborating all these different, but interconnected perspectives, the article will conclude over the main theoretical resemblances and differences between the two concepts.

At the same time, it will point out practical aspects reflected in case – law in close connection to parental authority and common custody (specially domicile of the child /alternate domicile and rights of acces/„equal time" for the child with both parents).

2. Content

2.1. Content and forms of parental authority in Romanian legislation

Article 483 of Romanian Civil Code („Parental Authority") provides the definition and main characteristics of the notion of parental authority[2].

According to the above-mentioned article: „ (1) Parental authority is the set of rights and obligations concerning both person and property of the child which belong equally to both parents. (2) Parents exercise parental authority only in the best interests of the child, with due respect to his person, and associate the child in all decisions affecting him, considering the age and maturity of the child. (3) Both parents are responsible for bringing up their minor children." (our underline)

Subsequently, Article 487 of Romanian Civil Code („Content of parental authority") offers details about the content of the concept of parental authority in our domestic law: „Parents have the right and duty to raise the child, taking care of the child's health, physical, mental and intellectual upbringing, and also the child's education and training, according to their own beliefs, characteristics and needs of the child; they are bound to give the child guidance and advice needed in order to properly exercise the rights granted by the law".

General provisions of Romanian Civil Code must be corroborated to special legislation, respectively Law no. 272/2004[3] (Article 36), according to which: „(1) Both parents are responsible for raising their children. (2) *Exercise of parental rights and obligations must be in the best interests of the child and ensure material and spiritual welfare for the child, especially by providing care, maintaining personal relationships and providing growth, education and maintenance, as well as legal representation and administration of patrimony*" (our underline).

[2] References to parental authority are to be found also in other legislations, e.g. Articles 371-373 of French Civil Code or Articles 597-612 of Quebec Civil Code. Despite of the formal title ("parental authority"), the concept corresponds more to the notion of custody, whereas parental authority and custody cannot be assimilated in substance. Likewise, Civil Code of Luxemburg (Title IX) refers to "parental authority". Therefore, this notion is not new in Romanian law (details to this respect in A.-G. Gavrilescu, *Drepturile și obligațiile părinteşti. Drept român și comparat*, Universul Juridic Publishing House, 2011, p. 242).

[3] Law no. 272/2004 concerning protection and promotion of children's rights, published in the Oficial Journal of Romania no. 557/23.06.2004, successively modified and lastly republished in the Oficial Journal of Romania no. 159/05.03.2014.

In case of divorce, the general rule is common parental authority[4], whereas sole/exclusive parental authority is the exception, in cases stipulated both by Romanian Civil Code (objective exceptions[5]), respectively Romanian Civil Code and Law no. 272/2004 (subjective exceptions[6]).

In each of the cases, the decision to grant exclusive parental authority belongs to the court, which will establish, considering the specificities of the case, if the best interests of the child recommend common or sole parental authority; in the latter case, it is also for the court to choose the parent who presents the guarantees for exercising sole parental authority.

From corroboration of legal provisions detailed above, it results that parental authority (either joint or sole), deals with rights and obligations of the parents that must be exercised only in the best interests of the child[7]. To reach this aim, parents take decisions on behalf of the child, by common consent or unilaterally (depending on exercise of parental authority - joint or exclusive).

In this context, it is important to underline a major distinction between the notion of parental authority introduced by Romanian Civil Code and the notion of „*încredinţare*" legiferated by the former Romanian Family Code[8].

The notion of „*încredinţare*" implied both domicile of the child and right to make unilaterally decisions for the parent who had the domicile[9]. According to actual legislation, the notion of parental authority encompasses the right to make decisions (jointly or exclusively)[10], but does not include domicile of the child (which is to be

[4] Per Article 397 of Romanian Civil Code: "After divorce, parental authority rests jointly to both parents, unless the court decides otherwise".

[5] Article 507 of Romanian Civil Code ("Exclusive parental authority") provides an exhaustive list of objective exceptions: "If one parent is *deceased*, *declared dead* by judgment, under *interdiction*, *deprived of the exercise of parental rights* or if, for any reason, it is *impossible* for him or her to express his or her will, the other parent exercises parental authority alone". (our underline).

[6] Article 398 of Romanian Civil Code ("Exclusive parental authority") opens the possibility for the court to appreciate in favour of sole parental authority in subjective situations, depending on circumstances specific to each case: "For *serious reasons*, given the interests of the child, the court decides that parental authority is exercised exclusively by a parent. (2) The other parent retains the right to watch over the child's care and education and the right to consent to adoption" (our underline). Subsequently, Article 36 para. 7 of Law no. 272/2004 exemplifies in a nonexhaustive list the subjective reasons mentioned by Civil Code in a general manner, as follows: "There are considered serious grounds for the court to decide that parental authority is exercised by a single parent *alcoholism*, *mental illness*, *drug addiction* of the other parent, *violence* against children or against the other parent, *convictions* for human trafficking, drug trafficking, crimes concerning sexual life, crimes of violence, as well as *any other reason related to risks for the child* that would derive from the exercise by that parent of parental authority." (our underline).

[7] M. Welstead & S. Edwards, *Family Law*, Oxford University Press, 2nd Edition, 2008, p. 242: " (…) parental rights and parental responsabilities (…) have been displaced in favour of the responsabilities of parents towards their children, and (…) under certain circumstances the rights of children prevail. Parental rights have been reframed as responsabilities (…)".

[8] Law no. 4/1953, published in the Oficial Journal of Romania no. 4/04.01.1954, amended by Law no. 4/1956 published in the Oficial Journal of Romania no. 11/ 04.04.1956, republished in the Oficial Journal of Romania no. 13/18.04.1956, succesively amended, lastly by Law no. 59/1993, published in the Oficial Journal of Romania no. 177/26.07.1993.

[9] M. Avram, *Drept civil. Familia*, 2nd Edition revised and completed, Hamangiu Publishing House, 2016, p. 152.

[10] M. Avram, *op. cit.*, p. 160: " (…) exercise of parental authority does no longer split by entrusting the child to one of the divorced parents, situation which does not exclude the possibility for the court to decise otherwise, but nevertheless these measures of splitting parental authority operate only in exceptional situations".

decided over different criteria from parental authority[11]).

Although common parental authority was introduced to our domestic legislation to encourage maintenance of parental responsibility after divorce, in certain cases it may give rise to abuses/perpetuate the conflict between parents, and the consequences are inflicted directly and primarily on the child.

In this case, we consider that the recommended solution is sole parental authority. Despite a significant resistance against exclusive parental authority in the beginning (save for the objective situations limitedly prescribed by Article 507 of Romanian Civil Code), present case-law[12] accepts exclusive authority.

A parent who, by his own behavior, comes to present a significant risk for the child (even appreciated by subjective standards offered by Article 398 of Romanian Civil Code and Article 36 para. 7 of Law no. 272/2004), must not be allowed to exercise parental authority.

Also, not all parents are suitable for joint authority. Parents should respond in an analogous way to the child's needs (physical, material, emotional, spiritual, etc.) and must be able to handle a functional and non-conflictual communication.

We consider that at least the following criteria are important in deciding over exercise of parental authority: parents have no difficulty in working together; they both agree on joint parental authority and take their share of responsibility; there is no violence, resentment or revenge between the parents; they agree on domicile of the child; they have similar style education and values; in case of divergence, they are ready to negotiate and give in; they are supporting each other as partners equal to raise and educate the child; they are able to maintain a stable environment including extended family (grandparents, uncles, aunts, cousins) and even reconstituted families (stepmothers or stepfathers may represent distinct forms of attachment for children).

If these criteria are not met, we consider that joint parental authority becomes only the means to continue and expand after divorce the conflict between parents and child is caught between different (even opposite) systems of education and values.

2.2. Content and forms of custody

By contrast to Romanian legislation which recognizes the notion of parental authority, domestic legislations of other states refer to the notion of custody[13], which encompasses two forms (legal custody and physical custody).

Legal custody considers the authority to make major (important) decisions on behalf of the child and includes sole legal custody and common (joint) legal custody.

The parent who has sole legal custody is the only person who has legal authority to make major decisions concerning the child.

On the contrary, joint legal custody means that both parents have legal authority to make important decisions for the child.

There are certain advantages of sole legal custody, such as: it is easier to make

[11] For the same conclusion, F. Emese, *Dreptul Familiei. Căsătoria. Regimuri matrimonial. Filiaţia,* 5th edition, C.H. Beck Publishing House, Bucharest, 2016, p. 521.

[12] Bucharest Tribunal, Fourth Civil Section, decision no. 938/A pronounced on 22.10.2012 (the court appreciated that exclusive parental authority was justified in the situation where one of the parents encountered real difficulties to obtain the consent of the other parent for important decisions concerning the child, such as participation of the child in crossborder sport competitions with the national team).

[13] S.P. Gavrilă, *Instituţii de dreptul familiei în reglementarea Noului Cod Civil*, Hamangiu Publishing House, 2012, p. 205: "(…) notion borrowed from other legal systems, which does not overlap identically to exercise of parental authority (…)".

major decisions when there is only one parent legally responsible; it may result in greater consistency for the child; for situations when one parent is completely absent, it is necessary for the other (present) parent to be able to make important decisions without having to consult and decide with a parent who is not available.

In case of joint legal custody, the major disadvantage is that, when disagreements arise over various decisions, it is often the case that neither of the parents compromises on his or her convictions, and the court must be seized to take the decision for them. The inevitable consequence is that decisions cannot be taken but at the end of litigation, whereas it is well known that celerity is very important in taking decisions concerning children[14].

Physical custody refers to the aspect where the child lives most of the time (it is sometimes referred to as „residential custody").

Similar to legal custody, physical custody encompasses two forms: sole physical custody **and joint physical custody.**

In case of sole **physical custody,** the child physically resides in one location (with „custodian parent"). In most cases, „non-custodial" parent is awarded generous visitation rights, including sleepovers.

In case of joint **physical custody (**also called „shared custody", „shared parenting" or „dual residence"), the child lives with one parent for part of the week (or month/even year), and with the other parent during the remaining time. The division of time spent at each location is approximately equal.

It is important to note that parents can potentially share joint legal custody without having joint physical custody.

There is also a third option, called „**bird's nest custody**". This appears when the children live in one central location, and the parents rotate in and out of the children's home on a regular schedule[15].

While this child-centered approach can ease transitions for the children, it can be costly (too impossible) to maintain three separate residences and difficult for parents to constantly move from one residence to another[16] (this type of custody remains just a proposal that we have never met in practice).

2.3. Important decisions/routine decisions

As a common point between parental authority and custody (when they are jointly exercised, and in addition custody encompasses the form of joint legal custody[17]), major decisions concerning the child are to be taken by agreement of both parents.

On the contrast, decisions concerning routine aspects of the child's every day life can be made individually by the parent who

[14] This might be the reason why some legislations prescribed an original (and very practical) solution for situations where parents cannot reach an agreement concerning a certain type of important decisions. According to B. D. Moloman, L.-C. Ureche, *Noul Cod Civil. Cartea a II-a. Despre familie. Art. 258-534. Comentarii, explicații și jurisprudență*, Universul Juridic Publishing House, Bucharest, 2017, p. 671, Article 1628 of German Civil Code stipulates that in such situations, at the request of parent(s), the court may transfer authority to take that type of decisions to one of the parents. Romanian legislation does not have such a solution, and thus it is necessary to seize the court every time parents do not agree over an important decision (even if the situation is repetitive) - Article 264 of Romanian Civil code and Article 36 para. 8 of Law no. 272/2004.

[15] For example, parents spend alternate weeks at the children's home.

[16] Nevertheless, it is far more difficult for children to move from one location to another in case of alternate domicile (joint physical custody).

[17] Physical custody, as already pointed out, does not deal with making decisions on behalf of the child, but with periods of time spent by the child with each of the parents.

is currently exercising his or her parenting time.

In this context, it is of high importance to identify if a decision is major or merely routine.

If not prescribed by the domestic law or clarified in the judgment governing parental authority/custody, it can sometimes be difficult to determine whether a specific decision is important or routine.

As a general rule, major decisions are distinguished from day-to-day decisions by their importance and their nonrepetitive nature[18]; likewise, major decisions are those which „exceed daily needs of the child"[19].

Important decisions are, in general, decisions regarding education, religion, and healthcare.

Examples of major decisions include e.g., where the child should go to school, what type of religious upbringing he or she will have, non-emergency medical decisions.

As consequence, routine decisions encompass all the other aspects that do not enroll in the area of major decisions.

This type of decisions is to be taken individually and the other parent cannot interfere[20].

In conclusion, the general rule is that important decisions shall be made jointly by applying what was called „principle of codecision"[21] and routine decisions shall be made individually.

Should both parents not agree on an important issue, one parent will have to petition the court to make the decision for them, based on the child's best interests.

If important decisions are made unilateraly by one parent or if a parent believes that the other parent is engaging in harmful routine decisions regarding the child, he or she may ask the court to modify rights of access (parenting time) or even the domicile of the child (or custody).

In Romanian legislation, the initial form of Law no. 272/2004 did not prescribe which types of decisions were important. Therefore, it was often the case that parents seized courts to decide over this aspect and the case-law was quite diverse, generated by lack of even general criteria that at least should have been regulated by the legislator.

This is the reason why, in 2013, among other modifications, the legislator decided to expressly and limitatively state which decisions are important[22].

Article 36 para. 3 of Law no. 272/2004 (actual form) provides that: „If both parents exercise parental authority, but do not live together, important decisions, such as type of education or training, complex medical treatment or surgery, residence of the child or administration of property shall be taken only with the consent of both parents."

Also, to avoid non-implication/abuse in making important decisions, the legislator stipulated two limits.

The first limit regards the non-responsive parent, who does not provide any answer on important decisions needed to be taken, even specifically asked by the other

[18] J. S. Ehrlich, *Family Law for Paralegals*, 7th edition, Wolters Kluwer Publishing House, New York, 2017, p. 202.

[19] D. Lupașcu, C. M. Crăciunescu, *Dreptul Familiei*, 3rd edition amended and actualized, Universul Juridic Publishing House, 2017, p. 557.

[20] "If the other parent is interrogating you about the way you handle routine matters related to the children, you should feel comfortable politely telling him/her to back off. It is YOUR parenting time. YOUR rules apply. If the court determined you were fit to have parenting time, the court also determined that you were fit to make routine decisions regarding the children without your ex-wife's or ex-husband's unwanted input". (D.M. Germain, *Joint Legal Custody* & *Decision-Making during your visitation*, available on-line at http://www.bestinterestlaw.com/joint-legal-custody, last accession on 28.02.2018; 19:12).

[21] F. Emese, *op. cit.*, p. 523.

[22] Article 31 para. 2^1 of Law no. 272/2004, introduced by Law no. 257/2013, in force from 03.10.2013.

parent. In this case, the decision is to be made by the parent who has been entrusted with the domicile of the child.

The second limit concerns the abusive parent, who makes important decisions that are not in the interests of the child, taking advantage of the non-interested conduct of the other parent. In this case, the decision cannot be taken unilaterally, and most often will be decided by the court[23].

2.4. Alternate domicile

As already pointed out, under Romanian Civil Code, the domicile of the child does not fall in the area of parental authority, and this is the first and most important distinction between parental authority and custody[24].

As consequence, in case of divorce and absence of agreement between parents[25], the court must decide separately and under different criteria on the one hand regarding exercise of parental authority (common or sole) and on the other hand concerning domicile of the child (which is to be established at one of the parents)[26].

According to Article 400 of Romanian Civil Code: „ (1) In the absence of agreement between the parents or if it is contrary to the best interests of the child, the guardianship court shall decide, at the same time with divorce, the domicile of the child to the parent with whom he or she lives constantly. (2) In case that before pronouncement of divorce the child lived with both parents, the court shall establish the domicile of the child to one of them, given the child's best interests."

The criteria under which the court decides which parent should have the domicile of the child are prescribed by Article 21 of Law no. 272/2004:

„ (1) If parents do not agree on domicile of the child, the guardianship court will establish the domicile to one of them, according to Article 496 para. (3) of the Civil Code. In evaluating the interest of the child, the court may consider, in addition to the items stipulated in Article 2 para. (6), issues such as:

c) availability of each parent to involve the other parent in decisions related to child and to respect parental rights of the latter;
d) availability of parents to allow each other to maintain personal relationships;
e) housing conditions in the last three years of each parent;
f) history of parents' violence against children or other persons;
g) distance between the house of each parent and education institution of the child."

[23] The premise for this situation is a non-responsive behaviour of one parent, and therefore the decision cannot be taken in common. At the same time, decision cannot be taken unilaterally by the other parent, as it is against the best interests of the child. By consequence, the only solution is asking the court to make the decision.

[24] Physical custody implies alternate domicile of the child. Alternate domicile of the child is legiferated, for example, in United Kingdom (Children Act, 1989), Belgium (Law from 18.07.2006), Spain (Law from 08.07.2005), Italy (Law from 08.02.2006). Even in countries where the law allows alternate domicile, this subject generated intense discussion with extensive arguments in favour or against it (L. Briad, *Résidence alternée et conflit parental*, A.J. Famille no. 12/2011, p. 570-573; M. Juston, *De la coparentalité à la déparentalité*, A.J. Famille no. 12/2011, p. 579-583; A. Gouttenoire, *Autorité parentale*, in P. Murat (coord.) *Droit de la Famille*, 5th Édition, Dalloz, Paris, 2010, p. 803-807, in F. Emese, *op. cit.*, p. 532).

[25] Nonetheless, in the light of Article 8 of Law no. 272/2004, agreements between parents must be verified by court as follows: "In all cases concerning children's rights, the court verifies that agreements between parents or concluded by parents with other persons should fulfill the best interests of the child".

[26] By consequence, the other parent has only rights of access.

In conclusion, alternate domicile under Romanian Civil Code is not possible[27].

Nevertheless, a natural question appears: if it were possible (as it is in other national legislations), would it be a satisfactory solution for the child?

Our opinion is that, even in absence of legal arguments presented above which operate in the context of our domestic legislation, alternate domicile is not an option in the best interests of the child.

Juridical literature sustains our opinion: „We doubt that from the child's point of view the idea of alternate domicile is, as a rule, the happiest choice, whatever the rhythm of alternance in hosting child, and even if geographical proximity of the two locations would exempt additional shortcomings"[28].

2.5. Rights of access

According to Article 496 para. 5 of Romanian Civil Code: „The parent with whom the child does not live constantly has rights of access to the child at the latter's domicile. Guardianship court may limit the exercise of this right if it is in the best interests of the child".

Article 17 para. 4 of Law no. 272/2004 states that: „In case of disagreement between parents on exercise access rights to the child, the court will set out a schedule based on the child's age, needs care and education of the child, intensity of affection between child and parent who does not have the domicile of the child, the behavior of the latter, as well as other relevant issues in each case."

Subsequently, Article 18 of Law no. 272/2004 details different forms of rights of access: „a) meetings between the child and parent or other person who, per law, has the right to a personal relationship with the child; b) visiting the child at his domicile; c) hosting child, for a limited period, by the parent or other person with whom the child does not live habitually."

The rights of access as described above by Romanian legislation cannot come to application in practice of the idea of „equal time" of child with both parents, specific to common physical custody and consisting, in reality, in alternate domicile[29].

Also, alternate domicile the child (not allowed by Romanian law) can not be confused with a large programme of personal ties, because the two concepts are distinct and, as a rule, rights of access imply a prior establishment of the domicile of the child (not alternating) to one of the parents.

3. Conclusions

Parental authority legiferated by Romanian Civil Code and (common) custody prescribed by other domestic legislations remain two entirely different concepts[30].

[27] For the same conclusion, M. Avram, *op. cit.*, p. 165; D.F. Barbur, *Autoritatea părintească*, Hamangiu Publishing House, 2016, p. 126 and p. 170; D. Lupașcu, C. M. Crăciunescu, *op. cit.*, p. 568.

[28] F. Emese, *op. cit*., p. 532. The author explains as follows: "Fulfilling parental duties is a daily task, and implies continue and sustained involvement, without the inevitable gaps of "exchange of shifts" between parents. Ensuring stability and continuity in care, upbringing and education of the child (…) cannot be done sequentially (…) we are not of the opinion that the right of the child to be raised by his parents (…) implies alternance of domicile".

[29] For example, case no. 54/4/2013 registered at Bucharest Tribunal, Fourth Civil Section, decision no. 648A/19.05.2014, where the court denied alternate domicile (presented as "equal time" of child with both parents).

[30] Confusion comes mainly from the fact that Romanian Civil Code was inspired from Quebec Civil Code, where the notion of parental authority, as already pointed out, corresponds in substance to the concept of custody. Still, even according to Quebec legislation, common custody implying alternate domicile of the child is considered to be a solution only if it is in the best interests of the child and considering the need of stability, relations between parents are good, the opinion of the child is in favour of this type of arrangement (J. Dutil, *La garde partag**é**e au Qu**é**bec*,

At large, one may consider that parental authority as regulated in Romanian legislation may be approached to legal common custody, where the child lives most of the time with one parent („resident parent") and the other parent („non-resident parent") has right of decision over important matters concerning the child and relatively large rights of access.

Thus, under Article 400 of Romanian Civil Code and Article 21 of Law no. 272/2004, the court has the obligation to establish the domicile of the child after divorce to one of the parents (different from physical common custody, associated to alternate domicile).

Nevertheless, parental authority in our national legislative system remains different even from legal common custody.

We argue this point of view as, according to clarifications brought by Article no. 36 of Law no. 272/2004, important decisions to be taken by agreement of both parents are limited in number and expressly regulated by our domestic law (and not to be decided from case to case, as in case of common custody).

On the other hand, rights of access for the parent who has not been entrusted with the domicile of the child are to be established, in the light of Article 17 para. 4 of Law no. 272/2004, from case to case, depending on factual circumstances specific to each litigation, and not considered *de plano* to be large (the case of legal common custody).

As a first consequence of this conclusion according to which parental authority and (common) custody are different notions, it results that under parental authority in Romanian law alternate domicile of the child after divorce of parents is not legally possible.

In adition to this legal point of view, alternate domicile is not a solution in the best interests of the child also considering the effort it would impose (only) on the child, forced to adapt and readapt continuously to different environment, rules, etc. and with serious psychological consequences on long term basis.

In conclusion, common parental authority decided/agreed in case of divorce implies only that important decisions are to be taken by mutual consent, whereas the domicile of the child will be established in favour of one parent (and the other parent will have access rights).

A second consequence resides in the fact that rights of access organized on the so-called principle „equal time" also are not possible, mainly because „equal time" means shared residence of the child and is frequently used in practice as a disguised form of alternate domicile.

We identified a single real common point between notions of parental authority and custody, namely that in case they are exercised by both parents, important decisions necessarily imply agreement of both parents, whereas day-to-day decisions are to be taken by the parent who takes care of the child at that moment.

We consider that this firm theoretical distinction between parental authority and custody and its practical consequences reflecting in application of other notions of family law (as detailed above) could help to ensure a unified case-law, most necessary to be reached in an area as sensible as measures concerning children.

A.J. Famille no. 12/2011, pp. 596-597; M. Castelli, D. Goubau, *Le droit de la famille au Québec*, 5ème Édition, Presses Université Laval, 2005, pp. 331-333, as presented by F. Emese, *op. cit.*, p. 531). In a similar manner, French legislation allows alternate domicile of the child only based on agreement of parents or, in absence of it, disposed by the court as a provisional measure for a limited period; at the end of the "trial period" the issue of child domicile should to get a final solution (L. Delprat, L'autorité parentale et la loi, Studyrama, 2006, p. 78, as presented by F. Emese, *op. cit.*, p. 531).

In the light of specificity of issues generated by family law (some of them presented above), given the fact that at present family cases often encompass cross-border implications and necessarily specific training of judges, we consider that the legislator should seriously ponder the idea of a reasonable number of courts in Romania specialised in family law.

To this respect, we argue that there is already such a specialised court, namely Brașov Family and Minors Tribunal.

Also, in the area of international child abductions[31], the legislator unified territorial competence in Bucharest[32].

In both cases, the benefice of unified jurisprudence is evident and immediate and therefore a „network" of family courts should be construed.

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[31] The specific legal instrument in this area is the Hague Convention on the Civil Aspects of International Child Abduction concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law. Participation of Romania to 1980 Hague Convention was ensured by Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Oficial Journal of Romania no. 243/30.09.1992.

[32] Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Oficial Journal of Romania no. 888/29.09.2004 and republished in the Oficial Journal of Romania no. 468/25.06.2014 prescribes that international abduction cases are to be solved by Bucharest Tribunal as first instance and Bucharest Court of Appeal as second instance.

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WORKPLACE SURVEILLANCE: BIG BROTHER IS WATCHING YOU?

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Abstract

Only recently workplace surveillance has become a real concern of the international community. Very often we hear about employers who monitor and record the actions of their employees, in order to check for any breaches of company policies or procedures, to ensure that appropriate behaviour standards are being met and that company property, confidential information and intellectual property is not being damaged. Surveillance at workplace may include inter alia monitoring of telephone and internet use, opening of personal files stored on a professional computer, video surveillance. But what if this monitoring or recording breaches human rights?

In order to give practical examples for these means, we shall proceed to a chronological analysis of the most relevant cases dealt by the European Court of Human Rights along the time, in which the Strasbourg judges decided that the measures taken by the employers exceed the limits given by Article 8 of the Convention. After providing the most relevant examples from the Court's case-law in this field, we shall analyse the outcome of the recent Grand Chamber Barbulescu v. Romania judgment.

The purpose of this study is to offer to the interested legal professionals and to the domestic authorities of the Member States the information in order to adequately protect the right of each individual to respect for his or her private life and correspondence under the European Convention on Human Rights.

Keywords: *ECHR, employee, human rights, workplace surveillance.*

1. Introductive Remarks

We all have been in the situation, at one point, of using at work the company resources for personal interest. What did you do? Did you stop before doing it and thought you are not allowed to use them? Did you remember that the internal regulations prohibited the use of company resources by the employees? Or does your company have a policy for employee personal use of business equipment or a code of ethics and business conduct? Did you go to the management and asked for permission? Did you use them and thought that nobody else will find out? What if your employer decided to monitor the employees' communications and you did not even know? What if you knew, and you still have decided to use them anyhow? And if we would tell you that certain workplace surveillance techniques could violate your human rights? Most probably you will ask us: what does

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surveillance in the workplace have to do with human rights?

Through this study, we propose an analysis to increase the understanding between the protection of human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "*European Convention on Human Rights*" or the "*Convention*") and one cosmopolite threat: workplace surveillance. The purpose of this study is to strengthen human protection at the national level, having in mind that the European Court for Human Rights (hereinafter the "*ECtHR*" or the "*Court*") represents the most developped regional jurisdiction on human rights[1]. To attain this purpose, the present study seeks to provide the most relevant examples from the Court's case-law in which workplace surveillance has been considered to breach the Convention.

It is indisputable that "*human rights concern the universal identity of the human being and are underlying on the principle of equality of all human beings*"[2], therefore all individuals have the right to complain if the domestic authorities[3], natural or legal persons violate their individual rights under the Convention in certain conditions.

Through time, individuals have filed complaints against the Contracting States of the Convention[4], arguing that a breach of the Convention rights has resulted from workplace surveillance which can track an employee's every move. As it is easy to imagine, this is possible because each individual has the right to privacy.

Please note that Article 8 (right to respect for private and family life, home and correspondence) of the Convention provides that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"[5].

In order to determine whether the interference by the authorities with the applicants' private life or correspondence was necessary in a democratic society and a fair balance was struck between the different

[1] For general information on the European system of human rights protection instituted by the Council of Europe, please see Raluca Miga-Besteliu, *Drept international public*, 1st volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 184-185, and Bogdan Aurescu, *Sistemul jurisdictiilor internationale*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2013, p. 211 and following.

[2] Augustin Fuerea, *Introducere in problematica dreptului international al drepturilor omului – note de curs*, ERA Publishing House, Bucuresti, 2000, p. 4.

[3] The domestic authorities can breach individual rights trough juridical acts, material and juridical facts, material and technical operations or political acts; in this respect, please see Marta Claudia Cliza, *Drept administrativ*, second part, Pro Universitaria Publishing House, Bucuresti, 2011, p. 14 and following, and Marta Claudia Cliza, *Revocation of administrative act*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 627.

[4] On the other side, it is important to have in mind also the European Union. For an interesting study on the European Union law infringements that caused damages to individuals, please see Roxana-Mariana Popescu, *Case-law aspects concerning the regulation of states obligation to make good the damage caused to individuals, by infringements of European Union law*, in the Proceedings of CKS eBook, Pro Universitaria Publishing House, Bucharest, 2012, pp. 999-1008.

[5] Please see the European Convention on Human Rights, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf, p. 10.

interests involved, the European Court of Human Rights examines whether the interference was in accordance with the law, pursued a legitimate aim or aims and was proportionate to the aim(s) pursued.

According to this article, "*the respect for the right to private life, family life, the respect for the domicile of a person and the secrecy of his/her correspondence impose, first of all, negative obligations on the part of the state authorities*[6]". Besides these negative obligations, the public authorities have positive obligations, which are necessary for ensuring effective respect for private and family life.

What should we understand by the notion "private life"? Can it be defined precisely or is it blurred? We totally agree that "*it is a notion whose content varies depending on the age to which it relates, on the society in which the individual lives, and even on the social group to which it belongs*"[7]. As it is stated in the Court's case-law and it is widely recognized in the legal doctrine, the Convention is "a living instrument (…) which must be interpreted in the light of present-day conditions"[8], fact that raises many challenges for its judges.

Even in the Court's opinion, the notion of "private life" is a broad term which is not susceptible to exhaustive definition. Everyone has the right to live privately, away from unwanted attention. In a famous judgment, *Niemietz v.* Germany[9], the Court also considered that "*it would be too restrictive to limit the notion of "private life" to an "inner circle" in which the individual may live his or her own personal life as he or she chooses, thus excluding entirely the outside world not encompassed within that circle*"[10].

The notion of "private life" may include professional activities[11] or activities taking place in a public context[12].

2. ECHR's Relevant Case-law on Incompatibility Between Workplace Surveillance and Article 8 of the Convention

According to the experts, nowadays employers use many technologies to monitor their staff at work in order to discover their web-browsing patterns, text messages, screenshots, social media posts, private messaging applications. Are all these technologies compatible with the right to respect for private and family life, home and correspondence?

Surveillance at workplace may include *inter alia* monitoring of telephone and internet use, opening of personal files stored on a professional computer, video surveillance. In order to give practical examples for these means, we will proceed to a chronological analysis of the most relevant cases dealt by the Court along the

[6] Corneliu Birsan, *Conventia europeana a drepturilor omului. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2010, p. 597.

[7] *Idem*, p. 602.

[8] *Tyrer v. The United Kingdom*, application no. 5856/72, judgment dated 25.04.1978, para. 31, available at http://hudoc.echr.coe.int/eng?i=001-57587.

[9] Application no. 13710/88, judgment dated 16 December 1992, available at http://hudoc.echr.coe.int/eng?i=001-57887.

[10] *Idem*, para. 29.

[11] Case of *Fernández Martínez v. Spain*, application no. 56030/07, judgment dated 12 June 2014, para. 110, available at http://hudoc.echr.coe.int/eng?i=001-145068, and case of *Oleksandr Volkov v. Ukraine*, application no. 21722/11, judgment dated 27 May 2013, para. 165-66, available at http://hudoc.echr.coe.int/eng?i=001-115871.

[12] Case of *Von Hannover v. Germany (no. 2)*, application nos. 40660/08 and 60641/08, judgment dated 7 February 2012, para. 95, available at http://hudoc.echr.coe.int/eng?i=001-109029.

time, in which the Strasbourg judges decided that the measures taken by the employers exceeds the limits given by the Article 8 of the Convention.

One interesting case in monitoring of telephone and internet use is *Halford v. the United Kingdom*[13]. The applicant, Ms Halford, was the highest-ranking female police officer in the United Kingdom (Assistant Chief Constable with the Merseyside police). She decided to bring discrimination proceedings in front of the British courts of law because she had been denied promotion during the years: on eight occasions in seven years, she applied unsuccessfully to be appointed to the rank of Deputy Chief Constable, in response to vacancies arising within Merseyside and other police authorities. One of her allegations before the ECtHR in this respect was that her office and home telephone calls had been intercepted in order to obtain information against her in the course of the domestic proceedings.

Because of her job, Ms Halford was provided with her own office and two telephones (one for private use) which were part of the Merseyside police internal telephone network (*i.e.* a telecommunications system outside the public network). Since she was frequently "on call", a substantial part of her home telephone costs was paid by the Merseyside police. Unfortunatelly, no restrictions were placed on the use of these telephones and no guidance was given to the applicant.

The Court held that, in this case, there had been a violation of Article 8 of the Convention as regards the interception of telephone calls made on the *applicant's office telephones*. The Court considered that there was a reasonable likelihood that this interception was made by the police with the primary aim of gathering material against the applicant in the defence of the sex-discrimination proceedings she instituted. The Court noted that this interception made by a public authority represented an interference with the exercise of the applicant's right to respect for her private life and correspondence. Additionally, after analyzing the domestic applicable law, the Court noted that there was no legal provision regulating interception of telephone calls made on internal communications systems operated by public authorities, therefore the respective measure could not have been interpreted as being in accordance with the law.

Aditionally, the Court considered that the United Kingdom violated Article 13 (right to an effective remedy) of the Convention, since the applicant had been unable to seek relief at national level in relation to her complaint concerning her office telephones.

On the other hand, surprisingly, the Court held that there had been no violations of Articles 8 and 13 of the Convention as regards the interception of telephone calls made on the *applicant's home telephone*, since it did in particular not find it established that there had been interference regarding those communications. The Court observed that the only item of evidence which tended to suggest that the home calls were being intercepted had been the information concerning the discovery of the Merseyside police checking transcripts of conversations. The applicant provided to the Court with more specific details regarding this discovery (*i.e.* that it was made on a date after she had been suspended from duty), but the Court noted that this information might be unreliable since its source has not been named. Even if it had been assumed to be true, the fact that the police had been discovered checking transcripts of Ms

[13] Application no. 20605/92, judgment dated 25 June 1997, available online at http://hudoc.echr.coe.int/eng?i=001-58039.

Halford's telephone conversations "*on a date after she had been suspended does not necessarily lead to the conclusion that these were transcripts of conversations made from her home*"[14].

Judge Russo filed a dissenting opinion to this judgment for the non-violation of Article 13 of the Convention in relation to the applicant's complaint that telephone calls made from her home telephone were intercepted. We also consider that Ms Halford had an arguable claim of a violation of Article 8 in respect of her home telephone and she was entitled to an effective remedy in the United Kingdom in respect to this point.

In another interesting case against the United Kingdom, *Copland*[15], the applicant, Ms Copland complained that during her employment in a statutory body administered by the state (the Carmarthenshire College), her telephone, e-mail and internet usage had been monitored. She was appointed personal assistant to the College Principal and from the end of 1995 she was required to work closely with the newly appointed Deputy Principal, with whom at one point it was supposed to have an improper relationship. The Deputy Principal ordered that the applicant's telephone, e-mail and Internet usage to be monitored, during her employment (although at the College there was no policy in force regarding the monitoring of telephone, e-mail or Internet usage by employees).

The Court held that there had been a violation of Article 8 of the Convention since the collection and storage of personal information obtained from the telephone calls, e-mails and internet usage, without he knowledge, had amounted to an interference with her right to respect for her private life and correspondence. The applicant had not been given a warning that her calls, e-mails and personal internet usage would be monitored, fact which created a reasonable expectation as to the privacy of her correspondence.

In *Antović and Mirković v. Montenegro*[16], the Court was asked to decide if an invasion of privacy complaint brought by two university lecturers (University of Montenegro's School of Mathematics) after installing in the university amphiteatres video surveillance, at the dean's decision.

The applicants filed a complained with the Montenegrin Personal Data Protection Agency which upheld their complaint and ordered the removal of the respective cameras, particularly on the grounds that the reasons for the introduction of video surveillance had not been met, since no evidence existed regarding a danger to the safety of people and property and the university's further stated aim of surveillance of teaching was not among the legitimate grounds for video surveillance. The domestic courts overturned this decision in the civil proceedings on the grounds that the university was a public institution, carrying out activities of public interest, including teaching. Therefore, the amphitheatres were a working area, where professors were together with students, and they could not invoke any right to privacy that could be violated because of the video surveillance. It is also implied that the professors could not invoke the fact that the respective data collected with such surveillance cameras be considered personal data.

[14] *Idem*, para. 59.

[15] Case of *Copland v. the United Kingdom*, application no. 62617/00, judgment dated 3 April 2007, available at http://hudoc.echr.coe.int/eng?i=001-79996.

[16] Case of *Antović and Mirković v. Montenegro*, application no. 70838/13, judgment dated 28 November 2017, available at http://hudoc.echr.coe.int/eng?i=001-178904.

The professors argued that they had no effective control over the information collected through the surveillance system and that the surveillance had been unlawful. Since the cameras had been installed in public areas, the Montenegrin courts of law rejected a compensation claim arguing that the question of private life had not been at issue.

The Court held that there had been a violation of Article 8 (right to respect for private life) of the Convention, considering that the camera surveillance had amounted to an interference with the applicants' right to privacy and that the evidence showed that that surveillance had violated the provisions of domestic law.

In the very recent judgment of *López Ribalda and Others v. Spain*[17], dated 9 January 2018, the Court held that there had been a violation of Article 8 of the Convention, finding that the Spanish courts had failed to strike a fair balance between the applicants' right to privacy and the employer's property rights. This case concerned the covert video surveillance of a Spanish supermarket chain's (*i.e.* M.S.A., a Spanish family-owned supermarket chain) employees after suspicions of theft had arisen. After noting some irregularities between the supermarket stock levels (losses in excess of EUR 7,780 in February, EUR 17,971 in March, EUR 13,936 in April, EUR 18,009 in May and EUR 24,614 in June 2009), the employer installed surveillance cameras (visible for customer thefts and hidden for employee thefts – zoomed in on the checkout counters). The employees were informed only about the installation of the visible cameras. After ten days of surveillance, all the employees suspected of theft were called to individual meetings, where the applicants admitted their implication in the thefts. The applicants were dismissed on disciplinary grounds mainly based on the video material, which they alleged had been obtained by breaching their right to privacy.

The Court underlined that under Spanish law the applicants should have been informed that they were under surveillance, but in fact they had not been. The employer's rights could have been safeguarded by other means and it could have provided the applicants at the least with general information about the surveillance.

3. *Barbulescu v Romania*, the Milestone in the ECHR's Recent Case-Law on Workplace Surveillance

This case concerns the surveillance of Internet usage in the workplace and was brought to the attention of the Court on 15 December 2008[18]. The applicant born in 1979, lived in Bucharest and from 01 August to 06 August 2007 was employed in the Bucharest office of a Romanian private commercial company as a sales engineer. For the purpose of responding to the customers' enquiries, at his employer's request, Mr Barbulescu had to create an instant messaging account using Yahoo Messenger, an online chat service offering real-time text transmission over the internet (while he already had another personal Yahoo Messenger account).

The internal regulations prohibited the use of company resources by the employees, but it did not contain any reference to the possibility for the employer to monitor employees' communications.

[17] Cases of *Isabel López Ribalda against Spain*, *María Ángeles Gancedo Giménez and Others against Spain*, applications nos. 1874/13 and 8567/13, judgement date, available at http://hudoc.echr.coe.int/eng?i=001-179881.

[18] Case of *Barbulescu v Romania*, application no. 61496/08, judgment dated of the Grand Chamber dated 05 September 2017, available at https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Barbulescu%22],%22 document collectionid 2%22: [%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-177082%22]}.

From the evidence submitted by the Romanian Government to the Court, it appears that the applicant had been informed of the employer's internal regulations and had signed a copy of those internal regulations, after acquainting himself with their contents.

From the evidence it appears that from 05 to 13 July 2007, the employer recorded the applicant's Yahoo Messenger communications in real time, and on 13 July 2007 (at 4.30 p.m.), the applicant was summoned to give an explanation. The relevant notice was worded as follows: "*Please explain why you are using company resources (internet connection, Messenger) for personal purposes during working hours, as shown by the attached charts*". The charts attached indicated that his internet activity was greater than that of his colleagues. It is interesting that at that stage, he was not informed whether his communications monitoring activities had also concerned their content.

On that same day, the applicant informed the employer in writing that he had used Yahoo Messenger for work-related purposes only. In the afternoon (at 5.20 p.m.), the employer again summoned him to give an explanation in a notice worded as follows: "*Please explain why the entire correspondence you exchanged between 5 to 12 July 2007 using the S. Bucharest [internet] site ID had a private purpose, as shown by the attached forty-five pages*". The forty-five pages mentioned in the notice consisted of a transcript of the messages which the applicant had exchanged with his brother and his fiancée during the period when he had been monitored; those messages related to personal matters and some were of an intimate nature. The transcript also included five messages that the applicant had exchanged with his fiancée using his personal Yahoo Messenger account, which did not contain any intimate information.

Later that same day, the applicant informed the employer in writing that in his view it had committed a criminal offence, namely breaching the secrecy of correspondence.

On 01 August 2007 the employer terminated the applicant's contract of employment.

The applicant challenged his dismissal in an application to the Bucharest County Court, asking to:

1. set aside the dismissal,
2. order his employer to pay him the amounts he was owed in respect of wages and any other entitlements and to reinstate him in his post,
3. order the employer to pay him 100,000 Romanian lei (approx. 30,000 euros) in damages for the harm resulting from the manner of his dismissal,
4. reimburse his costs and expenses.

As to the merits, relying on the case Copland v. the United Kingdom[19], he argued that an employee's telephone and email communications from the workplace were covered by the notions of "*private life*" and "*correspondence*", being therefore protected by Article 8 of the Convention. He also underlined that the dismissal decision was unlawful and that his employer had breached the Romanian criminal law, by monitoring his communications and accessing their contents.

The applicant noted the manner of his dismissal and alleged that he had been subjected to harassment by his employer through the monitoring of his communications and the disclosure of their contents "*to colleagues who were involved in one way or another in the dismissal*

[19] Cited above.

procedure"[20]. For this reason, we consider that the highly sensitive messages obtained from the transcripts should have been restricted to the disciplinary proceedings, fact which exposes his employer to the accusal that it went far beyond what was necessary with its interference.

In a judgment of 07 December 2007, the Bucharest County Court rejected the applicant's application and confirmed that his dismissal had been lawful.

The relevant parts of the judgment read as follows:

*"*In the present case, since the employee maintained during the disciplinary investigation that he had not used Yahoo Messenger for personal purposes but in order to advise customers on the products being sold by his employer, the court takes the view that an inspection of the content of the [applicant's] conversations was the only way in which the employer could ascertain the validity of his arguments.

The employer's right to monitor employees in the workplace, [particularly] as regards their use of company computers, forms part of the broader right, governed by the provisions of Article 40 (d) of the Labour Code, to supervise how employees perform their professional tasks.

Given that it has been shown that the employees' attention had been drawn to the fact that, shortly before the applicant's disciplinary sanction, another employee had been dismissed for using the internet, the telephone and the photocopier for personal purposes, and that the employees had been warned that their activities were being monitored (see notice no. 2316 of 3 July 2007, which the applicant had signed [after] acquainting himself with it – see copy on sheet 64), the employer cannot be accused of showing a lack of transparency and of failing to give its employees a clear warning that it was monitoring their computer use.

Internet access in the workplace is above all a tool made available to employees by the employer for professional use, and the employer indisputably has the power, by virtue of its right to supervise its employees' activities, to monitor personal internet use.

Such checks by the employer are made necessary by, for example, the risk that through their internet use, employees might damage the company's IT systems, carry out illegal activities in cyberspace for which the company could incur liability, or disclose the company's trade secrets.

The court considers that the acts committed by the applicant constitute a disciplinary offence within the meaning of Article 263 § 2 of the Labour Code since they amount to a culpable breach of the provisions of Article 50 of S.'s internal regulations ..., which prohibit the use of computers for personal purposes.

The aforementioned acts are deemed by the internal regulations to constitute serious misconduct, the penalty for which, in accordance with Article 73 of the same internal regulations, [is] termination of the contract of employment on disciplinary grounds.

Having regard to the factual and legal arguments set out above, the court considers that the decision complained of is well-founded and lawful, and dismisses the application as unfounded"[21].

As the Bucharest County Court underlined, the employer was obliged to inspect the content of the applicant's conversations since the employee affirmed that he had not used Yahoo Messenger for personal purposes. The Court confirmed that the employer had ther right to monitor employees and the employees had been

[20] Case of *Barbulescu v Romania*, application no. 61496/08, judgment date of the Grand Chamber dated 05 September 2017, para. 26.

[21] *Idem*, para. 28.

previously informed about the prohibition of the use of computers for personal purposes.

Unsatisfied by the reasoning of the Bucharest County Court, the applicant then appealed the respective judgment to the Bucharest Court of Appeal, by adding that the court had not struck a fair balance between the interests at stake, unjustly prioritising the employer's interest in enjoying discretion to control its employees' time and resources. He further argued that neither the internal regulations nor the information notice had contained any indication that the employer could monitor employees' communications.

The Bucharest Court of Appeal dismissed the applicant's appeal in a judgment of 17 June 2008, by underlying that:

"In conclusion, an employer who has made an investment is entitled, in exercising the rights enshrined in Article 40 § 1 of the Labour Code, to monitor internet use in the workplace, and an employee who breaches the employer's rules on personal internet use is committing a disciplinary offence that may give rise to a sanction, including the most serious one.

There is undoubtedly a conflict between the employer's right to engage in monitoring and the employees' right to protection of their privacy. This conflict has been settled at European Union level through the adoption of Directive no. 95/46/EC, which has laid down a number of principles governing the monitoring of internet and email use in the workplace, including the following in particular. (...)

In view of the fact that the employer has the right and the duty to ensure the smooth running of the company and, to that end, [is entitled] to supervise how its employees perform their professional tasks, and the fact [that it] enjoys disciplinary powers which it may legitimately use and which [authorised it in the present case] to monitor and transcribe the communications on Yahoo Messenger which the employee denied having exchanged for personal purposes, after he and his colleagues had been warned that company resources should not be used for such purposes, it cannot be maintained that this legitimate aim could have been achieved by any other means than by breaching the secrecy of his correspondence, or that a fair balance was not struck between the need to protect [the employee's] privacy and the employer's right to supervise the operation of its business.

Accordingly, having regard to the considerations set out above, the court finds that the decision of the first-instance court is lawful and well-founded and that the appeal is unfounded; it must therefore be dismissed, in accordance with the provisions of Article 312 § 1 of the C[ode of] Civ[il] Pr[ocedure]"[22].

Additionally, on 18 September 2007, the applicant had lodged a criminal complaint against the statutory representatives of the Romanian company, alleging a breach of the secrecy of correspondence (a right enshrined in Article 28 of the Romanian Constitution). On 09 May 2012, the Directorate for Investigating Organised Crime and Terrorism (DIICOT) of the prosecutor's office attached to the Supreme Court of Cassation and Justice of Romania ruled that there was no case to answer, on the grounds that the company was the owner of the computer system and the internet connection and could therefore monitor its employees' internet activity and use the information stored on the server, and in view of the prohibition on personal use of the IT systems, as a result of which the monitoring had been foreseeable. The applicant did not avail himself of the opportunity provided for by the applicable

[22] *Idem*, para. 30.

procedural rules to challenge the prosecuting authorities' decision in the domestic courts.

After exhausting all the domestic remedies relevant to the alleged violations, Mr Barbulescu filed an application to the ECtHR, relying on Article 8 of the Convention. The applicant complained, in particular, that his employer's decision to terminate his contract (after discovering that he was using their internet for personal purposes during work hours) had been based on a breach of his right to respect for his private life and correspondence as enshrined in Article 8 of the Convention and that the domestic courts had failed to comply with their obligation to protect his right.

The application was allocated to the Fourth Section of the Court, and on 12 January 2016 a Chamber of that Section unanimously declared the complaint concerning Article 8 of the Convention admissible and the remainder of the application inadmissible.

The Court analysed the relevant domestic law (the Romanian Constitution, the Criminal Code, the Civil Code, the Labour Code, and the Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and on the free movement of such data), as well as the international law and practice (the United Nations standards[23], the Council of Europe standards[24], the European Union law[25], the comparative law[26]).

In its judgment of 12 January 2016, the Chamber held that Article 8 of the Convention was applicable and found that the case differed from *Copland v. the United Kingdom*[27] and *Halford v. the United Kingdom*[28]. The significant difference was

[23] The Guidelines for the regulation of computerized personal data files, adopted by the United Nations General Assembly on 14 December 1990 in Resolution 45/95 (A/RES/45/95), the Code of Practice on the Protection of Workers' Personal Data issued by the International Labour Office in 1997, the Resolution no. 68/167 on the right to privacy in the digital age, adopted by the United Nations General Assembly on 18 December 2013 (A/RES/68/167).

[24] The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which entered into force on 1 October 1985, the Recommendation CM/Rec(2015)5 of the Committee of Ministers to member States on the processing of personal data in the context of employment, which was adopted on 1 April 2015.

[25] The Charter of Fundamental Rights of the European Union (2007/C 303/01), Directive 95/46/EC of the European Parliament and of the Council of the European Union of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC published in OJ 2016 L 119/1, entered into force on 24 May 2016 and will repeal Directive 95/46/EC with effect from 25 May 2018.

[26] The Court analysed the legislation of the Council of Europe member States, in particular a study of thirty-four of them, which indicate that all the States concerned recognise in general terms, at constitutional or statutory level, the right to privacy and to secrecy of correspondence. However, only Austria, Finland, Luxembourg, Portugal, Slovakia and the United Kingdom have explicitly regulated the issue of workplace privacy, whether in labour laws or in special legislation. With regard to monitoring powers, thirty-four Council of Europe member States require employers to give employees prior notice of monitoring (e.g. notification of the personal data-protection authorities or of workers' representatives). The existing legislation in Austria, Estonia, Finland, Greece, Lithuania, Luxembourg, Norway, Poland, Slovakia and the former Yugoslav Republic of Macedonia requires employers to notify employees directly before initiating the monitoring. In, Austria, Denmark, Finland, France, Germany, Greece, Italy, Portugal and Sweden, employers may monitor emails marked by employees as "private", without being permitted to access their content. In Luxembourg employers may not open emails that are either marked as "private" or are manifestly of a private nature. The Czech Republic, Italy and Slovenia, as well as the Republic of Moldova to a certain extent, also limit the extent to which employers may monitor their employees' communications, according to whether the communications are professional or personal in nature. In Germany and Portugal, once it has been established that a message is private, the employer must stop reading it.

[27] Cited above.

[28] Cited above.

that the internal regulations in this case strictly prohibited employees from using company computers and resources for personal purposes. Since a transcript of the applicant's communications had been used as evidence in the Romanian court proceedings, the Chamber concluded that his right to respect for his private life and correspondence was involved.

The Chamber also acknowledged that Romania had positive obligations towards Mr Barbulescu because the dismissal decision had been taken by a private-law entity. From this perspective, the Chamber analised if the domestic authorities had struck a fair balance between, on one part, Mr Barbulescu's right to respect for his private life and correspondence and, on the other part, his employer's interests. The Chamber noted that Mr Barbulescu had been able to bring an action before the competent court of law which found that he committed a disciplinary offence.

The Chamber retained the fact that the employer had accessed the contents of the applicant's communications only after Mr Barbulescu had declared that he had used the respective Yahoo Messenger account for work-related purposes.

It then held, by six votes to one, that there had been no violation of Article 8 of the Convention (except for the Portuguese judge Paulo Pinto de Albuquerque, who's partly dissenting opinion was annexed to the Chamber judgment[29]).

On 12 April 2016, the applicant requested the referral of the case to the Grand Chamber[30] and on 06 June 2016 a panel of the Grand Chamber accepted the request. Considering that the respective case presents interest for all the Member States, President Guido Raimondi allowed the French Government[31] and the European Trade Union Confederation[32] to intervene in the written procedure of this case.

A hearing took place in public in the Human Rights Building, Strasbourg, on 30 November 2016.

By eleven votes to six, the Court held that there had been a violation of Article 8 of the Convention, finding that the domestic authorities had not adequately protected the applicant's right to respect for Mr Barbulescu's correspondence and private life. This violation was due to the failure to strike a fair balance between the interests at stake, *i.e.* determining if the applicant had received a prior notice from his employer

[29] Please see the Partly Dissenting Opinion of Judge Pinto De Albuquerque, available at https://hudoc.echr.coe.int/eng#{%22appno%22: [%2261496/08%22], %22itemid%22:[%22001-159906%22]}. The judge shared the majority's starting point (interference with Article 8 of the Convention), but disagreed with their conclusion, since he considered that Article 8 was violated.

[30] In his observations before the Grand Chamber, Mr Barbulescu complained for the first time about the 2012 rejection of the criminal complaint filed in connection with an alleged breach of the secrecy of correspondence. Since this new complaint was not mentioned in the decision of 12 January 2016 as to admissibility, which establishes the boundaries of the examination of the application, it therefore falls outside the scope of the case as referred to the Grand Chamber, which did not have jurisdiction to deal with it.

[31] The French Government gave a comprehensive overview of the applicable provisions of French civil law, labour law and criminal law in this sphere. The authorities referred to the settled French Court of Cassation's case-law to the effect that any data processed, sent and received by means of the employer's electronic equipment were presumed to be professional in nature unless the employee designated them clearly and precisely as personal.

The French Government argued that the employer could monitor employees' professional data and correspondence to a reasonable degree, provided that a legitimate aim was pursued, and could use the results of the monitoring operation in disciplinary proceedings. However, the employees have to be given advance notice of such monitoring. In addition, where data clearly designated as personal by the employee were involved, the employer could ask the courts to order investigative measures and to instruct a bailiff to access the relevant data and record their content.

[32] The European Trade Union Confederation stated that internet access should be regarded as a human right and that the right to respect for correspondence should be strengthened. At least the employee's prior notification is required, before the employer could process employees' personal data.

regarding the possibility that his communications might be monitored, or if he had been informed of the nature or the extent of the monitoring, or the degree of the intrusion into his private life and correspondence. Additionally, the Romanian courts of law had failed to determine the reasons justifying such monitoring measures, if the employer could have used certain measures less intruding into his private life and correspondence and if the communications might have been accessed without his knowledge.

The Grand Chamber acknowledged the delicate character of the *Barbulescu* case which was heightened by the nature of certain of the applicant's messages (referring to the sexual health problems affecting the applicant and his fiancée and to his uneasiness with the hostile working environment), requiring protection under Article 8. The employer incorrectly proceeded when decided to access not only Mr Barbulescu's professional Yahoo Messenger account created by the applicant at his employer's request, but also Mr Barbulescu's own personal account (entitled "Andra loves you" which is obvious that has no relationship with performing the applicant's professional duties). We also consider that the employer did not have any proprietary rights over this second account, even though the computer used by the employee for this account belonged to the employer.

Hence judge Pinto de Albuquerque was right! He strongly expressed his disagreement with the majority opinion of the Chamber. He warned that unless companies clearly stipulate their Internet usage policy, "*Internet surveillance in the workplace runs the risk of being abused by employers acting as a distrustful Big Brother lurking over the shoulders of their employees, as though the latter had sold not only their labor, but also their personal lives to employers*"[33].

The importance of this rulling is not only for Romania, but for all the forty-seven countries which have ratified the European Convention on Human Rights, because the Court's rulings are binding for all of them. Mr Barbulescu is not a solitary case, therefore many employers have had to change their internal policies in order to conform themselves with this recent rulling. The lesson the Court taught the Contracting States with this Grand Chamber judgment was that Internet surveillance in the workplace is not at the employer's discretionary power.

It is obvius that a comprehenive Internet usage policy in a workplace should be put in place, mentioning specific rules on the use of instant messaging, web surfing, social networks, email and blogging. Employees must be informed of their clear rights and obligations, of the rules on using the internet, of the Internet monitoring policy, of the procedure to secure, use and destroy data, as well as of the persons having access to the respective data.

Every employee should be informed of such policy and should consent to it explicitly. It is obvious that breaches of the internal usage policy expose the employer[34] and the employee[35] to sanctions.

[33] Please see the Partly Dissenting Opinion of Judge Pinto De Albuquerque, available at https://hudoc.echr.coe.int/eng#{%22appno%22:[%2261496/08%22],%22itemid%22:[%22001-159906%22]}, para. 15.

[34] If the employer's Internet monitoring policy breaches the internal data protection policy or the relevant law, it may entitle the employee to terminate the employment agreement and claim constructive dismissal, in addition to pecuniary and non-pecuniary damages.

[35] Depending on the breaches of the internal policy, the employer should start with a verbal warning, and increase gradually to a written reprimand, a financial penalty, demotion and, for serious repeat offenders, termination of the employment agreement.

3. Concluding Remarks

It is undisputed that the Convention rights and freedoms have a horizontal effect, being directly binding on domestic public authorities and indirectly on private persons or entities. The Contracting States have the obligation to protect the victims of workplace surveillance, otherwise their legal responsibility may be invoked[36]. Employees do not give up to their rights to data protection and privacy every day when coming to the workplace.

Unfortunatelly, work surveillance is a hot topic, arguments and counterarguments could be brought in discussion. For example, companies that sell packages of employee monitoring tools can offer an interesting part for their clients.

Certain restrictions on an individual's professional life, which influence the way that individual constructs his/her identity, may fall under the scope of Article 8 of the Convention.

It is obvious that "*enforcing the right to respect for private and family life seeks to defend the individual against any arbitrary interference by the public authorities in the exercise of the prerogatives that provide the very content of this right*"[37].

Under the Convention, communications from home or from business premises may be covered by Article 8 of the Conventions, through the notions of "private life" and "correspondence": by mail, by email, by telephone calls, information derived from the monitoring of a person's internet use.

Nowadays, the Internet plays an important role in enhancing the public's access to news and, in general, facilitating the dissemination of information.

In such cases involving Article 8 of the Convention, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State.

After the analysis of the Court's case-law we can conclude that, although the Convention does not mention if there is a formal hierarchy of the human rights enshrined in it, it is recognized the fact that "*a balance has to be achieved between conflicting interests, usually those of the individual balanced against those of the community, but occasionally the rights of one individual must be balanced against those of another*"[38]. As it is stated in the legal doctrine, "*the human being is the central area of interest for the lawmaker*"[39].

Despite the concerted efforts of the national public authorities[40] with the international organizations, in the following years we will still encounter many varieties of innacurate or illegal workplace surveillance, and many States that do not act

[36] For general information on the legal responsability of states, please see Raluca Miga-Besteliu, *Drept international public*, 2nd volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 29-56.

[37] Corneliu Birsan, *Conventia europeana a drepturilor omului. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2010, p. 597.

[38] Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, 5th edition, Oxford University Press, 2010, p. 9, *Evans v. United Kingdom*, application no. 6229/05, judgment dated 10.04.2007, available at http://hudoc.echr.coe.int/eng?i=001-80046.

[39] Elena Anghel, *The notions of "given" and "constructed" in the field of the law,* in the Proceedings of CKS eBook, 2016, Pro Universitaria Publishing House, Bucharest, 2016, p. 341.

[40] For more details on public authorities, please see Elena Emilia Stefan, *Disputed matters on the concept of public authority*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015, p. 535 and following.

with responsibility[41] towards their nationals or other categories of individuals found on their territory[42].

The importance of the *Barbulescu* case has been confirmed by the President of the European Court of Human Rights, during the Solemn Hearing of the new judicial year, on 26 January 2018[43]. This was the first case cited by the President during his speech, therefore its value of precedent is undisputed.

We leave you with a conclusion drawn by President Raimondi regarding this case: "[i]t is illustrative of the ubiquitous nature of new technologies, which have pervaded our everyday lives. They regulate our relationships with others. It was thus inevitable that they should permeate our case-law. As was quite rightly observed by Professor Laurence Burgorgue-Larsen: "New technologies have led to an implosion of the age-old customs based on respect for intimacy". What is the point of communicating more easily and more quickly if it means being watched over by a third party or if it entails an intrusion into our private lives? (…) In Barbulescu the Court thus lays down a framework in the form of a list of safeguards that the domestic legal system must provide, such as proportionality, prior notice and procedural guarantees against arbitrariness. This is a kind of "vade mecum" for use by domestic courts"[44].

The public authorities and the companies should understand that, without an accurate and consistent Internet policy in accordance with the principles mentioned in the *Barbulescu* case, "*Internet surveillance in the workplace runs the risk of being abused by employers acting as a distrustful Big Brother lurking over the shoulders of their employees, as though the latter had sold not only their labour, but also their personal lives to employers*"[45].

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[42] Please see Nicolae Popa coordinator, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar*, 3rd edition, revised and enlarged, C.H. Beck Publishing House, Bucharest, 2017, pp. 129-130.

[43] Please see President Guido Raimondi's opening speech available at http://www.echr.coe.int/Documents/Speech_20180126_Raimondi_JY_ENG.pdf.

[44] *Idem*, p. 5.

[45] Please see the Partly Dissenting Opinion of Judge Pinto De Albuquerque, available at https://hudoc.echr.coe.int/eng#{%22appno%22:[%2261496/08%22],%22itemid%22:[%22001-159906%22]}, para. 15.

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THE LEGAL REGIME FOR CUSTOMS DUTIES AND TAXES HAVING EQUIVALENT EFFECT IN THE EUROPEAN UNION

Augustin FUEREA[*]

Abstract

One of the consequences that generates direct, short, medium and long-term effects, determined by the accession of the states to the European Union, is that of valorizing also the free movement of goods. More precisely, it is about the correct knowledge (in a society of knowledge), understanding and application of the principles and rules that govern the goods, but also the appropriation, respectively the engagement in a series of complex mechanisms, which can determine the activation of exceptions, limitations, restrictions or exemptions from the freedoms concerned. For these reasons precisely, the emphasis on freedom has to fall on the norm, rule, knowledge, understanding, and above all on compliance, application. Why? Because, in the European space too, the freedom is regarded as representing what philosophers call "understood necessity", not chaos, not hazard, not disorder. Freedom is for all, not only for some, under conditions of equal chances, but also of engaging in valorization through the assimilation of a large amount of information, in a time, why not admit, relatively brief and last but not least, in terms of competence, professionalism and competition, specific conditions of a market economy, an economy in which we already find ourselves. The free movement of goods is the legal regime under which goods are not confronted at frontiers with any restrictions regulated by a State, both in the case of imports and exports. Therefore, the freedom results equally in the prohibition between the EU Member States of customs duties and charges having equivalent effect to customs duties, plus the prohibition imposed on the Member States of the Union to establish quantitative restrictions or to adopt measures having equivalent effect.

Keywords: *legal regime; customs duties; charges having equivalent effect to customs duties; the European Union; institutional treaties; amending treaties; case law of the CJEU).*

1. Historical and conceptual references

The choice of the wording of this introductory part for the analysis to which we shall proceed is based in particular, on the paradox of each of the three notions, namely: "references," "history," and "concepts". As a consequence, the choice was not a random one, but rather the opposite. Each above-mentioned notion presents the paradox of cumulation of two dimensions. On the one hand, we are talking about the precision given to us by the "references" to which we relate our existence, temporally speaking, and on the other hand, about the flexibility given by the relative character of their stability (the continuous movement of the universe, the existential space we find ourselves in, and so on). The same goes for "history" (seen and rendered subjectively, obviously in a different manner from one person to another), and also in the case of "concepts" understood, defined and accepted

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differently. Each concept (to which we also refer) revolves around invariable constants that are difficult or even impossible to challenge. At such constants, we shall try to refer in this approach, since the objective view is now more necessary than ever, given the extent, complexity and implications of the information that is covered by such an area of concern.

Our research starts from the time factor. When exactly do we encounter preoccupations incident to common rules referring to a uniform conduct? Who highlights such concerns? Where do they manifest and through what are they materialized, consecrated from the point of view of the headquarters of the matter? These are questions to which we shall try to find answers.

By concentrating our interest on the European Union, the undeniable temptation would be to artificially overlap the concerns in matter, as origins, over the origins of the idea of unity at European level. Nor would we mistake much in terms of the time position of these origins. With the arguments that both historians and jurists have identified, we might end up either in antiquity or in different stages of the evolution of the European continent, or in the first half of the twentieth century, essentially marked by the two world wars.

Why are we going so far in history? It is simple. Because "for a long time, Europe's idea of union was confused with the organization of the world; it is thus related to Europe, if not the known world, at least the useful world"[1], a world that harmoniously has proposed to bring equally together both dimensions: the political one (peace, security) and the economical one, from the legal point of view.

Economists confirm such assumptions, appreciating that "the history of the union of territories (including for economic reasons), and later of European states, is found in remote periods, with reference to the expansion of the Roman Empire, to Great Carol's empire and to the Napoleonic conquests, to the establishment of the League of Nations in the interwar period"[2].

Everything is done in the context of the globalization trend of international relations, including from an economical and financial perspective, because "globalization is the process of internationally interdependent expansion of international economic flows. Current globalization is a new way of life for the international community (...). Globalization is not new. It has been observed from the beginning of the 16th century, recognized until the end of the 19th century and characteristic of the 20th century"[3]. Among the entities identified as being involved in this process, the World Trade Organization, for example, occupies an important place. Europe has assumed, through a process of integration very well thought and followed, a special role as an actor with global responsibilities, including from an economic perspective. The Common Market is an enlightening example for the above finding.

"The Community objective of the founding members of the [European Economic Community] was (...) **a Community market**, which subsequently

[1] Charles Zorgbibe, *Construcția europeană. Trecut, prezent, viitor*, Trei Publishing House, Bucharest, 1998, p. 5

[2] Maria Bârsan, *Integrarea economică europeană, vol. I – Introducere în teorie și practică*, Carpatica Publishing House, Cluj-Napoca, 1995, p. 7.

[3] Petre Tănăsie, *România, globalizarea și cerințele regândirii guvernării globale. Oportunități și vulnerabilitate*, in *Studii Juridices*, "N. Titulescu" University of Bucharest, Economic Publishing House, Bucharest, 2001, p. 155.

became **an internal market**, namely **an economic and monetary Union**"[4].

Briefly, the historical references to such developments point to the following institutional and amending Treaties: the Treaty establishing the European Economic Community; the Treaty establishing the Atomic Energy (as institutional treaties), namely the Single European Act, the Maastricht Treaty, the Treaty of Nice and the Treaty of Lisbon (as amending Treaties).

In art. 3 par. (1) of the Treaty establishing the European Community (ECT), in its consolidated form of 1992[5], it is stated that "in order to achieve the objectives set out in art. 2[6], the activities of the Community shall include, subject to and in accordance with the deadlines laid down in (...) the Treaty: (a) the prohibition between Member States of customs duties and quantitative restrictions on imports and exports of goods and all other measures having equivalent effect; (b) a common commercial policy; (c) an internal market characterized by the elimination, between Member States, of obstacles to the free movement of goods, persons, services and capital".

The provisions of art. 14 par. (2) TEC, the consolidated version of 1997, according to which "The internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured", are edifying.

Impressive is the speech by former British Prime Minister Margaret Thatcher (The Bruges Speech[7]), which, in its debut, shows: "You have invited me to talk about the UK and Europe. I should congratulate you for your courage. If you believe certain things that are being told or written about my view of Europe, it's almost like inviting Genghis Khan to talk about the virtues of peaceful coexistence!". However, the same person, within the framework of the Third Idea-Force ("A Europe open to entrepreneurship") insists on appreciating that "the goal of a Europe open to the entrepreneurial spirit was the driving force behind the creation of the Single European Market until 1992. By deploying barriers and enabling businesses to operate on a European scale, we shall be able to better compete with the United States, Japan and other economic powers that are emerging in Asia or elsewhere". This is the essence of Britain's concerns, including now under the Brexit conditions. Worthy to add, it is also the statement made by the same British Prime Minister on the occasion of her speech, namely: "The UK has provided an example by opening its markets to the others. The city of London has for a long time been home to financial institutions around the world. This is why, it is the biggest financial centre in Europe and the one that has prospered the best". There are assertions that currently stimulate the deepest reflections in the context of an important stage of the EU-UK negotiations that the Brexit has generated.

[4] Andrei Popescu, *Reglementări ale relațiilor de muncă – practică europeană*, under the aegis of the Legislative Council, Tribuna Economică Publishing House, Bucharest, 1998, p. 104.

[5] The Treaty was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. Subsequently, the Treaty has been amended several times.

[6] Article 2 TEC, consolidated form of 1992: "The Community's task is to establish a common market and economic and monetary union and to implement the common policies and actions referred to in Art. 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of convergence of economic performance, a high level of protection and improvement of the quality of the environment, raising the standard of living and quality of life, economic and social cohesion and solidarity between Member States".

[7] Charles Zorgbibe, *op. cit.*, pp. 336-342.

Article 131 TEC has a particular consistency in terms of building the common commercial policy, stating that "by establishing a customs union among themselves, the Member States understand to contribute, for the common interest, to the harmonious development of world trade, to the progressive elimination of restrictions on international trade and to the reduction of customs barriers. The common commercial policy (being within the exclusive competence of the European Community / EU) takes into account the favourable effect that the elimination of duties between Member States can entail in increasing the competitive power of enterprises in these States". This is the reason why, gradually, a genuine customs duty of the European Community / European Union has emerged and developed. Next, following the same logical thread, art. 135 TEC states that "within the scope of [the Treaty], the Council (...) shall take steps to intensify customs cooperation between the Member States and between them and the Commission".

Even though sometimes the regulations subsequent to the Maastricht Treaty have helped not directly, but only implicitly, to enshrine the principle of the free movement of goods, including through the prohibition of customs duties and charges having equivalent effect between Member States. The Treaties of Amsterdam and Nice have maintained a constant evolutionary nature of the matter, however, emphasized by the Treaty of Lisbon.

2. Grounds for the appearance of the Common Market)

The common market "is essentially a customs union which, in addition to the freedom of trade in goods and services, also implies the freedom of movement of the main factors of production (capital and labour force) among the member countries"[8]. Customs Union "is an even closer form of economic integration. In such a union, [the Member States] are obliged to use common tariffs and rules on imports [and exports] from [to] non-member States"[9]. Moreover, the same authors add that the economic union "involves all the features of a common market"[10].

Our concern is precisely the first component, namely that of import and export customs duties and charges having equivalent effect, at the level of Member States of the European Community, respectively of the European Union, later.

From the point of view of stages crossed, within the framework of the economic integration, "the European Economic Community started with a customs union"[11]. This is because the ECSC [similar CEEA] is a special case of sectoral integration for coal and steel" as it is the "1965 US-Canada Automobile Agreement"[12]. Because "for developed countries [as in the case above], these sectoral initiatives require a so-called removal of obligations, i.e. a derogation from the General Agreement on Tariffs and Trade"[13].

[8] Dan Drosu Şaguna, Mihail Romeo Nicolescu, *Societăţi Comerciale Europene*, Oscar Print Publishing House, Bucharest, 1995, p. 15.
[9] *Idem*.
[10] *Idem*.
[11] Jacques Pelkmars, *Integrare europeană. Metode şi analiză economică*, second edition, IER, R.A. Oficial Journal, Bucharest, 2003, p. 7.
[12] *Idem.*
[13] *Idem.*

"Like the World Trade Organization, the European Union apparently seeks to establish free trade among nations. As in the case of the World Trade Organization, this requires not only the elimination of taxes, but also the criticism of any attempt by a government or national authority[14] to place its own producers unfairly to those in other states"[15]. In other words, what it is not allowed to be practiced in the relations between the Member States in terms of customs duties and charges having equivalent effect, that should also be the case in the relations between these States and third States, with reference to the Lisbon Agenda 2000, according to which the EU wanted to become the most dynamic and performing knowledge-based economy in the world by 2010, an objective which has subsequently been carried forward.

From a conceptual point of view, there are substantial differences between the "internal market" and the "common market", as stated in the doctrine, as follows: "the transition from the "common market" to "the internal market" is not a mere terminological change. As it also results from the Commission White Paper of 1985, it was an ambitious objective, the completion of which involved the adoption of 310 directives to approximate the laws of [the Member States]"[16]. Regulatory developments have been so conspicuous that, over time, a genuine European Union customs law has emerged, which is based on the 1993 Community Customs Code, which has produced legal effects, in terms of rights and obligations, from January 1st, 1994 as a generally accepted rule for the entire customs territory of the European Union.

3. Current grounds for the prohibition of customs duties and charges having equivalent effect, between Member States

The primary and fundamental element of the matter is art. 28-37 of the Treaty on the Functioning of the European Union (TFEU)[17].

From the very beginning, art. 28 par. (1) TFEU states that the Union, this time as subject of international law, on the basis of the legal personality acquired under Art. 47 of the Treaty on European Union (TEU), "is made up of a customs union which regulates the entire trade of goods and which involves a prohibition between Member States of customs duties on imports and exports and any charges having equivalent effect, such as the adoption of a common customs tariff in relations with third countries".

Par. (2) of the same art. 28 TFEU states that "the provisions (...) shall apply to products originating in the Member States as well as to products coming from third countries which are in free circulation in the Member States".

With value of interpreting the provisions of art. 28 par. (2) of the TFEU, the following article (Article 29 TFEU) is added: "Products originating in third countries for which import formalities have been completed are considered to be in free circulation in a Member State and for which the customs duties and charges having

[14] Concerning the concept of public authority into national law, see Elena-Emilia Ștefan, *Disputed matters on the concept of public authority*, LESIJ no. 1/2015, Nicolae Titulescu Publishing House, Bucharest, pp. 132-139.

[15] Steven P. McGiffen, *Uniunea Europeană. Ghid critic*, New edition, R.A. Monitorul Oficial Publishing House, Bucharest, 2007, pp. 76-77.

[16] Sergiu Deleanu, *Drept comunitar al afacerilor*, Servo-Sat Publishing House, Arad, 2002, p. 9.

[17] For more information on the legal basis, see Mihaela-Augustina Dumitrașcu (coord.), *Legislația privind libertățile de circulație în Uniunea Europeană*, C.H. Beck Publishing House, Bucharest, 2015, in particular *Fișă sintetică*, pp. 1-8.

equivalent effect which were due and which did not benefit from a full or partial refund of those taxes and charges were levied in that Member State".

The European Union legislature expresses unequivocally, in Art. 30 TFEU which provides that "customs duties on imports and exports or charges having equivalent effect shall be prohibited between Member States". The article invoked "concerns any kind of customs duties or charges having equivalent effect, irrespective of whether they relate to imports or exports, without making any distinction according to the time when those taxes are levied"[18]. According to the doctrine[19], the prohibition referring to customs duties on imports and exports or on charges having equivalent effect "also applies to customs duties of fiscal nature".

By analyzing, conceptually, from the fund perspective, we find the fact that customs duties and charges having equivalent effect are "the most often used ways to obstruct the free movement of goods. These forms of protectionism are reflected in the increase in prices of imported goods compared to domestic similar products, thus favouring domestic products. The removal of such taxes is particularly important for the idea of a customs union and the single market, as the European Commission emphasizes in its policy on customs strategy[20]: the Customs Union is at the heart of the European Union and is an essential element in the functioning of the Single Market, a market which can only function normally when properly applying common rules at its external borders. This implies that the 28 customs administrations of the European Union must act[21] as if they were one"[22].

For a proper understanding, we distinguish in our research, between customs duties, charges which do not involve too much documentation, unlike charges having equivalent effect, which make it necessary to resort to the case-law of the Court of Justice of the European Union[23] (CJEU). Thus, customs duties, in the strict sense of the word, "are one of the oldest forms of protection of national trade, until it has had a deterrent effect on trade. It was estimated that around the 18th century there were about 1,800 customs frontiers on the territory of today's Germany. Merchants who wanted to transport goods along the Rhine, from Strasbourg to the Dutch border, had to pay 30 charges"[24].

The legislator of the European Economic Community directly banned customs duties by sanctioning the violation of such permissive conduct for the development of trade by banning barriers to

[18] Paul Craig, Grainne de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, 6th edition, Hamangiu Publishing House, Bucharest, 2017, p. 715.

[19] *Idem*.

[20] http://ec.europa.eu/taxation_customs/customs/policy_issues/customs_strategy/index_fr.htm.

[21] *Idem.*

[22] Roxana-Mariana Popescu, *Influența jurisprudenței Curții de Justiție de la Luxemburg asupra dreptului Uniunii Europene – studiu de caz: noțiunea de "taxă cu efect echivalent taxelor vamale*, Public Law Review, no. 4/2013, Universul Juridic Publishing House, Bucharest, p. 73.

[23] 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 juridică*, Hamangiu Publishing House, Bucharest, 2016, pp. 156-165; Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, pp. 96-98.

[24] Walter Cains, *Introducere în legislația Uniunii Europene*, Universal Dalsi Publishing House, Bucharest, 2001, p. 163.

it, tax barriers[25] and not only. From a conceptual point of view, customs duties are indirect taxes which the State levies on goods when they cross the frontier of a country for import, export or transit[26]. In other words, customs duties are financial burdens affecting goods crossing a border. At European Union level, this type of tax applies to goods coming from third countries and not to exports or imports between Member States of the Union.

"The concept of charges having equivalent effect comprises all pecuniary taxes other than customs duties in the strict sense, imposed on goods which are in free circulation in the Community, by crossing borders between States and which are not permitted under the specific rules of the Treaty"[27]. This is the definition established in the doctrine of the field, with references to the jurisprudence of the matter[28], in the 1962s. Later in 1976, another case, *Bauhuis*[29], is likely to complete the above definition of charges having equivalent effect. In this case, "the Court has held that any monetary charge, whatever the destination and manner of its application, unilaterally imposed on goods on the ground that they cross a border (but not crossing the border) and which are not customs duties, strictly speaking, constitutes a charge having equivalent effect in the case where it is not linked to a general system of systematic internal taxation applied according to the same criteria and the same stages in the marketing of similar domestic products"[30]. There has been a very rich jurisprudence in the field, according to the doctrine of the field[31], even since the 1990s[32].

Of particular importance are also the problems concerning the avoidance of confusion between taxes with equivalent effect (forbidden) and other (permitted) taxes, such as the following types of taxes: internal taxes; the fees charged for services rendered to economic agents and the fees charged under provisions of European Union law.

What happens if these fees have been collected in breach of the provisions of the Treaty on the Functioning of the European Union? Naturally, there is a sanction that, in terms of finality, leads to their recovery and return to those from whom they have been unlawfully received, including through the initiation and conduct of an infringement proceeding against States that are guilty of breaches of the European Union law, in the light of their obligations.

4. Conclusions

Concluding, we appreciate that the regime of customs duties and charges having equivalent effect in the European Union is of particular interest, recording significant developments that are likely to strengthen relations between Member States as subjects of international law, but also between individuals (individuals and legal entities) as genuine beneficiaries of all the freedoms of movement, taken as a whole.

[25] "In tax matters, the unanimity rule of decision-making prevented the harmonisation of the laws inthe Member States of the European Union, the States not being willing to cede their sovereignty in this matter" –Viorel Roș, *Drept financiar și fiscal*, Universul Juridic Publishing House, Bucharest, 2016, p. 57.

[26] Aurel Teodor Moldovan, *Drept vamal*, C.H. Beck Publishing House, Bucharest, 2006, p. 118.

[27] Walter Cairs, *op. cit.*, p. 166.

[28] Judgment Commission of the European Economic Community v. the Grand Duchy of Luxembourg and the Kingdom of Belgium, Joined cases 2-3 / 62, ECLI:EU:C:1962:45.

[29] Judgment in W.J.G. Bauhuis v. The Netherlands, 46/76, ECLI:EU:C:1977:6.

[30] Walter Cairs, *op. cit.*, p. 166.

[31] Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, pp. 161-170.

[32] Judgement Kapniki Michaïlidis AE v. Idryma Koinonikon Asfaliseon (IKA), Joined Cases C-441 and 442/98, ECLI:EU:C:2000:479.

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WHITEHEAD´S IDEAS WITHIN SOME ROMANIAN JURIDICAL THINKERS

Mihai BĂDESCU*

Abstract

Alfred North Whitehead (1861 – 1947) was a mathematician, logician and English philosopher, being the most important representative of the philosophical school of thought known as "process philosophy," which today has found application to a wide variety of disciplines such as: ecology, theology, physics, education, biology, economics, psychology.The main ideas of Whitehead's thinking can be circumscribed to the following:(i)every real-life object can be understood as a series of events and similarly constructed processes;(ii)if philosophy is successful, it must explain the link between the objective, scientific and logical discourses of the world and the present world of subjective experience;(iii)all experience is a part of nature;(iv)a good life is best thought of as an educated and civilized life;(v)recognizing that the world is organic rather than materialistic is essential for anyone who wants to develop a complete description of nature and so on.Regarding Whitehead's work, we appreciate that, even in our country, there have been and are authors whose views, if not overlapping with Whitehead's thinking, at least present a series of common elements.As far as the present study is concerned, we propose to bring, from this perspective, in the analysis, the conceptions of the most important philosophers of Romanian law: Eugeniu Speranţia and Mircea Djuvara. Eugeniu Speranţia's philosophical work is characterized by a strong biological, social and metaphysical trait. Speranţia admits that none of the fundamental philosophical problems can be resolved unless life is taken into account – which is the original principle of existence – and social reality. What seems to stand in the way of the foundation of a single science that deals with both organic and psychic facts is individuality or discontinuity, on the one hand, and, on the other hand, the fluid continuity of states of the soul. What characterizes every living being is unity and its synthesized activity, which assimilates amorphous and disparate elements, thus portraying itself as a continuous process of synthesis in analogous forms (expansion, conquest, construction). Regarding the philosophy of law, Speranţia maintains – in an obviously Kantian spirit – that it must investigate the a priori or transcendent foundations of law in general. Because a philosophy of law must fit into a broad view of the world, it must be preceded by a philosophy of the Spirit. The philosophy of law has as an aim the spiritual justification of law which, encompassing science, offers it the opportunity to rise to the principles or the first causes. Regarding Mircea Djuvara, we agree with the statement that no one up to Mircea Djuvara brought the legal phenomenon under the eyes of the philosophers, and no one offered the practitioners such a broad horizon, the horizon he considers necessary: «the philosophy of law contains one of the indispensable elements of a true culture». In short, Mircea Djuvara's thinking can be qualified as dialectical idealism; it is not a subjective idealism but obviously an idealism whose epistemological way requires experience, a conception in which matter and spirit are mixed, forming two simple aspects of the experience, the deontological result of which reduces everything to objective relationships. Mircea Djuvara is a strict relationalist: „it is a danger to believe that our lives can work without categories." There is no human consciousness without its own philosophy, the practical attitude towards life, the inherent attitude of every human being. Reason, detached from subjectivity, predominates in every human being; the very law – expression of social relations – has a predominantly rational character: attitude towards life determines in any human consciousness a certain philosophical consciousness, the attitude towards

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society determines a certain philosophical consciousness, the attitude towards society determines a certain legal consciousness.

Keywords: *Whitehead, Djuvara, Speranţia, philosophy, legal thinking, subjective experience, fundamentals of law, spirituality, social reality, organic being.*

1. The philosophy of law is the philosophical reflection on the law, which deals with the right in a dual sense: as an objective law (in its sense), as a set of rules, norms that organize social life and as a subjective law (in its sense), respectively as a faculty, as the possibility, the enabling, the prerogative of a subject (of law) to have, to capitalize and to protect themselves against another a certain legally protected interest.

The Romanian philosophers of law have made important contributions - together with other thinkers of the world - to the development and affirmation of the philosophy of law in the world in an attempt to explain and evaluate the principles on which one of the major dimensions of human existence is based, the normative dimension (ethical and legal).For example, in this regard the following can be taken into account, Alexandru Vălimărescu, Traian Ionaşcu, Petre Pandrea, Dumitru Drăghicescu, P.P. Negulescu, Gheorghe Băileanu, Şt. Zeletin, Nicolae Titulescu. Out of them, the following have made themselves known through their own conceptions: Eugeniu Speranţia and Mircea Djuvara. In their works are ideas that can be appreciated as being close to Whitehead's thinking, an aspect on which we will settle on in the following passages.

2. A thinker of the greatest rank and a true encyclopedic spirit, the author of an impressive work in the field of philosophy of law was **Eugeniu Speranţia.**

Eugeniu Sperantia was born in Bucharest on May 6/18, 1888. He attended the secondary and university education in Bucharest; in 1912 he completed his Ph.D in law with the thesis called: „*Pragmatic Apriorism"*.

He subsequently specialized in Berlin and upon his coming back in the country (1914) he had a position in a department in the secondary education after which he was appointed lecturer (1921) and professor (1923) in the philosophy of law and sociology within the Faculty of Law and the Orthodox Theological Academy, both from Oradea.

Among the most important scientific studies and researches we enumerate: Pragmatic Apriorism (1912), Definition and Prehistory (1912), The Philosophy of Magic (1916), The Beauty as Great Sufferance (1921), The Philosophy of Thinking (1922), The Ideal Factor (1929), Social Phenomenon as Spiritual Process of Education (1929), Course in General Sociology (1930), Problems of Contemporaneous Sociology (1933), The Historic Spiritualism (1933), Judicial Encyclopedia, with an Historic Introduction in the Philosophy of Law (1936), Immanent Lyricism (1938), Introduction in Sociology (1938).

Eugeniu Sperantia was one of the few Romanian thinkers that attended the international congresses of philosophy of the time, collaborating at the same time with foreign magazines of philosophy.

The thinker's philosophical work is characterized by a strong biological, social and metaphysical feature.

None of the fundamental philosophical problems can be solved, according to Sperantia, if social reality and life, which is the original principle of existence, are not taken into consideration. In other words, there is a unique formula with the help of

which both biologic phenomena and psychological acts may be expressed, starting with the simplest ones.

What seems to stay in the way of incorporating a single science dealing both with organic and psychical acts, would be the individuality or material discontinuity of organic beings on one hand and the fluid continuity of the moods, on the other hand.

Any living creature is defined by unity and its synthesized activity, whereby it assimilates amorphous and disparate elements, appearing thus as a permanent preservative and expansive process of synthesis. But creating syntheses is one and the same with conquering and creating. The phenomenon of conscience is defined by the same features: the tendency to preserve itself as a process of synthesis, under analogue forms: expansion, conquest, construction.

This resemblance of features leads us to the idea, according to Sperantia, that both at the basis of biological and psychological phenomena lies the same impulse, that psychology could have great advantages by using biology and also that, biology would obtain precious information by using and consulting psychology. Sperantia is strongly convinced that we would reach very interesting knowledge if we decided to consider conscience (despite all vicissitudes of its short existence and in all relationships with its peers) as representing the minimal vital phenomenon and hence, as presenting in itself, in abbreviated form, all essential and distinctive features of life in general.

According to Sperantia, the logical laws are laws that the thinking subject requires alone and which it forces itself to comply with. Having a binding feature, they may be breached but when this is happening the thinking subject feels the need of a reprimand or reprobation, or at least of an apology and seeks to make things right.

If life represents the total acts of thinking and movement, then the world is only the content and virtual aspect of life. A reality can only be conceived for and by a living creature.

Along with philosophy in general, the philosophy of law was also challenged for many times, being often attacked in a fervent way and of course, groundlessly.

Sperantia – who found out that philosophy had been severely discredited in the 19th century, being challenged by the ascension of the scientific spirit, by the ephemeral time of materialism and empiricism – considered, at the time he was teaching his course in Cluj that, a "*progressive affirmation*" is close to the philosophy of law.

According to Sperantia, the philosophy of law was closely correlated in the last centuries with social and political sciences of those times. The periods of great social and political turmoil, wars or revolutions brought along with them great projects of social reform. At the same time with these projects it appears, however, an interest in the studies related to the justifying bases of the right and state.

Starting from the idea that social organization closely follows the logic of thinking, Sperantia reaches the conclusion that, even if philosophy followed the social and political oscillations to a great extent, it corresponds to a general exigency of the human mind, which it renders the feature of stability.

Sperantia is one of the most fervent supporters of the philosophy of law, being aware of the fact that it is the only one that can contribute to a proper creation of the law. That is why he militates against the exclusion of philosophical problematic from the General Theory of Law. The philosophy of law gains, in his conception, practical connotations, to the meaning that "*in all branches of scientific research it is more and more difficult to challenge the truth that between the philosophical conception of the*

world and the solution to problems of detail there is such an intimate correlation that any insignificant discovery or verisimilar hypothesis may cause a modification of the philosophical trend".

In Kant's spirit, Sperantia argues that the philosophy of law must examine which are the aprioristic or transcendental bases of law in general. Besides these aprioristic bases, the philosophy of law must also take into consideration the influence of external, extrinsic factors which are important in the elaboration of judicial order. Besides these two factors, a third one has a significant role in the functioning of law. It is the finality of the right as technical means of progressive spiritualization of the humankind.

Because a philosophy of law must be framed within a broad vision about world, it must, in Sperantia's opinion, be preceded by a philosophy of the Spirit. The statement is correct and it was applied with success especially by Kant and Hegel. Since the characteristic and primordial function of the spirit is that to create norms, it results that the law has a spiritual foundation, and the spirit-related problematic must be found, specifically, in the problematic of law. The purpose of the philosophy of law conceived by Sperantia is the spiritual substantiation of the law which embedding the science, it offers it the possibility to ascend to principles or to first causes.

Eugeniu Sperantia, known for having a rich culture founded on thorough readings in the field of social sciences and nature, succeeds to carry out a philosophy of the law in connection with all other fields. Without fear of error, one may state that Sperantia is the philosopher that frames the law within an universal vision about the world in general; the law is framed within and is part of an integrated world and the philosophy of law is the one that requires and renders it the endorsement of unity with the great world of ideas that transits to an optically founded reality.

Although it is a part of a unitary whole, the law is, at its turn, a unitary reality, which is different from other realities, which confers it a different feature. To this purpose, Sperantia stated that "*the philosophy of law shall consider the right as a unitary whole, in what it has identical with itself always and everywhere –which makes it to be a unitary reality, in what it differentiates it from any other reality and in what it assigns to it an own place and feature inside the whole imaginable and thoughtful world."* From this way of raising the question, it results that the law, as a different reality, is part of a much broader world and in which it brings its characteristic way of being.

Starting from the framing of the law within the broad area of social sciences, Sperantia tries to catch, however, its the characteristic elements, its essentiality, that is what it distinguishes it in its idealism and reality itself.

The main distinction made by him is the one between the science of social life (the sociology) and the science of law and, correlatively, between the social philosophy and the philosophy of law. "*Sociology* – argues Eugeniu Sperantia – *ascertains certain phenomena, it seeks for their causal explanation and the regularity of their relationships, while the judicial point of view is not that of causal explanation but of logical justification".*

It is very interesting the way in which Sperantia approaches the concept of constraint. He remarks that the sanction or non-sanction doesn't characterize only the norms of law. It is exercised under all aspects of the social life. The society itself is a reality which constrains us and forces us to subordinate ourselves to its way of being. Moral is also, at its turn, an internal constraint. In contradiction with Trade who argued that not only constraint is the engine

of the social life but also imitation, Sperantia, will show that in case of imitation, even if we are not in the presence of an outer constraint, it is however the result of an inner, involuntary impulse that in fact, constrains to a certain adaptation to environment. Sperantia states that in fact, constraint is one way of imitation: "*through it, the process of unification, hence of imitation, universalizes and smoothens itself."*

Starting from the ascertainment that social life is a manifestation of the human spirit, Sperantia requires that the general and imitable laws of thinking should apply also here with all consistency. In fact, according to him, the need for consistency is the most general need of the human spirit.

Approaching the notion of the norm characterized by constraint and identifying the constraint with fundamental logical concepts, such as those of identity and non-contradiction, Sperantia, succeeds in performing a substantiate logic of the norm.

Dealing with the laws of evolution of right, Eugeniu Sperantia, assimilating what other thinkers brought positive in this matter and completing with his own contributions, determines the following laws:

- the law of progressive intentionality: the right evolves through a transition from instinctive and automatic to intentional;
- the law of progressive rationality: the right evolves through a transition from irrational to rational;
- the law of transition from anonymous enactment to enactment by established bodies;
- the law of progressive organization of sanction – which, implying an increasing intervention of intentionality and rationality, represents a corollary of the two laws;
- the law of continuity or of psychological adaptation of the new institutions to the old mentality;
- the law of progressive solidarity of society with the individual;
- the law of evolution from particular to universal (supported by Giorgio del Vecchio);
- the law of transition from a "status" to a "contractus" (or the law of Sumner Maine) which could be also called –Sperantia says – the law of gradual affirmation of human personality (thus appearing as a corollary of law 6);
- the law of transition from psychological inferior grounds to superior grounds;
- the law of gradual simplification of the procedure;
- the law of sweetening and individualization (extrinsic and intrinsic);
- the law of progressive organization of creation and self-preservation functions of the right;
- the law of functional and adaptive motivation.

All these laws would be reduced, according to Sperantia, to two general laws, that is:

- the right– as one of the social aspects of life – similarly evolves with any vital process;
- the right – as spiritual fact – evolves through the progressive affirmation of human spirituality

The evolution of practical behaviour and of the human spirit is carried out through a permanent and progressive union of means of "intermediation" (as a transition from immediate to mediate).

Despite having an obvious biological conception about the world, Sperantia does not exclude though aprioristic, transcendental factors in establishing the right. On the contrary, he strongly highlights their role. "*The law* – says Sperantia – *appearing always as a spiritual synthetic product aspiring to a maximum of harmony and consistency, a philosophy of law must be preceded by at least one concise*

introduction in the philosophy of Spirit". The spirit creates itself certain exigencies to which it understands to obey, because they express the life of the Spirit itself and they make it possible. Which are these universal and imperative exigencies without which the spirit itself couldn't exist? They are the following:

- the spirit conceives itself as universal;
- the spirit considers itself as sufficient to itself;
- the spirit is and requires always to be subjected to a universal norm enacted by itself;
- the exigency of universality is the condition of rationality;
- any confinement of the universality of a norm represents for the spirit a defeat of its fundamental and primordial exigency;
- the sensible experience is a series of defeats of aspiration of the spirit to the universal;
- any defeat of the aspiration to the universal represents a negation of identity of the real with the spiritual and the rational;
- the horror of contradiction, the impulse to reject and avoid any contradiction is the defensive attitude of the spirit which tends to preserve its identity with itself and its aspiration to the universal norm;
- the individual spirit ("*the ego")*, as we know it in subjective conscience, postulates the objective existence of the spirit;
- thanks to the exigencies of universality, "*the ego"* conceives "*the alter*" as its own exteriorization;
- "*the ego*" assigns to each "*alter"* the same position of purpose in itself and the same requirement to be subjected to a universal norm. The consequences of identity of the subjective spirit and of the application of the same norm are:
  - the exigency of "equality of rights";
  - the exigency of "reciprocity";
  - the exigency of "compensation"

The real "*social conflict*" is reduced to the subjective, inner conflict, among the affective tendencies and rational norms. Any interdiction that starts from the normal conscience is a form of imperative of non-contradiction, a refusal of our logic, such as any exigency of the moral conscience is in fact still a logical existence.

Naturally, Sperantia is not content only with establishing the judicial imperatives which, as we have seen, they are exigencies of the spirit and they show as systematically the appearance that such imperatives have in the social contingency.

Spiritual life assumes social life, the latter being a constituent of the former: spiritual life is not possible without social life. Two strong tendencies are noticed in social life: on one hand, the tendency to possess material goods and on the other hand, the tendency to possess spiritual goods. While the latter tendency almost animates the humans and intensifies sociality, the former tendency alienates the humans, hence threatening the social cohesion. The explanation for these adverse effects of the two tendencies lies in the fact that while spiritual goods are susceptible of a simultaneous, unlimited affiliation, material goods, being exhaustible, are susceptible only of a limited affiliation. The exigencies of animality on one hand, the limitation of goods on the other hand, threatens not only the social life but also the spiritual one. That is why the spirit can not remain indifferent, but reacts, reducing or limiting the tendency of possession of material goods by certain norms. By doing so, the spirit is not the only one subjected to confinements: Organic life itself is subjected to norms, but to certain norms which are dictated to it from outside. Logical thinking creates alone norms for itself, according to which it develops, without which it wouldn't be a thinking but just a simple incoherent dream.

Social life can not dispense with norms, because it would be fully precarious without norms. This is why the law intervenes and establishes the necessary norms. Of course, besides the proper judicial norms, social life is followed by habits, customs, manners, commons laws, rules of politeness and ceremony, religious rites, etc., such as the individual conscience is normalized, besides the logical laws, by the laws of association. The right though, is not the result of fortuity or of human conscience taken in the amplitude of its formations, but "it is a rational and international creation", resembling to this respect with technical constructions.

The law must accomplish a high function: that of insuring human spirituality by protecting the social life, indispensable to the spirit.

3. Above all Romanian authors who consecrated the life and work of philosophical and legal writings is **Mircea Djuvara**, the representative figure of Romanian culture, the founder of an original thinking system, of definite theoretical and methodological value[1].

Mircea Djuvara was born in Bucharest on May 18th (30th), 1886, son of Estera (born Paianu), and Traian Djuvara, of a family of Aromanian origin who gave the Romanian society more jurists. With his existence, Mircea Djuvara marked a new opening in the Romanian interwar philosophy. A prominent personality of the time, Djuvara is an important landmark for any current research in the field of legal philosophy.

Mircea Djuvara followed, with very good results, the general education in Bucharest, also graduating from high school, the studies having provoked him *"That ferment of ennobling and intellectual creation found in every human consciousness ... when I realize today how complete was the study cycle I have undergone in my childhood and how great was the influence it has exercised in its entire complexity upon my being, I bring through this the highest honor to the high school in which I have studied"*-(the "Gheorghe Lazăr" highchool - n.a.)[2].

During high school, which he graduated in 1903 with honors, he was awarded the "Romanian Youth" award, a prestigious pedagogical institution of that time.

He starts his University studies in Bucharest, where he attends the Faculty of Law and the Faculty of Letters and Philosophy. Here he receives the influence, decisive for his scientific orientation, of Titu Maiorescu, a jurist and philosopher himself.

In 1909 he defends his thesis, both at the Faculty of Law and at the Faculty of Letters and Philosophy, the latter educational institution awarding him the mention "*magna cum laude*". Later, at Sorbonne, Mircea Djuvara gets the title of Doctor in Law with the thesis entitled *Le fondement du phénomène juridique. Quelques reflections sur les principes logiques de la connaisance juridique,* thesis which he publishes in 1913.

Characteristic for that age in which he begins to publish his studies, are collaborations in the "Facts" section of

[1] Above all, Mircea Djuvara, who through the vastness and depth of his attempts must be recognized not only as the greatest Romanian thinker but also one of the greatest contemporary thinkers in the field of Philosophy of Law." (Giorgio Del Vecchio, *Lecţii de filosofie juridica (Lessons in the phylosophy of Law)*, Europa Nova Publishing House, f.a.).

[2] M. Djuvara**,** *Confessions of a former student* (*Confesiuni ale unui elev de altădată,)*in the "Gheorghe Lazar" High School Monograph in Bucharest, (1860-1935), on the occasion of the 75th anniversary of its foundation, Bucharest, Inst. a.g. Luceafărul, 1935, pp. 299-301.

"Literary Conversations" where he makes himself known through his high level of knowledge, giving preference to the signaling of the interdisciplinary phenomena, revealing the unity of the universe, by the skill, even then, in the nuanced presentation of moral and social problems, with the desire to become a *homo universale*[3].

In 1920, he started his university career at the Faculty of Law of the University of Bucharest, where he gradually obtained all degrees and where he would carry out most of his teaching activity. He was also a professor at The Hague International Law Academy and lectured as an associate professor at law schools in Rome, Paris, Vienna and Marburg.

His scientific work materialized - including chronographs, reviews, lectures, conferences and interventions - in over 500 titles, of which, apart from his PhD thesis, we take into account the most important: *Teoria generală a dreptului (Enciclopedia juridică) (The General Theory of Law (Legal Encyclopedia))*, 1930; *Drept raţional, izvoare şi drept pozitiv (Rationally, Sources and Positive Law)*, 1934; *Dialectique et experience juridique*, 1939, *Le fondement de l'ordre juridique positif en droit international*, 1939; *Precis de filosofie juridical (Tezele fundamentale ale unei filosofii juridice) (Précis of legal philosophy (The Fundamental Theses of a Legal Philosophy))*, 1941; *Contribuţiile la teoria cunoaşterii juridice/Spiritul filosofiei kantiene şi cunoaşterea juridică (Contributions to Theory of Legal Knowledge / Spirit of Kantian Philosophy and Legal Knowledge)*, 1942. The entirety of this scientific work was to culminate in a published Legal Philosophy Treaty, practically outlined, at least in part, in three of the aforementioned works: the 1913 thesis, the 1930 printed course and the *"Précis"* started in 1941.

Along with these basic works, Djuvara's scientific research consisted of numerous studies and works of theory and philosophy of law. As early as 1907, he began publishing articles and philosophical studies in the magazine" *Convorbiri literare*", then in other magazines and periodicals as well, such as: „ *Democraţia*" (1919-1932)," *Dreptul"* (1920-1935), " *Revista de filosofie"* (1924-1940)," *Pandectele române*" (1923-1942), " *Rivista internationale di filosofia del diritto* „(Roma, 1931-1936)," *Revue internationale de la théorie du Droit*" (1931-1939)," *Archives de philo- sophie du droit et de Sociologie juridique*"(Paris, 1937)," *Annuaire de l'Institut international de philosophie du droit et de sociologie juridique*" (1934-1938), „*Analele Facultăţii de Drept din Bucharest"*(1938-1942), „*Revista cursurilor şi conferenţiarilor (universitare*)"," *Revue roumaine de Droit privé*", *„Forme*"," *Buletinul Academiei de Ştiinţe Morale şi Politice*", „*Cercetări juridice*", as well as in the newspaper" *Universul"* .

Regarding Mircea Djuvara's entire work, it can be appreciated that it is a broad analysis, in which are included elements of general philosophy or juridical philosophy as well as elements of the theory of law or sociology of law. The great project of Mircea Djuvara, which identifies solid foundations for the entire legal research, is based on a complex series of epistemological and axiological researches, which induce a certain pre-eminence of the philosophical analysis in relation to the whole work. Moreover - as Nicolae Bagdasar claims - from the investigation of juridical phenomena, Mircea Djuvara always wants to exceed the limits imposed

[3] B.B. Berceanu**,** *Universul juristului Mircea Djuvara (The Universe of Lawyer Mircea Djuvara)***,** Romanian Academy's Publishing House, Bucharest, 1995, p. 26.

by the strictly determined thematic framework of legal philosophy in order to relate to the much broader horizon of general philosophy: *"What characterizes Djuvara's philosophical attitude in general ... is that by examining issues of philosophy of law, he is convinced that they cannot be untied without an overall, epistemological and philosophical conception.. For, according to Djuvara's conception, the problems of the philosophy of law are not isolated from the great philosophical problems, but they are closely related to them, the philosophy of law integrating organically with general philosophy"*[4].

Most philosophical concerns of Mircea Djuvara aimed at identifying the ontological and epistemological foundations of law. When inventing the various elements of legal reality, the Romanian philosopher transposes legal analysis in the field of juridical logic, and when the structure of legal appreciation and implicitly the system of juridical values is investigated, research is transposed into the horizon of legal epistemology.

In addition to his scientific and publishing activities, Mircea Djuvara was directly involved in the work of highly reputable scientific institutions and organizations. He was an active member of major institutions: The Association for the Study and Social Reform (later became the Romanian Social Institute on February 13, 1921), the Society for Philosophical Studies (the Romanian Society of Philosophy), the Institute of Administrative Sciences, the Romanian Academy (Correspondent member elected in the Historical Section on May 23, 1936, following the proposal of Andrei Rădulescu, until then the only representative of the law science in that institution), The Institute of Moral and Political Science (which became, on November 20, 1940, the Academy of Moral and Political Science), the International Institute of Philosophy of Law and Legal Sociology in Paris (at whose congress he participated, being also one of its seven vice-presidents and the president of the Romanian Institute of Philosophy of Law, founded by him and affiliated with the previous one),The Academy of Sciences of Boston (Honorary Member), the Society for Legislative Studies (from its establishment until July 1921) and the Romanian Legal Chamber (from its establishment until February 1942, as Vice-President, at whose private international law session he attended)[5].

As a teacher, Mircea Djuvara has been a lecturer since 1920, an aggregate professor since 1931 (August 10) and a permanent professor (June 1, 1932) at the Faculty of Law in Bucharest. As a professor, he held the chair of General Theory of Law with Application to Public Law, a chair transformed on November 1, 1938 into the Department of Encyclopedia and Philosophy of Law. He held, up until the last academic year (1943/1944), lectures on the philosophy of law, and until tenure, lectures of constitutional law as well.

Djuvara also had an important activity as a lawyer in the Ilfov Bar.

„Those who have known him - colleagues of scientific research, chair or bar, organizers or auditors of conference cycles, students - emphasize his vocation as a researcher and teacher, his culture and intelligence, oratory elegance, urbanity and courtesy in disputes, his sense of justice, character and power of work, his modesty, charm, fine humor".

[4] N. Bagdasar, *Istoria filosofiei românești (The History of Romanian Philosophy)*, Tipo Moldova Publishing House ,Iași,1995, p. 387.

[5] B.B. Berceanu, *op. cit*., p. 27-28, which cites the Romanian Academy, "Anale", 56, 1935-1936, p.128, "Cercetări juridice", 2, no. 2, 1942, p. 121 and "Curierul Judiciar", 28, 1921, pp. 407-408.c.

Mircea Djuvara was a legal advisor to the Permanent Delegation of Romania at the Paris Peace Conference (1919), during which he edited a Newsletter and published the most comprehensive legal study on Romania's participation in World War I, preceded by a history of the country, unfortunately, only in French.

After the war, Mircea Djuvara was aware of the importance and problems of the Great Union ("*We live in our country in such great times that it would seem that we cannot in any way ascend to their meaning [...] our intellectuals - especially ours - must come to understand, those who have the mission of thinking and not action, that their role today is not in criticizing what is being attempted, but in helping what is being done*").

Mircea Djuvara brought legal arguments against the local autonomy tendencies, contrary to the decision of the Great National Assembly in Alba Iulia (December 1, 1918), and stressed the necessity of legislative unification, recalling, after J.E.M. Portalis, that "*People who depend on the same sovereignty, without being subject to the same laws, are necessarily strangers to each other*"[6] and, aware of the weight of developing massive codes, proposed urgent partial changes.

Mircea Djuvara was a delegate of Romania at the General Assembly of the League of Nations and other international conferences, being also Vice-President of the International Union for the League of Nations and Chairman of the Executive Committee of the Romanian Association for the League of Nations. He was minister from August 29, 1936 to March 31, 1937 (but with the portfolio of Justice only until February 23, unable to stand in the defense of legality to the Carlist junctions). He was the only Minister of Justice - to give a single example of respect for the lawfulness - under which the positions of the State Attorney, a post of that time, was given through n examination, in accordance to a law not respected by those who had promoted[7] it; He has politically militated for barring the fascist ascension[8].

The dictatorships established under the pressure of Nazi fascism were, for Mircea Djuvara as well, a difficult challenge. He followed his way, continuing to promote, under the new circumstances, the values he believed in. Thus, in 1941, the opposes to the Nazi ideology, the subject of *the Romanian Nation as a principle of our law*[9] *and combats that "nationalism ... which, instead of remaining the representative of one of the holiest sentiments, of justice, foreign subjects to an unfair regime without any legitimate reason or which counts other nations as devoid of any rights"*[10].

He keeps alive the idea of freedom in Nazi Germany - in Berlin, Vienna, and Marburg - and still defends the Romanian view of the nation, underlining the difference between it and the German-Italian conceptions (more precisely the idea of *Volksgemeinschaft* of the German National Socialists and the Fascist Italian Conception, Which, in relation to the nation-state report, claims that the state creates the nation and not the other way around).

[6] M. Djuvara, *Intelectualii şi necesitatea noii constituţiuni*, in the magazine "Revista vremii", 2, no. 24, 10th Dec. 1922, pp. 1-2.

[7] See: Arh. St. Buc., Min. Just., Judiciary Dir., file 18, 1936, vol. II, F. 468.

[8] Armand Călinescu, *Memorii* (Memoir), 25th Oct. 1936, Arh. ISSIP., fond XV, DOS. 65.403.

[9] M. Djuvara, *Naţiunea română ca principiu al dreptului nostrum* (The Romanian Nation as a principle of our Law) ("The Academy of Moral and Political Science", 4th Dec. 1941), The Academy of Moral and Political Science, Communications, 3," Buletinul", 1941/1942, pp. 41-68.

[10] *Idem*, Precis of philosophy of law (Fundamental theses of a legal philosophy) in" The Annals of the Faculty of Law", no. 34, p. 58.

Mircea Djuvara, at the same time, adds that "in international law we cannot also admit the violation of national rights, and we also acknowledge here a supreme justice that is not based on either security or interests", That we tend "to a community of nations as a beginning of a new universal age", that the struggle of every nation throughout history must be carried out "with all sacrifice" but only "for justice, defending itself and rounding itself where Their essential rights are disregarded[11]",An attitude that is a true condemnation of the invasion war of the Third Reich and its general policy[12]. It had previously fought the idea of Grozraum ("great space"), later became the Lebensraum ("vital space"): "It is beyond any doubt that any state, even a small state, possesses spheres of interest that often extend very far, in <large spaces>, because of international solidarity"; but such interests intertwine and their existence "does not imply any right of tutelage or international domination for one another". In no way, therefore, "can there legally exist Great Powers, be they global or European, destined to govern the Little Powers"[13].

He also criticized the Nazi doctrine, which reduces the right to physical and biological phenomena. And still during full Nazi eruption, he dedicates a work to Professor Frantisek Weyr of the occupied Czech Republic, the only time he dedicated a work to a person (except for participation in collective homage). At the death of Henri Bergson (1940), Djuvara published a warm obituary and, from the chair, emphasized the greatness of the one who neglected his life because he understood not to use the regime of favor in relation to the one that was imposed on his Jewish countrymen by the Nazi occupation (whose responsibility for the premature death of the French philosopher was thus underlined)[14].

Also in this last period of life, Mircea Djuvara wanted to inform and warn the Romanian reader about the content of some writings by the Nazi lawyers, emphasizing their removal from the science of law, signaling their misgivings and removing the ambiguity, underlining their lack of scientific quality and Legal, ironizing and defending the idea of law.

Concerning the domestic law, in which the constitutional regime was suspended (1940-1944), Mircea Djuvara observes that such a regime presupposes the existence of principles over which an abusive lawmaker cannot pass; For without a wise interpretation that would lead to an objective and unyielding justice against the legislator himself, "the rule of law can easily be translated, especially to us, in the reign of whim".

In his last year of life, struggling with the illness, he seeks, accompanied and watched by his wife, to continue his courses and even suggests to students, at a time when such initiatives were unthinkable, to take a political attitude *("... and what are you waiting for?")*; He organizes seminars with students at home, requests of the members of the institute that he be allowed to chair the meeting while lying on the couch. He thinks and writes until the last day of his life, dying in Bucharest - we could say symbolically -

[11] *Idem, Contribuţie la teoria cunoaşterii juridice/Spiritul filosofiei kantiene şi cunoaşterea juridică (Contribution to the theory of legal knowledge / Spirit of Kantian philosophy and legal knowledge)*, in the "Analele Facultăţii de Drept" ("The Annals of the Faculty of Law"), Bucharest, 4, no. 1-2, p. 67.

[12] B.B. Berceanu**,** *op. cit*. p. 30.

[13] Carl Schmit, *Völkerrechteiche Grossraumordnung mit Interventionsverbot für raumfrem, Deutscher Rechtsvereag* Berlin-Wien, 1939, in "Analele Facultăţii de Drept Bucharest" ("The Annals of the Bucharest Faculty of Law"), 1 no. 2-3 apr.-sep. 1939, pp. 382-384.

[14] B.B. Berceanu, *op. cit.*, p. 31.

on November 7, 1944[15], at the age at which Immanuel Kant, who influenced his philosophical conception and whose life he had as a model, had just begun working on the *Critique of Practical Reason*[16].

Mircea Djuvara's main merit - even between 1918 and 1938 - is of having extended the creative effervescence of the time from the literary-artistic field to that of moral, legal and political disciplines. "*In this circumstance - writes Prof. Paul Alexandru Georgescu - Mircea Djuvara worked as a multiplier of brightness. He extended the plenary system, integrating a doctrine of the philosophy of law developed on the basis of the Kantian concept, but with direct and fertile applications in our country*"[17].

The state of philosophy of law in 1936 was simple: neo-kantianism was the dominant center, challenged only by extremes: Marxism and totalitarian nationalism. The differences between these positions being radical and the exacerbated adversities they did not pose the problem of synthesis or integration.

Djuvara's philosophy in the history of doctrines of law philosophy was the third stage of development that brought about the solving of the millenary confrontation between fact and normality, between the world of *Sein* ("what is") and *Sollen* ("what is needed"). After the metaphysical postulation of a natural right with the pretense of being eternal and immutable, occupying antiquity, the Middle Ages, the Renaissance and extending with the rational right of the century of Enlightenment, following the unrealistic reaction of the Historical School and the legal positivism which, with the help of sociology, denied values and subdued the right to the brutal facts — interest or force — the critical idealism, supported by Mircea Djuvara, alongside and often beyond prestigious neo-kantians like Stammler and Radbruch, appears as a final solution, as a superior synthesis of the previous thesis and antithesis[18].

Djuvara allies and dialectically articulates the two major components of the legal phenomenon: the rational irradiation of the idea of justice, conceived as an open consistency of logically constrained activities and wills and the concrete social realities that justice and the legal norms inspired by it assume and to whom they apply. In this vision, the State becomes a reporting and attribution center, and the legal experience a network of assessments containing increasing doses of justice, within a legal order that gains a somewhat mathematical structure; This consisted of a continuous series, consisting of acts and act-generated situations, both legally built[19].

In any encyclopedic dictionary, Mircea Djuvara appears as a neo-kantian thinker, a neo-kantian "logico-methodologist (Marburg School), also receiving echoes from the Baden School of Values, but closer to Kant than the two neo-kantian schools ", the result of direct research and self-reflection. Djuvara himself did not conceal his point of departure: "We have started our scientific, legal and philosophical studies in the University, with the premise conviction that empiricism, sensualism and utilitarianism are the truth: strict positivism was our only method. A lesson by Titu Maiorescu about Kant's <transcendental aesthetics> was a true

[15] He was incinerated at the "Cenușa" crematorium on the 9th of November 1944, at 12^{00}.

[16] B.B. Berceanu, *op. cit*., p. 31.

[17] P.A. Georgescu, in the Preface to the work of B.B. Berceanu, *Universul juristului* Mircea Djuvara (*The Universe of the Lawyer* Mircea Djuvara), *op. cit*., p. 13.

[18] *Ibidem*, p. 14.

[19] *Ibidem*.

revelation to us and changed our perspective all at once.

Since then, we have continually gone into this new direction: we have sought to deepen the spirit of Kant's philosophy, further enlightening his criticism, detaching from him what remains alive today, and completing it with new scientific and philosophical contributions[20] *"His own conception was presented as "a new return to Kant," a Kant "transformed by Fichte and Hegel and adapted to the contemporary scientific themes"2*[21].

For Mircea Djuvara, Immanuel Kant was, if not the "deepest thinker that mankind had"[22], he was anyway "the one who, after Plato, was perhaps the greatest philosopher of all time,"[23] who opened Before us an "imperial path", which gave "the only philosophy of the ideal that can be coherent", i.e. a logical idealism contrary to the psychological one, a concept in which <empirical realism> is solved in a "transcendental idealism"; Which put the "theoretical basis of contemporary science and culture"[24]; The one whose philosophy "fits, explains and legitimizes all the advances of contemporary science"[25]; The one to begin with in order to reach W. Wilson's principles of the Peace of 1919, as well as the socialist theories of the era[26].

What is certain is that Mircea Djuvara has treated Kant's work and less that of neo-kantians[27]; Alongside Kant, Djuvara distinguished between knowledge and reality, while emphasizing the connection between them ("between knowledge and its object cannot be an abyss")[28]; Along with Kant he attested to the existence of values, mainly of the ethical idea, first of all of the right-obligation, being at the antipode of positivism and, to the extent that it encompasses it, at the antipod of psychological and intuitionistic trends.

Mircea Djuvara accepted the Kantian distinction between numen and phenomenon. But Kant's assimilation of the former with an incomprehensible "thing in itself", parallel to the relativization of the value of experiential knowledge ("for Kant, experience is a combined product of the work itself and of thought"[29]), a thesis considered having the quality of rejecting an absolute idealism (and also an absolute realism) did not prevent Mircea Djuvara from condemning it ("*"It is bizarre to see the reason that he reaches a conclusion of his reflection on himself, to his own helplessness"; "a reality in itself, incognoscible, has no significance*"[30]); Or to bring <this thing in itself> into the sphere of thought, for *"nothing is given, everything is*

[20] M. Djuvara, *Precis.....op. cit.*, p. 5-6.

[21] *Idem, Contribuţie la teoria cunoşterii juridice (Contributions to the theory of legal knowledge)*, II. *Ideea de justiţie şi cunoaştere juridică (the idea of justice and legal knowledge)*, *op. cit*., p. 63.

[22] *Idem, Teoria generală a dreptului* (Enciclopedia juridică) (*general Theory of Law*, Legal Encyclopedia), II: *Noţiuni preliminare despre drept (Preliminary Notions of law)*, Bucharest, Librăriei Socec Publishing House, 1930, p. 44.

[23] *Idem, Contribuţie la teoria cunoşterii juridice (Contribution to the Theory of Legal Knowledge)*,I: Ceva despre Kant: Spiritul filosofiei lui (About Kant: the Spirit of his Philosophy), p. 3.

[24] *Idem, Teoria generală (General Theory*…) III: Realităţile juridice (Legal Realities), p. 158.

[25] *Idem*, Contribuţie I:Ceva despre Kant, p. 4.

[26] *Idem, Teoria generală I: Introducere (Introduction)*, p. 28, II: *Noţiuni preliminare despre drept (Preliminary Notions of Law)*, pp. 77-78.

[27] For more, please see Alexandru Boboc, *Kant şi neo-kantianismul (Kant and Neo-kantianism)*, Scientific Publishing House, Bucharest, 1968.

[28] M. Djuvara, *Dialectique et expérience juridique,* in "Revista de Filosofie" no. 2 (April-June) /1938.

[29] *Ibidem*, p. 7.

[30] M. Djuvara**,** Considerations sur la connaissance en géneral et sur la connaissance juridi-que en particulier: la Realite, la Verite et le Droit, in "*Annuaire de l'Inst*'' 2, 1935/1936, Paris, Libr. Du Recueil Sirey, 1936, p.83-96"

built; And even to consider that it is "a rational formula, which, in its entirety, gives objectivity to knowledge". Still, between the obligatory and the incomprehensible <thing in itself> there is no, as it had been interpreted, the cause of the phenomenon (which can only be a phenomenon as well), but as M. Djuvara interpreted in time - <the act of knowledge>, "If we look at him in his logical nature, in his rational, inherent and necessary tendency towards truth," he is apart from time and space, he will become an object of psychological knowledge, a phenomenon.

Kant and Djuvara's eternal intangible ideal is more than a nuance[31].

"The activity of knowledge gives itself, in accordance with the internal logical necessity which constitutes its law, its own object"[32] For knowledge and its object are correlative, and one cannot think without the other (Aristotelian thought that thinks of oneself).

In another hypostasis, the "thing itself" is, "in a good interpretation of Kant," the freedom.

Concurrently, therefore, Mircea Djuvara defended Kant and at the same time opposed him, the danger in his system was removed, that which stated that the minds oppose themselves, as ourselves - in our aspiration for truth - to hinder ourselves[33].

The characteristics of Djuvara's thinking, which divide both Kant and Comte, consist also in the dual approach to the object of his thought, his conception of the double epistemological approach. It is not just the inductive approach, starting from the individual to the general, attributed to science and the deductive, attributed to philosophy, the expression of two methods compensating each other, but also the psychological and logical approach, the empirical and the transcendental approach, of the development of knowledge and a priori principles.

Thus, Djuvara's philosophical thinking was influenced by his legal knowledge; The idea of a relationship, specific to law, is fully present in its general philosophy.

Djuvara's pro-Kant philosophical attitude did not prevent the former from appreciating the founder of positivism A. Comte and, in general, the French positivists[34], to appreciate institutionalism[35], pragmatism[36] and other trends of thought, and to retain from these thinkers and these trends of thinking to aid in setting up his system, valuable elements[37].

If the history of Romanian law has benefited from broad-minded personalities, with a penetrating legal sense — such as Mihai Eminescu and Nicolae Iorga — if he guided people of legal formation either to the science of history — as BPHasdeu— to the thought of the science of history — As ADXenopol — or directly to the building of history — as Mihail Kogălniceanu — or to generalization and synthesis — like Simion Bărnuţiu, Titu Maiorescu and Dumitru Drăghicescu — we can say that no one up to Mircea Djuvara brought the legal phenomenon under the eyes of the philosophers and no one offered

[31] B.B. Berceanu**,** *op. cit*., p. 38.
[32] M. Djuvara**,** *Contribuţie la teoria*, p. 17.
[33] B.B.Berceanu, *op. cit*., p.39.
[34] Constitutional Law, Part II, PhD [The Methods of French Positivism in Public Law] 1924-1925.
[35] *Idem*, some observations on the relationship between the philosophy of intuition and today's great tendencies of law, a fragment of the conference "Henri Bergson and the Modern Trends in Law", Universitatea liberă, 22 November 1922, in "Convorbiri literare", 55, 1923, pp. 378-389.
[36] *Idem*, *New trends in philosophy: pragmatism*, în "Convorbiri literare*"*, p. 43, 1909, pp. 765-775.
[37] B.B. Berceanu, *op. cit*., p.37.

practitioners such a wide horizon, a horizon they considered necessary: *"The philosophy of law is one of the indispensable elements of a true culture"* [38], he said, addressing both philosophers and lawyers[39].

Mircea Djuvara felt the need to draw attention to the fact that "most lawyers are content to make simple compilations for legal practice or, in public law, they think they are doing science through simple acts of obedience to authority"[40]; But "only the scientific understanding of the idea of justice and rational elaboration can ensure a strong affirmation of cultural legal values, in light of which we must guide the world that is meant to create and apply our positive right", a goal analyzed by the philosophy of law [41]. He devises for this this law "a profound and original analysis" in a work that he — at one point — divided it into four parts: I - philosophy, II - the philosophy of law, III - applications of the philosophy of law, IV - politics. The philosophy of law thus makes the connection between philosophy and positive law, and politics, in the same conception, studies the means of achieving the law. The philosophy of law is a part — a necessary part — of philosophy, the goal of which is to bring the whole Truth (the right itself has a rational character) and to guide the positive right.

Mircea Djuvara's thinking can be described as dialectical idealism. It is not a subjective idealism, which is rejected by the following: *"It is impossible to firmly support idealism in the form of the unique and exclusive existence of my own self, in which the world would only be a representation in the sense of a subjective image. My conscience is, quite contrary to itself, a product of relationships that necessarily and objectively, through their creative dialectics, put forth a plurality of consciousness*." But, obviously, an idealism whose epistemological way requires the experience, a conception in which — after C. Rădulescu-Motru's formulation — matter and spirit are confused, forming two simple aspects of the experience[42], whose ontological result *"reduces everything to objective relationships "*[43].

Mircea Djuvara is a strict rationalist[44]. It is a danger to believe — he says — "*that our lives can work without categories"*[45]; His confidence in the possibilities of knowing reason is total: *Cogito ergo realia sunt*, he will say at some point. According to Mircea Djuvara, there is no human consciousness without its own philosophy, the practical attitude towards life, an inherent attitude for each one, which *"determines, of course, in any consciousness with reason, a certain*

[38] M. Djuvara**,** *Precis,* no. 2, p. 6.

[39] B.B. Berceanu, *op. cit.*, p. 34 and following.

[40] M. Djuvara Review of Romul Boila's work: *The State*, vol I:" *Consideraţii teoretice"(Theoretical Considerations)*,(Tipografia Cartea Românească Publishing House, Cluj, p. 246), în "Analele Facultăţii de Drept Bucureşti", 3, no. 1-2, Jan-Jun 1941, pp. 486-489 1018.

[41] M. Djuvara, *Filosofia dreptului şi învăţământului nostru juridic- fragment dintr-un memoriu* (*The philosophy of law and our legal education - fragment from a memoir)*, in "Pandectele române" 21, 1942, IV, p.7.

[42] M. Djuvara, *Dialectique et expérience juridique,* in" Revista de filosofie*"* no. 23, 1938, p. 21.

[43] N. Bagdasar**,** *Mircea Djuvara in "Istoria filosofiei moderne"*, vol. V, Bucharest, Societatea Română de Filosofie, 1941, p. 310.

[44] B.B. Berceanu, *op. cit.*, p. 35.

[45] M. Djuvara, *Review of the work of Mircea Gorunescu: Reinhard Höhn şi disputa în jurul personalităţii juridice a Statului (Reinhard Höhn and the dispute over the legal personality of the State,)*, in "Cercetări Juridice", year I, no. 2, April 1941, p. 491.

philosophical consciousness".[46] It reduces to rational data all other human values. Djuvara believes that reason, detached from subjectivity, predominates in every human being. The very Law — the expression of social relations — has a predominantly rational character, for, according to Djuvara, as attitude towards life determines in a certain human conscience a certain philosophical consciousness, as the attitude towards society determines a certain legal consciousness[47]. Mircea Djuvara's logical idealism did not stop at the possibilities of logic: *"…. The whole knowledge, and hence the whole human action, is the product of a sui generis creative activity, the so-called dialectic, this activity proceeds in successive and unceasing differentiations, and the systematic ordering of its products leads to the idea of truth*[48] *"*.

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[46] *Idem*, Câteva reflexiuni asupra laturei filosofice a sufletului reginei Elisabeta (Some reflections on the philosophical side of Queen Elisabeth's soul), in "Convorbiri literare", 50, 1916, p. 361.

[47] M. Djuvara**,** *Dialectica creatoare a cunoaşterii juridice (The Creative Dialectics of Legal Knowledge)*, lecture, 1935/1936.

[48] *Idem, Problema fundamentală a dreptului,* în "Convorbiri literare", 70, 1937, p. 2.

WHAT MEANS DISCRIMINATION IN A NORMAL SOCIETY WITH CLEAR RULES?

Marta-Claudia CLIZA*

Abstract

The concept of discrimination is relatively new which has already issued various interpretations and approaches. Discrimination manifests itself on various criteria such as gender, religion, race and others. We arrived in such a point that the idea of indirect discrimination was pointed out provided that certain act or deeds affect the person who may be discriminated. The present study intends to analyse the concept of discrimination, the persons affected by this kind of behaviour and how the legislation tries to correct the human conduct in order not to affect the dignity of individuals. All concepts from legislation are analysed under the precedent of the Romanian authority empowered to sanction the discrimination deeds. Also, we analyzed the issue of discrimination from the point of view of the Council for Combating Discrimination, the sole authority competent to pronounce on first instance if we face of an act or deed of discrimination nature which could affect human values that characterize an individual. The study starts from the presentation of general concepts as they are taken into account by the legislation, but also by the case-law of the National Council for Combating Discrimination or of the domestic or international courts. Starting from this general concept, we finally reached the particularization of certain specific situations of discrimination. Despite this, the analysis was always performed in relation to concepts clearly established, as we have shown, by the legislation or by the case-law.

Keywords: *discrimination, rules of law, applicable legislation, CNCD, discriminated person.*

1. Introduction - Presentation of Discrimination Concept

1.1. The defining elements of the concept of discrimination. Notion. Definition

Ab initio, we believe that we need to perform a brief analysis in terms of the terminology of word *"discrimination"*, for a better understanding of the situations it comprises.

In this respect, we hereby point out that, in accordance with the *Explanatory dictionary of the Romanian language*[1], "***to discriminate***" means, *inter alia*:

- "to make a difference";
- "to separate";
- "to make a distinction";
- "to pursue a policy by which a category of citizens of a state are deprived of certain rights on racial, ethnic origin, sexual grounds, etc.".

Furthermore, the same source defines the term of "***discrimination***" as being:

- "the action of discrimination and its result";
- "net difference, distinction made between several objects, ideas, etc.";

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[1] See in this respect, https://dexonline.ro/intrare/discrimina/17069, site accessed on 10.02.2018.

- "policy by means of which a state or a category of citizens of a state are deprived of certain rights on the basis of illegitimate considerations".

Therefore, given this first aspect, it can be concluded that the notion of "discrimination" implies unequal treatment, materialized in a distinction, differentiation between certain categories of objects/persons, a distinction which is performed based on specific criteria.

In what concerns second aspect, in terms of the normative definition of **"*discrimination*"**, we hereby state that both the national law maker[2], and the community law maker[3] defined **"*discrimination"*** as representing "***different treatment applied to individuals in a comparable situation"***. In other words, to discriminate means to make a *difference or distinction, to distinguish, reject or apply arbitrary or unequal treatment, **in unjustified way**, **between two persons or situations in comparable positions***. Furthermore, differences, restrictions, exclusions or preferences related to an individual's characteristics ***are discriminatory if their purpose or effect is the reduction or exclusion of rights, opportunities or freedoms***.

In what concerns third aspect, any criterion according to which a person is treated differently may represent a criterion of discrimination; there can be **discrimination** when two or more persons

[2] See in this respect the provisions of art. 2 para. (1) of Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination, republished in Official Journal, Part I no. 166 of March 7th, 2014 (hereinafter referred to as "*G.O. no. 137/2000*"), according to which: "*[…] any distinction, exclusion, restriction or preference on the grounds of race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, age, disability, non-contagious chronic disease, HIV, infection, affiliation to a disadvantaged category, as well as any other criteria of which scope or effect is the restriction, removing, recognition, use or performance, on an equal footing, of human rights and fundamental freedoms or of the rights recognized by the law, in the political, economic, social and cultural field or in other fields of public life".*

[3] See in this respect the provisions of art. 2 para. (1) and (2) of Council Directive 2000/43/EC of June 29th, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, published in Official Journal of European Union no. 180 of July 19th, 2000 (hereinafter referred to as "*Directive no. 43/2000*"), according to which.(1) The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.(2) For the purpose of para. (1):(a) direct discrimination: shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on grounds of race or ethnic origin;(b) indirect discrimination: shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared to other persons, unless the respective provision, criterion or practice is objectively justified, by a legitimate purpose and the means for reaching the respective purpose are appropriate and necessary.Furthermore, see the provisions of art. 2 para. (1) and (2) of Council Directive of November 27th, 2000 establishing a general framework for equal treatment in employment and occupation (2000/78/EC), published in Official Journal of the European Union no. 303 of December 2nd, 2000 (hereinafter referred to as "*Directive no. 78/2000*"), according to which: (1) For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1(2) For the purposes of paragraph (1):(a) direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or(ii) as regards persons with a particular disability, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

are treated identically, despite the fact they are in different situations. These persons are treated identically due to the fact a specific characteristic that differentiate them from other category is not taken into account.

From this perspective, if the differential treatment or the identical treatment has an objective justification does not represent discrimination, in which respect the national and community case-law appreciated unanimously that differential treatment becomes discriminatory when distinctions are made between analogous and comparable situations without being based on a reasonable and objective justification, as we are to detail below.

2. Content

2.1. National and International Case-Law Matters

The following were established in the judicial practice of the contentious constitutional court:

"the violation of the principle of equality and non-discrimination occurs **when different treatment is applied to equal cases, without any objective and reasonable grounds** or if there is a disproportion between the scope aimed by means of the unequal treatment and the used means"[4].

Therefore, the discrimination is not only an action or a conduct, but also the intention to promote social inequalities, by being a form of marginalization, therefore discrimination is related to different categories of persons who are marginalized, isolated or unprivileged based on prohibited criteria.

In this respect, the following were stated in the case law of the European Court of Justice[5]: "the principle of equal treatment prohibits comparable situations to be treated differently and different situations to be treated identically".

Furthermore, it was stated that „*the right to non-discrimination prohibits situations in which persons or groups of persons in a similar situation are treated differently, as well as situations in which persons or group of persons in different situations are treated identically*"[6].

In the case law of the European Committee of Social Rights, **the notion of discrimination** was defined as representing: "the differential treatment applied to persons in comparable situations, difference which does not have a legitimate purpose and/or is not based on objective and reasonable grounds".

Furthermore, the **non-discrimination principle** is provided both by the provisions of **art. 14** of the **European Convention on Human Rights,** and by **Additional Protocol no. 12** which sanctions all forms of discrimination.

In this respect, the High Court of Cassation and Justice established the following in its constant judicial practice:

"The principle of non-discrimination is provided by all international treaties and documents on human rights protection. This principle entails the application of an equal treatment to all individuals who have equal rights. Drawn up this way, non-

[4] See in this respect, Constitutional Court, Decision no. 82 of February 7th, 2012, published in Official Journal of Romania no. 250 of April 13th, 2012, available on http://legislatie.just.ro/Public/DetaliiDocument/137137, site accessed on 10.02.2018.

[5] See in this respect, Case C-106/83, *Sermide SpA c. Cassa Conguaglio Zuccero* and others, available on: http://curia.europa.eu/juris/ celex.jsf?celex=61983CJ0106&lang1=en&lang2=RO&type=TXT&ancre, site accessed on 10.02.2018.

[6] See in this respect, the Decision of the European Court of Human Rights, *Hoogendijk/the Netherlands (dec.)* (58641/00), January 6th, 2005.

discrimination principle appears as a modern and improved form of the principle regarding the equality of all individuals before the law. Furthermore, art. 7 of the Universal Declaration provides that all individuals are equal before the law and are entitled without any discrimination to equal protection of the law.

As a legal matter, the right to non-discrimination, provided for by art. 14 of the European Convention on Human Rights, is a substantially subjective right. The text in question lists 13 non-discrimination grounds, but this list is not limited. ***In other words, any form of discrimination shall be prohibited, regardless the criterion it is based on.***

The right to non-discrimination provided for by art. 14 of the European Convention on Human Rights does not have an independent existence in the system of European protection of the fundamental rights and freedoms established by the Convention, due to the fact it can only be claimed in connection to them. It can also emerge autonomously, meaning that, it may be violated in a given situation without a violation of the rights in connection to which it was found being ascertained. The ascertainment of a violation of these provisions can only be performed in connection with another right protected by the Convention and/or its additional protocols, and, as of April 1st, 2005, when Protocol no. 12 to the Convention on the general interdiction of any form of discrimination entered into force, in connection with any other right recognized in the national legislation of any contracting state.

By making a specific interpretation of the provisions of the Convention, its bodies concluded that to distinguish does not mean to discriminate, by noting the existence of situations the peculiarities of which require to be treated differently.

The difference in treatment becomes discrimination, under art. 14 of the Convention if state authorities introduce distinctions between analogous and comparable situations, without being based on a reasonable and objective justification"[7].

Therefore, discrimination does not operate in any situation, but entails the existence of a criterion of those provided by the law, therefore differentiation does not represent discrimination if there is an objective justification for this differentiation.

In the same respect, the Court of Appeal Bucharest noted in its constant judicial practice the following:

„Not any differential treatment means discrimination; in order for unfair differential treatment to be ascertained, it is required to establish that ***persons in analogous or comparable situations benefit from a preferential treatment****, and if such distinction between analogous or comparable situations occurs,* ***it must not find any objective or reasonable justification****"*[8].

Therefore, in order to find ourselves in a situation of discrimination, the differentiation, exclusion, restriction or preference has to be **based on one of the prohibited criteria provided by the law,** to be arbitrary. Furthermore, it is required that all the aforementioned refer to persons in

[7] See in this respect, Decision no. 2808/2015, pronounced by the High Court of Cassation and Justice, Division of Contentious Administrative and Fiscal. The whole material can be accessed by using site: https://lege5.ro/App/Document/gi3diojrgq3q/decizia-no.-2808-2015-anulare-act-administrativ?d=18.09.2015&pid=250376975#p-250376975, site accessed on 10.02.2018.

[8] See in this respect, the Court of Appeal Bucharest, Division VIII civ. and mun. asig, Decision no. 562R/2010, quoted by Loredana-Manuela Muscalu, *Discriminarea în relațiile de muncă*, Hamagiu Publishing House, Bucharest, 2015, p. 4.

comparable situations and their scope or effect is the restriction or removal of a right granted by the law**.**

Furthermore, the relevant doctrine in the field provided the following:

„The differential treatment shall be deemed discriminatory if the operated distinction is objective and reasonable. The distinction is admissible if it has a legitimate purpose, by following, at the same time, the reasonable report of proportionality between the means used and the achieved aim. To say that differentiation is objective means that it does not have to be subjective and arbitrary. Reasonable nature of the differentiation is subject to the same logics and concerns to avoid arbitrary: this has to occur in certain limits, so that the operated differentiation cannot violate principle of equality by protecting the interests of the group in question. This is the application of the proportionality principle".[9]

Therefore, any time there is a reasonable and objective justification of the differential treatment, we cannot talk about a discrimination action.

In this respect, we hereby mention that the provisions of art. 2 para. (3) of Government Ordinance no. 137/2000 expressly establish that there is no discrimination if there is an objective justification of a certain behavior: [...] „*unless these provisions, criteria or practices are objectively justified by a legitimate purpose, and the methods of reaching the respective purpose are appropriate and necessary".*

In connection to the notion of differential treatment, the High Court of Cassation and Justice noted the following:

„[…] the criterion based on which the differential treatment apply must be the determinant factor in the application of the differential treatment, meaning that this element is the cause of the discrimination deed.

In case of discrimination, the differential treatment is determined by the existence of a criterion, which entails a causality relation between claimed differential treatment and the criterion claimed in case of the person who considers himself/herself discriminated, and the scope or effect of the differential treatment must be the restriction or removal of the admission, use or exercise, under equality terms, of human fundamental rights and freedoms, or of the rights admitted by the law, in the political, economic, social and cultural area or in any other areas of public life[10]*."*

Therefore, objective justification includes the existence of a legitimate purpose reached by appropriate and mandatory methods. In other words, objective and reasonable justification must follow a legitimate purpose, and the applied measures must be proportional to the purpose.

If differential treatment is on grounds of race, color or ethnic origin, the notion of objective and reasonable justification must be construed as strictly as possible. Therefore, in case *D.H. and others against Czech Republic*, the European Court of Human Rights (hereinafter referred to as "***ECtHR***") established the following:

"The court was not convinced that the difference in treatment between Roma and non-Roma children was based on objective and reasonable justification and that there is

[9] See in this respect, J.-F. Renucci, *Tratat de drept european al drepturilor omului*, Hamangiu Publishing House, Bucharest, 2009, pp. 153-154, quoted by Loredana-Manuela Muscalu, *Discriminarea, op. cit.*, p. 7.

[10] See in this respect, Decision no. 2808/2015, pronounced by the High Court of Cassation and Justice, Division of Contentious Administrative and Fiscal. The whole material can be accessed by using site: https://lege5.ro/App/Document/gi3diojrgq3q/decizia-nr-2808-2015-anulare-act-administrativ?d=18.09.2015&pid=250376975#p-250376975, site accessed on 10.02.2018.

a reasonable proportionality between the means used and the aim to be achieved. Therefore, the application of the relevant Czech legislation had, in fact, at that time, disproportionate prejudicial effects on the Roma community, and the plaintiffs, by being members of the respective community suffered the same discriminatory treatment" [11].

The national courts ruled in the same matter in their constant judicial practice, namely: "*the legal differential treatment is admissible for different situations, when it is rationally and objectively justified*"[12].

In conclusion, according to the national and community judicial practice, discrimination can operate only if it is determined by the existence of unjustified criterion/criteria, of those forbidden by the legislation, and not if there is a simple difference in treatment which is reasonably and objectively justified, at the same time requiring the existence of analogous and comparable situations in relation to which the differential treatment is to be assessed.

2.2. Features of the notion of discrimination. Classification of the forms of discrimination

2.2.1. Discrimination features

First of all, we consider necessary to carry out a brief analysis of the main features of the concept of discrimination, in order to show the absence of any discrimination action in the present case.

Therefore, the supreme court, by means of the interpretation of the provisions of Government Ordinance no. 137/2000, noted the following:

„[…] in order for an action to be qualified as a discrimination action, ***it must meet the following conditions at the same time****:*

- the existence of a differential treatment expressed by difference, exclusion, restriction or preference **(the existence of persons or situations in comparable situations);**
- the existence of a discrimination criterion according to art. 2 para. (1) of G.O. no. 137/2000 republished, **differential treatment is not objectively justified by a legitimate aim, and the means of achieving that aim are not appropriate and necessary;**
- **the aim or effect of the differential treatment is the restriction, removal of the acknowledgment, use or exercise, under equality terms, of a right established by the law**.

In other words, in order for a certain conduct to be considered discrimination, it is required to fulfill the following conditions:

h) the difference in treatment of two or more persons in identical or comparable situations or the failure to treat differently certain different situations;
i) the lack of objective and reasonable justification for differential treatment;
j) the scope or the result of the differential treatment is the restriction or illegal refusal of the exercise of certain rights.

Therefore, as the Court of Appeal Bucharest noted, ***not any difference in treatment means discrimination***, taking into account that, in order for unfair differential treatment to be ascertained, **it is required to establish that persons in analogous or**

[11] See in this respect, Decision ECtHR, *D.H. and others against Czech Republic*, November 13th, 2007 (Case no. 57325/00), available on: https://jurisprudentacedo.com/D.H.-c.-Republicii-Cehe-Plasamentul-copiilor-romi-in-scoli-speciale-incalcare.html. In the same respect, see Decision ECtHR, *Sampanis and others against Greece*, June 5th, 2008, site accessed on 10.02.2018.

[12] See in this respect, Constitutional Court, Decision no. 168 of December 10th, 1998, published in Official Journal of Romania no. 77 of 22.02.1999, quoated by Loredana-Manuela Muscalu, *Discriminarea*, *op. cit.*, p. 7.

comparable situations benefit from a preferential treatment, and if such distinction between analogous or comparable situations occurs, it does not find any objective or reasonable justification[13].

In the same respect, opinions were expressed in legal specialized literature[14], meaning that an action can be qualified as discrimination if it fulfills *certain conditions at the same time*, namely:

- **the existence of a differential treatment** applied to certain analogous situations or the omission to treat differently certain different, not comparable situations;
- differential treatment is expressed by **exclusion, difference, restriction or preference**;
- **the existence of a discrimination criterion provided by the law**;
- **the scope or effect** of the differential treatment has to be the restriction, removal of the acknowledgment, use or exercise, under equality terms, of a right provided by the law (exempli gratia: the violation of the right to work);
- differential treatment **is not objectively justified by a legitimate purpose**, and the means of reaching that aim **are not appropriate and necessary.**

Therefore, we hereby reaffirm that in order to ascertain the existence of an action of discrimination, the claimed actions must result in the *restriction or removal of a right provided by the law.* Not any abuse or violation of human fundamental rights and freedoms or of the rights provided by the law fall under the scope of the notion of discrimination.

2.2.2. Discrimination categories

From another point of view, we hereby state that, both from the perspective of the European Convention on Human Rights (hereinafter referred to as "***ECHR***"), and in what concerns the relevant European case law, several categories of discrimination are identified, namely: *direct discrimination* and *indirect discrimination, harassment and incitement to discrimination.*

- In this respect, ECtHR uses the formulation that there must be "a difference in the treatment of persons in analogous or relevantly similar situations", which is "based on an identifiable characteristic" [15].

Therefore, "***direct discrimination***" occurs when[16]:

- *a person is applied unfavorable treatment* – this can be relatively easy to identify compared with indirect discrimination. Actual examples of unfavorable treatment expressing direct discrimination are, *inter alia*, the following:

- refusal of entry to a restaurant or shop;
- receiving a smaller pension or lower pay;
- having a higher or lower retirement age;
- being barred from a particular profession;
- not being able to claim inheritance rights;
- being excluded from the mainstream education system;
- being deported;
- not being permitted to wear religious symbols;

[13] See in this respect, the Decisions of the Court of Appeal Bucharest, Division VIII civ. and mun. asig, decision no. 4463/R/2009, dec. no. 2295R/2009, dec. no. 1715R/2009, dec. no. 4204R/2009 and dec. no. 2020R/2009, quoted by Loredana-Manuela Muscalu, *Discriminarea*, *op. cit.*, p. 4.

[14] See in this respect, Loredana-Manuela Muscalu, *Discriminarea*, *op. cit.*, pp. 4-5.

[15] See in this respect, European Union Agency for Fundamental Rights, European Council, *Handbook on European non-discrimination law*, Imprimerie Centrale, 2010, p. 24.

[16] *Ibidem.*

- being refused social security payments or having them revoked;
  - *unfavorable treatment is relevant by comparison with how other persons in a similar situation were or would be treated* – this criterion is of the essence of a direct discrimination action, which is why it is inconceivable to retain discrimination in the absence of the fulfillment of such requirement. Therefore, providing a comparator is often a controversial issue, and sometimes neither the parties to the dispute nor the court explicitly discuss the comparator[17]. Despite this, it has been held that there is a clear exception to the rule of finding an appropriate "*comparator*", in the context of the European Union law regarding employment, meaning that there is discrimination if the person concerned is treated differently because the respective person is pregnant. In such cases, it will be considered that there is direct discrimination on grounds of sex and that there is no need to have a comparator[18];
  - the ground of this treatment is represented by an actual feature of them, which falls under the scope of the "protected ground" category – in detail, the "protected grounds" are exhaustive, representing the factor that practically leads to a different behavior towards a person in relation to other persons in similar situations, id est: sex, sexual orientation, disability, age, race, ethnic origin, national origin and religion or belief. We have to keep in mind that in order to talk about discrimination, it is required to exist a causality connection between less favorable treatment and "protected ground"[19].

By summing up the above, it can be noted that direct discrimination is characterized by differential treatment, meaning that the following ***must be shown****: alleged victim has been treated less favorably based on the possession of a characteristic falling under a "protected ground" and Less favorable treatment is determined through a comparison between*

[17] See in this respect, Decision of the European Court of Justice, *Allonby/Accrington & Rossendale College and others*, case C-256/01 [2004] RJ I-873, January 13th, 2004. In this case, the complaint, who worked for a college as a lecturer, did not have her contract renewed by the college. She then went to work for a company that supplied lecturers to educational establishments.

This company sent the complainant to work at her old college, performing the same duties as before, but paid her less than her college had done. She alleged discrimination on the basis of sex, saying that male lecturers working for the college were paid more. The ECJ held that male lecturers employed by the college were not in a comparable situation. This was because the college was not responsible for determining the level of pay for both the male lecturer who it employed directly and the complainant who was employed by an external company. They were therefore not in a sufficiently similar situation. In the same respect, see: Decision ECtHR, *Moustaquim/Belgium* (12313/86), February 18th, 1991; Decision ECtHR, *Luczak/Poland* (77782/01), November 27th, 2007; Decision ECtHR, *Gaygusuz/Austria* (17371/90), September 16th, 1996, quoted by the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law, op. cit.*, p. 26.

[18] See in this respect, Decision of the European Court of Justice, *Dekker/Stichting Vormingscentrum voor Jong Volwassenen* (VJV-Centrum) Plus, case C-177/88 [1990] RJ I-3941, November 8th, 1990; Decision of the European Court of Justice, *Webb/EMO Air Cargo (UK) Ltd*, case C-32/93 [1994] RJ I-3567, July 14th, 1994, quoted by the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law, op. cit.*, p. 28.

[19] See in this respect, Decision of the European Court of Justice, *Maruko/Versorgungsanstalt der deutschen Bühnen*, case C-267/06 [2008] RJ I-1757, April 1st, 2008. See in this respect Decision ECtHR, *Aziz/Cipru* (69949/01), June 22nd, 2004.

the alleged victim and (iii) another person in a similar situation who does not possess the protected characteristic[20].

- In what concerns the second category of discrimination, the European legislation and case law note that discrimination can result not only from the application of different treatment to persons in similar situations, but also from the application of the same treatment to persons in different situations, the latter hypothesis being known as "***indirect discrimination***".

Unlike direct discrimination, in case of indirect discrimination, the treatment is not the one that differs, but its effects, which will be felt differently by people with different characteristics. In this respect, Directive no. 43/2000 provides *expressis verbis*, in the content of art. 2 para. (2) letter (b) the following:

"Indirect discrimination shall be taken to occur where an apparently ***neutral provision, criterion or practice would put persons*** *of a racial or ethnic origin* ***at a particular disadvantage compared with other persons****, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".*

From the interpretation of the normative text quoted above, the conditions in which indirect discrimination occur are evident, namely:

- *the existence of a neutral provision/criterion/practice* – the particularity of this criterion is given by the fact that the neutral provision/criterion/practice applies to all, not only to those subject to unequal treatment. *Exempli gratia*, in case *Schönheit*, the pensions of part-time employees were calculated using a different rate to that of full-time employees. This different rate was not based on the differences of the time spent in work. Thus, part-time employees received a smaller pension than full-time employees, even taking into account the different lengths of service, effectively meaning that part-time workers were being paid less. Despite the fact that this neutral rule on the calculation of pensions applied equally to all part-time workers, taking into account that around 88% of part-time workers were women, the effect of the rule was disproportionately negative for women as compared to men[21].
- *neutral provision/criterion/practice places a "protected group at a particular disadvantage"* – this is defining by the fact that when considering statistical evidence that the protected group is disproportionately effected in a negative way by comparison to those in a similar situation, evidence is sought that a particularly large proportion of those negatively affected is made up of that "protected groups"[22]. *Exempli gratia*, Advocate General Léger, on the discrimination

[20] See in this respect, the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law, op. cit.*, p. 46.

[21] See in this respect, the European Court of Justice, *Hilde Schönheit/Stadt Frankfurt am Main şi Silvia Becker/Land Hessen*, related cases C-4/02 and C-5/02 [2003] RJ I-12575, October 23rd, 2003. Furthermore, see Decision ECtHR, *D.H. and others/Czech Republic* [GC] (57325/00), November 13th, 2007, item 79.

[22] See in this respect, the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law, op. cit.*, p. 33.

on grounds of sex in case *Nolte*[23], referred to a number of previous cases, considering that: "*in order to be discriminatory, the measure must affect «a far greater number of women than men»*"[24] or "*a considerably lower percentage of men than women*"[25] or "*far more women than men*[26]".

- *the existence of a comparator – other groups in a similar situation* – similar to direct discrimination, the existence of a "*comparator*" is mandatory in order to determine whether the effect of the particular rule, criterion or practice is significantly more negative than those experienced by other individuals in a similar situation.

Given all the above, proving indirect discrimination requires an individual to provide evidence that, as group, those sharing their protected characteristic are subject to differential effects or impact, by comparison to those without this characteristic[27].

- In what concerns the third form of discrimination, we hereby state that harassment, while treated separately under EU law, is a particular manifestation of direct discrimination [28]. This is contemplated by a detailed analysis performed in the next chapter of this study, in relation to the de facto situation claimed by petitioner Nicoleta Crenguța Ciocea.
- In what concerns instigation to discrimination, this is expressly provided both in the content of Directive no. 78/2000[29], and by the provisions of art. 2 para. (4) of Directive no. 43/2000[30].

3. Conclusions

Given all the aspects detailed in this section, especially with regard to the first two forms of discrimination, it is obvious that, regardless if the discrimination is direct or indirect, discrimination entails the fulfillment, at the same time, of several mandatory conditions, namely:

- differential treatment;
- the person subject to differential treatment or in relation to which the differential effect of a general treatment is materialized is part of a "protected group" and, last but not least,
- the absence of an objective

[23] See in this respect, the Opinion of Attorney general Léger of May 31st, 1995, items 57 and 58 in the Decision of the European Court of Justice, *Nolte/Landesversicherungsanstalt Hannover*, case C-317/93 [1995] RJ I-4625, December 14th, 1995.

[24] See in this respect, Decision of the European Court of Justice, *Rinner-Kühn/FWW Spezial-Gebäudereinigung*, case 171/88 [1989] RJ 2743, July 13th, 1989.

[25] See in this respect, Decision of the European Court of Justice, *Kowalska/Freie und Hansestadt Hamburg*, case C-33/89 [1990] RJ I-2591, June 27th, 1990.

[26] See in this respect, Decision of the European Court of Justice, De Weerd, fostă Roks, și alții/Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others, case C-343/92 [1994] RJ I-571, February 24th, 1994.

[27] See in this respect, the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law, op. cit.*, p. 47.

[28] *Ibidem.*

[29] See in this respect, the provisions of art. 2 para. (4) of Directive no. 78/2000, according to which: "Any conduct which consists in ordering someone to practice a discrimination against certain individuals for any of the grounds referred to in art. 1 is deemed discrimination under para. (1)".

[30] See in this respect, the provisions of art. 2 para. (4) of Directive no. 78/2000, according to which: "The instigation to discrimination against persons based on grounds of race or nationality is deemed discrimination for the purpose of first paragraph".

justification or legitimate aim for different treatment/effect of a particular treatment;

- the existence of a comparator,

therefore, we cannot speak about discrimination in the absence of any of the aforementioned requirements.

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SHANG YANG 商鞅 AND LEGALIST 法家 REFORM IN THE ANCIENT CHINESE STATE OF QIN 秦*

Daniel HAITAS*

Abstract

Legalism has played a major role in the history of the Chinese legal and governmental tradition. One of the major exponents and formulators of this school of thought in ancient times was Shang Yang, an official in the state of Qin. Shang Yang oversaw a program of law reform in Qin in such areas as criminal law and the economic life of the country which aimed to strengthen the power of the state. This can be said to have had long term consequences for both Chinese and world history, in that the strengthening and reorganization of Qin along the lines of Legalist principles helped lead to its gaining preeminence amongst the other states vying for influence in the Warring States period, ultimately leading to the unification of China under the rule of the Qin dynasty.

Keywords: *Shang Yang, Legalism, law reform, Qin state, criminal law, economic regulation*

1. Introduction

Throughout much of the history of the Chinese legal and governmental tradition, two different schools of thought have been portrayed as competing and coexisting at the same time; these are the Legalists 法家 and the Confucians 儒家.[1] Both sought to maintain social order, yet differed in the primary methods through which they sought to achieve this end.[2] The Legalists generally believed in increasing the power of the ruler through written laws that would strengthen the power of the state,[3] while the Confucians, whose beliefs are seen as a manifestation of feudal and traditional Chinese values,[4] placed more emphasis upon the idea that the ruler had to support and adhere to a certain moralistic order, which involved following proper rules of proprietary and behaviour.[5] An important member of the Legalist school was Shang Yang, an official in the state of Qin during the fourth century B.C.[6] two areas in which he had a particularly strong influence were criminal law and in regulation of the

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[1] Xin Ren: *Tradition of the Law and the Law of the Tradition: Law, State, and Social Control in China*, Greenwood Press, Conneticut, 1997, p. 19.

[2] T'ung-Tsu Chu: *Law and Society in Traditional China*, Mouton, Paris, 1961, p. 226.

[3] Yongping Liu: *Origins of Chinese Law: Penal and Administrative Law in its Early Development*, Oxford University Press, Oxford, 1998, p. 173.

[4] Zhengyuan Fu: *Autocratic Tradition and Chinese Politics*, Cambridge, Cambridge University Press, 1993, p. 30.

[5] Ren *op. cit.*, p. 19.

[6] Herrlee G. Creel: *Chinese Though from Confucius to Mao Tse-tung*, 1953, p. 141.

economic life of the state. These shall be examined in this study, as well the general legal and governmental philosophy which inspired Shang Yang's reform program. As shall be seen, Shang Yang advocated a system of strong centralized rule and the promulgation of written laws that would be known among the general population, which included a system of strict punishments to be applied equally to all. Additionally, he implemented reforms that favoured agriculture at the expense of commerce.

This study particularly draws on the *Book of Lord Shang* 商君書, the earliest surviving and foundational text of the Legalist school whose authorship is attributed to Shang Yang.[7] It has been noted that very few studies on the *Book of Lord Shang* have been done in European languages, and indeed, the only complete English translation of the book was made by Jan J.L Duyvendak in 1928.[8] Thus, it is hoped that the present work may contribute to increasing knowledge of this vital part of the Chinese legal and governmental history. Indeed, this is a topic that goes beyond the interest of just antiquarians; the issue of Legalist and Confucian thinking, and their respective places in Chinese society, are still being debated even today in modern China.[9] As a result, an accurate study and assessment of the past may furnish insights and instruction for issues being faced today. Such a study is also of interest more broadly, offering insights into the nature of law generally, its origins, uses, and purpose.

2. Shang Yang's Background and Philosophy

Shang Yang, who lived during the fourth century B.C., had originally served as an official in the state of Wei 魏.[10] We are told that "In his youth, he was fond of the study of criminal law."[11] He had heard that Duke Xiao of Qin 秦孝公 was seeking capable men to help him strengthen his state and increase his military power.[12] Shang Yang went to Qin, and soon found favour with the duke,[13] eventually being appointed to the office of Minister in 357 B.C.[14] As a result of the work that he undertook in Qin, Shang Yang has come to be intimately connected with the rise of the Qin state in the Chinese political landscape[15].

The Zhou dynasty 周朝, which nominally ruled China at the time of Shang Yang, had established itself in 1122 B.C.[16] The nature of Zhou rule in China was

[7] There is scholarly debate about the actual authorship of this book; however, the work is accepted by most scholars as containing the basic ideas of Shang Yang's thinking (see Liu *op. cit.* 175) and as containing parts composed either by himself or his immediate followers, and thus the work has been described as expressing his "intellectual current" (see Yuri Pines: Legalism in Chinese Philosophy. In Edward N. Zalta (ed.): *The Stanford Encyclopedia of Philosophy*, Winter 2014 edition, https://plato.stanford.edu/archives/win2014/entries/chinese-legalism/) and so, the work shall be used as if expressing his thoughts and opinions.

[8] Yuri Pines and Carine Defoort: *Chinese Academic Views on Shang Yang Since the Open-Up-and-Reform Era, Contemporary Chinese Thought*, Vol. 47, no. 2, 2016, p. 59.

[9] See, for example, Ren *op. cit.* p. 32.

[10] Creel *op. cit.* p. 141.

[11] *The Biography of the Lord of Shang in the Shih-Chi. In: The Book of Lord Shang: A Classic of The Chinese School of Law*, Arthur Probsthain, London, 1928, p. 8.

[12] Creel *op. cit.*, p. 142.

[13] *Ibidem.*

[14] Liu *op. cit.*, p. 175.

[15] J.J.L Duyvendak, *Introduction. In: The Book of Lord Shang: A Classic of the Chinese School of Law*, Arthur Probsthain, London, 1928, p. 1.

[16] Fu *op. cit.*, p. 17.

essentially feudal, with various vassals and lords being nominally under the jurisdiction of the Zhou king; in time, especially during the Eastern Zhou period (771-249 B.C), these vassals came to gain a great deal of independence in their respective regions, even coming to challenge the authority of the Zhou king, which eventually led to a decline in the strength of the central authority.[17] This led to the Warring States period, which has been described as a 'war against all' amongst the various strong states of China, who sought to spread their influence and territory at the expense of one another.[18] One of these was the state of Qin, located in China's West.[19]

In order to properly comprehend the significance and meaning of Shang Yang's Legalist philosophy and his criminal law reforms, it is important to understand something of the traditional values that underlined the political and social structure of Zhou China. It was during the Zhou period that various important developments in Chinese civilisation took place; this included the development of the feudal system, and the various beliefs and customs that were connected to this system.[20] One of the most important concepts that developed during this period was that of *li* 禮.[21] *Li*, which was believed to be the most important factor in governing society, was a body of approved behaviour patterns governing the interaction between individuals in society.[22] It can be said to have captured the spirit of the feudal era, containing within it the relational and hierarchic quality that existed within the political and social structure of feudal China under the Zhou dynasty.[23]

Central to the concept of *li* was social interaction and relationships; these rules governing relations between members of society were strongly connected to one's social status, and varied according to the status of the individual and the specific dynamics and nature of the relationship.[24] In addition to this, family relationships were considered to be the foundation of human society;[25] Confucius 孔子 himself had said, 'When a gentleman feels profound affection for his parents, the common people will be stirred to benevolence. When he does not forget friends of long standing, the common people will not shirk their obligations to other people.'[26]

The Zhou king was bound to uphold the traditional *li*, with all its rules of proprietary and right behaviour, having to maintain and honour the immemorial customs that had been handed down from ancient times.[27] The empire was to be ruled by natural law, which was a standard held to be sufficient for all public and private activity; moral virtue, which was considered to be inherent within man, was supposed to be the ultimate basis of conduct in every aspect of society.[28] This social and political system, led by the king, the Son of Heaven,

[17] *Ibidem*, pp. 17-18.
[18] *Ibidem*, p.18.
[19] Robin D. S Yates: The Rise of Qin and the Military Conquest of the Warring States. In Jane Portal (ed.), The First Emperor: China's Terracota Army, London, British Museum Press, 2007, p. 30.
[20] N. & V. Rajendra - C. Lower: A History of Asia, Melbourne, Longman Cheshire, 1992, p. 121.
[21] Roberto Mangabeira Unger: *Law in Modern Society: Toward a Criticism of Social Theory*, Free Press, 1976, p. 93.
[22] Chu *op. cit.*, p. 230-231.
[23] Unger *op. cit.*, p. 93.
[24] Chu *op. cit.*, p. 231.
[25] *Ibidem* p. 244.
[26] Confucius: *The Analects*, trans. D.C. Lau, Penguin Classics, London, 1979, Book VIII:, p. 2 92.
[27] J.J.L Duyvendak *op. cit.*, p.77.
[28] *Ibidem*, p. 78.

was bound to follow the law of Heaven.[29] Confucian thought always emphasised the importance of *li* and considered it to be the primary regulations or 'rules' in governing a society.[30] Confucius had said, 'For giving security to superiors and good government of the people, there is nothing more excellent than the rules of propriety [*li*].'[31] Shu-hsiang said '[*Li*] are the King's great canons.'[32]

These abovementioned beliefs differ markedly from Shang Yang's legal philosophy. In order to properly understand the basic tenets of his beliefs, and the reforms that he subsequently implemented in the Qin state, his concept of the origin and nature of law must be examined. The Legalist school that Shang Yang belonged to can be said to have come into being during the time of the Spring and Autumn period, and coincided with the development of ideas that sought to elevate the position of the ruler.[33] Its central tenets began to develop more fully, however, during the Warring States period, which spanned the fourth and third centuries B.C.[34] One of these was the idea that the ruler should centralise all state power in his own hands, create written codes of law with which to govern the country *fa* 法, and rule the population through a bureaucratic system of government, making use of various officials in the handling of affairs.[35]

The actual practice and development of Legalism took place mainly in the state of Qin, which was situated on the western frontier of Chinese civilisation.[36] It would appear from a survey of the history of the Qin state that it was an area conductive to the development of Legalist thinking and reform.[37] For example, in 513 B.C. tripods bearing various penal regulations were cast in Qin, which shows that by the Spring and Autumn periods the practice of relying on written laws had already come to exist in Qin.[38] It must also be said that the Qin state, due to its frontier location, had never been as saturated with Chou feudal customs as other parts of Qin.[39] For example the Confucian scholar Hsun Tzu said that Qin 'were less observant of the proper conduct between father and son and husband and wife than were the people of certain other parts of China, because they failed to follow the traditional rules of etiquette and the proper relationships.'[40]

In order to understand properly the basic tenets of Lord Shang's philosophy, and as a result, the reforms that were subsequently implemented according to the spirit of his thinking, his concept of the origin of law must be examined, for it could

[29] *Ibidem*, p. 78.
[30] Chu *op. cit.*, p. 239-40.
[31] Confucius, *The Li Ki. In James Legge: The Texts of Confucianism*, V, Clarendon Press, Oxford, 1885, 258, quoted in Ch'u *op. cit.*, p. 239.
[32] Shu-hsiang: *The Ch'un Ts'ew with the Tso Chuen*. In James Legge (ed.): The Chinese Classics, V, Pt. II , Hong Kong, 1872, 660, quoted in Ch'u *op. cit.*, p. 239.
[33] Kung-chuan Hsiao: *A History of Chinese Political Thought: From the Beginnings to the Sixth Century A.D.*, Vol. I, Princeton University Press, p. 376.
[34] Liu *op. cit.*, p. 173.
[35] *Ibidem.*
[36] Creel *op. cit.*, p. 138.
[37] Hsiao *op. cit.*,p. 45.
[38] *Ibidem.*
[39] Hucker *op. cit.*, p. 41.
[40] Quoted in Leonard Cottrell: *The Tiger of Ch'in: The Dramatic Emergence of China as a Nation*, Rinehart and Winston, Holt, 1962, p. 116.

be said to form the root from which all his other concepts grow

In the *Book of Lord Shang*, Shang Yang states that:

Of old, in the times of the Great and Illustrious Ruler, people found their livelihood by cutting trees and slaying animals; the population was sparse and trees and animals numerous … In the times of Shen-nung, men ploughed to obtain food, and men wove to obtain food, and women wove to obtain clothing. Without the application of punishments or governmental measures, order prevailed; … After Shen-nung had died, the weak were conquered by force and the few oppressed the many. Therefore Huang-ti created the ideas of prince and minister, of superior and inferior, the rites between father and son, … At home he applied sword and saw, and abroad he used mailed soldiers; this was because the times had changed … Shen-nung is not higher than Huang-ti, but the reason that his name was honoured was because he suited his time.[41]

Here we see that Shang Yang held that during an earlier period of time society functioned without the need for any serious administrative measures; it could be said that society functioned almost naturally, without the need for complex laws. Yet in time, as society developed, and oppression increased, the need finally arose for a more interventionist form of government.

In one instance, when Duke Xiao was discussing policy with his three Great Officers, Kan Lung had warned the Duke against changing the law and customs of the Qin state, saying that 'I am afraid that the empire will criticise Your Highness and I wish that You would reflect maturity.'[42] In response to this, Shang Yang said 'a wise man creates laws, but a foolish man is controlled by them; a man of talent reforms rites, but a worthless man is enslaved by them.'[43] During this same audience, Tu Chih had said 'I have heard it said, that in taking antiquity as an example, one makes no mistakes, and in following established rites one commits no offence. Let Your Highness aim at that.'[44] In response, Shang Yang stated that:

Former generations did not follow the same doctrines, so what antiquity should one imitate … Wen-wang and Wu-wang both established laws in accordance with what was opportune and regulated laws in accordance with what was opportune and regulated rites according to practical requirements … There is more than one way to govern the world and there is no necessity to imitate antiquity, in order to take appropriate measures for the state[45].

Shang Yang clearly challenges the traditional Zhou notions with regard to custom and historical precedent, expounding a doctrine that would free a ruler from what some might be seen as the 'shackles of the past', giving them the ability to respond to the needs of the times

As to Shang Yang's attitude with regards to the importance of written law and the administration of a society, he said 'Law is the authoritative force of the people, and the key to governing … Rule by law is fundamental to governing.'[46] Elsewhere he said:

[41] Shang Yang: *Translation of the Book of Lord Shang*, trans. J.J. L Duyvendak, Arthur Probsthain, London, 1928, pp. 284-5.
[42] *Ibidem* , p. 170.
[43] *Ibidem*, p. 171.
[44] *Ibidem*, p. 172.
[45] *Ibidem*, pp. 172-3.
[46] Shang Jun Shu, quoted in Ren *op. cit.*, p. 20.

Of old, the one who could regulate the empire was he, who regarded as his first task the regulating of his own people … For the way, in which the conquering of the people is based upon the regulating of the people, is like the effect of smelting in regard to metal or the work of the potter in regard to clay; if the basis is not solid, then people are like flying birds or like animals. Who can regulate these? The basis of the people is the law. Therefore, a good ruler obstructed the people by the means of the law, and so his reputation and his territory flourished.[47]

Here, Shang Yang's attitude differs from more feudal and Confucian notions of the importance of rule by certain moral standards that one exemplifies; instead, the ruler's authority is based upon the enforcement of regulations within a community. This idea of the ruler's authority being based on his power to create and enforce law must be borne in mind when looking at the reforms Shang Yang implemented in the Qin state.

3. Shang Yang and Criminal Law in Qin

Shang Yang implemented a range of reforms in Qin, which were known as a 'change of law' (*bianfa)*.[48] This process essentially aimed at increasing the power of the state, which involved the weakening of the feudal structure.[49] Shang Yang was aided in this endeavor by the *Fa Jing* ("Canon of Laws") 法經[50], which was a legal code put together around 400 B.C by Li Kui, which was made up of six parts [51]

An area that Shang Yang paid special attention to was criminal law, particularly the system of punishments. Shang Yang said that "nothing is more basic than for putting an end to crimes than the imposition of heavy penalties". Shang Yang espoused what appears to have been a novel concept at the time, which was that in the course of a criminal procedure, there was to be no distinction on the application of the law based upon social position.[52] He stated that:

What I mean by the unification of punishments is that punishments should know no degree or grade, but that from ministers of state and generals down to great officers and ordinary folk, whosoever does not obey the king's commands, violates the interdicts of the state, or rebels against statutes fixed by the ruler, should be guilty and not be pardoned. Merit acquired in the past should not cause a decrease in the punishment for demerit later, … If loyal ministers and filial sons do wrong, they should be judged according to the full measure of their guilt.[53]

This is a concept very different from traditional feudal Chinese concepts, which considered such things as family relationship, individual merit, friendship, and social status in relation to the administration of justice and the way in

[47] Shang Yang *op. cit.* p. 285-6.

[48] Fu *op. cit.*, p. 40. It should be noted that as far as the author is aware, there are no real primary examples of actual, preserved legal statutes implemented by Lord Shang; knowledge of Shang Yang's legal reforms come from various historical accounts instead, and these shall be relied upon, either directly or indirectly.

[49] *Ibidem*, p. 22.

[50] Attila Kormany: "*To Enter a Court is to Enter a Tiger's Mouth*" The Role of Law in China, 50 Annales U. Sci. Budapestinensis Rolando Eotvos Nominatae, 349 (2009), p. 359.

[51] Jinfan Zhang: *The Tradition and Modern Transition of Chinese Law*, Springer, Berlin Heidelberg 2014, p. 271.

[52] A.F. P Hulsewé: *Remnants of Ch'in Law: An Annotated Translation of the Ch'in Legal and administrative rules of the 3rd century B.C. discovered in Yün-meng Prefecture*, Hu-pei Province, in 1975, E.J. Brill, Leiden, 1985, p. 7.

[53] *Ibidem*, pp. 278-9.

which crimes were dealt with.[54] In fact, there had been a Confucian idea that "rules of ceremony do not go down to the common people. The penal statutes do not go up to great officers."[55] One of the aims of this equal application of the law to all levels of society was to maintain the general population's trust in the system of rule.[56]

Shang Yang also believed that the laws should be understood and known by the entire population. One measure that was taken in order to achieve this was the placing of laws in prominent places on pillars in order to make them known amongst the whole population.[57] He is cited in the *Book of Lord Shang* as making the following statement:

For, indeed, one should not make laws so that only the intelligent can understand them, for the people are not all intelligent ; and one should not make laws so that only the men of talent can understand them, for the people are not all talented. Therefore did the sages, in creating laws, make them clear and easy to understand, and the terminology correct , so that stupid and wise without exception could understand them ; and by setting up law officers, and officers presiding over the law, to be authoritative in the empire, prevented the people from falling into dangerous pitfalls.[58]

Another reform that can be seen as a manifestation of Shang Yang's philosophy is the harshness of punishments that he developed in Qin; in fact, it can be said such strictness was his avowed policy in implementing his legal program.[59] It was believed that by threatening harsh punishment, the state could increase its exercise of power.[60] He is quoted as saying that:

In applying punishments, light offenses should be punished heavily; if light offenses do not appear, heavy offenses will not come. This is said to be abolishing penalties by means of penalties, and if penalties are abolished, affairs will succeed. If crimes are serious and penalties light, penalties will appear and trouble will arise. This is said to be bring about penalties by means of penalties, and such a state will surely be dismembered.[61]

One striking example of the operation of the criminal law regime instituted by Shang Yang is the case when the Crown Prince of Qin broke the law, and Shang Yang required that the infringement be punished; as the heir to the Qin throne could not be subject to such action, his tutor was punished and his teacher branded instead.[62] We are told that after the Crown Prince's tutor and teacher were punished harshly on their master's behalf, and that, subsequently, the

[54] Hsiao *op. cit.*, p. 402.

[55] *The Book of Rites* (Li Ji): English-Chinese Version, trans. by James Legge, Intercultural Press, Washington, Intercultural Press, 2013, par. 68, quoted in Christine Abigail L. Tan: The Cultured Man as the Noble Man: *Jun zi* as a Man of *Li* in *Lun yu*, Kritike, 2015/9/2, p. 186.

[56] Gray L. Dorsey: *Jurisculture: China*, Transaction Publishers, New Brunswick and London, 1993, 129. However, this must be qualified by what appears to have been the fact that hierarchy still played a role in the handing down of punishments, with those of aristocratic rank receiving lighter punishments than commoners. See Hulsewé *op. cit.* 50.

[57] Dorsey *op. cit.*, p. 127.

[58] Shang Yang *op. cit.*, p. 334.

[59] Derk Bodde: *China's First Unifier: A Study of the Ch'in Dynasty as seen in the Life of Li Ssu*, 280?-208 B.C., Hong Kong University Press, Hong Kong, 1967, pp. 167-168.

[60] Creel *op. cit.*, p. 136.

[61] Shang Yang *op. cit.*, p. 203.

[62] *The Biography of the Lord of Shang in the Shih-Chi*, *op. cit.*, p. 16.

population of Qin 'hastened into (the path of) the law.'[63]

An area of importance that Shang Yang legislated for was in the area of family relations, which was also affected by his program of criminal law reform. He implemented a system that involved the organisation of the population into groups of ten and five families.[64] This form of organisation was known as the *shiwu* system; the reason why this form of familial organisation was put into placed by Shang Yang in Qin was in order to allow the state to increase its ability to manage what was at the time a relatively mobile population.[65] A particular component of the *shiwu* system was the principle of mutual responsibility,[66] which involved the denunciation of crime and joint responsibility in the case of offences.[67] Those who were members of the group of five or ten families would end up sharing in the responsibility for the crime of another member of the family unit.[68] Part of this involved a system of denunciation;[69] one was subject to punishment if the individual failed to denounce the crimes of a member of a fellow *shiwu.*[70] Shang Yang's purpose in instituting these reforms was in order to prevent the growth of powerful units in society that may have resisted the expansion of state power.[71] As to the success of the *shiwu* system implemented by Shang Yang, Han Fei 韓非 wrote that 'the sovereign thereby became glorious and secure and the state thereby became rich and strong.'[72]

4. Economic Reforms

One important area in which Shang Yang implemented legal reforms was in the economic sphere.[73] The major thrust of these reforms that private industry and commerce should be strictly controlled and regulated by the state, which he saw as being of lesser importance than agriculture, which was understood as being absolutely fundamental and of the highest importance to the state.[74]

One of Shang Yang's most significant reforms was his completely abolishing the *ching* system, which was then replaced by a system of individual property.[75] According to the former system, peasants were bound to the land of their overlords as virtual chattels.[76] Lord Shang's likely purpose in implementing this reform was to break up the feudal system that existed in the area of land ownership.[77] He also probably had the desire to attract settlers from neighbouring

[63] *Ibidem,* p. 16.
[64] Han Fei Tzu: *Eight Villainies. In: The Complete Works of Han Fei Tzu: A Classic of Chinese Political Science*, Vol. I , W.K. Liao, Arthur Probsthain, 1939, p. 115.
[65] Liu *op. cit.*, p. 187.
[66] Han Fei Tzu: *On Assumers. In: The Complete Works of Han Fei Tzu*, Vol II, trans. W.K. Liao, Arthur Probsthain, London, 1939, p. 213.
[67] Han Fei Tzu: Eight Villanies, *op. cit.*,p. 115.
[68] Han Fei Tzu: On Assumers, *op. cit.*, p. 187.
[69] *Ibidem.*
[70] Liu *op. cit.*,p. 188.
[71] Brian E. McKnight: *Law and Order in Sung China*, Cambridge, Cambridge University Press, 1992, p. 123.
[72] Han Fei Tzu, Eight Villanies, *op. cit.*,p. 115.
[73] Bodde *op. cit.*, p. 170.
[74] Li Yuyie: *Legalism emphasized role in agriculture, military, Chinese Social Sciences* Today, 2 February 2016, http://www.csstoday.com/Item/3128.aspx.
[75] Duyvendak *op. cit.*, p. 44.
[76] Bodde *op. cit.*, p. 170.
[77] *Ibidem.*

states with the prospect of becoming free landholders.[78]

Shang Yang also implemented reforms that aimed at repressing commerce in favour of the development of agriculture.[79] Agriculture was seen as something absolutely fundamental and the ultimate source of the state's wealth, while commerce was seen as being somewhat unproductive; [80] he said 'the means, whereby a country is made prosperous, are agriculture and war',[81] and 'Insignificant individuals will occupy themselves with trade and will practise arts and crafts, all in order to avoid agriculture and war, thus preparing a dangerous condition for the state …such a country will be dismembered.'[82]

Shang Yang said in regard to the focus on agriculture that by limiting the people's skills and opportunities by prohibiting certain kinds of activity, the population's capacity would be limited; in addition to this, he believed that by focusing on farming, the people would remain 'simple', being content with where they are, and would not have a desire to leave the territory.[83] During Shang Yang's time, the Qin state had a vast territory, but a sparse population.[84] As the human resource was the main factor in agriculture, it was necessary for the aims Shang Yang and the power of the Qin state that the population be kept within the territory of the state.[85]

Another area in which Shang Yang ventured into with regards to family organisation was taxation; a family that had two or more males had to pay double taxes.[86] The reason for this was once again related to extending state influence; this taxation policy would prevent the creation of strong family units that had caused difficulties for the authorities during the Spring and Autumn period; it also allowed for the development of more independent units of production so that the population would increase at a faster rate, which in turn would lead the cultivation of wasteland into productive farmland.[87]

From the words and actions of Shang Yang in relation to agriculture and trade, several aspects of his philosophy can be seen. First, law is used in order to strengthen the state. Laws implemented in this instance are practical and utilitarian, and he felt free to discard older systems that seem to inhibit the prosperity of the state. His reason for encouraging agriculture and discouraging or controlling trade was because he believed it would strengthen Qin, while commerce was not seen as having the same utility. So, in this instance we see Shang Yang bringing about legal reforms primarily with reference to state power and with a utilitarian eye.

Due to his various reforms, Shang Yang had made many enemies among members of the aristocracy, and after the death of Duke Xiao and his son Huiwen 秦惠文王 ascending to the throne, he was accused of plotting against Qin's new sovereign.[88] So effective had his reforms

[78] *Ibidem,* p. 52.
[79] Bodde, *op. cit.*, p. 171.
[80] *Ibidem.*
[81] Shang Yang *op. cit.*, p. 185.
[82] *Ibidem,* p. 186.
[83] *Ibidem,* p. 222.
[84] Liu *op. cit.*, p. 186.
[85] *Ibidem.*
[86] 'The Biography of the Lord of Shang in the *Shih-chi*' in Duyvendak *op. cit.*,p. 15.
[87] Liu *op. cit.*, p. 187.
[88] Zhengyuan Fu: *China's Legalists: The Earliest Totalitarians and Their Art of Ruling*, M.E Sharpe, London and New York, 1996, p. 18.

been that when he fled as a result of the accusations against him, he was unable to find accommodation as no innkeeper dared to receive a traveller not in possession of an internal passport, a law that had been established by Shang Yang himself.[89] Duke Huiwen had his body torn to pieces by chariots,[90] a penalty which Shang Yang had instituted.[91]

5. Conclusion

After Shang Yang's death his ideas continued to be influential, with his system of criminal law continuing to form the basis of the Qin penal code.[92] Most importantly, his reform program led to the strengthening of the Qin state, which aided Qin Duke Ying Zhen 嬴政 in defeating the rival states in China, and in 221 B.C proclaiming himself as the 'First Emperor' or *Qin Shi Huang* 秦始皇, thus establishing a unified Chinese empire for the first time in history.[93] Later, the Han dynasty 漢朝, upon its ascension to China's imperial throne, continued to take Shang Yang's code as the basis of its own system of criminal law,[94] and which retained the Qin's central administration apparatus in order to aid it in consolidating its rule over the territory that it came to possess.[95] Thus, Shang Yang's worldview and legal and governmental reforms which strengthened the Qin state may be said to have contributed to the ultimate unification of China and the formation of its imperial state tradition. China's ability to assert itself in the international arena as an independent international actor is ultimately rooted in the country's unification in ancient times, which saw disparate and warring kingdoms come together to form a unified state. This event has determined the ultimate destiny of China and to an extent the wider world, and has allowed that country to project itself further afield, from ancient times up until the present day.

The chaotic Warring States period of ancient Chinese history in which Shang Yang lived caused him to seek to bring about a higher degree of order to the political and social life of those times.[96] As has been seen, Shang Yang implemented a program of reforms in such areas as criminal law and economic relations in Qin which utilized written law as a primary tool in strengthening the state, with his measures focusing upon the maintenance and strengthening of the ruler's authority. Despite what has been written about the differences in the Legalist and Confucian schools of thought, it can be argued that they ultimately had the same ends in mind, while essentially differing as to the way in which this was to be achieved. As the Chinese scholar Zeng Zhenyu put it, "There are certain commonalities between Confucius and Shang Yang. They differ just in the means they advocate for the advancement of

[89] *Ibidem.*
[90] 'The Record of Shang Yang in the *Ch'in-ts'e*'. In Duyvendak *op. cit.*, p. 32.
[91] Fu *op. cit.*, p. 18.
[92] Yates *op. cit.*, p. 30.
[93] Christian D. Von Dehsen, Shang Yang, In: Christian D. Von Dehsen: Lives and Legacies: *An Encyclopedia of of People Who Changed the World, Philosophers and Religious Leaders*, Oryx Press, 1999, Phoenix, Yates, p. 30.
[94] Roger T Ames: The Art of Rulership: A Study of Ancient Chinese Political Thought, State University of New York Press, Albany, 1994, p. 109.
[95] Wei Wu: *Cultural Relativism and Universal Fair Interrogation Standards in Europe and China*. In Marc Cools, et. al (eds.): European Criminal Justice and Policy, Maklu, Antwerpen, Apeldoorn, Portland, 2012, p. 155.
[96] William P. Alford: *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, Texas Law Review, 1986/64, p. 9.

an ideal society based on morality. For Confucius, the means are ethical education and consequent transformation of the populace. Shang Yang, in distinction, believes that only after reliance on heavy punishments will humans be able to advance on to the new stage of a society ruled by morality."[97] Indeed, there are examples from Chinese history where an actual synthesis between the two took place, a development particularly noteworthy during the Han dynasty period.[98] This is a subject worthy of further research, which reflects the diversity of the intellectual tradition of Chinese civilization, and its ability to utilize and synthesize a myriad of differing currents of thought.

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[97] Quoted in Yuri Pines and Carine Defoort: Chinese Academic Views on Shang Yang Since the Open-Up-and-Reform Era, Contemporary Chinese Thought, 2016/47/2, https://www.tandfonline.com/doi/ full/10.1080/ 10971467.2016.1227112.

[98] Derk Bodde and Clarence Morris: Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases with Historical, Social, and Juridical Commentaries, Harvard University Press, Cambridge, 1967, pp.27-8.

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ANTI – CORRUPTION INITIATIVES, GOOD GOVERNANCE AND HUMAN RIGHTS: THE REPUBLIC OF MACEDONIA

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Abstract

In fighting corruption, good governance efforts rely on principles such as accountability, transparency and participation to shape anti-corruption measures. Initiatives may include establishing institutions such as anti-corruption commissions, creating mechanisms of information sharing, and monitoring governments' use of public funds and implementation of policies. Good governance and human rights are mutually reinforcing. Human rights principles provide a set of values to guide the work of governments and other political and social actors. They also provide a set of performance standards against which these actors can be held accountable. Moreover, human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmers, budgetary allocations and other measures. Corruption is recognized as a serious crime in the EU, which is reflected in its many anti-corruption instruments covering existing member states. Countries wishing to join still face considerable systemic corruption issues in their public institutions. In Macedonia as one of these countries the most significant human rights problems stemmed from pervasive corruption and from the government's failure to respect fully the rule of law.

This article introduces anti-corruption work, good governance, and attempts to identify the various levels of relationship between that work and human rights with particular reference to Macedonia as an EU candidate country.

Keywords: *corruption, anti-corruption instruments, good governance, impact of corruption on human rights, Macedonia.*

1. Introduction

Fighting corruption is a global concern because corruption is found in both rich and poor countries, and evidence shows that it hurts poor people disproportionately. It contributes to instability, poverty and is a dominant factor driving fragile countries towards state failure[1].

Every year $1 trillion is paid in bribes while an estimated $2.6 trillion are stolen annually through corruption – a sum equivalent to more than 5 per cent of the

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[1] Governments, the private sector, non-governmental organizations, the media and citizens around the world are joining forces to fight this crime. The United Nations Development Programme (UNDP) and the United Nations Office on Drugs and Crime (UNODC) are at the forefront of these efforts. See International Anti-Corruption Day 9 December: http://www.un.org/en/events/anticorruptionday.

global GDP. In developing countries, according to the United Nations Development Programme, funds lost to corruption are estimated at 10 times the amount of official development assistance[2].

The 2017 joint international campaign focuses on corruption as one of the biggest impediments to achieving the Sustainable Development Goals (SDGs). To mark the 2017 International Anti-Corruption Day (IACD), UNODC has developed a wide-ranging campaign focused on different SDGs and on how tackling corruption is vital to achieving them[3].

Corporate corruption scandals unearthed in recent years have provided further impetus to the anti-corruption movement[4].

What exactly is corruption? How are "offering", "promising" and "giving" a bribe treated under the law? Different countries have different answers to these questions, by definition as well as interpretation[5]. Corruption here will be understood to mean abuse of public office for private gain, which involves, for instance, public officials accepting bribes, unwarranted commissions or 'kickbacks' around processes of public procurement and service[6].

The fight against corruption is central to the struggle for human rights. Corruption has always greased the wheels of the exploitation and injustice which characterize our world. From violent ethnic cleansing to institutionalized racism, political actors have abused their entrusted powers to focus on gains for the few at great cost for the many[7]. Human rights strengthen good governance frameworks. They require: going beyond the ratification of human rights treaties, integrating human rights effectively in legislation and State policy and practice; establishing the promotion of justice as the aim of the rule of law; understanding that the credibility of democracy depends on the effectiveness of its response to people's political, social and economic demands; promoting checks and balances between formal and informal institutions of governance; effecting necessary social

[2] Corruption is a serious crime that can undermine social and economic development in all societies. No country, region or community is immune. This year UNODC and UNDP have developed a joint global campaign, focusing on how corruption affects education, health, justice, democracy, prosperity and development. See United Nations Campaign: http://www.anticorruptionday.org/actagainstcorruption/en/about-the-campaign/index.html.

[3] *Ibidem*. On 9 December each year, the world celebrates International Anti-Corruption Day. The fact that such a symbolic day exists (and immediately precedes Human Rights Day on 10 December) reflects the international community's increased recognition of the importance of anti-corruption measures. Various factors have contributed to this, including the heightened awareness of the concrete impact of corruption. Attention has turned, for example, to: the financing of terrorist acts; the covering up of narcotics trafficking; and the impediments to the effective use of aid for economic growth and development caused by corrupt practices. See, eg, UNCAC Preamble para. 2: 'Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering'.

[4] Well-known examples include the corruption allegations against BAE Systems and Siemens: R (Corner House Research) v Director of the Serious Fraud Office [2009] 1 AC 756 ('BAE Case'); United States v Siemens Aktiengesellschaft (Plea Agreement) (DC, no. 1:08-CR-00367-RJL, 6 January 2009) ('Siemens Plea Agreement')

[5] Corruption is the abuse of power for private gain. Corruption takes many forms, such as bribery, trading in influence, abuse of functions, but can also hide behind nepotism, conflicts of interest, or revolving doors between the public and the private sectors. Its effects are serious and widespread. Corruption constitutes a threat to security, as an enabler for crime and terrorism. It acts as a drag on economic growth, by creating business uncertainty, slowing processes, and imposing additional costs. The abuse of entrusted power for private gain. corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs. See Transparency International at: https://wwwtransparency.org/glossary/term/cprruption.

[6] See Observer: http://oecdobserver.org/news/archivestory.php/aid/2163/Defining_corruption.html.

[7] See, The Global corruption Barometer (2007): https://www.transparency.org/research/gcb/gcb_2007.

changes, particularly regarding gender equality and cultural diversity; generating political will and public participation and awareness; and responding to key challenges for human rights and good governance, such as corruption and violent conflict[8].

Moreover, Human rights require a conducive and enabling environment, in particular appropriate regulations, institutions and procedures framing the actions of the State. Human rights provide a set of performance standards against which Governments and other actors can be held accountable. At the same time, good governance policies should empower individuals to live with dignity and freedom. Although human rights empower people, they cannot be respected and protected in a sustainable manner without good governance. In addition to relevant laws, political, managerial and administrative processes and institutions are needed to respond to the rights and needs of populations. There is no single model for good governance. Institutions and processes evolve over time[9].

The success of the democratization and the establishment of a functioning State will depend on the existence of functioning institutions of pluralistic democracy and market economy in the Republic of Macedonia as well as other West Balkans States concerned. The effectiveness of local reform efforts and international technical and financial assistance requires the quality of public service and must be based on the best practices of good governance. As corruption is the negation of the Rule of Law and an impediment to efficient law enforcement and effective functioning of public institutions, non-governmental institutions need to find a common platform with the institutions of the state to work to prevent it. Reducing corruption requires not only the relevant institution-building measures but also creating the social preconditions for establishing the Rule of Law. In this context it is of decisive importance to foster a democratic political culture based on trust and respect of government institutions, transparency and openness of the activities of the administration, and an orientation towards stability and predictability. This task has become all the more pressing in the Republic of Macedonia.

2. The International Legal Framework Against Corruption

Corruption is the abuse of public or private office for personal gain[10]. The costs of corruption for economic, political and social development are becoming increasingly evident. But many of the most

[8] *Ibidem.*

[9] Governance refers to mechanisms, institutions and processes through which authority is exercised in the conduct of public affairs. The concept of good governance emerged in the late 1980s to address failures in development policies due to governance concerns, including failure to respect human rights. The concepts of good governance and human rights are mutually reinforcing, both being based on core principles of participation, accountability, transparency and State responsibility. See HRBA Portal: http://hrbaportal.org/faq/what-is-the-relationship-between-human-rights-and-good-governance.

[10] It could be the multinational company that pays a bribe to win the public contract to build the local highway, despite proposing a sub-standard offer. It could be the politician redirecting public investments to his hometown rather than to the region most in need. It could be the public official embezzling funds for school renovations to build his private villa. It could be the manager recruiting an ill-suited friend for a high-level position. Or, it could be the local official demanding bribes from ordinary citizens to get access to a new water pipe. At the end of the day, those hurt most by corruption are the world's weakest and most vulnerable. See, The rationale for fighting corruption at: https://www.oecd.org/cleangovbiz/49693613.pdf.

convincing arguments in support of the fight against corruption are little known to the public and remain unused in political debates. This brief provides evidence that reveals the true cost and to explain why governments and business must prioritise the fight against corruption[11].

International anti-corruption conventions play a key role in the global fight for integrity by: bringing the fight against corruption to the political forefront, setting legally binding standards and principles by which signatory states can be held to account, fostering both the domestic action and international co-operation needed to tackle the many facets of corruption.

Although they may be similar in substance, conventions can vary considerably depending on their signatories and specific obligations. Regarding their geographic scope, some aspire to a global coverage, while others have a regional focus. They may provide for different types of obligations, whether it is concrete recommendations for action along with sophisticated review processes, or more general political commitments as a basis for specific steps to be taken[12].

From the preceding brief summary of the international anti-corruption movement's evolution, it is clear that the Organization of Economic Cooperation and Development (OECD) Convention was a catalyst for further action[13]. The Convention have a global impact. It reduce the supply side of corruption as the OECD countries are the home states of most international companies. It is important on the demand-side, strengthening domestic anti-corruption efforts in developing countries and in those countries in transition in Central and Eastern Europe[14].

This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe[15]. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system[16].

[11] *Ibidem.*

[12] See https://www.oecd.org/cleangovbiz/internationalconventions.htm#global.

[13] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, opened for signature 17 December 1997, [1999] ATS 21 (entered into force 15 February 1999) ('OECD Convention').

[14] Public knowledge of the critical issues under discussion within the OECD needs to be increased. In defining and describing those issues, the public can note that finally governments are moving to curb corruption. An inadequate Convention forces the question to OECD governments: how much global business bribery is the international community willing to tolerate? See, OECD Anti-Corruption Convention Leaves Critical Question Still Open, at: https://www.transparency.org /news/pressrelease /oecd_anti_corruption_convention _leaves_critical_ questions_still_open.

[15] The Convention does not utilize the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

[16] See also the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions Adopted by the Council on 26 November 2009; Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Council on 25 May 2009; Recommendation of the Council on Bribery and Officially Supported Export Credits Adopted by the Council on 14 December 2006; Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption 16 November 2016; and OECD Guidelines for Multinational Enterprises – Section VII.

It should be noted that Bribery in international business subverts world trade and investment. Bribery often leads to a misallocation of scarce public resources. Sometimes public officials are bribed to support non-essential projects thereby[17]. The rot may result from foreign contractors doing dirty deals with local administrators[18] that enrich them both.

The OECD has been a global leader in the fight against corruption for many years. Along with other intergovernmental organizations, OECD has helped to create a panoply of international instruments that seek to limit corruption. And yet corruption continues. This is, in part, the inspiration for launching CleanGovBiz. This initiative supports governments, business and civil society to build integrity and fight corruption. It draws together existing anti-corruption tools, reinforces their implementation, improves co-ordination among relevant players and monitors progress towards integrity[19].

The first global agreement comprehensively addressing corruption is the United Nations Convention against Corruption (UNCAC)[20]. The high number of signatories and ratifications reflects the broad international consensus on the UNCAC. This consensus was not only shared among states, but also among the international private sector and civil society[21].

Substantive highlights of the Convention include:

- Prevention[22] which means that the corruption can be prosecuted after the fact, but first and foremost, it requires prevention. An entire chapter of the Convention is dedicated to prevention, with measures directed at both the public and private sectors[23];
- The Convention requires countries to

[17] For example in many developing countries. Further postponing construction of vital rural clinics and sanitation systems. Sometimes important infrastructure, such as roads and railways, is constructed but then collapses. Bribery can enable corrupt authoritarian regimes to stay in office. And there is frequently a link between high levels of official corruption and widespread human rights abuse. Or, corporate bribery of officials can contribute to the collapse of fragile institutions of democracy. And, at worst, the collapse of such institutions can spark the forceful overthrow of governments, so unleashing a fresh cycle of military rule, repression and corruption. See *Ibidem*. Supra 17.

[18] For example, purchasing poor quality equipment at inflated prices.

[19] The CleanGovBiz Toolkit is being developed on the basis of the important standards embodied in international conventions to help put these standards into practice. In order to "walk the talk" o these conventions, the Toolkit proposes concrete priority measures, guidance on their implementation and examples of good practices in the multiple policy areas concerned. These conventions have been signed and ratified by states which in turn provides the necessary political legitimacy for applying the CleanGovBiz guidance. Political momentum is building to intensify the fight against corruption. Citizens are no longer willing to bear the burden of corrupt political and economic elites, as shown by the uprising in the Arab world. The tight budget constraints deriving from the crisis and the emerging corruption cases in a number of countries are increasing pressure on decision makers to act. CleanGovBiz provides governments, businesses and civil society with guidance and access to practical tools to face this challenge. See at: https://www.oecd.org/cleangovbiz/about/.

[20] UN General Assembly Resolution UNGA, on 31 October 2016 and was opened for signature in Merida, Mexico, on 9-11 December 2003. The Convention entered into force two years later, on 14 December 2005.

[21] By ratifying treaties, states make an explicit and legally binding commitment to abide by and give effect to the normative principles espoused in them. However, there is no guarantee that states will institute the legal protections necessary to secure their international obligations, especially because the institutional characteristics, monitoring mechanisms and substantive content of these treaties vary greatly.

[22] Article 6 of the Convention.

[23] These include model preventive policies, such as the establishment of anticorruption bodies and enhanced transparency in the financing of election campaigns and political parties. States must endeavour to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once

establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law[24];

- Countries agreed to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders[25]; and
- In a major breakthrough, countries agreed on asset-recovery, which is stated explicitly as "a fundamental principle of the Convention[26]…".

The UNCAC does not specify what conditions need to be met in order for anti-corruption bodies to be considered independent. Clarification can be found in an OECD study, which states that structural and operational autonomy, along with a clear legal basis and mandate for anti-corruption body, are all important elements in achieving independence[27].

The EU started off with modest anti-corruption instruments that mainly tackled the misdirection of EU funds in 1995. However, the EU broadened its focus over the course of time, with the final step being a comprehensive two-year review process of member states' general anti-corruption achievements. The results of a 2012 EU Corruption Barometer underlined that even in the EU, the fight against corruption is far from won.1[28] The Treaty on the Functioning of the EU recognizes corruption as a "euro-crime", listing it among the particularly serious crimes with a cross-border dimension for which minimum rules on the definition of criminal offences and sanctions may be established[29]. With the adoption of the Stockholm Program,[30] the Commission has been given a political mandate to measure efforts in the fight against corruption and to develop a comprehensive EU anti-corruption policy, in close cooperation with the Council of Europe

recruited, public servants should be subject to codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures.

[24] In some cases, States are legally obliged to establish offences; in other cases, in order to take into account differences in domestic law, they are required to consider doing so. The Convention goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and "laundering" of the proceeds of corruption. Offences committed in support of corruption, including money laundering and obstructing justice, are also dealt with. Convention offences also deal with the problematic areas of private-sector corruption. See Article 43 of the Convention.

[25] Countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders. Countries are also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption. *Ibidem.*

[26] Article 51 of the Convention.

[27] Anti-Corruption Network for Eastern Europe and Central Asia, 'Specialized Anti-Corruption Institutions: Review of Models' (Report, Organizations for Economic Co-Operation and Development, 2008), 10, pp. 24-7. See also, UN Doc. CAC/COSP/IRG/2012/CRP.8 (22 June 2012); UN Doc CAC/COSP/2009/15 (1 December 2009) 3.; UN Doc CAC/COSP/IRG/1/1/1 Add. 3 (9 January 2012); UN Doc CAC/COSP/IRG/1/1/1/Add..4 (16 January 2012); UN Doc CAC/COSP/IRG/1/1/1 Add.5 (31 January 2012); UN Doc CAC/COSP/IRG/1/1/1 Add. 6 (23 March 2012) and UN Doc CAC/COSP/IRG/2012/CRP. 4 (18 Lune 2012).

[28] See European Commission, 'Commission Fights Corruption: A Stronger Commitment for Greater Results' (Press Release, IP/11/678, 6 June 2011) ; European Commission, '*Commission Steps Up Efforts to Forge a Comprehensive Anti-Corruption Policy at EU Level*' (Press Release, MEMO 11/376, 6 June 2011) ; European Commission, 'Frequently Asked Questions: How Corruption is Tackled at the EU Level' (Press Release, MEMO 12/105, 15 February 2012).

[29] See the Treaty on the Functioning the EU (TFEU) Article 83.1.

[30] See The Stockholm Programme — An Open And Secure Europe Serving And Protecting Citizens (2010/C 115/01).

Group of States against Corruption (GRECO)[31] .

The EU Anti-Corruption Report, published in 2014[32], demonstrated that the nature and scope of corruption vary from one EU country to another and that the effectiveness of anti-corruption policies is quite different. The Report also showed that corruption deserves greater attention in all EU countries.

Since then, the EU Anti-Corruption Report has served as the basis for dialogue with national authorities while also informing broader debates across Europe. All EU countries have designated a national contact point to facilitate information exchange on anti-corruption policy. Together with the anti-corruption experience-sharing programme launched by the Commission in 2015[33], these efforts have encouraged national authorities to better implement laws and policies against corruption.

The Commission's anti-corruption efforts are centred around the following main pillars: mainstreaming anti-corruption provisions in EU horizontal and sectorial legislation and policy; monitoring performances in the fight against corruption by Member States; supporting the implementation of anti-corruption measures at national level via funding, technical assistance and experience-sharing; improving the quantitative evidence base for anti-corruption policy[34]. One tool to help anti-corruption efforts is ensuring a common high standard of legislation, either specifically on corruption, or incorporating anti-corruption elements in other sectoral legislation.

Specific anti-corruption acquis includes the 1997 Convention on fighting corruption involving officials of the EU or officials of Member States[35] and the 2003 Framework Decision on combating corruption in the private sector[36] aims to criminalise both active and passive bribery.

The Council of Europe (CoE) , which aims to defend and promote pluralistic democracy, human rights and the rule of law, has played a pioneering role in the fight against corruption as it represents a danger for the core values cited. The Criminal Law Convention on Corruption states that corruption endangers the rule of law, democracy and human rights; it poses a threat to good governance, a fair and social justice system, distorts the competitive map, puts a brake on economic development and endangers the stability of democratic

[31]It is in the common interest to ensure that all Member States have effective anti-corruption policies and the EU supports the Member States in pursuing this work. See Report from the Commission to the Council on the modalities of European Union participation in the Council of Europe Group of States against Corruption (GRECO), COM/2011/0307.

[32] See European Commission, Brussels, 3.2.2014, COM(2014) 38.

[33] European Commission Anti-Corruption Report at: https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report_en.

[34] *Ibidem.*

[35] Council Act of 26 May 1997 drawing up the Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union [Official Journal C 195 of 25 June 1997].

[36] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector. See also: 1st Protocol to the PIF Convention of 27 September 1996 (in force since 17 October 2002); Protocol of 19 June 1997 to the PIF Convention (in force since May 2009); Convention on Fighting Corruption involving Officials of the EU or Officials of the Member States, 1997 (entered into force on 28 September 2005); EACN, Council Decision 2008/852/JHA, of 24 October 2008 on a contact point network against corruption; EU Anti-Corruption Package (follow- up the Stockholm Programme, adopted on 16 June 2011; and Directive 2004/18 on the coordination of procedures for award of public work contracts, public supply contracts and public service contracts.

institutions and the moral foundations of society.

On 6 November 1997, the Committee of Ministers of the CoE adopted the Twenty Guiding Principles for the Fight against Corruption[37]. These guidelines set out a broad spectrum of anti-corruption measures, such as limiting immunity for corruption charges, denying tax deductibility for bribes, ensuring free media and preventing the shielding of legal persons from liability.

The Criminal Law Convention was adopted by CoE in early 1999[38] and an Additional Protocol to the Criminal Law Convention on Corruption was adopted in May 2003[39]. The Criminal Law Convention aims to harmonise the definition of a certain type of corruption, namely that of public officials. Such harmonisation, as stated by the Explanatory Report that accompanied the Criminal Law Convention,[40] would more easily allow for the requirement of dual criminality to be met by the states parties.

The Civil Law Convention on Corruption ('Civil Law Convention') was adopted on 4 November 1999 and entered into force four years later[41]. It focuses on effective civil remedies for any damage caused by corrupt acts. Both the Criminal Law Convention and the Civil Law Convention are open for signature by non-European countries[42].

The CoE's anti-corruption efforts have received substantial attention mainly because of the anti-corruption implementation mechanism. The CoE established GRECO on 1 May 1999[43]. Its function is to monitor compliance with the Council's anti-corruption standards[44], serving as a platform for both the exchange of best practices and peer pressure[45]. States that are not members of the CoE can become members of GRECO[46] and states that become parties to the Criminal Law Convention or the Civil Law Convention automatically become members[47].

3. Anti-Corruption Measures, Good Governance and Human Rights

There is no single and exhaustive definition of "good governance," nor is there a delimitation of its scope, that commands universal acceptance[48]. Depending on the context and the overriding objective sought,

[37] Committee of Ministers, Council of Europe, Resolution (97)24 on the Twenty Guiding Principles for the Fight against Corruption (6 November 1997).

[38] See Criminal Law Convention on Corruption**,** Strasbourg, 27.I.1999, *European Treaty Series* - no. *173.*

[39] Additional Protocol to the Criminal Law Convention, opened for signature 15 May 2003, ETS no. 191 (entered into force on 1 February 2005) ('Additional Protocol').

[40] Council of Europe, Criminal Law Convention on Corruption: Explanatory Report, [21]–[22].

[41] Civil Law Convention on Corruption, opened for signature 4 November 1999, ETS no. 174 (entered into force 1 November 2003).

[42] In addition to these treaties, the CoE has issued several soft law instruments. One of them is the recommendation on codes of conduct for public officials, adopted on 11 May 2000 (See Committee of Ministers, Council of Europe, Recommendation no. R 2000(10) of the Committee of Ministers to Member States on Codes of Conduct for Public Officials (11 May 2000). On 8 April 2003, the Committee of Ministers adopted a recommendation on common rules against corruption in the funding of political parties and electoral campaigns (See, Recommendation Rec(2003)4); Council of Ministers Recommendation Rec(2003)4; and Council of Ministers Recommendation no. R (2000) 10.

[43] Committee of Ministers, Council of Europe, Resolution 99(5) Establishing the Group of States against Corruption (GRECO) (1 May 1999).

[44] *Ibidem* art. 2.

[45] *Ibidem* art. 1.

[46] *Ibidem* art 4(2).

[47] Criminal Law Convention art 24; Civil Law Convention art 14.

[48] The term is used with great flexibility; this is an advantage, but also a source of some difficulty at the operational level.

good governance has been said at various times to encompass: full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance.

However, there is a significant degree of consensus that good governance relates to political and institutional processes and outcomes that are deemed necessary to achieve the goals of development[49]. The key question is: are the institutions of governance effectively guaranteeing the right to health, adequate housing, sufficient food, quality education, fair justice and personal security?

The concept of good governance has been clarified by the work of the former Commission on Human Rights,[50] identified the key attributes of good governance: transparency, responsibility, accountability, participation, responsiveness (to the needs of the people)[51].

In fighting corruption, good governance efforts rely on principles such as accountability, transparency and participation to shape anti-corruption measures. Initiatives may include establishing institutions such as anti-corruption commissions, creating mechanisms of information sharing, and monitoring governments' use of public funds and implementation of policies[52].

At the Warsaw Summit in June 2016[53] Heads of State and Government agreed that corruption and poor governance are security challenges that undermine democracy, the rule of law and economic development, erode public trust and have a negative impact on operational effectiveness.

Improved governance requires an integrated, long-term strategy built upon cooperation between government and citizens. It involves both participation and institutions. The Rule of Law, Accountability, and Transparency are technical and legal issues at some levels, but also interactive to produce government that is legitimate, effective, and widely supported by citizens, as well as a civil society that is strong, open, and capable of playing a positive role in politics and

[49] It has been said that good governance is the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of "good" governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights.

[50] UN Commission on Human Rights, resolution no. 2000/64. By linking good governance to sustainable human development, emphasizing principles such as accountability, participation and the enjoyment of human rights, and rejecting prescriptive approaches to development assistance, the resolution stands as an implicit endorsement of the rights-based approach to development.

[51] Resolution 2000/64 expressly linked good governance to an enabling environment conducive to the enjoyment of human rights and "prompting growth and sustainable human development." In underscoring the importance of development cooperation for securing good governance in countries in need of external support, the resolution recognized the value of partnership approaches to development cooperation and the inappropriateness of prescriptive approaches.

[52] See SELDI.net: http://seldi.net/history/summary/anti-corruptiongood-governance.

[53] See Warsaw Summit Communique, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016, at: https://www.nato.int/cps/en/natohq/official_texts_133169.htm.

government[54]. Good governance involves far more than the power of the state or the strength of political will. The rule of law, transparency, and accountability are not merely technical questions of administrative procedure or institutional design[55]. They are outcomes of democratizing processes driven not only by committed leadershiut also by the participation of, and contention among, groups and interests in society—processes that are most effective when sustained and restrained by legitimate, effective institutions[56].

There is no doubt that the goals for good governance are: Legitimate, effective, responsive institutions and policies; understandable processes and outcomes[57]; transparency[58]; incentives to sustain good governance for leaders[59]; vertical accountability[60]; and horizontal accountability and leaders, and among segments of government[61] .

The human rights issues primarily concern the relationship between the state and its citizens. The economic development mainly depends on good governance and equitable. Now, these days, is what good governance is to ensure the political and economic development. There are two aspects of good governance, about the legitimacy of a political aspect and a technical aspect that is related to the capacity. Democratic governance and state capacity inextricably linked together. Good governance as an ideal principle refers to the effective user friendly laws that benefit those who live in the territory. Good governance and basic human rights standards should be defined by economic criteria and management. Relationship between human rights and good governance is the way in which human rights can be seen as good corporate governance reform policies[62].

Finally, corruption compromises States' ability to fulfil their obligation to promote, respect and protect the human rights of individuals within their jurisdictions. Human rights are indivisible and interdependent, and the consequences of corrupt governance are multiple and touch on all human rights — civil, political, economic, social and cultural rights, as well as the right to development[63].

4. EU Enlargement: The Republic of Macedonia

Corruption is recognized as a serious crime in the EU, which is reflected in its

[54] Good Governance: Rule of Law, Transparency, and Accountability by Michael Johnston Department of Political Science, Colgate University, at: http://unpan1.un.org/intradoc/groups/public/ documents/un/ unpan010193.pdf.

[55] See UN Millennium Development Goals (MDG): http://www.un.org/millenniumgoals/.

[56] *Ibidem.* Supra 56.

[57] With visible results in citizens' lives --with clear standards for success or failure --with clear lines of responsibility and accountability.

[58] Openness from above --participation and scrutiny from below --honesty from all.

[59] The opportunity to take credit --for citizens: a credible chance for justice and a better life --for neighboring societies: sharing insights, experiences, expertise, values.

[60] Government that answers to citizens --citizens who accept and abide by laws and policies.

[61] Access to information --the right to be consulted --the power to check excesses and abuses.

[62] See Relationship between good governance and Human rights Masoomeh Mostafavi Azad University, 2012, at: file:///C:/Users/e.andreevska.SEEU/Downloads/SSRN-id2136129.pdf.

[63] In recent years, a number of relevant UN bodies and mechanisms have acknowledged the negative effects of corruption on the protection of human rights and on development. UN human rights bodies and mechanisms (i.e., Human Rights Council, its Special Rapporteurs, and the Universal Periodic Review mechanism, as well as human rights Treaty Bodies) are increasingly mindful of the negative impact of corruption on the enjoyment of human rights, and have addressed issues of corruption and human rights on numerous occasions.

many anti-corruption instruments covering existing member states. Countries wishing to join still face considerable systemic corruption issues in their public institutions[64].

Corruption affects citizens in very basic aspects of their everyday life in various ways. It has a negative impact: on citizens' everyday life[65]; on a political level[66]; and on economic development[67].

Macedonia is the 90 least corrupt nation out of 175 countries, according to the 2016 Corruption Perceptions Index reported by Transparency International. Corruption Rank in Macedonia averaged 79.20 from 1999 until 2016, reaching an all time high of 106 in 2003 and a record low of 62 in 2010[68].

Corruption and inefficient bureaucracy are challenges companies may face when doing business in Macedonia. There is a high risk of corruption in most of the country's sectors. Private businesses frequently complain about burdensome administrative processes that create operational delays and opportunities for corruption. Public procurement, the customs administration, and the building and construction sectors are some of the areas where corruption and bribery are most prevalent. The primary legal framework regulating corruption and bribery in Macedonia is contained in the Law on prevention of Corruption[69] and the Crime Code,[70] which make individuals and companies criminally liable for corrupt practices[71].

As a final point, concerning the fight against corruption, the country has some level of preparation. Corruption remains prevalent in many areas and continues to be a serious problem. The legislative and institutional framework has been developed. However, the structural shortcomings of the State Commission for Prevention of Corruption and political interference in its

[64] Between September 2012 and February 2013, more than 6,000 people were interviewed in the Western Balkans on their views of corruption levels in their country/territory and their governments' efforts to fight corruption. The survey shows that: 44% of people surveyed in the enlargement region believe that corruption has increased in their country over the past 2 years. Perceptions of increase in corruption levels are particularly high in Bosnia and Herzegovina and Albania with 65% and 66% respectively of people surveyed. Political parties, the judiciary and medical sectors are perceived as the most corrupt institutions across the region. See, EU Enlargement Factsheet, at: https://ec.europa.eu/neighbourhood-enlargement/.

[65] It affects their trust in the legal system and public administration; it deprives them from the health services they are entitled to get when bribing doctors is a common way to be helped faster it affects the quality of education and professional standards if a diploma can be bought instead of honestly obtained.

[66] It fosters a system where not the public interest, but the interests of individuals or groups are better served. Gaps in legislation allow corruption to spread it causes, distortions in elections, and it undermines democratic values which are indispensible for EU enlargement.

[67] It scares off foreign investors, it prevents the free market to grass root; it causes skilled people to leave the country to seek for better opportunities abroad.

[68] See, Macedonia Corruption Rank 1999-2018, at: https://tradingeconomics.com/macedonia/corruption-rank. It should be noted that **e**very government that has been in power in Macedonia since independence has declared the fight against corruption a priority. However, according to observers, the actions of the government have been rather superficial. Although progress has been made in establishing the legal and institutional framework for fighting corruption, implementation of anti-corruption laws and independent handling of corruption cases by the relevant supervisory bodies and courts remains a major challenge. See, Transparency International, at: https://knowledgehub.transparency.org/helpdesk/former-yugoslav-republic-of-macedonia-overview-of-political-corruption.

[69] See at: http://rai-see.org/wp-content/uploads/2015/06/law_on_prevention_of_corruption.pdf.

[70] See at: http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan016120.pdf.

[71] Facilitation is prohibited, and gifts may be considered illegal depending on their value or intent. Insufficient implementation of legislation and ineffective law enforcement impede the fight against corruption and public officials continue to act with impunity.

work have minimized the impact of past efforts. There is still a need to establish a convincing track record, especially on high level corruption cases. In the fight against organised crime, the country has reached some level of preparation. The legislative framework is broadly in line with European standards and strategies have been elaborated. However, the law enforcement capacity to investigate financial crimes and confiscate assets needs to be developed further[72].

5. Conclusion

The case for combating corruption is that "it is a force which drives poverty, inequality, dysfunctional democracy and global insecurity". These words, from one of the world's foremost experts on countering corruption over the past thirty years, speak to all of us, in nations rich and poor, who wish to see a more prosperous and secure global future. National anti-corruption strategies and plans are a component of realizing this desire.

There is no silver bullet for fighting corruption[73], but effective law enforcement is essential to ensure the corrupt are punished and break the cycle of impunity, or freedom from punishment or loss[74]. Moreover, reforms focussing on improving financial management and strengthening the role of auditing agencies have in many countries achieved greater impact than public sector reforms on curbing corruption[75]. Countries successful at curbing corruption have a long tradition of government openness, freedom of the press, transparency and access to information.[76] Also, strengthening citizens demand for anti-corruption and empowering them to hold government accountable is a sustainable approach that helps to build mutual trust between citizens and government[77]. Finally, without access to the international financial system, corrupt public officials throughout the world would not be able to launder and hide the proceeds of looted state assets[78].

The concept of corruption and ideas on the proper functioning of political systems are exceedingly specific socially and culturally. Therefore, the existing anti-corruption consensus is problematic. It is necessary to learn more about the ambiguities of the term in its local translations. The anti-corruption campaign has to understand much more precisely which types of corruption emerge in different contexts and, even more basically,

[72] See European Commission Doc. SWD(2016) 362 final, Brussels, 9.11.2016.

[73] Many countries have made significant progress in curbing corruption, however practitioners are always on the lookout for solutions and evidence of impact.

[74] Successful enforcement approaches are supported by a strong legal framework, law enforcement branches and an independent and effective court system. Civil society can support the process with initiatives such as Transparency International's Unmask the Corrupt campaign. See, Unmask the Corrupt, at: https://unmaskthecorrupt.org/.

[75] One such reform is the disclosure of budget information, which prevents waste and misappropriation of resources.

[76] Access to information increases the responsiveness of government bodies, while simultaneously having a positive effect on the levels of public participation in a country.

[77] For example, community monitoring initiatives have in some cases contributed to the detection of corruption, reduced leakages of funds, and improved the quantity and quality of public services.

[78] The European Union recently approved the 4th Anti-Money Laundering Directive, which requires EU member-states to create registers of the beneficial owners of companies established within their borders. See, Transparency International, How to stop Corruption: 5 Key Ingredients, at: https://www.transparency.org/news/feature/how_to_stop_corruption_5_key_ingredients.

what corruption actually means in a given context. It appears to be crucial that activities aimed at overcoming corruption consider the extreme cultural variations in the concept of corruption and its related implications[79].

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[79] See GIGA Research Programme: Power, Norms and Governance in International Relations, Contextualizing Conceptions of Corruption: Challenges for the International Anti-corruption Campaign, at: http://repec.giga-hamburg.de/pdf/giga_09_wp115_gephart.pdf.

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THE WITNESS'S RIGHT AGAINST SELF-INCRIMINATION. NATIONAL STANDARD

Ioan-Paul CHIȘ[*]

Abstract

This study is meant to reveal the legal solution in the Romanian system regarding the witness's right not to contribute to self-incrimination. Thus, as a translation of the principle nemo testis idoneus in re sua, the Romanian legislator stipulated the witness's right against self-incrimination under the privilege of not using his statements, in consideration of his locus standi, against him, regardless of the fact that he later on was given the status of a defendant for the same offence or whether he is a defendant in a different case, which is connected to the one where he is a witness. Likewise, the privilege of not using his statements against him, stipulated under these conditions in the criminal procedure law, seems to respond to the three difficult choices that the witness has, a premises for the necessity to formulate, on a jurisprudential bases, the witness's right to remain silent and the right against self-incrimination.

Keywords: *right to remain silent, self-incrimination, nemo testis idoneus in re sua, national legal solution.*

1. Legal framework

According to the Reasoning of the project for the Law regarding the Criminal Procedure Code, it was explicitly regulated according to the European Court of Human Rights (the case *Serves v. France*), *the privilege* against self-incrimination, also in respect to the hearing of the witness.

In its initial form, the proposed legislation, the privilege against self-incrimination was marginally defined, under Article 118 Criminal Procedure Code, *The right of the witnesses to avoid self-incrimination* that is *the witness's statement may not be used in a trial against him.* Later on, Article 102 point 75, Law no. 255/2013 for the implementation of the criminal procedure law, the content of Article 118 suffered a series of changes, practically lacking utility, the text thus became *the witness's statement given by a person who had the capacity as suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case, may not be used against him. The legal authorities have the obligation to stipulate, when the declaration is written, the previous capacity of that person.*

For a better understanding of the law-maker and of the elements that accounted for its legal acknowledgement, for the patrimony of the witness's rights, of the privilege against self-incrimination, we consider it necessary to highlight the relevant circumstances that the European Court took into consideration in the above-

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mentioned reasoning, respectively *Serves v. France*[1].

As to the facts, it was maintained that the applicant Paul Serves, a regular officer in the French army, that held the rank of captain, was in command of the first company of the 2nd Foreign Parachute Regiment ("2nd Para") and was based in the Central African Republic. On 11 April the applicant, holding information on poaching activities, he ordered an "unofficial" investigation mission in order to find and catch the poachers. For this purpose, he ordered that any poachers encountered during the missions should be intercepted, and, if they fled, should if necessary be fired on after a warning had been given. During one mission, one poacher was wounded in the leg and later killed by one of the subordinates of the applicant.

Regarding this incident, several investigations were carried on under the supervision of a prosecutor at the Paris Military Court who, on 20 May 1988, had been notified and presented the names of the soldiers involved, and the applicant was amongst them.

Thus, following this notification, the prosecutor charged the applicant with manslaughter, later a murder charge was substituted, and the applicant was detained.

Notes that the investigation was commenced without the opinion of the Minister of Defense or of the authority referred to the Code of Military Criminal Procedure, the Paris Court of Appeal upheld the orders in issue, the only documents held were the messages with the names of the persons involved in the incident that had been sent to the prosecutor.

Restarting the investigation, and after receiving the opinion of the Minister of Defense, showing that the facts seemed to be severe crimes and that a criminal investigation had to be carried on, the prosecutor charged two of the applicant's subordinates, and the applicant was summoned to appear as a witness. The hearing of the witness failed as he refused to oath and give evidence on the facts. Each time he was ordered to pay fines.

The applicant appealed against those orders and his argument in his pleadings was that the preliminary inquiry and the messages of 18 and 20 May 1988 on which his 1988 charge had been based remained effective, there was incriminating evidence against him such as enabled him to be charged, so that he could not be examined as a witness without his defense rights being infringed and a breach of Article 6 of the Convention and Article 105 of the Code of Criminal Procedure being committed.

The applicant was later charged for aiding and abetting murder and convicted to four years' imprisonment at first court.

For the reason that the applicant was summoned by the military authorities as a witness, regardless of the fact that there were evidence that he had been involved in the case, that he could have been considered as a defendant according to the autonomous sense of the convention, the European Court held that Article 6 paragraph 1 was applicable.

For these reasons, the European Court held that, the way he acted, the investigation judge placed the applicant in the position to choose either to refuse to take the oath and give evidence, thereby making himself liable to repeated fines, or should he convince the judge of the overwhelming nature of the case against him and thus, ultimately, admit guilt.

The Court reiterated that the right of any "person charged" to remain silent and the right against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair

[1] CEDO, *Serves v. France*, 20225/92, 20 Oct. 1997, [www.hudoc.echr.coe.int].

procedure under Article 6 of the Convention. Their rationale lies, *inter alia*, in protecting the "person charged" against improper compulsion by the authorities and thereby contributing to the avoidance of miscarriages of justice and to the fulfillment of the aims of Article 6. The right against self-incrimination, in particular, presupposes that the prosecution in a criminal case seeks to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the "person charged".

Resuming to national provisions, we also note the fact that according to Article 47 paragraph (5) of Law no. 24/2000 regarding the legislative technique norms for laws – wide-ranging laws, as it is the case of codes, the articles should have marginal definitions that express the synthetic object, but with no self-significance within the body of the provision.

Under these circumstances, we understand the witness's right against self-incrimination as the privilege stipulated by the law that no charge or unfavorable solution of the court should be based on the statements given as a witness before or after becoming an offender or defendant in the case.

2. The conventional standard

Unlike other systems of fundamental rights protection[2], the European Convention does not explicitly provide the right to remain silent or the right not to contribute to self-incrimination. Nevertheless, jurisprudence, as a form of protection of the defendant against improper compulsion by the authorities, in order to avoid judicial errors and to the fulfillment of the objectives of Article 6[3], the European Court formulated the right of any "person charged" to remain silent and the right against self-incrimination[4]. The jurisprudential formulations were elaborated under the umbrella of the notion of the right to a fair trial under the Article 6 § 1, pointing, especially, the connection with the presumption of innocence stipulated by Article 6 § 2[5]. Though, the doctrine observed that recent jurisprudence seems to place the discussion towards the lack of equity of the procedure[6].

The concept of "criminal charge" or "the charge under the criminal law" has an autonomous meaning, according to the specific meaning of the European Convention, a solution which is imposed to ensure the object and the purpose of the convention[7], given the multitude of interpretations of these concepts under domestic law systems which might endanger the actual protection of the right in lack of a common standard, of consistency, imposed by Strasbourg Court.

Thus, a "charge" is "the official notification of an individual by the competent authority that he is suspected of committing a criminal offence", the definition corresponds to the test whether "the situation of the [suspect] has been substantially affected"[8].

The exam whether the charge was "criminal" is by taking the *Engel* test[9], which

[2] Art. 14 pct. 3/g of International Covenant on Civil and Political Rights.
[3] CEDO, *John Murray v. UK*, 18731/91, 08 Feb. 1996, para. 45.
[4] CEDO, *Funke v. France*, 10828/84, 25 Feb. 1993, para. 44.
[5] CEDO, *Saunders v. UK*, 19187/91, 17 Feb. 1996, para. 68.
[6] J.F. Renucci, *Tratat de drept european al drepturilor omului*, Hamangiu Publishing House, Bucharest, 2009, p. 517.
[7] CEDO, *König v. Germany*, 6232/73, 28 June 1978, para. 88.
[8] CEDO, *Deweer v. Belgium*, 6903/75, 27 Feb. 1980, para. 46.
[9] CEDO, *Engel and others v. The Netherlands*, 5100/71, 5101/71, 5102/71, 5370/72, 8 June 1976, para. 82.

has as a starting point *the classification of the offence under the domestic law*, the second point is *the nature of the offence*, and the third refers to the *severity of the penalty*.

The first criterion is absolute or relative, depending on the way the offence is stipulated under the domestic law, whether it is a crime or, on the contrary, it is not stipulated at all, and it falls under other areas (e.g. the civil law, the administrative law, etc.). Therefore, the test ends when according to the domestic law, the offence is stipulated under the criminal law, the criteria from point two and three are no longer analyzed, but they are used when under the appropriate domestic system either the offence was no longer considered a crime[10], or it has never been part of the criminal law and was stipulated under other areas. This approach, more substantial than formal, is nothing but the mirror of the guaranty of the rights in a real and effective manner, not in a theoretical and illusory one.

As according to the hypothesis of this study the offence is a crime according to the domestic law, which legitimates the criminal procedure where the parties of the trial are heard, we assess that it is no need to dwell upon this aspect.

Returning to the first element, respectively the hypothesis of a person who committed or took part in the commitment of a crime, we refer only to the situation when the party had not been granted the status of a charged person, with all the consequences deriving from, and he was invited by judicial authorities to testify as a witness.

This particular case, as the court itself noticed, places the person in the position of choosing one of three possibilities, all of them reaching the point of getting the person sanctioned or charged: either he does not make any statement and he would probably be fined, or he agrees to make statements, but he does not tell everything he knows about the case or he decides to distort the truth, and then he would probably be charged with false testimony, or he tells the whole truth and he places himself amongst the participants to the offence, as he confesses all the facts and circumstances[11].

To avoid such a judicial trap, the European Court emphasized that the subject of a crime has to acquire the quality of a defendant as soon as the judicial authorities have reasonable doubts that the person was involved in the commitment of the crime. His hearing as a witness is purely formal when the judicial authorities have consistent evidence proving he took part in the commitment of the crime[12].

As a first conclusion, we identify that the authorities have the negative obligation not to hear as a witness the person who is under the suspicion of participating or committing the crime, as the moment of turning him into a defendant does not lie in the hands of the judicial authorities. If such evidence does not appear in the case, the judicial authority has no reason to presume the person committed the crime, the criminal party is heard as a witness during the criminal trial, and the negative obligation of the judicial authority stays latent up to the moment when that person incriminates himself by the data and information he provides. As soon as the witness provides the incriminating elements, the judicial authority has to bring to his attention the right to remain silent and the right to an attorney, otherwise, it does not mean that the witness gave up his rights as he continues to make statements[13].

[10] CEDO, *Öztürk v. Turkey*, 8544/79, 21 Feb. 1984, para. 49.
[11] CEDO, *Serves v. France*, 20225/92, 20 Oct. 1997, para. 45.
[12] CEDO, *Brusco v. France*, 1466/07, 17 Oct. 2010, para. 47.
[13] CEDO, *Stojkovic v. France and Belgium*, 25303/08, 27 Oct. 2011, para. 54.

This is one of the two cases identified by the European Court as breaches of the right to remain silent and the privilege against self-incrimination, respectively the use of constraint in order to obtain information against the person who is invited to provide that information, the person who holds the status of a charged person according to the autonomous concept under Article 6 § 1. If the case has no elements leading to the conclusion that the witness had any implication, the European Court verifies whether the incriminating information was used in a subsequent criminal case[14].

3. The witness in the Romanian criminal trial

During a criminal trail, the following persons can be heard: the suspect, the defendant, the injured party, the party who pays money to victim of a crime, the witnesses and the experts (art. 104). Any person can be heard as a witness, except for the parties [art. 115 paragraph. (1)]. A witness is also a person who suffered an injury from a criminal offence in case of an internally generated investigation, if the person states he does not wish to take part in the criminal trial [art. 81 paragraph (2)].

Hence, the witness is the natural person who is aware of any offence or circumstance that helps in finding the truth and who is invited by the judicial authorities to be heard about the knowledge he poses.

The doctrine underlined the social duty the witness has to help the judicial authorities to find the truth, and also the legal obligation that calls for the witness to come to the judicial authorities when invited and to tell the truth about the facts and the circumstances he knows, and not fulfilling this can bring along judicial constraints[15]. The law asks for the witness to be objective and to efficiently contribute to the finding of the truth because his status, outside the interests of the legal relationship, fully permits him to do so[16].

3.1. Domestic standard regarding the witness's rights and obligations

During the criminal trial, the witness has the *obligation* to come in front of the judicial authorities when he is summoned, at the place, day and hour mentioned in the citation, the obligation to sworn testimony or to solemnly make statements, the obligation to tell the truth about the case [art. 114, paragraph (2)] and the obligation to write, in a five days term, any change in the address to be cited [art. 120 paragraph (2) letter c)].

The witness has the *right* to protective measures and to get back the money paid during the trial [Article 120 paragraph (2) letter a)].

3.2. The right not to contribute to self-incrimination

As a novelty, the new criminal procedure law introduced the right of the defendant against self-incrimination (Article 118), which is defined as the interdiction to use against himself the statement he made as a witness if, in the same case, before or after the statement he became a suspect or a defendant.

The meaning of the criminal procedure provision seems to be a real a criminal procedure aporia, thus the doctrine developed several possible opinions.

Thus, according to one opinion, the criminal procedure law does not regulate

[14] CEDO, *Weh v. Austria*, 38544/97, 08 Apr. 2004, para. 41-43.

[15] Gr. Theodoru, *Tratat de drept procesual penal*, second edition, Hamangiu Publishing House, Bucharest, 2008, p. 387.

[16] Supreme Tribunal, criminal section, dec.no. 1957/1979, in CD 1979, p. 441.

under the provisions of Article 118, or under any other provision, *in terminis*, a virtual right of the witness to remain silent or against self-incrimination. The new provision regulates in fact a right associated with the exclusion of evidence[17].

According to another opinion, the witness cannot raise the right to remain silent, as, in principle, the quality he has when heard, does not reveal the formulation of a criminal charge against him[18]. At the same time, it was noticed that the witness's right against self-incrimination is defined by the domestic law-maker as a negative procedural obligation of the judicial authority which cannot use the statement made by the witness against the same person who obtained the status a suspect or a defendant[19]. According to both opinions, obtaining the status of a charged person in the criminal trial does not lead, *per se*, to the exclusion of evidence as being unfaithfully or illegally taken.

We consider this last opinion to be just, the conclusion derives *proprio motu* by simply reading the incident texts, the statement made as a witness by a party on whom, at that time the judicial authority had no suspicion that he had been involved in the commitment of the crime as it was legally taken, but, due to the law, the authorities will not be able to use it against him.

In other words, the judicial authority will not be able to ground the solution on this evidence when the former witness is charged, as the use of this information is forbidden including as a test to confirm the other evidence taken in the case.

A contrario, the statement will have probative force for the benefit of the person who was a witness and then turned into a defendant and in the detriment of the other persons involved in the commitment of the crime.

Thus, the mere successive assignment of several status in the same case, especially at the beginning of the criminal investigation, cannot be considered as being, per se, an unfaithful procedural behaviour of the judicial authority, because the necessary elements for the preservation of all the aspects appear, due to the nature of things, during and at the end of the criminal investigation.

Coming back to the witness's right against self-incrimination, as it is stipulated under Article 118 Criminal Procedure Law, we notice a difference of content from the right to remain silent that the defendant has during the criminal case[20]. This is because the subject against whom there is no evidence showing he was involved in the commitment of the crime, has the obligation to respond when the judicial authorities invite him to testify as a witness, and the right to decline the invitation by claiming the right to remain silent is not accepted.

The same meaning was given also by the legal constitutional court; the judicial authorities have the liability to take all the available evidence in order to find the truth regarding the offence and the person who committed it, the witness's self-incriminating statements are, at the same time, the statements necessary to resolve the case, regarding another charged person[21].

[17] T-V. Gheorghe, *Audierea martorilor* in N. Volonciu, A.S. Uzlău, *Codul de procedură penală. Comentat,* 3rd edition, revizuită și adăugită, Hamangiu Publishing House, 2017, p. 334; G.-D. Pop, *Dreptul martorului de a nu se acuza*, [www.juridice.ro] accessed on 15 Mar. 2018.

[18] M. Udroiu, *Procedură penală. Partea generală,* ed. 3, C.H. Beck Publishing House, Bucharest, 2016, p. 333.

[19] V. Constantinescu, *Capitolul II. Audierea persoanelor* in M. Udroiu, coord. *Codul de procedură penală. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2017, p. 575.

[20] A. Zarafiu, *Drept procesual penal. Partea generală. Partea specială,* second edition, CH Beck Publishing House, Bucharest, 2015, p. 195.

[21] Decision of the Constitutional Court no. 519/2017, p. 16, *[www.ccr.ro]*.

The legislative solution of neutralizing the statement made against the charged witness shows that the defendant's right against self-incrimination is rescued, the subject who is heard as a witness shall not be asked to choose from one of the three above mentioned options that injure him, as the statement he made is never going to be unfavourable to him.

As a procedural remedy for the hypothesis of the judicial authority had sufficient incriminating data against the subject, the hearing of the person as a witness will be illegal, having as consequence the exclusion of the evidence from the criminal case and those deriving from it. Likewise, when the witness's statement brings self-incriminated evidence and the judicial authority does not immediately stop the hearing and does not warn the subject that he has the right to remain silent and the right to be assisted by an attorney, his statement shall be excluded as illegally taken.

4. Elements of comparative law

In other legal systems, the problem is treated the same way and there is no breach in the procedural law if the person who is supposed to have committed the crime is heard as a witness if the circumstances of the case did not bring sufficient solid clues of culpability[22]. In case there are clues of culpability that are not sufficient to state a criminal charge, the judicial authorities will hear the subject as an assisted witness *(témoin assisté)*[23].

Likewise, according to Article 63 Criminal Procedure Law of Italy, if a person is heard during the criminal case and, in case he is not under investigation, he makes statements that provide circumstances against him, the judicial authority shall stop the hearing and worn the person that his statements can trigger investigations against him, and invites him to bring a lawyer. The witness's statements are unusable if he makes them as a witness, when narcotic substances were found at his dwelling place, because this circumstance reveals sufficient elements of culpability to state a charge against him from the very beginning of the investigation[24].

5. Conclusions

As a conclusion, we consider that the solution of the Romanian law-maker caters to the conventional test, the privilege against self-incrimination outlined by the extreme solution of neutralization of the statement in the detriment of the charged-witness by safeguarding his rights, for the benefit of which the European Court developed and acknowledged the right to remain silent and the right to not contribute to self-incrimination.

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[22] Art. 105 French Criminal Procedure Code, Crim. 18 dec. 1963 în *Code de procédure pénale*, 54e édition, Dalloz Publishing House, 2013, p. 354.

[23] J. Pradel, *Procédure pénale*, 17e édition, Cujas Publishing House, Paris, 2013, p. 694.

[24] Cass. III, 24944/2015 in Sergio Beltrani coord. *Codice di Procedura Penale*, Giuffré Publishing House, Milano, 2016, p. 199.

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THE CONFIDENTIALITY OF THE MEDICAL ACT IN THE DEPRIVATION OF LIBERTY ENVIRONMENT

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Abstract

Respecting the medical secrecy is one of the essential conditions underlying the protection of private life. Medical information obtained from patients in the context of a physician - patient relationship should be protected by confidentiality. Disclosure of personal health care data without the agreement of the person is a touch brought to private life. One particular feature of the health care system is the healthcare provided to patients in detention. Even though the doctor-patient relationship in the penitentiary environment has a number of peculiarities, it is coordinated according to the same ethical principles as in the public one. The penitentiary physician's duty is not limited to consultation and treatment, he often becomes the prisoner's personal physician, and the means of relationship must respect the fundamental rights of the patient, regardless of his or her status.

In the penitentiary system, there are also many dilemmas arising from the duties of the medical staff, the first of the detainee's personal physician and the second of the penitentiary administration's counselor.

The medical specialist in a penitentiary must take into account that communicating with the patient is essential in the doctor-patient relationship and she must be sincere. In determining the attitude of the patient towards the doctor and the medical act, the context of the first contact with the doctor, the way in which the first medical consultation takes place, is of great importance. Trust is gradually gaining, and medical staff must strive to demonstrate that they can ensure the protection of prisoners' medical records.

Keywords*: medical secret, penitentiary, health condition, detainee, secret.*

1. Introduction

Exercising certain professions involves, in many cases, getting the relevant professional from another person to have information about it and which, if disclosed to someone else, could cause injury. All this information obtained by a person in the exercise of his profession or practicing his profession falls within the broader concept of professional secrecy. Professional secrecy, though it seems a simple notion, involves many nuances, involves many facets, determined not only by the multitude of professions / professions in which the obligation of professional secrecy is imposed. But the issue of determining the extent of the obligation of professional secrecy is as old as the secret itself. It was born in the context in which it was obvious that the strict application of the principle of professional secrecy can have disastrous consequences[1].

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[1] Ilie Dumitru, *Legal considerations on medical professional confidentiality, between the obligation to preserve and the obligation to disclose it*, Universul Juridic Magazine, no. 9, 2016, pp. 85-99.

Human health is the ultimate goal of the medical act. The duty of the physician is to protect the physical and mental health of the human being, to alleviate suffering, and to ensure the respect for the life and dignity of the human person, without any discrimination[2].

In order to establish the attitude towards the patient and the medical act, the physician, in the exercise of his profession, prioritizes the patient's interests, whatever the status of the patient. Confidentiality is one of the most important values of the medical act that underlie the doctor-patient relationship, representing, and an obligation, stipulated in olden times, the Hippocratic oath being the basic principle[3]. Hippocrates, the father of medicine, wanted to bring attention to the importance of medical consultation and the status of doctor-patient relationship. This oath that all graduates of a faculty of medicine complete when completing their studies and receiving the right of medical practice and who has become a moral code of any practitioner in the exercise of his / her lifetime profession, gives the moral and ethical view of a physician: Whatever I see and hear while doing my job, or even beyond it, I will not talk about what is no need to be revealed, considering that under such circumstances keeping the mystery is a duty[4]. "

The protection of personal data is a fundamental right enshrined in the Charter of Fundamental Rights of the European Union, in art. 8. These data may be used only for specified purposes and on the basis of the consent of the person concerned or another legitimate reason provided by law.

2. Paper content

In Romania, according to the provisions of art. 21 of Law no. 46/2003 on patient's rights, all information about the patient's condition, the results of the investigations, the diagnosis, the prognosis, the treatment, are confidential even after his death. The exceptions to the confidentiality principle set out in the legislation are: situations where the law expressly requires it, if the information is needed by other healthcare providers involved in the patient's care, if the patient is a danger to himself or if the patient is a danger for public health[5].

Any breach of confidentiality (except as permitted by national or international law) is considered to be a violation of professional secrecy, with legal and criminal legal consequences for the physician[6]. Thus, according to Romanian criminal law "the disclosure, without right, of data or information concerning the private life of a person, capable of causing injury to a person, by the one who has become aware of them by virtue of his profession or function and who has the obligation of confidentiality with respect to these data shall be punished by imprisonment from 3 months to 3 years or by fine[7]."

[2] Extract from the Medical Deontology Code, adopted by the Romanian College of Physicians, published in the Official Journal no. 418 of 18 May 2005.

[3] Mihaela-Catalina Vicol, *The limits of medical secrecy*, available at https://www.ziaruldeiasi.ro/opinii/limitele-secretului-medical~ni4mg2, last access on 29.02.2018.

[4] Ilie Dumitru, *Legal considerations on medical professional confidentiality, between the obligation to preserve and the obligation to disclose it*, published in the Universul Juridic Magazine, no. 9, 2016, pp. 85-99.

[5] Art. 22, Art. 23 and Art. 25 paragraph (2) of the Law no. 46/2003 on patient's rights, published in the Official Journal no. 51 of 29 January 2003.

[6] Sorin Hostiuc, Cristian George Curca, Dan Dermengiu, *Consensus and confidentiality in the medical assistance of women victims of domestic violence*, published in the Romanian Journal of Bioethics, vol. 9, no. 1, 2011, p. 41.

[7] Available at https://legeaz.net/noul-cod-penal/art-227, last access on 29.02.2018.

The legal norms speak with the ethical principles of patient rights before talking about the citizen's right to information, which in any civilized society does not rely on the right to self-determination, privacy and medical secrecy (except where the same rights of other individuals are in danger). Deontological and Legal There is no transparency in medical confidentiality (unless expressly required by the law). The medical domain of information covered by the professional secrecy is not a public domain, the data being accumulated being classified[8].

A special approach to the protection of personal data is highlighted in the deprivation of liberty when there may be suspicion of the application of insufficient measures to respect the individual interests of the persons detained.

For any human being, deprivation of liberty is a special situation with a broad resonance in the living environment, both during and after detention, in freedom[9]. The communication "works" differently in the reference public space compared to the penitentiary. Behind the pillars, the written regulation - as opposed to the initial verbal connotation and subsequently codified social relations - regulates the relations between the surveillance staff, the administration and the detainees, as well as the relationships between the "reeducations[10]".

Penitentiary, in the first phase, requires adaptation and integration to a particular pattern of life, driven by entirely different laws. The establishment of inter-human relations is made after other considerations and under other conditions, the value hierarchy acquires another face, passing through successive deformations to the normal social model, unanimously accepted. Inherent adaptive tensions are accumulated, and often the condemned person will not be aware of the culpability of the act done in the existential sense. The notion of freedom is emptied of content, completely disappearing the feeling of belonging to the social, the desire for active integration. The society that blames is also blamed for denial[11]. The peculiarities of the penitentiary environment and the psychology of the custodial persons impose that in the beginning any contact between the personnel and the detainees should have a specific connotation, the mutual mistrust and only after long periods of probation a complete communication can be established.

Once in prison, detainees have to assign specific identities, from their excluded position they have moral values that are apparently opposed to those of ordinary citizens, which would allow them to regain an honorable identity - "we are simply different from you "- they say[12].

The shock of entering the penitentiary is directly proportional to the pre-existing

[8] George Curcă, *Bioethics legal responsibility in the medical act. Bioethics as medical science. Confidentiality and consensus in medical practice. Aspects of legislation*, available at http://medic-legist.eu/confidentialitate.pdf/, last access on 29.02.2018.

[9] Gabriela-Ioana Gavriluţ, *Sociopsiological explanatory and predictive factors of juvenile delinquency and social reintegration*, unpublished doctoral thesis, University of Cluj-Napoca, Faculty of Sociology and Social Assistance, Cluj-Napoca, 2013, available at http: // www.scritube.com./sociology / environment-penitentiary, last access on 29.02.2018.

[10] Dragoş Cârciga, *Communication in the Romanian concentration area*, published in the ROST Magazine, Christian Culture and Politics Journal, no. 79, 2009.

[11] Ana-Maria Barbu, *Influence of the penitentiary environment on criminal criminology*, p. 3, available at http://drept.unibuc.ro/dyn_doc/publicatii/revista-stiintifica/Influenta-mediului-penitenciar-asupra-criminalitatii-2011.pdf, last access on 29.02.2018.

[12] Léonorore le Caisne, *Prison. Une ethnologue en centrale*, Odile Jacob Publishing House, Paris, 2000, pp. 78-79.

emotional disorder: the more sensitive, the weak, the affective and the socially immature, the sick, in general, suffer the most. Sometime later - a month or two - the victim becomes victimized when the prisoner realizes the magnitude of touch - loss from conviction and begins to imagine the handicap of the legal situation, the failure to satisfy the need for moral, emotional helplessness and dispossession accentuated by the presence the other detainees with whom they can't find affinities at first[13].

During custody, detainees must have access to a doctor at any time, regardless of the detention regime they are subject to. This is especially important when the person has been placed in a solitary confinement regime. The medical service must ensure that the doctor's consultation is promptly performed without justification[14].

Except for emergencies, every medical examination / consultation is done in a medical consulting room to create privacy, privacy and dignity. Medical confidentiality must be guaranteed and respected with the same rigor as the general population. Detainees should be examined individually, not in groups. No third person without medical specialization (other inmates or non-medical staff) should not be present in the examination room[15]. If medical staff who come in contact with prison-guards communicate openly, with a sincere mood to listen to the needs of detainees before asking them, then they will get a positive feed-back, even if not always from the first consultation.

Communicating with the patient is essential in the doctor-patient relationship and she has to be honest. Often, a "good" doctor is considered to be the one who "speaks", "listens" and "counsels", aspects that become visible in front of numerous titles or diplomas of excellence.[16] In the case of a recalcitrant prisoner, the primary objective is that health professionals involved in direct activities with detainees communicate more with those who have problems because it stimulates their confidence, and the prison doctor tries to restore the patient's calm by approaching the patient's demands, juggling with administrative solutions to pacify the patient. Most of the time, it is NOT necessary or appropriate to ask the inmate who is at risk, about his intentions of self-harm, in conversations that medical staff has with him.[17] The consulting cabinet is the place where the patient expands his or her suffering, and this applies to detainees, and for the physician, this is the most important opportunity to establish the diagnosis and treatment, as well as the physician-patient confidentiality relationship.

In the penitentiary, as in another small community, the doctor occupies a special position, recognized both by the status imposed by his profession and by his personality, through which he gains his social prestige.

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[13] Sociology Course *Specialized penitentiary intervention*, p. 6, available at https://biblioteca.regielive.ro/cursuri/sociologie/interventie-specializata-in-penitenciar-222795.html, last access on 29.02.2018.

[14] Andres Lehtmets, Jörg Pont, *Prison health care and medical ethics – A manual for health-care workers and other prison staff with responsibility for prisoners' well being*, 2014, Strasbourg, p. 12, available at https://rm.coe.int/publications-healthcare-manual-web-a5-e/16806ab9b5.

[15] *Ibidem.*

[16] Mihaela-Catalina Vicol, *The limits of medical secrecy*, 13.03.2008, available at https://www.ziaruldeiasi.ro/opinii/limitele-secretului-medical~ni4mg2, last access on 18.01.2018

[17] Dana Făget, Cristina Pripp, Udrea Carmen – Elena *Clinical Manual of Violence Risk*, National Administration of Penitentiaries in Romania, ALFA Publishing House, Iasi, 2015, pp. 78-79.

The physician's activity is, in this environment, governed by the deontology of his profession, embodied in the set of the behavioral norms of reference.[18] The International Code of Medical Ethics states that "a doctor will keep absolute secrecy about everything he knows about the patient, regardless of his or her status, because of the patient's trust[19]."

The detainee seeks medical assistance by virtue of an acquired social role, such as sick, a role that may be temporary or permanent.

There are four features of the patient in the detention environment:

- Disease can offer the patient the possibility of diminishing tasks and responsibilities; he may gain certain rights, the healing occurring in such cases at the end of the detention;
- the patient does not want healing, he / she asks to confirm the affection he suffers, there is a tendency to exaggerate or to refuse the relationship with the physician who denies the alleged affection;
- Not all patients want to heal because the role of the patient and, implicitly, the rights they gain benefit from them[20];

In the detention environment, the situation where the patient asks the doctor to confirm a certain diagnosis, as well as the prescription of a certain treatment. In this way, the character of the disease is deviant, the disease state of the patient is illegitimate, and the doctor-patient relationship can become conflictual.

In such situations, the physician must maintain a balance between helping and refusing, advising the authorities or continuing the confidential relationship. However, and in this context, the patient must be protected and his / her personal information passed to the physician must remain confidential in accordance with the legal provisions. In this regard, the physician helps the patient for his pathological condition, refusing him for the side that gives him rewards resulting from the disease state, proving to him that the disease state can't be exploited. Thus, the legislator wanted these issues to be foreseen in the executive - criminal law. By art. 72 of the Law no.254 / 2013 on the execution of sentences and deprivation of liberty ordered by the judicial bodies during the criminal trial, it is stipulated that "the medical examination is carried out in confidentiality conditions, with the provision of safety measures, respectively, the presence of the surveillance staff is performed only at the request of the medical personnel (in the case of dangerous detainees, violent, with a history of attack on personnel). But also in this context, detainees should not be handcuffed during the consultation, and surveillance staff should be outside the field of vision and sound when conducting medical examination.

In order to ensure confidentiality, in these cases medical shields are used in front of the consultation bed for the protected medical examination. However, the Council of Europe's Committee on the Prevention of Torture and Inhuman or Degrading Treatment (CPT), in its visits to Romania, has brought to light cases of privacy violations due to the presence of surveillance staff in the consulting cabinet. Another

[18] Constantin Ouatu, Beatrice Ioan, Diana Bulgaru Iliescu, *Doctor-patient relationship in the detention environment*, available at http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/344, last access on 29.02.2018.

[19] Mihaela-Catalina Vicol, *The limits of medical secrecy*, 13.03.2008, available at https://www.ziaruldeiasi.ro/opinii/limitele-secretului-medical~ni4mg2, last access on 18.01.2018.

[20] Constantin Ouatu, Beatrice Ioan, Diana Bulgaru Iliescu, *Doctor-patient relationship in the detention environment*, available at http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/344, last access on 29.02.2018.

aspect of privacy is the protection of medical records.

According to the provisions of art. 60 of the Law no.254 / 2013 on the execution of sentences and deprivation of liberty ordered by the judicial bodies during the criminal trial "the personal data of convicted persons are confidential, according to the law"[21] even the lawyer or relatives can obtain, data or photocopies related to the medical history, only with the written consent of the convicted person[22]. Thus, medical staff in penitentiaries has all the necessary measures for all medical records to be kept in places that ensure confidentiality, and when presenting to medical investigations outside the penitentiary system or when transfers between prison units are made, the medical file is presented confidentially, in a sealed envelope.

However, in the penitentiary system, there are many dilemmas arising from the duties of the medical staff, the prisoner's personal physician and, respectively, the penitentiary administration's counselor. For example, the request from the penitentiary management to provide surveillance staff, knowledge of inmates diagnosed with HIV / AIDS may be a conflict with the interest of the patient who has the status of detained. In this case, the doctor is faced with a dilemma if he can consider the detainee in his / her book as HIV / AIDS as a danger to public health, given the aggressiveness of such detainees through acts of violence against the staff , blood splashes, bites, etc.), or need to protect the patient by refusing to supply a diagnosis.

We mention that, in the Romanian legislation through the provisions of Law no. 584/2002 on measures to prevent the spread of AIDS in Romania and to protect persons infected with HIV or AIDS patients, stipulates in Article 8 the obligation of confidentiality of data for these patients:

"Keeping the confidentiality of data on HIV-infected or AIDS-sick people is mandatory for: health care staff; employers of these people; civil servants who have access to these data.

Also, in connection with the transfer of detainees with infectious-contagious diseases through the means of transport of the penitentiary system, there were invoked situations of affecting the safety of the transfer missions on the grounds of contagious diseases.

We reiterate that the Patient Rights Act no. 46/2003 (Articles 21 and 22) and the Order of the Minister of Health no. 1410/2016 on the approval of the Rules for the application of the Patient's Rights Law no. 46/2003 (Article 11 (2) and Annex 5 to the Rules) clearly state that medical data may only be communicated with the consent of the patient and only to persons expressly designated by him (to this end, it is not permitted to disclose the diagnosis on documents to which several non-specifically identified people have access). The fact that most infectious-contagious diseases have a high stigmatization and discrimination potential once again supports the need to respect medical confidentiality in the penitentiary environment.

In this condition, even in art. 166 par. (1) GD no. 157/2016 for the approval of the Regulation on the application of Law no. 254/2013 on the execution of sentences and detention measures ordered by the judicial bodies during the criminal proceedings regarding the "Confidentiality of the data regarding the state of health of detainees" stipulates:

[21] Art. 60 para. (8) of the Law no. 254/2013 on the execution of custodial sentences and measures involving deprivation of liberty by the judiciary in the course of criminal proceedings, published in the Official Journal no. 514 of 14 August 2013.

[22] Art. 60 para. (5) of the Law no. 254/2013 on the execution of custodial sentences and measures involving deprivation of liberty by the judiciary in the course of criminal proceedings, published in the Official Journal no. 514 of 14 August 2013.

"Except the cases expressly provided for by law, health information may be provided to other persons only if the detainees or their legal representatives give their consent free, informed, in writing and in advance." In order to effectively protect the health of staff and prisoners and respect for the confidentiality of medical data, diagnostic codes were used for a short period of time, according to the International Classification of Diseases, WHO revision 10, but from practice that the use of disease codes is by no means a way of secrecy but, on the contrary, coding is done in order to find a faster (and, implicitly, more superficial) diagnosis of a patient.

Early knowledge of a prisoner's infectious status is not a means of protecting the health of the staff, as there are no legal provisions whereby operational incidents are managed differently from infected individuals to healthy ones and the separation criteria can not be decided by the members of the escort, who do not have medical training (even if they know the real diagnosis) [23].

Thus, this configuration was rethought and regulated in the Romanian penitentiary system, by cataloging the detainees as "medical-surgical vulnerable cases", so that the surveillance staff must ensure protection measures in all cases of contact directly with any detainee.

Another issue underlying the confidentiality of professional secrecy is found in the obligation of medical staff to advertise when prison services are abusive, immoral or inmates are subjected to ill-treatment, which poses a potential danger to their lives and health[24].

In such cases, even if the detainee refuses to recognize the abuse for fear of possible repercussions, the medical staff has an ethical obligation to take prompt action, since failure to take an immediate position makes it more difficult to object at a later stage[25]. International codes and ethical principles require reporting of torture or ill-treatment information to responsible bodies[26]. In the Romanian penitentiary system, this aspect is a legal requirement, so if he / she finds evidence of violence or the convicted person is accused of violence, the doctor conducting the medical examination has the obligation to record in the medical record the findings and the declarations of the convict in connection with or any other aggression, and to immediately notify the public prosecutor[27].

Another view on the confidentiality of medical data is that of disclosure after the patient's death. This approach is different in the Romanian penitentiary system compared to the national system. If in the matter of the death of a person at large, the national legislation states that "all information on the patient's condition, the results of the investigations, the diagnosis, the prognosis, the treatment, the personal data are confidential even after his death[28], the implementing law - 52 par. (3) of the Law no. 254/2013 on the execution of sentences and detention measures ordered by the

[23] Internal Note Dr. Laurenţia Ştefan (Director of the Medical Directorate - National Administration of Penitentiaries and Dr. Cosmin Decun - Head Physician Timişoara Penitentiary) at the Department of Prison Safety and Penitentiary Regime - National Administration of Penitentiaries no. 51084 / 11.09.2017 regarding the deficiencies found in deployments transfer of detainees published.

[24] *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (also known as "*The Istanbul Protocol*"), adopted by the United Nations, 2004, p. 23, pts. 72-72, available at http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf, last access on 29.02.2018.

[25] *Idem.*

[26] *Idem.*

[27] Art. 72 para. (3) of the Law no. 254/2013 on the execution of sentences and detention measures ordered by judicial bodies during criminal proceedings, published in the Official Journal no. 514 of 14 August 2013.

[28] Article 21 of Law no. 46/2003 on patient rights published in the Official Journal no. 51 of 29 January 2003.

judicial bodies during the criminal proceedings that "the spouse or a relative up to the fourth degree or any other person designated by them has access to the individual file, the medical certificate of death and any other act related to the death of the convicted person and can obtain, upon request, photocopies thereof, on request.

In this case, the principle of knowing the truth about the right to health is a matter of professional secrecy. The primary task of a prison doctor and other healthcare workers to ensure the health and welfare of detainees must be highlighted.

3. Conclusion

The physician-patient relationship materializes, in most cases, through a special relationship, a certain type of affective relationship.

One of the most important issues in the doctor-patient relationship - especially at the beginning but not only - is communication, which is influenced by many factors. One of the special circumstances that influence this relationship is the situation of the patient whose status is offender who executes his custodial sentence. The penitentiary environment is a special environment with specific requirements, and communication in this environment is essential.

In the patient-patient relationship, the personality of the patient is very important, but equally important is the personality and attitude of the doctor towards the patient, by the way of being the doctor, the patient being converted into believing in the value scale of the first and adopt them.

The meeting between the doctor and the patient is a meeting between two different personalities who are in different positions and who take place in different stages, which is why - during the course of the relationship - the tendency must be balancing by adapting the ideas, expectations, parties to those of the other party in order to gain confidence and then medical confession. The doctor-patient relationship detained leaves free personal trends, unconscious feelings, beliefs and prejudices. The patient must be given protection and models to develop his / her potentials so that he / she can cope with changes in his / her existence. It is important that he does not consider himself an object, as there is a risk when he enters the penitentiary system. Respect for confidentiality is essential in order to provide the atmosphere of trust that is required for the doctor-patient relationship; it is the duty of the physician to ensure such a relationship and to decide on how to observe confidentiality rules in a particular case. A doctor in the penitentiary performs his duties as a personal physician of a patient. Health professionals need to look for solutions that promote justice without violating the person's right to privacy[29].

[29] Andres Lehtmets, Jörg Pont, *Prison health care and medical ethics – A manual for health-care workers and other prison staff with responsibility for prisoners' well being*, p. 12, available at https://rm.coe.int/publications-healthcare-manual-web-a5-e/16806ab9b5, last access on 29.02.2018. The Romanian version is published with the financial support of the Council of Europe Project "Supporting the Criminal Justice Reform of the Council of Europe Project", "Supporting the Reform of Criminal Justice in the Republic of Moldova", financed by the Government of Denmark, p. 12.

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THE ROLE OF THE ATTORNEY WITHIN THE LEGAL DEBATE DURING A CRIMINAL TRIAL

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Abstract

The attorney, during the criminal trial, endeavours to help his client in any way possible, by utilising a most complex legal arsenal so as to win the debate between the accusation and the defence. The criminal trial often involves very high stakes for the parties involved, which may incur some difficulties in maintaining a normal dialogue until its completion. Thus, the lawyer must step in to facilitate this dialogue, in helping the judge to determine the relevant issues which require a most thorough analysis, so as to ensure that the client receives a fair trial. In fulfilling this objective, he must concentrate his speech on only the key issues and present only relevant conclusions. Failure to do so may result in a dismissal of all his arguments, instead of merely the non pertinent ones. The risk is evident and proper measures need to be taken, in order to minimise it, so that ultimately the judge may grasp the situation accordingly. The aim of the article is to shed some light on the issue at hand, by establishing some good practices which may significantly aid in expressing the viewpoint of the accused to the court in the manner which best fits the needs of the client.

Keywords: *attorney's role, criminal trial, duty, power of attorney.*

1. Introduction

1.1. What matter does the paper cover?

The paper deals with the many problems which may arise in practice due to the fact that the legal debate during a criminal trial presents more challenges for all parties involved.

It shall focus on outlining several usefuls courses of action for the attorney, in circumventing the most common impediments which may prevent him from exercising his duties to the best of his abilities.

1.2. Why is the studied matter important?

The studied matter is very important given the fact that judicial errors can sometimes be made in the context of an improper legal debate. It thus falls on the attorney to utilise the best means available in order to facilitate the exchange of opinions between himself and the judge in order to prevent any potential problems. The paper shall offer an analysis of the main legal texts applicable and try to establish some useful guidelines to properly employ them.

1.3. How does the author intend to answer to this matter?

Upon a thorough analysis of the legal applicable texts and the views of well

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renowed legal authors, it is hoped that certain good practices may be identified.

Thus. the recipients of the message may receive potential solutions to the problems which may arise from contradictions between the laws which regulate the procedure.

1.4. What is the relation between the paper and the already existent specialized literature?

The paper shall endeavour to add to the perspectives on the matter at hand expressed in the specialised literature. The authors whose opinions will be integrated in the paper are well known and have managed to offer interesting views regarding the issue. Thus the task of improving on their perspective is that much more daunting. Nonetheless, the article is to establish some useful observations regarding the challenges of ensuring that the rights of the client are respected without infringing upon any legal texts, including the Statute of the lawyer.

2. The legal applicable texts and opinions of some proeminent legal authors

2.1. The Criminal Procedural Code

Firstly, our national Criminal Procedural Code[1] outlines the legal framework regarding the role of the lawer during the debate int the criminal case in: **Article no. 88** -" *The lawyer **assists or represents**, in the criminal proceedings, the parties or the main procedural subjects, **according to the law***. "-; **Article no. 92** - "*…During the preliminary and trial proceedings, the lawyer has the right to **consult the case files**, assist the defendant, **exercise his procedural rights, make complaints, requests, memos, exceptions and objections**… The attorney of the suspect or defendant has the right to benefit from the time and facilities necessary to prepare and carry out an effective defense.*"-; **Article no. 109** -" … *The suspect or defendant has the right to **consult with the lawyer both before and during the hearing**, and the judiciary may, when he considers it necessary, allow him to use his own notes and personal writings*… "; **Article no. 129** -"*… The principal procedural subjects, their parties and their lawyers may **address questions to the witness interviewed under para. (1)***… "-; **Article no. 378** -" *…The defendant is allowed to express everything he knows about the act for which he was sent to trial, then the prosecutor, the injured party, the civil party, the civilly responsible party, the other defendants, **as well as their lawyers and the defendant's lawyer who is being heard**…*"; **Article no. 388** - " The debates and the order in which the word is given *(1) At the end of the judicial inquiry the debates shall be debated with the following order: the prosecutor, the injured party, the civil party, the civil responsible party and the defendant(2) The President may also **grant the word in reply.** (3) The **duration of the conclusions** of the prosecutor, the parties, the injured person and their attorneys **may be limited**....* "-

2.2. Law no. 51/1995 Published the Oficial Journal of Romania no. 98 of 7 February 2011

The analisys shall also focus on the the lawyer's rights and obligation, as stated in the provisions of his statute, as established by Parlament.

Key aspects fall under article **Article no. 2** -" … In the exercise of his profession, the lawyer is independent **and is subject only to the law, the statute of the**

[1] Law no. 135/2010 regarding the Criminal Procedure Code, published in the Oficial Journal of Romania no. 486 of July 16, 2010.

profession and the code of ethics… In the exercise of the right of defense, the lawyer has the right and the duty to enforce the free access to justice for a fair trial **which is to last a reasonable amount of time**. "-; **Article no. 39** -" … The lawyer shall not be liable for the oral or written claims, in the appropriate form and in compliance with the provisions of paragraph (2) before the courts, …if they are done **in compliance with professional deontology rules**… It is not a disciplinary misdemeanor nor can any other legal form of legal liability be attributed to the **lawyer's legal opinions, the exercise of rights, the fulfillment of the obligations provided by law, and the use of legal means to prepare and effectively defend the legitimate** freedoms, rights and interests of his clients. "-; **Article no. 86** -" The lawyer shall be **liable to disciplinary action for failure to comply with the provisions of the present law or statutes**, for failure to comply with binding decisions adopted by the governing bodies of the Bar or the Union and for any acts committed in connection with the profession or outside the profession which are detrimental to the honor and the prestige of the profession, the body of lawyers or the institution.... "-.

2.3. High Court of Cassation and Justice case law

Finnaly, the High Court of Cassation and Justice[2] has expressed in its Appeal in the interest of the law no. 15 of 21 September 2015 formulated by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice regarding the unitary interpretation and application of the provisions of art. 348 of the Criminal Code, in the case of exercising activities specific to the profession of lawyer by persons who are not part of the forms of professional organization recognized by Law no. 51/1995 that " *in interpreting and applying the provisions of art. 348 of the Criminal Code states: "The act of a person exercising activities specific to the profession of lawyer within entities not belonging to the forms of professional organization recognized by Law no. 51/1995 on the organization and pursuit of the profession of lawyer, republished, as subsequently amended and supplemented,* ***constitutes the offense of exercising a profession without right or activities provided by art. 348 Criminal Code***."

2.4. The opinion of the legal authors

Adrian Tony Neacșu[3] has expressed his reservations concerning the emphasis on the style of speech instead of on the need for the lawyer to focus on merely conveying the relevant facts of the case and his view on the applicability of the legal texts. His role is not to win a speech contest, but to use the allotted time as efficiently as possible and express as much useful insight as he can.

Some other authors[4] have expressed the idea that " The right to defense is a judicial function exclusively for the lawyer, of crucial importance in achieving impartial justice and a fair trial, **even though this judicial function is not currently expressly regulated in the Code of Criminal Procedure.** ".

[2] Decision no. 15 of 21 September 2015 of the High Court of Cassation and Justice.

[3] Neacșu, Adrian Toni, (2014), *Convinge judecătorul.Tehnica și arta convingerii instanței* [Convince the judge. The technique and art of persuading the court], Wolters Kluwer Publishing House, Bucharest pp. 255-256.

[4] RADU, Casandra (2016), *Consilieri juridici vs. avocați. Avocați pentru avocați și avocați în apărarea consilierilor juridici* [Legal advisers vs. Lawyers. Lawyers for lawyers and lawyers for legal advisers], juridice.ro. https://www.juridice.ro/417931/consilieri-juridici-vs-avocati-avocati-pentru-avocati-si-avocati-in-apararea-consilierilor-juridici.html.

Indeed, as it has been pointed out, there are some aspects which may not have been properly and expressly emphasized in the Code of Criminal Procedure, but this is an opportunity to lay the steps for proper relations between the accused and the state with the aid of the attorney.

In the treaty written under the coordination of the late Vintilă Dongoroz[5], the main guideline which is to be followed by the lawyer, consists in doing all that he can in order to aid the party he represents, within the limits of the law and the powers that have been granted to him. In order to achieve this, he may exercise the right to come into contact with the accused, and should the accused request it, the right becomes an obligation for the lawyer[6].

Some rights of the accused may be exercised only personnaly, such as the refusal to make any statements, or to have the last statement in the trial[7].

However, it is important to note that in the last example, exercising his duties may mean interrupting his own client when he may incriminate himself.

Mihail Udroiu[8] has also analysed the difficult role of attorney. He considers that the presence of the lawyer during the proocedings is a guarantee of the right to a fair trial, protected by article 6 of the Europeean Convention on Human Rights and also article 3. In cases in which the court appointed attorney is incapable of mounting a proper defence, the defendant may solicit his replacement or that he be jointed by yet another counsellor[9].

3. The interpretations of the author

Firstly, in regards to article **88** of the Criminal Procedural Code, it is crucial to note that the most important obligation of the attorney is to obey the law. No matter how useful for the client would be to invoke certain articles, make unfounded requests to the court, solicit certain witnesses to be heard, despite the evident impossibility in this respect, the primary obligation for the lawyer is to act in full accordance with our legislation.

Indeed, there have been cases in which the lawyer has requested the court to solicit the point of view of the Constitutional Court of Romania in regards to certain legal provisions which may be relevant to the final solution.

Given the fact that once our laws made it mandatory for the court to suspend the entire proceedings until a point of view was presented by the Constitutional Court of Romania on the specific matter at hand, some defendants have greatly benefited from the statute of limitations in their cases, with the court ending the case with an acquittal.

This course of action of postponing the case as often as possible may provide the party with significant advantages - memory loss for witnesses for the prosecution- but it should be noted that it is also in complete defiance of Article 88 and also article 2 of Law no. 51/1995: " *In the exercise of the right of defense, the lawyer has the right and*

[5] Dongoroz, Vintilă, coordonator, *Explicatiile teoretice ale Codului de procedura penala roman. Editia 2. Volumul V,* [Theoretical explanations of the Romanian Criminal Procedural Code], Ch Beck Publishing House Bucharest, p. 94.

[6] Dongoroz, Vintilă, coordinator, *Explicatiile teoretice ale Codului de procedura penala roman. Editia 2. Volumul V,* [Theoretical explanations of the Romanian Criminal Procedural Code], Ch Beck Publishing House, Bucharest, p. 352.

[7] Dongoroz, Vintilă, coordinator, *Explicatiile teoretice ale Codului de procedura penala roman. Editia 2. Volumul V,* [Theoretical explanations of the Romanian Criminal Procedural Code], Ch Beck Publishing House, Bucharest, p. 353.

[8] Udroiu, Mihail, *Procedură penală. Partea generală. Ediția 3,* [Criminal Procedure. General Aspects. Third Edition], Bucharest, 2016, Ch Beck Publishing House, p. 48.

[9] Udroiu, Mihail, *Procedură penală. Partea generală. Ediția 3* [Criminal Procedure. General Aspects. Third Edition], Bucharest, 2016, Ch Beck Publishing House, p. 790.

the duty to enforce the free access to justice for a fair trial ***which is to last a reasonable amount of time***.". Thus, there are certain conflicting issues which stem from the provisions previously indicated, given the necessity for the lawyer to walk a very fine line in terms of avoidind potential infringements.

As to article **92** of the Criminal Procedural Code, it is paramount to note the fact that the attorney should always struggle to receive the needed time in order to mount a most proper defence. There will be cases with an enormous amount of paperwork. He should strive to use the technology available in his favour. High quality fotographs should be taken of the key aspects of these cases, combined with Optical Character Recognition technology aimed at turning the photos into editable text. Thus, sifting through the mountains of information in high complexity cases should prove more feasible.

In regards to Article no. **109,** he should conduct a careful analysis of the aspects which may be revealed during the hearing of the defendant. He has to always be ready to interrupt his client's testimony, should it become damaging for the defence. When the evidence is clearly leading to a guilty verdict, he should seize the opportunity to solicit the applicability of Article no. 375 of the Criminal Procedural Code. He ought to address the proper questions to his client and lead the client into focusing on the key issues during the actual testimony, without any potential deviations. The client, during the stage of the testimony when he freely expresses his point of view, should be guided by the lawyer in order to prove the positive and determined facts, the positive undetermined facts and the negative determined facts. The outcome of the efforts should result in conveying to the court that he is innocent or that he never was near the crime scene.

Article no. **129** of the Civil Procedural Code is equally important in this respect. Here, the role of the lawyer is to address as many control questions as possible to the witnesses in order to establish whether or not they were actually at the time of the crime and have also properly perceived the events. This can be done in a very simple manner, like asking what sort of garment was the defendant wearing at the key moment and presenting survellaince pictures from the local bank which may depict a very different picture. His duty is to challenge the credibility of the witness when his testimony is damaging for the defence but also to enforce the testimony of the defence witnesses in order to convince the court. Of great importance is to constantly corroborate in his mind all the evidence presented before the court in order to gain a proper insight on the needed course of action.

Article no. **378** of Criminal Procedural Code should be interpreted in the sense that the main objective of the defence counsel is to focus on the alibi of the defendant. He should always strive to provide a most compelling alibi, no matter how circumstantial the accusatory evidence is or how poorly the case is being handled by the prosecutor. It is not a question of an infringement to the right to be considered innocent until proven guilty, but coming forward before the court is also useful. A proper collaboration during the trial may lead to a more mild sentence, should the unexpected occur and a conviction be passed.

In regards to Article no. **388** of the Criminal Procedural Code there should be noted that in this stage of the trial lies the pinnacle of the defence efforts. The defence speech should be as pertinent as possible. Little time should be allotted for emotional arguments. It is highly likely that the judge is usually impervious to such attempts. Instead, ample efforts should be directed

into the facts of the case and why the prosecutor has failed to unequivocally prove the guilt of the accused. Should the facts be clear, the focus should be on the interpretation of the legal texts, in addressing the necessity for the court to apply only those relevant to the case. After these stages, the punishment and other legal measures that are to be taken shall mandatory complete the list of obligations for the lawyer. No other aspects should be addressed, such as offering irrelevant examples. The speech can be completed by the supportive case law, in order to aid the judge in maintaining a unitary judicial practice.

Relevant to this article is the strategy employed by some attorneys to bombard the court with conclusions, exceptions, requests, recusations, many of which failing to address relevant matters. This option is very dangerous for the client, since the judge, after trying to select the most pertinent aspects, may fail to notice some of them, due to the overwhelming amount of inapplicable information to the case in particular. This practice is very damaging to the cause of the defendant and the reputation that usually accompanies the lawyer can in no way usefully serve future clients.

As to Article no. **2** of Law no. 51 of June 7, 1995 it is imperative to readdress the issue of artificialy prolonging the length of the trial by means of procedural or substancial law based strategies. Indeed, the fact that the client can benefit from the statute of limitations for his crime is a clear indication of fulfilling the duty of providing a most useful defence. However, so is falsifying evidence to serve one's needs and witness tampering. These means can never justify the end. The counsellor is obligated to abide by the legal provisions and his legal statute. Clients shall always come and go, but committing a crime to serve their interests or damagind one's reputation can never be a valid course of action.

Article no. 39 can be viewed as a safeguard for the lawyer, free to emit his opinion on the matter at hand. However, evident difficulties may arise from its interpretation. This freedom can lead to dissservices for the client. As previously indicated, there are cases in which the lawyer expresses his opinion over the course of multiple pages and during very long debates. Indeed, the court is able to limit such interventions, but these practises should be discouraged. In the instances when the opinion of the lawyer is severely irrelevant and also the length of the arguments is unreasoanable, certain measures should be undertaken in order to limit this type of practice. Over the long run, its effects are severely damaging for a large number of clients who receive defences which span over dozens of pages but out of which extremely little actually aids their cause.

Another aspect of interest is that of the obligation to ensure all that he can do to allow for a trial which lasts a reasonable amount of time. In the examples previously mentioned, the length of the proceedings is unorganically altered, in violation of article 2 of Law no. 51 of June 7, 1995.

Article no. **86** of Law no. 51 of June 7, 1995 thus becomes applicable in this particular case, since the attorney, in attempting to provide a most complex defence, fails to respect article no. 2. Indeed, the solution of disciplinary action should be employed with the utmost consideration, but in some cases in which the mannor of the proceedings has reached a very alarming level, in ensuring the right to fair tiral for future clients, the practice should receive due attention and proper sanctions. A proper fulfilment of his role can never allow for any deviation of the main goal of offering a most

pertinent opinion for the judge and not bombarding him with useless information.

4. Conclusions

4.1. Summary of the main outcomes

It is evident that the more rules and regulations exist, the easier it is for the counsellor to be in situations where they contradict. The main focus of the article was to identify the ones which may seem more problematic.

As for the aspects which derive from the interpretation of the Criminal Procedural Code, it is important to point out that any requests made during the trial should be as pertinent as possible. The legislation has been modified, soliciting the opinion of the Constitutional Court of Romania no longer attracts a mandatory suspension of all proceedings. But that does not mean that there could be some judges who could interpret the law in such that a way that they see no impediment in suspending. So, requesting the suspension could mean an act of defence, in accordance with Article no. 39, but in violation of Article no. 2 of Law no. 51/1995.

Mounting a proper defence may sometimes mean advising the client not to offer testimony. The importance of knowing when to proceed in this manner and when to employ Article no. 375 of the Criminal Procedural Code cannot be stressed enough. The flair of the lawyer is revealed most often in the way in which he choose which legal battles to engage in. Refusal to capitulate may seem very heroic, but his role in the debate can sometimes mean that embracing defeat is the most useful option for the client.

In regards to witness testimony, the lawyer should always prepare several control questions which may help the court decide on the credibility of the person who is being questioned. He should always ask the witness whether or not he is sure of what he has expressed. Any waverings are always beneficial for the accused.

He should always focus on the alibi and how the facts of the case relate to the facts presented by the defendant since any uncorroborated pieces of evidence cannot justify the conviction.

Every single time a reasonable amount of doubt can be prooven, every single time some key aspects do not relate to one another, it is mandatory for the court to interpret the evidence in the favour of the defendant. It is here the role of the attorney is of the utmost importance, since most cases are not clear. The court cannot proceed to imprison a person if it is not certain of the evidence presented before itself. Indeed the lawyer should sometimes avoid creating too much doubt since the judge may overwhelmed by too much stimuli and overview some key aspects regarding the defence.

Thus it is of great importance that the ending speech for the accused be as shortest possible and it should also integrate all that is useful in viewing the case from the perspective of the defendant. Failure to refrain oneself from providing the judge with too much unnecessary information may be extremely detrimental to the client. In the long term a significant number of individuals could pay a far too high cost for this error in strategy. It is better to be clear in making one's point, especially in cases where the stakes are so high.

Finally, artificially prolonging the duration of the trial can never be a winning strategy. It can also be very stressful for the client to wait years and years to receive a solution from the court. In preventing this, the lawyer should always endeavour to respect the provisions of Article 2 of law number 51/1995 in regards to a reasonable duration the the trial.

4.2. The expected impact of the research outcomes

The article shall hopefully facilitate an improved communication between the lawyer and the court, in ensuring a proper defence of the fundamental rights of the accused. It is hoped that it shall inspire new research regarding the matter at hand in establishing even more correct courses of action in the interpretation and application of the articles previously analysed.

4.3. Suggestions for further research work.

New research could offer a multidisciplinary approach on the subject, by utilising aspects of Psychology and Philosophy in order to present a more complex perspective.

It could also establish *de lege ferenda* proposals in modifying the content of some of the articles analysed above in order to avoid potential contradictions between the legal texts so that the role of the attorney be simplified.

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