MINISTERUL EDUCAȚIEI NAȚIONALE
UNIVERSITATEA ROMÂNO-AMERICANĂ
FACULTATEA DE DREPT

INSITUŢII JURIDICE CONTEMPORANE ÎN CONTEXTUL INTEGRĂRII ROMÂNIEI ÎN UNIUNEA EUROPEANĂ

CONFERINȚĂ CU PARTICIPARE INTERNAȚIONALĂ

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Cuprins

GOVERNMENT REGULATION VS. FREE ENTERPRISE
James K. McCollum 11

FALSE DOCUMENTATION IN EASTERN EUROPE: ITS IMPLICATION FOR UNIVERSITIES
Stephen R. Bowers 14

PERSPECTIVE ASUPRA SCHIMBĂRII. OPINII ALE STUDENȚILOR UNIVERSITĂȚII ROMÂNO-AMERICANE DESPRE ÎNVĂȚĂMÂNTUL JURIDIC
Mihaela Prună, Robert Popescu 20

REGULATIONS OF THE NEW CODE OF CIVIL PROCEDURE ON SOLVING DISPUTES WITH CELERITY
Florea Măgureanu 35

PRESENT LEGAL ASPECTS REGARDING UNFAIR COMPETITION
Florin Sandu, Anca-Elena Bălăşoiu 44

QUELQUES CONSIDERATIONS SUR LES INTERMEDIAIRES D'ASSURANCE
Veronica Stoica 50

TAX CLAIMS. DETERMINATION AND COLLECTION ACCORDING TO RECENT REGULATIONS IN THE TAX PROCEDURE CODE
George Măgureanu 54

COMPETITION LAW & HUMAN RIGHTS PROTECTION: CONTROVERSIAL NEW DIMENSIONS
Ksenya Smyrnova 65

ASPECTS OF THE FIGHT AGAINST THE TRAFFIC AND CONSUMPTION OF DRUGS
Lidia Simona Seceleanu 70

ENFORCEMENT IN TIME OF THE CRIMINAL LAW IN RELATION TO THE NEW CRIMINAL LEGISLATION
Constantin Duvac 76

ESTE NEVOIE DE SCHIMBARE ÎN ÎNVĂȚĂMÂNTUL JURIDIC? OPINII ALE STUDENȚILOR LA FACULTĂȚI DE DREPT DIN ROMÂNIA
Robert Popescu 93

DEZVOLTAREA DREPTURILOR OMULUI DIN PERSPECTIVA NOILOR TEHNOLOGII
Mădălina Virginia Antonescu 97

AUTHENTIC INSTRUMENT – MEANS LEGAL PROTECTION OF PROPERTY RIGHTS
ATTRIBUTES GRANTED BY THE NEW CIVIL CODE AND THE NEW CIVIL PROCEDURE CODE
Gabriela Chiran, Ion Flămînzeanu 109

THE REASONABILITY OF CIVIL PROCEDURE TERMS CONTAINED IN THE LEGISLATION OF THE REPUBLIC OF MOLDOVA
Clima Vladislav, Eleonora Badan-Melnic 119

THE RIGHT OF EASEMENT ON GOODS FROM THE ENERGETICAL FIELD
Mariana Bordian 126

THE MECHANISMS OF ADMINISTRATIVE DOCUMENTATION IN ELABORATING OF ORGANIZATIONAL DOCUMENTS AND DOCUMENTS OF DISPOSITION
Cristina Cernega 131

ENVIRONMENT CRIMINAL LAW IN TODAY EUROPEAN UNION
Ion Flămînzeanu 140

SOME NOTES ON THE DUTY OF THE ASSOCIATES OF A LIMITED LIABILITY COMPANY TO PAY UP CONTRIBUTION TO THE REGISTERED CAPITAL
Olga Tretiacov 145

LES ASPECTS HISTORIQUES DU DÉVELOPPEMENT DES INSTITUTIONS DU DROIT D'USUFRUIT, USAGE ET D'HABITATION
Violeta Chisilița 152

THE RIGHT TO A FAIR PROCESS IN VIEW OF NEW CHANGES OF CIVIL PROCEDURE CODE OF RM
Gheorghe Postolachi 161

THE PARTICULARITIES OF ADMINISTRATION PUBLIC PROPERTY OF LOCAL COLLECTIVITIES
Gheorghe Guțu 165

INTERPRETATION OF TERMS IN INSURANCE CONTRACTS. UNFAIR TERMS
Andreia Dobrescu 172

RAPORTUL DINTRE PROTECȚIA MEDIULUI ŞI DREPTURILE OMULUI
Cătălin Eugen Popescu 175

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN THE REFERENCES FOR PRELIMINARY RULINGS SUBMITTED BY NATIONAL COURTS
Mihaela Vrabie 181

RESPECTAREA DREPTURILOR OMULUI LA NIVELUL ȚĂRILOR MEMBRE AL UNIUNII EUROPENE
ANALIZĂ COMPARATIVĂ
Adela Alexandra Marin (Simedrea) 189

INCREASING EFFICIENCY IN INTERNATIONAL ARBITRATION
Cristina Florescu 194

MĂSURI SPECIFICE DE PREVENȚIE ŞI COMBATERE A CRIMINALITĂȚII FEMININE LA NIVEL NAȚIONAL ŞI EUROPEAN
Anca-Elena Bălăşoiu 206

ASPECTE ACTUALE PRIVIND PROCEDURA CONTESTAȚIEI LA EXECUTARE ÎN CAZUL BILETELOR LA ORDIN ŞI A ALTOR TITLURI DE CREDIT
Alexandru Cristian Roşu 212

COPYRIGHT AND THE RIGHT TO FREEDOM OF EXPRESSION IN THE KNOWLEDGE SOCIETY
Teodor Chirvase 218

CONFISCATION OF CRIMINAL PROCEEDS IN THE EUROPEAN UNION CRIMINAL LAW
Mihaela Agheniței 232

TRANSPUNEREA DIRECTIVELOR EUROPENE ÎN DOMENIUL ASIGURĂRILOR GENERALE ÎN LEGISLAȚIA ROMÂNEASCĂ
Ruxandra Oana Giosan 238

THE ACADEMIC APPROACH OF THE BAKA PIGMIES FROM CAMEROON. CONCEPTUAL AND ETHICAL PROBLEMS
Adrian-Dan Vîlcan 249

ASPECTE JURIDICO-PENALE ŞI MEDICO-LEGALE PRIVIND UCIDEREA NOU-NĂSCUTULUI DE CĂTRE MAMĂ
Gheorghe-Iulian Ioniță 264

RISCURI POTENȚIALE PENTRU SECURITATEA ECOLOGICĂ ŞI, IMPLICIT, PENTRU ORDINEA PUBLICĂ ŞI SECURITATEA NAȚIONALĂ A ROMÂNIEI
Ştefania-Diana Ioniță-Burda 278

CHALLENGES OF THE BAKA PIGMIES FROM CAMEROON. AN EMPIRICAL STUDY
Adrian-Dan Vîlcan 286

HUMAN DIGNITY – A HEURISTIC DISCIPLINE OF HUMAN RIGHTS
Beatrice Berna 301

DREPTURILE PERSONALULUI DIDACTIC DIN ÎNVĂȚĂMÂNTUL SUPERIOR DIN ROMÂNIA
Andra-Elena Eftimie 309

CONSIDERAȚII GENERALE PRIVIND SOLUȚIONAREA ALTERNATIVE A CONFLICTELOR DINTRE PROFESIONIŞTI
Liviu Eugen Gheorghe 317

THE ROMANIAN LENIENCY PROGRAMME BETWEEN CONTINUITY AND CHANGE. AN EMPIRICAL VIEW
Nathaniel Cornoiu-Jităraşu 328

CONTRACTUAL CONSENSUS – THE EVOLUTION OF THE NOTIONS OF FORMALISM AND CONSENSUALISM
Ioana Cristina Panțu 337

GOVERNMENT REGULATION VS. FREE ENTERPRISE

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Abstract

Governments exist to do for citizens what they cannot do for themselves, but often they encroach into activities that should be run by private enterprise. We recognize that governments should provide safety against harmful activities and/or dangerous actions that citizens may want to undertake either for ill-gotten gain or activities that are contrary to good order in society. Of course, governments must tax the citizens to enable the programs to serve and protect the society, but the taxation and the actions should be limited to activities the citizens cannot do for themselves.

Keywords: government encroachment, excess taxation

INTRODUCTION

Many nations in existence today call themselves Representative Democracies, or Republics. Most of them have a Constitution as the basic legal guideline for government activities involving both foreign and domestic decisions. These legal frameworks usually divide the actions of the governing bodies into specialties pertaining to such actions as providing for defense against outside dangers, promoting the general welfare of the population by establishing laws for contracts and other interactions, and actions to take to punish those who act outside the legal framework to prevent harm to others.

Further divisions allow for actions on the national scale, actions on the next lower subdivision, and ultimately actions for cities, villages, school districts, and other self governing divisions. A system of judicial oversight gives responsibilities from the highest to lowest levels. However, for all of these oversights, the overall guideline should be that of self reliance for activities that need no interference from a governing body. An axiom in most government text books is, "The best government is the least government". Decentralization should be the accepted method of governing. Unfortunately, history shows that the longer a government exists, the more intrusive it becomes. It finds activities that might be harmful or questionable by some (large or small) segments of society.

Such anxiety may lead to centralized decisions that affect the majority as well as the smaller group. As observed by Thompson, "A centralized, tight, monocratic structure is best for adopting new ideas" that are necessary to placate the unhappy segments.

HYPOTHETICAL

This situation deals with a fairly large country calling itself a republic, having a constitution and a national government with a separation of powers between the executive, legislating, and judicial branches. After a recent election won by a small majority of one of the political parties controlling the executive and both houses of the legislative branch, the newly elected executive, decided to make a significant change in one of the government

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entitlements available for the population. He had said that he would be making large changes in the country, but he didn't get into specifics until he was elected. Apparently, in his perspective, he was elected to make some dramatic changes and he would manipulate the status quo to insure that his ideas were implemented. In the first two years of his "reign" he forced a program through the legislative branch without any input from other parties who normally would be able to have input into large programs and be able to amend some of the nuances of the program. He was able to do this by instructing his legislators to "lock out" the other political parties so that his program have only inputs from his party.

When the legislation was published, it was impossible to understand how such a piece of legislation could be implemented. A majority of the country's population were shown in polls to be against the legislation in its form that emerged from his "one party" creation. The program would replace a system that was working moderately well by combining actions partly run by private enterprise with assistance from the government. The new program would eliminate the actions of the private sector and put the handling entirely into government agencies. This would have the taxpayers funding the program and would increase their tax burden. At first, only those that appeared to be benefitted by the legislation and favored the change were citizens who pay no taxes. Later, even many of the early voters who favored the legislation turned against it because it became clear that it would cost everyone much more than the executive claimed. Even so, the executive declared that it would be put into force in the timetable originally specified. It became clear that it was a program to give the executive more power. It is well understood that governments are wasteful and poor managers. This was not at all accepted by 70% of the populace and thus contrary to such accepted doctrine as that of Rourke who enunciated a well known edict, "The power of government agencies can be looked upon as resting essentially on political support".

This legislation was resting only on the elected members of government of the president's party, not the constituents who would be affected by the legislation. After another election, one house of the legislature, the one that proposes funding for government programs, was won by a different party. When the legislation was on the verge of being implemented, the funding was denied for the program since the population didn't want it. At that point, the executive chose to shut down the government because of his embarrassment that his legislation was not acceptable.

The executive refused to negotiate at all with the legislators and eventually they gave in to him because they didn't want to be responsible for shutting down the government. (WSJ). The legislation went into effect which required users to call up the program online and register for it. Approximately ninety-five percent of those who tried to register couldn't get into it because of the flaws in the program. Another embarrassment for the executive and his staff (WSJ).

ANALYSYS

There are many abnormalities apparent in this hypothetical case. First, the "locking out" of legislators not of the executives party is highly unusual. That act in itself was not illegal, but highly undemocratic. Its crass results of turning out an undesired piece of legislation should be indelibly remembered by the electorate so that that ruling party should suffer and in fact, it did by losing one branch of the legislative side of the government in the

next election. That ugly act should go further and reflect in the next executive election. Unfortunately, the constituent memory may not last that long.

One point should be quite clear: The executive's actions were more about his own power than that of pleasing his electorate. All elected officials should keep foremost in their minds that they are the servants of the people, both those who voted for them, those that voted against them, and those who didn't vote. The members of all three branches of the government are servants of the people. They should keep close knowledge of what the people are thinking about their performance. Of course, some unpopular decisions must be made that are not well accepted by the people. That happens in time of war and other unfortunate happenings where unpopular decisions must be made. However, in this hypothetical, it was less than a "life and death" situation. Other alternatives could have been chosen. But the executive refused even to consider any of them.

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FALSE DOCUMENTATION IN EASTERN EUROPE: ITS IMPLICATION FOR UNIVERSITIES

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In 2012, the utilization of false documents by non-governmental organizations seeking financial support for their activities became a major issue in the European Union. Most of the controversy was focused on distorted EU reports and the policy recommendations based on what were eventually determined to be falsely documented claims. Journalists and governmental officials feared that such policies would undermine Israeli security and result in renewed tension, and even violence in the Middle East. At the heart of the problem was the realization that more than a decade of the production and proliferation of false documents had resulted in a significant international crisis[1]. The purpose of this presentation is to provide some of the background about the disturbing trends involving false documentation.

With the emergence of international terrorism as a major security concern throughout Europe, authorities have recognized the key role of false documents and identities in terrorist activities. The falsification of documents in the former USSR is a common phenomenon that is approaching epidemic proportions. The increase in counterfeiting is related to the social and economic isolation following the breakdown of the Soviet Union as well as to the widespread poverty. Because the average monthly salary is only about $30 and employment opportunities are scarce, citizens are breaking the law simply to survive. This situation has had a great impact on popular attitudes toward criminal activities. According to police officials in the former Soviet Union, almost any kind of document can be falsified today. Underground false identity producers can create a wide range of identifications including simple identity cards, passports, diplomas, bills, labor contracts, passports, and visas. These forms of identification are used for anything from tax evasion to actions generating serious human rights violations.

In the Soviet era, Central Asia and the Soviet southwestern borderlands were recognized as being among the best places to live in the USSR. The pleasant climate and congenial atmosphere made these regions not only the preferred retirement home for many Russians, especially those in the military. Service in these areas also constituted important steps in the political ladder ascended by individuals such as Leonid Brezhnev and Constantin Chernenko, both of whom were at one point first secretary of Moldova's communist party while Brezhnev also served in Kazakhstan as first secretary. Yet, these regions also had, among Soviet circles, a reputation for corruption. Some would say this was a result of its more relaxed atmosphere while others suggest that it was a result of Russian influence. In Central Asia, Uzbekistan emerged as the site of a great controversy involving a Brezhnev family member who was Deputy Minister of Interior while in the southwest borderlands few places reached the level of corruption attributed to Moldova.

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[1] "EU Documents Repeat False NGO Claims and Increase Tension", NGO Monitor, 14 May 2012.

Whatever the reasons for the emergence of this reputation, it has endured. Tajikistan, Uzbekistan, and Moldova have been the targets of considerable attention among those who study corruption and crime in the FSU[2]. One of the most widely discussed features of crime in the former USSR is the creation of false documentation that will support the performance of various illegal actions.

Creating and Maintaining False Documents

Post-Soviet violence and lawlessness created an environment in which there was a recognized need for falsified documents. Both Moldova and Tajikistan experienced major conflicts. The Tajik civil war, which began in 1992, resulted in an abrupt increase in crime in Tajikistan with an unprecedented rise in the production and distribution of false documents. Recent analyses by journalists and interviews with representatives of law-enforcement bodies and experts indicate that practically all kinds of documents have been falsified and used during the past decade.

Passports

In recent years, the most important civil document – the passport, has more often been subject to different illegal "operations". Not only Tajik internal but also Tajik international passports are being falsified. Numerous reports have exposed ongoing criminal actions associated with the forging of documents in Tajikistan, where individuals or organized criminal groups forge and sell the republic's internal and foreign passports by hand or with the use of computer equipment. Corruption among government officials has facilitated such activities. According to Tajikistan's Security Ministry Public Relations Center, "In October 1999, the law-enforcement bodies prevented activities of a criminal group. For a long period, A. B. Mazganov, a government employee, and his accomplices B. B. Nabiev, G. Khasanov and others were involved in making and selling of Tajik internal and foreign passports, diplomas of different higher education institutions and different types of ID cards, thus facilitating the legalization of many foreigners on the territory of our country"[3].

Law-enforcement bodies in Sogdi Oblast stopped the illegal activities of a prominent criminal group. Criminal proceedings were instituted by the Oblast Prosecutor's Office against the gang headed by S. Olimdzhonov, the Vnesekonombak Khodjent Branch senior economist. Olimdzhonov and his partners forged the stamp and other relevant documentation of the Russian Federation Consulate General in the city of Khodjent. In order to do this, they used with the computer equipment of the bank in which Olimdzhonov worked. Using this stamp, the group made the necessary marks in the passports of citizens of Tajikistan and Kyrgyz Republics, which cost each "client" from 400 to 1000 Russian Rubles[4].

A more common method of passport forgery is the falsification of data about the passport holders by simply making changes in the passport. Often this involves the replacement of the passport holder's photograph. This can easily be done because of a technological peculiarity of the new Tajik internal passports, where the passports are

[2] Justin Peay, "A Post-Communist Nation Loses Its Way", The International Herald Tribune, 16 June 2000, p. 2.

[3] "Security Forces Inform…", Vecherny Dushanbe, 28 April 2000.

[4] Tajikistan Newspaper, Dushanbe, 29 Nov 2001.

stamped above a laminated surface that covers the photograph of the owner. When placed in a freezing chamber, the photograph easily comes off in 15 to 20 minutes, and can be replaced. The replacement cannot be visually identified, as the stamp does not have a deep imprint on the photograph. The most common and widespread passport forgery in Tajikistan occurs when Tajik citizens sell their passports to buyers and then report them as lost. They are able to get a new passport from the Ministry of Interior (MOI) when they file a statement claiming a loss. Information about the number of lost passports indicates the scale of this new kind of "business". In 1999, 5,340 Tajik national passports were reported lost in the Sogdi Oblast alone. In 2000, 4,945 residents of this Oblast reported lost passports, and 3,975 persons reported the same within 9 months of 2001. The Sogdi Oblast First Deputy Prosecutor Fozildjon Okhunov has reported that individuals claiming to have lost passports are rarely ever reprimanded. Moreover, most of those who have lost their passports obtained new ones within a short period without any investigation, a practice which is contrary to the Tajik law on passports. Some individuals received new passports the same day they reported the loss. (see Appendix 1 for specific cases) There even are instances in which citizens obtained new passports two and even three times a year. All these facts indicate the level of corruption in the Interior Ministry bodies, particularly in passport services[5].

Obtaining False Passports

The illegal issuance of passports is typically caused by (1) the poor control of MOI bodies over the process, (2) by the corruption of agencies responsible for issuing passports, or (3) by some combination of corruption and inefficiency. The primary method of obtaining false passports is through buying and selling. Sometimes Tajik citizens illegally obtain passports from the Interior Affairs Departments of city or district Khukumats or simply through outright bribery of relevant officials. The greatest emphasis is on buying or selling of official Tajik internal and foreign passports by ordinary citizens, Passport Services officials on the one hand and consumers on the other hand. The exchange is made directly and through mediators. In the latter case such illegal operations as a rule are made by a group of people, including Passport Services or MOI representatives.

There are instances in which passports are given to citizens residing in other districts and even in other countries. Some former residents of a particular district, who earlier immigrated to other countries and returned temporarily, have received new passports in their former place of their residence without processing relevant documents. Sometimes Tajik passports are illegally given to CIS citizens. The casual practices with regard to issuance of passports are, in part, a result of the difficulties in identification of Soviet citizens in the Newly Independent States. They are also a consequence of the new states' inabilities to create border-guard and immigration control procedures in the post-Soviet states. In addition, there are problems with multiple citizenships. These occur when people either legally or illegally obtain citizenship and passports of several post-Soviet states. As a rule, these are states in which they have relatives or business and where they are labor migrants.

Another source of identity modification in the former USSR is tourist agencies. Almost all the former-Soviet republics acknowledge that this is a problem. As Soviet authority

[5] Tajikistan Newspaper, Dushanbe, November 29, 2001.

collapsed, numerous tourist "ghost-agencies" sprang up to offer so-called tourist services before the police could shut them down. There were cases in which agencies issued visas for citizens and then disappeared immediately after receiving payment from the clients. Later these visas proved to be false. Some victims not only lost their money but were arrested as well. According to the Moldovan Ministry of Internal Affairs, in January 2001 alone there were 1,341 registered enterprises that had international tourist services in their charter. Only 307 of them had licenses to practice such an activity and a mere 128 economic agents out of the total number of 1,341 registered at the beginning of the year actually presented their documents for registration.

Illegal Migration of Afghans

The falsification of Tajik passports, higher education diplomas and identity cards is commonly used in both the legalization of foreigners in Tajikistan as well as in illegal transit migration. The Afghan migration, which began in 1997, causes the biggest influx of illegal migrants into Tajik territory. As a result of the deterioration of the situation in Northern Afghanistan in 1997, the flight of Afghans into Tajikistan became a major problem. Most of them do not register with the refugee organizations but simply move on to third countries. Tajikistan is now a major center for the Afghan transit migration to other CIS countries, Western Europe, the USA and Canada. Most Afghans do not wait for the State Migration Services decision on their refugee petitions; they generally leave Tajikistan for other CIS states, especially Moldova which is the final stop before entering the West. In the spring of 2002, the State Migration Services reported that about half of asylum-seekers were no longer in Tajikistan and their whereabouts were unknown. Most Afghans travel from Tajikistan to the West by illegal international networks that have agents in all institutions dealing with migrants[6].

Russian journalists have reported that "in Tajikistan, one can buy false passports for $100, and that Kazakh border-guards detained more than 100 Afghans with false Tajik passports in the Moscow-Bishkek train". As authorities searched the sources where Afghans obtain false passports they found that passport trading is a thriving business. This endeavor has existed since the Afghan flight into Central Asia began. Some of them took the legal way: via registration of citizenship, obtaining a "propiska". Others resorted to the easier illegal way." (see Appendix 7 for specific cases) Russian investigative bodies have identified the procedures for obtaining false passports[7].

Some illegal migrants who have obtained false Tajik passports choose Tajikistan as place of their permanent residence. Others use the illegally obtained documents for further migration. "Depending on the country they wish to move to, the clients pay from $1,500 to $5,000 or even $6.000 to get airplane tickets, false passports and visas. After boarding their flights, the migrants destroy the documents. When they land at the airport they approach relevant officials in order to request asylum"[8].

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[6] S. Olimova. "Tajikistan is the first stop on the way of Afghan migration", Central Asia and the Caucasus Magazine, No. 1, 1998.

[7] "How much costs …the motherland? Or the new business on passport trading", Krim-Infor (Dushanbe), November 1, 2001.

[8] S. Olimova. "Tajikistan is the first stop on the way of Afghan migration", Central Asia and the Caucasus Magazine, 1998, No. 1.

Dual Citizenship

Dual citizenship is widely sought by many individuals involved in criminal activities and may be illegally obtained in two ways. First, illegal migrants who have bought false passports obtain it. These are mostly Afghans who use false Tajik documents for transit via Tajikistan to further CIS countries, USA, Canada and Western Europe countries. Sometimes they take the advantage of the "Agreement on Double Citizenship" between Russia and Tajikistan and with their Tajik passports they receive Russian Federation passports, sometimes real and sometimes false. They go to Moscow, procure visas and then move to third countries. "It influences the cost of illegal transportation. Thus, the travel from Tajikistan (via Tashkent) to Western European countries costs Tajik citizens some $1,500 ($500 for the passport, $500 for visa, $300 for a ticket and the rest is honoraria for the senders). For Afghan citizens, the same route would cost $5,000"[9].

Second, there are countless attempts to obtain dual (Tajik and Russian) citizenship by Tajik citizens and citizens of other CIS countries (mostly by Uzbekistan and Kyrgyzstan) who intend to move to Russia as labor migrants or "shuttle traders". Such individuals traveling to the Russian Federation were the main clients of the organized group in Khudzhand. With a forged stamp of the Russian Federation Consulate General this group made the necessary marks in the passports of Tajik and Kyrgyz citizens, which cost each "client" from 10 to 1,000 Russian Rubles[10].

The Role of Universities

An essential element in the creation of false identities is the counterfeit documentation of academic achievements and credentials. In post-communist East Europe, phony academic certificates can be used to accomplish two objectives. The first and least sinister is professional advancement. The second and more ominous objective is the creation of a completely new identity for individuals who are avoiding prosecution for previous criminal activities or are currently engaged in criminal endeavors. Several officials of the Dniester Moldovan Republic have been mentioned in this connection.

A willing and available university is required for accomplishment of either of the above objectives. Widespread international attention was focused on this issue when a Romanian university, one of the several independent universities to appear in the wake of the collapse of the communist regime in 1989, was implicated in the sale of advanced degrees in dentistry. The Romanian National Council for Academic Evaluation and Accreditation called attention to the phenomenon of universities granting doctoral degrees without authorization[11]. As the National Council investigated these activities it learned that one new university was also issuing doctoral degrees in return for participation in a four-week "training program" and payment of a generous amount of money[12]. Most widely commented upon was that university's doctorate in economics, a document that was embraced by many individuals hoping to either advance themselves professionally or to establish new identities[13].

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[9] Ibid.

[10] Tajikistan Weekly (Dushanbe), 29 Nov 2001.

[11] "Scandalul diplomelor false dă în clocot", Ziua (Bucharest), 27 February 2001.

[12] "Universitatea Ecologică rămâne pe tusă: 19 universități particulare din 20 pot primi acreditarea" Ziua (Bucharest), 31 October 2000.

[13] "Diplome false de doctorat, eliberate de Universitatea Independentă Moldova", Evenimentul Zilei (Bucharest), 27 February 2001.

Many educational entrepreneurs in Moldova have strengthened their positions over the years by offering well-paid teaching positions to individuals who suddenly found themselves unemployed as a result of the uncertainties and instability of Moldovan political life. By careful manipulation of the post-communist system, they have acquired impressive real estate holdings in downtown Chisinau and elsewhere.

The practice of bribing professors to document academic accomplishments is closely related to the outright falsification of academic credentials. In 2002, Moldova's Prime Minister Vasily Tarlev addressed this concern in a meeting with representatives of the Ministries of Justice and of Education. The Moldovan government eventually established a special body to combat fraud in the university system. In the past, such activities were generally ignored and even in the event of exposure, perpetrators were not subject to criminal prosecution[14].

Using Documents in Connection with Criminal Activities

A well-publicized incident involving false passports occurred in March 2001 when Ukrainian authorities reported that a group of six Moldovan citizens had been detained at the border between Ukraine and Belarus after attempting to cross the frontier using false Ukrainian passports. Police determined that the group's final destination was Poland where they intended to join with a criminal organization. In 1999, several Arab citizens were arrested on a similar charge. A passenger flight from Chisinau to Prague was delayed in the Chisinau airport because several passengers held Moldovan passports but had Arab features and spoke no Romanian or Russian. The case was investigated by Moldova's Security and Information Service, which apparently was embarrassed by the incident and did not wish to publicize details about the holders or producers of the documents. While representatives in charge of the Ministry of Interior claimed that no false passports are made in the Republic of Moldova they limited that assertion to only Moldovan passports.

[14] "Premier Warning of University Bride-takers", Infotag, May 30, 2002.

PERSPECTIVE ASUPRA SCHIMBĂRII. OPINII ALE STUDENȚILOR UNIVERSITĂȚII ROMÂNO-AMERICANE DESPRE ÎNVĂȚĂMÂNTUL JURIDIC

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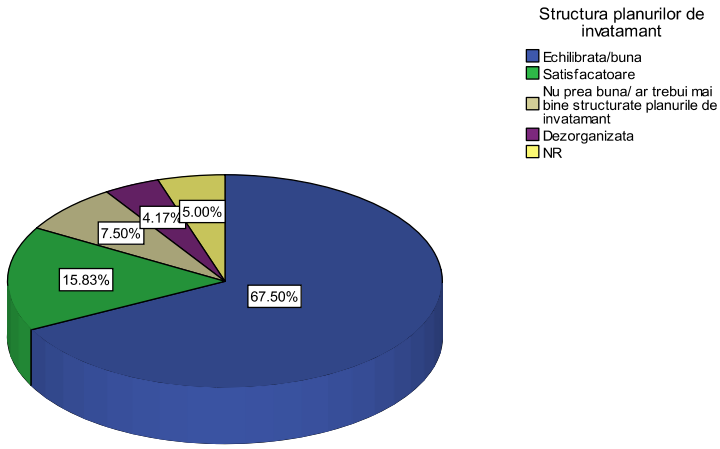
Este nevoie de schimbare în învățământul juridic? Pentru a răspunde la această întrebare, este necesar să pornim de la percepția situației curente – aşa cum este ea experimentată de cei care activează în domeniul universitar juridic. Un pas important în dobândirea unei imagini clare asupra situației existente constă în cercetarea felului în care studenții înşişi percep această situație. Un număr de 130 de studenți ai Universității Româno-Americane au fost intervievați. Deşi cercetarea noastră este, în esență, una de tip calitativ, numărul mare de date recoltate a făcut posibilă şi o analiză de tip cantitativ. Avantajele prelucrărilor de tip statistic, atunci când acestea sunt posibile se regăsesc atât în ceea ce priveşte rigoarea şi structurarea datelor, dar mai ales în posibilitatea de a face accesibile cititorului o serie de corelații între variabilele supuse cercetării. Aceste avantaje sunt vizibile, credem, în analizele pe care le vom prezenta în continuare.

1. Structura planurilor de învățământ

Miza centrală a unui proiect de îmbunătățire a procesului de învățământ este dată de curricula universitară. De aceea, cercetarea noastră a pornit de la felul în care studenții percep structura planurilor de învățământ.

Aşa cum se poate vedea în figura 1, mai mult de 80% din studenții Universității Româno-Americane consideră structura planurilor de învățământ de la Facultatea de Drept cel puțin satisfăcătoare (mai mult de doua treimi o consideră echilibrată sau bună).

Fig.1



Ţinând cont că dintre cei 12% nemulţumiţi de actuala structură, doar 4% exprimă o profundă nemulţumire, s-ar putea concluziona că planurile de învăţământ corespund aşteptărilor studenţilor de la Facultatea de Drept.

2.1. Corecţii negative la planul de învăţământ

Sigur, atitudinile declarate faţă de variabile atât de complexe precum „structura planurilor de învăţământ" trebuie cercetate cu atenţie. Nu este clar dacă toţi studenţii au în vedere aceleaşi lucruri atunci când se declară mulţumiţi de planurile existente în facultatea lor. Numeroase studii din psihologia socială indică faptul că indivizii tind să fie mai puţini critici in raport cu situaţiile pe care le consideră prea complexe. De aceea am considerat foarte important să aprofundăm investigaţia, dând posibilitatea studenţilor sa aleagă modificările pe care le-ar aduce planurilor de învăţământ. Fiecare student a fost rugat sa aleagă trei discipline pe care le-ar elimina din actualul plan de învăţământ, înlocuindu-le cu alte trei pe care el ar dori sa le studieze. Studenţii au indicat un număr de 22 de discipline (Retorica, Filosofie, Contabilitate, Economie, Sociologie, Informatica, Engleza, Drept ecologic, Comunicare, Organizaţii europene, Psihologie, Teoria Generala a Dreptului, Logica, Istoria Dreptului Romanesc, Dreptul comerţului internaţional, Drept roman, Dreptul mediului, Drept financiar, Organizarea sistemului judiciar, Medicina legală, Dreptul concurenţei, Dreptul administrativ); in tabelul I sunt prezente cele care care au întrunit un număr mai mare de nominalizări. Fiecare student având posibilitatea de a „elimina" trei discipline şi dat fiind faptul că din fiecare an au fost intervievaţi câte 33 de studenţi, rezultă ca există 99 de opţiuni de eliminare/an universitar. Aşa cum se poate observa din tabel, studenţii din anul I sunt cei mai puţin „dispuşi" să elimine discipline din planul de învăţământ, pentru simplul motiv că sunt abia la început (interviurile au avut loc în primul semestru al anului universitar). Doar 10 opţiuni sunt folosite din totalul de 99. Însă previzibilitatea reacţiilor studenţilor se opreşte aici.

Tabelul I

		Ce discipline aţi elimina din planul de învăţământ												
		Retorica	Filosofie	Contabilitate	sociologie	Economie	informatica	Engleza	Drept ecologic	Comunicare	Organizaţii Europene	Alta disciplina	NR	Subtotal
Anul de studii	I	0	0	1	2	3	0	2	0	0	0	2	89	10
	II	13	11	17	3	7	0	4	3	0	3	4	34	65
	III	5	7	4	5	2	6	3	4	5	1	14	44	55
	IV	13	5	10	3	7	4	3	2	2	2	6	45	57

Urmând aceeaşi logică, ne-am fi aşteptat ca cei din anul patru să aibă cele mai multe opţiuni de eliminare, cei din anul trei ceva mai puţine, iar cei din anul doi şi mai puţine (dar ceva mai multe decât cei din anul I). Dimpotrivă, studenţii anului II au folosit 65 din totalul opţiunilor, cu 10 mai multe decât cei din anul III si cu 8 mai multe decât cei din anul IV. O asemenea situaţie neaşteptată ar cere o explicaţie.

O ipoteză la îndemână ar fi următoarea: cu cât studenţii sunt mai nemulţumiţi de disciplinele din planul de învăţământ si de felul în care se desfăşoară activitatea la aceste discipline, cu atât vor utiliza într-o proporţie mai mare opţiunile de „eliminare" a

disciplinelor nedorite. Cuantificând, într-un an universitar în care studenții sunt foarte mulțumiți, totalul opțiunilor de eliminare va tinde către zero, pe când într-un an cu studenți nemulțumiți, acest total va tinde către 99 (fiecare student folosindu-şi toate cele trei opțiuni). În lumina acestei ipoteze, studenții anului II, care au folosit cele mai multe opțiuni de eliminare, sunt probabili cei mai nemulțumiți studenți ai facultății de drept.

Pentru a verifica această ipoteză, am comparat, pe ani de studiu, răspunsurile studenților la întrebările „Cât de mulțumiți sunteți de cadrele didactice", „cât de mulțumiți sunteți de cunoştințele teoretice acumulate" şi „cum apreciați sistemul de notare". Dacă ipoteza noastră ar fi corectă, atunci studenții anului II ar trebui să fie mai nemulțumiți de cadrele didactice, de cunoştințele acumulate şi de sistemul de notare practicat în facultate. În mod surprinzător, ipoteza a fost infirmată în toate aceste trei contexte.

În tabelul II sunt grupate răspunsurile studenților privitoare la cadrele didactice, pe ani de studii. Cei mai mulțumiți sunt studenții anului I, în proporție de 90%. Acest procent pare să confirme ipoteza enunțată anterior, cum că un număr mic de opțiuni de eliminare folosite ar corespunde unui grad ridicat de mulțumire cu privire la cadrele didactice. Însă răspunsurile studenților din anul II par să răstoarne ipoteza.

Tabelul II

		Cât de mulţumiţi sunteţi de cadrele didactice?			
		foarte mulţumit/mulţumit	În parte mulţumit, în parte nu	nemulţumit	NR
Anul de studii	I	90.0%	3.3%	0%	6.7%
	II	80.0%	13.3%	3.3%	3.3%
	III	50.0%	30.0%	16.7%	3.3%
	IV	76.7%	23.3%	.0%	.0%

80% din studenții anului II se declară mulțumiți/foarte mulțumiți de cadrele didactice ale facultății, cu 30% mai mult decât studenții anului III, an care de altfel furnizează cel mai mare număr de studenți nemulțumiți (16.7%). Şi acest din urmă lucru este surprinzător în lumina ipotezei noastre, deoarece studenții anului III au folosit un număr mai mic de opțiuni de eliminare decât cei din anul IV, care se declară, într-un procent semnificativ mai mare (cu 26.7% mai mulți) decât cei din anul III, mulțumiți/foarte mulțumiți.

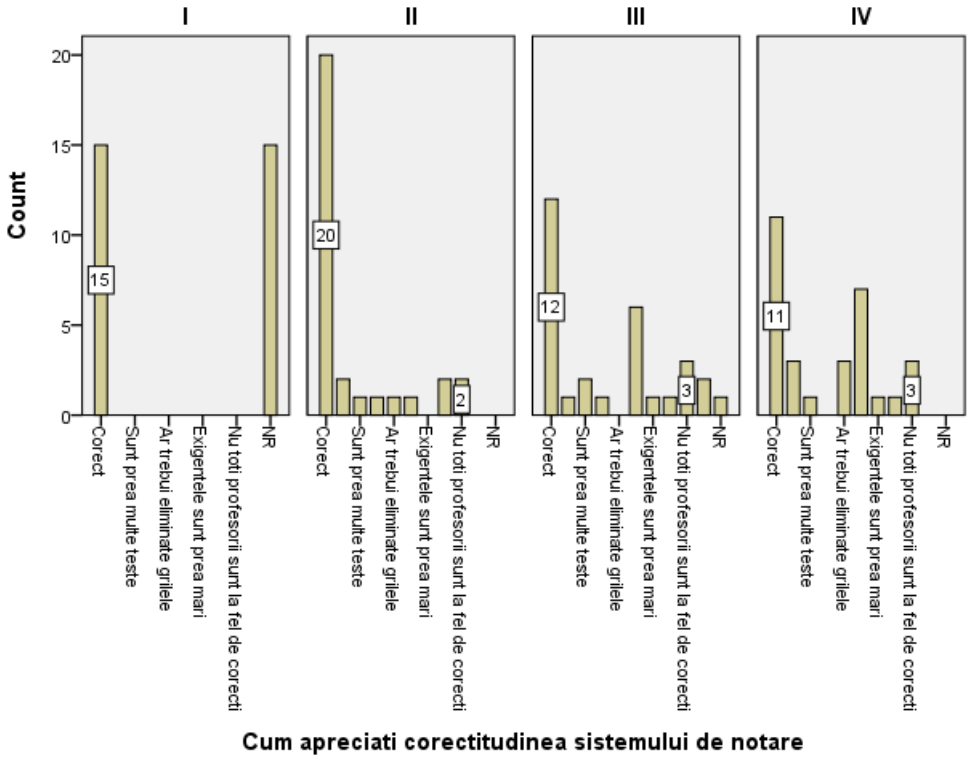
Tabelul III

		Cât de mulţumiţi sunteţi de cunoştinţele teoretice acumulate?			
		foarte mulţumit/mulţumit	În parte mulţumit, în parte nu	nemulţumit	NR
Anul de studii	I	66.7%	6.7%	.0%	26.7%
	II	73.3%	20.0%	3.3%	3.3%
	III	33.3%	36.7%	20.0%	10.0%
	IV	70.0%	30.0%	.0%	.0%

Tabelul III ne oferă o imagine foarte asemănătoare, la fel de surprinzătoare în raport cu aşteptările ipotetice. Studenții anului II apar drept cei mai mulțumiți de cunoştințele teoretice acumulate, deşi ar fi „trebuit" (în raport cu anticiparea noastră ipotetică) să fie cei mai nemulțumiți. Studenții din anul I, cei care au folosit doar 10 opțiuni de eliminare, ocupă în acest tabel abia poziția a treia (66.7% dintre ei declarându-se mulțumiți). La fel ca şi în cazul atitudinii față de cadrele didactice, studenții anului III se dovedesc cel mai puțini mulțumiți de cunoştințele teoretice acumulate. 20% dintre aceştia se declară chiar nemulțumiți, față de 0% (anii I şi IV), respectiv 3.3% (anul II). Doar o treime dintre studenții anului sunt mulțumiți/foarte mulțumiți, în raport cu toți ceilalți ani, unde cel puțin două treimi se declară mulțumiți/foarte mulțumiți. Este o diferență care trebuie analizată mai îndeaproape, însă deocamdată ne vom mărgini să subliniem dramatica infirmare a ipotezei noastre inițiale.

În figura 2 sunt schematizate răspunsurile studenților, grupate pe ani de studii, cu privire la corectitudinea sistemului de notare. Consistent cu ceea ce am remarcat în analizele precedente, studenții anului II par să fie cei mai mulțumiți de sistemul de notare existent. 20 de subiecți, reprezentând 66.7% dintre studenții anului II apreciază sistemul de notare ca fiind corect si nenecesitând schimbări. În comparație, doar 50% din studenții anului I, 40% din cei ai anului III si 36.7% ai anului IV au oferit răspunsuri similare.

Fig. 2



Ne confruntăm, aşadar, cu următoarea situație: deşi studenții anului II sunt cei mai mulțumiți de calitatea cadrelor didactice, de calitatea cunoştințelor teoretice dobândite, ca şi

de sistemul de notare folosit în facultate, au utilizat într-o măsură mai mare decât colegii lor din ceilalți ani opțiunile de eliminare a unor discipline din planul de învățământ. Cum pot fi puse de acord aceste lucruri, aparent contradictorii? A dori eliminarea unor discipline presupune, cel puțin la prima vedere, nemulțumirea față de cunoştințele primite la cursuri, față de calitatea celor care predau la acele discipline şi/sau sistemul de notare existent la disciplinele respective. Şi totuşi, studenții care îşi doresc în cea mai mare măsură renunțarea la discipline existente sunt cei mai mulțumiți de felul în care se petrece procesul de predare/evaluare, ca şi de calitatea cunoştințelor dobândite.

O posibilă explicație ar putea fi sugerată de comentariul unui student din anul II „Nu cred ca ar **trebui** neapărat eliminată vreo disciplină, însă dacă aş fi **nevoit** să elimin un număr de trei, acestea ar fi...". Cuvintele cheie sunt „trebuie" şi „nevoit". Aparenta contradicție între „sunt mulțumit" şi „aş dori sa elimin" ar putea fi înlăturată de această variabilă suplimentară „dacă aş fi nevoit". Sigur, studenții nu au fost „nevoiți". Operatorii de interviu nu au „obligat" studenții să nominalizeze trei discipline, lucrul acesta e evident măcar şi prin faptul că studenții din anul I, într-o măsură semnificativă, au refuzat să propună eliminarea fie şi a unei singure discipline. „Nevoia" amintită de studentul menționat anterior pare să conducă spre teoriile conformismului din psihologia socială. Plecând de la acestea din urmă, s-ar putea sugera ideea că o persoană ce aparține unui grup social (în cazul nostru universitatea) este cu atât mai mulțumită de apartenența la grup cu cât integrarea in grup este mai mare. Dacă o persoană integrată este una care se conformează normelor şi exigențelor de grup, atunci am putea formula ipoteza că, o într-o situație percepută ca directivă („eliminați trei discipline din planul de învățământ"), o persoană mai puternic integrată va tinde să se supună a ceea ce ea consideră drept ordin. Afirmația studentului din anul II, „nu cred ca ar **trebui** neapărat eliminată vreo disciplină, însă dacă aş fi **nevoit..."** capătă acum un sens nou.

Din păcate, această ipoteză nu poate fi verificată direct prin datele culese de către noi, ea apărând post-interviuri, ca o posibilă explicație pentru aparentele contradicții atitudinale. Totuşi, ipoteza are nişte implicații colaterale care ar putea fi verificate de către noi. Dacă noastră ipoteză ar fi falsă, ar însemna că studenții „elimină" o disciplină pentru faptul că sunt **nemulțumiți** de calitatea actului predării, calitatea şi cantitatea de cunoştințe etc. şi nu pentru că au perceput situația drept directivă (caz în care ar elimina pentru a răspunde la un presupus ordin la care trebuie să se conformeze). Într-o asemenea situație, nu ar conta **tipul** disciplinei, faptul că ea este obligatorie sau opțională, de cultură generală sau de specialitate, ci doar modul în care ea este predată/percepută de student. Dimpotrivă, dacă ipoteza este adevărată, atunci modul în care studentul alege să elimine disciplinele trebuie să difere semnificativ. De ce? Simplu. În cazul în care studentul este mulțumit de planurile de învățământ şi de procesul efectiv de transmitere/asimilare de cunoştințe (ceea ce am stabilit că e cazul, în situația particulară a studenților din anul II), atunci ceea ce trebuie să facă diferența între discipline este nu calitatea actului predării, ci importanța percepută în formarea profesională. Dacă un student se simte „obligat" să elimine trei discipline dintr-un ansamblu de mai multe față de care este egal mulțumit, probabil că le va elimina pe acelea despre care crede că nu îi sunt indispensabile pentru formarea sa profesională. Probabil că disciplinele de cultură generală se încadrează mai uşor în acest profil, de disciplină mai

puțin esențială, decât disciplinele de specialitate. Consultând tabelul I, am putea spune că ipoteza noastră este coroborată. 55 din totalul de 65 de opțiuni de eliminare folosite reprezintă discipline de cultură generală. Contabilitatea, retorica, filosofia, economia, limba engleză şi sociologia sunt (în această ordine) considerate de către studenții din anul II ca putând fi eliminate din planul de învățământ. Doar 10 din 65 de opțiuni sunt folosite pentru discipline din domeniul dreptului. Dimpotrivă, dacă ne uităm la răspunsurile studenților din anul III, vedem că 20 din cele 55 de opțiuni de eliminare folosite vizează discipline de specialitate, mai mult decât dublu în raport cu colegii lor mai mici.

Deşi pare că am insistat foarte mult pe o problemă minoră (rezolvarea unei aparente contradicții atitudinale), credem că insistența nu a fost în van şi că avem o mai clară imagine asupra motivațiilor subiacente exprimării dorințelor studenților de a elimina discipline din planul de învățământ. La prima vedere, rezultatele statistice sunt evidente: disciplinele de cultură generală sunt considerate cele mai puțin importante de către studenții Universității Româno-Americane. 26.6% dintre aceştia ar elimina Contabilitatea din planul de învățământ, 25.8% Retorica, 19% Filosofia, 15.8% Economia şi 10.8% Sociologia. În contrast, un număr de peste 20 de discipline din domeniul dreptului subsumează, împreună, 34%! Aşa cum am argumentat, explicația *prima facie* cum că studenții doresc să elimine disciplinele de cultură generală pentru că sunt nemulțumiți de calitatea actului de predare de la disciplinele respective este **falsă**. Dimpotrivă, studenții care au folosit cel mai consistent opțiunile de eliminare oferite de operatorii de interviu pentru a elimina disciplinele de cultură generală sunt cei mai mulțumiți dintre studenți! Am încercat să explicăm acest aparent paradox apelând la ideea conformismului social, anume că studenții cei mai mulțumiți, fiind cei mai bine integrați, au interpretat „opțiunea de eliminare" ca „ordin de eliminare" şi s-au conformat acestuia nu prin eliminarea disciplinelor în care calitatea actului predării este slabă, ci pe acelea pe care le-au perceput ca fiind „mai puțin importante". În felul acesta se înlătură aparența de paradox al formulării „studentul mulțumit doreşte să elimine mai multe discipline decât studentul mai puțin mulțumit".

2.2. Corecții pozitive la planul de învățământ

În analiza corecțiilor pozitive la planul de învățământ am plecat de la ipoteza că dorința de a introduce noi discipline (în raport cu cele prevăzute în programă) se corelează invers cu gradul de mulțumire al studenților față de calitatea actului predării. Într-adevăr, datele din tabelul IV, coroborate cu cele din tabelele II si III, confirmă ipoteza noastră şi anume: studenții anului III, care au folosit cele mai multe din opțiunile de introducere ale noilor discipline (48 de opțiuni), sunt de asemenea studenții care înregistrează cea mai mică satisfacție cu privire la calitatea cunoştințelor teoretice primite (doar o treime din studenți declarându-se mulțumiți, mai puțin de jumătate din media celorlalți trei ani). Asemănător, studenții anului III sunt cel mai puțin mulțumiți şi când e vorba de felul în care apreciază calitatea cadrelor didactice. Dacă 90% dintre studenții anului I, 80% dintre studenții anului II şi 76% din studenții anului IV apreciază pozitiv cadrele didactice, abia 50% dintre studenții anului III au o percepție asemănătoare.

Tabelul IV

		Ce discipline aţi introduce în planul de învăţământ?											
		Practică	Limba străină	Drept internat	Psihologie	Criminologie/victimologie	Drept penal	Dreptul afacerilor	Drept notarial	Discipline de drept specializat	Discipline de cultura generala	NR	Total opţiuni exprimate
Anul de studii	I	0	4	4	2	1	1	0	0	5	7	15	26
	II	6	7	1	3	2	0	1	0	4	6	9	30
	III	15	9	1	0	0	1	0	3	9	10	2	48
	IV	13	3	5	0	4	5	3	2	2	5	4	42

Din păcate, motivele pentru care apar diferenţe atât de substanţiale între studenţii din ani diferiţi de studiu ne sunt obscure. Nu ne-am aşteptat la asemenea diferenţe şi, prin urmare, nu am pregătit nici o serie de întrebări care să investigheze suplimentar raţiunile acestora. Poate că exact conţinutul alegerilor studenţilor, anume disciplinele propuse spre introducere, ar arunca o lumină asupra diferenţelor de mai sus. Cei mai mulţi studenţi din anii III şi IV aleg „practica" ca disciplină de introdus în planul de învăţământ. Sigur, practica nu reprezintă propriu-zis o disciplină şi cu atât mai puţin ceva nou. Totuşi, studenţii care propun introducerea în planul de învăţământ a practicii suplimentare susţin că practica ce deja există în plan este insuficientă.

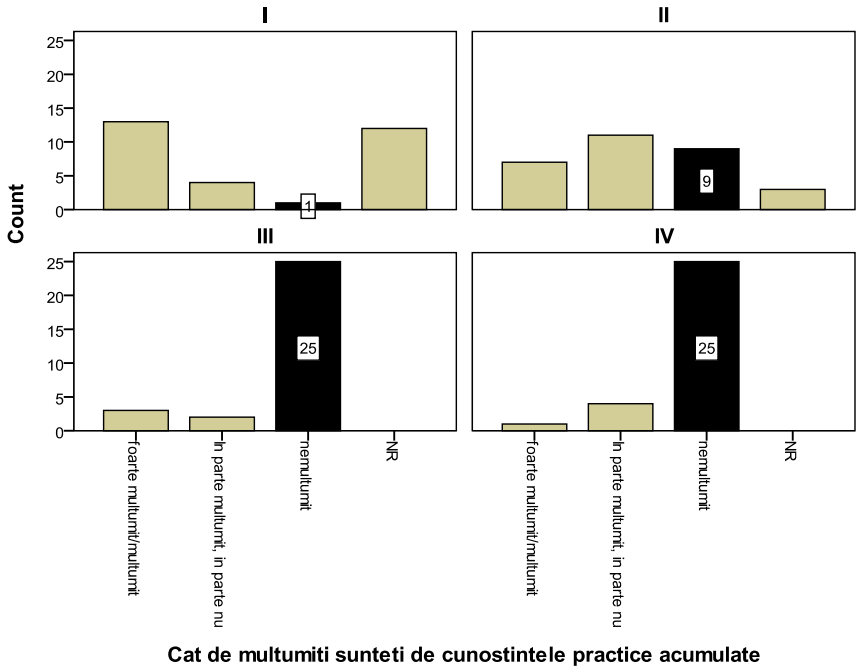
În fig. 3 este prezentat gradul de mulţumire al studenţilor în raport cu cunoştinţele practice acumulate de-a lungul anilor. Observăm că dacă între studenţii anului I există foarte puţini nemulţumiţi de calitatea/cantitatea cunoştinţelor practice dobândite, în anul II aproape o treime din studenţi se declară nemulţumiţi, iar în anii III şi IV procentul nemulţumiţilor creşte până peste 80%. În aceste condiţii, devine evidentă nevoia de a compensa această presupusă deficienţă a procesului de învăţământ prin introducerea practicii suplimentare. Corelativ, numărul celor care se declară foarte mulţumiţi de cunoştinţele practice asimilate scade dramatic de la 40% în anul I la 10% în anul III şi 3% în anul IV. Cifrele sunt îngrijorătoare şi ar trebui să ne dea o explicaţie de ce studenţii preferă efectuarea unor stagii suplimentare de practică în locul introducerii unor discipline de studiu noi.

În ciuda faptului că studenţii au propus spre introducere un număr impresionant de discipline noi (44), gradul de dispersie al acestora este foarte ridicat[1]. Numărul mare de discipline propuse sugerează, credem, un lucru important, acela că nu există o viziune coerentă asupra schimbării planurilor de învăţământ la studenţii Universităţii Româno-Americane, modificările propuse reflectând interese mai mult sau mai puţin individuale ale fiecărui student. Un număr mic de discipline întruneşte un număr

[1] Disciplinele propuse spre introducere sunt următoarele: Practică suplimentară, a doua limbă străină, Drept internaţional, Drept american comparat, Drept european comparat, Psihologie, Victimologia/criminalistica, Drept roman, Drept Penal suplimentar, Dreptul afacerilor, Drept notarial, Logica juridică, gramatica, Informatica, Retorica, Medicina legală suplimentar, Filosofia şi etica dreptului suplimentar, Politologie, ordine şi siguranţă publică, Management, Expertiza financiar-contabilă, Educaţie civică, Educaţie antreprenorială, Religie, Diplomaţie, Dicţie, Cultura generală, Limbaj juridic specific, Dreptul transporturilor, Dreptul internetului, Organizare judecătorească, Jurisprudenţa CEDO, Drept umanitar, Dreptul refugiaţilor, Drept Penal internaţional, Drepturile omului, Drept corporatist, Drept maritime, Drept consular şi diplomatic, Cooperare juridică internaţională, Drept comunitar, Drept comparat, Drept civil suplimentar, Dreptul concurenţei.

semnificativ de studenți pentru a fi menționate în raport. Este interesant de urmărit cum, în afară de practică, cele mai multe opțiuni s-au îndreptat spre o nouă limba străină şi pentru drept internațional. Cele două opțiuni par să fie motivate subiacent similar: studenții vor să fie pregătiți pentru piața muncii externe.

Fig. 3



Dintre disciplinele de drept propuse, cele mai multe voturi se îndreaptă spre (varietăți de) drept penal, criminologie/victimologie şi dreptul afacerilor. Acest lucru credem că este un bun indicator al faptului că cele două programe de masterat ale facultății de drept (drept penal şi dreptul afacerilor) au fost create având la bază preferințele exprimate ale studenților. Preferințele exprimate referitor la introducerea unor cursuri suplimentare de psihologie juridică au, probabil, la bază acelaşi interes pentru drept penal.

Deşi nu se poate vorbi de un interes foarte mare referitor la introducerea unor discipline de cultură generală, altele decât limba străină şi psihologie, este interesant de menționat că studenții anului III, despre care am arătat că sunt cei mai puțin mulțumiți de desfăşurarea procesului de învățământ de la facultatea lor, înregistrează cel mai mare număr de propuneri de introducere a unor discipline de cultură generală. Este, într-un sens, simetricul faptului analizat mai devreme, acela că studenții anului II, cei mai mulțumiți din cei patru ani, propun cele mai multe eliminări ale opțiunilor de cultură generală.

3. Dotarea universității

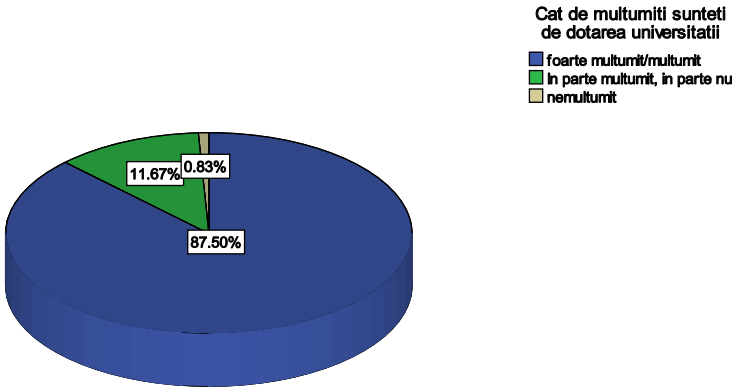
Aproape în unanimitate, studenții Universității Româno-Americane apreciază dotarea universității drept foarte bună. Un singur student s-a arătat nemulțumit de dotarea

universității. Doar 11% dintre aceştia au exprimat o mulțumire parțială, aproape 90 % declarându-se foarte mulțumiți.

Dacă însă detaliem pe ani de studii, situația este mai nuanțată. Răspunsurile studenților din anii III şi IV se distribuie oarecum curios. Este oarecum firesc ca, pe măsură ce trece timpul, mulțumirea studenților să scadă, pe măsură ce avansează în cei patru ani, nevoile lor devenind din ce în ce mai complexe. De pildă, dacă în anul I, 93% dintre studenți se declară foarte mulțumiți, în anul III doar 73% au declarat acelaşi lucru. Principalul motiv de nemulțumire la studenții din anii II şi III este acelaşi: **biblioteca**. Studenții consideră că numărul de titluri de carte este insuficient, numărul de exemplare din fiecare titlu este mai mic decât nevoile lor şi, în plus, există o serioasă nemulțumire legată de faptul că nu se pot scoate, prin împrumut, cărți în afara bibliotecii.

Ceea ce este curios e că studenții anului IV se înscriu în afara trendului menționat de creştere a nemulțumirii o dată cu avansarea în anii de studii, răspunsurile lor situându-i pe prima poziție în ceea ce priveşte numărul de studenți foarte mulțumiți de dotarea universității. Această situație, relativ curioasă, se corelează cu atitudinea aceloraşi în raport cu cunoştințele teoretice.

Fig.4



Dacă doar 33% dintre studenții anului III s-au declarat mulțumiți de cunoştințele teoretice asimilate, aşa cum se poate observa în tabelul III, 70% dintre studenții anului IV au oferit răspunsuri similare.

Tabelul V

		Cât de mulţumiţi sunteţi de dotarea universităţii			
		foarte mulţumit/mulţumit	În parte mulţumit, în parte nu	nemulţumit	NR
Anul de studii	I	93.3%	6.7%	.0%	.0%
	II	86.7%	13.3%	.0%	.0%
	III	73.3%	23.3%	3.3%	.0%
	IV	96.7%	3.3%	.0%	.0%

Sigur, o asemenea diferență substanțială între cei doi ani de studii ar merita investigată cu atenție, însă ea depăşeşte posibilitățile de explicație ale curentului studiu. Ar fi nevoie de noi ipoteze şi, de fapt, de o nouă cercetare separată. Ne mulțumim doar să remarcăm corelația între cei care sunt nemulțumiți de cunoştințele teoretice şi cei care sunt nemulțumiți de dotarea bibliotecii.

4. Factorii succesului

La prima vedere, o întrebare precum „care credeți că sunt factorii succesului în formarea profesională" ar putea părea superfluă. Toată lumea „ştie" cum se obțin rezultatele bune la învățătură, şi anume prin studiul individual intens. Cu siguranță că aşa stau lucrurile, însă întrebarea noastră viza mai mult decât „rezultatele bune", „succesul" fiind o noțiune mai largă. Apoi, este limpede că studiul individual nu este singurul factor care, dacă ar fi prezent, ar conduce automat la formarea unor specialişti în drept. Răspunsurile studenților arată că nu au abordat simplist întrebarea pusă.

O constată a răspunsurilor studenților este importanța pe care ei o acordă profesorului şi metodelor de predare ale acestuia ca factor esențial în formarea profesională încununată de succes. Mai bine de două treimi din studenții fiecărui an de studiu consideră profesorul ca având o importanță fundamentală în obținerea succesului. Cineva ar putea obiecta, consultând tabelul VI, că alegerea profesorului ca factor principal de succes reprezintă o modalitate de de-responsabilizare a studentului, de atribuire externă a succesului, iar o asemenea atitudine ar fi dăunătoare, deoarece ea ar încuraja pasivitatea, lipsa de inițiativă. Într-o asemenea perspectivă, studentul ar fi un simplu receptacul de informații, depinzând în exclusivitate de profesor dacă ceea ce se transmite este de calitate sau nu.

O asemenea obiecție nu este lipsită de plauzibilitate şi ar trebui să ne oprim asupra ei. Dacă privim cu atenție datele din tabelul VI, observăm un lucru curios.

Tabelul VI

		Factorii succesului (număr studenţi care au ales varianta)							
		Studiul individual	Voinţa de a învăţa/motivaţia studentului	Planul de învăţământ/Dotarea universităţii/	Prezenţa la cursuri/ seminarii	Practică	Profesorul/ modul de predare	Mediul social al studentului	NR
Anul de studii	I	10	14	2	2	0	17	3	11
	II	2	9	1	0	0	22	4	22
	III	5	14	1	0	0	23	1	16
	IV	7	14	2	3	0	22	0	11

Dacă 80% dintre studenții anului I consideră ca esențiale pentru obținerea succesului elemente intrinsece precum studiul individual, motivația, dorința de a fi cel mai bun, doar 36% dintre studenții anului II menționează factori intrinseci asemănători. Importanța acordată cadrelor didactice este ceva mai mare la anul II, fiind aleasă de 73% dintre respondenți, pe când studenții din anul I o aleg doar în proporție de 56%. Cum ar trebui

lecturate aceste diferențe? Suntem oare îndreptățiți să sugerăm că studenții anului I sunt mai responsabili, mai conştienți de propriul rol în obținerea succesului decât colegii lor mai mari? Dacă luăm în considerare şi răspunsurile studenților din anii III şi IV, observăm că deşi numărul celor care aleg factorii intrinseci ai succesului este mai mare decât al celor din anul II, tot cei din anul I rămân pe primul loc al alegerilor factorilor intrinseci. Ar fi extrem de ciudat să asumăm că facultatea determină o de-responsabilizare şi o pasivizare a tinerilor. Probabil că ar trebui să încercăm să lărgim uşor perspectiva.

Dacă luăm în calcul anul II, cel în care se manifestă în cea mai mare măsură tendința de presupusă „pasivizare", e important, credem, să readucem în discuție atitudinile studenților în ceea ce priveşte procesul efectiv de învățământ. Din figura 2, tabelele II şi III se poate observa faptul că studenții anului II sunt cei mai mulțumiți, în raport cu colegii lor din ceilalți ani, de prestația cadrelor didactice, de cunoştințele teoretice asimilate, ca şi de sistemul de evaluare practicat în facultate. Cum am mai spus într-un paragraf anterior, este probabil ca studenții anului II să fie cei mai bine „integrați" în facultate. O bună integrare în structurile şi activitățile unui grup/instituții este asociată adesea cu conştiința acestei integrări, mai precis cu deplina interconectare a tuturor elementelor ce constituie grupul/instituția. În această lumină, devine oarecum inteligibil de ce în determinarea factorilor de succes, de către un student „integrat", elementele „extrinseci" vor ocupa un loc central.

Din păcate, explicația precedentă se confruntă cu o obiecție deloc lipsită de importanță:, de ce studenții anului III, mai puțin „integrați"[2], au o atitudine similară cu cei de anul II în atribuirea succesului unor factori extrinseci. N-ar trebui sa fie contrariul adevărat?

În aceste condiții, ceea ce trebuie să facem este să privim mai degrabă spre ceea ce au în **comun** studenții celor doi ani, nu spre ceea ce-i diferențiază. Vedem că acest comun al studenților anilor II, III şi IV este „durata" mai mare – în raport cu studenții primului an – de timp petrecută în instituția de învățământ superior. Cu alte cuvinte, nu credem că diferențele în atribuire succesului ar putea fi căutate pe axa intrinsec/extrinsec; mai degrabă, ar fi vorba de înțelegerea faptului că formarea academică şi profesională depinde într-o mare măsură de „formator". Pentru studenții anului I acest lucru apare cu mai mică claritate – ei par să înțeleagă într-o mai mică măsură interrelaționarea complexă a actorilor procesului de învățământ. Indiferent dacă studenții sunt mai mult sau mai puțin mulțumiți cu felul în care se desfăşoară procesul de învățământ, ei cad de acord asupra faptului că o educație juridică de calitate – aceea care să garanteze succesul academic şi profesional al absolvenților, depinde într-o măsură crucială de prestația cadrelor didactice. Chiar şi aşa, obiecția cum că ponderea foarte mare în atribuirea externă a succesului (succesul depinde în primul rând de cadrele didactice) este un indicator al de-responsabilizării nu poate fi înlăturată cu uşurință. Cu atât mai mult cu cât lipsa de asumare a responsabilității pare să fie o problemă serioasă a întregii societăți româneşti contemporane.

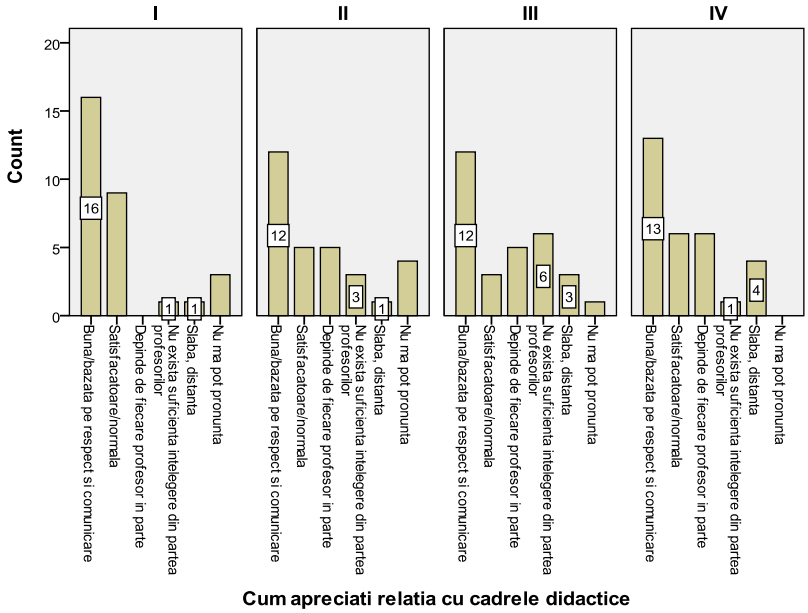
[2] Poate că expresia „mai puțin integrați" este hazardată şi ar cere dovezi suplimentare. Ceea ce am dorit să subliniem este faptul, incontestabil, că studenții anului III sunt semnificativ mai nemulțumiți de procesul de învățământ decât colegii lor din anul II.

5. Relația studenților cu cadrele didactice

Ne putem întreba, plecând de la datele sintetizate în tabelul II (vezi mai sus), dacă percepția studenților privitoare la calitatea prestației academice a profesorilor are vreo legătură cu modul în care este percepută, de către aceiași, disponibilitatea relațională a cadrelor didactice. La modul general, majoritatea studenților Universității Româno-Americane apreciază relațiile cu profesorii ca fiind bune: 58.8% consideră relațiile ca fiind bune/întemeiate pe respect reciproc, iar alți 26,7% consideră relațiile ca fiind normale/satisfăcătoare. Doar 17.7% dintre studenți sunt nemulțumiți de relațiile cu profesorii lor, apreciindu-le ca fiind slabe/distante sau considerând că profesorii nu au suficientă înțelegere pentru studenți.

În figura 5 situația este defalcată pe anii de studii. Se poate observa faptul că cei mai mulți studenți nemulțumiți de relațiile cu profesorii lor sunt în anul III, 10%, mai mulți decât în toți ceilalți trei ani la un loc (ce însumează 7.7%).

Fig. 5



Aceste date se corelează cu observațiile precedente – nu e de mirare că studenții nemulțumiți de procesul de învățământ se recrutează mai ales dintre aceia care percep relațiile cu profesorii ca fiind slabe, distante. Reciproca este, de asemenea, adevărată. O relație bună, apropiată cu cadrele didactice este un indicator al faptului că studenții respectivi sunt mulțumiți de desfăşurarea întregului proces de învățământ.

6. Corectitudinea sistemului de notare

Am abordat această problemă în subcapitolul 2.1, datele fiind obținute din cercetare fiind sintetizate în fig. 2. Ceea ar mai trebui adăugat este legat de conținutul concret al nemulțumirilor legate de sistemul de evaluare şi de soluțiile concrete propuse pentru

îmbunătățirea acestuia. Principala nemulțumire a studenților este legată de faptul că examenele la Universitatea Româno-Americană sunt doar scrise. Un număr semnificativ de studenți din anii III şi IV propun introducerea examenelor orale care, consideră aceştia, ar putea testa mai în profunzime cunoştinţele studenților. Atitudinea studenților față de examenele tip grilă este ambivalentă. Doar studenții din anul IV par să aibă o atitudine mai clară față de acest tip de examinare, 10% dintre ei respingând total ideea examenelor grilă.

Ideea că exigențele examinării ar fi prea mari este împărtăşită de un număr mic de studenți, doar doi studenți plângându-se de acest aspect. Numărul studenților nemulțumiți de sistemul de notare este de asemenea relativ scăzut – toți cei nemulțumiți de sistem fiind din anul III.

Tabelul VII

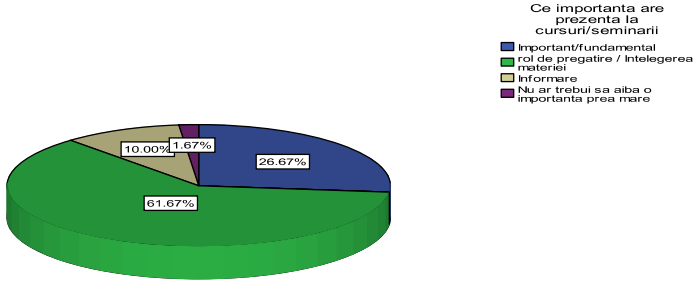
		Cum apreciaţi corectitudinea sistemului de notare?										
		Corect	Relativ bun	Sunt prea multe teste	Ar trebui mai multe grila	Ar trebui eliminate grilele	Ar trebui introduce examene orale	Exigentele sunt prea mari	Prezenta are un rol prea mic in notare	Nu toţi profesorii sunt corecţi	Nu este corect	NR
Anul de studii	I	50.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	50.0%
	II	66.7%	6.7%	3.3%	3.3%	3.3%	3.3%	.0%	6.7%	6.7%	.0%	.0%
	III	40.0%	3.3%	6.7%	3.3%	.0%	20.0%	3.3%	3.3%	10.0%	6.7%	3.3%
	IV	36.7%	10.0%	3.3%	.0%	10.0%	23.3%	3.3%	3.3%	10.0%	.0%	.0%

Restul nemulțumirilor sunt motivate de factori mai degrabă contextuali, anume faptul că nu toți profesorii sunt la fel de corecți.

Prezența la cursuri şi seminarii

Spre surprinderea noastră, un procent de 98% dintre studenți apreciază importanța deosebită a prezenței la cursuri şi seminarii.

Fig. 6



Dintre aceştia, 61.6% consideră că prezența este esențială pentru înțelegerea materiei predate, 26,6% apreciază prezența ca fiind importantă fără să menționeze motivele pentru care ar fi astfel, iar 10% dintre studenți spun că prezența ar avea un rol de informare. Miza întrebării referitoare la prezență este însă uşor diferită de celelalte.

Spre deosebire de întrebările ce vizau stabilirea gradului de mulţumire faţă de o componentă sau alta a procesului de învăţământ, atitudinea verbală în ceea ce priveşte alocarea importanţei prezenţei are o relevanţă limitată. Indicatorul corect al atitudinii în acest caz este frecventarea reală a cursurilor şi seminariilor de către studenţi. În lipsa acţiunii propriu-zise, ceea ce rămâne este un simplu conformism verbal. Din păcate, declaraţiile studenţilor nu sunt suficiente pentru a decide dacă atitudinea exprimată reprezintă mai mult decât expresia acestui conformism.

Concluzii focus grup studenţi

Dacă ne raportăm la datele rezultate din interviuri, am putea spune că aşteptările studenţilor privitoare la structura planurilor de învăţământ sunt, în mare, îndeplinite în momentul de faţă. 80% dintre studenţii intervievaţi se declară mulţumiţi cu situaţia existentă. Dacă privim însă propunerile de schimbare, ne poate încerca o nedumerire. Studenţii propun spre eliminare din actuala structură un număr de 22 de discipline, pentru a fi înlocuite de 44 de alte discipline! Este mulţumirea declarată doar o reacţie de faţadă? Pentru a răspunde la întrebare, am încercat să corelăm propunerile de schimbare cu alte date relevante obţinute în urma interviurilor. Am observat, nu fără surprindere, că cele mai multe din propunerile de eliminare ale unor discipline provin de la studenţii mai bine integraţi în sistemul universitar, mai mulţumiţi de prestaţiile cadrelor didactice, de cunoştinţele teoretice acumulate şi de sistemul de evaluare practicat la Universitatea Româno-Americană. Dacă motivaţia care stă la baza eliminării disciplinelor nu este nemulţumirea, am sugerat că o posibilă explicaţie ar fi conformismul: studenţii bine integraţi au răspuns într-o măsură mai mare la invitaţia de a elimina discipline pentru că au perceput această invitaţie ca pe o necesitate externă (în sensul de „ce aţi elimina dacă aţi fi nevoiţi să o faceţi"). Nu e de mirare că opţiunile de eliminare se concentrează asupra disciplinelor de cultură generală: Contabilitate, Filosofie, Retorica, Economie, Sociologie. În ciuda numărului ridicat de discipline propuse spre eliminare, nici una nu întruneşte un număr semnificativ de voturi negative, astfel încât să putem vorbi de potenţiale probleme serioase la o disciplină anume.

Dacă privim spre propunerile de introducere a unor noi discipline, numărul de 44 de discipline noi, propuse spre a fi introduse, ne poate deruta. Doar la prima vedere, căci ne dăm seama că există o dispersie pronunţată a voturilor şi că doar un număr mic de discipline întruneşte un număr relevant de voturi. Cele mai multe opţiuni nici măcar nu vizează o disciplină anume: studenţii doresc, într-o măsură semnificativă, practică suplimentară. Aproape jumătate din studenţii anilor mari au ales practica suplimentară ca disciplină de introdus. În afară de practică, cele mai multe opţiuni s-au îndreptat spre o nouă limbă străină şi pentru drept internaţional. Cele două opţiuni par să fie motivate subiacent similar: studenţii vor să fie pregătiţi pentru piaţa muncii externe. Dintre disciplinele de drept propuse, cele mai multe voturi se îndreaptă spre (varietăţi de) drept penal, criminologie/victimologie şi dreptul afacerilor. Acest lucru credem că este un bun indicator al faptului că cele două programe de masterat ale facultăţii de drept (drept penal şi dreptul afacerilor) au fost create având la bază preferinţele exprimate ale studenţilor. Omniprezenţa practicii în alegerile studenţilor se corelează puternic cu un grad ridicat de nemulţumire al studenţilor din anii mari în ceea ce priveşte **cantitatea şi calitatea cunoştinţelor practice dobândite** în facultate. De altfel, nemulţumirile legate de acest aspect al procesului de învăţământ constituie principala sursă de nemulţumire a studenţilor Universităţii Româno-Americane.

Numărul mare de discipline propuse sugerează, credem, un lucru important, acela că **nu există o viziune coerentă asupra schimbării planurilor de învățământ la studenții Universității Româno-Americane**, modificările propuse reflectând interese mai mult sau mai puțin individuale ale fiecărui student.

Dotarea materială a universității este apreciată ca fiind excelentă de către aproape toți studenții (e adevărat totuși că dotarea bibliotecii este considerată deficitară de un număr important de studenți), relația cu cadrele didactice este percepută ca fiind bună/foarte bună de către peste 80% din cei intervievați. Cu excepția studenților anului III, calitatea cadrelor didactice este considerata foarte mulțumitoare de peste 80% din studenți, iar cunoştințele teoretice dobândite sunt considerate foarte mulțumitoare de peste doua treimi din studenți. Studenții anului III sunt însă semnificativ mai nemulțumiți de aceste doua aspecte, doar o treime din ei declarându-se mulțumiți de cunoştințele teoretice dobândite şi doar jumătate fiind pe deplin mulțumiți de prestația cadrelor didactice. Nu ne este clară, din datele obținute, sursa acestor diferențe între anii de studii.

Sistemul de evaluare practicat în facultate este apreciat într-o măsură mai mare de către studenții primilor doi ani şi într-o măsură mai mică de către studenții anilor III şi IV.

Importanța prezenței la cursuri şi seminarii se bucură de o cvasiunanimitate (98%) în rândul studenților, chiar dacă această unanimitate pare mai mult una formală – simpla apreciere a importanței prezenței este ceva care nu responsabilizează nicicum. Prezența reală la cursuri şi seminarii reprezintă un indicator mult mai fidel al importanței pe care aceasta o ocupă în ierarhia de valori a studentului. Din păcate, nu am putut face o corelație între atribuirea de importanță pe care studenții o alocă factorului „prezență" şi prezența lor efectivă la cursuri şi seminarii. În atari condiții, am fi putut înțelege mai bine dacă nu cumva deficitul de cunoştințe „practice" acuzat de studenți nu are cumva legătură cu absențele de la activitățile de seminarizare şi clinică juridică. Spre deosebire de aspectele teoretice ale disciplinelor, partea practică nu prea poate fi dobândită din simpla lecturare a materialului bibliografic.

O corelație interesantă este aceea între importanța pe care studenții o atribuie prezenței la activitățile didactice şi rolul atribuit cadrelor didactice în obținerea succesului în profesie. La întrebarea „de ce studenții atribuie un rol covârşitor profesorilor în obținerea succesului profesional" (în condițiile în care succesul este, totuşi, o realizare individuală), am putea oferi două răspunsuri. Un prim răspuns, măgulitor pentru profesori, este acela că studenții înțeleg faptul că formarea academică şi profesională depinde într-o mare măsură de „formator" şi că actorii procesului de învățământ se află într-o intercorelare complexă. Al doilea posibil răspuns este mai puțin plăcut: el sugerează că este vorba de o situație tipică de derogare a responsabilității, în care succesul/insuccesul sunt atribuite extern. Dacă succesul individual depinde într-o mică măsură de propria persoană, atunci studentul îşi poate permite să se „relaxeze": profesorii vor avea grijă ca el să aibă succes. Iar dacă succesul va întârzia să apară, atunci măcar va putea exista posibilitatea de a plasa altora vinovăția propriului insucces. Datele recoltate în urma interviului nu ne permit să decidem care dintre cele două răspunsuri este cel corect. Asta nu înseamnă însă că nu se poate descoperi răspunsul la întrebare: dimpotrivă, felul în care studenții se implică în mod real în procesul academic, seriozitatea cu care abordează testele, verificările şi examenele ne-ar putea da ajuta în aflarea răspunsului corect.

REGULATIONS OF THE NEW CODE OF CIVIL PROCEDURE ON SOLVING DISPUTES WITH CELERITY

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Abstract

The large number of disputes and the celerity in achieving commercial transactions and trading activities, the need for simplified and faster judicial proceedings to solve conflicts among professionals have determined the amendment of the former Code of civil procedure and the implementation of regulations which could lead to the adoption of the celerity principle.

The common law judicial procedure is, even in the regulation of the new Code of civil procedure, pretty cumbersome, it takes much time and has become increasingly costly due to the numerous fees, bails or lawyers' charges.

Our paper aims to contribute to the in-depth knowledge and improvement of the legislation on the speedy dispute resolution through special, simplified procedures which could assist the truth, restore the lawful order and increase the trustworthiness of law enforcing bodies.

Keywords: celerity, disputes, predictable term, judicial procedures

CONTENTS

Professional ventures, not only in Romania, but all through the European Union, mainly small-and medium-sized enterprises, still face administrative and financial difficulties stemming from long payment terms and delays in making payments, which can generate the impossibility to pay and, consequently, insolvency. These situations which threaten the existence of companies and lead to the loss of numerous job have represented for the European Council, ever since 1995 a major concern for the regulation of much simplified judicial procedures, applying to those who repeatedly fail to pay their commercial debts, a highly harmful phenomenon, with particularly serious consequences on economic development and the capital.

There has been a deep need to set special procedures[1], governed by the celerity principle, with a predominantly non administrative character in the first stage of this procedure, that of notifying the court, possibly followed by an administrative stage if the debtor resorts to cancellation.

As proven by assessments from numerous European countries but also by the reform of the European Court of Human Rights, justice is facing a celerity and efficiency crisis. For this precise reason, justice is unable to answer citizens' needs, in Europe being generally considered too complicated, slow and expensive and often turning into injustice[2].

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[1] For an in-depth study of special procedures, also see: Fl. Măgureanu, G. Măgureanu, Drept procesual civil. Curs pentru materat. Dreptul afacerilor, 2nd edition, Ed. Universul Juridic, Bucureşti, 2009.

[2] M. Voicu, *Procedura somaţiei de plată în materie comercială*, în „Revista de drept comercial", nr. 12/2001, p. 45 and the next.

Currently, in order to obtain a decision of the court, the "reasonable" term defined by the European Convention of Human Rights is exceeded. That is why the central objective of the legislative and institutional reform is to update the legal system with the setup of extrajudicial organisms capable of taking over disputes and certain special procedures (the procedures of mediation, prior conciliation, demand for payment etc.).

Definitely, the efficiency of justice is also given by the speed with which the rights and obligations set through court decisions or other enforcing titles are established and implemented, thus restoring rightful order when this has been breached.

Lack of celerity in the resolution of files has often been invoked and supported before the European Court of Human Rights in many of the cases it judged. Romania was charged because a trial lasted significantly longer than it would have under the circumstances of celerity[3]. The causes of such delays have always been the judicial procedures which prove to be cumbersome, abounding in excessive formalism, much too expensive and lasting an unjustifiably long period.

Romania has a very large number of the total complaints addressed to the Court. Together with 3 other states, Russia, Turkey and Ukraine, they count up to over 50% of the total number of complaints pending before the Court. In 2011 there were 4,349 complaints against Romania, most of them referring to unjustified delays in trials; thus, the sum total that Romania has to pay is approximately Euro 12 million[4].

The need of celerity is not a new topic. It has preoccupied many law practitioners and theoreticians, even prior to the European Convention of Human Rights, because there have been a constant concern of the legal doctrine and practice for speedy resolution of files.

The closer the decision to the moment when the plaintiff resorted to the court for the resolution of its file, the more correct it will be, since it spares the plaintiff's stress and uncertainty experienced until obtaining the final decision, and all the more useful, since for the plaintiff it is essential that its claim be solved as soon as possible, and for society the restoration of rightful order occur as soon as possible, but not to the detriment of the quality of the said decision.

I. Analysis on general regulations of the new Code of civil procedure

The entry into force of the new Code of civil procedure[5] mainly aimed to accelerate trial resolution, to simplify procedures and increase the celerity of dispute resolution, with a direct impact on the execution of court decisions and other enforcing titles. Regulating the right to a fair trial within the best and predictable term, the new Code set at art. 6 paragr. (1) the right of every person who resorts to justice in order to benefit from the trial of its case in

[3] See, for instance: the decision of the European Court of Human Rights in the file Abramiuc vs. Romania, when the Court decided that the excessive extension of the file resolution was due to the lack of celerity of the judicial procedures (CEDO, Abramiuc vs. Romania, application no. 37411/02, decision of February 24th, 2009, www.echr.coe.int.); Sandor-Kocsis vs. Romania, in which the Court accepts the application relying on the grounds referring to the excessively long duration of the procedue and failure to execute the decision of May 6th, 2003 of the Court of Târgu Mureş, in breach of the provisions of art. 6 paragr. 1 of the European Convention of Human Rights and sentences Romania to the payment of money to the plaintiff, dueto the excessively long term of the procedure, http://jurisprudentacedo.com.

[4] http://adevarul.ro/news/eveniment/audio-razvan-horatiu-radu-condamnarile-romaniei-cedo.

[5] Republished in the Official Gazette, Part I, no. 545 of August 3rd, 2012, amended including through Law no. 72/2013, published in the the Official Gazette, Part I, no. 182 of April 2nd, 2013.

a fair manner, within the best term, by an independent and impartial court set by the law, a regulation which can be found with similar terms in art. 6 of the European Convention of Human Rights. In order to achieve this goal, the court needs to have all the measures permitted by the law and ensure the celerity of trials and of forced execution.

The speedy case resolution involves a fast operative judgment, within a reasonable and predictable term[6].

It is regulated also by the Constitution[7], which, under art. 21 point (3) stipulates that "the parties are entitled to case resolution within a reasonable term". Similarly, Law no. 304/2004 for judicial organization[8] stipulates at art. 10: "All the persons are entitled to a fair trial and to case resolution within a reasonable term, by an impartial and independent court set up under the law", as well as art. 6 point 1 of the European Convention of Human Rights[9].

Usually, the Code of civil procedure does not expressly indicate the celerity principle, but it contains a series of regulations which aim at the implementation of this principle.

For instance:

- the regulation on the provisions of the Code of civil procedure referring to the principle of the judge's active role determines him to use all the measures permitted by the law and ensure the speedy organization of the trial [art. 6 paragr. (1) C. civ. proc.]. Repeatedly failing to comply with the legal provisions referring to the speedy case resolution or repeated delays of works for reasons which are attributable to the magistrate is a disciplinary breach and can be sanctioned according to the provisions of art. 99 paragr. (1) letter h) of Law no. 303/2004 on the status of judges and prosecutors[10];

- in order to diminish the period when summons and other procedural activities are communicated to the parties and to other participants in civil trials, the communication can be carried out by the registry of the court and by telefax, electronic mail or other means ensuring the transmission of the act and the acknowledgment of the receipt thereof, if the party specified to the court the appropriate data to this end [art. 154 paragr. (6)];

- the court decides on compensations for any material or moral damage caused by the delay, by forcing payment onto the entity which, willingly or in default, caused the delay of the trial or forced execution (art. 189);

- an estimate of the case resolution. The question is whether the judge can estimate the trial duration right from the onset and the criteria influencing this duration;

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[6] Fl. Măgureanu, *Drept procesual civil*, vol. I, Ed. Universul Juridic, Bucureşti, 2013, p. 49 and the next one; M. Tăbârcă, *Drept procesual civil*, vol. II, Ed. Universul Juridic, Bucureşti, 2013, p. 19 and the next.

[7] Published in the Official Gazette, Part I, no. 767 of October 31st, 2003.

[8] Republished in the Official Gazette, Part I, no. 827 of September 13th, 2005 and amended including through Emergency Order no. 74/2013, published in the Official Gazette, Part I, no. 389 of June 29th, 2013.

[9] The Convention was ratified through Law no. 30/1994, published in the Official Gazette, Part I, no. 135 of May 31st, 1994, entered into force on June 20th, 1994 by submittal of the ratification instruments to the general Secretariat of the European Council. In the meaning of the Convention there are also the provisions of art. 14 of the International pact on civil and political rights, ratified by Romania through Decree no. 212/1974.

Also see the Decision of January 18th, 1989 of the European Court of Human Rights on the scope of art. 6 point 1 of the Convention, given in file LORENIUS/VS/SWEDEN, in V. M. Ciobanu, Tratat teoretic şi practic de procedură civilă, vol. I, Ed. Naţional, Bucureşti, 1996, p. 150.

[10] Republished in the Official Gazette, part I no.826 of September 13th, 2005, also amendedt hrough Emergency Ordinance no. 48/2013, published in the Official Gazette, Part I no. 303 of May 28th, 2013.

Art. 238 paragr. (1) C. civ. proc. implements the judge's obligation, at the first hearing for which the parties are lawfully summoned, to decide on the hearing thereof and, considering the parties' opinions and circumstances of the file, to make an estimate of the trial duration, in order to ensure the resolution thereof within the best and predictable term. The duration thus estimated shall be written down in the minutes of the session.

What happens if the aspects of the file resolution are more complex and the judge realizes that the term cannot be complied with?

Paragr. (2) of art. 238 established that, for solid grounds, after hearing the parties, the judge may reconsider the duration set previously.

In order to determine the judge to comply with the term thus estimated, the new Code of civil procedure regulated the institution of the contestation on trial delays[11]. Therefore, according to the provisions of art. 522 paragr. (1), any party, as well as the prosecutor attending the trial, may submit a contestation which invokes the breach of the right to case resolution within the best and predictable term and the removal of any obstacles which led to the failure of compliance with the estimated term, unless the term has not been reconsidered as mentioned above.

The law has also established the cases for submitting a contestation:

- when the law stipulates a term for the completion of a file, for granting or motivating a decision, but this term elapsed without any results;

- when the court established a term during which a participant in the trial had to complete an element of the procedure, and the term elapsed but the court failed to implement the measures stipulated by the law against the entity who failed to execute its obligation;

- when a person or authority which is not a party has been made to communicate tothe court, within a certain term, a written document or data or other information resulting from its registers and which were necessary for the case resolution, and this term elapsed but the court failed to implement the measures stipulated by the law against the entity who failed to execute its obligation;

- when the court failed to execute its obligation to solve the file within the best and predictable term by failing to take the measures stipulated by the law or by failure by office, when the law imposes it, of a procedural element necessary to solve the case, although the time elapsed since the last procedural action would have been enough to allow taking the said measure or fulfilling the said action.

In order to comply with the celerity principle, the contestation does not suspend the case resolution, since the contestation is solved immediately or within 5 days at the most, without the parties being summoned. We think that it is necessary to amend the regulation at art. 524 paragr. (3) C. civ. proc. which stipulates that the contestation can be solved by the panel in charge with solving the case, since the judge can be accused of subjectivism in analyzing the circumstances leading to the delays in the case resolution.

When solving the contestation, the court has two possibilities:

a) to rule that the contestation is grounded, in which case the panel gives a decision which cannot be challenged, whereby it takes the measures necessary to remove the

[11] Also see: V.M. Ciobanu, N. Marian et al., *Noul Cod de procedură civilă comentat şi adnotat*, vol. I, Ed. Universul Juridic, Bucureşti, 2013, p. 1223 and the next.

situation which led to the delay of the trial, and the court has the obligation to communicate to the objector one copy of the decision for information purposes;

b) to rule that the contestation is ungrounded, to reject it, in which case the objector has the opportunity to complain within 3 days as of the communication, which does not suspend the judgment. The complaint is submitted to the court which formulated the decision, but will be solved by the hierarchically superior court. If the trial is pending before the High Court of Cassation and Justice, the complaint is solved by another panel of the same section.

The complaint will be solved within 10 days as of the reception of the file from the court where it has been submitted, without summoning the parties, through a decision which is not subject to any appeal. The decision must be motivated within 5 days as of the issuance thereof.

We are of the opinion that the structure of the panel which has to solve the complaint and which consists of 3 judges is exaggerated, just like the appeal judgment, the complaint being closer to the appeal.

The court which solves the complaint will not be allowed to provide any guidance or clarifications of de facto or de jure issues which could anticipate the case resolution or impact the judge's freedom to decide, according to the law, on the solution which needs to be given in the trial. However, it can decide that the court judging the trial should go through the procedural action or take the necessary legal measures, indicating which these are and establishing, when applicable, a term for their fulfillment, if the complaint is deemed grounded.

The Code of civil procedure stipulated at art. 526 paragr. (1) the sanction for the ill-willed objector (the clearly ungrounded nature of the contestation or of the complaint, or the pursuit of purposes other than justice), who can be made to pay a judicial fee between RON 500 to RON 2.000 and to pay, upon the request of the interested party, damages in order to repair the effects caused by submitting the contestation or the complaint, if any effects have been caused and its worth can be set.

Other regulations whereby the new Code of civil procedure aims to fulfill this principle refer to:

- failure to comply with the term for the use of a trial right, which leads to the loss of the right, the procedure act being carried out beyond the term affected by nullity [art. 185 paragr. (1)], which determines the party to make all efforts to perform the trial actions and activities within the term stipulated by the law;

- the parties' opportunity to select the procedure for the administration of evidence through an attorney at law, in which case the judge, on the first hearing when the parties are lawfully summoned, informs them, if they are represented or assisted by an attorney, that they can agree that the evidence be presented by the parties' attorneys, also estimating the term of such administration, the legal regulations on the estimate of the trial term being also applicable in these cases. An exception are the disputes on the marital status and ability of persons, family relations and any other rights for which the law does not allow for any transaction;

- analysis of the trial in order to prepare the debate by the judge, in the meeting room, unless otherwise stipulated by the law. In the situations when the debate in public session would impact morality, public order, minors' interests, parties' private lives or justice

interests, when the court may decide that they occur in part or in full without the presence of the public.

The trial analysis in order to prepare the debate aims to solve with celerity aspects referring to: the resolution of exceptions invoking or which the court may raise by office; the analysis of the intervention requests formulated by parties or third parties, under the law; the analysis of each claim and defense, based on the summons, the notification, the notification reply and the parties' explanations, if applicable; in order to see which claims are accepted and which are contested; in order to decide, under the law, upon request, on measures to provide evidence or acknowledge a situation, in case these measures had not been taken; in order to be informed on the plaintiff's renunciation, the defendant's acceptance or the parties' transaction; in order to accept the evidence requested by the parties which it deems conclusive, as well as the evidence which, by office, is necessary for the judgment of the trial and which it will present under the law; in order to decide on any other applications which can be formulated on the first hearing when the parties are summoned; it will decide that the parties proved the checks carried out with the publicity registers stipulated by the Civil Code or special laws and it will also conduct any other procedural action necessary to solve the case, including checks in registers stipulated by special laws.

In all these cases, in the meeting room or the board room, there will be only the parties, their representatives assisting minors, the parties' defense, witnesses, experts, interpreters, as well as any other persons whom the court, for solid grounds, accepts as audience to the trial.

Since the investigation occurs without any summons and only if the presence of the parties or of those mentioned is necessary, the numerous terms that could be requested during the procedure stipulated by the previous Code of civil procedure are removed.

- appointment by the court, upon the request of the interested party, of a special curator, in emergency situations, if the natural person lacking the capacity to exert civil rights or whose capacity is restricted does not have a legal representative, until one is appointed. Thus, trial suspension is avoided until the appointment of the legal representative, a suspension which can sometimes last for a significant period and the checks that need to be carried out by the authorities, for the protection of these categories of persons. The special curator has all the rights and obligations stipulated by the law for the legal representative [art. 58 paragr. (1)].

The special curator will also be appointed by the court in case of conflicts of interests between the legal representative and the represented entity or when a legal entity such as associations, companies or other entities without legal personality, if established under the law, summoned to be part of the trial, does not have a representative.

The court can appoint a special curator from among the attorneys designated to this end by the bar for each court of law.

- priority resolution of requests on: relocation [art. 144 paragr. (1)]; providing evidence [art. 359 paragr. (1)]; the emergency acknowledgment of a situation [art. 364 paragr. (1)]; acknowledgment of the obsolescence condition [art. 420 paragr. (1)]; clarification of the decision and removal of any contradictory provisions [art. 443 paragr. (2)] as well as completion of the decision [art. 444 paragr. (2)]; appeal for cancellation [art. 508 paragr. (1)]; settlement by the court of impediments occurring during the arbitration procedure

[art. 547 paragr. (2)]; if the debtor is no longer entitled to the term of payment [art. 674 paragr. (2)]; in case of a contestation upon execution [art. 716 paragr. (3)]; upon the settlement of the debtor's request in case of payments with special observations [art. 720 paragr. (2)]; upon the resolution of the request on return of the forced execution [art. 723 paragr. (3)]; in the cases on the enforcement of decisions referring to children, if the child definitely refuses to leave the debtor or manifests aversion towards the creditor [art. 912 paragr. (1)]; in case of insurance measures and others.

- the judge's obligation to consider, for the establishment of procedural terms, the urgent nature of certain files [art. 180 paragr. (3)].

II. The establishment of much simplified judicial procedures by removing excessive formalism, in files where the conditions imposed by the law are complied with. We hereby mention two of them:

a) the procedure of money order[12] regulated by art. 1013 – 1024 C. civ. proc., if some terms mainly referring to the debt are complied with.

At the 1995 recommendation of the European Council on terms of payment for commercial transactions[13], Directive 2000/35/EC of June 29th, 2000 of the European Parliament and Council was issued on the prevention of delays in payments in the case of commercial transactions[14].

The above-mentioned directive set the implementation of secondary legislation meant to remove the repeated failure to pay commercial debts, by adopting special derogating rules governed by the celerity principle.

When drafting the new Code of civil procedure referring to the above-mentioned aspects, consideration was given to similar regulations from France (L`injonction de payer – a procedure regulated by art. 1405-1425 of the New French Code of civil procedure) and Germany (Mahnverfahren, a procedure contained in the 7th Book of the German Code of civil procedure)[15]. Similar regulations are found in Italy (Procedimento di ingiunzione), Austria (Mandatsverfahren), Portugal (Injuncao), Brazil (Acao monitoria), Nordic and African countries.

According to the provisions of art. 1.013 paragr. (1) C. civ. proc., the debt must refer to the obligation to pay amounts resulting from a civil contract, including those closed between a professional and a contracting authority and which is proven through a written document or determined under a statute, regulation or some other document, assumed by the parties under signature or otherwise as stipulated by the law. The scope of this procedure does not include the debts registered in the statement of assets within an insolvency procedure [art. 1013 paragr. (2) C. civ. proc.].

Celerity results even more clearly from the provisions of art. 1022 paragr. (1) C. civ. proc., which specify that, if the debtor does not challenge the debt through a notification, the money order will be issued within 45 days at the most as of the enforcement of the

[12] For a thorough analysis of this procedure, see also: M. Tăbârcă, *Drept procesual civil*, vol. II, Ed. Universul Juridic, Bucureşti, 2013, p. 779 and the next. In order to analyze the regulation before the entering into force of the new Code of Civil procedure, see also Fl. Măgureanu, G. Măgureanu, *op. cit.*, p. 193 and the next.

[13] JO L 127, 10.06.1995, p. 19.

[14] Published in The Official Journal of the European Union, no. L 200/35 of August 8th, 2000,

[15] See also George Măgureanu, *Consideration on the judiciary procedures of conflict resolution*, Magazine Curentul Juridic, Târgu Mureş, no. 4/2011, p. 123-135.

application, but the calculation of this term rules out the period necessary to communicate the procedural actions and the delay caused by the creditor, including as a result of any modification or completion of the application.

b) the procedure referring to low worth applications, which has an alternative character, since the plaintiff may choose between this special procedure and the common law procedure.

The procedure referring to the low worth applications is applied when the amount, without considering any interests, legal charges and other accessory incomes, does not exceed RON 10,000 on the date the court is notified.

An exception to this situation refers to actions of fiscal, customs, administrative nature; in respect of the liability of the state for acts or omissions in exerting public authority; the marital status or capacity of natural persons; patrimonial rights deriving from family relations; inheritance; insolvency; preventive concordance, procedures on the liquidation of insolvent companies and other legal entities or other similar procedures; social insurance; labor law; the rental of goods, except for actions referring to debts which focus on the payment of amounts; arbitration; negative influences on the right of private life or other rights referring to personality.

The procedure is drafted and takes place in the council room, removing the formalism caused by the summoning of the parties, the delays in common law cases, the parties being summoned only if the court deems it necessary or upon the request of a party. In this latter situation, the court may refuse the request of the party if it thinks that, considering the circumstances of the file, no verbal debate is necessary.

The principle of celerity or that of the reasonable term is also strengthened by other regulatory documents. Thus, art. 271 of the labor Code stipulates: "Any applications referring to the settlement of labor conflicts are judged with priority". "Judgment terms cannot exceed 15 days". "The procedure of party summoning is deemed lawful if it occurs at least 24 hours prior to the judgment term", while art. 273 of the same regulatory document mentions that "The administration of evidence complies with the emergency regime, the court being rightfully entitled to remove the benefit of the accepted evidence from the party which unreasonably tergiversates to present it".

To conclude, we can claim that, through the amendments to the Code of civil procedure, judgment acceleration was attempted and finally succeeded in certain files, particularly in the commercial field, by removing the appeal means of the remedy at law.

However, the common law procedure which a creditor has to undergo until it obtains the enforcing title still remains pretty cumbersome and long, all these also due to the large number of alternatives the debtor can resort to in order to delay the payment of its outstanding debts.

The new regulations have also been successful because, in civil and commercial fields, many trials pending to the courts which refer to outstanding debts go through the common law procedure, although not all its stages are necessary.

On the whole, the money order is a procedure which precedes the submitting of summons. Therefore, whenever there are applications which can make the object of a procedure prior to submitting the summons under the common law, the creditor may first go through the order procedure and, if its application is rejected or partly accepted, it may address the court using the common law procedure.

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PRESENT LEGAL ASPECTS REGARDING UNFAIR COMPETITION

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Abstract
Unfair competition represents a legal challenge both for the legislators and for the economic market. As new ideas of breaking the legal texts arrive, more legal work has to be done in order to keep up with the illegal actions taken by companies in their attempt to earn more for less.

Keywords: competition, unfair competition, leniency, cartels, the European Union

1. Introduction

Unfair competition in a sense means that the competitors compete on unequal terms, because favorable or disadvantageous conditions are applied to some competitors but not to others; or that the actions of some competitors actively harm the position of others with respect to their ability to compete on equal and fair terms. It contrasts with fair, legal competition in which the same rules and conditions are applied to all participants, and the competitive action of some does not harm the ability of others to compete.

Often, unfair competition means that the gains of some participants are conditional on the losses of others, when the gains are made in ways which are illegitimate or unjust.

Unfair competition in commercial law area refers to a number of areas of law involving acts by one competitor or group of competitors which harm another in the field, and which may give rise to criminal offences and civil causes of action. The most common actions falling under the banner of unfair competition include, among others, various unfair business practices such as fraud, misinterpretation, and unconscionable contracts may be considered unfair competition, if they give one competitor an advantage over others. In the European Union, each member state must regulate unfair business practices in accordance with the principles laid down in the Unfair Commercial Practices Directive, subject to transitional periods[1].

2. Aspects regarding Unfair Competition from EU's point of view

From the European Union's point of view, c**ompetition** is a basic mechanism of the market economy which encourages companies to offer consumers goods and services at the most favorable terms. It encourages efficiency and innovation and reduces prices. In order to be effective, competition requires companies to act independently of each other, but subject to the competitive pressure exerted by the others.

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[1] http://en.wikipedia.org/wiki/Unfair_competition

European antitrust policy was developed from the **two central rules** set out in the Treaty on the Functioning of the European Union.

• First, **agreements between two or more independent market operators which restrict competition** are prohibited by Art. 101 of the Treaty. This provision covers both **horizontal** agreements (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firms operating at different levels, i.e. agreement between a manufacturer and its distributor). Only limited exceptions are foreseen in the general prohibition. The most flagrant example of illegal conduct infringing Art. 101 is the creation of a cartel between competitors (which may involve price-fixing and/or market sharing).

• Second, Art. 102 of the same legal act prohibits **firms holding a dominant position on a determined market to abuse that position**, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers.

The European Commission is empowered by the Treaty to apply these prohibition rules and holds a number of **investigative powers** to that end (e.g. inspection at business and non-business premises, written requests for information, etc.). It may also impose fines on undertakings which violate the EU antitrust rules. The main rules on procedures are set out in Council Regulation 2003.

Since 1 May 2004 all National Competition Authorities have also been empowered to fully apply Art. 101 and 102 of the Treaty in order to ensure that competition is not distorted or restricted. **National courts** may also apply these provisions in order to protect the individual rights conferred on citizens by the Treaty.

As part of the overall enforcement of EU competition law, the Commission has also developed and implemented a policy on the application of EU competition law to actions for damages before national courts It also cooperates with national courts in order to ensure the coherent application of the EU competition rules within the Member States[2].

3. Procedural aspects regarding anticompetitive practices

Art. 101 to which we refer here is part of **Consolidated version of the Treaty on the Functioning of the European Union – PART THREE: UNION POLICIES AND INTERNAL ACTIONS – TITLE VII: COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS – Chapter 1: Rules on competition – Section 1: Rules applying to undertakings and has the following content:** "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

[2] http://ec.europa.eu/competition/antitrust/overview_en.html

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragr. 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question"[3].

In other words, Art. 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between companies which prevent, restrict or distort competition in the EU and which may affect trade between Member States (anti-competitive agreements). These include, price-fixing or market-sharing cartels. Anti-competitive agreements are prohibited regardless of whether they are concluded between companies that operate at the same level of the supply chain (horizontal agreements) or at different levels (vertical agreements).

Art. 101 can be applied by the European Commission or by the competition authorities in the EU member states. For Romania, this means Competition Council.

Art. 101 cases can originate in: 1) a complaint, 2) opening of an own-initiative investigation, or 3) a leniency application from one of the participants to a cartel. Under the Commission's **Leninecy programme**, the first firm to submit evidence that is sufficient for the Commission to either launch an inspection or enable it to find an infringement receives full exemption from its fine (total immunity).

The Leniency programme refers to a legal provision that allows the European Commission to apply fines to firms involved in Cartels or which in any other way choose to greach the competition rules.

In order to benefit from the Notice, companies can approach the Commission directly or through a legal adviser.

However, companies that have participated in illegal cartels have a limited opportunity to avoid or reduce a fine. The Commission operates a leniency policy whereby companies that provide information about a cartel in which they participated might receive full or partial immunity from fines[4].

When it applies for immunity, the firm must also end its participation in the infringement. Firms that approach the Commission later and that contribute a real added value to the investigation are eligible for a fine reduction, subject to the same on-going cooperation as for immunity applicants.

[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML
[4] http://ec.europa.eu/competition/cartels/leniency/leniency.html

The **Commission's investigative powers** to enforce Art. 101 are detailed in the Antitrust Regulation. The Commission is empowered, for example, to:

• Send information requests to companies;

• In the context of an inspection:

- enter the premises of companies;
- examine the records related to the business;
- take copies of those records;
- seal the business premises and records during an inspection;
- ask members of staff or company representatives questions relating to the subject-matter and purpose of the inspection and record the answers.

At the end of the initial investigative phase, the Commission can take the decision to pursue the case as a matter of priority and to conduct an in-depth investigation, or to close it. In cartel cases, if the case is to be pursued, the Commission decides whether or not the case is suitable for the Settlement procedure.

This procedure refers to the fact that in **cartel cases**, the Commission or the parties may propose a settlement. The Commission may reject the settlement route for cases that are not suitable. In settlement cases, the parties acknowledge upfront their participation in the cartel, resulting in a speedier procedure and an up to 10% reduction in the fines. The Commission presents parties with the evidence and notifies them of its conclusions as to duration, seriousness, liability and likely fine. The parties must make an oral or written submission acknowledging their liability and stating that they accept the Commission's statement of objections. The settlement procedure allows the Commission to adopt a faster, more streamlined decision and to allocate resources to other cases.

If the in-depth investigation confirms the Commission's competition concerns, a statement of objections (SO) detailing the Commission's concerns is sent to the companies concerned.

To ensure an objective outcome, the parties are given certain rights of defence. They are entitled to have access to the file – this means they can see all non-confidential documents from the Commission's investigation. The parties may then reply to the SO in writing within a certain delay. They may also request an **oral hearing**, which is conducted by an independent hearing officer. After examining the parties' arguments, the Commission reviews and sometimes abandons (part of) its initial objections and may decide to close the case.

If the Commission's concerns are not – or only partly dispelled – it drafts a decision prohibiting the identified infringement (according to Art. 7 of the Antitrust Regulation). The draft is then submitted to the Advisory Committee composed of representatives of the Member States' competition authorities.

This provides a final check of the draft decision. If fines are proposed in the draft decision, the Advisory Committee meets a second time to specifically discuss them. Finally, the draft is submitted to the College of Commissioners which adopts the decision.

Alternatively to a prohibition decision the Commission may take a commitment decision under Art. 9 of Regulation 1/2003. This is a quick way of restoring effective competition to the market. Under commitment decisions, the Commission does not have to conclude on the existence of an infringement of the antitrust rules and imposes no fines.

It voices its competition concerns and parties can come forward with commitments to address these concerns. If the Commission, after consulting market participants, finds these commitments sufficient, it takes a **decision to make them legally binding**.

The commitments are usually in place for a specific period of time, and if the companies breach them they can be fined.

A company that has participated in an anti-competitive agreement and so infringed competition law may have to pay a fine. The Commission's fining policy is aimed at **punishment and deterrence**. The fines reflect the gravity and duration of the infringement. They are calculated under the framework of a set of Guidelines that have been last revised in 2006.

The starting point for the fine is the percentage of a company's annual sales of the product concerned in the infringement (up to 30%). This is then multiplied by the number of years and months the infringement lasted. Certain aggravating circumstances (e.g. repeat offender) or attenuating circumstances (e.g. limited involvement) may increase or decrease the fine. In **cartel cases**, the fine is increased by a one-time amount equivalent to 15-25% of the value of one year's sales as an additional **deterrent**. The **maximum** level of fine is capped at 10% of the overall annual turnover of a company.

The 10% limit may be based on the turnover of the group to which the company belongs if the parent of that group exercised decisive influence over the operations of the subsidiary during the infringement period. There is also a limitation period of five years from the end of the infringement until the beginning of the Commission's investigation.

The Commission encourages companies that are involved in a cartel to come forward with evidence to help the Commission to detect cartels and build its case. The first company to provide sufficient evidence of a cartel to allow the Commission to pursue the case can receive full immunity from fines; subsequent companies can receive reductions of up to 50% on the fine that would otherwise be imposed[5].

In cartel cases, the Commission also offers a reduction of 10% in the fine if the Commission reaches a settlement with the company. Settlements reduce the administrative costs of cartel decisions, including before the court, and help the Commission deal more quickly with cartel cases, freeing up resources to devote to new investigations.

In exceptional circumstances, the Commission may reduce the fine if the company provides sufficiently clear and objective evidence that the fine is likely to affect seriously the economic viability of the undertaking. The analysis looks in detail at various company specific factors, and aims to be as objective and quantifiable as possible to ensure equal treatment and maintain deterrence, as mentioned above[6].

The addressees of a Commission decision have the right to appeal to the EU General Court to amend or annul the decision. The Court can cancel, increase or reduce the fine imposed by the Commission.

Judgments of the General Court can be appealed before the European Court of Justice (ECJ) by the unsuccessful party (so the Commission can also be an appellant). However, these appeals to the ECJ are limited to questions of law only.

Any citizen or business which suffers harm as a result of a breach of the EU competition rules is entitled to claim compensation from the party who caused it. This

[5] http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf
[6] http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf

means that the victims of competition law infringements can bring an action for damages before the national courts. If the Commission has taken a prohibition decision regarding the infringement, this decision can be used before national courts to prove that the behavior took place and was illegal[7].

4. Conclusions

The European Union has developed a clear procedure regarding cases of unfair competition, as in ways to signal this phenomenon, to have an objective rule over such a case and even ways to get to a settlement. The Leniency programme will hopefully act as a preventive measure in fighting with illegal actions taken by the majority of the significant companies in order to ensure their spot on the relevant market.

In our opinion, at national level, a better popularizing of the mentioned provisions would be a positive method in fighting with the problem in discussion.

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QUELQUES CONSIDERATIONS SUR LES INTERMEDIAIRES D'ASSURANCE

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Résumé
Dans la pratique de l'assurance joue un rôle important l'activité d' intermédiation en assurance, qui est l'activité de placer, de proposer ou d'effectuer d'autres activités qui précèdent le contrat d'assurance ou qui fournit de l'assistance pour la conclusion de contrats en cas de dommages; évidemment, il ne s'agit pas de telles activités d'intermédiation en assurance le cas où elles sont effectuées par un assureur ou par un employé de celui-ci agissant sous la responsabilité de l'assureur.

Mots clés: assurance, intermédiaires, agent d'assurance, courtier d'assurance, assureur

Dans la pratique de l'assurance joue un rôle important l'activité d' intermédiation en assurance, qui est l'activité de placer, de proposer ou d'effectuer d'autres activités qui précèdent le contrat d'assurance ou qui fournit de l'assistance pour la conclusion de contrats en cas de dommages; évidemment, il ne s'agit pas de telles activités d'intermédiation en assurance le cas où elles sont effectuées par un assureur ou par un employé de celui-ci agissant sous la responsabilité de l'assureur. Ainsi, ceux qui effectuent l'activité d'intermédiation en assurance contribuent à la négociation et à la conclusion du contrat d'assurance, en raison du fait qu'ils participent à l'information et au conseil des parties impliquées, à la gestion des risques, du management, des assurances et du marché des assurances; en tant que tel, l'intermédiaire n'est pas et ne doit pas devenir partie intégrante du contrat d'assurance[1].

L'activité de médiation en matière d'assurance est régie par les dispositions de la loi no. 32/2000[2], qui identifie une catégorie d'intermédiaires en assurance: le courtier d'assurance, les assistants de courtage, les agents d'assurance, les agents d'assurance subordonnés.

Le législateur a noté que ces intermédiaires d'assurances sont les personnes physiques ou morales exerçant des activités de courtage d'assurance pour une taxe, une rémunération, autorisées ou enregistrées en vertu de la loi et de ses règlements d'application, et les intermédiaires des États membres exerçant une activité d'intermédiation en assurance sur le territoire de la Roumanie, au titre du droit d'établissement et de libre prestation de services, le cas échéant[3].

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[1] J. Bigot, D. Larige, Traite de droit assurance, La distribution de l'assurance, LGDJ, Paris, 1999, p. 5.

[2] La Loi no. 32/2000 sur l'activité d'assurance et de surveillance des assurances, publiée dans le JO no. 148 du 10 avril 2000, modifiée par l'O.U.G. no. 117/2007 complétant la Loi no. 32/2000 sur l'activité d'assurance et de surveillance des assurances, publiée dans le JO no. 732 du 10 octobre 2007 et la Loi no. 289/2010 publiée dans le JO no. 892 du 30 décembre 2010.

[3] La Commission de Surveillance des Assurances a émis l'Ordre no. 15/2009, publié dans le JO no. 569 du 14 août 2009 pour la mise en application des normes concernant le droit de séjour et la liberté de prestation de services sur le territoire de la Roumanie par les intermédiaires d'assurances/reassurances, autorisés et/ou enregistrés par une autorité d'un Etat membre de l'UE.

Ainsi, les intermédiaires d'assurances sont ceux qui sont enregistrés à la CSA ou à l'autorité compétente de l'État membre d'origine et les intermédiaires (autres) qui sont autorisées par la CSA ou par l'autorité compétente de l'État membre d'origine[4].

Ensuite, nous ferons une brève analyse de courtage d'assurance, en termes de la loi.

1. L'agent d'assurance

Sur la base des dispositions de la loi, nous définissons l'assureur comme la personne autorisée à négocier ou à conclure au nom et pour le compte d'un assureur/réassureur un contrat d'assurance avec des tiers en conformité avec les conditions énoncées dans le contrat de mandat, mais uniquement des classes d'assurance non compétitives[5].

Les agents d'assurance ne fonctionneront qu'après la conclusion d'un contrat d'agent avec l'assureur; ils représenteront des actes juridiques commis au nom et pour le compte de l'assureur, des activités impliquant la négociation, la conclusion de contrats d'assurance et de réassurance, la collecte des primes (parfois) et les activités de régression et de relèvement[6].

Bien que la loi appelle le contrat entre l'agent d'assurance et l'assureur "le contrat d'agent", elle ne lui fournit pas une réglementation propre, les règles qui s'appliquent à ce contrat sont celles applicables au contrat de mandat[7], de sorte que l'assureur au nom duquel l'agent agit est responsable pour les actes ou les omissions de l'agent d'assurance. Par conséquent, en termes du régime juridique, l'agent d'assurance est un mandataire de l'assureur, agissant dans les limites du contrat conclu. D'où la responsabilité de l'assureur qui est basé sur l'idée de garantie objective indépendante de tout défaut propre à l'assureur portant un préjudice à l'assuré; et si l'agent d'assurance est coupable en ce qui concerne les actes ou les omissions préjudiciables, l'assureur peut recourir à l'action de régression contre l'agent pour couvrir les dommages[8]. L'agent d'assurance répond seulement pour la conclusion du contrat d'assurance, pour le mode d'exécution répond l'assureur.

À ce titre, par la conclusion du contrat d'assurance par l'intermédiaire de l'agent d'assurance, s'établissent des relations juridiques entre l'assuré et l'assureur, l'assureur étant tenu de verser une indemnité à la partie bénéficiaire ou aux tiers en cas de production du risque assuré.

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[4] Art. 33 alin. 1 de la Loi no. 32/2000 prévoit que „Les intermédiaires en assurances et reassurances sont, selon le cas, enregistrés à ou autorisés par la Commission de Surveillance des Assurances, en conformité avec les normes émises dans l'application de la loi en vigueur ou à l'autorité compétente de l'Etat Membre d'origine".

[5] Art. 2 p. 58 de la Loi no. 32/2000 prévoit que l'agent d'assurance est „la personne physique ou morale autorisée par un assureur ou reassureur à conclure au nom et pour le compte de l'assureur ou du reassureur des cotrats d'assurance ou de reassurance avec les tiers, conformément aux conditions prévues dans le contrat de mandat signé, sans avoir la qualité d'assureur ou de reassureur, courtier d'assurance et/ou de reassurance".

[6] Art. 34 alin. 8 de la Loi no. 32/2000 prévoit que „Un agent d'assurance personne phisique ou morale ne peut intermédier les mêmes classes d'assurances que pour un seul assureur".

[7] I. Sferidian, Contractul de asigurare de bunuri, Editura Lumina Lex, Bucurşti, 2004, p. 45.

[8] Il y a eu des débats liés à la nature juridique de ce contrat dans la littérature de spécialité, montrant soit une variété du contrat du mandat (voir C. Roşu, Contractul de mandat dintre asigurător şi agenţii de asigurare încheiat în temeiul Legii nr. 32/2000 privind societăţile de asigurare şi supravegherea asigurărilor, în Revista de drept comercial nr. 10, 2001, p. 47), soit le contrat de mandat même (F. Moţiu, Aspecte de drept comparat privind curtierii de asigurări, în Revista de drept comercial nr. 7-8, 2005, p. 46). Nous considérons que, n'importe la dénomination, les règles du mandat s'appliquent si le contenu du contrat confirme le contrat de mandat.

2. Le courtier en assurances

C'est la personne morale roumaine ou étrangère qui négocie pour ses clients, particuliers ou entreprises, assurés ou assurés potentiels, la conclusion du contrat d'assurance ou de réassurance et accorde de l'assistance avant et pendant le déroulement du contrat ou en relation avec le règlement[9], le cas échéant ou un intermédiaire d'État membre qui déroule des activités d'intermédiation en Roumanie, conformément au droit d'établissement et de libre prestation de services[10].

Comme nous pouvons le voir, par rapport à des agents d'assurance qui peuvent être aussi bien des personnes physiques et morales, les courtiers d'assurance ne peuvent être que des personnes morales roumaines ou étrangères qui agissent comme un intermédiaire qui vise à représenter les intérêts des assurés dans leurs relations avec les assureurs et qui vendent les polices d'assurance en vertu du contrat conclu avec chaque compagnie d'assurance.

L'activité du courtier d'assurance signifie négocier la conclusion du contrat d'assurance/réassurance et accorder de l'assistance tout au long de la durée du contrat; le courtier opère dans l'intérêt du client, en représentant les intérêts de l'assuré auprès la compagnie d'assurance et en négociant les conditions de résiliation du contrat, y compris la prime d'assurance que son client paie, en négociant et en fournissant aussi d'autres services relatifs à la protection contre les risques ou au règlement des dommages et intérêts; il doit être un bon connaisseur du marché d'assurances et du management des risques, alors son travail prend des aspects complexes telles que: la négociation du contrat d'assurance pour le compte de l'assuré (comme illustré), de l'aide à la négociation et la poursuite des paiements des indemnités, du conseil sur les questions de gestion des risques.

Le courtier d'assurance cherche à représenter les intérêts des assurés en rapport avec les assureurs, en échange l'agent d'assurance représente les intérêts de l'assureur; le courtier d'assurance est considéré comme un mandataire de l'assuré, l'agent d'assurance c'est un mandataire de l'assureur[11]; le courtier d'assurance a besoin de l'autorisation de la Commission de surveillance des assurances, lorsque l'agent d'assurance n'a pas besoin d'une telle autorisation, même si les deux types d'intermédiaires sont enregistrés dans le Registre des intermédiaires d'assurance et/ou de réassurance; en termes de responsabilité, les courtiers sont responsables de leurs faits, lorsque l'agent est responsable seulement de la conclusion du contrat avec l'assuré, et non de son exécution de laquelle l'assureur est responsable.

3. Les assistants de courtage, les sousagents et les agents d'assurance subalternes

Les assistants de courtage, comme auxiliaires dépendants des intermédiaires d'assurances sont les personnes physiques ou morales qui, en vertu d'un contrat conclu avec un courtier d'assurance et/ou de réassurance obtiennent un mandat de courtage, par lequel

[9] ÎCCJ, S. cont. adm. şi fisc., dec. civ. nr. 694/2009.

[10] Art. 2 p. 57 l. a de la Loi no. 32/2000 prévoit que le courtier d'assurance est „la personne morale roumaine, autorisée dans les conditions de la loi en vigueur, qui négocie pour ses clients, personnes phisiques ou morales, assurés ou potentiels assurés, des contrats d'assurances ou de reassurances et accorde assistance avant et pendant le déroulement des contrats ou en liaison avec les compensations, selon le cas".

[11] Le courtier d'assurance est défini également par la Directive no. 77/92 CEE du 13 décembre 1976, modifiée et complétée par la Directive no. 2002/92/CEE du Parlement Européen et du Conseil sur l'intermédiation en assurances, qui stipule que l'activité professionnelle du courtier est d'établir une liaison entre une société d'assurance/reassurance et de potentiels assurés pour la conclusion d'un contrat d'assurance.

ils s'obligent à dérouler certaines activités pour mener à bien le mandat reçu; l'assistant de courtage travaille pour le compte du courtier d'assurance et sous la couverture du contrat de responsabilité civile professionnelle du courtier en question. Entre l'assistant de courtage d'une part et les assureurs pour lesquels les courtiers d'assurance négocient et les assurés ne surgissent pas de rapports juridiques directes, donc pour les actes et les omissions de ceux-ci la responsabilité appartient aux courtiers d'assurance qui peuvent ultérieurement agir en regression contre eux.

La loi envisage également les agents d'assurance subalternes, décrits comme des personnes physique ou morales qui négocient au nom et pour le compte d'un ou de plusieurs assureurs des produits d'assurance qui sont complémentaires aux produits fournis par les institutions de crédit et les établissements financiers non bancaires actifs sur un marché réglementé; les agents d'assurance subordonnés déroulent ces activites en plus de leur activité professionnelle principale.

Cette activité d'intermédiation de produits d'assurance qui sont complémentaires aux produits fournis par les institutions de crédit et les établissements financiers non bancaires est appelée «bancassurance»; Ces établissements fournissent des services d'assurance en tant qu'agents d'assurance subordonnés; il n'est pas question ici des assurances bancaires considérant que, pour mener à bien cette activité, les institutions de credit et celles financières non bancaires doivent demander et recevoir l'avis de la CSA pour les agents d'assurance subalternes.

Cette activité de «bancassurance» ne peut être effectuée que par les personnes physiques qui ont conclu un contrat de travail à durée indéterminée avec une institution de crédit financier non bancaire[12].

La loi sur l'assurance ne prend en compte que la distribution des produits d'assurance par les intermédiaires d'assurance – les agents et les courtiers d'assurance, tandis que le mécanisme de distribution des produits d'assurance par l'activité de "bancassurance" n'est pas réglementée par la loi, s'imposant de cette manière le cadre juridique concernant les relations juridiques qui s'établit entre la compagnie d'assurance et les agents d'assurance subordonnés, ainsi que les moyens de contrôle de la solvabilité des compagnies d'assurance dont les produits sont intermédiés[13].

En ce qui concerne les sousagents, ils sont des personnes physiques agissant sous le mandat de représentation donné par l'agent d'assurance avec lequel ils établissent des rapports de subordination et qui ont la qualité d'employé avec un contrat individuel de travail avec une entité juridique.

En conclusion, nous pouvons affirmer que les intermédiaires d'assurance ne font pas partie du contrat d'assurance, mais les personnes physiques ou morales agissant en tant que mandataires soit pour le compte de l'assureur (agents d'assurance), soit pour le compte de l'assuré (courtiers d'assurance)[14].

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[12] H. Groutel, C-J Berr, Droit des assurances, Ed. Dalloz, Paris, 2008, p. 40.

[13] L'Ordre CSA no. 10 pour la mise en application des Normes CSA sur le Régistre des intermédiaires en assurances et/ou reassurances du 16.07.2007, publié dans le JO no. 553 du 14 août 2007, indique que dans ce Régistre sont inscrits également les agents d'assurance subordonnés, personnes morales, c'est-à-dire les institutions de crédit et les institutions financières non bancaires qui développent une activité de „bancassurance".

[14] Les dispositions de l'art. 2 l. C p. 58[1] de la Loi no. 32/2000 indiquent que les sousagents sont des personnes physiques, mais compte tenant des dispositions de l'art. 12 des Normes sur le Régistre des intermédiaires en assurances, ceux-ci peuvent être également des personnes morales; alors c'est à désirer une corelation des textes de loi.

TAX CLAIMS. DETERMINATION AND COLLECTION ACCORDING TO RECENT REGULATIONS IN THE TAX PROCEDURE CODE

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Abstract

Tax claims, which according to the tax procedure code regulations constitute the property rights arising from the reports of tax laws, principal or secondary, have always represented an important financial source for the revenues of the State, especially in the current context. The collection the tax obligations of taxpayers, consisting of the collection of taxes, contributions of employees and employers who have a tax base, has been a constant concern of the Government, in order to cover the costs incurred by the State.

The tax procedure code regulates the tax claims and tax liabilities, as well as the methods of enforcement if they were not paid voluntarily according to the law.

We aim at analyzing the new regulations of the tax procedure code, with reference to the legislative proposals that would lead to the improvement of the legal framework concerning the collection of the taxes from taxpayers, and the harmonization of legislation in this area with that of the European Union.

Our research approach is useful to: students, practitioners in the field of tax and financial law, employers and employees.

Keywords: tax receivables, budgetary liabilities, tax officer, enforcement

CONTENTS

The art. 21 of the code of tax procedure[1] covers aspects relating to tax claims and to art. 22 tax liabilities, rights and obligations of the parties of the tax judiciary relations with respect to fiscal taxes and charges set out in the tax code, to be paid to the State budget and local budgets.

According to art. 21 paragr. (1) C. tax proc., tax claims represent property rights that, in keeping with the law, follow from the tax material law relations and paragr. (2) of the same article lays down their content, namely: the right to collect taxes, fees, contributions or other amounts constituting the revenues of the consolidated general budget, entitlement to the refund of value added tax, entitlement to the refund of taxes, fees, contributions or other amounts constituting the revenues of the consolidated general budget, which according to paragr. (4) are referred to as main tax receivables as follows: the collection of interest, penalties for delay or delay increases, as appropriate, in accordance with the law, tax receivables considered secondary[2].

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[1] Published in the Official Gazette, part I, no. 513 of July, 31, 2003, amended 14 times in 2013 only, including by the Government Ordinance No. 28\/2013, published in the Official Gazette, part I, no. 553 of August, 30, 2013.

[2] For a detailed study on the tax claims, also see: D.D.Şaguna, Drept financiar şi fiscal (Financial and Tax Law), All Beck Publishing House, Bucharest, 2003, p. 329 and; V.Roş, Drept financiar. Sistemul bugetar

In a rule of law state, it is natural that tax obligations be paid through benevolent pay.

In practice, most of the times these obligations are implemented through enforcement, through identification of the fiscal indiscipline of sums of money from taxpayers, and the unavailability or the identification and seizure of movable and immovable property that, by selling at auctions, the amount obtained pay these claims and possibly penalty increases for delays.

Financial tax legislation, though, has provided for different deadlines on the right to tax claims by enforcement or to require their refund, compensation or more extended deadlines than in the case of common law claims.

According to the provisions of art. 24 C. tax proc.[3], claims shall be discharged through tax revenue (paying), clearing, execution, cancellation, prescription exemption, and by other means provided by law.

As a result, the natural method of discharging tax debt is payment by the one who owes them and in case of non-payment, enforcement, carried out according to the provisions of the code of tax procedure and the code of civil procedure[4], where no derogatory rules apply.

With respect to the two parties in the framework of the execution, the creditor and the borrower, art. 25 C. tax proc. establishes what these are tax as well as their relationship them to the tax authorities.

Lenders are individuals holders of debt tax duties, namely the right to levy taxes, fees, contributions or other amounts constituting the revenues of the consolidated general budget, entitlement to the refund of value added tax, entitlement to the refund of taxes, fees, contributions or other amounts constituting the revenues of the consolidated general budget, called the main tax claims and the right to claim payment of interest, the penalties for delay or delay increases, known as secondary tax receivables.

Debtors are those persons who, in keeping with the law, are under the correlative obligation of payment of such rights, and if the obligation to pay was not met by taxpayers, borrowers become, according to the law: the heir to accept the taxpayer's estate the debtor; the one who takes over, totally or partly, the rights and obligations of the debtor subject to the division, merger or to reorganization, where appropriate; the person to whom responsibility has been established in accordance with the legal provisions relating to

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(Financial Law. The Budgetary System), Universul Juridic Publishing House, Bucharest, 2009, p. 133 as well as G. Măgureanu, Impozitul şi contribuţiile asupra veniturilor din salarii (Taxes and Contributions on Income from Wages and Salaries), Universul Juridic Publishing House, Bucharest, 2010, p. 24 and the following.

[3] Reprinted in the Official Gazette, part I, no. 513 of 31 July, 31, 2007 and amended, including by Ordinance No. 28\/2013, published in the Official Gazette, part I, no. 553 of August, 30, 2013

[4] Regarding the method of enforcement according to the common law rules, see also: E. Oprina, I. Gârbuleț, Tratat teoretic şi practic de executare silită (Theoretical and Practical Treaty for Enforcement), vol. I and II, Universul Juridic Publishing House, Bucharest, 2013; S. Zilberstein, V.M. Ciobanu, Drept procesual civil. Executarea silită (Civil Procedural Law. Enforcement), vol. I and II, Lumina Lex Publishing House, Bucharest, 1996; A. Hilsenrad, S. Zilberstein, Tratat teoretic şi practic de procedură a executării silite (Theoretical and Practical Treaty of Procedure for Enforcement), Academiei Publishing House, Bucharest, 1966; I. Leş, Tratat de Drept procesual civil (Treaty of Civil Procedural Law), 4th edition, C.H. Beck Publishing House, Bucharest, 2009, p. 939; D. Negulescu, Execuţiunea silită, Principiile generale (Enforcement. General Principles), vol. I, Guttenberg Printing Press, Bucharest, 1910; E. Herovanu, Teoria executării silite (The Theory of Enforcement), Cioflec Publishing House, Bucharest, 1942; I. Stoenescu, C. Sion, Căile de execuţie (Means of Enforcement), Iaşi, 1943; Fl. Măgureanu, Drept procesual civil (Civil Procedural Law), 12th edition, Universul Juridic Publishing House, Bucharest, 2010, p. 598 and the following.

bankruptcy; the person who assumes the obligation to pay the debtor, by an undertaking or by any other act concluded in authentic form, ensuring real guarantees onto the payment obligation; a legal entity, for tax obligations owed by its secondary offices; other people, according to the law.

In the case of joint responsibility regulated by art. 27 C. tax proc., liability is also incurred for: a) associates of associations having no legal personality, including members of the family businesses, tax obligations owed by them, along with legal representatives who, in bad faith, have prompted failure to declare and/or failure to pay tax liabilities when due; b) sanctioned third parties, within the limits of the amounts circumventing inalienable restrictions; the legal representative of the taxpayer who, in dishonesty, declares that the Bank has no other financial availabilities

There are also held jointly and severally to pay outstanding obligations of the debtor declared insolvent (Sunt de asemenea, ținute în solidar pentru obligațiile de plată restante ale debitorului declarat insolvabil): a) natural or legal persons who, before declaring insolvency, in bad faith, have acquired any assets from borrowers who have caused such insolvency; b) directors, associates, shareholders and any other people that have caused the insolvency debtor entity through disposal or concealment, in bad faith, in whatever form, of the assets of the debtor; c) administrators who, in the exercise of their mandate, in bad faith, failed to fulfill their legal obligation to request the competent court to open insolvency proceedings, for the tax obligations pertaining to that period and left unpaid at the date of declaration of the state of insolvency; d) trustees or any other persons who, in bad faith, have failed to declare and/or pay tax liabilities when due; e) trustees or any other persons who, in bad faith, have prompted the refund or reimbursement of amounts from the consolidated general budget when these were not due the debtor.

Regarding the time limit for establishing the tax obligation and its execution, it is different from the term of ordinary law.

Art. 91 C. tax proc. regulates the right of the tax body to determine tax obligations, which shall lapse within a period of five years, unless the law provides otherwise. If tax liabilities stemming from committing criminal law offences, a term is 10 years and runs from the date of the act constituting the offence sanctioned as such by a final court judgment.

The special limitation period may tend toward 6 years, even in circumstances where the legislature has determined that the statute of limitations of five years, shall run from January 1st of the year following the year in which the claim appeared.

The time limits shall cease and shall be suspended in the cases and under the conditions established by law for the interruption and suspension of the limitation period of the right of action under common law.

The tax procedure code has regulated the possibility of the debtor to demand compensation or refund, situations in which the calculation of the term of limitation in this case is similar to the tax authorities the right to receive any amount receivable due from the borrower[5].

[5] According to the provisions of art.135 C. tax proc, taxpayers' right to demand compensation or refund of tax claims shall lapse within a period of five years from January 1st of the year following that in which there was issued the right to compensation or refund.

Regarding the enforcement of tax claims that were not barred, the tax procedure code came within the competence of tax authorities administering the respective claims, insurers and officers carrying out measures of enforcement proceedings if the debtor does not pay the due tax obligations voluntarily and the procedure of enforcement must be carried out to discharge these claims.

From the point of view of general competence, art. 32 C. tax proc. provides that tax authorities have a general competence regarding the administration of tax claims, exercise control and issuing rules for the application of legal provisions concerning taxes. In the case of income tax and social contributions, by decision of the Government there may be established other special competence of administration.

Taxes, fees and other amounts that are due, according to the law, in customs, are administered by Customs bodies.

With regard to territorial jurisdiction for the administration of taxes, fees, contributions and other amounts owed to the consolidated budget, jurisdiction lies with the tax body, in that county, or Bucharest city, established by order of the President of the National Tax Administration Agency, in whose territorial range is the domicile of the taxpayer or of the payer of income, in the case of taxes and contributions made by witholding tax at source according to the law.

As an exception to the rule mentioned above, regarding the administration of the tax authorities in the subordination of the National Tax Administration Agency for tax debts owed by the contributors, including their secondary offices, jurisdiction may be established in other fiscal bodies, by order of the President of the National Tax Administration Agency.

The paragr. (2) of the art. 33 C. tax proc. was amended by the Ordinance No. 8/2013[6] meaning that, in the case of non-resident taxpayers carrying out activities on the territory of Romania by one or more permanent establishments, the competence lies with the tax body on whose territorial range is situated the permanent establishment designated in accordance with title II of the tax code. In the case of tax registration tax declaration is submitted to the tax bodies in which the permanent establishment is to be appointed.

The law no. 168/2013 foresaw, since July 1st 2013 a new regulator for the taxable profits of foreign legal entities that operate through a number of permanent establishments in Romania, establishing that they have the obligation to set one of these offices as permanent establishment designated for taxable obligations. At the level of permanent-designated headquarters income is to be aggregated, as well as permanent premises expenses belonging to the same foreign legal person. In these cases, taxable profits at the level of permanent-designated headquarters shall be determined on the basis of income and expenses recorded by each permanent establishment belonging to the same foreign legal persons, through the use of transfer pricing rules upon setting of a market price of a transfer made between the foreign legal entity and its permanent headquarters.

Regarding the secondary headquarters, according to the provisions of art. 34. (1) C. tax proc. the territorial jurisdiction for the administration of tax on income from wages and salaries due by these returns to the tax body responsible for administering the obligations owed by the taxpayer that has set them up. The paragr. (2) of the same article lays down the

[6] Ordinance No. 8/2013, was published in the Official Gazette, part I, no. 54 of January, 23rd 2013. It was amended, including by the law's approval. 168\/2013, published in the Official Gazette, part I, no. 310 of May, 29th 2013.

competence for recording the location of minor tax paying wages and salary income, which, according to the law, pertains to the tax body in whose territorial range these are located.

If the law stipulates payment obligations at secondary premises, including obligations related thereto, such as reporting obligations, obligations for the submission of documents, requests, tax records, etc., territorial jurisdiction for the administration of these obligations belongs to the tax body in whose territorial range the secondary premises is situated.

It is the secondary premises that pays for the tax on income from wages due to secondary headquarters, registered as a payer of tax obligation to the territorial tax body other than taxpayer-legal person. Payment is made in this case to the State Treasury territorial unit in whose area it is situated and the payment documents must contain the following information:

a) fiscal identification code and name of the legal person;

b) fiscal identification code of secondary headquarters.

By order no. 28/2013[7], there was regulated the jurisdiction regarding tax and contributions relating to income from agricultural activities, which has determined that by exception to the mentioned provisions, tax and related contributions from agricultural activities, any income owed by individuals, according to the law, may be paid in cash at specialized departments of the administrative and territorial unit corresponding to the town where tax taxpayers have their residence and where there is no territorial unit of the National Tax Administration Agency, provided that the administrative-territorial unit and the NTAA drew a protocol for this purpose.

The date of payment, in the case of cash payments, is the date entered in the payment document issued by bodies or persons empowered by the tax body, including the amounts erroneously paid by the taxpayer on other obligations or erroneously discharged by the tax bodies.

The amounts listed and collected shall be deposited by the tax authorities of the territorial-administrative units in a separate account, no later than 5 business days from receipt, together with the situation relating to amounts received which shall include at least the following information: the document number and date by which payment is made in cash, the CUI code/CNP code of the taxpayer, the taxpayer name, the type obligation paid, the amount paid.

The tax procedure code has provided for a special jurisdiction in the cases expressly laid down by law.

Thus, in the situation where the taxpayer has no residence, the local jurisdiction lies with the tax body where the tax situation is lawfully recorded. In the same way one establishes jurisdiction and the ability to take urgent legal measures that might be required in the cases of extinction of the elements of identification of the real tax base, as well as in the event of enforcement. For claims due to non-resident taxpayers who have no permanent establishment on the Romanian territory, jurisdiction lies with the tax body determined by order of the Minister of Economy and Finance, at the proposal of the President of the NTAA.

With regard to the collection of tax debts, according to the provisions of art. 24 C. tax proc., tax claims shall be discharged by compensation, collection, enforcement, relief, cancellation, prescription and by other means provided by the law.

[7] Ordinance No. 28/2013 on regulating fiscal-budgetary measures was published in the Official Gazette, part I, no. 553 of August 30, 2013.

As a result, the natural method of tax debt discharge is collection or payment by the taxpayer.

Unfortunately, many times, the taxpayer does not fulfill this lawful, enforcement officers being required to trigger the procedure for enforcement.

Local jurisdiction for the conduct of enforcement proceedings lies with the executing body in whose territorial range the traceable belongings are to be found, the coordination of all judicial enforcement pertaining to the body in whose territorial range the tax debtor or the competent enforcement body reside, as designated by art. 33 C. tax proc., where applicable.

Where enforcement is done by deduction, the measure of execution is made by the coordinating enforcement body, if any.

The coordination of enforcement where it was decided to attract joint liability with the debtor found in a state of insolvency, in accordance with art. 27, or in the case referred to in art. 25 paragr. (2) e) returns to the the enforcement body in whose territorial range the tax debtor or the competent enforcement body is domiciled, as appointed by art. 33. (3), as applicable.

If it has been decided to attract the liability of members of the management bodies, in accordance with the provisions of chap. IV of law No. 85/2006 on insolvency, and tax claims, by way of derogation from the provisions of art. 142 of law No. 85/2006, levy of execution shall be carried out by the enforcement body under the tax procedure code. In this case, the coordination of the enforcement returns to the enforcement body in whose territorial range the tax debtor or the competent enforcement body is domiciled, as appointed by art. 33 paragr. (3) C. tax. proc.

In the case when the successful bidder does not pay the price, the enforcement coordinator body is the one in whose territorial range the debtor whose property have been awarded has its fiscal domicile or operates.

If the same borrower's income or assets started to be undergo enforcement, both in order to achieve enforceable tax receivables concerning securities, and securities that are running under the conditions provided for by other laws, levy of execution shall be done in accordance with the provisions of the code of tax procedure, by the enforcement bodies referred to by the law.

If the fiscal domicile of the debtor is situated in the territory of another body, the instrument permitting enforcement along with the enforcement documentation will be sent to the latter, also notifying, where appropriate, the body that sent the instrument permitting enforcement.

The amounts in the account debtor shall be communicated to the coordinating enforcement body within 10 days of their implementation, by the enforcement bodies who were notified on the reported flow rate, after enrolling in a nominal record and after taking of enforcement measures.

The enforcement coordinating body which keeps track of the entire flow, will require in writing to the other bodies to cease enforcement immediately if it be found that it had been achieved through acts of execution made by himself and the other bodies.

According to provisions of art. 138 C. tax proc., levy of execution shall be made by the competent enforcement authorities through authorized tax officers, empowered in front of the debtor and third parties through identification documents and the mandate issued by the enforcement body.

Public institutions that do not have their own enforcement bodies may submit enforcement, enforcement titles regarding their own revenues to the tax authorities, on the basis of an agreement concluded with the NTAA or with local public administration authorities, as appropriate.

In the exercise of their duties, pursuant to the enforcement procedures, tax enforcement officers can:

a) enter any premises of a debtor's business, legal person or other premises where goods be found, in order to identify the goods or values that can be executed, as well as to examine the accounts of the debtor in order to identify third parties who owe or hold in preserving the debtor's assets or revenues;

b) enter all spaces holding the goods or values of the debtor, a natural person, as well as to investigate all the places where they keep their goods;

c) request and inspect any document or material element which may constitute the sample in the determination of the debtor's property assets.

In what represents the domicile or residence of a natural person, the executor may enter upon consent of the owner, and in case of refusal, the enforcement authorities will be required to authorize the competent court according to the provisions of the code of civil procedure, which is the District Court in whose jurisdiction the registered office of tax enforcement is to be found.

The access of the tax executor in the dwelling, the business premises or in any other room of the debtor, a natural or legal person, may take place between 06.00-20.00, on any working day. Enforcement started may go on on the same day or in the next few days. In cases duly justified by the danger of property alienation, access in the debtor's premises will take place at different times than those mentioned, as well as on non-working days, on the basis of the authorization of the Court of execution.

If the debtor is missing or denies access to any of the rooms, the executor may break into in the presence of a representative of the police or gendarmerie or any other agent of the public force and two major witnesses, being applicable to the above-mentioned provisions on the authorization of the competent court and times in which execution can be carried out.

According to the provisions of art. 139 C. tax proc. taxes, fees, contributions and any other revenue of the consolidated general budget may not be pursued by any creditor for any category of receivables in enforcement proceedings.

With regard to the enforcement against an association without legal entity character, for the enforcement of tax claims owed by it, even if there is an enforceable title on behalf of the association, it may be forced upon both moveable and immovable property of the association and its members ' personal belongings. We believe that for the personal property of the members of the association, the instrument permitting enforcement must be represented by a court order in order to bind the debtor, this being the association and not on an individual, a member of the association. The instrument permitting enforcement. The execution title[8] issued by the law enforcement authorities, features all unpaid tax debts fully due, taxes, fees, contributions and other revenues of the consolidated general budget, as well as any related secondary items pertaining to them.

[8] For more details regarding other executory titles, and see FL. Măgureanu, G.Măgureanu, European Executory Titles, The Enforcement Magazine no. 11-12/2007.

All the enforcement papers must feature the execution title as well as point out the nature and amount of the amount that is the subject of enforcement.

The enforcement title will be modified accordingly if the tax claim title was amended.

The title of the claim becomes enforceable from the date on which the tax is due on the claim by the expiry of the period for payment laid down by law or established by the competent organ or otherwise required by law.

The instrument permitting enforcement issued by the competent enforcement authority shall include, apart from the name of the issuing of the tax body and its assignee, taxpayer's identification data, the object, the legal basis, in fact, the taxpayer's right to challenge the measure of execution and other items leading to individualize tax claim and to respect for the law on the execution.

If the executory title does not include one of the following elements: name and surname or name of debtor, social security number, registration code, place of residence or seat, the amount of the amount due, the legal basis, the signature body that issued it and proof of service thereof, the enforcement authorities will immediately remit the executory titles to the executory issuing bodies, these being essential elements of title.

For debtors jointly and severally liable to pay the tax debt there will be prepared only one enforcement title.

The instrument permitting enforcement shall be drawn up by the performance for each type of tax debt accounting for taxes, fees, contributions, other budgetary revenue and their accessories and is transmitted no later than 30 days after the issuance to enforcement bodies as stipulated by the law. Where appropriate, together with the executory there will be transmitted and certified copies of the minutes of the fighting in order to comply with the precautionary measures.

For amounts that do not represent income of public institutions financed from the State budget, State social insurance budget or budgets of special funds, where appropriate, recovery by enforcement is carried out on the basis of enforceable securities obtained as a result of actions to the competent courts, which will be submitted to the tax bodies competent for execution.

Failure to render the enforceable titles consequent to administrative sanctions, within 90 days after the issuance by the competent bodies, leads to their annulment. The issuing body shall issue the enforcement decision apportioning the value evaluation of the staff guilty of delay. The 90-day period shall be extended to the period which elapsed in the procedure of appeal against the protocols establishing the contravention.

According to the provisions of section 6 of the Ordinance No. 8/2013, since February 1st, 2013, public institutions financed entirely from their own incomes, which do not have their own enforcement bodies may transfer their income executory titles to the bodies subordinated to the National Tax Administration Agency or, where appropriate, to the fiscal authorities of the administrative-territorial units or administrative-territorial subdivisions of municipalities. Such amounts are income to the State budget or local budgets, as appropriate, in accordance with the law.

The section 5 of the Ordinance no. 8/2013 has modified the provisions of the Code of procedure for tax purposes, meaning that institutions wholly or partly public-funded from the State budget, State social insurance budget, budgets of special funds, if any, who do not have their own enforcement bodies, render their executory titles on the revenues of the consolidated budget for enforcement, to the tax authorities that are subordinate to the

National Tax Administration Agency. Such amounts qualify as revenue in the budget that finance public institutions.

Subject to execution are the income and assets of the debtor's property, generally traceable according to law, and their exploitation is carried out only to the extent necessary to achieve the tax claims and the costs of execution.

Subject to seizure and recovery of property of the debtor generally are traceable belongings, presented by them and/or identified by the executive body, in the following order:

a) movable and immovable property which is not directly used in the activity that constitutes the main source of income;

b) goods which are not directly appointed for the activity that constitutes the main source of income;

c) movable and fixed assets that are temporarily holding others under lease contracts, loan, lease, concession, lease and others;

d) set of movable and/or immovable property of the debtor, which may be used individually or as a whole if the enforcement body considers that they can be sold in more favorable conditions;

e) machinery, equipment, raw materials and other mobile assets and real estate serving the activity that constitutes the main source of income;

f) finished products.

Whenever recovery is not possible, the tax authority may proceed to seizure of the property in question.

The goods subject to a special regime of movement, such as those purchased in installments, the assets of underaged, common property of the spouses, etc. can be pursued only under conditions provided by law.

Enforcement is carried out until the extinction of the tax debt entered into enforcement, including increases in late payments or other amounts due or paid pursuant to law by it, and the costs of enforcement proceedings and during the execution enforcement means can be used sequentially or simultaneously. If the instrument permitting enforcement provided for increases of delay or other amounts, without having been established the amount thereof, they shall be counted by the enforcement body and recorded in the minutes which shall constitute the execution title and which shall be communicated to the debtor.

To sum up, we consider that the new regulations added to the tax procedure code relating to the determination and collection of tax claims, constitute a breakthrough, an important progress to previous regulations, that will lead to a better collection and administration of these funds.

However, they still represent a series of regulations established for the exclusive interest of the State and deviating from the rules of common law by creating a tiered, unfair, system for the various parties, thus creating the need for them to come to agree with common law regulations in order to ensure equal treatment for all before the law. I have mentioned some of these regulations, such as the terms stipulating the period for the enforcement of tax claims and especially their calculation methods.

Other such rules and regulations may be: the enforcement of tax claims is not subject to depreciation, which makes it even more subject to preferential treatment over other types of claims and to failure of the enforcement body to carry out these tasks expeditiously.

With reference to third parties, including the State, a genuine guarantee and the other real tasks on the goods have a degree of priority which is determined at the time when they were made public by any of the methods provided by law.

The third party shall not oppose the seizure of a debtor's property, citing a pledge, mortgage or a privilege. The third party will participate in the distribution of amounts resulting from the revaluation of the asset, according to the law.

The existence of one's own enforcement bodies, tax claims being not subject to enforcement regimes by the court executors, which makes the norms of procedure of enforcement be applied non-uniformly by comparison to other claims and especially fail to respect the principle of impartiality towards the parties, the enforcement officers being employees of the State, of the respective tax claims'creditor, subject to the regulations of the Labour Code, to a system of subordination to claims holders and not to a liberal profession.

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COMPETITION LAW & HUMAN RIGHTS PROTECTION: CONTROVERSIAL NEW DIMENSIONS

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Abstract

Article is devoted to the analysis of theoretically and practical aspects of human rights protection mechanisms in cases of violations of competition into the EU. It was determined that the right to fair competition has economic as well as social aspect. From an economic perspective, the right to not distorted (fair) competition has entities & undertakings. It follows the basic prohibition of antitrust behavior covered in Art. 101 and 102 TFEU. The social aspect of the right to fair competition shows consumers the right to receive fair benefits to the domestic market by staying in the equal access to the goods and/or services. It was researched the EU Court practice in the field of human right violations in competition sphere & the ECHR practice in cases concerning violations of competition. The judgment of a chamber of the European Court of Human Rights of 27 September 2011 in Menarini has examined the impact of Art. 6 paragr. (1) of the ECHR in competition cases.

Keywords: human rights, European Union, competition law, European Court of Human Rights, Menarini case

1. Introduction

The notion of "freedom to compete" was established in ordoliberalism theories, that was introduced through the main goal of competition – to increase social welfare. Defining competition as a necessary element of a functioning market economy is worth noting that it should be based on the basic principles, values and freedoms. Especially it must be determined by the protection of human rights. Now we just try to explain the correlation of mechanisms of fair competition through the human rights protection. In the Treaty on European Union (TEU), a new category of "values" among which we should pay attention to equality and human rights. Then there was formed and developed by the EU Court practice the basic principles of EU law, the focus of which is the principle of the protection of human rights and freedoms in accordance with Art. 6 TEU and Art. 16 TFEU.

The study of economic stability for the internal market through the prism of the right to fair competition in the EU is relatively new, but the doctrine is characterized by a diversity of views in this area. Among Western scholars, lawyer's interaction of human rights and the consumer, such as A. Andreangeli [Andreangeli A., 2008] who is the author of a monograph devoted to compliance with competition rules and at the same time human rights. We can also isolate single special research of the relationship of competition law and

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human rights, such as M. Ramsden's [Ramsden M., 2008]], E. Ameye's, A. Brawn's, A. Rileya's, W. Wils [Wils W., 2011] works.

Study of the right to fair competition requires the definition of "unfair" competition and "freedom" to compete. At the core of this concept there are such fundamental characteristics as integrity, wisdom and justice. The concept of free competition was founded in theories of liberalism, especially reflected in the current ordoliberalizm. The idea ordoliberalizm was founded in Germany by scientists such as V. Oyken and F. Böhm. They advocated the main idea of the flow – free competition and protection. This idea was supported and spread within the Member States of the European Union [Quack S., Djelic M-L., 2005].

2. Main issues on legal regulation of the competition in the EU

The EU competition policy serves as protection of fair competition from illegal restrictions and distortions is an important factor in the creation and effective functioning of an integrated internal market in the EU. The principle of an open market economy with free competition is one of the foundations of the economic system of the European Union due to the special Protocol the TFEU and other items of TFEU. Thus the implementation of the principle of respect for EU supranational institutions endowed with exceptional powers in this area. In particular, Art. 3 TFEU defines the exclusive competence of the EU in establishing of the competition rules necessary for the effective functioning of its internal market of the European Union. It should again be emphasized that the meaning of the Treaties implies that competition policy plays a key role in the establishment and functioning of the internal market in accordance with the principle of an open market economy with free competition, which is directly reflected in Art. 119 TFEU. The basis of the EU internal market is the ability of business entities to compete on equal terms. Competition policy provides competitive behavior of enterprises and protects the interests of consumers, making possible the production of goods and services at a qualitative level.

3. The right of fair competition

The right of fair competition has both economic and social aspects.

From an economic perspective, the right to not distorted (fair) competition has entities & undertakings. It follows the basic prohibition of antitrust behavior covered in Art. 101 and 102 TFEU. The right to fair competition and endowed states that in its legal regulation refrain from giving undue advantage to certain subjects or industries, which distorts or threatens to distort competition. Such actions of the Member States recognized incompatible with the internal market under art. 107 TFEU. Another aspect relates to the obligation of national monopolies in the provision eliminating any discrimination expressly provided for in Art. 37 TFEU.

The social aspect of the right to fair competition shows consumers the right to receive fair benefits to the domestic market by staying in the equal access to the goods and/or services. To ensure fair competition entities have to make legitimate fair measures to attract consumers, and consumers have the right to benefit from fair competition. This approach was supported by the sociological jurisprudence. Court of Justice in its judgment in the case of GlaxoSmithKline[1] pointed out that the purpose of Art. 101 (paragr. 1) TFEU is to prevent companies from actions that would reduce the welfare of the final consumer.

[1] See Case T-168/01 GlaxoSmithKline Services Unlimited v Commission // European Court Review. – 2006.- II-2969.

The Charter of Fundamental Rights, which according to the Treaty of Lisbon, is one of the fundamental documents of the EU confirms this social dimension of the right to fair competition. Art. 38 of the Charter states that "the Union's policies ensured a high level of consumer protection". This means that one of the objectives of EU competition policy is to protect consumer rights.

For the purpose of the right to fair competition the EU has exclusive competence. The Commission under Regulation 1/2003[2] has broad powers to obtain information, to investigate and take an appropriate binding decisions. However, the Commission applies its right in quite active character, by imposing fines in the millions and billions of euros[3]. However, any decision by the Commission may be subject to review by judicial review under Art. 263 TFEU.

In other words, the right to fair competition from both positions (both economically and from the social aspect) provided not only the power of the Commission, but also judicial mechanisms. Decisive for the right to fair competition in the light of the prohibition of antitrust behavior in the market are the powers of the Commission (in accordance with Regulation 1/2003) and the distribution of jurisdiction of the Court in the European Union claims from individuals and businesses with regard to acts in which they are recipients or directly and immediately affect them (according to paragr. 4 Art. 263. TFEU). It should be noted that in almost all cases the EU Court of Justice, concerning violations of the subjects of competition, the protection of human rights deviated (such as in the case of Pioneer[4]).

4. ECHR's point of view

But since the 2000's, the role of human rights in the implementation by the Commission of its powers increased, and in 2011 the European Court of Human Rights considered the case in the field of violation of competition rules.

Due to the fact that the EU defines and includes its legal system rights under the European Convention on Human Rights, the question arises as to the mechanisms of their implementation. In other words, there is the practical question of value competition in the market and human rights. This also applies to the issue of human rights during the Commission powers to enforcement of the competition rules, in particular during the investigation by the Commission. The main provisions of the Convention relevant in the context of EU antitrust enforcement are Art. 6 (right to a fair trial), Art. 7 (no punishment without law), Art. 8 (right to respect for private life), Art. 13 (right to an effective remedy) and Art. 4 of Protocol No 7 to the Convention (right not to be tried or punished twice).

In other words, there is the practical question of the relation of competition in the market and human rights. This also applies to the issue of human rights during the Commission authority to monitor compliance with competition rules, in particular during the investigation by the Commission.

Thus, the question is whether fall under the jurisdiction of the ECHR case of violation of competition rules. Thus, Art. 6 of the European Convention on Human Rights defines the

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[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty // Official Journal. – 2003. – L 1. – p.1-25.

[3] For example, see decisions: Commission Decision 13 May 2009 Intel D // COMP. – 2009. – 37/990 – 3726.; Case T-201/04 Microsoft v. Commission // European Court Review. – 2007 – II -3619.

[4] Case 100/80 Musique Diffusion Francaise v Commissione // European Court Review. – 1983. – 1825.

right to a fair and public hearing within a reasonable time whether civil or criminal implemented. Furthermore, this paper corresponds to Art. 47 (paragr. 2) EU Charter of Fundamental Rights, which defines the right to an effective remedy and access to impartial courts.

Despite the fact that Regulation 1/2003 has established that sanctions are not criminal liability, litigation is somewhat different position on this issue. The decision of the ECHR in the case of Société Stenuit v. France[5] was analyzed the fines imposed under national competition law. Here the court considered in the light of a criminal nature in connection with the nature of national competition law of France, whose goal is to protect free competition in the French market, i.e. the general interests of society, which is usually protected by criminal law. In the judgment in the case of the EU KME Germany and others v. Commission found that the Commission's decision to impose a fine of competition associated with "criminal charge" for the purposes of Art. 6 (1)[6]. Furthermore, it is well known that in the light of Art. 6 (1) of the European Convention, the definition of "criminal charge" the Court must not only be independent and impartial, but must also have full jurisdiction to hear and decide all questions of fact and law relevant to the dispute, which he considers[7].

5. Conclusion

Case ECHR in the case Menarini[8] reaffirmed the applicability of Art. 6 of the European Convention on Human Rights to cases involving the protection of competition in Europe. The very bright example of such correlation is the Menarini case. The decision of the ECHR of September 27, 2011, confirmed that the procedure against Menarini in the Italian jurisdiction had a "criminal nature" for the purpose of Art. 6 of the Convention. This case demonstrates the immediate relevance of fundamental rights to EU competition law enforcement.

This western doctrine confidently declares that this case has given rise to possible further appeals to the ECHR in cases involving violations of competition [Bronckers M., Valery V., 2012; Bellamy C., 2012]. The "Menarini" ruling of the European Court of Human Rights paves the road to a material and significant enhancement of a company's rights of defense in antitrust cases based on Art. 6 of the Convention and on the respective seminal case-law of the European Court of Human Rights which materializes in a detailed manner the principles associated with the due process of law.

However, in the future there is another rhetorical question of the appropriateness of trial states in accordance with Art. 6 of the European Convention on Human Rights. In accordance with Art. 6 TEU Union will join European Convention on Human Rights. This affiliation will allow for anyone who claims that his rights under the European Convention on Human Rights have been violated by the European Commission or the European Union Court during its review of decisions of the Commission to apply the mechanism of the

[5] ECHR decision dated 24 February 1992 – Société Stenuit v. France, case no. 67/1991/319/391.

[6] Case C-272/09 P KME Germany and others v. Commission, judgment of 8 December 2011.

[7] Le Compte, Van Leuven and De Meyer v. Belgium, 23 June 1981, Series A, number 43 p.23 §51(b); Schmautzer v. Austria 1996 21 ECHR e1, 536;Chevrol v. France, 13 February 2003, CEDH 2003-III, §77.

[8] European Court of Human Rights, A. Menarini Diagnostics S.R.L. c. Italie (Requête no. 43509/08), judgment of 27 September 2011.

ECHR. The process of joining the European Union to the European Convention continues with the accession agreement should put an end to the many possible appeals on violation of Art. 6 of the European Convention to the ECHR.

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ASPECTS OF THE FIGHT AGAINST THE TRAFFIC AND CONSUMPTION OF DRUGS

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Abstract

Drug traffic is the main illegal activity of organized crime groups. The main problem is the fact that countries that export illegal drugs are not under the control of the European Union and sometimes not even under their own government's control, except for the synthetic drugs. Europe being the largest producer of synthetic drugs in the world.

UNESCO underlines the importance of the healthcare system, as health itself is considered "essential to life itself and must be considered social good and humane".

The Global Healthcare Organization, in 1946, defined heath "as a completely favorable state, both physically, mentally and socially, and not merely the absence of disease or infirmity".

Ulterior, the definition was completed, with another one "Health is the capacity to lead a productive, social and economically stable life".

Keywords: the drug traffic, the European Union, the government's control, the healthcare system

„There is nothing better in life than a state of good health"
Platon

CHAPTER I
THE TRAFFIC AND CONSUMPTION OF DRUGS

Drug traffic is the main illegal activity of organized crime groups. The main problem is the fact that countries that export illegal drugs are not under the control of the European Union and sometimes not even under their own government's control, except for the synthetic drugs. Europe being the largest producer of synthetic drugs in the world.

The most used illegal drug is cannabis (1,6%), followed by ecstasy (0.7%), heroin (0.3%) and cocaine (0.3%). Cannabis and ecstasy are the most used drugs with predilection by youth in between 15 and 34 years old, mostly males, especially from Bucharest/Ilfov regions and the Western side of Romania. The youngest age, declared by a respondent for the initiation in cannabis consumption is 14 years old, reports are showing that the average age of drug users is 22.

It's estimated that in Bucharest there are 18.297 problematic drug consumers, or persons that consume drugs for a extended period of time or regularly. The results of the syringes renewal program were used for this estimation. Comparative to past years, a slight growth is noticed, says the report, specifying that the main boundary for the realization of a country wide estimate is the availability of the programs and/or services from the rest of the country.

Drugs have a diversity of negative effects on a person, from panic, anxiety, depression or suspiciousness and paranoid tendencies, culminated with increased aggressiveness, even in decreasing intellectual performances, on the psychological plan, thus causing the progressive deterioration of social relationships and social exclusion risk growth, even in the involvement in criminal activities when under the influence of narcotics or to procure his regular dose of narcotics, in the social sphere.

UNESCO underlines the importance of the healthcare system, as health itself is considered "essential to life itself and must be considered social good and humane".

In the UE there is an increasingly higher tendency to differenciate between the criminal activities commited by persons for personal consumtion, either pathological, or as a pseudorecreative need, as well as those asociated with drug approvisation. Medical and/or social measurements are applied instead of punishment for drug possession.

For example, in Spain, Italy and Portugal, drug possession for personal consumption is looked upon as a so-called "administrative offence", in Luxemburg, it's applied only for cannabis. And in Italy, Germany and the Netherlands don't forbid drug consumption per se (for personal usage).

CHAPTER II
THE EVOLUTION OF ROMANIAN LEGISLATION AGAINST ILLEGAL DRUG TRAFFICKING AND CONSUMPTION

The preoccupation of the regulation of the Romanian jurisdiction against illegal drug trafficking appears since the XVII century, with Vasile Lupu's Code of Laws and obtains amplitude with the passing of time.

Thus, different regulations (1830-1964), regarding professional exertion of the apothecary and the pharmacist, sanitary laws from 1874, 1885, 1893 and their reviews from 1886 and 1893, referential to the toxin regime, required authorization by obtaining a specialty diploma; "Regulation of drugs and sale of prime medicinal substances", approved at 21 of April 1921, ordered the establishment of control on drugs by the General Leadership of the Sanitary Services of the Social and Health Care Ministry, founded in the same year.

Romania will accede at the "International Convention on opium" from 1925, in Geneva, by the Decree nr. 1578 from 21 of June 1928, promulgating then the Law nr. 58/1928 for the fight against the narcotic abuse – in the category which includes opiates – which prohibited the public and abusive consumption, possession, production, commercialization without medical authorization and illegal drug traffic enabling, foreseeing the necessary collaboration of the ascertaining reports of flagrant felonies with other means of probation. In July 1933, the state will establish a monopoly for narcotics.

By the law nr. 84 from 9 April 1933, Romania will accede at "The Internation Convention on the Limitation and Regulation of the Fabrication and Distribution of Narcotics" signed in Geneva, at 13 July 1931.

The law nr. 73/1969 on the product regime and narcotic substances and the Instructions nr. 103/1970 for the execution of the acts of this law appertains in the category of felonies "production, possession or any other operations on the circulation of products or of narcotic substances, cultivation with the goal of processing of plants containing such substances,

prescription by the medic, without necessity, of narcotic products or substances, organization or permission of said consumption in certain places" provided a list of said drugs and competent bodies to perform control on this matter.

"The Unique Convention on Narcotics" signed on 30 March 1961 in New York and "The Protocol of 1972" which amends this convention were ratified by Romania at 31 December 1973.

The Decree nr. 476/1979 on produce regime and toxic substances will specify the distinction among narcotics, on one side, and products and substances, on the other.

Romania will accede, by the Law nr. 118/1992 on 8 December 1992, at "The Convention Regarding Psychotropic Substances" – concluded on 28 February 1971 in Vienna – and at "The Convention Against Illegal Drug Trafficking of Narcotics and Psychotropic Substances" signed 20 December 1988 at Vienna. Until the appearance of the Law nr. 143/2000 regarding the fight against the illegal traffic and consumption of drugs, the trafficking of narcotics was sanctioned by the art. 312 from the Penal Law, modified by the Law nr. 140/1996, included in Chapter II – "Offences against public health" – of the title IX of the Penal Law.

Thus, in addition to the adherence at the international conventions from 1925, 1931, 1961, 1971 and 1988, Romania signed numerous protocols, memorandums of understanding and agreements bi or multilateral, regarding the eradication of illegal narcotic trafficking and the suppression of those found guilty of its proliferation.

The Interministrial Committee of the fight against drugs, founded through H.G. nr. 534/1999, is constituted in a nation organism meant to assure the durability and the coordination of the communication in between the Ministry of Internal Affairs and other state authorities regarding the measurement efficiency imposed to be taken in consideration by the setting of the war declared on narcotics.

In the Romanian Police setting, at the General Inspectorate of the Police level, functions The **Direction of the Fight against Organized Crime and Antidrug**, D.C.C.O.A., made of 2 enforcement agencies (The **Brigade of the Fight against Organized Crime** and **Antidrug Brigade**); according to the dispositions art. 26 from the Law nr. 143/2000, D.C.C.O.A is the only Romanian institution competent to centralize and capitalize the total of information regarding drugs, essential chemical substances, toxic chemical precursors and inhalants, regarding the coordination of the fight against illegal drug trafficking and consumption.

CHAPTER III
THE CURRENT STATE OF ROMANIAN LEGISLATION REGARDING THE FIGHT AGAINST DRUG TRAFFIC AND CONSUMPTION

The drug phenomenon in Romania started acquiring, at the moment, particularly worrisome proportions, which should make all the factors in our country involved in the prevention and the counteraction of the white death scourge to take thought. A severe emphasis of the illegal drug traffic inside the Romanian border is remarked, with the necessary specification that the ascertainment number, separated or jointly, by the custom house officers and the police doesn't identify, never and in no country in the world, with the real situation of illegal drug trafficking that takes place effectively by the criminal

organizations or by the individuals in self interest. The massive and surprising implication of the Romanian citizen in committing drug trafficking, in continuous growth, made necessary a thorough juridical actualization and regulation in this matter.

Therefore, the Law nr. 143 of 26 April 2000 was adopted by the Romanian Parliament, regarding the fight against illegal drug traffic and consumption, which abolishes the dispositions or the art. 312 from the Penal Code concerning the narcotic substances or products, as well as other contrary dispositions. So from the Chapter II entitled "The sanctioning of trafficking and other illegal operations with illegal substances under national control" from the Law nr. 143/2000 we underline the following statements:

Art. 2. (1) The cultivation, production, fabrication, experimentation, extraction, preparation, transformation, offering, placement in sale, selling, distribution, delivery with any title, sending, transporting, procuring, buying, possession or other operations regarding the circulation of risk drugs, illegally, is punishable with prison from 3 to 15 years and the prohibition of some civil rights.

(2) If said facts provided by the paragr. (1) have as objective high risk drugs, the punishment is prison from 10 to 20 years and the prohibition of some civil rights.

Art. 4. (1) The cultivation, production, fabrication, experimentation, extraction, preparation, transformation, buying or possession of drugs for self consumption, illegally, is punishable with prison from 6 months to 2 years or with a fine.

(2) If said facts provided by the paragr. (1) regard high risk drugs, the punishment is prison from 2 to 5 years.

CHAPTER IV
NATIONAL ANTIDRUG STRATEGY 2013-2020

In the setting of the Government Meeting of Wednesday, 9 October a.c., the National Antidrug Strategy 2013-2020 and the Plan of Action between 2013-2016 for the implementation of the National Antidrug Strategy 2013-2020, were adopted by a decision, following that the two pragmatic documents to be published in the Official Monitor of Romania, Part I.

The National Antidrug Strategy 2013-2020 brings new elements regarding the reaction of the Romanian state towards the drug problems, by developing the mechanisms for coordination, interinstitutional collaboration, decisional transparency, research and strategic analysis.

The current legitimate normative act targets 5 directions of action, from which 2 directions are vertical and 3 are horizontal.

The vertical directions of action include the following:

- the reduction of drug requests, through the consolidation of the integrated national system for prevention and assistance, consistently with the scientific evidence, as well as the identification intervention, the allurement and motivation of the drug consumers in order to provide specialized assistance aiming social integration.

- reducing the drug supply, by identification and the destruction of trafficking networks, the reduction of the availability of drugs on the market and the efficient use of the system for law application, simultaneously with the development of the institutionalized

mechanisms for monitorization and control, coordinated and adapted to the current needs and the bad situation of the phenomenon to support the viable measures of the fight against it;

Also the horizontal directions involve the coordination in the drug domain by the implementation of a unitary concept of action in the field of the drug and precursor issues, the monitoring of the implementation of national politics, the efficient use if the available resources and the maximization of the results of the accomplished interventions. **National Cooperation**, through the reaffirmation of Romania's commitments, assumed through international documents, bilateral or multilateral, in which our country is a part of and strengthens the position as an active partner in the global effort to reduce the demand and supply of drugs and it's precursors. **Improving the level of knowledge of the drug issue on national level** starting from the scientific evidence, through monitoring, researching and informing, by strengthening the role of the National Antidrug Agency as national coordinator in the drug and it's precursors area as well as the development of a dialogue and cooperation platform between institutions implicated in the application of said strategy and between the government section and the non-government section.

Likewise, the new strategy promotes the state principles with emphasis on the humane approach of the drug consumers as a vulnerable group subject to risks of social exclusion, enrolled in the national normative setting and respecting the fundamental principles of the European Union: **respect towards human dignity, liberty, democracy, equality and the rule of law.**

CHAPTER V
ACTION PLAN ON THE STOCKHOLM PROGRAMME 2010-2014

Through the Action Plan on the Stockholm Programme, the European Commission engaged in adopting consolidating measurements of protection against serious felonies and organized crime. **The Treaty of Lisbon** being now in effect, the European answer to the drug issue must be firm and decisive, tackling aspects related to both the demand and the supply of drugs. The new legislation which involves the European Parliament and is implemented by the member states will be subject to control by the European Commission and ultimately by the Court of Justice of the European Union.

The European Commission wants to confer a new vitality to European politics regarding the fight against drugs. In its motion **"A budget for Europe 2020"**, the Commission engages itself to provide financial support for the approach of future drug related challenges. The UE budget should concentrate on financing the actions that have an amplified and clear value, which also include: the resolution of problems regarding the new drugs, developing of practical innovations in the matter of prevention and treatment, the transboundary cooperation in the field of law application.

Starting from an integrated, balanced approach, scientifically based, the strategy addresses both old and new problems, such as policonsumption of drugs including the consumption of the combination of drugs and alcohol, the dynamics of the drug market generated by the use of the internet as means of distribution of drugs and the quality of the services for the reduction of the demand, given the fact of Hepatitis C occurrence throughout the injectable drugs consumers and the risk of a HIV epidemic as well as other associated diseases.

An even growing number of new psychoactive substances, often meant to mimic the effects of controlled drugs, are available in Europe. Some of the said substances are sold directly on the black market, while other so called "legal drugs", are sold transparently. The EU Early Warning System continues to get reports of approximately one new substance per week in 2013.

The strategy develops the national politics setting, necessary for the implementation of a proactive response towards the drug, alcohol and nicotine consumption phenomenon, as well as towards the traffic of drugs and its precursors, through specific objectives and integrated actions of the national and local institutions. The new strategy aims to bring a bonus of value concerning the reaction of the Romanian state towards the problem of drugs, by developing mechanisms of coordination, interinstitutional collaboration, decisional transparency, research and strategic analysis.

CHAPTER VI
CONCLUSION

Taking advantage of the youths vulnerability, the complex networks of distribution are focusing especially on the young ages for both consumption and traffic.

The vicious circle created around the adolescent need to affirm themselves towards their group as well as the fear of being rejected by said group if they decline their offer, make them disregard the risks posed by taking their first dose, becoming in most cases addicted to risk drugs or high risk drugs, afterwards becoming in need to sell further on, to procure their next dose of narcotic, is caused by their lack of education by the state institutions and by its inactivity or its inefficiency in the battle against the organized traffic of illegal substances.

ENFORCEMENT IN TIME OF THE CRIMINAL LAW IN RELATION TO THE NEW CRIMINAL LEGISLATION

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Abstract

The author accomplish a comparative examination over the criminal law provisions related to the enforcement of the more favorable criminal law in opposition with the previous regulation, underlining the added value and the shortcomings of the new Criminal Code. The presentation methods are based on examples, personal opinions and suggestions meant to improve the legal text subjected to this assessment.

Finally, the author draws up his personal conclusions concerning the subject in question, briefly adding the main *de lege ferenda* proposals for the enhancement of the new criminal legislation.

Keywords: Criminal Code of 1969; the new Criminal Code from 2009; criminal law enforcement over time; enforcement of the more favorable criminal law prior to the final judgment of the case; enforcement of the more favorable criminal law after the final judgment of the case

1. INTRODUCTIVE NOTIONS

In accordance with art. 264 of the Law no. 187/2012[1] for amending the Law no. 289/2009 on the Criminal Code[2], the New Criminal Code (also referred to as the 2009 Criminal Code), adopted through Law no. 286/2009 related to the Criminal Code, will enter into force starting with 1st of February 2014, when the republished Law no. 15/1969 (also referred to as the 1969 Criminal Code or the previous Criminal Code or the previous criminal law) on the Romanian Criminal Law[3] will be rendered obsolete.

The main grounds that supported the elaboration of the new Criminal Code were presented within the recitals of the Criminal Code's project[4] (referred to as the Project), drawn up during 2006-2008 by a commission formed of prestigious criminal law specialists (in theory and in practice) and within the Government Decision no. 1183/2008 for the approval of the preliminary thesis for the Criminal Code's project[5].

Within the process of issuing the new criminal law, the commission emphasized on a hand the need to maintain the traditional value of the Romanian criminal legislation and on another hand to complement it with some of the juridical systems considered as reference points within the European criminal law.

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[1] Published within the „Romanian Official Journal", part I, no. 757/12.12.2012.

[2] Published within the „Romanian Official Journal", part I, no. 510/24.07.2009, amended and updated.

[3] Republished within the" Romanian Official Journal", part I,, no. 65/16.04.1997, amended and updated.

[4] The project of the new Criminal Code is available at the following web address: http://www.just.ro/MeniuStanga/Normativepapers/Proiectedeactenormativeaflate%C3%AEndezbatere/tabid/93/Default.aspx, uploaded on the Ministry of Justice site on 24th of January 2008 (the website was last accessed on 10th of March 2012).

[5] Published within the Romanian Official Journal", part I, no. 686/8.10.2008.

The starting points in sustaining the traditional value of the Romanian criminal legislation relate to the provisions of the 1937 Criminal Code (inspired from the Italian and Austrian examples), most of them being maintained by the 1969 Criminal Code, also taking into consideration that currently the criminal regulations with the most influence within the European area belong to the German and Italian territories. The new Criminal Code provisions' junction with these legislations, and also with the ones inspired by them (the Spanish, Swiss, Portuguese law), so that the editors not to ignore the solutions of other European systems, such as the French, Belgium, Dutch law or even the one of some Scandinavian countries, allowed the creative valorization of the national tradition in the same time with achieving regulations in compliance with the current trends of the criminal law of the European states with a more advanced experience within this domain.

Part of the institutions specific to the Romanian criminal law (some of them inserted by the 1969 Criminal Code) were maintained due to the fact that the commission was convinced by their functionality [for instance, there was maintained the mandatory enforcement of the more favorable criminal law after the final judgment of the case or the indirect participation to committing an offense, even though most of the legislations use in such hypothesis the institution of the immediate author].

As a result, the new Criminal Code was developed after a thorough examination of the traditional solutions, foreseen by the our previous criminal codes (this would explain why many texts of the 1937 Criminal Code were "resurrected", such as the incriminations related to the murder requested by the victim – art. 190[6] or the insurances fraud – art. 245 or the patrimonial exploitation of a vulnerable person – art. 247 etc.), after the identification also of other criminal legislations' experiences (in this respect, it's to appreciate the new criminal law editors' effort for mentioning within the recitals the foreigner inspiration for the new texts).

2. THE GENERAL PRESENTATION OF TITLE I OF THE NEW CRIMINAL CODE'S GENERAL PART

The Title I – General Part of the 2009 new Criminal Code – which will enter into force of 1st of February 2014 – referred to as **"The Criminal Law and its scope"** has the same structure as the Title I – general part of the 1969 Criminal Code, namely two chapters: general principles (chapter I) and the applicability of the criminal law (chapter II). Nevertheless, comparing with the previous criminal law, this one contains more novelty elements.

More precise, due to the doctrine suggestions[7], the new Criminal Code firstly regulated the applicability in time of the criminal law and then foreseen the provisions related to the

[6] From editorial reasons, within the content of this paper, where it's not mentioned the legal act after the article's number, we must take into consideration the Criminal Code adopted through the Law no. 286/2009, revised and updated.

[7] Also see: George Antoniu, Aplicarea legii penale în timp şi spaţiu, within „Revista de drept penal" no. 4/2001, p. 9-10; George Antoniu, Un nou pas pe calea reformei penale, within „Revista de drept penal" no. 3/2002, p. 11; Idem, Examen critic al unor dispoziţii din Codul penal. Partea generală (Reforma penală şi unele aspecte critice ale legislaţiei penale în vigoare), within „Reforma legislaţiei penale" by George Antoniu (coordinator), Emilian Dobrescu, Tiberiu Dianu, Gheorghe Stroe, Tudor Avrigeanu, Publishing House: Academia Română, Bucharest, 2003, p. 83; Idem, Noul Cod penal. Codul penal anterior. Studiu comparativ, Publishing House: All Beck, Bucharest, 2004, p. 6. Also see: Rodica Mihaela Stănoiu, Teritorialitatea legii

territorial applicability of the criminal law, since the legislator, previous to determining the territorial applicability of the criminal law, has to establish the conditions related to its existence from the temporal point of view. Thus, the existence of the criminal law involves the assessment of the moment (extracted from a period of time) when the legislator's will becomes law and the effects caused in time, determined by the law's existence, these representing a priority comparing with the subject related to the territorial applicability of the criminal law.

On another hand, it has been told that such a legislative option is meant to ensure the continuity of the legal incrimination and the penal sanctions principle, foreseen by art. 1 and 2, principle that finds its grounds in connection with the law's existence in time and with the conduct of the criminal law's recipients[8].

The 2009 legislator justifiably renounced to the optional enforcement of the more favorable criminal law for the final and binding decisions. Maintaining such a solution could be supported by the full compliance with the intangibility of the res judicata's principle applicable to the final and binding court's decisions.

Moreover, the content of some principles was better defined and updated according with the doctrine's suggestions, but also with the solutions existent within other European Union's criminal law systems.

Through the Law no. 187/2012 for implementing the Law no. 289/2009 on the Criminal Code[9] there were adopted several provisions related to the settlement of the criminal law's temporal conflicts determined by the entrance into force of the new Criminal Code – the Law no. 286/2009 – and that will not be solved by simply applying the general rules within the matter contained by the code.

Chapter II ("Criminal Enforcement"), which was named in the previous law "limits of the enforcement of the criminal law" is divided into two sections: Section I – "Enforcement of criminal law in time" (art. 3-7) and Section II – "the enforcement of criminal law in space" (Art. 8-14).

3. ENFORCEMENT OF THE CRIMINAL LAW IN TIME

Under Section I – Enforcement of the criminal law in time – are regulated principles governing the enforcement, in time, of the Romanian criminal law like: business criminal law (art. 3) enforcement of the criminal law of decriminalization (art. 4), the enforcement of the more favorable criminal law up to final judgment of the case (Art. 5), the enforcement of the more favorable criminal law after the final judgment of the case (Art. 6) and the temporary enforcement of the criminal law (art. 7).

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penale (Aplicarea legii penale), within „Noul Cod penal comentat", vol. I by George Antoniu (coordinator), Constantin Mitrache, Rodica Mihaela Stănoiu, Ioan Molnar, Viorel Paşca, Avram Filipaş, Nicoleta Iliescu, Matei Basarab, Publishing House: C. H. Beck, Bucharest, 2006, p. 94; Marin Făgăraş, Aplicarea legii penale în spațiu, PhD. Thesis supported by the Juridical Research Institute „Acad. Andrei Rădulescu" from within the Romanian Academy under the scientific coordination of univ. PhD. George Antoniu, Bucharest, 2009, p. 26-27.

[8] See: Constantin Mitrache, Activitatea legii penale (Comentarii), within „Explicații preliminare ale noului Cod penal", vol. I, Art. 1-52 by George Antoniu (coordinator), Costică Bulai, Constantin Duvac, Ioan Griga, Gheorghe Ivan, Constantin Mitrache, Ioan Molnar, Ilie Pascu, Viorel Paşca, Ovidiu Predescu, Publishing House: Universul Juridic, Bucharest, 2010, p. 41; Idem, Reflecții asupra unor reglementări de aplicare în timp a legii penale prevăzute în noul Cod penal, within „Noua legislație penală: tradiție, recodificare, reformă, progres juridic", vol. I, Publishing House: Universul Juridic, Bucharest, 2012, p. 52.

[9] Published within the „Romanian Official Journal", part I, no. 757/12.11.2012.

3.1. Art. 3 – **"The activity of the criminal law"** – establishes the rule that "The criminal law applies to offenses committed while it is in force," meaning while it is active. The text is identical to that of art. 10 of the previous criminal law so requires no additional information.

In this section, *de lege ferenda* would require the introduction of a legal norm to be discipline the content and the principles for resolving criminal competition of rules or of texts, or by taking the Italian model (art. 15 of the Criminal Code) or the Spanish (art. 8 of the Spanish Penal Code), adapted to the legal and social realities from us, either in an own drafting, given that this issue is not handled uniformly in the doctrine and jurisprudence.

Such a provision would be even more necessary after 1989 when the tendency was to increase artificially the competition of criminal texts, which reveals a flawed legislative technique, capable of controversy and difficulty in applying criminal law[10]. This trend was expressly recognized by the legislature when by the Romanian Government Decision no. 1183/2008 for the approval of the project prior theses of the Criminal Code[11] stated that "there are currently around 250 of special laws or extra-criminal containing criminal provisions with numerous overlapping texts, with implicitly repealed, over which hovers uncertainty, with legal penalties including flagrant differences despite the similar nature of the alleged misconduct, making them difficult to be enforced by the judiciary and very less predictable for citizens" because, after only 3 years in the Explanatory Memorandum[12] of Law. 187/2012 stating that the number has reached 300 of special penal laws or extra-criminal containing criminal provisions.

The excess of competing criminal rules prevent the proper functioning of the criminal justice system, being generator of confusion in judicial practice and is one of the ways to "legal pollution" by excess of incrimination, a phenomenon manifested in Romanian positive law[13].

Since the Romanian criminal law (nether the old nor the new one) does not contain explicit provisions for the handling of competition of texts, our doctrine and jurisprudence have failed to develop uniform criteria for identifying criminal provision applicable when there is a plurality of criminal provisions seem to apply to facts, because in reality only one of the rules is applicable.

The central problem facing the interpreter regarding the competition of rules is the criteria (principles) and then chooses from the competing rules the applicable one. Although they regulate the same matters, between competing rules there may be some objectives differences: for example, a rule can be more recent than another (chronological criterion) or a competing norm to have a more general content including the particular hypothesis covered by another rule (specialty criterion) or a competing standard to provide a penalty heavier than the other (criterion of subsidiarity) or a competing rule may also be in relationships with other competing rule so that it becomes applicable. Such differences not

[10] For details, see Constantin Duvac, Apparent plurality of offences, Universul Juridic Publishing House, Bucharest, 2008, p. 53-109.

[11] Published in the Romanian Official Gazette, part I, no. 686 from 8.10.2008.

[12] Available at http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/LegeAplicareCP/tabid/1438/Default.aspx.

[13] To be seen Sofia Popescu, The state of law in contemporary debates, Academia Romana Publishing House, Bucharest 1998, p. 150-152. Also, Constantin Duvac, op. cit., p. 56; Andreea-Alexandra Popa, Counterfeinting the object of a patent, în „Revista română de dreptul proprietății intelectuale", nr. 3/2008, p. 133.

only allow individualization of competing norm applicable, but also contribute to highlighting the entire concurrence.

The reason to accurately solve the competition of criminal rules (texts) by applying the principle of specialty, subsidiarity and alternation, being to avoid that a person is criminally liable twice for the same offense *(ne bis in idem)*, would be desirable that the Romanian law, like other foreign criminal laws, to regulate in the future ways of solving the competition of rules[14].

The introduction of a norm of criminal law to establish means to ensure the principle of *ne bis in idem* would require even more as recognizing the importance of this principle, the Romanian legislator explicitly enshrined in art. 6 of the new Criminal Procedure Code adopted by Law no. 135/2010 on the Code of Criminal Procedure[15].

The text entitled "Competition of criminal rules" could have the following drafting "When several criminal provisions of the Criminal Code or in special criminal laws or special extra-criminal laws govern the same subject, the special criminal norm is applied derogating from the general criminal norm, unless otherwise provided".

3.2. Applying the criminal law of decriminalization (art. 4). Under this name the legislature from 2009 reproduces in full the provisions of art. 12 paragr. 1 of the previous criminal law, without accepting the provisions of paragr. 2 of that text. Thus, according to art. 4, "The criminal law does not apply to offenses committed under the old law, if not provided by the new law. In this case, the execution of sentences, educational measures and safety measures, imposed under the old law, and all penal consequences of decisions regarding these facts cease with the entry into force of the new law".

The phrase "acts committed" has the meaning stated in Art. 174, which provides that "perpetrating an offense" or "committing an offense" means the commission of any of the acts which the law punishes as the crime or attempted consumption and participation in their commission as co-author, instigator or accomplice.

In fact, when explaining the text of art. 174, it was stated that the phrase "perpetrating an offense" is used generically by the legislature when referring to an undetermined offense (not individualized), whatever it may be, likely to have certain consequences such as criminal law enforcement in time and space, effects of mitigating or aggravating circumstances, the consequences of the criminal liability of minors, the effects of amnesty, the calculation of the limitation period for criminal liability etc.[16]

The title of this text is changed, the legislature of 1969 using the "retroactivity of criminal law." In this regard, the doctrine observed rightly that the name of art. 4 suggests that the new law of decriminalization applies to offenses committed under the old law that criminalized those facts, although the provisions of art. 4 mention not "applying", but rather "failure to apply" it. This creates a mismatch between the content of art. 4 and its name. To resolve this discrepancy, it was proposed either, if they keep the current name, the

[14] For details, see Constantin Duvac, op. cit., p. 53-203, 276.

[15] Published in the Official Gazette of Romania, part I, no 486, of 15.07.2010.

[16] See Constantin Duvac Public Official (Comments) in the "Preliminary Explanations of the new Criminal Code", Vol II, Art. 53-187 of George Antoniu (ed.), Alexander Boroi, Nicolae Bogdan-Bulai, Costica Bulai Ştefan Daneş, Constantin Duvac, Mioara-Ketty Guiu, Constantin Mitrache, Cristian Mitrache, Ioan Molnar, Ion Ristea, Constantin Sima, Vasile Teodorescu, Ioana Vasiu, Adina Vlăsceanu, Universul Juridic Publishing House, Bucharest, 2011, p. 504.

reformulation text such as "decriminalization criminal law applies to acts committed before its entry into force" either it be renamed to the "Retroactive criminal law"[17].

No taking paragr. 2 of art. 12 of the Criminal Code of 1969 was justified by the fact that the old regulation allowed retroactive safety measures and educational measures, without any circumstantial[18], new measures are likely to be more severe than those in the old law[19], or by the fact that art. 12 paragr. 2 of the previous Criminal Code contravened the principle of legality of criminal sanctions[20].

Preservation of paragr. 2 of art. 12 of the Criminal Code of 1969 provision that established the permanent retroactive character of the law providing for security measures and educational[21] measures would contravene the principle emerged of art. 15 paragr. (2) of the Romanian Constitution, according to which only the more favorable criminal law may have for the past (otherwise the law disposing only for the future, meaning that it is not retroactive), where, on these measures, the new law is more serious. By waiving this provision on which the view is that it is already implicitly repealed after the entry into force of the Constitution of 1991[22], a bill that would provide future security or educational

[17] To be seen Constantin Mitrache, Reflections on the application of rules of criminal law as laid down in the new Criminal Code, cit. supra, p. 53.

[18] See Mihai Adrian Hotca, new Criminal Code and previously Criminal Code – Differential aspects and transitory situations, Hamangiu Publishing, Bucharest, 2009, p. 6.

[19] See: Matei Basarab, Current Issues of Criminal Law, in "Criminal Law Review" no. 1/1994, p. 50. Pointing out this possibility, the author admitted retroactivity safety measures (contrary to the doctrine which held the majority in this case the principle most appropriate law enforcement or social protection in accordance with the needs of society), but only when they are more favorable to the offender, George Antoniu, New criminal Code. Previous Criminal Code. Comparative Study, cit. supra, p.7; Traian Dima, Criminal Enforcement of decriminalization (Comment) in the "new Criminal Code commented. General part "of Ilie Pascu, Vasile Dobrinoiu, Traian Dima, Mihai Adrian Hotca, Costică Păun, Ioan Chiş, Mirela Gorunescu, Maxim Dobrinoiu, Universul Juridic Publishing House, Bucharest, 2012, p. 36.

[20] See: Ilie Pascu, Petre Buneci, The new Criminal Code, the general and the Criminal Code, the general effect – comparative presentation, Universul Juridic Publishing, Bucureşti, 2010, p. 16; Valentin Mirişan, Romanian criminal law enforcement time. Comparative presentation of the provisions of the Criminal Code in force and the new Criminal Code, collective works "New criminal legislation discussion Romanian Association of Penal Sciences members", Universul Juridic Publishing, Bucureşti, 2012, p. 39.

[21] This provision has been criticized doctrine rightly signaled the possibility that some safety measures or educational measures, with all their character preventive and repressive be obvious even to consist imprisonment of the perpetrator, in which case it would be questionable to argue that retroactive application of such measures is a fair solution and in line with the principle of legality of criminal offenses and penalties. In this view, would be more appropriate, and where safety measures as well as educational measures to make enforcement more favorable (in full or at least, only on measures that would involve a restriction of freedom person). See George Antoniu, Retroactivity of criminal law (Comment 10) in "criminal judicial practice. The general part (art. 1-51 Criminal Code) ", vol. I de George Antoniu (coordinator), Constantin Bulai (coordinator), Rodica Mihaela Stănoiu, Avram Filipaş, Constantin Mitrache, Vasile Papadopol, Cristiana Filişanu, Academiei Române Publishing, Bucureşti, 1988, p. 24-25; George Antoniu, Penal reform in the first step (I), cit. supra, p. 17. On this occasion, the professor proposed to amend the text so that in cases where such measures are custodial apply only to actions under the criminal law committed after the entry into force of the law, unless they are milder; Also see Vasile Dobrinoiu, Ilie Pascu, Constitution and criminal law, in "Criminal Law Review" no. 2/1995, p. 59-61.

[22] See Florin Streteanu, op. cit., p. 253. In a previous study, the author argued, rightly, that the provision of Art. 12 paragr. 2 of the Criminal Code in 1969 will retroactively only if its provisions are more favorable (See Florin Streteanu, Retroactivity of criminal law under art. 15 paragr. 2 of the Constitution, in Studia Univesitatis „Babeş-Bolyai", Iurisprudentia series, no. 2/1992, p. 64-65). Also see: Viorel Paşca, Safety measures and application of criminal law in time, "Criminal Law Review", no. 1/1997, p. 42; Florean Ivan, op. cit., p. 135; Valentin Mirişan, op. cit., p. 39.

measures will follow the general rule of non-retroactivity of criminal law, unless they constitute a disposition more favorable.

According to other authors, art. 4 should be completed with the provision of art. 12 para. Previous 2 of the Criminal Code in respect of security measures and educational measures, which, in principle, must retro activate, the new law being usually more appropriate. After taking this text, it would require, in this view, addition of the words "unless the law provides otherwise"[23] to avoid some possible excesses of the new law, solution promoted in the preliminary solution of the Institute of Legal Research "Acad. Andrei Rădulescu" in 2002[24].

The 2009 legislature has not approved that new law proposal and decided to completely abandon the retrospective nature of these measures, referred to in art. 12 paragr. 2 of the previous criminal law, following that in these cases always apply the rules of more lenient criminal law *(lex mitior)* solution fully justified and in accordance with art. 15 paragr. (2) of the Romanian Constitution.

3.3. The enforcement of the more favorable criminal law before the final judgment of the case (art. 5). The content of the art. 5 paragr. 1 – „If from the moment the offense was committed until the case was finally judged there existed one or several criminal laws, the more favorable law is applicable."– was retrieved from the art. 13 paragr. 1 of the previous criminal law's text without significant changes (the term "the most" attached to the word law was removed, even though this attribute was stipulated namely to emphasize the fact that in case of appearance of more than two criminal laws, each one having the prerogative of being more favorable comparing to the other, but not comparing with a third or a fourth and so on, finally the most favorable law would have been applied; for all these reasons, the term should have been maintained).

Therefore, *de lege ferenda* it will be required to include again the term "the most" within the content of the paragr. 1, so that this one to foresee that "the most favorable law will be applied".

Also, the legislator changed the title of this text from "The enforcement of the most favorable criminal law" into "The enforcement of the more favorable criminal law before the final judgment of the case", this being considered a more complete and precise *nomen iuris* in what concerns its delimitation from the one described by art. 6.

The content of the art. 13 paragr. 2 of the previous Criminal Code wasn't taken over because it couldn't suggest[25] the fact that new law's provisions related to the

[23] See George Antoniu, Comments on the preliminary draft of a second new Penal Code (I), cit. supra, p. 10. Also see Constantin Mitrache, Applying criminal law of decriminalization (Comments), cit. supra, p. 53. The author is of the opinion that it was better if art. 4 would be out in full the content of art. 12 of the previous Criminal Code, keeping the name "retroactivity of criminal law", the more that changes the text in question was neither required nor doctrine and jurisprudence.

[24] Published in the "Criminal Law Review" no. 3/2002, p. 127-156.

[25] In this respect, see Florin Streteanu, Tratat de drept penal. Partea generală, vol. I, Publishing House: C. H. Beck, Bucureşti, 2008, p. 288. On contrary, see Constantin Mitrache, Aplicarea legii penale mai favorabile până la judecarea definitivă a cauzei (Comentarii), within „Explicații preliminare ale noului Cod penal. Articolele 1-52", vol. I, by G. Antoniu (coordinator), cit. supra, p. 79. The author considers that the chosen solution is not critics' free and doesn't solve the complementary penalty's matter which is complex, because it's possible, for instance, that the new law to no longer foresee those complementary penalties from the old law. De lege ferenda, the author suggests adding a regulation similar to the one from the art. 13 paragr. 2 of the

complementary penalties are retroactive applicable no matter if they are more favorable or more strict than the old law's ones, the more favorable law being determined in connection with the main penalty, interpretation that contravene the art. 15 paragr. 2 of the republished Romanian Constitution, even though some authors[26] sustained that the text in question would be applicable only if the complementary penalty foreseen by the new law is more favorable.

In accordance with the new situations arisen within the juridical domain after the appearance of the 1991 Romanian Constitution and as a result of the doctrine's suggestions[27], the provisions related to the enforcement of the more favorable criminal law during the criminal trial were revised with the provisions of the art. 5 paragr. 2 related to the situation of the normative acts or some provisions declared unconstitutional and also governmental emergency ordinances approved by the Parliament with changes or updates or rejected, if during their existence they contained more favorable provisions, situation when these acts, even though they are obsolete – totally or partly – the enforcement is maintained for the juridical situations subjected at some point to their provisions, regulation that is in compliance with art. 15 paragr. 2 of the revised Romanian Constitution.

The new Criminal Code's solution of extending also in this case the provisions of the more favorable criminal law is fully justifiable and consequently settles a very controversial issue[28] after 1991 in a fortunate manner and in compliance with art. 15 paragr. 2 of the revised Romanian Constitution.

In these cases, based on art. 5 paragr. 2, the possible changes brought by the Parliament to a normative act or as a result of declaring unconstitutional some provisions will cause *ex nunc* effects (starting with the moment the changes were operated) and not *ex tunc* (from the initial moment of the normative act).

The Romanian legislator explicitly and in a complete manner establishes through art. 5, the theory of the more favorable criminal law's extra-activity, the softer law being applicable, either the previous law (in this case the law is ultra-active), or the new law (in this case the law is retroactive).

Practically, the decisive criteria[29] in choosing from the laws in conflict the enforceable criminal law, is the creation of an actual more favorable situation for the offender, the origin of this criteria residing from the procedural principle *in dubio pro reo*.

3.4. The enforcement of the more favorable criminal law after the final judgment of the case (art. 6). This principle assumes that if within the period between the court's

previous criminal law, taking into consideration that its absence could generate difficult situations, if not even impossible to solve or by seriously violating the principle related to the legality and the enforcement of the more favorable criminal law for the ongoing judged offenses. This doctrine position seems to have been influencing the 2012 legislator, on the occasion of enacting the art. 12 paragr. 1 of the Law no. 187/2012.

[26] See Constantin Barbu, Aplicarea legii penale în spațiu şi timp, Publishing House: Ştiințifică, Bucharest, 1972, p. 239-240.

[27] See George Antoniu, Examen critic al unor dispoziții din Codul penal. Partea generală (Reforma penală şi unele aspecte critice ale legislației penale în vigoare), cit. supra, p. 90-92. A similar opinion was expressed by the professor within older papers. See, George Antoniu, Aplicarea legii penale în timp şi spațiu, cit. supra, p. 15-16; Idem, Un nou pas pe calea reformei penale, cit. supra, p. 11.

[28] For a thorough examination of this subject, see Florin Streteanu, op. cit., p. 301-311.

[29] For a thorough examination of the criteria used to determine the more favorable criminal law, see Florin Streteanu, op. cit., p. 280-283.

decision is final and binding and the complete execution of the imprisonment penalty or fine, a new occurred law foresees a lighter amendment, if the inflicted penalty is higher than the special maximum established by the new law for the committed offense, the penalty will be mandatory reduced to this maximum.

The provision of the text's paragr. 1 is retrieved without changes from the art. 14 paragr. 1 of the previous criminal law[30], the 2009 legislator changing the name of art. 6 from "The mandatory enforcement of the more favorable criminal law in the cases of final penalties" in "The enforcement of the more favorable criminal law after the final judgment of the case".

The content of paragr. 2 of the art. 6 is repeated from the paragr. 2 of the art. 6 of the previous Criminal Code, with the specification that the text is applicable only if the new law stipulates for the same offense only the imprisonment penalty. By adding this term – "only" – the legislator removed a shortcoming of the previous regulation that didn't offer clear solutions for the cases when the penalty foreseen by the new law was also life imprisonment, but alternative to the imprisonment penalty within lower limits than the ones comprised by the old law.

The provision of paragr. 2 is not incident, the criminal law being strictly interpreted, if the new law establishes the imprisonment penalty for the same offense, but alternative to the life imprisonment or only the fine (even if this last hypothesis is most likely only theoretical). A fortiori enforcement of the text[31], in our opinion, would be contrary to one of the aspects of the legality principle *(nullum crimen sine lege stricta)*.

De *lege ferenda*, it was suggested to rewrite paragr. 2 in order to cover also these situations, namely "If after a final conviction to life imprisonment and until its execution, there was adopted a new law that foresees for the same offense the imprisonment penalty or the imprisonment penalty alternative to a fine, the life imprisonment is being replaced by the maximum imprisonment prescribed for the same offense"[32].

Also, the provisions of art. 6 paragr. 3 are copied without changes from the content of the art. 14 paragr. 3 of the 1969 Criminal Code.

Within the context of their explanation, it was sustained that the court should replace the imprisonment with the fine's special maximum foreseen by the new law, taking into consideration that it's not possible to establish a lower fine, because within this phase the judge cannot reassess the penalty, but he/she may do so within the next stage when will be able to dispose the fine's execution and by taking into account the executed imprisonment and will may dispose partly or entirely to remove the fine's execution[33].

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[30] It's worth mentioning that art. 2 paragr. 2 of the Spanish Criminal Code foresees the retroactive effects of the criminal laws even in the cases when a final and binding decision was issued and the convicted person is executing the penalty.

[31] See Constantin Mitrache, Aplicarea legii penale mai favorabile până la judecarea definitivă a cauzei (Comentarii), within „Explicații preliminare ale noului Cod penal", vol. I, Art. 1-52 by George Antoniu (coordinator), Costică Bulai, Constantin Duvac, Ioan Griga, Gheorghe Ivan, Constantin Mitrache, Ioan Molnar, Ilie Pascu, Viorel Paşca, Ovidiu Predescu, Publishing House: Universul Juridic, Bucharest, 2010, p. 84.

[32] See Constantin Mitrache, Reflecții asupra unor reglementări de aplicare în timp a legii penale prevăzute în noul Cod penal, within „Noua legislație penală: tradiție, recodificare, reformă, progres juridic", vol. I, Publishing House: Universul Juridic, Bucharest, 2012, p. 55.

[33] See: Constantin Mitrache, Aplicarea legii penale mai favorabile până la judecarea definitivă a cauzei (Comentarii), cit. supra, p. 84; Idem, Reflecții asupra unor reglementări de aplicare în timp a legii penale prevăzute în noul Cod penal, cit. supra, p. 55-56.

As well, paragr. 3 will not be applicable if the new law foresees the fine penalty, but alternative to the imprisonment. Within the recent criminal doctrine[34], there were proposals – in reference to art. 6 paragr. 2 – concerning the extension of the text also to this hypothesis, with the following form: "… a law that foresees for the same offense only the imprisonment punishment or alternative to the fine's penalty".

Practically, the enforcement of the more favorable criminal law after the final judgment of the case is being achieved when the new law prescribes a lighter main penalty either from the duration point of view (the special maximum is lower than the inflicted penalty on the basis of the old law), or as characteristics (the imprisonment instead of life imprisonment or fine instead of imprisonment).

Comparing with the previous regulation some changes were operated in order to remove the shortcomings in what concern the text's appliance. In this respect, the hypothesis of the educational measures received a different regulation, such that they are considered main penalties and cannot be assimilated to the complementary punishments. Consequently, „the unexecuted educational measures and not foreseen by the new law will no longer be executed and the ones that have a correspondent within the new law will be executed as they are described and within the limits prescribed by the new law, if this one is more favorable." – paragr. 4.

Moreover, paragr. 5 contains a new provision according to which "when the new law is more favorable in compliance with paragr. 1-4, the unexecuted complementary penalties and the safety measures and not foreseen by the new law will no longer be executed and the ones that have a correspondent within the new law will be executed as they are described and within the limits prescribed by the new law".

By inserting this provision, it was considered that the more favorable law arisen after the final conviction of the defendant is first of all determined in accordance with the main penalty, even if the complementary punishment or safety measure would be more severe, so that the complementary punishments from the old law that have a correspondent within the new law would be executed as they are described and within the limits prescribed by the new law.

If the complementary punishments and safety measures were already executed before the enforcement of the new more favorable criminal law, these penalties will remain executed and it's not a question to debate, the law expressly stipulating that the penalties taken into account are only the ones not executed. Therefore, the new more favorable law doesn't lead to the reestablishment of the situation prior to the conviction, but only removes the penalties' execution (the complementary penalties and the safety measure that don't longer have a correspondent within the new law, which creates effects only for the future)[35].

When the new law doesn't modify the main penalty, the complementary penalties and the safety measures, foreseen by both laws, will be executed as they are described and within the limits prescribed by the new law, if this one is more favorable (paragr. 6), this solution not having a correspondent within the previous criminal law. This represents an extension of the enforcement of the more favorable criminal law also for the case when this is lighter in what concerns the complementary penalties and safety measures.

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[34] See Constantin Mitrache, Aplicarea legii penale mai favorabile după judecarea definitivă a cauzei (Comentarii), cit. supra, p. 83-84.

[35] See Constantin Mitrache, *Reflecții asupra unor reglementări de aplicare în timp a legii penale prevăzute în noul Cod penal*, cit. supra, p. 57.

The text of paragr. 5 of the art. 14 of the previous Criminal Code is comprised by paragr. (7) of art. 6, which means that the provisions of the more favorable criminal law will benefit also to the ex-convicts that entirely executed the inflicted penalty or for which the penalty is being considered executed (for instance, in case of reprieve) in accordance with some consequences caused by the inflicted penalty [for example, the rehabilitation terms will be calculated in this case from the execution of the reduced or replaced penalty according to art. 6 paragr. 1-6 and not from the actually execution of the punishment].

Even though the commission admitted that after the enforcement of the 1991 revised Romanian Constitution, the constitutional principle related to the separation of powers imposed the reduction up to minimum of the prejudices brought to the *res judicata* principle, this one arguably chosen to maintain the regulation related to the mandatory enforcement of the more favorable criminal law after the final judgment of the case, even if it could be sustained that such detriment is justifiable if it's also based on a constitutional principle, such as the penalty's legality principle or if only this way it could be avoided that part of the penalty executed by the convicted not to have a correspondent within the law.

This solution specific to the Romanian criminal law, which mainly represents an interference (even if some authors consider it general, it's still an interference) of the legislator within the judicial authority's activity by violating the principle of the intangibility of *res judicata*, isolate us from other regulations of the criminal codes of the states with tradition within the penal sciences (such as Germany, Italy, France) and consequently, de *lege ferenda* we reiterate[36] the proposal to remove the text.

The solution of extending the principle of the enforcement of the more favorable criminal law also to the final and binding decisions was criticized and within the doctrine it was asserted that this contravenes to the separation of powers principle and paves the way to possible abuses of the legislator which, from political reasons, may adopt a more favorable law in order to release some political partisans from prison before the term foreseen by the conviction decision[37].

The only exception from complying with the principle of the intangibility of *res judicata* that could be admissible would be the non-incrimination law that could produce

[36] In this aspect, see Constantin Duvac, *Unele observații critice cu privire la proiectul unui al doilea nou Cod penal*, within: „Revista română de criminalistică" no. 4/2009, p. 150. By contrary, see Constantin Mitrache, Aplicarea legii penale mai favorabile după judecarea definitivă a cauzei (Comentarii), within „Explicații preliminare ale noului Cod penal", vol. I, Art. 1-52 by George Antoniu (coordinator), Costică Bulai, Constantin Duvac, Ioan Griga, Gheorghe Ivan, Constantin Mitrache, Ioan Molnar, Ilie Pascu, Viorel Paşca, Ovidiu Predescu, Publishing House: Universul Juridic, Bucharest, 2010, p. 81-82. The author considers this solution perfectly justifiable.

[37] See, George Antoniu, *Aplicarea legii penale în timp şi spațiu*, cit. supra, p. 14.

Within this context, it's worth mentioning the legislative abuse from 1997 in what concerns the fraudulent bankruptcy offense; when this criminal act, foreseen, at that time, within art. 208 of the Law no. 31/1990 concerning the commercial societies, republished within the „Romanian Official Journal", part I, no. 1066/17.11.2004, revised and updated, was rendered obsolete with no ground through the Government Emergency Ordinance no. 32/1997 for revising and updating the Law no. 31/1990 concerning the commercial societies, published within the „Romanian Official Journal", part I, no. 133/27.06.1997, so that in short time to be incriminated again with the same content, but punished with an higher penalty through Law no. 195/1997 for the approval of the Government Emergency Ordinance no. 32/1997 for revising and updating the Law no. 31/1990 concerning the commercial societies, published within the „Romanian Official Journal", part I, no. 335/28.11.1997.

effects towards the final conviction and also towards the other penal consequences that could reside from it.

In reference to the prevalence of the art. 15 of the previous Criminal Code, even after the enforcement of the new Criminal Code, it was been worthily asserted that not having a correspondent within the new criminal law, these provisions can no longer be claimed, not existing juridical grounds for an affirmative solution. When the new Criminal Code entered into force, a person finally convicted based on the old law would have found him/her in the hypothesis of art. 6 or not[38]. Under the influence of the doctrine's position, in a fair manner, through art. 4 of the Law no. 187/2012 it has been established that the inflicted penalty established for an offense by a decision that became final and binding under the applicability of the 1969 Criminal Code, if the penalty doesn't exceed the special maximum foreseen by the new Criminal Code, cannot be reduced as a result of entering into force of this law.

3.5. Temporary criminal law enforcement (art. 7). This principle implies that the criminal law is applied temporarily to the crime committed when it was in force, even if the act was not prosecuted or tried in that time frame [paragr. (1)]. In terms of content, we observe that the principle is the same as that emerges from art. 16 of the previous criminal law.

A novelty in this area is the introduction of a contextual explanatory rule on the meaning of the concept of temporary criminal law thus understood "the criminal law which provides on its output of force or application of which is limited by the temporary nature of the situation imposed adoption".

By this norm are consecrated explicitly both forms of the temporary criminal law, namely formal or proper and by its nature or exceptional.

The doctrine proposed the completion of this rule with the explanatory words "the inevitability temporary or exceptional situation which forced its adoption" as this would emphasize the distinction between the temporary character of the criminal law determined by a temporary situation and the temporary character of the criminal law determined by an exceptional situation (for example, the state of emergency)[39].

On the same line of thought, it was also proposed adding after paragr. (2) a new paragraph stating that "the termination date of the exceptional character of the situation which required temporary adoption of the law will be determined by a subsequent law."

In fact, art. 55 paragr. (3) of Law no. 24/2000[40] regarding the legislative technique for drafting laws, re-impose the rule that the regulatory act temporarily to provide for the period of application or date of termination of its application.

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[38] See Constantin Mitrache, Reflecţii asupra unor reglementări de aplicare în timp a legii penale prevăzute în noul Cod penal, cit. supra, p. 58. By contrary, see Valentin Mirişan, Aplicarea legii penale române în timp. Prezentare comparativă a dispoziţiilor Codului penal în vigoare şi ale noului Cod penal, within the collective paper „Noua legislaţie penală în discuţia membrilor Asociaţiei Române de Ştiinţe Penale", Publishing House: Universul Juridic, Bucharest, 2012, p. 44-45.

[39] See George Antoniu, Comments on the preliminary draft of a second new Criminal Code (I), cit. supra, p. 11.

[40] Republished in the "Official Gazette of Romania", Part I, no. 260 of 21 April 2010, as amended and supplemented.

4. PROVISIONS RELATED TO MITIOR LEX FORESEEN BY THE LAW NO. 187/2012

A. Within the process of preparing the entrance into force of the new Criminal Code, from legislative point of view, it was necessary to elaborate a law for the enforcement of the Code, namely the Law no. 187/2012 (referred to as the Law), which needed to comprise also the legislative solutions for the transition situations determined by the existence of some juridical relations in conflict occurred under the enforcement of the old law that aren't solved until the 1st of February 2014.

B. The Chapter II of the Title I of the Law – **"The general provisions related to the enforcement in time of the criminal law"** – contains several rules applicable for the regulation of the transition situations, out of which the ones foreseen within the art. 4 and 8 are of interest for our intercession.

1. According to art. 4 of the Law, the inflicted penalty established for an offense by a decision that became final and binding under the applicability of the 1969 Criminal Code, if the penalty doesn't exceed the special maximum foreseen by the new Criminal Code, cannot be reduced as a result of entering into force of this law.

This provision, which we agree with, is listed on the line imposed by the legislator for the adoption of the 2009 Criminal Code, related to the removal of the hypothesis of the optional enforcement of the more favorable criminal law, inclusively during the transition situation. The solution is justifiable not only from consistency reasons, but also in order to avoid the threat of unreasonable punishment reductions within the accommodation with the penalties foreseen by the new Criminal Code.

The reduction of the inflicted penalty can operate neither if the special maximum prescribed by the new Criminal Code for that offense is equal with that inflicted penalty.

Due regard to the imprisonment penalty, the comparison between the inflicted penalty and the special maximum limit foreseen for that offense is easy to accomplish. This activity becomes more difficult when what it needs to be compared are the fines punishments. In this case there has to be taken into consideration the special limits of the penalty foreseen by the new criminal legislation for that offense and the provisions of the art. 61 (establishing the fine) or of the art. 137 (establishing the fine for the legal person).

2. In compliance with art. 8 of the same Law, the provisions of art. 4 of the Law are suitable applicable to the inflicted penalty established through the decision that became final before the Law no. 187/2012 entered into force, for deeds incriminated through the normative acts foreseen by its Title II ("Provisions related to the modification and completion of several normative acts that contain penal provisions"), rule that is fully justified and in agreement with the opinion of the authors of the paper Preliminary Explanations related to the new Criminal Code (Explicații preliminare ale noului Cod penal).

Subsequently, neither these inflicted penalties for the deeds incriminated under special laws (penal or extra-penal), in case they don't exceed the special maximum imposed by the Law no. 187/2012, cannot be reduced as a result of the entering into force of this law on 1st of February 2014.

In what concerns the legislative technique, it's a subject to reflect on if the two provisions (art. 4 and 8 of the Law) couldn't be jointly expressed in only one stipulation

using as benchmarks the expressions "the previous criminal legislation" and "the new criminal legislation, entered into force on 1st of February 2014".

C. The Chapter III of the Title I contains **provisions related to the enforcement and execution of the penal amendments,** out of which some refers also to the enforcement of the more favorable criminal law, the stipulations contained within this chapter being imposed by the changes brought by the new Criminal Code in what concerns the criminal law sanctions. From editorial reasons the analysis will refer only to some of them.

1. First of all, the 2012 legislator foreseen that art. 62 provisions concerning the fines correspondent to the imprisonment penalty doesn't apply to the offenses committed prior to the entrance into force of the Code and cannot be taken into account for determining the more favorable criminal law (art. 11 of the Law). It's to be noticed that the previous criminal law didn't comprise in any manner the possibility of applying two main penalties in the same time for one offense.

2. Within the legislative practice it's possible that the complementary punishments to be differently presented within the content of successive laws, both in accordance with themselves or with the main penalties, being possible that an existent juridical regime for the main penalties not to correspond to the one for the complementary punishments (for example, it is possible that a law to be more favorable in what concerns the main penalty and to be more severe in relation to the complementary punishments and the other way around). In these cases we may ask what the applicable complementary penalty is.

The new Criminal Code no longer copied art. 13 paragr. 2 of the 1969 Criminal Code in relation to the enforcement of the more favorable criminal law in the case of the complementary punishments (these having a subsequent attribute towards the main ones), solution that might suggest that also these ones must take the course of the main penalty, which in the favorable case, will be entirely enforceable, even if the correspondent complementary punishment would be more severe. Such a thesis is contradicted by the provisions of art. 12 paragr. 1 of the Law, in accordance with which "In case of successive criminal laws occurred before the conviction decision is final and binding, the accessory and complementary penalties are enforceable in compliance with the law identified as being the more favorable in connection to the committed offense". Such a solution seems wiser.

Considering the criteria of the more favorable law in connection with the committed offense and not to the main penalty inflicted to the defendant, the 2012 legislator decided that in all cases, the principle of the more favorable criminal law to be determined independently (separately) also for the accessory and complementary penalties, no matter the prescribed regime for the main penalty.

This way, it's being legislatively stated a certain functional autonomy of the complementary penalties in relation to the main ones, being enforceable independently from the situation of the main penalties, without being able to sustain that a *lex tertia* is being created in the favor of the accused person, because such a ban related to mixing different penal provisions from successive laws which may be incidental in a certain case in order to create a softer situation for the defendant, is opposable only to the criminal judiciary authority during the process of incriminating the ones that committed offenses, and no to the legislator who from penal policy considerations or other reasons superior to the existent ones from the moment the concurrent law was elaborated, could established such rules that may be differently used.

The text of art. 12 paragr. 1 of the Law corroborated with art. 5 foresees, thus, the enforcement of the more favorable criminal law, in case of successive criminal laws occurred before the conviction decision is final and binding, in what concerns all types of penalties stipulated within the positive criminal law, even in the asymmetrical situations (when the conditions related to these ones may be different from law to law and from category to category).

In compliance with the principle related to the penal law sanctions' legality, within art. 12 paragr. 2 of the Law it's being stipulated that the complementary penalty foreseen by art. 55 let. c) of the 2009 Criminal Code („ the publicity of the conviction decision") is not applicable in the cases of the offenses committed prior to its entrance into force, natural solution that seems to take into consideration that such a penalty is foreseen by art. 53^1 paragr. 3 let. e) of the 1969 Criminal Code only for the legal persons under the modality of displaying and spreading the conviction decision.

5. CONCLUSIONS

The enforcement in time of the criminal law is generally better structured and with a superior content comparing with the previous criminal law. In this respect we could mention, the regulation of criminal law enforcement in time firstly, followed by the enforcement of the criminal law provisions in space, the removal of the optional enforcement of the more favorable criminal law in what concerns the final penalty, the improvement of several provisions' content and the applicability limitation of art. 6 through art. 15 and art. 16 paragr. 1 of the Law no. 187/2012.

We also take notice that the 2012 legislator was concerned in offering as many legislative solutions (sometimes excessively) in order to settle the transition situations determined by the existence of some juridical relations in conflict occurred during the applicability of the old law, which aren't completely solved until the 1st of February 2014. Thus, through the Law no. 187/2012, within its Title I there were foreseen 20 texts containing several provisions related to the applicability in time of the criminal law, the applicability and execution of the penal sanctions and the punishment regime for the under aged persons (minors).

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ESTE NEVOIE DE SCHIMBARE ÎN ÎNVĂȚĂMÂNTUL JURIDIC? OPINII ALE STUDENȚILOR LA FACULTĂȚI DE DREPT DIN ROMÂNIA

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În cadrul unui proiect ce avea ca miză centrală îmbunătățirea învățământul juridic din România, a fost organizată o cercetare sociologică având ca scop înțelegerea situației curente, a conştientizării problemelor existente şi a cauzelor acestora. Un pas important în dobândirea unei imagini clare asupra situației existente constă în cercetarea felului în care studenții înşişi percep această situație. Cercetarea noastră a cuprins un număr de 240 de studenți, după cum urmează: 130 de studenți aparținând Universității Româno-Americane, gazda proiectului, 30 de studenți de la Universitatea Lucian Blaga din Sibiu şi câte 40 de studenți de la universitățile Transilvania din Braşov, respectiv Constantin Brâncuşi din Tîrgu-Jiu. Studenții au fost intervievați în cadrul unor focus grupuri, având fiecare un număr de 10 participanți. Datele recoltate au fost prelucrate si analizate, iar interpretarea lor va fi detaliată în paginile următoare.

Analiza interviurilor de tip focus-grup de la universitățile partenere

Alături de cei 130 de studenți ai Universității Româno-Americane, au fost intervievați un număr de 30 de studenți de la Universitatea Lucian Blaga din Sibiu, 40 de studenți de la Universitatea Transilvania din Braşov şi 40 de studenți de la Universitatea Constantin Brâncuşi din Tîrgu-Jiu.

În ceea ce priveşte structura planurilor de învățământ, studenții din Tîrgu-Jiu au apreciat că structura planurilor de învățământ de la universitatea lor este bună/echilibrată. Studenții braşoveni au apreciat că structura planurilor de învățământ este uşor dezechilibrată, în sensul că primii doi ani sunt mult mai „uşori" în raport cu ceilalți doi. Două treimi din studenții Universității Lucian Blaga apreciază structura planurilor de învățământ ca fiind mult prea încărcată. Este interesant să observăm cu se corelează aceste diferențe în percepția structurii planurilor de învățământ cu propunerile concrete de modificare a acestora.

Studenții din Tîrgu-Jiu au folosit aproape integral opțiunile de eliminare a disciplinelor. La singura universitate (din cele vizate de cercetarea noastră) în care nu există nici un student nemulțumit de structura planurilor de învățământ, avem cele mai multe opțiuni de eliminare a unor discipline! Singura explicație pe care putem să o dăm este că gradul de conformism al studenților din Tîrgu-Jiu este mai ridicat decât în alte părți. Disciplinele propuse spre eliminare sunt în principal din cele de cultură generală: sociologie, filosofie, politologie, dar sunt amintite şi câteva discipline juridice: Drept comunitar, roman, fiscal şi bancar. Gradul de dispersie este unul relativ mic, ceea ce ne duce cu gândul la „contaminare" a răspunsurilor în timpul interviului. În mod asemănător, propunerile de introducere a unor noi discipline ale studenților din Tîrgu-Jiu sunt aproape identice: 70% dintre studenți propun suplimentarea practicii şi introducerea disciplinei Jurisprudența CEDO. Această (presupusa) contaminare a răspunsurilor se întrezăreşte pe tot parcursul interviurilor, ceea ce face ca datele recoltate la Universitatea Constantin Brâncuşi să aibă un grad de relevanță mai scăzut.

Propunerile studenților sibieni sunt coerente cu percepția declarată a supraîncărcării planurilor de învățământ: ei fac 49 de propuneri de eliminare a unor discipline şi doar 25 de propuneri de introducere a unora noi. Spre deosebire de studenții celorlalte universități, sibienii au mai multe propuneri de eliminare a unor discipline juridice decât a celor conexe (26 de propuneri de eliminare a unor discipline juridice, 23 a unor discipline de cultură generală şi conexe). Cele mai multe voturi negative le-au obținut dreptul administrativ, dreptul economic, IDR, economia, contabilitatea si filosofia. În ceea ce priveşte introducerea de noi discipline, studenții Universității Lucian Blaga sunt solidari cu colegii de la celelalte universități. Din 25 de propuneri, 17 vizează acelaşi lucru: suplimentarea practicii juridice. Studenții braşoveni propun spre eliminare filosofia dreptului, sociologia juridică, politologia, IDR, educația fizică, retorica şi dreptul roman. Ca noi discipline au fost propuse practica specializată pe diferite ramuri de drept, informatica juridică, comunicarea şi economia.

În ceea ce priveşte mulțumirea față de diferitele aspecte ale procesului de învățământ, putem că răspunsurile studenților de la Braşov şi Sibiu se înscriu în parametri asemănători cu cei ai studenților Universității Româno-Americane. Atât studenții sibieni, cât şi cei braşoveni s-au declarat mulțumiți de prestațiile cadrelor didactice. Un număr semnificativ de studenți braşoveni şi-au exprimat dorința de a exista mai multe discipline interactive şi mai puțină predare după metoda clasică a dictării. Doar 4 din cei 30 studenți sibieni intervievați au declarat că sunt nemulțumiți de profesori. Percepția studenților privitoare la cunoştințele teoretice asimilate este asemănătoare cu cea privitoare la cadrele didactice. În mare parte, studenții celor două universități sunt satisfăcuți/mulțumiți de calitatea acestor cunoştințe, doar 16% dintre studenți declarându-se total nemulțumiți de ceea ce au dobândit în facultate.

Cu totul alta este situația în ceea ce priveşte mulțumirea față de cunoştințele practice. Aproape două treimi din studenții Universității Lucian Blaga se declară total nemulțumiți de calitatea şi cantitatea cunoştințelor practice dobândite. Situația este similară la Universitatea Transilvania. Dimpotrivă, studenții universității Constantin Brâncuşi au o atitudine radical diferită. 70% din studenții anului IV (care la toate celelalte trei universități aflate în cercetare s-au dovedit a fi cei mai nemulțumiți de cunoştințele practice asimilate) sunt mulțumiți de cunoştințele practice dobândite în timpul facultății. Nici un student nu s-a declarat nemulțumit! Există o posibilitate – neneglijabilă – ca şi în acest caz să fie vorba de o „contaminare" a răspunsurilor, o contaminare în sens conformist. Cu atât mai mult cu cât studenții universității Constantin Brâncuşi se situează pe primul loc în ceea ce priveşte alegerea practicii ca disciplină suplimentară! 70% din studenții acestei universități propun suplimentarea practicii, în ciuda faptului că sunt mulțumiți de cunoştințele practice asimilate, pe când doar 56% dintre studenții sibieni cer suplimentarea practicii, deşi nemulțumirea cu privire la calitatea şi cantitatea cunoştințelor practice afectează două treimi dintre studenți.

Cât priveşte atitudinea față de dotarea propriei universități, o problemă apare constant în preocupările tuturor studenților: dotarea bibliotecilor, mai precis deficiențele în dotarea bibliotecii. Studenții reclamă insuficiențele în ceea ce priveşte achiziționarea de lucrări recente din literatura juridică internațională, ca şi lipsa unui număr suficient de exemplare din cărțile şi manuale existente în dotarea bibliotecilor. În plus, studenții universității Transilvania deplâng lipsa unei biblioteci a facultății de drept, fiind nevoiți să apeleze la biblioteca Universității. Alte probleme, comune studenților tuturor celor trei universități, sunt următoarele: dorința de a avea acces la laboratoare dotate mai performant, mai multe

calculatoare conectate la internet, spatii de predare mai moderne şi mai spaţioase. Cu toate acestea, numărul celor care sunt cu adevărat nemulţumiţi de dotările propriilor universităţi este relativ mic: doar 10% dintre studenţii sibieni şi gorjeni s-au declarat nemulţumiţi, la fel şi 15% dintre cei braşoveni.

Atitudinea faţă de problema frecvenţei la cursuri şi seminarii este similară (aproape toţi studenţii considerând că prezenţa la ore are o importanţă deosebită) la toate cele patru universităţi, ceea ce însă nu ne spune nimic, din păcate, despre prezenţa reală a respectivilor studenţi. Comună studenţilor celor patru universităţi este şi percepţia relaţiilor cu cadrele didactice. Cei mai mulţi dintre studenţi apreciază că relaţiile sunt bune, întemeiate pe respect reciproc. Doar 10% dintre studenţii sibieni, respectiv 12% dintre cei braşoveni acuză relaţiile cu profesorii ca fiind slabe sau distante. Nici un student de la Târgu-Jiu nu s-a declarat nemulţumit.

O problemă mult mai delicată vizează atitudinea studenţilor faţă de sistemul de evaluare. Aşa cum am văzut mai devreme, principala nemulţumire a studenţilor de la URA în această privinţă este dată de lipsa examenelor orale. Este oarecum ironic că principala nemulţumire a studenţilor de la Universitatea Lucian Blaga este furnizată tocmai de prezenţa acestor examene orale la facultatea lor. Din procentul de 30% studenţi nemulţumiţi de metodele de evaluare practicate în propria universitate, cei mai mulţi acuză subiectivitatea inerentă a acestor examene orale. Studenţii apreciază că în cazul unor asemenea examene posibilitatea de a face contestaţie este mult diminuată (neexistând documente scrise), ceea ce creează importante frustrări celor examinaţi. Dimpotrivă, studenţii celorlalte două universităţi, în care examinarea orală ocupă o poziţie marginală, studenţii deplâng lipsa mai multor examene orale. Aceste contradicţii nu ar trebui să ne mire. În fond, nici o formă de examinare nu este lipsită de probleme. Pentru cei care au experimentat doar una din aceste forme de examinare (de exemplu cea scrisă), problemele celorlalte forme nu sunt evidente. Acesta, credem, este motivul pentru care studenţii universităţilor Constantin Brâncuşi, Transilvania şi Româno-Americană apreciază că forma de examinare orală este superioară celei scrise.

Concluzie

Există importante asemănări între atitudinile exprimate în interviuri de către studenţii celor patru universităţi. În primul rând, principala problemă identificată de studenţi la nivelul structurii programelor de învăţământ este insuficientul accent pus pe latura practică a formării profesionale. Un procent important din studenţii intervievaţi sunt nemulţumiţi de cunoştinţele practice pe care le-au dobândit în timpul facultăţii, iar schimbarea majoră ei şi-o doresc este aceea de a beneficia de mai multă practică. Deşi numărul disciplinelor propuse spre introducere în planurile de învăţământ este destul de ridicat (mai mult de patruzeci de discipline au fost menţionate), în fapt foarte puţine dintre ele întrunesc un număr semnificativ de voturi. Numărul mare de discipline propuse sugerează, credem, un lucru important, acela că **nu există o viziune coerentă asupra schimbării planurilor de învăţământ la nivelul studenţilor celor patru universităţi**, modificările propuse reflectând interese mai mult sau mai puţin individuale ale fiecărui student. Alături de practică, limbile străine şi cursurile de drept internaţional se situează pe primele locuri în preferinţele studenţilor, un semn destul de clar de orientare spre piaţa internaţională a muncii. În afară de nemulţumirile legate de insuficienţa resimţită la nivelul cunoştinţelor practice, studenţii celor patru facultăţi s-au declarat, în general, destul de mulţumiţi cu structura planurilor de învăţământ existente. Este de asemenea clar că o bună parte din

studenți (ceva mai puțin de o treime) resimt disciplinele de cultură generală precum Economia, Filosofia, Retorica sau Sociologia ca având o importanță mai scăzută şi că, la o adică, ele ar putea fi eliminate din planurile de învățământ. Un lucru care ne-a atras atenția a fost acela că propunerile de eliminare nu au avut drept motivație nemulțumiri legate de felul în cere se desfăşoară activitatea la disciplinele respective; dimpotrivă, studenții care şi-au exprimat într-o mai mare măsură mulțumirea cu privire la calitatea procesului de învățământ au formulat un număr mai mare de propuneri de eliminare a unor discipline. Poziția secundară atribuită disciplinelor de cultură generală de către o parte din studenți pare să provină dintr-o imagine simplistă a pregătirii juridice: anume aceea că doar disciplinele strict legate de drept sunt cu adevărat esențiale pentru formarea viitorilor juriști.

Vorbind despre dotările materiale ale universităților, studenții reclamă constant insuficienta dotare a bibliotecilor (atât în ceea ce priveşte numărul de titluri de carte, cât şi în cantitățile insuficiente din exemplarele existente). Alte probleme amintite sunt legate de dotarea laboratoarelor şi a sălilor de predare (la Universitatea Constantin Brâncuşi din Transilvania). Studenții Universității Româno-Americane, aproape în unanimitate, apreciază dotarea materială a universității drept „excelentă".

Cu excepția cunoştințelor practice, considerate deficitare de o mare parte din cei intervievați, studenții apreciază calitatea cadrelor didactice şi a relațiilor care s-au stabilit cu aceştia. Mai bine de două treimi din totalul studenților celor patru facultăți apreciază că relațiile cu cadrele didactice sunt bazate pe respect reciproc. Numărul celor nemulțumiți este mic, plângerile principale vizând pretențiile receptate ca fiind exagerate de unii studenți, sau de atitudinea receptă drept „distantă" de unii studenți. Studenții consideră sistemele de evaluare existente în general corecte, nemulțumirile vizând în principal, forma concretă în care se desfăşoară examinarea. Dacă studenții Universității Româno-Americane deplâng lipsa examenelor orale, un număr semnificativ din studenții Universității Lucian Blaga sunt nemulțumiți tocmai de existența acestor examene orale, expuse într-o mare măsură subiectivității examinatorului.

Studenții celor patru facultăți au manifestat o similaritate privitoare la rolul esențial al activității cadrelor didactice în obținerea succesului profesional. Oarecum surprinzător, numărul studenților care susțin că esențial în obținerea succesului profesional este cadrul didactic şi activitatea desfăşurată de acesta este mai mare decât numărul celor care apreciază ca esențial rolul motivației individuale şi al studiului asiduu. O asemenea opțiune, combinată cu importanța deosebită pe care studenții o atribuie prezenței la cursuri şi seminarii, ar indica conştientizarea complexității procesului de învățământ, că faptul de a fi student la o universitate de elită, cu profesori de elită nu poate fi contrabalansat **doar** printr-un studiu individual intens. Spunem „ar indica" şi nu „indică", pentru că importanța pe care studenții o acordă prezenței nu este autentică decât atunci când se concretizează faptic – iar acest lucru nu poate fi verificat de către studiul nostru. Dacă studenții nu participă constant la procesul de învățământ prin frecventarea cursurilor şi seminariilor, avantajul de a fi student la o universitate de top se diluează până la disoluție. Nu mai vorbim de faptul că, într-o asemenea situație de non-implicare, orice atribuire a importanței valorii profesorilor în obținerea succesului de către student nu este decât o strategie de deresponsabilizare a acestuia din urmă. Un student care nu se implică activ în procesul de formare academică şi care, în acelaşi timp, vorbeşte despre importanța profesorilor în formarea profesională şi succesul în carieră, nu face decât să-şi găsească justificări pentru propria lipsă de motivație.

DEZVOLTAREA DREPTURILOR OMULUI DIN PERSPECTIVA NOILOR TEHNOLOGII

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Rezumat
Începutul secolului XXI, în contextul noilor descoperiri ştiinţifice şi al avansului înaltelor tehnologii impune o dezvoltare şi o detaliere corespunzătoare a materiei drepturilor omului, deoarece principala problemă este ca nu cumva, în societăţile lumii globale de azi, acestea să nu fie folosite împotriva oamenilor şi nu pentru îmbunătăţirea calităţii vieţii lor, pentru accesul sporit al persoanei umane la cunoaştere. Lucrarea de faţă încearcă să arate unele tipuri de tehnologii inteligente ce, folosite pervertit (adică într-un mod desprins de raportarea la etică, morală, responsabilitate, spiritualitate) pot crea noi forme de discriminare, dependenţă şi chiar sclavie pentru fiinţele umane ce golesc practic, de conţinut, drepturile omului, aşa cum sunt ele consacrate în legislaţia internaţională.

Cuvinte-cheie: drepturile omului, noi tehnologii, globalizare, model plutocratic

1. Introducere

În prezenta comunicare ştiinţifică[1] încercăm să arătăm pe scurt, după o prezentare de ansamblu a principalelor riscuri de modificare a contextului global (trecerea la o lume plutocratică globală[2], după declinul prezis şi controlat al statelor-naţiune sub impactul acţiunii diverşilor actori globali privaţi) care sunt unele pericole la adresa drepturilor omului, aşa cum sunt ele astăzi consacrate în legislaţia internaţională. Această legislaţie prezintă dezavantajul că se adresează doar unei lumi a statelor-naţiune, o lume westfaliană, în care principalul actor decident şi responsabil în a proteja drepturile persoanei umane este statul-naţiune. Or, în contextul declinului programat al statelor-naţiune (datorat presiunii actorilor globali privaţi, cu alte interese decât cele ale statului-naţiune), responsabilitatea în a proteja corespunzător drepturile omului este lăsată în suspensie, deoarece nici la ora actuală corporaţiile şi alţi actori globali privaţi nu îşi asumă responsabilităţi adecvate pe plan internaţional (iar pe cele la nivel naţional, un stat-naţiune slăbit sau cumpărat nu este în măsură să le asigure). Aceasta impune o dezvoltare corespunzătoare a drepturilor omului în sec. XXI, tocmai pentru a se oferi din partea statelor-naţiune (rămase apărătorii intereselor cetăţenilor lor, în virtutea conceptelor de suveranitate şi independenţă) o protecţie adecvată a acestor drepturi şi libertăţi fundamentale.

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[1] Textul de faţă reprezintă punctul de vedere personal al autoarei.

[2] Guvernare a societăţii (aici, una globalizată) de către o elită a bogaţilor. Existenţa pluralismului şi a parlamentarismului într-un regim politic democratic nu înlătură riscul unei conduceri plutocratice a societăţii. Cf. Sergiu Tamaş, Dicţionar politic. Instituţiile democraţiei şi cultura civică, Ed. Academiei Române, Bucureşti, 1993, p. 206.

2. Avansul tehnologic impune şi o responsabilitate adecvată

La începutul sec. al XXI-lea, dezvoltarea rapidă a tehnologiilor[3] (în domenii precum cel nuclear, electronic, al informaticii, al roboticii, al bio-tehnologiilor, al explorării spațiului, al tehnologiilor cu aplicabilitate medicală etc.) au produs o uriaşă presiune asupra întregului corp existent de drepturi ale omului, determinând o nevoie de adaptare şi de dezvoltare a acestora.

Practic, astăzi ne găsim în situația în care nu mai există o concordanță clară între nivelul actual de protecție juridică a drepturilor omului (rămas undeva, la nivelul sec. XX) şi nivelul de dezvoltare al tehnologiilor (specific sec. XXI), situație prin care omul, ca ființă rațională, înzestrată cu personalitate, unicitate, demnitate şi libertate prin însăşi natura sa, este pus de multe ori, prin folosirea de către el sau de către alții a numeroaselor tehnologii disponibile, în ipostaze în care esența sau exercițiul drepturilor şi libertăților sale fundamentale sunt amenințate sau încălcate. De aceea, juriştii sec. XXI au obligația de a identifica, cu rigoare şi profesionalism, cazurile şi formele noi de încălcări ale drepturilor omului provocate de folosirea noilor tehnologii, precum şi de a determina o veritabilă dezvoltare a corpului de drepturi ale omului, la nivelul adecvat de protecție juridică pe care îl necesită sec. XXI şi viețuirea omului într-o societate înalt tehnologizată şi informațională, în care abuzurile de putere şi abuzul în folosirea noilor tehnologii duce la forme noi de încălcări ale drepturilor omului şi încă unele la dimensiuni globale (datorită globalizării sociale, economice, culturale şi răspândirii noilor tehnologii la nivel global).

3. Lumea sec. XXI: o lume a statelor-națiune şi a democrației reale sau una a plutocrației globale?

Lumea începutului de secol XXI, axată pe o variantă corporatistă de globalizare (spre deosebire de versiunile socială sau moderat-liberală, ecologistă sau democratică de globalizare)[4] este o lume caracterizată printr-o uriaşă prăpastie între o elită ce a acumulat prea multă putere economică şi decizional-politică la nivel global, anexând în beneficiul său rezultatele şi avansul tehnicii, ştiințelor şi al mass-media şi, pe de altă parte, imensa majoritate a oamenilor, care nu au un acces real la locuri de muncă plătite la valoarea reală a muncii prestate, la protecție socială, la cultură şi avantajele tehnologiei, la noile descoperiri ale ştiinței sau la informație corectă şi completă. Globalizarea de tip corporatist, în versiunea sa radicală, riscă să transforme lumea într-un model bazat exclusiv pe o concepție axată pe profit şi consumerism[5], fără legătură cu responsabilități față de natura şi ființa umană, față de planeta pe care trăim, fără legătură cu spiritualitatea (căderea în anti-modelul de om-marfă, de unde şi riscul de apariție a unor noi forme de discriminări şi de sclavie).

Evoluțiile extraordinare din ştiință şi tehnică, menite să confere confort sporit oamenilor, o lume mai sigură, prosperă şi în care ființa umană să îşi dedice timpul său liber (din ce în ce mai extins, datorită înlocuirii sau facilitării muncii sale de către roboți sau maşini) liberei dezvoltări a personalității sale, culturii, adâncirii dimensiunii sale spirituale

[3] Ion Diaconu, Drepturile omului, Institutul Român pentru Drepturile Omului, Bucureşti, 1993, p. 120.

[4] David Held, Anthony McGrew, David Goldblatt, Jonathan Perraton, Transformări globale. Politică, economie şi cultură, trad. de Ramona-Elena Lupaşcu, Adriana Ştraub, Mihaela Bordea, Alina-Maria Turcu, Polirom, Iaşi, 2004, p. 26-55.

[5] Paul Hirst, Război şi putere în secolul XXI. Statul, conflictul militar şi sistemul internațional, trad. Nicolae Năstase, Ed. Antet, 2001, p. 94-95.

sau divertismentului ori avansării cunoaşterii în noi domenii de activitate, au fost însă acaparate treptat, de „cei bogaţi" – grupuri de firme multinaţionale, grupuri de interese mai mult sau mai puţin oculte, bancheri – (creându-se astfel, datorită în special, globalizării corporatiste de tip economic, militar, conceptul de „plutocraţie globală"[6], opus esenţei democraţiei veritabile, bazate pe controlul puterii – nu doar politice – de către popoarele lumii).

Or, după cum se remarcă în doctrină, un regim plutocratic global, în care puterea economică influenţează şi diminuează (acolo unde nu există transfer de putere de la nivelul statelor la cel trans-statal sau privat) puterea statelor-naţiune[7], regim axat exclusiv pe ideea de profit şi pe speculaţii financiare, pe ideea de piaţă globală nu poate garanta, ca model, ca viziune şi ca implementare practică în relaţia cu statele-naţiune şi cu ordinea onusiană generată de ele în secolul XX, o protecţie veritabilă a drepturilor omului. Pentru acest model plutocratic global, tehnica, tehnologiile înalte şi ştiinţele, împreună cu marile lor descoperiri în domeniu (genetica, robotica, nano-tehnologii, tehnologia informaţiilor, electronica, biologie, tehnologii spaţiale etc.) nu sunt menite să ridice de pe umerii fiinţei umane povara unor munci grele, de rutină şi obositoare şi să-i respecte libertatea, demnitatea sa, drepturile sale ci sunt destinate, în opinia noastră, să mărească dependenţa oamenilor de diferite nevoi de a consuma produse, servicii, stimulate artificial şi constant de o mass-media globală[8] aservită acestor interese private de profit. În acest punct se produce o subminare reala a contractului social, prin care oamenii au încredinţat unei entităţi colective, artificiale (statul) anumite atribuţii şi sarcini spre a îşi gestiona în comun interesele, spre a supravieţui şi a prospera. Multinaţionalele, bancherii globali, grupurile diverse de interese cu putere economică şi decizională reprezintă factori-cheie în înţelegerea corectă a contextului global al lumii secolului XXI şi al impactului pe care noile tehnologii şi dezvoltări ale ştiinţelor, aservite acestei plutocraţii globale, îl produc în realitate asupra conceptului de drepturi ale omului, nu doar asupra pachetului de legislaţie internaţională care le consacră.

Nici tehnica, nici înaltele tehnologii, nici noile ştiinţe sau dezvoltări ale ştiinţelor de la începutul sec. XXI nu sunt malefice sau cu impact negativ prin ele însele ci modul pervertit[9] imprimat acestora prin civilizaţia de tip materialist, căzută în idolatria tehnologică (de unde se poate vorbi şi de crearea unui soi specific de barbarie, în sec. XXI)[10] şi aflată sub dominaţia plutocraţiei globale (ca actor global compozit).

Nu tehnologia în sine este ceva rău (de exemplu, ochii bionici, creaţi pentru a reda vederea persoanelor fără simţul vederii sau cu simţul vederii slăbit prin degenerare maculară asociată îmbătrânirii sau din cauza afecţiunii retinis pigmentosa de care suferă circa 1,5 milioane de oameni, global[11]) ci modul în care tehnica şi ştiinţa sunt folosite de

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[6] Alvin Toffler, Power shift. Puterea în mişcare, trad. Mihnea Columbeanu, Ed. Antet, 1995, p. 456-462.

[7] Ioan Voicu, Suveranitatea şi organizaţiile internaţionale, în Nicolae Ecobescu, coord., Suveranitatea şi progresul, Ed. Politică, Bucureşti, 1977, p. 368-369. Susan Strange, Retragerea statului. Difuziunea puterii în economia mondială, trad. Radu Eugeniu Stan, Ed. Trei, Bucureşti, 2002, p. 62-63, 93-94, 240-241.

[8] David Held et alii, op. cit., p. 387-406. Alvin Toffler, op.cit., p. 342-345, 346-352, 356.

[9] Aici, desprins de orice raportare la o scară de valori religioase sau de etică, de spiritualitate. Ion Diaconu, op. cit., p. 121.

[10] George Colang, Adela Gavrilescu, Portretul omului contemporan. Barbarul, Ed. Minerva, Bucureşti, 2011, p. 148, 169.

[11] Noua generaţie de ochi bionici, în BBC Science Focus, iulie-august 2012, nr. 7, p. 22.

grupurile globale de interese pentru a realiza noi forme de dependențe sau discriminări între oameni, noi forme de supraveghere şi monitorizare a oamenilor, încălcându-li-se prin aceasta libertatea, demnitatea, privativitatea lor, libertatea de deplasare sau de opinie, de religie sau de gândire, dreptul la sănătate, la confidențialitatea datelor privind starea de sănătate a persoanelor umane şi multe alte drepturi şi libertăți.

Este o mare eroare, în acest context, să gândim că societatea umană dispune de un set de drepturi şi libertăți fundamentale „care nu mai pot suferi vreo dezvoltare în viitor", indiferent de schimbările de modele prin care societatea umană trece. Aceste dezvoltări ale materiei drepturilor omului sunt necesare tocmai pentru a spori nivelul de protecție al oamenilor[12], din perspectiva unei legislații internaționale adaptate la pericolele pe care dezvoltarea științei şi tehnicii[13], acaparate de grupurile de interese plutocratice globale le pot produce sau le produc deja, prin intermediul unor state slăbite, lipsite de reală putere de decizie politică sau economică sau al unor instituții internaționale financiare ce îndatorează sistematic şi masiv statele, spre a le relativiza independența şi suveranitatea[14] (norma fundamentală a capacității reale de decizie a statelor şi a posibilității popoarelor de a îşi controla singure destinul[15], la care se raportează ordinea westfaliană).

Acest model de organizare a societății umane, pornit pe baza globalizării de tip corporatist (opus unui model de globalizare ce are în centru statul-națiune) poate genera, folosind cuceririle şi inovațiile tehnicii şi științelor, noi forme de exploatare, manipulare, discriminare, inclusiv sclavie la adresa persoanei umane (redusă la statutul de consumator, de client sau de marfă).Or, aceasta este o degenerare fundamentală a nivelului de evoluție a societății umane, sub presiunea regimului plutocratic global, o întoarcere într-un ev al barbariei (aici, tehnologice)[16], detaşate de etică, morală, spiritualitate, simț religios, responsabilitate față de om, planeta Pământ, față de fragilul ecosistem terestru[17].

Sub presiunea tot mai crescută (fără o contra-pondere adecvată, deocamdată) a plutocrației globale, domenii-cheie ale statelor-națiune sunt privatizate, slăbind liantul dintre stat şi cetățenii săi, în procesul general de fărămițare sistematică a puterii statelor-națiune[18]. Tehnologiile spațiale, explorarea cosmică, din elemente de bază ale activităților strategice ale unui stat în beneficiul cetățenilor săi, încep să facă loc tehnologiilor private de explorare şi exploatare a spațiului cosmic, vehiculelor spațiale private, inclusiv ideii de turism spațial privat[19]. Aceasta adâncește şi mai mult prăpastia dintre națiuni (sărăcite constant de resursele lor naturale de către corporații) şi actorii globali (ce nu au responsabilități juridice şi etice în plan național şi internațional pentru activitățile lor transfrontaliere sau cosmice), dintre bogați (plutocrație globală din ce în ce mai mult constituită din actori privați, fără identități naționale şi fără responsabilități internaționale şi naționale) şi săraci.

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[12] Ion Diaconu, op. cit., p. 122.

[13] John Naisbitt, Megatendințe, trad. Constantin Coşman, Bucureşti, 1989, p. 94-95, avertizând asupra pericolului "mentalității tehno-fixiste", în care eroarea fatală este ca omul să creadă că tehnologia va rezolva toate problemele sale, abdicând astfel de la responsabilitatea personală.

[14] Ilie Şerbănescu, Corporațiile transnaționale, Ed. Politică, Bucureşti, 1978, p. 163-164, 235-237.

[15] Ion Diaconu, Respectarea drepturilor popoarelor de a dispune de ele însele – premisă esențială a salvgardării suveranității şi independenței naționale, în Nicolae Ecobescu, coord., op. cit., p. 211.

[16] George Colang, Adela Gavrilescu, op. cit., p. 40-48.

[17] Dumitru Mazilu, Drepturile omului, Ed. Lumina Lex, Bucureşti, 2000, p. 6-14.

[18] Paul Hirst, op. cit., p. 93-95.

[19] A început era spațială privată, în revista BBC Science Focus, iulie-august 2012, nr. 7, p. 14.

Drepturile omului riscă, în noua lume a plutocrației globale, să devină simple cuvinte înşiruite pe o hârtie, cărora statele, la nivel internațional, prin organisme specifice (ONU, de exemplu, Consiliul Europei, UE etc.) sau la nivel național, din cauza slăbirii lor controlate de către actorii globali (cu care încă dau lupta pentru putere pentru secolul XXI) să nu le mai poată asigura reala respectare în raport cu cetățenii lor. Folosirea pervertită a tehnologiilor şi a inovațiilor ştiințifice duce la apariția unui model profund nociv de organizare a societății umane în sec. XXI, o lume bazată pe sancțiune şi prevenție a folosirii de către individ a drepturilor sale, a libertăților sale fundamentale, inerente lui ca persoană umană. Aceste drepturi şi libertăți sunt permanent relativizate, tratate ipocrit, atât de guvernele slăbite sau cumpărate de corporații (ajungându-se până la penibila şi periculoasa situație de a se face lobby pentru aceşti actori globali, în loc de a se proteja corespunzător interesul cetățenilor lor) cât şi de corporații (pentru care, de fapt, aceste drepturi şi libertăți nu au contat şi nu contează, devreme ce raportarea actorilor globali plutocratici se face la om ca un cumpărător, ca o marfă, ca un prestator de muncă ieftină sau chiar la negru – deci, ca un sclav al secolului XXI).

Aşa cum admit futurologii, însăşi ideea de muncă se va schimba în 2050 (în plină epocă plutocratică globală, dacă modul pervertit de a folosi tehnologiile şi ştiințele pentru a slăbi drepturile omului, după slăbirea puterii statelor-națiune, în loc de a le proteja corespunzător, va ajunge cel dominant), fiind de aşteptat (dar şi acesta este doar un scenariu al celor pasionați de avântul tehnicii în detrimentul şi nu în armonie cu etica şi responsabilitatea față de protecția drepturilor omului) o personalizare a computerelor, o înlăturare a ideii de „spațiu de lucru" sau „birou", o omniprezență a computerelor ("ce vor fi dezbrăcate de straiele lor de sticlă, metal şi plastic, ele fiind pretutindeni şi nicăieri, aşa cum sunt electricitatea şi apa curentă, o încorporare a micro-procesoarelor în orice: în pereți, spun futurologii, în mobilier şi chiar în oameni". În acest concept de "spațiu computerizat", toate acțiunile oamenilor se salvează instantaneu într-un "cluster" sau "nor de servere care găzduiesc şi programele sofisticate de care omul are nevoie şi care asigură şi sincronizarea perfectă între toate terminalele (mobile sau fixe), indiferent de locație"[20].

2050 este şi perioada pe care futurologii (interesați de studiul avansării tehnicii şi ştiințelor în noile concepte de urbanism) o preconizează pentru saltul civilizației tehnologice, de la maşinile bazate pe benzină sau motorină la cele electrice, magnetice şi inteligente (conduse cu gândul, la fel cum omul interacționează cu computerele). Maşinile electrice se pot auto-conduce, fiind ghidate de GPS şi protejate de accidente prin diverşi senzori integrați[21] însă tot astfel, sporeşte şi nivelul de supraveghere şi control al ființei umane, aflate în aceste maşini şi asupra direcției de mers a acestor maşini, cunoaşterea rutei sale şi posibilitatea de control sau intervenție asupra acestora, de la distanță. Practic, în lumea computerelor omniprezente, conceptul de intimitate şi cel de libertate se văd puternic supuse presiunii, până la a se crea o barbarie tehnologică, o societate bazată pe profit dar şi pe controlul şi supravegherea ființelor umane în timp real. În acest punct, folosind un model exclusiv bazat pe tehnică şi ne-contrabalansat în niciun fel de etică, de responsabilitate, de o

[20] Michio Kaku, Munca. Tehnologia a schimbat rutina zilnică în 2050, în BBC Science focus, iulie-august 2012, nr. 7, p. 30.

[21] Idem, p. 31.

protecție adecvată a drepturilor omului, într-o societate dominată nu de state-națiune în beneficiul cetățenilor lor ci de actori globali privați, drepturile omului sunt golite de conținut.

Apare conceptul de hibrid, de cyborg, care se va pune din ce în ce mai serios în discuția (nu doar juridică) din deceniile viitoare: omul îmbinat cu tehnologia[22], care devine parte din el, din intimitatea şi din modul său de funcționare dar mai ales, din modul său de receptare a lumii şi a oamenilor săi. Va mai considera el oamenii drept semeni ai săi, condiționat fiind de componentele sale tehnologici şi de setările acestora (foarte posibil, pervertite de o lume dominată de profit şi de discreditarea spiritualizării, a eticii şi responsabilității, a caritării şi grijii față de oameni)? Cât de liber şi de ne-condiționat de setările componentelor sale tehnologice va fi acest „nou om"? Va lucra el în beneficiul societății şi al oamenilor sau va fi doar un servitor al actorilor globali care l-au creat sau l-au îmbunătățit şi care îşi arogă drepturi asupra lui? Poate un om să îşi cumpere asemenea piese tehnologice care să îi îmbunătățească abilitățile naturale? Dacă da şi va exista un acces liber, generalizat, pe piață, al oamenilor, la asemenea piese (cum este în prezent la telefoanele mobile sau la computere), ce fel de performanțe vor stimula asemenea tehnologii? Unele în beneficiul societății plutocratice globale şi în dezavantajul oamenilor – rămaşi vulnerabili în această societate (de exemplu, încurajarea aptitudinilor pentru munca grea, pentru luptă, pentru supravegherea şi controlarea oamenilor în orice condiții sau în condiții dificile)?

Apar noi forme de robie (prin înregimentarea lor în sistemul social în baza unui număr şi nu a identității lor umane, unice, de persoană unică, liberă şi demnă; prin crearea de componente tehnologice încorporate în oameni, făcându-i capabili să suporte condiții de muncă grea sau adaptați doar pentru luptă) care desființează conceptul de libertate şi demnitate al persoanei umane, de integritate corporala şi psihică, şi pentru cel ce poartă încorporări de elemente tehnologice şi pentru cei ce le suportă acțiunea. Şi în ipoteza în care nu va exista un acces liber pe piață la asemenea piese tehnologice şi nici modalitatea curentă, accesibilă, de a le schimba sau de a le încorpora (un fel de servicii specializate de încorporare şi de schimbare a pieselor – service-uri pentru aceşti hibrizi), actorii globali (corporații, diferite grupuri de interese, mafii, organizații para-militare etc.) vor fi plasați într-o poziție de dominanță față de state, față de cetățenii acestora, transformând aceşti proto-cyborgi în instrumente ale puterii şi strategiilor lor, neținuți de niciun fel de responsabilități internaționale legale şi politice (însăşi conceptul de "politică-monopol al statelor" se va transforma într-o astfel de lume, puterea devenind una privată şi politica statelor devenind una fără substanță). Politica privată va înlocui, prin folosirea tehnologiilor şi a descoperirilor științifice (sectoarele de cercetare științifică fiind unele defavorizate constant în bugetele statelor, în urma presiunilor exercitate de actorii globali ce deschid continue linii de creditare unor state slăbite şi aruncate într-o stare de disoluție, de înapoiere economică[23]), puterea politică a statelor.

Zborul în spațiu (turism de agrement), care în statele socialiste din sec. XXI se asigură în mod liber de către stat, cetățenilor săi, fără discriminare, în statele corporatiste (dominate de plutocrația globală, cu guverne slabe sau cumpărate de aceşti actori globali privați) nu vor fi accesibile decât celor bogați. Este un alt exemplu de discriminare între ființele umane

[22] Ayesha şi Parag Khanna, Tehnologia prinde viață, în Ştiință şi tehnică, anul LX, nr. 6, septembrie 2011, p. 62-63.

[23] Ilie Şerbănescu, op. cit., p. 167-169.

ce poate apărea în următoarele decenii, pornind de la premisa (deja existentă) a turismului spațial privat[24], domeniu adiacent în procesul de privatizare al explorării spațiului cosmic[25].

4. Tipurile de tehnologii inteligente. Noile tipuri de încălcări ale drepturilor omului (inclusiv prin dezvoltarea unor ramuri ale ştiinţei)

Lumea secolului XXI (care respectă libertatea de cunoaştere a fiinţei umane, deci acordă un loc special, de primă importanţă dezvoltărilor ştiinţifice şi tehnologice) este un cadru ideal pentru dezvoltarea noilor tehnologii şi ştiinţe dar prezintă şi riscul ca acestea să cadă sub controlul (prin sponsorizări directe; prin intermediul unor guverne slabe sau corupte; prin încurajarea migraţiei masive de creiere dinspre sectorul de stat, prost plătite, către sectorul privat – în special, către firmele transnaţionale) actorilor privaţi ce acţionează la nivel global, în cadrul unei paradigme a globalizării de tip corporatist. Armatele private[26], strângerea şi stocarea datelor personale despre oameni, folosirea tehnologiilor pentru interceptarea convorbirilor private, pentru monitorizarea şi supravegherea oamenilor şi a comunicaţiilor lor (telefon, net, comunicaţii directe), biometria sunt doar câteva exemple de pervertire a cuceririlor ştiinţei şi tehnicii pentru realizarea de sisteme poliţieneşti şi de profit, în care individului i se relativizează tot mai mult accepţiunea sa de persoană umană (beneficiind de drepturile şi libertăţile fundamentale), migrându-se spre conceptele de consumator, furnizor, marfă, prestator de servicii sau de potenţial suspect).

În cele ce urmează, vom aminti pe scurt câteva din noile tipuri de tehnologii inteligente şi faptul că modul lor de aplicare pervertit (adică, desprins de etica, de respectarea drepturilor omului, de valorile religioase şi morale, de ideea de spiritualitate prin care omul este tratat ca persoană, prin care este respectat în privativitatea, în libertatea şi în demnitatea sa de persoană, în unicitatea şi identitatea sa) produce o încălcare directă a esenţei drepturilor şi libertăţilor persoanei umane, ne-protejată corespunzător (prin legislaţie internaţională adecvată) la nivelul sec. XXI:

- Realizarea de componente robotizate, încorporate în organismul uman, în diferite aplicaţii şi cu folosirea diferitelor argumente (de protecţie, de menţinere a stării de sănătate a omului, de diagnosticare corectă a bolii, de monitorizare a bolii, de reducere şi eliminare a cauzei bolii, de îmbunătăţire a capacităţilor umane, de suplinire a unor simţuri îmbătrânite, defectuoase sau absente, de îmbunătăţire a capacităţii de a munci, de îmbunătăţire a simţurilor omului etc.). Protezele-robot[27] devin realitate în medicina viitorului apropiat, ele

[24] Leo Rickman, Odihna. Timpul liber şi vacanţele din anul 2050; revista BBC Science Focus, iulie-august 2012, nr. 7, p. 32. Turismul spaţial privat a devenit deja realitate din 2011, primele zboruri comerciale ale unei navete private şi primii turişti spaţiali vor pleca în 2013 în primele zboruri sub-orbitale (costul unei călătorii fiind de circa 200.000 dolari, în prezent fiind adunate 400 de rezervări plătite). Turism spaţial, revista Ştiinţă şi tehnică, anul LX, nr. 9, decembrie 2011, p. 20.

[25] Companiile private se implică tot mai mult în dezvoltarea de tehnologii spaţiale, chiar dacă momentan sunt apreciate doar beneficiile (se reduc mult costurile agenţiilor spaţiale ale statelor-naţiune în acest domeniu), pe termen lung acest domeniu este extras de sub controlul cetăţenilor (prin pârghiile democratice ale statelor-naţiune) şi devine o simplă activitate privată, nereglementată (încă) la nivel internaţional (ci doar prin contracte încheiate cu firmele de stat specializate, deci sub imperiul dreptului contractual naţional, deşi activitatea are un obiect de interes internaţional şi trebuie să fie armonizată juridic cu nevoia de respectare a legislaţiei privind drepturile omului şi cu principiul ne-discriminării fiinţelor umane şi al popoarelor în a accede liber în spaţiu).

[26] Privatizarea războiului este o realitate a sec. XXI. Mary Kaldor, op. cit., p. 157.

[27] Proteza auditivă, implantată în urechea medie, bazată pe un microfon invizibil din exteriorul urechii, cu posibilitatea de a detecta şi sunetele de intensitate şi frecvenţă mai joasă, ceea ce înseamnă mai mult decât restabilirea auzului uman normal ci îmbunătăţirea abilităţii umane de a auzi. Cf. Claudiu Andone, în Ştiinţă şi tehnică, anul LXI, nr. 14, mai 2012, p. 9.

putând înlocui orice organ afectat, devenind mai eficiente şi accesibile. Sistemul Argus II (ochiul electronic) este un singur exemplu în acest sens. Omul devine un simplu beneficiar, în aceste condiţii sau altceva? Omul-cyborg rămâne sau nu o persoană umană, în sensul clasic al legislaţiei internaţionale privind drepturile omului de la nivelul sec. XXI? Se pot crea aici inclusiv riscuri de sclavie asupra acestor persoane, de exploatare sau discriminare (pozitivă sau negativă) a acestor oameni, de manipulare sau control la distanţă (prin setările componentelor tehnologice încorporate, prevăzute cu sarcini multiple, dintre care nu toate sunt declarate sau controlate adecvat pentru a oferi persoanei umane protecţia drepturilor sale, a dreptului la viaţă, la sănătate, a libertăţii sale).

- Realizarea de îmbrăcăminte sau încălţăminte inteligentă (de la hainele cu textură inteligentă, care monitorizează starea de sănătate şi protejează organismul de viruşi sau haina capabilă să alerteze singură postul de poliţie în caz de rănire a poliţistului care o poartă, la hainele care, prin nano-tehnologie încorporată în textură, transmit un semnal către telefoanele mobile sau către alte dispozitive de comunicaţii, hainele care monitorizează pulsul şi presiunea sangvină, până la hainele de bumbac cu componente anti-microbiene capabile să ucidă viruşii sau agenţii patogeni, până la haine care se pot încălzi sau răci singure, după dorinţa noastră, bazate pe mini-circuite electrice[28] ori hainele şi încălţămintea cu micro-cipuri încorporate în ele, care fac posibilă urmărirea persoanei în timp real, încălcându-i libertatea de circulaţie, privativitatea sa, în numele consumerismului (cunoaşterea gusturilor consumatorului de produse şi servicii, personalizarea reclamelor comerciale în sec. XXI): adidasul cu cip încorporat care monitorizează organismul uman în antrenamentul sportiv[29] şi care poate transmite aceste date nu doar sportivului, antrenorului ci şi oricărui agent care interceptează sau colectează astfel de date despre o fiinţă umană aflată într-o activitate (aici, de tip sportiv). Aceste beneficii ale tehnologiei se pot lesne transforma în instrumente de încălcare a vieţii, libertăţii, demnităţii persoanei, a privativităţii sale, de monitorizare, controlare şi supraveghere a acesteia în timp real sau de îmbolnăvire/vătămare conştientă a acesteia, într-o societate aflată sub controlul agenţilor privaţi bogaţi şi al diferitelor grupări oculte de interese, ce nu au un vedere nici responsabilitatea faţă de fiinţa umană şi nici vreo relaţie constrângătoare juridic pe plan naţional sau internaţional, privind folosirea etică a acestor noi tehnologii, astfel încât să nu se producă direct sau indirect, conştient sau nu, o încălcare a drepturilor omului.

- Ochelarii inteligenţi (ochelarii conectaţi la net), care ghidează individul în orice spaţiu, oferindu-i acces instantaneu la informaţii despre lucrurile înconjurătoare, despre persoanele din jur – de unde şi caracterul colectiv al datelor despre oameni, care formează ”nori” accesaţi de oricine, în orice scop, desfiinţând ideea de privativitate şi de opoziţie a omului la accesarea datelor sale personale cât şi arătând neputinţa de a verifica dacă această ştergere de date a fost într-adevăr operată dar revelând şi ineficacitatea operaţiei în sine, căci datele pot fi deja transferate către alţi utilizatori, privaţi sau publici, oficiali sau hackeri – care nu au obligaţia de a le şterge. Şi această tehnologie prezintă riscul de încălcare a drepturilor la liberă deplasare în spaţiul public şi privat al fiinţei umane dar şi la privativitatea celorlalţi utilizatori de spaţii publice şi private, inclusiv prin faptul că se împleteşte accesul la spaţiul virtual de informaţie cu controlul şi urmărirea individului în timp real, prin simpla utilizare a unei astfel de aparaturi.

[28] Îmbrăcămintea inteligentă. S-au inventat hainele care îşi schimbă culoarea, produc căldură sau alertează medicul, www.gardianul.ro, accesat la 16.01.2009.

[29] Ştiinţă şi tehnică, anul LX, nr. 9, decembrie 2011, p. 63.

- Cuceririle ştiinţifice din bio-tehnologie, care creează şi pericolul de bio-terorism, atacuri ce pot distruge în termen foarte scurt, specii de plante si animale, culturi şi popoare, fără posibilitate de intervenţie in timp util. Nici în domeniul protecţiei persoanei umane în faţa acestui pericol, legislaţia internaţională a începutului de secol XXI nu este adaptată corespunzător, deşi ONU a declarat intervalul 2011-2020 Deceniul Bio-diversităţii şi s-a adoptat la Rio de Janeiro Convenţia asupra bio-diversităţii[30]. Bio-tehnologiile (de ex., realizarea de ţesut artificial – ţesut tipic vaselor capilare, capabil să transporte nutrienţi[31]; realizarea de sânge artificial) pun iar în discuţie aplicaţiile de acest tip desprinse de etică şi îndreptate împotriva individului (în scopul de a câştiga un grad sporit de putere asupra sa, prin manipularea stării sale de sănătate fizică şi psihică).

- Nano-tehnologiile. Realizarea celui mai mic motor electric din lume, dintr-o moleculă, măsurând un nano-metru în lungime[32]. Creează acelaşi tip de îngrijorări în cazul unei aplicări lipsite de etică, necontrolate de statele-naţiune slăbite sau care şi-au transferat puterea la nivele ce nu mai reprezintă individul ci caută să îl controleze.

- Biometria (înlocuirea identităţii personale, umane cu o identitate artificială, generată de sistem, a unui număr, care nu deosebeşte fiinţele umane de mărfuri, produse ori de specia animală, răpindu-le personalitatea lor unică, demnitatea, libertatea lor; încorporarea de micro-cipuri cu stocări de date fundamentale despre individ şi viaţa sa, identitatea sa, preferinţele sale) pe tot felul de acte personale-cheie (paşapoarte, cărţi de identitate, carduri bancare, carduri de sănătate, de transport public, permise auto etc.) ce permit, cumulate, supravegherea, monitorizarea continuă a oamenilor, limitarea, condiţionarea sau împiedicarea libertăţii lor de circulaţie, de a face tranzacţii bancare, de a li se elibera documente publice; acumularea de date despre originea, averea lor, capitalul deţinut, deplasările făcute, destinaţiile preferate sau de rutină, starea de sănătate, compatibilitatea de organe şi multe altele, ce încalcă în mod esenţial drepturile omului, privativitatea fiinţei umane, dreptul de a nu oferi acces la datele personale (drept relativizat de societatea plutocratică globală şi transformat în versiunea sa pervertită, adică într-o obligaţie a individului de a furniza aceste date pentru a avea acces la servicii publice sau de a îşi achiziţiona anumite bunuri ori a presta anumite activităţi).

- Răspândirea amplasării de camere video în spaţiile publice, sub argumentul unei mai bune protecţii a individului. În loc de o scădere a ratei infracţionalităţii, vedem că aceasta proliferează în societăţile plutocratice şi în regimurile poliţieneşti constituite cu ajutorul tehnologiilor de supraveghere a oamenilor în timp real (asupra străzilor, băncilor, super-marketurilor, în transportul public, în şcoli, în hoteluri, în alte spaţii de interes public). Această practică supune individul unui stres permanent, de a trăi ca ”potenţial suspect”, încălcându-i privativitatea sa (concept ce trebuie extins în secolul XXI şi la deplasarea sa în spaţiul public sau cel puţin, în anumite tipuri de spaţiu public, în caz contrar, acesta devenind transparent complet în viaţa sa, sub ochiul autorităţilor omniprezente, într-un stat al suspiciunii îndreptate împotriva individului şi nu pentru a îl proteja).

- Provocarea la comandă a hibernării[33] (strategie de supravieţuire la unele specii de animale, preluată în bio-tehnologie) dar care poate fi, odată perfecţionată şi aplicată la

[30] Biodiversitate, bioterorism, revista Ştiinţă şi tehnică, anul LX, nr. 9, decembrie 2011, p. 119.
[31] Revista Ştiinţă şi tehnică, nr. 7, octombrie 2011, p. 7.
[32] Idem, p. 6.
[33] Claudiu Andone, Cristian Român, revista Ştiinţă şi tehnică, anul LX, nr. 7, oct. 2011, p. 12.

oameni, inclusiv folosită în moduri contrare drepturilor acestora la integritate corporală, la libertate şi demnitate, împotriva deciziei acestora (utilizare inclusiv în scop militar).

- Crearea micro-roboților zburători[34] (folosiți inclusiv pentru spionarea, interceptarea comunicațiilor a diferite ținte umane sau chiar pentru vătămarea acestora ori pentru influențarea lor în sensul dorit). Nici aici nu există o legislație internațională adecvată pentru a ocroti corespunzător drepturile omului în sec. XXI.

- Interceptarea conversațiilor private şi a comunicațiilor de orice fel dintre oameni, mergând până la spionarea a populații întregi, pe totalitatea teritoriului lor (deci, ca reacție, putem vorbi de necesitatea unui drept la privativitate al popoarelor, în secolul XXI?)[35]

- Strângerea de date personale despre oameni şi stocarea lor la nivel național, privat şi supranațional – o altă formă specifică sec. XXI de afectare a vieții oamenilor, în toate aspectele sale publice şi private şi a privativității ființei umane (inclusiv vulnerabilizarea a populații întregi)

- Accesul ne-restricționat la baze de date personale, de către diverşi utilizatori, fără ştirea indivizilor sau cu încălcarea dreptului lor la opoziție; ne-transparentizarea procedurilor de a face opoziție la colectarea de date personale sau inutilitatea lor (ştergerea datelor nu garantează dispariția reală, completă, a acestora, din toate bazele de date). Acordurile de schimb de date personale între țări sau blocuri economice, peste voința indivizilor (fără dezbatere publică, fără proceduri publice de informare a acestora, fără consultarea lor prin referendum) şi fără acordul acestora (un alt aspect non-democratic al ”societăților digitale”)

- Dezvoltarea de soiuri de plante sau animale hibride sau modificate genetic, care încalcă dreptul la sănătate al oamenilor şi cerințele securității alimentare – altă dimensiune de protecție a drepturilor omului şi a bioeticii ce trebuie dezvoltată în viitor.

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[34] Alexandru Safta, Adrian Nicolae, Ştiință şi tehnică, anul LX, nr. 7, oct. 2011, p. 21. Claudiu Andone, Adrian Nicolae, O muscă inspiră un nou design de microfon, în revista Ştiință şi tehnică, anul LXII, nr. 26, iunie 2013, p. 7.

[35] Practică pe scară largă, care a luat amploare în ultimele decenii, până la a provoca o reacție concertată a statelor, în cadrul ONU. Astfel, delegațiile Germaniei şi Braziliei, alături de Mexic şi Norvegia, au elaborat deja textul unei rezoluții ONU care să limiteze supravegherea comunicațiilor pe internet şi să protejeze sfera privată a acestor comunicații în plină epocă digitală. Inițiativele Germaniei în acest sens sunt un semnal clar în direcția îmbunătățirii nivelului de protecție a sferei private (inclusiv comunicații private), pledându-se pentru un acord internațional, în cadrul ONU dar şi de protecție a datelor personale în traficul mondial de net (adaptarea Pactului Internațional pentru respectarea drepturilor cetățeneşti şi politice din 1966 la provocările erei digitale). Rezoluția propusă la ONU de Germania şi Brazilia este destinată să joace un rol important în eforturile internaționale de protejare a sferei private şi a dreptului la intimitate în sfera virtuală; în proiect se mai prevede şi ca țările ONU să înființeze organe independente de control, care să garanteze transparența modalităților în care statul supraveghează comunicațiile cetățenilor şi strânge date despre aceştia. Cf. articolului ”Germania şi Brazilia au depus la ONU un proiect de rezoluție anti-spionaj”, OS/DPA/Reuters, redactor Robert Schwartz, 2.11.2013, www.dw.de/germania. Lumea este confruntată cu provocarea ca, pentru prima dată, datorită tehnologiilor de interceptare a comunicațiilor, populații întregi, pe toată suprafața teritoriului lor, nu doar liderii lor, să fie interceptate, sub pretextul luptei globale anti-terorism. Se mai remarcă, în mass media germană, şi rolul serviciilor secrete (pe care nu ar trebui să îl joace, într-o societate democratică reală), în a transa în modalități netransparente dilema lumii globalizate de azi (interesul asigurării securității versus respectarea drepturilor omului), unde informația corectă şi completă precum şi decizia nu sunt în mâna cetățenilor. Cf. articolului ”Naivitatea încrederii în guverne”, Peter Janku, redactor Medana Weident, 31.10.2013, www.dw.de/naivitatea.

5. Concluzii

Din instrumente de îmbunătățire a nivelului vieții oamenilor, de sporire a confortului material, de îmbunătățire a traiului lor, tehnologiile şi noile descoperiri ştiințifice pot fi cu uşurință întoarse împotriva acestora în cadrul modelelor pervertite de societăți (consumeristă, polițienească), provocând forme diverse de încălcări directe la adresa drepturilor şi a libertăților acestora. De aceea, nevoia de dezvoltare a drepturilor omului cât şi de recunoaştere a calității de subiect de drept internațional public al drepturilor omului pentru fiecare persoană umană vor trebui puse cu seriozitate în discuție în deceniile următoare.

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AUTHENTIC INSTRUMENT – MEANS LEGAL PROTECTION OF PROPERTY RIGHTS ATTRIBUTES GRANTED BY THE NEW CIVIL CODE AND THE NEW CIVIL PROCEDURE CODE

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Abstract

Legal protection of human rights represents a major challenge in modern society, both in national and European perspective.

The subject of this study is to analyze the advantages of the authenticated documents concerning the protection of property rights of individuals, in terms of Romanian citizens, as well as foreigners, with individualization of particular aspects concerning the ownership of citizens of Member States of the European Union, compare to third-country nationals. An analysis of the land acquisition rights is required when foreigners are involved, as of January 1, 2014 new provisions of Law no. 312/2005 will come into effect, affecting the EU citizens. The legal provisions and the practical aspects are likely to prompt extensive debate not only in the legal national and European circles, but also in the mass-media across Romania and also in the European governing bodies.

Keywords: Authentic instrument, human rights, protection of property rights, new legislation

THE AUTHENTIC DOCUMENT – A MEANS OF LEGAL PROTECTION OF PROPERTY RIGHTS ATTRIBUTES GRANTED BY THE NEW CIVIL CODE AND THE NEW CIVIL PROCEDURE CODE

Legal protection of human rights represents a major challenge in modern society, both in national and European perspective.

The subject of this study is to analyze the advantages of the authenticated documents concerning the protection of property rights of individuals, in terms of Romanian citizens, as well as foreigners, with individualization of particular aspects concerning the ownership of citizens of Member States of the European Union, compare to third-country nationals. An analysis of the land acquisition rights is required when foreigners are involved, as of January 1, 2014 new provisions of Law no. 312/2005 will come into effect, affecting the

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EU citizens. The legal provisions and the practical aspects are likely to prompt extensive debate not only in the legal national and European circles, but also in the mass-media across Romania and also in the European governing bodies.

According to the Universal Declaration of Human Rights adopted by the UN General Assembly on 09/10/1948, all Member States have an obligation to ensure the legal protection of persons, both for its own citizens and citizens of other countries and stateless persons.

In this regard were included in the Constitution, but also in special laws, details regarding the protection of human rights, including property rights provided for in Art. 17 of the Declaration and secured by art.44 of the Constitution. But not only ownership is protected and guaranteed by the Constitution, but also the other rights laid down in the Declaration can be found in the fundamental law, Chapter 2 – Rights and Freedoms, art. 22-53.

Expression or exercise of these rights in material form, most often takes the form of an authenticated document because on one hand the authentic document is recognized by all institutions and state authorities, on the other hand notary public is a person vested with the necessary authority power under law to give this category of acts.

Thus, from a simple authentic statement necessary to obtain social assistance or unemployment benefits, the conversion of driving license or passport issuance or certain forms of state support in various areas, or to declare loss of title property until the deed of sale, the certificate of inheritance, or the act of voluntarily sharing or the will, all these categories of acts and more, are just examples of how individual rights are protected through the document.

Practical exercise of the right to social assistance, the right to travel freely, the right to social security, right to education, the right to association, the right to marry and to dissolve the marriage, etc. often takes the form of an authentic document and the notary public is entitled to mediate the free expression of these rights and establish procedures laid down in law for this purpose.

Since the protection of individual rights is extremely vast subject, the purpose of this paper is the analysis of the authentic document as a specific means of protection of property rights – one of the most important and tangible individual rights.

The main regulations by which the state guarantees and ensures the right of property, mainly the new Civil Code and the new Civil Procedure Code, republished, with subsequent amendments make numerous references to authentic documents. Thus, while the current Civil Code sets/establishes mandatory requisite for the validity of legal documents, the Code of Civil Procedure outlines the probative value of the authentic document. Furthermore, according to art.638 and art. 639 of the Code of Civil Procedure republished and amended, it is established the principle that authentic documents are enforceable and can be put into enforcement, and the document authenticated by notary public that finds an outstanding, liquid and payable debt is also enforceable, no longer requiring enforceable investment by the court, which is particularly relevant in enforceable investment of pre-contracts of sale. Following the enactment and entry into force of the new codes – Civil and Civil Procedure, the regulations changes were authentic, the probative value and enforceability thereof.

Should be noted that the old code contained regulations concerning the authentic document, its value and importance as evidence of ownership, but also as evidence, as well as its effects.

The provisions of the new Civil Code state in many cases the authenticity of the document in terms of legal validity. In this regard reference can be found regarding the field of family law (marital status, adoption, parentage, curator, marriage settlements, divorce involving minor children or not etc.) in the matter of legal regulation of the land rights book, in the field of real estate and dismemberment, but also of securities rights, inheritance matters, in commercial law and in other branches of law. Basically we can say that the authentic document is one of the most important tools to protect individual rights.

The importance of the document as a means of protecting individual rights, especially property rights is demonstrated by compulsoriness of authentic acts, under penalty of nullity when it comes to legal documents related to the ownership of people. Thus, art. 589 conditions the registration of ownership rights in the land ownership book under the convention of parties if is in 'authenticated form or judicial decision', measurements repeated in art. 888. Art. 889 paragr. 1 provide that 'the owner may waive his right to property by notarial authentic statement'. Also reference to the authentic form of the act is done, under penalty of nullity, to the donation (art. 1011 section 1), form also required for the authentic testament (art. 1043 section 1), the declaration of non-acceptance (art. 1111) or waiver of succession (art. 1120 p. 2), Art. 1144 – in inheritance proceedings, separation can be achieved by agreement and if the property is in real estate, the separation agreement must be concluded in authentic form, under penalty of nullity. Likewise, the legislature imposed a mandatory requisite documents relating to immovable property or their dismemberments, the penalty being absolute or relative nullity, as applicable, as provided in art.885, art. 888 and following, art.242 paragr. 3 – for legal persons (transmission of ownership right on real estate), Art. 774 – fiduciary contract; also, under penalty of nullity, there must be concluded in authentic form the sale of an inheritance (art. 1747 paragr. 2), conventions by which we shift or establish real immovable property (Art. 1244), maintenance contract (art. 2255) and the mortgage contract (art. 2378).

The reason for which the legislature has established absolute nullity of acts that are not authenticated when it is a requirement of the law is that the authentic form is required due to the high degree of safety of act and due to the greater protection offered by the solemn character of this form. To be authentic, an act must take a certain form, you must have certain terms and targeted content to be drafted and signed in certain circumstances, public notary is the person responsible for checking formal conditions during authentication.

The term "authentic document" is defined in art. 269 of the Civil Code, first paragraph stating that "the authentic act is the document issued or, where appropriate, received and authenticated by a public authority, a notary public or other person entrusted by a state public authority, in the form and conditions established by law". Same law regulates the content of art. 270 proving its strength, namely that "the authentic act makes full proof against any person, until it is declared as false, regarding the observations made by the person who authenticated the document, under the law".

The authentic act, prepared with solemnity and conditions provided by law, proof of ownership, or other legal relations are in direct correlation with proof of ownership by up to false.

Should be noted that the evidential value of the authentic act imposes distinction between those claims regarding the observations made by the notary public through his senses (presence of the parties, their identity, consent, signature and date of the document), which can be combated only by the false registration procedure, benefitting from total

presumption of veracity towards the assessment of exercise capacity (altered partially or totally) – which exceeds the level of specialized training of the notary (if the notary has suspicions in this respect he can require a medical certificate or deny authentication of document requested) or from assessing the validity of the consent expressed by the parties before it, the notary public cannot be accused of any defects of consent (fraud, error, violence), where the constraint was not explicitly stated[1].

It is necessary to emphasize that if the notary public becomes aware of the existence of constraints affecting the control of the parties or either party finds lack of judgment, or if the parties insist on inserting an unlawful clause in the act, he is obliged to refuse authentication of document and where applicable, to notify or inform the authorities or competent institutions when appropriate.

These obligations of the notary are part of the global legal regulation of the authentic act, being another guaranty, a further proof of how the legislature intended to protect the property rights of the person through the instrument notarized. The fact that either party has the option to notify any defects in their will, or even the notary, in case he has suspicions about any aspect of legality and/or free agreement of the parties shall refuse the authentication or even inform, if circumstances require it, other state institutions.

As such, there is no doubt regarding the absolute importance that the legislature has given to the authentic document, and the weight assigned to entries in it, which is likely to further empower notary public in the performance of his duties.

Early discovering of illegal acts, improvement of security and safety elements of notarial acts, but also increase in the level of training and the degree of legal responsibility of notaries public, and why not – even the intense media coverage of cases identified and resolved by the prosecution will lead to a decrease in crime and prevent more effectively the offenses of forgery in the notarial activity.

All these actions are aimed at securing the authentic document, and thus more efficient protection of human rights, especially the right of ownership, requirement imposed by European legislation and practice.

Ownership generally has a deep heritage character and the property enjoys a special legal regulation, arising from the need to protect this right efficiently.

Thus, based on the general rules of the Civil Code and Civil Procedure Code, the legislature inserted in all the legislative acts which affect the field of real estate, provisions for mandatory requisite for acts that constitute, transfer, alter or extinguish legal relations related to real estate. Thus, any transfer of ownership, regardless of the manner of performance, must be made only by an act concluded in authentic form, under penalty of nullity. Whether it is a sale, a donation, a maintenance contract, an act of real estate exchange, a will, an estate or an act that refers to a dismemberment of ownership, the applicable law imposes the authentic form. In these circumstances it is clear that the legislature intended that the most effective means of protecting property rights should be the authentic instrument, which is why nullity was imposed in cases where the act doesn't take the form required by law.

The high degree of safety of the instrument lies in the legal requirements for its validity. Thus, in addition to the specifications of the art. 269 of Civil Code which defines the authentic act, as 'the document authenticated by a notary public or other person vested

[1] Mircea Ionescu, *Înscris autentic în reglementarea noului Cod civil şi a viitorului Cod de procedura civilă.*

with public authority in the form and conditions established by law', the legislature has set out in detail the authentication procedure by means of Law No.36/1995 – of notaries public, which is the basic legal act that establishes the main rules and authentication procedure (Chapter V – Procedure of notary acts, Section 2 – Authentication of documents – from Law no. 36/1995 republished), mentioning what other people besides the notary public are entitled to authenticate documents, but also the limits of those powers (art. 8, art. 18 of Law no. 36/1995R). But authentication of legal documents among the living with incorporation or ownership transfer effect, and of acts on choosing, changing and winding matrimonial regime are the exclusive competence of the notary public. Authentication procedure of documents in real estate, but also those involving the movable property involves verifying certain documents, certain registry offices, checking the conditions of validity for document authentication as well as the agreement of the parties, identity and existence and validity of rights, all of which are elements that finally provide a high degree of protection of property rights.

Browse through these stages, collecting all documents and information necessary, the solemnity required by law to authenticate the document, verifying the identity of the parties, all these requirements established by law for the notary public, are intended to protect property rights of individuals as effective as possible. For the same reason the protocol was initiated and signed to allow notaries public access to database administered by the Direction of Population Records, in order to check the identity documents of Romanian citizens. In a similar way they proceeded when the new civil code regulated the establishment of the National Notary Registers that allow real time verification of matrimonial regime of the parties, verification of the existence and validity of special proxies, publication for information purposes and for enforceability of marital agreements, acts of liquidation of the matrimonial etc, the operation of these registers being governed by internal rules.

Adopting legislation on the organization and functioning of the land register, taking over provisions of the Civil Code regarding mandatory authentic documents to be allowed in the land register, linking land registry law with notary law is another way to prove the importance of the authentic act in the civil circuit of real estate.

Any act involving the exercise in any way of ownership right will result in an authentic document: the renunciation of ownership can be done through an authentic statement, the establishment of a mortgage, an easement, any dismemberment of ownership, but also alteration or extinguishment, all are subject to the authentic form of the document.

Following the rules of the new codes, and changes in other regulations, to achieve putting them in line with new regulations, the legislature intended to enhance the value of the authentic instrument, while establishing severe penalties for notary public, when he does not perform his duties properly.

The new civil code introduced many new elements, changed prior regulations or replaced those that did not correspond to reality.

Thus, as a novelty in the ownership, with direct application on family relationships, the legislature introduced by art. 317, the principle of patrimonial independence of spouses, thus eliminating the prohibition of sale between spouses under the old Civil Code; as a consequence there has been regulated distinct matrimonial regimes, (art. 329 and seq. NCC) as compared to the old Civil Code regulating only legal community regime, the new civil Code also introduced the concept of family housing (art. 321-322) – which restricts the

right to dispose of one of the spouses, even if it is the sole owner of that property, but also the praecipuum clause (art. 333) under which the surviving spouse may take one or more unpaid goods before the division of inheritance, all these documents and legal reports are put into practice through the authentic instrument.

The contract of sale between spouses will be authenticated (required, whether it is real estate) matrimonial convention must be authenticated, under penalty of nullity (art. 330), the act of liquidation of the legal community must also be concluded in original form, the praecipuum clause should be inserted in matrimonial convention and the declaration of a property as a family home is done either by contract of sale (authentic) or through an authentic statement which will be based on the corresponding entry in the land register.

Ability to exercise in advance – for good reasons, guardianship court can recognize the minor who reaches the age of 16, full legal capacity, thus his right to make available documents relating to his property.

In property law, one of the most important legal relations is selling, which has undergone significant changes. The following changes can be highlighted:

- In art. 1650 NCC, it appears that the transfer of ownership is not the essence, but the nature of the contract, so that the contract can be represented as a dismemberment of ownership etc., or as another real right, such as a as debt, inheritance rights, intellectual property rights, for most cases, the legislature requiring as a condition of validity of the document its authentic form as the most efficient way to reflect the rights and obligations of the parties, and to protect them;

- Through Art. 1654 legislature expanded occupational categories affected by the inability to purchase litigious rights which are for the court where it operates, including: judges, prosecutors, notaries, clerks, legal counsel, bailiffs, insolvency practitioners (the old regulation included only the categories of judges, prosecutors, lawyers and clerks); disregarding this prohibition is sanctioned by absolute nullity;

- If the price is fictional and ridiculous (art. 1665) the sanction is relative nullity, unlike existing regulation in the old Civil Code, according to which the penalty was an absolute nullity;

Legislature also established that the object of the sale may be a future good (art. 1658 – required transmission of ownership as a future obligation) which does not exist at the time of the agreement (unless that would sell legacy unopened), in which case the property shall be submitted at the time the good will be achieved, and if the property is not achieved, the buyer can be forced to pay the price, unless you assumed this obligation in contract.

In terms of price – this should be fixed in money, to be serious and be determined or determinable (art. 1660-1662) – setting the price of money is the essence of sale, failure to do so is grounds for invalidity absolute; the new civil code regulates explicit conditions of determinable price, when not specifically determined in the contract; if the price is not determined within 1 year from the date of the contract, the sale is considered void, unless the parties agree to another mode of determining it;

Removal of retractable litigator who was covered in the old civil code art. 1402-1404, is another modification of the new Civil Code, the legislature wanted to once again protect the interests of individuals who bought a conflicting right.

Through Art. 1668-1670, was introduced the pact option – an act must take the form of an agreement that includes elements of the future contract, promissory no longer undertakes

to conclude the contract in the future, but agrees to contract when it is concluded, consequently being required only the express consent of the recipient.

Another newly introduced provision establishes that the sale of another property (Art. 1683) is a valid contract, the seller has the obligation to convey the property to the buyer, even if in the setting of the act he was not the owner; the transmission will operate when the asset is acquired by the seller or when the contract is ratified by the owner; the penalty for not being good action is rescission of the contract, the buyer no longer having the annulment option.

In case of sale of the entire property in joint ownership (Art. 1683 paragr. 5), by one co-owner without the others – buyer can choose either to maintain the contract in conjunction with appropriately reduced price or demand rescission of contract, in case he would not have bought it if he had known from the beginning that he will not acquire full ownership, including claim damages.

Another novelty is art. 1684 regulating property reservation – Under this provision, the seller has the right to retain ownership of the property until full payment of the price, even if the property was delivered; property reservation should be specified in the contract in original and be registered in the land register, for enforceability against third parties.

Of course, there are many other new civil code provisions affecting the sale, but they are not absolutely necessary conditioned by the existence of an authentic act, but this kind of act may confer them enforceable value when appropriate. Examples:

A new way of solving the consequences of eviction (art. 1695), besides the classical (rescission of contract and refund price and damages) – the buyer can keep the property, paying to a third-party a sum of money mutually agreed or giving another good instead. The defaulting seller will indemnify the buyer the amount paid by him, plus statutory interest and related expenses.

Verification of the property by the purchaser before the sale, to see the apparent flaws in conjunction with the obligation of the seller to fix them (Art. 1707 et seq. NCC).

Mandatory denunciation of hidden defects (art. 1709); the deadline for reporting defects, if not provided for in the contract, is 3 months for construction and 2 months for other goods, starting from the discovery of the vice. Buyer may request the court to compel the seller to eliminate the defect at its own expense, either substitute a similar property without flaws, or the court may decide a measure other than that requested by the customer, depending on the severity of the defects, the purpose and circumstances in which the contract was concluded.

Another novelty – warranty of the goods purchased when this warranty is offered for a certain period of time under the contract; this shall not be mistaken by warranty for hidden defects that has another regulation – the property will be repaired and not replaced. It shall be replaced only if repair is impossible to be performed or cannot be achieved within the period specified in the contract or if it exceeds 15 days. If not repaired/replaced within a reasonable property, the buyer may request termination of the contract and price refund.

Ultimate in sales is location of payment – the amount will be paid at the location of property at the time the contract is concluded, if parties provide otherwise by contract. Old Civil Code stipulated that payment location should be where the good was delivered.

Another novelty brought by the Civil Code is the change of the legal nature of the right of passage, that in the old civil code was requested by owner of the place without access to

the public road, and with the duty to award compensation to subdued fund owner (art. 616 of the old civil Code); under the new civil Code, the right of passage was included in the category of legal limitations, it is not extinguished if unused, having a certain way of annulment – in case the dominant fund gains access to public road, either naturally or subservient to another fund.

Introducing the trust institution in the legal civil relationships, institution that had not existed in our legislation until the entry into force of the new Civil Code, is also another way of protecting property rights. According to art. 773, this is the legal operation by which the constitutor transmits real rights to the fiduciary, claim rights, securities or other property rights to be exercised on behalf of a beneficiary; the goods subject to trust constitute a distinct mass of other patrimonial heritage. In order to get remuneration, the fiduciary handles or exercises and administrates these rights or property, for a specific purpose, to the benefit of another person (a third party or trustee, or the constitutor himself).

Thus, a person who has an ongoing credit secured by real estate can protect other goods in his heritage by establishing the trust of unencumbered assets. So if you get unable to repay the loan, and the creditor cannot satisfy the enforcement of the mortgaged property, he cannot turn to the property for which the trust was established, for the uncovered debt difference.

One sort of disadvantageous way of using the trust is the situation created by attracting personal liability, as provided in the Law on insolvency and bankruptcy. According to art. 138 of Law no. 85/2006 republished, management or supervisory and control bodies of a company (associates, directors, auditors etc.), can respond with their own property, for causing the insolvency in any of the ways set forth in subparagraphs a-g of this article. To protect these assets, the individuals may be fiduciary on their property, lenders no longer being able to turn against this category of goods, to the extent the court will decide liability of shareholders/directors.

The main characteristic elements of the trust are reflected in the fact that on the one hand property of fiduciary patrimony can be traced only by creditors whose claims have been born in connection therewith, with the exception of the case in which a personal creditor of the constitutor constituted and made enforceable, prior to the conclusion of the trust, a security interest over those goods, and on the other hand creditors of the constitutor can track goods only in the case of dissolution or declaration as inapplicable of the trust agreement (art. 786 paragr. 1 NCC)[2].

According to art. 774 of the Civil Code, trust is established by law or by contract concluded in authentic form, which proves once again, if necessary, the amount of special importance that the legislature has in view, the authentic act as a means of protecting the right property.

Also for the purpose to protect property rights, the maximum duration of the trust was limited to 33 years and in this period the goods covered by the trust cannot be tracked and/or executed than under the terms of the civil code.

Regarding the new regulations on the Land Registry, included in the new Civil Code in Title VII, the most important change is the fact that it gives an effect of incorporation of rights to registration in the Land Registry (Art. 557 paragr. 4); this provision is applicable

[2] Andra Oprea, Mariana Sandu, *Instituția fiduciei, o premieră în legislația din România*, ziarul Capital (31.10.2012).

after completion of cadastre for each administrative-territorial unit, followed by open land books (art. 56 of Law no. 71/1996), at the request of the owners or ex officio.

It should be emphasized that the inclusion in the Land Registry is carried out under the authentic notary act, the final court decision, the certificate of inheritance or under any other document issued by administrative authorities in cases provided for by law (art. 888 of the New Civil Code).

Another effect given up by registration in the Land Registry and mentioned in the New Civil Code is the acquisitive, meaning that the purchaser of a real right, which was registered in the land registry on the basis of a legal consideration, is recognized as the holder of the registered right for his own purpose, even if the true holder demands, his author right is removed from Land Registry (Art. 901 paragr. 1 of the new Civil Code).

With regard to usucaption – as a way of acquiring ownership, the new Civil Code has brought fundamental changes. Such was regulated the 5-year tabular usucaption (art. 931 Civil Code), provided that the entry in the land register is made without legitimate cause but in good faith, and the property entered had been possessed for 5 years from the time of enrollment, possession being uncorrupted, thus the ownership right entered in the land registry, without any possibility of contestation. On the other hand, Civil Code regulated extratabular usucaption, when a person possessed the property for 10 years (art. 930 Civil Code), the owner of the property registered in the land registry died (or ceased to exist), or was placed a statement disclaiming property in the land registry or property has not been entered in the land registry. In these cases, in order to acquire ownership the owner is required to have registered an application for registration in the Land Registry before a third person had registered his application for registration, based on a legitimate cause, during or even after the expiry of usucaption.

The new civil code produced significant changes in all areas of regulation, but in matters of obligation these changes are substantial. This paper does not aim at dealing with all these changes, its purpose is to highlight the innovations on the authentic document analyzed as a means of protection of property.

New Code of Civil Procedure repeatedly mentioned the authentic act and its probative value, particularly in property law. Changes brought by its enactment are critically important changes to the previous regulation, from the powers of the courts to the details of legal proceedings, including enforcement proceedings.

Thus, art. 85 regulates the mandate, which shall take the form of a genuine document, if the represented person is an individual – the legislature wanted to protect the interests of the person who has the right to set the limits of the mandate.

Art. 269 redefines the notion of an authentic document, which is a drafted document or, where applicable, received and authenticated by a public authority, a notary public or other person entrusted by a state public authority, in the form and conditions established by law. From a procedural standpoint, the authentic act is proof of identity of the parties, of their consent to the content, signature of the parties and date. Also, art. 270 regulates the proving value of the authentic act, which is full proof against any person, until it is declared as false, regarding the observations made by the person who authenticated the document, under the law, this recognition demonstrating the intention of the legislature to value the authentic act.

Also, the new Civil Procedure Code comprises notes on the revocation of the authentic act (art. 271),on the fact that an authentic document can be used as a model for comparison

(art. 303), precisely because of its authenticity, and regulates the proving weight of a court decision, which is treated as an authentic document.

As a novelty, in the procedure of mediation, arbitration or partition, the Code of Civil Procedure establishes the authentic form, under penalty of nullity, for conventions on the transfer of ownership or constituting a real right on immovable property, the authentic document proving the importance of these regulations especially in the protection of individual property rights.

It is also reiterated the enforcement attribute of the authentic act in art.638 paragr. 2 and art. 639, all statements referring to the existence, requirement, proving value of the authentic act across the entire code of civil procedure, in relation to the protection and exercise of ownership.

The conclusion of the issues raised in this paper is focused on the regulation of the special legislature considered it necessary for the authentic act, representing a vital tool in guaranteeing the exercise and protection of property rights of individuals.

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THE REASONABILITY OF CIVIL PROCEDURE TERMS CONTAINED IN THE LEGISLATION OF THE REPUBLIC OF MOLDOVA

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The legal reform is one of the most vehiculated and actual tendency of the governing of the Republic of Moldova, a perspective wich is asked for alike the european forums and the civil siciety. The imperative of the implementation of such a reform is dictated of objective and subjective factors, and argued through the low efficiency of proper and equitable solutions of cases in the court, the level of corruption in the judicial system, the alarming quotation of cases lost at the European Court of Humain Rights for The Republic of Moldova, becouse of the errors of the courts, in sense of applying the Convencion etc. One of the ambitios projects of this reform is tied to the reducing of the terms of the examination of the cases in the court, project orientated to the annihilation of the factors wich lead to the unfounded delay of the judicial procedures and the disciplination of judges in the sense of harmonisation with the resonable terms of examination civil, criminal and contraventional cases. Even if the reform is aimed at all the categories of the legal procedure, this research is refered only on the civil procedure and on the terms of the civil procedure.

First of all it is necessary to clear up some aspects bound to the encresenment of the resonability used in this study, wich won't be confused with one of the resonable term, but will be understood equal, in it's tipical sense, with the rationality, legality, equilibrated character etc. When we will refer to the resonability of terms, we will refer also to the fixed terms, estamblished by law. Where for, is tried on the apreciation of the context in wich is or not welcome the rigour and exigence with wich the legislator treates the arrangement in time of the activity of the court in the process of examination of different categories of civil cases.

For the coherence and explicitly of the study, we will separate the approaches bounded to the terms established by the civil procedure legislation from those regarding the resonable term (appreciated depending on several criterions established by the legislation into force).

The discretion of the court regarding the establishment of the term of judging a concrete civil case is the primary point of view, but also the reference point. In dependence of the nature of the civil case, the term will be appreciated in a different mode and it's evaluation doesn't impose the judge to indicate a concrete date, at wich he will be forced to

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give solutions on the case, but, in light of some considerations more or less objective, he should formulate an attitude regarding the examination and solving the case, in a decision not just equitable and acording to the law, but usefull in the context of defense the rights of the humain being, fact wich lies indissolubly this solution on the moment of it's occurence.

Throught the legeslative occurence wich appeared in last years, the terms of the civil procedure came to the fore of the procedures. We refer in this case to the terms established for the receiving of the demand in court (art. 168 Civil procedure code of the Republic of Moldova[1] – 5 days), the restitution of the demand (170 Civil procedure Code of the Republic of Moldova – 5 days), the disposal of not accepting the demands (art. 171 Civil procedure of the Republic of Moldova – 5 days), the preparation of the case for the judicial debates (art. 184, Civil procedure code of the Republic of Moldova), the term of the redactation of the motivation of the decision [art. 236 paragr. (6) Civil procedure code of the Republic of Moldova – 15 days] etc.

It is totaly incorrect to appear the problem of too short terms, till it is natural for the person who adreses in the court to have a level of knowledge and certainty refering on the fact of receiving the demand, the actions taken by the court and the going of the procedure in general. On the other hand, we are in the situation in wich, through a generalization, the court is imposed to the same terms for all the categories of civil cases (except those for which are specified more shorter terms), without carring out the standarts of appreciation the resonable character of this terms. If to think logicly, this terms appear to be adequated, but against with a concrete case, this terms are usually irrational and ineficient.

Concerning the term of 15 days, established for the redactation of the motivation of the decisions, this is a novation of the Civil procedure code of the Republic of Moldova, wich was introduced throught the Law nr. 155 from 5 iulie 2012, wich entered in force at 1 december 2012, and had the purpose of the eficiency and optimisation of the activities of the courts in the civil procedure. This term is twice shorter that the term accorded by the romanian legislation, for example, the art. 426 paragr. (5) of the Civil procedure code of Romania[2] (in force from 15 february 2013) establishes that the decision will be written and signed in 30 days from the day of the pronouncement. Our legislator argues the specification of the term of 15 days throu the fact that writing the motivated decision is necessary just in tree situations, expresly established by the civil procedure legislation, wich are: the parties expressly demand it, the parties appeal or if the decision will be recognised and executed in another country, like it's expresed in the art. 236 paragr. (5) Civil procedure code of The Republic of Moldova, in this mode, the activity of the courts is reduced and the sufficiency of the introductive part and of the disposal of the decision for the cases in wich the motivation in not necessary, makes economy of time for the judge, who have more time to motivate the decisions in wich the motivation is necessarily.

The marking out of the benefits and disadvantages of the motivation of the deciions don't have such a big importance, but the fact that our legislator can be induced in error concerning the suficiency of the term in wich the decision shoul be redactated, in the cases in wich this term is not interpretated regarding other civil cases, but regarding the perioud needed in order to motivate a decision completly and based on the law. The problem

[1] Civil procedure code of the Republic of Moldova, nr. 225 from 30.05.2003, Official Monitor nr. 111-115 from 12.06.2003.

[2] Civil procedure code of Romania from 01.07.2010, Official Monitor nr. 485 from 15.07.2010.

appeares in complicated cases, wich have as an object civil actions with a lot of parties or with a lot of demands. Such cases require a bigger time for the motivation and the practice already demonstrated the fact that this term doesn't cover, in all cases, the real of judges. It is ungratefull to consider that two weeks are enouth for the redactation of a decision, no matter what is the object and the level of complexity, from the moment in wich the judges activity doesn't simply refer to isolated cases, but represents the judges implication in a lot of procedures, the coordonation of activities and procedural acts, organisation and manage of the assizes etc. This is why, we think that the term of 15 days for the redactation of the motivated decision is way too little burdesome for the judge, and this fact could lead to faults, superficiality, formality and a not qualitative practice.

Beyond all, from the judicial system is required justice, but justice can't be offered without equity, truth, balance and quality. All this require a lot of thinking and a profund analisation of all the factors and circumstances wich lead to a legal solution, valid and argued on the case. In the situation in wich the judge is constrained to realize a procedural act in a perioud fixed of time, a part of his attencion is focused on the framing in that time and this can endanger the quality and wholeness of the decision or of the act elaborated/executed.

It should appeal to a high level of culture and juridical conscience from the judge, in order that the problem of rezonable term of the examination of a civil case not to homogenize the solution for all the categories of civil cases, but to derive from an eficient, qualitativ, conscientious activity, based on the the judge's responsability, to be folded on the specific and complexity of the case, to respond to legal interests of the person who adresed in the court, and, finally, to comply with the rezonable term.

Even if there are some reasonable facts for the specification of lower terms in the cases for wich the term of examination is specified, not always is posible to respect this terms, becouse of some objective reasons and wich don't depend on the behaviour of the judges. For exemple, in the cases examined in a special procedure, for wich the law expresly establish the term in wich the judge is engaged to pronounce on the requirements of the petitioner. In the cases of the examination the problems on the forced hospitalization, established by art. 310 Civil procedure code of The Republic of Moldova, the term is of tree days from the day of the deposal of the demand, but in the cases of the deposal the demands of internment in the psychiatrical stationary, without the person's agreement (demand wich must be depose in 72 hours from the moment of the internment in the stationary), the court must pronounce in the perioud of 5 days from the moment of beggining the process, adopting a decision on this case, according to the norms established at art. 314 paragr. (1) and art. 315 paragr. (1) and (3) Civil procedure code of The Republic of Moldova. The reduced terms absolutely argued from the moment in wich the judge adopts a decision regarding the restriction of one of the fundamental rights, the right of individual liberty and the safety af the person, established by aticle 25 of the Constitution of The Republic of Moldova[3]. The limitation of this right can be done just in accordance to the law and the Constitution, wich specifies the fact that a person can't be detained more than for 72 hours, and the internation in a psychiatrical institution, without the agreement of the person, is equal with the perioud of detencion. The forced hospitalization in other medical institutions affects the right of individual freedom of a person and the judge's decision, wich has the

[3] Constitution of The Republic of Moldova 29.07.1994, Official Monitor nr. 1 from 12.08.1994.

force to assure the right of personal safety, according to the law, must interfere in the shortest time posible, in order that the state of uncertainty in wich the person is, to be unable to limit the rights without a legal basis.

A lot of problems and dissatisfaction brought The Chapter XXX[1] of The Civil procedure code of The Republic of Moldova, introduced throu The Law nr. 167[4], refering to the applying of the means of protection in the cases of domestic violence. One of the problems is the term in wich the court should pronounce in a conclusion of admiting or denying the demand of applying the means of protection, this term is just of 24 hours from the moment of receiving the demand. Even if this chapter is placed among the special procedures, wich a not based on a problem between parties, the fact that the parties invoke the application of some violence acts and both the parties have a procesual quality (aggressor and victim), leads to the ideea of a problem, in wich each part has the right to bring evidence from there own point of view and position and this creates contradictions. Besides the facts presented by the victim and aggressor, the court (how results from the art. 318[3] paragr. 1 şi 2) will administrate evidence, will inform the police and will ask for the imformations regarding the case, also the court can ask the police or the social assistance to present a report, in order to characterize the family and the aggressor. From this results that the term of 24 hours becomes too shrinked and it's imposible for the court to manage to get all the information needed and also study the case in it's complexity, taking the account of the fact that the means of protection wich will be applied in the cases in wich the court will accept the demand of the victim, will affect some esential rights of the aggressor (an absolutely unadequated term for giving a civil processual quality from the moment wich leads, volens nolens, to the presumtion of an act of aggression as ascertain from the moment of the demand), for exemple the right of property and other rights on the objects, especially the right to live in his oun house and the right to communicate with the relatives (children) etc. Each mistake or superficial approach from the court can lead not just to legal problems, but serious repercussions to the members of the family and the relations between them.

We think that the implementation of a resonable term for examination of cases of domestical violence in the family, for wich is demanded the applying of some means of protection is opportune and this will reduce the number of unequitable decisions. Can be excluded the situation in wich the victim demand for the help of the court, but doesn't have some evidence in order for the court to have a motivation in the situation of applying of some means of protection, situation wich can lead to the denyal of the demand, becouse the laying other the examination is imposible in the situation of such reduced terms. This perioud was introduced, probably, becouse of the imediate intervention of the court in the cases of domestical violence and counteract the abusive behaviour of the aggressor, but the insufficiency of evidence can affect, in the circumstances regarding the time, the right of acces to justice, becouse the civil procedural legislation, in the chapter regarding the means of protection in the cases of domestical violence, doesn't establish any exceptions from the rule that a person can't adress repeatedly to the court with the same demand, the same pretencions against the same person for a case wich was resolved by the court. This means that the victim would have the posibility to adress repeatedly only after the happening of another fact, wich will modify the object of applying the means of protection.

[4] Law nr. 167 from 9 julie 2010.

Another category of civil cases, for wich the law prescribes reduces terms and is examined in a special procedure, is that regarding de termporary ceasing or withdrawal of the license/authorisation wich characterize the entrepreneur activity. According to the art. 343^4 Civil procedure code of The Republic of Moldova, the court will examin the demand of the competent authority (the authority of the public administration and the abilitated institution, established by law, with prerogatives of reglementation and cotrol), in the term of 5 working days from the deposal and adopts a decision of granting or denying the demand. The problem consists in the fact that this categories of cases, althou are examined in a special procedure, are based on a problem and misunderstandings between the competent public authority and the person wich deploys an entrepreneur activity. The contradictory element is desclosed throught the material interest of the petitioner (to suspend or withdrawal of the licence/authorisation of an enterprise), but also the holder's of the licence or authorised person's material interest, who have the quality of interested persons in the court. The contradictorial character leads to the increasement of the term to present evidence, some procedural acts and term necessary for the adverse participant to defend himself, to present evidence for the court etc.

Those two cases lost by The Republic of Moldova al the European Court of Humain Rights (Case Bimer S.A. vs. R. Moldova from 2007 and Case Megadat.com S.R.L. vs R. Moldova from 2008) established the fact that The Republic of Moldova broke the stipulation of art.1 of The First Protocol of The Convencion, throu denying to prolong the licence for the activity of entrepreneur, this puts into evidence the fact that the acts refering to the prolonging, ceasing, withdrawal of the licence of entrepreneur affects the right of property of a person and this leads to the necessity of defence of the person endorsed in a procedure based on the contradictorial principle, that means that the examination of this cases should be done in common procedure and in resonable term, depending on the situation and the complexity of the case.

The simplified procedure shoul be named an urgent procedure, if to take into account the term established for the examination of the demands received in this procedure. Art. 350 paragr. (2) Civil procedure code of The Republic of Moldova establishes that the judicial decree is reliefed by a judge in a perioud of 5 days from the day of the demand. The debtor has a perioud of 10 days for tender his motivated objections wich were granted throu de judicial decree, fact established by art. 352 paragr. (2) and in the term of 5 days from the objections the court must decide to allow or to deny the objections, according to art. 353 paragr. (1). This term established for the examination of this kind of demands is satisfactory, becouse the procedure is simplificated, the presence of the parties is not necessae, the judicial debates are not included, and this means that there can't be some delays becouse of the lack of presentation of some evidence. The judge will pronounce on the demand just in accordance with the presented evidence, wich is justified or not. Another plus is that the judicial decree musn't be motivated, according to art. 351 Civil procedure code of The Republic of Moldova, this is why it's posible for the judge to manage in the perioud of time mentioned.

Another term fixed by the law is the term needed for the preparation of the case for judicial debates in appeal, this term is of 30 days from the day of receiving the file. It is necessary toput into evidence the fact that this term is different from the term accorded by law for the preparation of the judicial debates in the court, wich is set for 5 days from the

date of the acception of the demands. The term of 30 days, set in art. 370 paragr. (1) Civil procedure code of The Republic of Moldova involves also the hole procedure of taking some actions of preparation the case for the debates. This term is sufficient enough for taking the needed means in order to make posible the pass on the judicial debates in appeal, on the date set. The difference between the term accorded to the court and to the appeal is welcomed, becouse the preparation of the case for the judicial debates in the court can'tbe limitated on a perioud of time, becouse of a large variety of civil cases and the behaviour of the parties and other participants in a trial. A good preparation of the case for the debates leads to a good result and this has a big resonance for the court and discipline in a civil procedure, especially when the civil procedure legislation forces all the participants to present all evidence in a fixed term, according to art. 122 paragr. (4) Civil procedure code of The Republic of Moldova, with the exceptions established by art. 204, this means that is more favourable the situation in wich the preparation of the case for the judicial debates runs as much time as needed for a proper examination, than the situation in wich the judicial debates will start without a preparation of the case, in this situation the participants will be forced to foot the bill for a lot of times, becouse of the delays.

In appeal, the actions of preparing the case for judicial debates are based on a file already examined by a court, fact wich imposes a smaller volume of work, even in the situations in wich, according to art. 122 paragr. (4) and art. 372 paragr. (1) Civil procedure code of The Republic of Moldova, in this step of the judicial brench is posible the presentation of some new evidence and some new claims. This argues the argumentation of fixing a time limit in wich the case should be prepared for the judicial debates and the clarifying of questions regarding the determination of the time limits of appeal.

The term established for the redactation of the decision in appeal is the same as the term of the redactation of a decision in the court and regarding the reasonability of this term, we made before the conclusions.

The term of examination of a recourse is not fixed, except the recourse against a judicial closure, wich can't, according to art. 426 paragr. (3) Civil procedure code of The Republic of Moldova, overdraw the perioud of 3 months. It is not a term wich will put into difficulty The Court of Recourse, becouse the judicial closures are acts wich don't expres the judges decission on the case, and in the situation in wich this acts are impugned separatly from the solution of the case, in most of the times the solution on the case can't forego the solution of the recourse declared against a judicial closure, this is why a too bigger term will affect the term of the examination of the case and will serve as a cause of delaying the process.

The exposed ideas creates the impresion of trammeling the court into examination of civil cases, even if all the terms mentioned represent some exceptions from the rule of resonable term. The idea of a resonable term is established by art. 192 Civil procedure code of The Republuc of Moldova, wich doesn't define this term, but establishes the criterionsof appreciation of this term, wich are: the complexity of the case, the behavior of the participants and of the court and the importance of the process for the person interested. This criterions must be analyzed every time when appears the problem of overdrawing the reasonable term by the court for cases which concerned some procedural actions or some procedures for which is not specified a fixed term.

The Law nomber 87[5], wich establishes the reparation by the state of the prejudice caused throu the breaching of the person's rights of a resonable term or of the right of execution in a resonable term of the judges decision, offers the posibility of the persons, who were affected by the passing of the resonable term, including in the cases examined in the court in a civil procedure, and expresses the procedure in wich this pretentions will be examined. The Law specifies, in art. 2 paragr. (3) that the prejudice caused throu the breaking of the right of judging in a resonable term of a case will be repaired even if the court is not guilty, and this fact should impose the judges to respect the tetms established by the law and be aware of the fact that when the terms are involved, the adjourning of the examination of the case, the breakes and other aspects will can couse the delay of the procedures. Very often happens that the court, becouse of an excessive tolerance, ofers them an extra time for presenting the evidence, adjourns the examination becouse one of the parties, being legaly informed, didn't came etc. All this fact, toghever with the irresponsable behaviour of the judges, make a bad image for the justice in general, harm the budget of the state, becouse the state is forced to repair the damage. Sometimes, the long perioud of time needed for the examination of the cases is becouse of the overcrowding of the courts, wich can't face the number of demands and procedures, and becouse of the terms fixed, place there stake on the cases in wich the law doesn't establish fix terms. That's why, metaphorical speaking, all the eggs breake by the head of the judicial system, wich is uncompetent, uncapable to adopt a solution in a civil case and the intentional delay of the procedures. In this cases, it's not taked into account the objective factors, wich are the general specialization for all judges, the nomber of cases in the court, the physological and intelectual fatigue of the judge etc.

We recollation about the newness brought by The Law number 88 from 2011[6], wich entered in force with The Law 87, and wich introduced the fact regarding the posibility of acceleration of the procedure, if the participand adresses a demand, established by art. 192 paragr. 1^1-1^2, solution wich was welcome and according to wich the court is informed about the ibterest of the parties to examine the civil case in more redused terms. But there are some risks to be puted into evidence the relations between judges, becouse the examination of the demand to examine the case in redused terms is made by another judge or a full court, from the same court. This risks can be brushed aside by some informal pointers, wich will be enouth to adopt a proper solution.

[5] Law nomber 87 from 21 april 2011, in force from 1 julie 2011, wich establishes the reparation by the state of the prejudice caused throu the breaching of the person's rights of a resonable term or of the right of execution in a resonable term of the judges decision, Official Monitor nr. 106-109 from 01.07.2011.

[6] Law number 88 from 21 of april 2011 for the modification and completion of legislative acts, Official Monitor nr. 106-109 from 01.07.2011.

THE RIGHT OF EASEMENT ON GOODS FROM THE ENERGETICAL FIELD

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Abstract
The servitude right size on energy related goods domain presents an interest not only in terms of legal status and termination of the establishment, but also in terms of their objective reality. Acquiring the subjective right of servitude on a good, interests the acquirer, but not the mere possibility possessions and uses thereof.

Keywords: energy goods, right of easement, posessions, energetical field

The dimensions of the real rights on real energy goods represents a complex intersection of the undefined legal individualization wich makes it impossible to accurately own or set its limits and liability. Achieving economic aims of a particular field involves various goods that make the subject of legal relations. For the purposes of the provisions of Art. 286 of the Civil Code of the Republic of Moldova[1] properties are likely closer everything individual and collective property rights. In this regard we must distinguish the goods like the object of the legal material civil possessions. Goods as material object are the things that are tangible objects that may exist in relation with civil rights and obligations.

Broadly the energy goods should be designed as all the tangible things and economic rights which are the subject of the legal power. In this respect we distinguish that the object of the legal goods are material object as subject and the legal actions or legal inactions. This concept emerges from O.S. Ioffe's legal relationship theory[2] showing that the legal relationship to be conceived not only as the behavior of the obligation. O.S. Ioffe indicates that the object of each action must be understood as something on which the action is directed. Depending on the object of the legal relationship it goes along to be considered something that it is directed to, civil rights and obligations of the subjects. The author specifies that if the rights and obligations should be directed to something that did not have its own subject, they would have lost any real meaning.

The examination in civil law of any matter relating to ownership issues directly involves the legal status of the property as a legal category objective.

Studying this issue requires determination, establishment, and where possible realization of the categories of energy goods. Because an exhaustive enumeration and classification is impossible, we consider it appropriate in this paper to specify the categories of energy goods, which according to the legal norms and the criterion subject category are: goods owned by the consumer, company (manufacturer, carrier, provider) of electricity, the state or municipalities.

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[1] Civil code of The Republic of Moldova nr.1107 from 06.06.2002.

[2] Bordian Mariana. Ownership of energy related goods.// Integration through research and innovation. Scientific conference of 26-28 september 2013. CEP USM. Chisinau-2013, p.210.

According to the Law on Energy[3] the property of the energy can be public or private. In the context, we mention that the state ownership can also be private property, considering the goods which the state can not alienate in any form, inalienable meaning[4]. There are state property and are not subject for privatization on power transmission grids and energy targets of strategic importance.

The legal system of property law rules is a subject to the state of the property. Although ownership is considered an absolute right, it is limited by other rights. Accordingly, the legal relationship as a key needs to be materialized according to its category. The legal regime of energy related goods in particular is regulated by the Law on Energy[5]. Here are reflected the real rights on real energy sector.

The legal analysis of energy related rights over the assets is necessary to determine how accurate are the extent of liability conditions. The real rights are of particular concern to researchers, but in the energy goods case, the interest to this subject is conditioned by the frequent disputes arising between landowners on the one hand and the owners or beneficiaries of the goods that deliver particularly natural gas and electricity on the other hand. The legal regime of property energy, unlike other categories of goods, is governed not only by the rules of the Civil Code[6], but by the following laws as well: Law on Energy of the Republic of Moldova, 1525 from 19.02.1998[7] Moldovan Law on Electricity, No. 124 of 23.12.2009[8] Moldovan Law on Natural Gas, No. 123 of 23.12.2009[9], the judgment of the National Agency for Energy Regulation on the approval of the supply and use of electricity 393 of 15.12.2010[10] Decision of the National Agency for Energy Regulation on the approval of the use of natural gas supply and 415 of 25.05.2011[11].

The moldovan legislation distinguishes as real rights: the right to property, the right of usufruct, superficies right, easement, right of use and habitation, the right of pledge.

The importance of real rights on real energy goods manifested by the variety acts regulate these relations. According to the principles, the special rules must not contradict with the general rules.

The establishment, exercise and termination of real rights over property are governed by the Civil Code[12]. A special interest is the easement right, because the energy related goods in most cases are the specific objects of the legal easement.

Starting from this idea we specify that the art. 431 of the Civil Code stipulates in a exhaustive way the modes of establishing servitude. So according to the law there are three

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[3] Law on Energy of the Republic of Moldova, no.1525 of 1998.// Official Monitor no.50-51 of 04.06.1998.

[4] Bîrsan Corneliu, Stătescu Constantin. Civil law. General Theory of obligations. Edition ALL Bucureşti. 1996. 414 p.

[5] Law on Energy of the Republic of Moldova, no.1525 of 1998.// Official Monitor no.50-51 of 04.06.1998.

[6] Civil code of The Republic of Moldova nr.1107 from 06.06.2002.

[7] Law on Energy of the Republic of Moldova, no.1525 of 1998.// Official Monitor no.50-51 of 04.06.1998.

[8] Law on electricity, of the Republic of Moldova, no.124 of 23.12.2009 // Official Monitor no. 23-24 of 12.02.2010.

[9] Law on natural gaz, of the Republic of Moldova, no.123 of 23.12.2009 // Official Monitor no. 23-24 of 12.02.2010.

[10] Decision of the National Agency for Energy Regulation of the Republic of Moldova, on the approval rules for supplyand use of electricity no.393 of 15.12.2010, // Official Monitor no. 59-62 of 15.04.2011.

[11] Decision of the National Agency for Energy Regulation of the Republic of Moldova, on the approval rules for supplyand use of natural gaz no.415 of 25.05.2011, // Oficial Monitor nr. 131-133 of 12.08.2011.

[12] Civil code of The Republic of Moldova nr.1107 of 06.06.2002.

estabileshed modes: the destination set by the owner, by acquisitive prescription or by legal acts.

But law No. 123 on gas and Law No. 124 on electricity, establishes the right of easement mentioning that over the land and other private assets, the transmission system operator, distribution system operators with the owners, the the law, the duration of the construction works, rehabilitation, refurbishment, respectively, operating and maintenance of gas networks and power grids have the right of the underground way, surface or overhead for the execution of the land at location of natural gas networks for intervention during retrofitting, repair, overhaul and eliminate the consequences of failure, and to access their place of location.

Ownership demarcation energy decisions are made by public administration, namely the National Agency for Energy Regulation. The property boundary point is set at a physical element (switching device, clamps, terminals, bushings, boxes, terminals, etc.). This allows effective separation of electrical network operator's electrical system (gas) to the final consumer. For industrial consumers the point of demarcation shall be determined by the agreement between the customer and the network operator and is recorded in the act of separation that is attached to the electricity supply contract. For domestic consumers is not mandatory drafting and signing of the boundary act. We specify that although it's the consumers property, he is not entitled to refuse the equipment to be installed on the property, therefore, most of the time they are on the property of another person, or entity. Moreover, the domestic consumer is responsible for the integrity of the equipment, but in reality it is impossible actually to achieve this requirement.

From the above we conclude that the ownership relations in the energy sector are regulated by laws issued not only by the legislature, and other public institutions, and according to the delimitation of states power, they do not belong in this category. However, the public administration also has legislative power.

From this it follows that the energy domain property, every time is on the personal property and whenever it is necessary to intervene for certain works, the owner's request has to be asked that in the event of unjustified refusal to bear the legal consequences.

We ask ourselves what is the legal relationship of servitude where electricity networks in the energy sector as the goods are located on a subservient land after acquiring its ownership of the land.

Consequences of causing any damage to the energy domain goods were predictedly regulated energy field predicted by Government Decision 514 of 23.04.2002 on approval of the Regulation on the protection of electrical networks. Thus the mentioned regulations ensure the integrity rules of the electricity networks, creating their normal operating conditions and accident prevention. The Regulation shall apply to the design, construction and operation of power grids, and the working performed near power grids.

In fact general principles and conditions for compensation shall be governed by the Civil Code, but thanks to the specific property of energy goods they are legally protected including through the normative act issued by the executive organ. None of normative acts mentioned do not establish specific category on the realization of the legal power over the assets of another, when we have real material object as energy goods. If we admit that the protection of electrical networks is ensured by the executive decision, we have to recognize that the protection of land and property that are located or incorporated in the energy sector

assets are protected by the provisions of the Civil Code. Accordingly, if the landowner did not know of the existence of underground electrical networks, that was not a legally established, it should not bear responsibility for the damage caused to the owner of power grids because, as previously mentioned, the destination set by the owner it is the right of easement. Consequently, if the landowner did not know, so it was not previously established, a servitude will not be liable for any damage to the operation of his land. In judicial practice, however, the court finds the essence constitute only servitude and arguments that confirm the existence of injury without legal finding of servitude. For example, in the civil case, file nr.2-695/2010 District Court Ciocani, Chisinau[13], at the electrical grid enterprise against V.V.. the court held in the grounds of obligation to repair the damage. V.V. recognized that he held sewage works on the neighbourhood territory, which is owned by N.G., but didnt knew of the existence of the networks. The court found that neither N.G. was not in the legal relations of servitude in Electric Networks. It follows that the damage was caused by an agent, but even this could not have been aware of the existence grids buried on land. The court made reference to legal norms that, according p.17 Regulation to protect power lines 514 from 23.04.2002, all works are carried out in radius protection zone are the prior written consent of the organization providing energy and electricity, and according to p.18 d) of the Regulation, the request is made 12 days before beginning work. The court thus found that none of the mandatory requirements have not been met by the defendant, the circumstances which had the effect of prejudicing the supplier. It would have been appropriate for the court to ascertain the origin of the legal relationship occurred because of the provider, under civilian rule establishing servitude to verify whether there was such a report.

Moreover, the Regulation provides that local government bodies or other legal persons, by authorization of the construction of houses, buildings and structures are required to coordinate in advance with the enterprise grids the possible places to locate these targets and materials on the actual placement of grids prepared in the established and businesses must keep the power grids that are required to provide local public authorities and landowners interested in the information about the actual location on the ground grids.

In the context, the Regulation also provides that effective placement must be drawn on the maps grids landowners that keeps the cadastral engineer from the local government or land surveying organizations. If the boundaries of the land use will change, the local government will inform the electricity networks businesses. But is the legislator never specified that the land owner must be informed and required to read the scheme location grids and give consent for the establishment of servitude, this would be legalized. So, the provider or the local public authorities should be required to ask the owner of land the agreement to the constitution servitude, or it follows to modify the rule that establishes servitude and by law, as the right of superficies. It follows that the land owner has to know a scheme location, or request information from the enterprise or Institute concerned. In this situation it seems illegal the use of land for siting electrictricity without a legally constitute reportl. In the case referred the court had to check some inventory that was conducted and whether the institution responsible with the grids notified the owner of the land under private signature on existing easement at the time of acquisition of the right of private ownership of land.

[13] www.Jci.justice.md

The regulation regulates the procedural including establishing conditions before work, or, respectively, anticipated recovery easements would stipulate mandatory information and procedural rules and the adjustment of the legal situation at the time.

These regulations were to be confirmed by the rules defined by the procedure to bring the owners energy goods wich are under/or on his land and the rights over them. Thus, due to the fact that the legal status of energy related goods is governed by special laws they were to be read in conjunction with the regulations governing the powers of the local and central public administration authorities.

In conclusion, the servitude right size on energy goods is of interest not only in terms of legal status and termination of the establishment, but also in terms of their objective reality. The acquiring subjective right of servitude on a good presents interest for the acquirer, but not the mere possibility possessions and uses thereof.

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THE MECHANISMS OF ADMINISTRATIVE DOCUMENTATION IN ELABORATING OF ORGANIZATIONAL DOCUMENTS AND DOCUMENTS OF DISPOSITION

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Abstract

This article is a study of the problem of administrative documentation in elaboration of the organizational documents and those of disposition, which was shown not only as a stage of the decision-making process but as an activity that requires knowledge in various fields and involves the use of certain mechanisms. Relevance and actuality of this topic consists in the fact that organizational documents contain rules on the organization and functioning of public administration authorities and represent local regulatory laws. On the other hand, due to the fact that public administration authorities have to solve everyday a lot of various problems, documents of disposition are the main tools which help them to achieve their aims.

A qualitative administrative documentation and a correct use of documentation mechanisms by the subject who will elaborate a document of disposition or an organizational one, will finally determine its quality. That's why the use of inaccurate and incomplete information in elaboration process, can have as a consequence not only worsening the quality of management and unjustified extension of time for make correct decisions, but also appealing the elaborated document in the administrative court.

Key-words: document, organizational document, document of disposition, administrative documentation, mechanisms of administrative documentation, electronic mechanisms of administrative documentation

Central and local public administration authorities have to process and operate with a large number of various documents, activity that has become a routine, but also is an indispensable for realization of an effective documentation which is important for both organization the activities of public authorities or adoption of administrative decisions materialized in administrative acts. The complexity and heterogeneity of these documents is determined by the multipolar nature of the problems which public administration have to solve daily. In the following, we will define disposition and organizational documents, we will specify administrative documentation mechanisms, including the electronic ones, and we'll analyze legal acts which regulate the activity and mechanisms of documentation in Republic of Moldova.

The term "document" is a central, fundamental one for the science of administrative documentation. It reflects the whole activity of collecting, analyzing, synthetic processing, storage, dissemination and use of information fixed on a physical or, more recently, digital support. This term is widely used in almost all areas of public activity, and documents are

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playing a crucial role in any organization, institution, body or local public administration. Document can be defined as information recorded in any way, on any material support adopted by any individual or entity, in any organization, for use in their own work"[1], in our case, we are talking about documents adopted by public administration authorities. Documents have a double essence: informational and material, that determines its characteristics: operational and informational. So, first determine the integrity and continuity of the document depending on the material support's resistance to harmful mechanical, thermal, biological factors, etc, and the latter determine document's ability to transmit information fixed on a particular support and to create certain legal effects according to their nature[2].

Typology of documents is so diverse that the possibilities of classification and subclassing can be hardly represented in a single schematic structure. However, from the point of view of public administration authorities' activity, it is relevant classification of documents according to their nature:

1) **Documents of disposition (decision, disposition, order, instruction)** according to the doctrine, these are a part of the executive activity of public administration authorities, through which they can decide on various issues related to their competence[3].

2) **Organizational documents (Statutes, Regulations)**: Resolution of the Government of Republic of Moldova on approving Rules of preparation of organizational and dispositive documents and Instruction-type on secretariat activities in central public administration bodies and local administration of Republic of Moldova establishes that statutes and regulations are some acts or sets of provisions with official character through which is regulated the purpose, structure and functioning of an organization, association etc.[4]

3) **Informative documents (informative and explanatory notes, protocols, expert opinions, etc.):** communicate certain information, which catalyze the adoption of decisions, (for example, they can initiate management solutions and can be an incentive to act in a certain way, also, they do not contain direct orders or instructions. They play an auxiliary role in relation to organizational documents and those of disposition[5].

Also, we can classify documents by the authority which adopt them, so we can distinguish: the documents adopted by the central public administration authorities (ministries) and those adopted by local authorities of level II (deliberative: District or Municipal Council, Executive Committee of Autonomous Territorial Unit with special status Gagauz-Yeri; and executive ones: President of the district, city mayor and governor of Gagauzia) and of level I (deliberative: Local Council of city, village (community); and executive authorities-mayors).

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[2] http://www.unibuc.ro/ebooks/stiinteadm/secretariat/.

[3] Кирсанова М. В., Аксенов Ю. М. Op. cit., p. 102.

[4] Hotărârea Guvernului pentru aprobarea Regulilor de întocmire a documentelor organizatorice şi de dispoziţie şi Instrucţiunii-tip cu privire la ţinerea lucrărilor de secretariat în organele administraţiei publice centrale de specialitate şi ale autoadministrării locale ale Republicii Moldova nr. 618 din 05.10.1993// B. Of. al Republicii Moldova nr. 000 din 05.10.1993.

[5] http://www.edou.ru/enc/razdel23/?COURSE_ID=4&LESSON_ID=70#1.

Organizational and dispositive documents adopted by central public administration authorities and by local ones of level I and II, play a triple role in their activity and are meant to: ensure the realization of the executive power[6]; to give birth, to amend or to annihilate rights and obligations (if we refer to documents of disposition) to organize the internal activity of the authority (in the case of organizational documents).

Multifunctionality of these documents inevitably implies the existence of a legal framework governing the procedure of their elaboration and mechanisms of administrative documentation, which alongside with doctrine, facilitate substantially the activity of civil servants who elaborate organizational and dispositive documents or who realize the documentation. Organizational documents are regulated by the Labor Code of the Republic of Moldova, Law of Local Public Administration no. 436-XVI from 28.12.2006 and Law of Framework-statute of the village (commune), city (municipality) no. 436-XV of 06.11.2003; and documents of disposition are regulated by: Law of Government no. 64-XII of 31.05.1990, Law of Local Public Administration no. 436-XVI from 28.12.2006, Law of Normative Acts of the Government and other central and local public administration authorities no. 317-XV from 18.07.2003, Law of the Special Legal Status of Gagauzia (Gagauz-Yeri) no. 344-XIII from 23.12.1994 and the Resolution of the Government of Republic of Moldova on approving Rules of preparation of organizational and dispositive documents and Instruction-type on secretariat activities in central public administration bodies and local administration of Republic of Moldova no. 618 of 05.10.1993.

The most important provisions relating to documentation activity and the mechanisms used to achieve it, is contained in the Law of Normative Acts of the Government and other public central and local administration authorities and in the Resolution of the Government of Republic of Moldova on approving Rules of preparation of organizational and dispositive documents and Instruction-type on secretariat activities in central public administration bodies and local administration of Republic of Moldova.

The first one includes important provisions on administrative documentation mechanisms applied to the preparation of dispositive documents in the specialized central public administration authorities, in the authorities of autonomous territorial unit with special legal status and in local authorities. These provisions are relevant for the civil servant who is involved in administrative documentation and in elaboration of the draft document; as well they are important for the whole authority. This law regulates the entire process of elaborating normative acts beginning from the project and finishing with its publication. The law emphasizes the need for correlation and concordance of elaborated documents with constitutional and legal provisions, with resolutions and orders of the Government. Chapter VI of Title II[7] are regulates directly the powers of the working group which is responsible for elaborating draft document, which will then be submitted for adoption to the competent authority. This law determines that the elaboration process must be preceded by a documentation; by a scientific and sociological analysis, with the purpose of gaining necessary knowledge of economic and social realities which have to be regulated; by analyzing of legislation history in the field which will be regulated, of the

[6] Creangă Ion. Curs de drept administrativ pentru studenții facultăților de drept. Volumul I. – Chișinău: Ed. Epigraf, 2004, p. 214.

[7] Legea privind actele normative ale Guvernului şi ale altor autorități ale administrației publice centrale şi locale nr. 317-XV din 18.07.2003// Monitorul Oficial al Republicii Moldova nr. 208-210 din 03.10.2003.

practice of legislation's application; by analyzing similar regulations in foreign law. In documentation process can be used such sources as: the practice of the Constitutional Court in the domain which will be regulated by the future document; jurisprudence, including the European Court's of Justice jurisprudence; and legal doctrine. The results of the documentation realized on the project's planning stage will be presented together with the draft document in an annexed folder.

Resolution of the Government of Republic of Moldova on approving Rules of preparation of organizational and dispositive documents and Instruction-type on secretariat activities in central public administration bodies and local administration of Republic of Moldova is called to improve the activity of documentation and to determine the basic requirements to the administrative activities' document and to the organization of work with documents. But perhaps the most relevant in this context are the provisions relating to the preparation and adoption of certain types of dispositive documents such as: order, decision and disposition. So, civil servants who are responsible for preparing the draft document may use different mechanisms: analysis of all documents that relate to the topic of the document which will be elaborated; analysis of the precedent; or consultation of specialists in various fields[8]. Overall, this law contains the most developed and detailed provisions on dispositive documents and establishes specific rules that must be taken into account in drafting these documents, compared with the other acts listed above.

In conclusion, after the analysis of normative acts listed above, we can say that although organizational documents and those of disposition enjoy of legal regulation, however, the current legislation does not provide a clear definition of administrative documentation mechanism. The legislator pays attention to the stages of drafting documents devices and is neglecting the documentation stage, which is essential; and, at the same tame, does not regulate the sources that can used by decision maker or by civil servant who is responsible for documentation. However, we propose to enumerate and analyze what are the mechanisms of administrative documentation used in drafting the two types of documents addressed in this article.

One of the most commonly encountered types of organizational documents in public administration authorities' activity is the **Regulation on organization and functioning of a public administration authority** or Internal Regulation as it is nominated in labor law doctrine. According to art. 198 of the Labor Code, it represents a legal document that is elaborated in each organization after consultation of employees' representatives (in this case employees are civil servants) and is approved by employer's order (disposition, decision). It will be attached to the order or decision, as an annex[9]. In drafting Regulation are usually used: **normative mechanisms, precedent and practice**. Thus, civil servant who realizes the documentation activity, first consults the normative acts which regulate the activity of the respective public administration authority. He/she can also consult other similar documents drafted by public administration authorities of the same level from

[8] Hotărârea Guvernului pentru aprobarea Regulilor de întocmire a documentelor organizatorice şi de dispoziţie şi Instrucţiunii-tip cu privire la ţinerea lucrărilor de secretariat în organele administraţiei publice centrale de specialitate şi ale autoadministrării locale ale Republicii Moldova nr. 618 din 05.10.1993// B. Of. al Republicii Moldova nr. 000 din 05.10.1993.

[9] Legea privind actele normative ale Guvernului şi ale altor autorităţi ale administraţiei publice centrale şi locale nr. 17-XV din 18.07.2003// Monitorul Oficial al Republicii Moldova nr. 208-210 din 03.10.2003.

Moldova or from abroad, or organizational documents drafted previously in the same authority.

Law of Normative Acts of the Government and other public central and local administration authorities establishes that drafting **documents of disposition,** according to their importance and complexity, should be preceded by the activity of scientific and sociological documentation and analysis for gaining necessary knowledge of the social and economic realities to be regulated, the *history* of legislation in the field which will be regulated, the practice of application of the legislation in force, and similar regulations of foreign law[10]. Drafting documents of disposition in public administration authorities is a complex process involving the completion of certain steps and achieving certain activities prior to, simultaneous and back issue. Also, this process supposes the involvement of some specific administrative documentation mechanisms, such as:

1) **Normative mechanisms** – which involve legal acts examination to determine competence of the authority and to ensure the legality of the document;

2) **Statistics** – which involves statistical analysis of certain phenomena to be regulated by the document, conducting studies and statistical calculations or the use of statistical data offered by specialized authorities;

3) Make certain **studies** when there is a need;

4) The use of certain **accounting or technical expertise**, etc. or **investigations** that contain explanations and conclusions;

5) Preparation of **reports** which reflect problems in the field of research and contains data and, sometimes, proposals;

6) **Regular press**[11]**;**

7) Analysis of the **opinion** or **report of the expert committee of the City, Municipal or District** Council;

8) **The report or opinion of City Hall and/or the relevant subdivision of the deconcentrated or decentralized public service**;

9) **Summary of recommendations received during the public consultation**[12];

10) **Archives of the authority and the State Archives Fund**;

11) **Doctrinal mechanisms** – which require a series of general and specialized bibliographical research;

12) **Precedent –** which means the activity of documenting the provisions previously developed within the same institution, selecting the necessary regulations and filling them with new ones;

13) Also, **the participation or involvement of specialists from various professional organizations such as think-tank organizations, NGOs**, as well as using **specialized studies** which refer to the topic of the document, can be applied as a modern mechanism of documentation, in order to obtain specialized information. This mechanism is plausible when the object of the document requires specialized knowledge that the authority does not

[10] Legea privind actele normative ale Guvernului şi ale altor autorităţi ale administraţiei publice centrale şi locale nr. 317-XV din 18.07.2003// Monitorul Oficial al Republicii Moldova nr. 208-210 din 03.10.2003.

[11] Creangă Ion. Curs de drept administrativ pentru studenţii facultăţilor de drept. Volumul II. – Chişinău: Ed. Epigraf, 2005, p. 133, p. 214.

[12] Legea privind administraţia publică locală nr 436-XVI din 28.12.2006//Monitorul Oficial al Republicii Moldova nr. 32-35 din 09.03.2007.

possess, or when it is necessary to analyze broad perspective on the possible consequences that may result after adopting the document.

The procedure of the adoption and mechanisms of administrative documentation applied in drafting documents of disposition and organizational ones differs depending on the character of the originator. Documentation is done by civil servants who prepare the draft document: if we are talking about decisions of the Local, District or Municipal councils, it is done by the members of the special commission in collaboration with the Secretary of the Council; or, in the case of dispositive documents drafted by the specialized central public administration authorities, the heads of these bodies, people with decision – making power – ministers participate at the adoption process.

Civil servants who realize the documentation often use a very important mechanism – **practice**, their own and authority's experience in drafting organizational and dispositive documents. Because decisions that will later be adopted depends on their will and competence, it is necessary for them to have a perfect logic; a powerful spirit of discernment and responsibility; a full and accurate knowledge of social realities, current and future requirements, of the possibilities of meeting them[13]. All these qualities should be crowned with multipolar knowledge, including knowledge in the field of working with information and administrative documentation, because on abilities and skills of civil servants who prepare the draft document will depend the quality of the adopted decision.

Besides the classical mechanisms of administrative documentation, nowadays, can be used **electronic mechanisms**. Studying modern trends in administrative documentation is significant and necessary because they can contribute substantially to simplifying and efficiency of the public administration authorities' activity[14]. Using information technology has a positive impact on process of administrative documentation by reducing certain routine activities, acceleration civil servants' activity and freeing them from specific functions

Nowadays, public administration authorities try to establish some embedded systems or databases containing information grouped by certain principles that will facilitate document management (including those of organizational and dispositive nature). This may contribute to the ordering of document flow, to increase the efficiency and simplicity of administrative activity, and also, to reduce the cost of creating, processing and transmission of these documents.

Therefore, if a public administration authority haven't a clear and well organized concept of management of information and documents, there can appear adverse consequences in authority's activity, causing a serious deterioration of the quality of management and decision-making process. So, the reliability and quality of public administration's activity is directly proportional to the quality and reliability, transmission speed, proper organization of information unit, properly organized documents' searching, use and storage process. So, at that point, the main tasks of automating administrative documentation are:

1) reducing the flow of information to the optimal minimum level;

2) simplification and reduction of the processes of collecting, processing and transmitting information using the latest technology and automation of these processes.

[13] Brezoianu Dumitru, Drept administrativ român. – Bucureşti: Ed. All Beck, 2004, p. 106.

[14] Oroveanu Mihai T., Tratat de ştiinţa administraţiei. – Bucureşti: Ed. Cerma, 1996, p. 366.

In Republic of Moldova the rhythm development of science and information technologies, unfortunately, is not the same as in states of Western Europe or in United States, where computer holds an important place in human life since the early 80s. But ultimately, this wave of computerization has reached up to the Moldova. Of course IT technologies didn't become an instant panacea but they are improving gradually as well as software are. Although information technologies gain more ground in the daily activities of public administration authorities, yet in Moldova using specialized software for working with organizational and dispositive documents is not practiced widely. Typically, civil servants use Microsoft Office applications, which are standardized and cannot meet the necessary requirements established by law. They are not sufficient and cannot fully meet the needs and specific of public administration authorities' activity. So, that's why there is a need of new solutions, which could materialize in the development of specialized software which can operate either autonomously or in a local network/regional or on-line.

Automating of administrative documentation may be viewed as a favorable framework for overall ameliorating of management in public administration. A complex documentation computerizing requires creating a single information space in which civil servants could work on the basis of uniform rules in the documents' management and processing. This unique system should allow:

1) easy access to documents, regardless of the distance at which civil servant is from their storage place;

2) simultaneous access to documents when users need the same documents without reducing performance of activity regardless of location;

3) using new mechanisms of communication, such as specialized sites, e-mail, social networking, video conferencing on-line, newsletter service, etc;

4) maintaining the integrity of documents;

5) operative searching of documents by text or elements;

6) open access database when users require certain documents which were created previously;

7) assuring security of information and creating resistant software to any kind of attack;

8) creating personalized settings according to specific of user's activity;

9) permanently digital database widening and improvement.

A good example to follow might be **specialized software** created by the company from Russian Federation named Cognitive Technologies, which are created by experts in the field of IT in collaboration with civil servants in order to adapt it to the specific needs of public administration; and in collaboration with specialists in law, to ensure the compliance of newly created program with state standards regulated by federal law (GOST). Recently on the market appeared such products as: "Evfrat", "Lotus – Notes", "DEC – PathLink", "Microsoft – Exchange", etc. Their strong point is that they are adapted to the state language, they fully meet all the requirements of the law and allow their revision depending on the specific tasks of the client, and provide a permanent link between client and company it via a hotline of technical support[15].

This software is widely used by both public administration authorities and private units due to its affordable price and adaptability to specific needs of a concrete client. The software is simple to use as it is fully compatible with the Microsoft Windows OS, so civil

[15] http://www.cognitiveforms.ru/products/.

servants are not required to have special knowledge in the IT area. The working principle of this software is that all computers in the authority are connected in a LAN (local area network), which allows the exchange of electronic documents among its subdivisions. When creating a document, civil servants will use the default templates and will save it automatically in .doc or .xls format. After the document is saved, it is indexed and can be used in other divisions of the authority or can be sent to other authorities. Also, it can be found instantly by name, content or its elements[16].

Regarding Moldova, unfortunately, use of the modern technologies in administrative documentation is still in draft form. The roots of this problem lies in the lack of specialists in the field of administrative documentation and in the fact that public administration doesn't cooperate with IT specialists for the purpose of development of specialized software that will ensure compliance with national legislation. Implementation of such technologies in public administration authorities in Moldova can create favorable conditions for boosting their efficiency, for adaptation to modern requirements and for increasing of efficiency of civil servants' activity.

We conclude that nowadays, in the public administration authorities' activity, the concept of administrative documentation mechanisms, besides theoretical dimension, has taken a strong practical connotation, due to the impact of their applicability in the process of drafting organizational documents and documents of disposition, which will influence their quality. Organizational and dispositive documents are regulated by a large number of laws. However, this heterogeneity of legislation does not provide an adequate regulation of administrative documentation mechanisms and sources or of overall documentation activity, because it contains only some fragmentary, timid references on about administrative documentation.

In this regard, we highlight the importance of the adoption of special legislation which would regulate administrative documentation in the public administration, adoption of an Instruction-type on organizational and dispositive documents management within central and local public administration authorities, which will complete the provisions of the Resolution of the Government of Republic of Moldova on approving Rules of preparation of organizational and dispositive documents and Instruction-type on secretariat activities in central public administration bodies and local administration of Republic of Moldova no. 618 of 05.10.1993, and last but not least, increasing collaboration between civil servants and specialists in information technology, in order to develop software adapted and personalized to the activity of public administration authorities and to support civil servants' education in digital innovation.

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[16] http://www.cognitive.ru/products/euph_doc/.

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ENVIRONMENT CRIMINAL LAW IN TODAY EUROPEAN UNION

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Abstract
Environment crime is among the European Union's central concerns. The Tampere European Council of 15 and 16 October 1999 at which a first work program for the European Union action in the field of Justice and Home Affairs was adopted asked that efforts be made to adopt common definitions of offences and penalties focusing on a number of especially important sectors, amongst them environment crime. But despite this agreement about the importance of joint the European Union action, environmental criminal law has become the centre of a serious institutional fight between the European Commission, supported by the European Parliament on the one hand and the Council, supported by the great majority of the European Union member states on the other hand. At stake is nothing less than the distribution of powers between the first and the third pillars, and therefore also between the Commission and the European Union's member states. The effect of this fight is currently a legal vacuum on general environmental criminal law that was closed with the Directive 2008/99/CE, taking into consideration the cross-border dimension of environmental crime and the existing significant differences in the national legislation of the European Union member states.

Keywords: Tampere European Council, common definition of offences, third pillars, enviromental crime

1. In February 2000, Denmark presented an initiative for a Framework Decision on Environmental Crime. Same country has made a proposal for a Directive on the Protection of the Environment through Criminal Law. Both proposals, defined offences as infringements of secondary environmental legislation or implementing national legislation of and participation in such activities were also considered an offence[1].

On sanction, the proposals obliged European Union states to provide for natural persons for criminal penalties, involving in serious cases deprivation of liberty[2]. The Directive proposal went through the first reading of the European Parliament, after which an amended proposal was adopted. But Council never took up the proposal for discussion, only adopting the Danish Framework Decision proposal in 2003[3].

The Framework Decision 2003/80/JHA, so adopting, on the protection of the environment through criminal law was build substantively on the structure of the Council of Europe Convention on the Protection of the Environment through Criminal Law[4]. In the

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[1] The Tampere European Council of 15 and 16 October 1999.
[2] The Directive 2008/99/CE.
[3] The Framework, Decision 2003/80/JHA.
[4] Jean Pradel, Droit pénal général, Paris 1990.

Decision, the offences are defined including the requirement of unlawful behaviour, i.e. "infringing a law, an administrative regulation or a provision of Community law aiming at the protection of the environment, with an exception of one autonomus offence in Art. 2 (a).

The European Union states had to ensure that penalties include at least in serious cases, deprivation of liberty which can give rise to extradition, which means generally more than one year of imprisonment, such in Art. 5. Art. 6 of the Framework Decision defined the grounds on which legal persons must be held responsible for conduct committed for their benefit by persons having a leading position within their structure or when such a person is liable for lack of supervision or control. Sanctions for legal persons should include criminal or non-criminal fines and may include other sanctions such as exclusion from entitlement to public benefits, a judicial winding-up order etc.

The Framework Decision 2003/80/JHA obliged European Union states to establish jurisdiction when the offence was entirely or partly committed in their territory or on board of a ship or on aircraft registered in it or flying its flag and provided for optional jurisdiction grounds, such in Art. 8. Additional rules[5] on extradition and prosecution in particular on offences committed by own nationals outside the territory of a European Union state, had lost their relevance with the introduction of the European Arrest Warrant[6].

2. When the Framework Decision was adopted in the Council, the Commission always upheld the view that this was not the appropriate legal instrument for provisions on environmental crime. In this situation, environmental criminal law has become the centre of a serious institutional fight between the European Commission and the Council about the possibility to include criminal law related provisions in first pillar instruments. So, briefly after the adoption, in april 2003 the Commission sought annulment of the Framework Decision before the European Court of Justice for wrong legal bases. The Commission was supported by the European Parliament, the Council by eleven European Union states. The Court annulled the Framework Decision and held that its Art. 1-7 could have been properly adopted on the bases of Art. 175 TEC so that its adoption under the third pillar provisions infringed upon Art. 47 of Treaty on the European Union[7].

The essential statement was paragr. 48 of the judgment, where the Court said: "However, the last-mentioned finding (according to which generally criminal law is a matter of the European Union Treaty) does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the European Union states[8] which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective…".

3. This statement involved significant changes for legislation[9]. Once the Commission presented the proposal for a new directive on environmental criminal law, to replace the annulled Framework Decision, this directive was adopted by the European Parliament and

[5] P.Salnoge, Droit pénal général, Press Universitaire, 1994.

[6] C.Soyer, Droit pénal et Procedure pénale, Librarie Generale de droit et de jurisprudence, Paris, 1994.

[7] International Review of Penal Law, 2007, Preparatory Colloquium, La Coruna (Spain), 2007, National reports – CD Rom annexes.

[8] Codice penale e leggi complementari, Ed. Giuridiche Simone, 2000.

[9] Le nouveau Code penal introduit et commente par Henri Leclerc, Edition du Seuil, 1994.

the Council of the European Union, having regard to the Treaty establishing the European Community and in particular Art. 175 paragr. (1) thereof to the proposal from the Commission, to the opinion of the European Economic and Social Committee, after consulting the Committee of the Regions and in accordance with the procedure laid down in Art. 251 of the Treaty.

This Directive (2008/99/CE) on the protection Issue Based of the environment through criminal law was adopted according to Art. 174 paragr. (2) of the Treaty. So, Community policy on the environment must aim at a high level of protection, the Community been concerned at the rise in environmental offences and at their affects, which are increasingly extending beyond the borders of the states in which the offences are committed. Such offences pose a threat to the environment and therefore call for an appropriate response.

Experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.

Common rules on criminal offences make it possible to use effective methods of investigation and assistance within and between European Union states[10].

In order to achieve effective protection of the environment, there is particular need for more dissuasive penalties for environmentally harmful activities, typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species.

Failure to comply with a legal duty to act can have the same effect as active behaviour and should therefore also be subject to corresponding penalties[11].

Therefore, such conduct may be considered a criminal offence throughout the Community of the European Union when committed intentionally or with serious negligence.

In the Art. 3 of the Directive 2008/99/CE, the European Union states must ensure that a series of fact constitutes a criminal offence when unlawful and committed intentionally or with at least serious negligence, such as the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or water, or to animals or plants.

Another conduct constitutes a criminal offence in the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including actions taken as a dealer or a broker-waste management – which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants[12].

The fight against maritime pollution through criminal law in the background of the disaster of the tanker "Prestige" off the coast of Galicia in November 2002 highlighted the urgent need for joint European Union action against ship-source pollution. The

[10] Strafgesctzbuch, 33 Aufflage, 1999, Beck Texte in Deutscher Taschenbuch Verlag.
[11] Model Pemal Code and Commentaires, Part I, Philadelphia, P.A. 1983, The American Law Institute.
[12] Mihaela Agheniței, Constancies of Penal Law General Part, Ed. Universul Juridice, 2010.

above-mentioned Framework Decision on environmental criminal law that was to be adopted approximately at the same time did not address specifically this issue. Political statements of the European Council were unanimous in calling for the rapid adoption of an European Union legislative framework. In addition to proposals for technical regulations, the Commission presented therefore in spring 2003 two proposals on offences and sanctions, one for a Directive based on Art. 80 TEC, the rules on the common transport policy and one for a Framework Decision based on Art. 31 and 34 TEU, which form a unity. The discussions for both instruments were difficult. The Framework Decision 2005/667/JHA "to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution" was finally adopted in July 2005, the Directive 2005/35/EC "on ship-source pollution and on the introduction of penalties for infringements" in September 2005. Two instruments were considered necessary due to the above-mentioned institutional conflict whether criminal law provisions were acceptable in a first pillar instrument. The Commission had initially included most of the criminal law related provisions in its proposal for a directive, however, the Council decided to transfer the majority into the Framework Decision.

The Directive 2008/99/CE on the protection of the environment through criminal law, of the European Parliament and of the Council, having regard to the proposal from the Commission stipulate that is an offence, the shipment of waste, where this activity falls within the scope of Art. 2 (35) of Regulation (EC) No.1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (6) and is undertaken in a non-negligible quantity, whether executed in a simple shipment or in several shipments which appear to be linked.

Another criminal offences such are in the Art. 3 of the Directive 2008/99/CE refer to the operations of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water or to animals or plants. With the same result are charging the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances, the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species, and trading in specimens of protected wild fauna or flora species or parts or derivatives thereof with the same exceptions.

Offences are also any conduct which causes the significant deterioration of a habitat within a protected site and the production, importation, exportation, placing on the market or use of ozone depleting substances.

All the European Union states shall ensure (Art. 4) that inciting, aiding and abetting the intentional conduct referred to the offences above-mentioned are punishable as a criminal offence, by effective and proportionate, dissuasive penalties for any legal person who don’t respect the stipulations of this Directive.

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SOME NOTES ON THE DUTY OF THE ASSOCIATES OF A LIMITED LIABILITY COMPANY TO PAY UP CONTRIBUTION TO THE REGISTERED CAPITAL

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The existence of the right of debt towards a society is conditioned by the existence of mutual obligations. The Civil Code stipulates in the same article: depending on participation in the assets of the legal entity, the founders have or have not rights of debt against it. This criterion is limited to the definition of the term "company" given in Art. 106 of the Civil Code, which defines that a company is a trading organization with a capital which consists of holdings of founders. As dictated by the very essence of the company, founder's obligation is to contribute by the economic means to the capital formation and it is essential for the establishment and effective functioning of society.

The analysis of definitions referred to the concept of commercial society leads to the idea that the main goal of any company is to have a profit-making activity. Undoubtedly, the interest of every individual when starting up a business (company) is to obtain material benefits.

This criterion distinguishes them from legal persons whose main goal is not represented by the profit. The possibility of share profits from the company has its foundation in a patrimonial right of the associate toward the company. The Civil Code of the Republic of Moldova stipulates in Art. 55 that legal entities whose founders claim rights to debt are the companies ... and legal entities whose founders do not have such rights are non-profit organizations.

The existence of the right of debt towards a society is conditioned by the existence of mutual obligations. The Civil Code stipulates in the same article: depending on participation in the assets of the legal entity, the founders have or have not rights of debt against it. This criterion is limited to the definition of the term "company" given in Art. 106 of the Civil Code, which defines that a company is a trading organization with a capital which consists of holdings of founders. As dictated by the very essence of the company, founder's obligation is to contribute by the economic means to the capital formation and it is essential for the establishment and effective functioning of society. Each founder is keen to contribute, with the amount determined by the articles of incorporation, to the formation of social capital. This is a general mandatory rule established by Civil Code Art. 107 for all types of companies, reiterated in its Art. 116. Subsequently, Art. 112 governs the share capital of the company is formed from contributions of founders.

The obligation to participate in certain economic contribution extends to all members, no one can be released from it. Therefore, the Law of 135/2007 on limited liability

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companies is quite thorough in Art. 22, which claims that associations can't be freed from the obligation to pay the contribution and can't discharge its debt contribution through compensation.

Next we give attention to some matters of patrimonial obligations of the associate in the limited liability companies. The associate's obligation to contribute to the social capital formation arises from the act of incorporation.

Consequently, he acquires a right of complex debt, which includes an asset component – the right to dividends and part of the company's assets in case of liquidation. The extent of these rights depends on the proportion (shareholding) which holds the associate out of the social capital. The amount of the capital, the manner and the terms of shedding intake are fixed in the constitution. But the law contains mandatory rules.

Civil Code – art. 113 paragr. (3) as well as the Law no. 135/2007 [art. 22 paragr. (2)] – provide that the owners must pay in cash before a company would officially register, at least 40% of the subscribed contribution. Act constitution may derogate from this provision only in order to establish a higher share. Another mandatory rule is found in art. 112 paragr. (3) of the Civil Code, which provides for full payment of social capital within 6 months from the moment of the record of the company, a rule enshrined as well in art. 22 paragr. (2) of Law no. 135/2007.

Articles of incorporation may establish a shorter period of time for the full payment of contributions. In case of single-associate company, it is required by law to pay the entire cash contribution to the company's registration.

Pecuniary obligation of the associate may concern both money and other property, including property rights. One of the major problems with the transmission of in-kind contributions is their proper evaluation. By Art. 114 the Civil Code stipulates that the value of the contribution is approved by the general assembly of associates, that is supreme body of the company. Law no. 135/2007 art. 23, indicates that contributions in kind are valued in money by an independent evaluator and approved by the General Assembly, but also allow them to be assessed directly by the general assembly, without involving independent evaluator, if such clause is stipulated in the articles of incorporation and whether associations agree on the amount of the assessment. When evaluating contributions in kind, there may be conflicting interests between partners, the ones who gives a good, being interested for this good to be valued at a higher price and, accordingly, to have returned a larger venture capital and to have a greater influence in society.

Yet even the independent expert assessment must be approved by the supreme body of the company, which ultimately accepts or rejects the asset of value that is transmitted. Since the value of the contribution in kind shall be stated in the act of incorporation, signed by all the founders, it must be approved by the consent of all the founders. The share capital gives credibility to the company and constitute guarantee for the creditors because it is presumed that the company has assets free of liabilities in the amount at least equal to the share capital stated in the articles of incorporation. In order to encourage fair and objective evaluation of contributions in kind, the legislature established the joint liability of the partner and the assessor for overpricing the goods that formed exaggerated capital. In this case responsibility comes not towards the society because it expressed agreement on the value of contributions in the act of incorporation, but to the company's creditors. Based on Art. 23 paragr. (2) of Law no. 135/2007, the associate who contributed with goodas to the social

capital and the evaluator are severally liable to creditors in the limits of overvaluation, within 3 years from the date of valuation.

Assets are considered to be transmitted under the right of property, if the articles of incorporation does not stipulate otherwise. If the the articles of incorporation or the act of transfer does not stipulate under what right the good is transmitted, the law establishes a presumption that it is considered under the right of proprietary transmitted. As a result, the founder's asset is added to the heritage of the company. Transmission operates based on a contract that due to the expressed willingness of the founder becomes automatically an ownership transfer. Thus, after the good transmission, founder loses all rights towards it. The law stipulates that during the period of the company, associates can't claim restitution of the paid in capital contributions, neither the articles of incorporation may provide such a clause.

The associate has, however, a share that can be estranged, if he wants to withdraw from society. Theoretically, the partner may recover property conveyed if the company decides that it is not used effectively in trade and decides so, meantime reducing the social capital proportionally to the value of the property returned. In this case the social part of the associate will be reduced accordingly. Also, goods can be recovered in the event of termination of the company's business, after satisfaction of all claims. When transmitting proprietary asset, the risk of fortuitously loss passes to the society.

Articles of incorporation may include the transfer of right to use those goods. There are different legal consequences. In the social capital will be included only the value of the right to use. As a clue to assess the right to use an asset may be taken the rent that the company would pay in advance for the use of such good. This amount of a presumed usage presents the value of right to use and is included in the assets of the company as a share to the social capital. Namely, this value is taken into account in determining the amount of participation of the associate. Within this contribution the associate is granted a share, with which he will vote at the General Assembly and will claim a part of the profit distributed.

Assets transferred in use for a certain period can't be reclaimed until the deadline. In case of accidental destruction of the property conveyed which is in use, the risk will be borne by the founder who remains to be the owner. The founder remains liable to pay the amount of money to be recovered or to provide a similar good.

The rights and obligations of associates have a dual nature: a legal one, as they are prescribed by normative acts, and a contractual one, as they are born on the basis act of incorporation. Regardless of the basis of their appearance, the obligations must be properly executed, in good faith, in accordance and within the time settled in articles of incorporation. The associates do not assumes obligations to each other, but to the company and their responsibility comes towards the company as prejudiced entity.

The obligation to pay share capital is established for the benefit of the company. Thus, the company may require forced cashing from the associate who avoids the fulfillment of the obligation of funds/goods which he had to pay to the company according to the Articles of incorporation. The member can be compelled by judicial process to perform an obligation assumed by the act of incorporation.

The administrator has the right to sue against the associate who didn't pay his contribution, or any associate, if the administrator avoids to. Reclaiming unpaid contribution can be made within three years from the registration of the company. Recalling

the obligation of the company established under the sanction of the possibility of its dissolution as provided in Art. 35 of Law no. 135/2007, to reduce the share capital if, at the expiration of six months from registration, associates have not fully paid contributions subscribed, we have to mention that forced cashing of the unpaid shares will condition the changes the act of incorporation and registration of amendments at the State Registration Chamber.

The law provides the associate's liability for belated or failure to execute the obligation to pay the contribution. The associate liability arises as a result of the belated enforcement as an effect set in art. 602 of the Civil Code. So, the associate is bound to repair the damage caused to the company even after the full paying the contribution. In determining the amount of compensation owed to the company, the lost profit due to the delay must be taken into consideration.

The law gives each associate the right to request, on behalf of the company, compensation, if the governing bodies refuse to do.

Failure to submit the contribution constitutes a ground for excluding the associate of the company, according to art. 47 of Law no. 135/2007, in conjunction with Art. 113 paragr. (5)-(6), 154 and 617 of the Civil Code. The associate shall be given an additional period for performance of the obligation for at least 30 days and only if either this term does he not perform the obligation, against him may be initiated a legal action for exclusion and the court may give the judgment for exclusion. So, the associate who didn't pay his contribution within 6 months after the registration of the company, first, must be notified about his possible exclusion and must be given an additional term of at least 30 days, and only if he doesn't pay the remained contribution at the expiration of this term, he can be excluded by court decision.

The lawsuit may be initiated by the administrator on his own initiative or by the decision of the General Assembly. Application Administrator exclusion period may be submitted own initiative or judgment of the General Assembly. The law also gives each associate or group of associates who have paid their contribution the right to sue on behalf of the company.

The excluded associate loses his share, also he will not be refund the goods that filed corporate assets. This is confirmed by art. 22 of Law no. 135/2007, which says that, during the period of the company's existence, the associate may not demand the return of his contribution paid in capital. The partner is only entitled to a monetary compensation equal to the value of his share at the date of exclusion. Compensation is not the amount the associate has paid in fact, but the amount of the net assets value of the company in proportion to the share he owns. This value can be greater than the contribution paid if the company worked efficiently, or less, if incurred losses. On the right and the amount to be attributed to the associate, the law leaves the court at its discretion to dispose i.e. otherwise as provided.

The value of the share should be paid to the associate within 6 months from the date of his exclusion. He is liable for damage caused by the actions or inactions that led to exclusion, including unpaid part of the contribution subscribed. He will receive the amount owed by the company only after full compensation for the injury. From a practical standpoint, it is indicated that the damage to be repaired on account of the amount due from company and the remainder to be paid. If, however, this part will not cover the damage, the

associate will be liable to compensate the expense of personal property. Exclusion of the associate involves corresponding changes in articles of incorporation and their registration.

Associate has patrimonial rights and bear the risks until its exclusion. He bears the risk of loss and is entitled to the benefit of activity during the year, calculated up to the date of his exclusion and payable within 30 days from the date of the decision on the distribution of benefits or the deadline for the adoption of of such decisions. Deadline is provided in art. 50 of Law no. 135/2007, which says that the Annual General Meeting must take place no later than 90 days of year end. The excluded associate liable to third parties for transactions made by the company until the date of exclusion, that is, until the judgment becomes final, and bears the consequences of the operations being performed at the time exclusion. He will not be able to get the value of the shareholding due to him until the end of that operations.

So if the associate does not perform the obligation to pay the entire share capital, the company has several options:

- the associate may be relieved of the obligation to pay the outstanding contribution following the capital decrease, the proportional reduction of his share;

- the company may sue against the associate for forced cashing within 3 years. In this case the company will have to comply with the formalities required by the law on capital: first to register its decrease on the expiry of six months after which to register increases when receiving performance;

- the company may bring a lawsuit on the exclusion of the associate.

The right to choose the appropriate option belongs to the company and not to the associate who failed to pay the entire contribution. In any case, since we are in the presence of private law relations, they can choose the solution by agreement of will. In these terms, we say that the obligation to transmit contribution, as well as the right of the associate debt instruments to society, is transmissible. If the associate understands that he can not fully meet the obligation to pay, that may be done by other partners, in correlation with the corresponding shares.

Associates may stipulate in the articles of incorporation other patrimonial obligations which will have the same binding force as those provided by law. For example, the articles of incorporation may provide for the submission of additional contributions (art. 37) and free remission free of goods without including them in the share capital, also may require coverage of losses by the venturers. For such additional obligations, all the members must consent to such arrangements.

Therefore, the obligation to pay contributions according to the Articles of incorporation extends to founders at the moment of setting up the company and to the associates if there was decided to increase social capital, in accordance with art. 33 of the Law. 135/2007, and operates when, by the act of incorporation, associations were obliged to pay additional contributions in accordance with art. 37 of the Law 135/2007.

It is necessary to define the meanings of the concept of "additional contribution" used in Law 135/2007 in two meanings. The first is referred to in Art. 33 as a contribution to capital increase (new contributions) by members or by third parties who become associate, and quite another is regulated in art. 37 and 38. Thus, in art. 37, the legislature refers to the additional contributions of members fixed initial wording of the act of incorporation, the founders are required to contribute after setting up the company, through a single payment or more, with additional contributions capital increase, to increase corporate assets to cover the losses. The size of these contributions can be determined or determinable by one clause

of the act of incorporation. Considering the fact that the act of incorporation clause may be fixed shedding additional contributions of great value which some partners can not cope, the law established a release mechanism for the associate obliged to pay additional contribution.

It was also established that the General Assembly decisions on the establishment and the paying additional contributions shall be adopted unanimously by the members. By this provision, the legislature limited the possibility of the associates who hold the majority of the shares to oblige the minority associates to pay additional contributions. In other words, major associations may decide three quarters of the vote the amendment of the constitution and share capital increase by new contributions the members. However, if they do not wish to participate in the capital increase, minority associates can not be forced to participate to contributions and share capital will be increased only by those who agree to make new contributions.

So statements regarding the possibility of raising capital by additional contributions of the associates only unanimously can not be accepted. Increasing social capital by additional contributions (called in the art. 33 "new contributions") of associates and third parties may be subject to conditions laid down in Art. 58 paragr. (2) as amendment of the Articles of incorporation, i.e. ¾ votes of all members. If the articles of incorporation in the original wording does not provide additional contributions, such a clause could be incorporated later by completing the act of incorporation. To complete the constitutive act with such a clause the law requires that all members vote unanimously. Thus, we exclude situation in which a partner, regardless of his participation share, may be subject to additional contributions against his will.

And consequences for failure to pay further contribution to the share capital increase are different from those that arise when not paying additional contribution considered in Art. 37 of Law no. 135/2007.

The member can be ruled out for not paying contribution only when setting up social capital fand not when increasing it. This is explained by the provision of Art. 33, which states that the contribution to the capital increase must be submitted until the registration of changes on the increase. It means, therefore, that if associate has not filed contribution to the share capital increase, the amount not paid will not be taken into account in the registration of changes. Furthermore, the same article regulates that if capital increase did not occur, the company within three months from the date of adoption by the general assembly of associates of the decision to amend the act of incorporation, refund additional contributions paid by associates, otherwise, it is liable to pay interest provided by law.

The associate who can not carry out the obligation to pay up the additional contribution is entitled to be relieved of it by making available his share. It should be noted that the associate enjoy this right only if paid into share capital. From the due date the associate will have 30 days to decide whether pay additional contribution or make his share available to the company.

The associate may be relieved of the obligation of paying additional contribution to the company by making available hi share within 30 days from the date the obligation to pay up the additional contribution. If, on the expiry of 30 days, the associate did not shed additional intake and did not make his share available to the company, he is to be notified by letter, that his share is qualified as made available to cover the damage incurred by not paying additional contribution. The Company within 30 days from the date of the shareholding at

its disposal, will take steps to sell the share at public auction unless agreed with the associate on other ways to sell. If the proceeds from the sale of the shareholding covers all sell costs and the value of the additional contribution, the surplus shall be remitted to the ex-associate. If the amount obtained is not sufficient to cover the amount of the additional contribution, the company will not be entitled to pursue the associate. The sale will be organized by the manager of the company, although the ownership will pass from the associate who made his share available to the person who buys it. If it can't be sold at auction or otherwise, the share will be passed free of charge to the company, without having any right to receive other amounts from the ex associate.

In other words, this is a specific procedure for releasing from the obligation to pay additional contribution that is special measure to exclude the associate who did not respect the obligation. In any case, the association who will not pay additional contribution which he assumed, loses the capacity of associate.

From the above considerations, those who participate in founding a company and agree to introduce in the articles of incorporation a clause which sets out additional contributions, must be careful to the size of these contributions and their ability to meet such obligations.

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LES ASPECTS HISTORIQUES DU DÉVELOPPEMENT DES INSTITUTIONS DU DROIT D'USUFRUIT, USAGE ET D'HABITATION

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The current regulation of the right of usufruct, use and habitation have to be performed taking into account both the historical aspects of our legislation, the steps they went through, but also the economic and social context in which we find ourselves. So, the research upon the development of institution of personal servitudes from historical point of view, the changes that this institution has suffered, but more importantly the issues that have remained unchanged along time, doctrine and jurisprudence at the moment is actual and demonstrable.

La recherche de l'occurrence, de l'évolution et de développement des servitudes personnelles, sur l'aspect historique, nous permet de comprendre l'importance de ces institutions juridiques, l'utilité et la tâche qu'ils accomplissent dans la société, à révéler leurs destinations réglementaires en fonction des besoins économiques et sociaux des temps, de réaliser l'importance de leur présence dans le système réglementaire actuel.

L'effondrement de l'Empire romain, n'a pas généré et la disparition du système normative, qui a été formé et cristallisé pendant si longtemps. Un phénomène unique de la vie juridique en Europe occidentale, été la réception du droit romain, par l'assimilation et l'appropriation de la société médiévale. Une nouvelle étape dans le développement de servitudes personnelles est due à la renaissance du droit romain en Europe.

La récupération et la renaissance du droit romain se produit pendant les XI – XII siècles. „En raison du fait qu'il contient en lui-même des formules déjà bien ciselées, il a trouvé l'utilité et l'applicabilité. La reprise du droit romain, a été dictée non seulement par des circonstances économiques, mais aussi par les besoins spirituels de la société, qui ont besoin d'un ordre juridique et de la stabilité”[1].

Le droit romain, moins adapté aux nouvelles conditions du société médiévale, qui ont persisté pendant une longue période, située entre l'invasion des barbares et la Renaissance, n'a pas été cultivé. Jusqu'à la Renaissance, la science du droit romain, portait un caractère rudimentaire, il existait une déficience des textes juridiques qui pouvaient servir comme support et inspiration pour tout le système de droit. Grâce aux Glossateurs, ont été restaurés les textes de droit romain: les travaux de Justinien, Corpus Juris Civilis, les Digestes et les Pandectes, rassemblés et remis aux établissements d'enseignement comme supporte didactique. Simultanément, l'Europe continentale, dans cette période a atteint une nouvelle étape économique, les gens ont pris conscience de l'utilité du droit romain, qui était à leur disposition pendant cinq siècles. Ceci est principalement dû au fait que le droit romain est un ensemble des principes, des institutions et des règles juridiques qui ont déjà été codifié et systématisé, étant compatible avec les nouvelles aspirations sociales.

[1] История государства и права зарубежных стран, под ред. Жидков О.А., Крашинников Н.А., из. Инфра М- Норма, p. 303.

„A la différence des lois barbares, coutumes de peuples pasteurs, le droit romain, droit de citadins, admet la volonté comme principal ressort. Lorsque tout est volonté, les questions sont en définitive tranchées par la force, mais une force ici régulée par le droit pour éviter l'anarchie. Le droit romain, comme légitimation de la force et du pouvoir de l'individu, a une vocation a l'universalité qui ne peut que satisfaire les négociantes, ses solutions claires, partout identique, doive permettre une circulation aisée des richesses. Ainsi, lui seul garantie une situation de concurrence et le triomphe du plus fort, dans le respect de la règle du jeu, qui commence à devenir synonyme de morale"[2].

Un rôle particulier dans le développement et la formation du droit contemporain en Europe, l'avais les systématisations locale des règles de droit, tels que „Miroir des Saxons" (Sachsenspiegel) en 1230 et „Le miroir de Souabe" (Schwabenspiegel) 1273-1282 appelé „Kaiserrecht", par la suite ils ont contribué à l'unification du droit. L'examen des règles régissant les relations économiques entre les membres de la famille dénote facilement la présence d'un droit d'usufruit, plutôt, de ses dérivés. La femme, qui était dans l'inégalité au mari, avait des droits d'usufruits tangentiels. „Sans le mari, la femme n'a pas le droit de disposer des biens en copropriété. Toutefois, de la propriété se détachait certains biens qui ont été inventoriés et sont hérités dans un régime distinct. Parmi ceux-ci, faisaient partie des objets personnels de la femme, des bijoux et divers outils, la dot de l'épouse et le cadeau de mariage donné par le mari, un patrimoine destiné pour entretenir la femme pendant sa vie, en cas de divorce ou de décès du mari. En cas de divorce, la femme pouvait utiliser, pendant la durée de sa vie, la richesse mis à sa disposition par le mari, la dot qu'elle a reçue au moment du mariage et le cadeau de conjoint. Après sa mort, ils sont retourné à la succession de la famille de son mari"[3].

La réception des règles de droit romain en Europe a commencé à des moments différents: en France et Italie en XII siècle, Allemagne plus tard.

La France, au Moyen Age, ne pouvait pas éviter l'influence de l'esprit romain qui se manifeste dans la littérature et le droit. Le droit romain existait en Europe, il a été appliqué dans les actions judiciaires, il était étudié, mais la pratique et la théorie n'avait pas ni le pouvoir, ni l'éclat. Dans le XII siècle il s'est réveillé de son hibernation et a versé un rayon de lumière vivante. Ce fut le résultat d'une nécessité des besoins importants et profonds[4].

La jurisprudence allemande, a obtenu une révolution théorétique en droit privé au moyen de Budei et Tibo, et plus tard avec l'aide de B. Windscheid, G. Puchta, F. Savigny, O. Gierke, et s'écartée de la propriété féodale divisé, au cours des quelques siècles a fait la formation théorétiques des institutions civiles, y compris le droit réel (begrenzte dinlische Rechte), en créant, à la fin de XIX siècle, le système de droits réels parfaitement logique et sans faute, classé par son contenu (Inhalt) comme: le droit d'utiliser la propriété d'autrui (Nutzungsrechte), le droit d'exploiter des actifs étrangers (maintenance à droite) (Verwertungsrechte (Sicherungsrechte)), le droit préférentiel d'acheter les actifs étrangers (Erwebsrechte)[5].

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[2] Testu François Xavier. Les glossateurs. Regards d'un civiliste. RTD civ. nr. 2/1993, p. 282.

[3] История государства и права зарубежных стран, под ред. Жидков О.А., Крашинников Н.А., из. Инфра М- Норма, p. 330.

[4] Е. Бутович-Бутовский. Римское право в средние веки. Журнал Министерства Народного Просвещения, Т. XX, 1838, № 10, Октябрь.

[5] Емелькина И.А. Система ограниченных вещных прав на земельный участок: монография / М.: Волтерс Клувер, 2011. -368 с p. 7-8.

Par la suite, non seulement les états européens ont pris la méthode de codification de règles civiles, en adhérant soit au modèle français ou allemand, qui était basée sur les mêmes règles de droit romain.

Après le contenu des variétés de droits réels, les systèmes existants peuvent être divisés en ceux créés par le modèle de pandectes (allemand), contenant une division bi ou tri dimensionnelle de droits réelles, et le modèle français, qui régit généralement une seule catégorie – les droits réels d'utilisation. Selon le modèle de pandectes, sont systématisés les droits réels dans la législation de l'Autriche, de Suisse, de République Tchèque, de l'Hongrie et d'autres pays. Après le modèle français – le droit civil de l'Italie, de l'Espagne, de la Belgique. La différence fondamentale entre ces deux systèmes est que le modèle de pandectes à être fondée non seulement sur les institutions reçues du droit romain, mais aussi celles nationaux créés sous l'influence des besoins vitaux. Les droits réels français et italiens sont principalement basés sur des dispositions de droit romain[6].

Sous réserve de changements dictés par les événements et les phénomènes de temps, l'institution de l'usufruit a été prise et reflété dans le Code français de 1804, modèle qui s'est ensuite propagé pratiquement dans toute l'Europe. Le législateur français, suivant le modèle de droit roman, a délimité l'institution de l'usufruit de celle de servitudes prediales, en la plaçant dans un chapitre distinct, soulignant ainsi l'importance des catégories juridiques mentionnées. La recherche sur la législation civile de l'Italie, de la Belgique, de l'Espagne, de la Roumanie et d'autres pays, permette de remarquer facilement que les réglementations dans ce domaine sont pratiquement identiques.

Mais, en droit français, l'institution de l'usufruit a été perçue par la division de la propriété, à la différence du droit romain, ou l'usufruit est une institution juridique distincte. Le droit d'usufruit, relancé comme institution au cours du développement de la propriété, à l'étape de la diversification de relations économiques et de l'industrialisation, est reste au service des relations patrimoniales au sein de la famille. Le concept social de l'usufruit suppose d'abord que l'institution visé, est destinée à réglementer les relations économiques entre les personnes très proches, afin d'offrir certains avantages alimentaire et parce qu'il était attrayant en raison de faciliter avec laquelle il pourrait s'établir. Le concept social, cependant, a régressé avec l'augmentation et l'intensification des relations commerciales, devenant l'un dépassées. En droit allemand est allé beaucoup plus loin, le Code civil de 1901, régissant l'institution de l'usufruit dans une manière enrichie, moderne, vu à travers le prisme d'une société industrialisée.

Le destin des normes de droit romain sur le territoire des états roumaines est similaire à celui presenté antérieur. La doctrine indique que „Après avoir quitté Dacia, les lois roumaines ont commencé à gâter et changer par les dacs"[7].

Après la relocalisation de l'administration romaine et de l'armée au sud du Danube, les indigènes sont retournés dans leurs anciennes formes d'organisation – la congrégation de voisins, territoriale ou de village. Organisé dans les collectivités locales rurales, de voisins ou de village, la population indigène romanisée, qui été dans le processus de formation de peuple roumain et de la langue roumaine, a fondé son existence sociale sur un système normative élémentaire. A sa base, en l'absence d'autorité de l'Etatcompétente de crer des

[6] *Idem*, p. 7-8.
[7] Cernea E, Molcuț E. Istoria statului şi dreptului românesc, ed. Şansa SRL, Bucureşti 1998, p. 44.

règles juridiques et de les respecter, a été la coutume juridique, constituée par les anciennes règles Geto-Daces et les règles de droit romain vulgaires.

Après le fin de la domination romaine, la population daco-romaine a continué ininterrompue sa existence sur le territoire de l'ancienne Dacie, dans des conditions nouvelles de l'unicication avec les Daces libres.

Comme indique le chroniqueur Dimitrie Cantemir „Les moldaves ont eu deux types de lois: l'une écrite, sur la base des lois des empereurs romains et tsarigradiens, et sur les décisions des tribunaux ecclésiastiques, et la deuxième, non écrite, que l'on pourrait appeler „la tradition du peuple"[8]. „L'histoire connaît un véritable crise d'information sur le temps de la suite de l'effondrement de l'Empire romain, au cours de migrations des peuples jusque à la formation des états et de la loi féodale"[9].

Pendant le IX-XIV siècle, la principale source de la loi était „Legea Ţării" (la loi du pays), qui représentent un ensemble d'habitudes et coutumes applicables dans tous les États roumain. Les documents de cette période, prouvent l'existence de jus valahicum, en vertu de laquelle déroulent les relations sociale et selon laquelle on juges les litiges entre les membres de cette société. „Legea Ţării", même si elle contient de nombreuses règles relatives à la propriété, les relations entre maris et sur la succession, l'institution d'usufruit, d'usage et d'habitation ne sont pas reflétées en cette période, probablement parce que les relations familiales, les conjoints ont une certaine autonomie réciproque, la famille avait un caractère patriarcal, qui est basé sur l'équité des conjoints, l'accès égal aux biens possédés et les deux époux ont vocation d'héritage égale avec leurs descendants[10].

La nécessité d'une codification des règles existantes a été imposée en raison de multiples facteurs: social, politique, religieuse, géographique et culturelle.

„Pravilile" émissent dans les années 1452, 1479, 1581, 1618, inspiré par byzantin, a marqué le début de la réception des idées juridiques romains et ses institutions. En 1646, sous l'égide de Vasile Lupu, a été imprimé à Iasi „Cartea românească de învăţătură"(Livre roumain de l'enseignement), considéré comme le premier document écrit contenant des règles formelles dans différentes sphères de la vie sociale, y compris les relations familiales, de propriété et de succession. Le titre complet est „Carte românească de învăţătură de la pravilele împărăteşti şi de la alte giudeţe". En représentant l' ambitions impériales du prince moldave, Vasile Lupu (1634-1653), ce document est le premier texte législatif laïque roumaine, tout en conservant un caractère religieux en raison de l'âge (les tribunaux ecclésiastiques sont compétents à juger car en ce qui concerne divers litiges de la famille, d'hérésie et de sorcellerie, etc.). „Cartea românească de învăţătură" se compose de deux parties, la première étant divisée en 16 chapitres et 252 „commencements" (paragraphes), totalisant un certain nombre de lois sur le terrain juridique et pastoral de la vie (échanges de terres, le partage de récolte, les dommages aux arbres et les cultures, les conditions qui doivent être respectées lors du fraisage d'eaux etc.)"[11].

Contemporain et rival de Vasile Lupu, Matei Basarab (1632-1654) – l'une des figures les plus imposantes des dirigeants roumains, imprimé „Îndireptarea legiei cu Dumnezeu

[8] Marcu Liviu P. Istoria dreptului românesc, Bucureşti, ed. Lumina Lex, 1997, p. 113.

[9] Cernea E, Molcuţ E., op. cit., p. 33.

[10] Cernea E, Legea Ţării, Ed. Universul Juridic, Bucureşti, 2008, Colecţia „Tratate şi cursuri universitare".

[11] Rădulescu A, Costin A, Grecu A şi alţii, Cartea Românească de învăţătură – Ediţie critică, Ed. Academiei, 1961.

care are toată judecata arhieresca şi împarătesca de tote vinele preoţeşti şi mireneşti" Il se produit comme une réponse à „Cartea românească de învățătură", notons toutefois bien qu'ils reproduisent le contenu: 1253 sur 1254 articles. Contrairement à la „Cartea românească de învățătură", „Îndreptarea legii" a un caractère beaucoup plus profondément religieux donné par ses dispositions législatives, et donc est appelé le „Pravila cea Mare" (Grand Code des lois). Ce Code contient des dispositions de droit civil, qui sont dispersés parmi les chapitres qui comprennent des sanctions pénales[12].

Dans le droit coutumier et le droit écrit de la période médiévale, il y avait des règles régissant les relations de propriété entre époux. Mais contrairement à d'autres périodes et d'autres systèmes juridiques, où toute la propriété, y compris la dot de l'épouse, appartenait au mari, dans la loi roumaine, les biens de la dot de l'épouse étaient dans sa propriété. „Elle pourrait même avoir des biens pendant le mariage, le mari ayant seulement leurs revenus, règles similaires au droit romain"[13].

Cependant, dans le contenu des sources mentionnées, manquent les règles sur servitudes personnelles, la réglementation de leur statut juridique, les droits et obligations de l'usufruitier et le nu-propriétaire.

La formation et le développement des relations sociales modernes ont augmenté lentement, dans la plupart des due à la domination étrangère. Pendant cette période, les principales sources du droit étaient „Pravilniceasca condică" par Alexandru Ipsilante – 1780; „Manualul lui Donici" – 1814 appliquée en Moldavie jusqu'en 1833; „Codul Calimah" – 1817 – inspiré non seulement sur les lois romano-byzantin et coutumes fonciers, mais aussi du Code civil de Napoléon – 1804 et du Code civil autrichien; „Legiuirea Caragea" – 1818[14].

„Pravilniceasca condică"de 1780 est l'œuvre du prince, d'origine grecque-phanariote, Alexandre Ypsilanti (années 1774 à 1782, de 1796 à 1797 dans le Pays roumain, les années 1786 à 1788 en Moldavie). Dans cet œuvre sont mélangées les coutumes avec les dispositions byzantines. C'est une loi féodale typique, mais dans son contenu il y a des germes de nouveaux principes de droit et de science politique, véhiculées à travers l'Europe, les idées de Montesquieu et Beccaria. Mais la loi a la principale source d'inspiration la coutume. Elle défend la propriété féodale, réglemente en détail la dîme et le corvée, les monopoles de séniores bénéficient d'une grande protection. En termes d'institution patrimoniale, est consacré le principe de la masculinité. Théoriquement restée en vigueur jusqu'en 1818, quand il a été abrogé par le „Codul Caragea".

Edité en 1785 par Alexander C. Mavrocordat, „Sobornicescul Hrisov" est le document de droit interne le plus important jusqu'à l'adoption de „Codul Calimach". Ce document organiser un nouveau régime commercial et de l'hypothèque, avec une mesure très importante: l'interdiction de donation „ de pauvres vers les riches et puissants", sauf que cela prouve un lien familial. Ils ont également porté sur „l'état de mariage des esclaves entres eux et avec les hommes libres."

„Legiurea Caragea" est appliquée en 1818, est compries d'éléments du droit byzantin, et des nombreux éléments de coutume roumains. „Renouveler plus en détail le processus de Ipsilanti et mélange les norme juridiques de Byzance et les coutumes. Il est également un

[12] Îndreptarea legii, Ed. Academiei R.P.R., Bucureşti, 1962.
[13] Marcu Liviu P., op. cit., p. 122.
[14] Idem, p. 167.

code général qui juxtaposer quatre codes spécialisés: civile, pénale, de procédure civile, et de procédure pénale"[15]. A été imprimé en grec et roumain. Il est resté en vigueur jusqu'en 1865 quand il a été mis en œuvre le Code civil roumaine.

En Moldavie, le „Manualul juridic a lui Donici" (le manuel juridique par Donici) comporte un chapitre traitant le droit de la propriété, inspiré par le droit roman – byzantine et coutumier, des droits réels et conserve son charme médiéval.

„Codul Calimach" est entré en vigueur en 1817, en Moldavie, sous le règne de Scarlat Calimach. Il était en effet jusqu'en 1865. „Codul Calimach" a été faussement décrit comme un „travail complètement byzantin sans mélange des traditions juridique roumaines". Cette source importante du droit, contient une réglementation détaillée des droits réels, en particulier la propriété, correspondant aux changements fondamentaux qui se produisent dans la société moldave à travers l'économie d'échange, ce qui explique pourquoi ces règles ont été inspirées par les modèles occidentaux[16].

Étant guidé par les règles du Code civil français, „Codul Calimah" consacre une bonne partie de la réglementation sur la propriété, d'autres droits réels, les qualifiant de servitudes. En ce sens, la doctrine affirme que la division des servitudes est en foncières et personnelles. Servitudes personnelles, à leur tour ont été divisées en trois catégories: le droit d'usufruit, usage et d'habitation. Les règlementations sont très précises et vastes, visant l'utilisation des choses, les biens qui peuvent être soumis à l'usufruit, les droits et obligations d'usufruitière et de nue propriétaire et même les moyens de protéger ces droits[17].

Les réglementations de „Codul Calimah" et „Legiuirea Caragea" ont été remplacés par les „Regulamentul Organic" (Règlement organique), conçus par la noblesse locale sous la surveillance stricte de la règle impériale russe, de 1828 à 1834. Introduit à un intervalle d'un an dans les deux principautés roumaines – Ţara Românească (1831), la Moldavie (1832) – était jusqu'en 1859 une véritable constitution. Cette loi fondamentale, „a contribué à la modernisation et à l'homogénéisation social, économique, administrative et politique" a commencé dans les décennies précédentes.

L'époque de l'unification des Principats, de la Moldavie et de la Valachie constitue pour l'histoire des roumains, „les transformations les plus représentatives et significatives, qui se sont produites tout au long de la phase renouvellement du XIXe siècle"[18]. Au cours de cette période, a été finis le processus de transition longue et complexe des structures et des formes d'organisation socio-économique et politique spécifique à une mentalité féodale, de ces institutions sociales bourgeoises apporté de l'Europe occidentale, fondé sur la propriété privée et la liberté du citoyen.

Le Code civil de Roumanie, promulgué par Al. I. Cuza en Décembre 1864 s'applique en Roumanie jusqu'en 2011, est la première loi moderne qui régit en détail l'institution des servitudes personnelles, leurs variétés et leur régime juridique. Étaient pour la plupart la traduction du Code civil français, au moins après le mode de fractionnement et de la structure de la matière, le Code civil roumain mette fin à une période de stagnation qui a

[15] Rădulescu A. Legiuirea Caragea, ed. Wallachia, Academia Republicii Populare Române.

[16] Marcu Liviu P., *op. cit.*, p. 171.

[17] Codul Calimah. Ediţie critică, Ed. Academiei Republicii Populare Române, Bucureşti, 1958, p. 267-289.

[18] Chiriţă Grigore, Organizarea instituţiilor moderne ale statului român (1856-1866), Editura Academiei Române, Bucureşti, 1999, p. 7.

connu l'institution des servitudes personnelles, pas utilisé en raison de l'existence des relations sociales très simplifiée, rudimentaire et même primitive, relatives à la propriété privée, de la famille et pas moins économique.

La recherche historique montre que les institutions de l'usufruit, l'use et l'habitation sont des entités juridique approprié pour une société éminent, développés et avancés, ou les relations de ses membres sont complexes et variées. Enfin, il convient de noter que ces institutions, en raison de son utilité pour servir une personne autre que le propriétaire, peut être trouvée dans le cadre juridique dans lequel les entreprises accordent une importance à la famille et à leur situation financière et tend à une récupération maximale de la propriété.

Le Code civil de Roumanie de 1864 a été en vigueur, étant modifié et abroge dans une partie de celui-ci, d'une manière adaptée aux nouvelles conditions imposées par le régime socialiste, mis en place après la Seconde Guerre mondiale. Se référant à ces moments, l'auteur Ioan Albu a déclaré que „Les principaux types de droits réels anciennes (usufruit, usage, habitation, servitudes et superficie) sont de faible fréquence a cette étape historique et peut être réglé que sur la propriété personnelle et privée”[19]. Toutefois, l'institution des servitudes personnelles n'a pas été exclue du champ d'application des normes juridiques civiles qui se réfèrent à des droits réels, en étant conscient de la nécessité et de l'utilité.

Actuellement, par l'adoption du nouveau Code civil roumain, à l'institution des servitudes personnelles a été donné un nouveau regard, révisés et améliorés, des changements ont été introduits en tenant compte des besoins et des exigences de la vie sociale contemporaine dictées par elle. Des modifications pas essentielles ont été soumis à des règles sur la constitution du droit d'usufruit, l'objet du droit d'usufruit, le terme de l'usufruit, les droits et obligations de l'usufruitier, mais une réglementation détaillée a été consacrée à l'usufruit dans les sociétés commerciale, le transfert du droit d'usufruit, l'usufruit d'une créance et du fonds de commerce[20].

En ce qui concerne le territoire situé entre le Prut et le Dniestr, certaines parties du code civil roumain a été étendu ici peu de temps après 1918, mais de 1 juin 1928 ont été appliquées toutes les dispositions du droit civil roumain. Après l'établissement du régime socialiste, ont été substantiellement modifiées et les règles de droit civil, qui ont été adaptés aux nouvelles relations. En raison de l'émergence de ces deux formes de propriété, socialiste et coopératiste, l'institution des droits réels a été considérablement changée, et ceux des servitudes personnelles a été totalement exclue.

Le destin de l'institution des servitudes prediales et personnels, dans la République de Moldova, était semblable à la législation russe. La doctrine russes précise que: „En Octobre 1917, la doctrine tend à mettre en évidence les caractères de loi de l'URSS, comme la nouvelle loi „socialiste”, en opposition avec le droit bourgeois. Donc, on ignore les bonnes fonctionnalités de droit et au nom des idées politiques, on annonce les slogans temps”[21]. Dans la République de Moldova, à partir de 1944 jusqu'à l'adoption du Code civil de la

[19] Albu I. Drepturile reale principale de tip nou în sistemul juridic al R.P.R, ed. Separatum, Cluj 1963, p. 61.

[20] Code civil de Roumanie de 17 juillet 2009, republiée dans le Monitorul Oficial, Parte I, nr. 505 de15 juillet 2011, en vigueur du 1 octobre 2011.

[21] Учебник по гражданскому праву. Часть 1, под ред. Сергеева А.П., Толстого Ю. К., из. Проспект, 1998, p.409.

République socialiste soviétique moldave en 1964, les relations civiles étaient régies par code civil de l'Ukraine.

Grâce au Code civil du RSSM 1964 a été consacré régime de la propriété socialiste. Ainsi, durant cette période la propriété socialiste a été le principal type de propriété et la propriété privée étaient réduise et étant limite aux bons personnels. Le droit d'usufruit, avec d'autres démembrements de propriété restait à exister que dans les livres d'histoire et de droit roman privé. Dans d'autres pays socialiste, ils ont été maintenus en mesure très limités, mais le droit soviétique a exclu totalement ces institutions juridiques. Pratiquement toutes les règlementations de droits réels sont limitées à la propriété, en ignorant l'existence des autres catégories. Par conséquent, le phénomène des servitudes prediales et personnelle avait aucune reconnaissance légale, par ce s'explique l'intérêt bas des savants pour étudier ce problème.

Ignorant l'institution de l'usufruit, le système juridique soviétique a nié et sa capacité de exploiter la propriété. À l'heure actuelle, l'examen de la pratique des pays ayant plus d'expérience dans ce domaine, nous sommes convaincus de l'utilité et l'efficacité des servitudes personnelles: leur utilisation dans les rapports de propriété entre époux, parents et enfants, les relations juridique de successions, et même dans les entreprises avec les immeubles. Cette institution a facilement surpassé les relations familiales, le cas bien connu de la mise en place du droit d'usufruit des sociétés commerciales, sur des actionnes, en Allemagne est réglementée et le droit d'usufruit imposées sur les softwares (systèmes de programmation informatique et de leurs modalités d'application.

La renaissance de droit des servitudes prediales a eu lieu après l'indépendance de la Moldavie et a été traité par des actes tels que: la Loi N-1308 du 25 Juillet 1997 sur le prix normatif et la vente de terrains[22]; la Loi N-1217 du 25 Juin 1997 relatif au programme de privatisation de 1997 à 1998 (art. 55)[23], la Loi N-1525 du 19 Février 1998 relative à l'énergie (art. 6)[24], la Loi N-1543 du 25 Février 1998 relative à cadastre immobilier (art. 2)[25], la Loi N-136 du 17 Septembre 1998 relative à gaz (art. 19)[26], la Loi N-137 du 17 Septembre 1998 relative à l'électricité (art. 19)[27], la Loi de la copropriété du logement. N-913 du 30 Mars 2000[28]. Ensemble, avec les servitudes prediales, été relancé par les dispositions du Code civil de la République de Moldova, le 6 Juillet 2002 et l'institution de servitudes personnelles.

L'institution de droit de l'usufruit a démontré son utilité en ce qu'elle a été au cours du temps pris presque de tous les systèmes de droit, est venu à être mis en œuvre dans le droit contemporain, depuis 1804, le Code civil français (art. 578), Cod civile de l'Autriche en 1811, le Code civil allemand de 1901, le Code civil du Québec en 1991, le Code civil de la Catalogne en 2006 etc.

Malheureusement, dans la doctrine a été exposée l'opinion que le champ d'application du droit d'usufruit est très limitée, citant R.fon Ierind, SA Gromov a déclaré que „Ailleurs

[22] Publiée au 06.12.2001 dans Monitorul Oficial Nr. 147-149, art. nr.1161.
[23] Publiée au 11.09.1997 dans Monitorul Oficial Nr. 59-60, art. nr. 518.
[24] Publiée au 04.06.1998 dans Monitorul Oficial Nr. 50-51, art. nr. 366.
[25] Publiée au 21.05.1998 dans Monitorul Oficial Nr. 44-46, art. nr. 318.
[26] Publiée au a 17.12.1998 dans Monitorul Oficial Nr. 111-113, art. nr. 679.
[27] Publiée au 17.12.1998 dans Monitorul Oficial Nr. 111-113, art. nr. 681.
[28] Publiée au 19.10.2000 dans Monitorul Oficial Nr. 130-132, art. nr. 915.

que les relations familiales, le droit d'usufruit viagère n'est pas rencontré. Il est inutile pour le circuit civil. Sa maison est la famille, entourage de maison, qui ne lui laisse pas. En dehors de cette zone usufruit n'est que dans les manuels scolaires. Il peut annoncer un prix pour celui qui va pointer vers un cas d'usufruit rencontré dans la réalité"[29].

Contrairement à ce point de vue, en faveur des servitudes personnelles, plaidé de nombreux autres chercheurs dans le domaine. Ainsi, A.I. Emelichina dit que „c'est très courant et qui ont soutenu l'idée de la mise en œuvre l'institution de l'usufruit dans la législation nationale, dans les conditions libéralisation du marché d'immeubles, l'un des éléments dont chaque participant a le droit d'utiliser les biens proposés. Les relations économiques actuelles, en tenant compte de son type spécifique, dicte la nécessité de la réglementation de droits d'usufruit, les investissements dans les biens immobiliers, appartements, maisons et terres agricoles, sans un mécanisme de récupération, limite les possibilités de ses propriétaires. Les droits réels, par opposition à la obligation ont un mécanisme de protection absolue[30].

Un autre auteur, A.G. Sirotchin dit que l'introduction de règles de l'usufruit, dans la législation français, allemands, suisses et de nombreux autres pays, parler de l'utilité de cette institution. Contrairement aux droits d'usage accordés en vertu d'une obligation, le titulaire d'un usufruit a une utilisation garantie et indépendant du propriétaire[31].

La réglementation actuelle du droit d'usufruit, d'usage et d'habitation doit être effectuer en tenant compte à la fois les aspects historiques de notre législation, les mesures qu'ils ont vécues, mais aussi le contexte économique et social dans lequel nous nous trouvons. Alors le recherche de développement de l'institution des servitudes personnelles, les changements que cette institution a souffert, mais plus important encore, les questions qui sont restées inchangées au cours du temps, de la doctrine et de la jurisprudence, en ce moment est réelle et justifiée.

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[30] Емелькина И.А., *op. cit.*, p. 155-156.

[31] Сироткин А. Г. Узуфрукт (пользовладение) в российском праве XIX – начала XXI вв., Автореферат, Нижний Новгород, 2012, p. 3.

THE RIGHT TO A FAIR PROCESS IN VIEW OF NEW CHANGES OF CIVIL PROCEDURE CODE OF RM

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Abstract

Democratic societies aspire unanimously to a fair trial and tend to create norms concerning the treatment of individuals involved in a criminal or civil trial that could be applied universally. The right to a fair trial is stipulated in the European Convention of the Protection of Human Rights and Fundamental Freedoms (ECHR) and in the legislation of many democratic countries.

Keywords: fair trial, guarantee of the right, equality of parties

The word "fair" is defined by DEX as "founded on justice, on truth, just, impartial".

Thus, the Art. 6 of the Convention mentioned above guarantees the "right of every individual to a fair trial" as applicable to both criminal and civil procedures.

As indicated in the legal sources, the Art. 6 of the European Convention of Human Rights is one of the longest and most complex of the Convention. As the provisions of the Convention are of great importance for the tribunals and legal units, we will realize a synthesis on this topic that concerns the right of an individual to a fair trial at an independent and impartial tribunal that shall be solved in a reasonable period and with respect to all legal procedures[1].

In the contemporary society, the right to a fair trial plays an extremely important and essential role. "The restrictive interpretation of paragr. 1 of Art. 6 and Art. 6 altogether, would not meet the overall purpose and scope of these provisions"[2].

Therefore, it was decided that the provisions of paragr. 1 of Art. 6 of the Convention shall be applied even in the cases of legal actions with patrimonial character that involve the infringement of civil and non-property rights (in a broad sense) or in cases when the settlement of a civil action is determined by rights and obligations of private character[3].

Regarding the concept of "civil rights and obligations", the European Court specifies it by adopting a broad interpretation of this concept, considering that it shall be applied not only in legal relations of civil law itself, but also in 'legal relations between individuals or private legal entities and state authorities, which may arise the rights and obligations of civil law, to which provisions of line 1 of Art. 6 of the Convention are applicable too".

In this report, the Court claimed "with a principle value" that paragr. 1 of Art. 6 of the Convention envisages not only "appeal" (court action) relating to individual rights which regulate the private domain, but these rights can also be questioned (may be subject to legal action), both in the context of private litigation and in disputes between individuals and the

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[1] Pătulea Vasil commented fair trial jurisprudence of the European Court of Human Rights. Romanian Institute for Human Rights, Bucharest 2007.

[2] Voicu M., "Protection of Human Rights. Theory and jurisprudence", Lumina Lex, Bucharest, 2001, p. 94.

[3] See ECHR, judgment of 25 November 1994, in the Ortenberg v. Austria, Series A no. 259 -B, paragr. 28.

state, to the extent that the State acts within the private legal relations and not as a public authority (jure imperii)[4].

In the Moldovan legislation there can be found the vast majority of guarantees to a fair trial. Certainly, most of the provisions relating to ensure a fair trial cover the provisions of the two procedural codes (civil and criminal). Although it is impossible to list exhaustively all provisions, we will reserve the right to mention the most important ones:

- independence and impartiality of the judges,
- court proceedings are public,
- guarantee of the right to defense,
- equality of parties in court is guaranteed by law,
- binding motivation decisions,
- reasonable observance of the trial period.

However, in this study we will refer to some of the guarantees of a fair trial provided by the examination of civil cases established by the Code of Civil Procedure of the Republic of Moldova[5] which in recent years has been changed thus ensuring guarantees of fair trial.

On the other hand, some provisions of this code are declarative and not implemented for objective reasons such as unwillingness of the courts and the involved parties to realize them.

In compliance with law nr. 155 dated on 5 July 2012 there were introduced some significant changes to the Code of Civil Procedure. These amendments entered into force on 1 December 2012

One of these amendments is defined in art. 18 by paragr. (1^1), which states: "To exercise the procedural rights and obligations the participants in the process can make the audio recording of the hearing."

According to the amendments, the parties of the process and representatives shall have the right to audio record the discussions at hearings without prior consent of the presiding judge or the president of the court.

We believe that this right is a part of the principle of the public nature of court proceedings, and it permits the parties to document certain facts and testimonies expressed by the participants in the process and can serve as evidence in case of divergence between them and the content of the minutes of the hearing.

We consider that the drawback is that it is forbidden to make video record of court hearings, without any prior consent. Such amendment would be very helpful in the future and would contribute significantly to the promotion of transparency in court.

The Law 155 of 05.07.12 contains significant provisions fostering the right to a fair process in terms of unconstitutionality settlement in civil cases.

If in the judgment of the case it appears that the law provision, that shall to be applied or has already been applied, is inconsistent with the Constitution of the Republic of Moldova, and the constitutionality of the normative act is for the Constitutional Court, the

[4] See ECtHR judgment of July 16, 1971, Ringeisen v. Austria concerned, Series A, art. 13, paragr. 94.

[5] Code of Civil Procedure of the Republic of Moldova no. 225 of 30.05.2003 // Official Gazette no. 111-115 of 12.06.2003.

court makes a referral to the Constitutional Court which is stated through the Supreme Court.

This provision would guarantee the application of present regulations sometimes outdated in strict conformity with the Constitution of the Republic of Moldova.

By filling in Art 236 with a new paragraph, there were made attempts to ensure the process with a fair but painful essential element of justice in Moldova, namely motivating court decisions. The amendment provides that the court is liable to pronounce decision without stating the motivation.

The court will be required to prepare full judgment expressly indicated only in cases, when trial participants within 30 days insistently request this, or when the appeal has been filed within 30 days since decision was pronounced or judgment will be enforced in another country.

Therefore, if a party files an appeal, the court will be required to prepare a motivated judgment, even without a specific request in this regard.

Although the law requires all decisions to be reasoned, the inadequate motivation of judgments still is a serious shortcoming of the Moldovan justice.

Frequently judges reproduce text of the law in the judgment, without explaining how this legal provision shall be applied to a definite situation. Also, many judges are not compelled to motivate essential argument put forward by one of the parties, creating the impression that the argument has been totally ignored. The lack of the judgments motivations in the Republic of Moldova was mentioned by the ECtHR in 2005[6].

The publication of judgments on the website increased their quality. However, motivating a large number of judgments still has a long way to become satisfactory.

The faulty motivation of the judgments is caused by past practices of superficial judgments motivation, large number of examined cases, traditional focus on the promptitude encouraged by the SCM (Superior Council of Magistrates of Republic of Moldova) to examination of cases, toleration of unmotivated decisions by supreme courts, contradictory practices of the SC (Supreme Court of the Republic of Moldova) and lack of rigorous control upon unification of jurisprudence. One of the basic principles in the operation of the courts is to reasonably respect the period of case examination. That directly insures the right of citizens to exercise the right of effective satisfaction of the courts. Generally, Moldova has never got chronic problems regarding the time examination of cases by the courts. The long examination of the cases is more an exception than a rule. Thus, in both civil and criminal cases the first meeting takes place within 6 weeks after notification of the court[7].

Though there are some cases with a dose of complexity and inefficient administration by the court or participants that are examined for several years with passing several times through all levels of courts.

The delay is caused by several reasons: excessive postponement of hearings, complexity of the dispute; abuse in lodging appeals by the parties in the process, performing acts of expertise for extended periods etc.

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[6] See judgments of the ECtHR in cases Becciev v. Moldova and Sarban both the October 4, 2011.

[7] Gribincea Vladislav Hriptievschi hope, Access to justice, the right to a fair trial and the presumption of innocence.

That drawback was eliminated by Law no. 87 of 21.04.2011, which created a cure for the defense of the right to trial within reasonable case and the right to enforcement of the judgment within a reasonable time.

Thus, if it is proved that the right to trial within reasonable time or within a reasonable right to enforcement of the judgment has been violated, the court will decide on the compensation of moral and material damage as well as litigation costs from the state budget. It is important to use all possible legal leverage for the realization of the right to examine the case within a reasonable time.

Although the civil procedure of Moldova apparently contains legal provisions ensuring the right of the parties to a fair trial, in reality there are still many deficiencies that cause discontent in society and distrust in the judiciary system. To guarantee the efficiency of this right it is necessary to introduce rules that would increase personal responsibility of courts and judges.

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THE PARTICULARITIES OF ADMINISTRATION PUBLIC PROPERTY OF LOCAL COLLECTIVITIES

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Abstract

Local collectivity is a law subject. Like another's law subjects, local collectivity as the holder of rights and obligations, has it's own patrimony. The patrimony of local collectivity is different than the state one and another local collectivities. This patrimony consists of mobile and immobile, corporal and incorporeal goods, and the rights over them. A distinct category of goods are the ones that form public property of collectivity. Over this category of goods, local collectivity exercises the prerogative of general administration which results from national and international legislation.

We will lead our study starting with property theories promoted by French and Romanian school and by their legislation, contributing with some completation with Republic of Moldova legislation, with the scope of clarifying the concept of administration public property and it's features.

Key-words: domain, public property, patrimony, administration, administration right, local collectivity

In the following we will analyze property and public property, and, in particular, public property right of the administrative-territorial units, through the lens of the organic law of the Republic of Moldova, as well as through the applicable stipulations, concerning the administration of public patrimony, which is contained in the European Charter of Local Self – Government and from the point of view of the certain provisions with fundamental character relating to property from the Constitution of the Republic of Moldova.

Provisions from the art. 14, paragr. 1 and 2 letter b) and art. 43, paragr. 1, letter c), as well from the art. 29, paragr. 1, letter g) and art. 53, paragr. 1, letter d1) and d2) of the Law of local public administration[1], covers the main tasks (competencies) in administration of public and private domain of the village (commune), town (municipality), and district, which revert to both local councils, as autonomous, deliberative administrative authorities and to mayors and presidents of district, as autonomous executive administrative authorities.

General characteristic. In accordance with the art. 1 of the Law of administrative decentralization[2], competencies of the local government represent the sum of rights and obligations of local public authorities in areas of activity that are set to them. In order to

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[1] Law no. 436 from 28.12.2006 of local public administration, Official Monitor of RM, no. 32-35 from 09.03.2007.

[2] Law no. 435 from 28.12.2006 of administrative decentralization, Official Monitor of RM, no. 29-31 from 02.03.2007.

realize these competencies local authorities use different resources: institutional, human and patrimonial. All combined they determine the administrative capacity of every single authority.

Art. 4 of the European Charter of Local Self – Government[3] establish the principle of subsidiarity and stipulate that within the framework of the law, that local authorities have, the entire power of taking the initiative in any matter which is not excluded from the sphere of their competencies, or which is not assigned to another authority.

Thus, the exercise of public power must belong to those authorities which are closest to the citizens and responsibilities which are entrusted to local communities should normally be full and complete. Or, as saying a French Decree of 1852, it can govern, but can only manage to close.

The normative framework. The legal framework which governs the powers of local public administration authorities in the Republic of Moldova in the field of local public property includes a wide spectrum of regulatory acts, among which can be mentioned:

- Law of local public administration,
- Law of administrative decentralization,
- Law of administrative-territorial units' public property,
- Law of the administration and privatization of public property,
- Law of expropriation for public interest,
- Law on concessions,
- Law of condominiums in the housing fund,
- Law of public communal services,
- Civil Code,
- The land code,
- The forest code,
- The subsoil code,

as well as other normative acts like: the Government's decisions, orders of ministries, decisions of local and district councils, and in some cases, the provisions of district presidents and mayors.

Through the prism of the analyzed facts, we note that the existing legislation in the field of competence to administrate the local public property by local public administration, it is quite impressive. However, there still exists, and we will try to prove this, a lot of ambiguities which could disappear, why not, with the unification of all those regulations, for example by adopting a Code of public property, as did France through the adoption in 2006 of a Code General de la Propriete des Personnes Publiques or by adopting Cod al Domenialității Publice in Romania, as is often discussed about the need of its adoption.

Area of activity of local public authorities. According to the current legislation in the sphere of local public administration, local councils as deliberative authorities and elected mayors as the executive ones are the local public authorities of first level administrative-territorial units. Also, district councils, as deliberative authorities and presidents of districts as the executive ones are the local public authorities in administrative-territorial units of level II. In this context, in accordance with the law no.

[3] European Charter of Local Self-Government from 15.10.1985, ratified by Republic of Moldova by Parliament Decision no.1253-XIII from16.07.1997.

436-XIII/2006, are set out the powers of the local public authorities of level I and II, which are separated into two types of local authorities: deliberative and executive. Besides this we mention that the local public administration authorities exercise three types of competencies: authorities' own competencies, delegated competencies and competencies of cooperation. Consequently, in the art.. 4 of the Law 435-XIII/2006, are set local public authorities' of level I own areas of activity, among which letter g) mentions the power of administration goods of public and private domains; in paragr. 2 letter a) of the same normative act, it is stipulated the power of administration goods from the public and private domain of the district, among all areas of activity of the local authorities of level II.

As a result of the amendment of law no. 435-XIII/2006[4], art. 5 has undergone some changes. In this way was introduced a new paragr. (5) according to which local public administration authorities of level I and II will develop cooperation with the private sector on the basis of public-private partnership, for the purpose of successful fulfilling of local public interests and increasing the efficiency of public patrimony. Therefore we can note that, in the area of local public property, the local public authorities, of the different levels of organization, are empowered with the competencies of cooperation, of course, in compliance with the law and only in order to ensure completion of some projects or public services which require joint efforts of these authorities, including the central authorities.

Even though the areas of activity proper for local public administration authorities are settled by the framework laws, however the local public authorities of all levels, within the limits of the law, have full freedom of action in regulating and managing all matters of local interest which are not excluded from their competence and aren't assigned to another authority.

We will concentrate at this section of the powers (sphere of activity), whereas we want to point that the competencies of local public authorities, in particular the competencies of the executive authorities, and we are referring here to the presidents of districts and mayors, are determined mainly by the need of achieving both the local and national interest. For these reasons, according to law, mayors and presidents of districts have both their own powers and delegated ones too. In other words, mayor and president of district don't exercise their powers in their own name but on behalf of the local community which chose them, and on the other hand, of the state which gave them rights and obligations of public interest. According to the status of the local executive organ, both mayor and president of the district represent and exercise powers pertaining to their competence or delegated powers. In this way, in the area of administration of public property, mayor is responsible for the inventory and administration of public goods and private domain of the village (commune), town (municipality), within the limits of his/her competence [art. 29 paragr. 1, letter g) of the Law no. 436/2006]; and president of the district ensures the establishment of feasibility studies and proposes for approval the lists of goods and services of district level interest for realization of projects of public-private partnership and ensures monitoring and control of projects of public-private partnership where local government authority participates as a public partner (art. 53 paragr. 1, letter d1, d2 of Law no. 436/2006).

And yet, what are the goals, guiding principles and how we might define the administration of local domain, as a competence of local public authority?

[4] Law of Parliament no.181 from 15.07.2010, Official Monitor of RM no. 155-158 from 03.09.2010.

The objectives and basic principles of the administration of the local community public domain. Analyzing in detail all the legal provisions relating to the public property of local communities and the provisions of the Law no. 436/2006, Law no. 435/2006 with the provisions of the Law of administration and privatization of public property[5], Law of the public property of administrative-territorial units[6], Law of public fields and their delimitation[7], administration of the local public property is realized on the basis of following principles: efficiency, legality and transparency, in order to:

- to determine the composition and value of local public goods;
- to keep track of local public goods;
- to supervise local public property;
- to harness goods of the public property, the administrative circulation of them, through the means provided by law,
- to defend the rights and legitimate interests of the local community in the area of local public property.

A try to define. By administration of public property of the local community we understand the specific area of activity which belongs to the holder of the right of public property, which encompasses the totality of processes of evidence, monitoring, recovery, preservation and defense of certain categories of public goods, characterized by inalienability, indefeasibility and insaisissability based on the rules of efficiency, legality and transparency, in order to preserve and exploit them for the benefit of the entire local community.

The features of administration local communities' public property. Once defined the administration concept, we will stop in the following over the features (specificities) of administration local communities' public property. First of all, we should specify that we will deduce these particularities from the definition. In our understanding, these are:

- public property right registration;
- public property evidence;
- public property inventory;
- public property protection;
- public property preservation;
- public property exploitation;
- public property protection.

Registration, inventory and accounting of public property. The purpose of the legal rules is to offer the necessary judicial security to the legal circuit. The law by its rules has the task of defending the present rights and those which will be gained by individuals and legal entities, including state and administrative units. The legal system, which is a normative one, tends to perfection as he governs better the delimitation and makes more widely known the subjective rights, and is respected more as it is exercised more concisely and accurately. The need for safety of civil legal relations is carried out through the state registration of patrimonial rights to immobile property, which presupposes the registration in the register of immobile goods of the property right and other patrimonial rights over it,

[5] Law no. 121 from 04.05.2007, Official Monitor of RM, no. 90-93 from 29.06.2007.
[6] Law no. 523-XIV from 16.07.1999, Official Monitor of RM, no. 124-125/611 from 11.11.1999.
[7] Law no. 91-XVI from 05.04.2007, Official Monitor of RM, no. 70-73/316 from 25.05.2007.

and of the holder of such rights. In accordance with art. 4 of the Law of immobile goods cadastre[8], subjects of registration are the owners of immobile property and other patrimonial rights holders, which are: […] Republic of Moldova as its administrative-territorial units. Registration is compulsory (art. 5 Law no. 1543), and the information about the recorded rights is transparent (art. 6 Law no. 1543).

The registration in the Register of immobile goods is made on the basis of applicant's declaration, in our case we are talking about the mayor of the locality, which is made at the territorial cadastral office in the territory of which the immobile property is located, and presenting an established set of acts. Once registered in the Register, the applicant becomes the owner of the right over an immobile good, consequently, the state assures him/her the protection and right over the goods.

Failure of delimitation of the lands which are public property of the state and those which are the public property of administrative-territorial units, has a direct negative impact on the immobile goods record-keeping, which is with deviations from the legal norms. The main problems of the daily record would be:

- incompatibility of the available data at the central level with the data existing at the local level;
- doubling recording data relating to immobile goods, does not permit the establishment of real data existing in the territory;
- activity area of territorial cadastral offices is not correlated with administrative-territorial division, which does not allow for efficient cooperation with local public authorities of different levels.

Lack of truthful and complete information about existing real estate goods, is jeopardizing record-keeping process and, as a result, creates conditions for irrational use of public resources both of the state and of local communities.

Local public authorities should ensure the demarcation and separate survey of property from the public and private domain. In this regard, in accordance with art. 77 of the Law no. 436, all goods belonging to the administrative-territorial unit, are subject to annual inventory, and reports on their situation, shall be submitted to the particular council. In accordance with art. 14 of the Law no. 523-XIV, inventory of public property of administrative-territorial units shall be made by the competent structures of Government. We note that, in terms of decentralization of property, the legislative itself admits the Government's interference in the process of inventory of public property to the local community, thus going against the principles of local autonomy and decentralization.

Protection and defense of public property. As with any subjective right, the right of public property is defended by the guarantees covered by the various branches of law, emphasizing the importance which it has in the social life of the community.

As regards Romania, under the constitutional aspect, since the Constitution of 1866, the right of property is guaranteed and is considered sacred and inviolable but the Constitution of 1923 declared that the property of any kind would not be guaranteed. The Constitution of 1991, revised, in art. 136 paragr. (1), paragr. (2) mentiones that state public property is guaranteed and protected by law. In the same way Constitution of the Republic of Moldova[9], in art. 127, notes that state protects property. We should point that the quoted

[8] Law no.1543 din 25.02.1998, Official Monitor of RM, no. 44-46 din 21.05.1998.

[9] Constitution of Republic of Moldova from 29.07.1994, Official Monitor of RM, no. 1 din 18.08.1994, with subsequent amendments.

constitutional provisions, do not contain any provision indicating that public property would enjoy a preferential protection or that constitutional texts dedicated to the preservation of private property are far more numerous and consistent.

Even if there are guarantees of the public property right in various branches of law, the most guarantees are regulated by civil law. In terms of civil law, defense of property right was defined as the sum of all legal actions through which the holder of the right requests the court to decide whether in order to remove any prejudice or breach of duty of his right, either as actions through which the owner tends to eliminate infringements of his right and to get at its restoration.

Defending the right of public property is realized via actions of requesting the court to determine directly that the applicant is the owner of the property right and concretely via the action in claim. What's more, we will make the specification that defending the right of public property through the action in claim, it is provided by the Romanian legislation and can be deduced from the legislation of the Republic of Moldova. Or, the express provision in this regard, is the art. 865 paragr. (3) and art. 564 of the Romanian Civil Code, which establishes that the provisions relating to the action in claim and action in defense of private property right, is applied in a proper way to the right of defense public property too. The Civil Code of the Republic of Moldova, does not contain express provisions nor even reference rules concerning protection of the right of public property, as in the case of the Romanian civil law. However, consequential from the fact that according to art. 296, goods may belong to the public domain or private one and so forming property of these entities, the action in claim is a defense mechanism applied to the public property as well.

In this way, the action in claim can be made by the holder of the right of public property. As regards Romania, in case of local community, representation is assured by the county councils, the General Council of the municipality of Bucharest or by local councils, as it is established in art. 12 paragr. (5) of the Law no. 213/1998. In terms of the legislation of the Republic of Moldova, in the case of the local community, the representation will be provided by the regional councils, the General Council of the municipality of Chişinău, the Popular Assembly of the Autonomous Territorial Unit Găgăuzia or by local councils, as it is established by art. 4 paragr. (1) of the Law no. 523-1455/1999.

Relating to the proof of public property right, this must be done in accordance with the rules of the common law.

The action in claim of goods from public property is indefeasible extinctive, regardless of whether the property is movable or immobile, and to this end, there are no exceptions. Moreover, the action in claim cannot be paralyzed by invoking usucapion, in the case of immobile goods, or invocation of possession in good faith, in the case of mobile goods.

Therefore, the Romanian Civil Code regulates protection of public property right, in consideration of the fact that it is the subjective right, which belongs to state or to local community over the goods which are of public use or public utility, either by their nature or by an express provision of the law. Even though the institution of public property may be treated interdisciplinary, defending the right of public property is an institution of civil law.

Law of the Republic of Moldova of public property of administrative-territorial units, contains a valuable provision, in our opinion, relating to guaranteeing the legal conditions for the exercise of the right of public property of administrative-territorial units. According to this rule, public property of the administrative-territorial units is acknowledged and

defended by law. State guarantees the legal conditions for the exercise of the right of public property of administrative-territorial units which are equal legal conditions for the exercise of the right to any other form of property. No one has the right to withdraw forcefully the property from a public owner, except the cases provided by law, and to demand the merging of its goods with the goods which belong to another owner. The public owner has the right to dispose its own property in its own way, without violating the law.

Exploitation and preservation of public property. Concerning to Romania and Republic of Moldova, exploitation of the public property, regarding the doctrine and jurisprudence may be realized: by using public domain by public services and by using of the public domain by individuals, so by the public.

At the same time, we highlight that in the action of exploitation as a component of the administration of the public property, local communities act as public authorities, i.e. issues of administrative law, not civil law. It involves the exercise of the attributes contained in the sphere of competence that the law gives them, and not the exercise of certain rights and obligations of a civil nature.

General administration of the goods which belong to public domain is a way of exercising the right of public property directly, unmediated by the county, city or municipality. The county, town or commune council, are the subjects of law by which a local community expresses its legal will, within the limits established by law. As to Republic of Moldova, the local community expresses its legal will through the district, town or village council. These subjects of law are acting exclusively in their status of persons of public law or administrative persons in the process of general administration of the goods from public domain. That's why, rights and obligations that make up the content of the general administration of the public domain represent only responsibilities within the area of their competence, and not within subjective civil rights[10].

As for conservation, it can be perceived as a fundamental task for the transmission of public patrimony, with all its components, to the future generations. In other words, every local community has an obligation to keep (preserve) public goods and use them for the benefit of the whole community.

[10] E. Bălan, Administrative law of goods, Publishing House C.H.Beck, Bucharest, 2007, p. 90.

INTERPRETATION OF TERMS IN INSURANCE CONTRACTS. UNFAIR TERMS

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Abstract:
The paper is structured in three parts. In the first part I treat interpretation of the terms of the insurance Romanian Law. In the second part we discussed the interpretation of insurance contracts clauses in the law of other European countries. Finally, we analyzed a controversial issue, namely unfair terms in insurance contracts.

Keywords: Interpretation, unfair terms, clause manuscript, P.A.D.

1. Interpretation of terms in insurance Romanian law

Interpretation, as a legal institution is "the logical-rational operation that sets the exact meaning of contractual terms. It is of particular importance as it constitutes an operation indispensable in the performance of contractual obligations and in the event of a dispute".

Interpretation includes a set of rules necessary for determining the real intention of the legislature.

If the insurance principle applied is that of strict interpretation of contract. The meaning of any term of the policy will be interpreted in the sense of basic, naturally, used by people with normal intelligence.

The nature of the insurance contract requires a strict interpretation of the terms. The risk must be well defined, as to avoid further confusion or misunderstandings caused by a possible different interpretation or incorrect parts. In the case of ambiguous terms, unclear, apply the provisions of the Civil Code which states that where there is doubt, in case of doubt, or due to the possible uses of a term inappropriate or unclear expressions of a term, the interpretation will be in favor of the authorization.

Interpretation of a contract means clarifying assembly itself constitute policy documents to determine the true meaning of obscure clauses by using techniques such rendering common intention of the parties.

Insurance contract is a contract of adhesion, the specific rules for the interpretation of terms default. In case of inconsistency between a clause expressly established between the parties (manuscript) and one default, the former prevails.

With regard to this rule, in theory considered that sometimes the default clause can only have a role model, given that the parties may express their real intention by express handwritten clause which derogates in some way to model default clause. Default clauses whose insertion in the contract is exceptional, it must be expressly accepted by the insured. The exceptional nature of these clauses can be given that they establish special rights for the insurer, or extremely onerous obligations secured rights and obligations normally not found in the contents of the insurance contract.

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Whatever type of insurance contract in case of default clauses ambiguous, they are construed against the insurer.

According to art. 978 of the Civil Code, questionable clauses shall be construed to produce legal effects. This rule applies to insurance contracts.

For clauses with two meanings, apply all the provisions of the common law, interpreting it in the sense of producing the same effects and not produce any. If both meanings of the clause lead to efficiency measure, but the consequences are different interpretation is in that fits best with rare nature of the contract of insurance.

If some categories of risks are excluded under general terms, by the terms of these manuscripts are covered, which are designed to supplement or derogate from the general ones.

In conclusion, as shown in our legal literature, it is doubtful whether a default clause, the contract will be interpreted under art. 983 of the Civil Code in favor of the insurer and not against it, since the insurance contract, it has the quality of ordinary debtor. When printed clauses are obscure or ambiguous, the contract will be interpreted on the basis of art. 1312 par (2) Civil Code, against the insurer (Contra proferentem) because he is the one who formulated and dictated standardized conditions and therefore imputed his mistakes or ambiguities, and the insured that he simply accepted.

2. Interpretation of terms in insurance contracts right in European states

The French doctrine was established that if obscurity, ambiguity or any other defect of expression is a result of bad faith or fault of the person who is obliged to show intent, the interpretation is made against him. Thus under policies preredactate, who drafted the contract (the insurer) is the one who provides and who adheres to the contract (the insured) is the contracting requirement. In most cases the insurer, the initiator of the contract must make all efforts for the insured to be able to perceive the meaning of the limits of the law and its obligations are contact terms and also to check the understanding and assimilation of contract clauses.

Regarding the Belgian Civil Code, which restricts the interpretation of rules similar way the French Civil Code? The vast majority of European legal systems, principles of interpretation of contracts apply to contracts of insurance.

Under Swiss law should be considered common intention of the parties and determine the conditions that led to conclusion. In Switzerland, Germany and Italy, obscure general conditions shall be construed against the insurer, which would have had to draw clear and subject to good faith of the insured. Italian Civil Code provides that the particular conditions prevail over general conditions.

In English law, the contract clearly is interpreted in a way which gives efficacy and contractual terms must acquire a meaning consistent with its subject. Adhesion contracts concluded between parties with unequal economic power are usually interpreted against the person who wrote them.

3. Unfair terms in insurance contracts

Insurers need to develop their own insurance conditions, conditions that we will encounter in terms of insurance contracts.

Often, insurers, get higher profits can insert into the insurance contract clauses abusive.

The practice of the Court of Cassation and Justice, unclear or ambiguous terms in an insurance contract shall be construed against him who has stipulated that in the insurer.

Art. 4 of Law no. 193/2000 provides that the insurer is required to submit a contractual term which has not been negotiated directly with the consumer (policyholder), it will be regarded as unfair if, by itself or together with other provisions of the contract shall, to the detriment of the consumer, the insured and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties.

Thus, a contractual provision will be deemed to be negotiated directly with the consumer (policyholder) if it is determined not to enable the insured to influence nature, such as pre-formulated standard contract.

The following provisions of the contract may be considered abusive clauses:

a) Require the policyholder to fulfill contractual obligations even when the insurer has not met on its own;

b) Entitle the insurer to automatically extend a contract for a specified period by the tacit consent of the insured;

c) give the insurer the right to modify unilaterally the terms of the contract, without having a reason specified in the contract and accepted by the insured by signing it;

d) Require the policyholder to submit to contractual terms which had no real opportunity to get acquainted with the signing of the contract;

e) Give the insurer the exclusive right to interpret the terms of the contract;

f) Require the policyholder to pay some amount disproportionately high if it fulfills its contractual obligations in comparison to the damage suffered;

g) Give the insurer the right to cancel the contract unilaterally;

h) Restrict or prohibit the insured's right to terminate the contract.

The effects of unfair terms contained in the insurance contract and held either personally or through authorized bodies will not affect the insured, and the contract will continue to run after their removal.

If the contract can no longer be effective after their removal, the policyholder may terminate the contract, may request, as appropriate and damages.

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6. Law no. 193/2000 on unfair agreements between insurers and consumers, Annex. The list of terms considered to be unfair;

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RAPORTUL DINTRE PROTECȚIA MEDIULUI ŞI DREPTURILE OMULUI

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Abstract
The present article presents and analyses the right of a healthy environment. Every society must provide a balance and healthy environment to their citizens. The right guarantees for each person a dignity and a prosperity feeling.

Keywords: healthy environment, dignity, human rights

INTRODUCERE

Un drept fundamental al fiecărei ființe umane este dreptul la un mediu sănătos şi echilibrat. Dreptul individual la un mediu propice transformă însuşi obiectul dreptului mediului, deplasând accentul de la raporturile omului şi ale societății omeneşti cu elementele naturii la raporturile individului cu societatea, cu statul şi cu comunitatea internațională. în multe țări, dreptul la un mediu sănătos face obiect al reglementării constituționale.

Desprinderea, din multitudinea reglementărilor legale ce alcătuiesc dreptul mediului, a unor principii cu caracter general cărora le sunt supuse normele actuale şi de care vor trebui să țină seama prevederile legislațiilor viitoare este dificilă, datorită complexității reglementărilor din acest domeniu, insuficientelor delimitări teoretice a dreptului mediului de alte ramuri ale dreptului, faptului că în acest domeniu există numeroase reglementări de dreptul internațional la care România este parte.

1.1. Dreptul omului la un mediu sănătos

Documentele internaționale fac referiri la această noțiune (Conferința mondială a ONU pentru protecția mediului – Stockholm, 1972 – omul are dreptul fundamental[1] la libertate, egalitate şi condiții de viață satisfăcătoare într-un mediu a cărui calitate îi permite să trăiască în mod demn şi în prosperitate).

Charta africană a drepturilor omului şi ale popoarelor (Nairobi – 28 iunie 1981) proclamă în art. 24: „toate popoarele au dreptul la un mediu satisfăcător, propice dezvoltării lor".

În democrațiile occidentale mai multe constituții revizuite după 1972 au inserat noul drept al omului la mediu, ca de exemplu: Constituția Greciei (1975) – în art. 24; Constituția Portugaliei (1976) – în art. 66; Constituția Braziliei (1988), în art. 285.

În avizul său consultativ din 8 iunie 1996, Curtea Internațională de Justiție declară: „mediul nu este o abstracție ci, desigur, spațiul în care viețuiesc ființele umane şi de care

[1] Conform Cartei ONU, Declarației universale a drepturilor omului şi altor documente internaționale, drepturile omului sunt de patru categorii:
- economice şi sociale (dreptul la muncă, la securitate socială, la sănătate etc.);
- culturale (dreptul la educație, la viață culturală etc.);
- civile (dreptul la egală ocrotire în fața legii, dreptul la cetățenie, la libertate, la inviolabilitate etc.);
- politice (dreptul la libertatea gândirii, la conştiință, dreptul de a alege şi de a fi ales etc.).

depinde realitatea vieţii lor, sănătatea lor şi a generaţiilor viitoare." Aşadar, mediul este o realitate care a dobândit în ceva mai mult de treizeci de ani o vocaţie universală, transformată într-o multitudine de reguli internaţionale şi naţionale care fundamentează, de fapt, un nou drept fundamental al omului.

De altfel, dreptul omului la mediu, se remarcă într-un document elaborat de profesorul M. Prieur, este recunoscut şi garantat de comunitatea internaţională[2], de Consiliul Europei prin jurisprudenţa Curţii Europene pentru Drepturile Omului, precum şi de constituţiile a numeroase state membre ale acestuia.

Valorile ataşate protecţiei şi bunei gestiuni a mediului sunt strâns legate de satisfacerea nevoilor esenţiale (apă, aer, hrană). Dar nevoile esenţiale pentru om sunt condiţionate de marile echilibre naturale ale biosferei şi deci de impactul activităţilor umane asupra mediului natural şi asupra resurselor naturale. Protecţia mediului şi respectarea regulilor ecologiei devine, astfel, un imperativ vital legat de dreptul fundamental la viaţă.

Echilibrul ecologic, biodiversitatea, conştientizarea rolului pe care îl joacă speciile florei şi faunei în menţinerea echilibrului natural, sunt indispensabile pentru supravieţuirea umanităţii.

Mediul, protecţia lui, au dobândit de asemenea un statut de drept fundamental, pentru că au devenit expresia unei politici publice de interes colectiv, a unei solidarităţi nu numai în interiorul statelor, dar şi la scară internaţională (protecţia mediului uman, a zonelor litorale, protecţia stratului de ozon).

Mediul reflectă aşadar, o valoare socială, o etică, o responsabilitate colectivă care se impun nu numai statelor, ci tot asemenea, tuturor actorilor economici şi sociali. Mişcările ecologiste sunt de altfel susţinute şi influenţate de o puternică mişcare populară acompaniată de organizaţii neguvernamentale, iar în unele ţări şi de partidele ecologice. Având un fundament ştiinţific şi un fundament social, mediul, organizat sub aspect juridic de o multitudine de convenţii internaţionale şi de legi naţionale (în mare parte asemănătoare) a dobândit o legitimitate politică, astfel încât a fost consacrat în cele mai înalte reglementări din ierarhia legilor, şi anume în constituţii ca un drept fundamental[3].

Ideea de mediu sănătos, nepoluat, echilibrat are semnificaţii fundamentale. Termenul „sănătos" se referă la un mediu nepoluat, propice dezvoltării fizice şi intelectuale a omului, dar are şi o dimensiune umană, urmărind apărarea integrităţii fizice şi morale a omului. Termenul „echilibrat" indică dimensiunea naturală, ce se referă la un mediu ecologic raţional. Dimensiunea individuală a dreptului la un mediu nepoluat implică dreptul fiecărui individ la: prevenirea poluării, încetarea activităţii care are drept efect o poluare nocivă, repararea pagubei suferite de pe urma acestei poluări; dimensiunea colectivă implică obligaţia statelor de a coopera în vederea prevenirii poluării, a protejării mediului natural la nivel regional şi internaţional.

O problemă juridică de o însemnătate şi actualitate deosebită este recunoaşterea şi garantarea internaţională şi naţională a dreptului fiecărui om la un mediu sănătos, ca drept fundamental[4].

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[2] Art. 1 din Convenţia Internaţională privind accesul la informaţie, participarea la luarea deciziei şi accesul la justiţie, Aarhus, 1998.

[3] Michel Prieur, Le droit de l'homme a l'environement – rapport national a la reunion de UE, 15-20 aprilie 2003, Ankara.

[4] Michel Prieur, Le droit de l'homme a l'environement – rapport national a la reunion de UE, 15-20 aprilie 2003, Ankara.

În practica unor ţări (inclusiv la noi), se cunosc soluţii legislative favorabile, dreptul la un mediu sănătos fiind recunoscut fie ca un drept fundamental al cetăţeanului (înscris în Constituţie), fie ca un drept subiectiv obişnuit. Însă dreptul la un mediu sănătos recunoscut de lege priveşte şi o dimensiune naturală, exprimată în cerinţa unui mediu echilibrat din punct de vedere ecologic; un mediu „natural" poate fi garantat mai bine în condiţiile consfinţirii dreptului tuturor la un mediu sănătos, care favorizează calitatea vieţii, în general. în acele ţări în care până în prezent nu s-a reglementat acest drept la nivel constituţional, ci doar prin legi speciale consacrate protecţiei mediului, formal-juridic nu se poate vorbi de un drept fundamental, dreptul la un mediu sănătos existând doar ca un drept subiectiv al oamenilor.

1.2. Corelaţia dintre dreptul la un mediu sănătos şi drepturile fundamentale ale omului

Consacrarea în Constituţie a dreptului la un mediu sănătos duce la creşterea numărului drepturilor fundamentale; într-o concepţie, aceasta ar risca devalorizarea „veritabilelor" drepturi fundamentale ale omului, adică la anihilarea anumitor semnificaţii ale acestora; într-o altă opinie, nu ar implica sub nici o formă anumite îngrădiri, nu ar afecta condiţiile de exercitare plenară a celorlalte drepturi fundamentale; într-o altă analiză, sunt posibile consecinţe negative asupra „libertăţii de mişcare", asupra dreptului de liberă circulaţie (prin restrângerea sau interzicerea accesului în anumite zone protejate) sau asupra „libertăţii de rezidenţă" (restricţii privitoare la sistematizarea localităţilor, la urbanism în general); de asemenea, s-a susţinut că s-ar aduce atingere dezvoltării economico-sociale (prin limitări legate de protecţia mediului), dreptului la muncă (s-ar pune problema reducerii sau încetării activităţii unor agenţi economici, din cauza poluării repetate) sau dreptului de proprietate (prin instituirea unor zone de protecţie, limitarea folosirii anumitor bunuri care fac obiectul dreptului de proprietate). S-a mai invocat de unii autori chiar pericolul unei „dictaturi ecologice", prin acordarea întâietăţii dreptului la un mediu sănătos în raport cu celelalte drepturi fundamentale ale omului.

Opiniile realiste care privesc necesitatea şi finalitatea recunoaşterii dreptului la un mediu sănătos subliniază convergenţa, reîntărirea şi îmbogăţirea reciprocă între aceste drepturi fundamentale şi ansamblul îndrituirilor umane stabilite de lege. Recunoaşterea dreptului fundamental al omului la un mediu sănătos, nepoluat are ca efect îmbogăţirea drepturilor fundamentale (nu numai cantitativ, ci şi calitativ), ca o consecinţă firească a dezvoltării economico-sociale pe plan naţional şi internaţional.

Si în concluziile Conferinţei de la Strasbourg se arată că dreptul la un mediu adecvat se inserează în problematica generală de echilibru între drepturile individuale şi exigenţele colectivităţii şi că acest drept constituie un mijloc de clarificare a cadrului social în care se înscrie orice drept al omului, putând chiar determina îmbogăţirea drepturilor omului, reîntărind pe cele care există sau făcând să apară altele noi.

1.3. Titularul dreptului la un mediu sănătos

În orice stat de drept oamenii au drepturi fundamentale reglementate de constituţie, precum şi alte drepturi recunoscute de lege. Toate aceste drepturi aparţin omului, ca subiect de drept, el fiind titularul unor asemenea drepturi.

În literatura străină[5] referitoare la protecția mediului, la întrebarea „cine este titularul dreptului la un mediu sănătos?" s-au dat, în esență, două feluri de răspunsuri:

• „teza finalității umane" – dreptul la un mediu sănătos nu poate aparține decât **individului** (omului);

• „teza naturalistă" – **natura** (care include şi omul) este cea care trebuie ocrotită.

Din punct de vedere juridic este clar că numai omul poate fi titularul dreptului la un mediu sănătos, iar nu natura sau mediul; deşi întreaga activitate desfăşurată pentru protecția mediului priveşte natura, nu se poate accepta ideea că natura este titulară de drepturi. Recunoaşterea pentru om a calității de titular al dreptului la un mediu sănătos nu afectează negativ natura, mediul uman în general; omul ocroteşte natura şi, fiind o parte a acesteia, se ocroteşte în acelaşi timp.

Din formularea art. 5 din Legea nr. 137/1995 – „Statul recunoaşte tuturor persoanelor dreptul la un mediu sănătos" – rezultă că nu numai persoana fizică, ci şi cea juridică (oamenii organizați în condițiile legii) sunt titulare ale dreptului la un mediu sănătos.

Protecția mediului nu este un scop în sine: natura trebuie şi este ocrotită din perspectiva şi în interesul conservării ființei umane. Dreptul îşi relevă, prin funcțiile sale de conservare şi ameliorare a mediului, determinațiile şi finalitățile sale profund umaniste, esența sa de a exprima şi proteja interesele şi nevoile fundamentale ale omului (societății).

1.4. Calitatea vieții şi factorii care o influențează

Calitatea vieții este totalitatea posibilităților oferite individului de către societate, în scopul de a-şi amenaja existența, de a dispune de produsele ei şi de a-i folosi serviciile pentru organizarea existenței individuale după trebuințele, cerințele şi dorințele proprii.

Acest concept se leagă de civilizație, de creşterea economică, de nivelul tehnic şi de dezvoltarea industrial-urbană.

Calitatea vieții este influențată de: calitatea mediului natural, calitatea mediului social, calitatea mediului internațional. Nevoile umane sunt într-o conexiune directă cu drepturile omului, ale națiunilor şi popoarelor.

Pentru protejarea juridică a calității vieții trebuie realizată premisa necesară, ce constă în a face pe plan internațional, respectiv regional, sinteza între sistemul de relații şi sistemul de drept.

Pe plan internațional, calitatea vieții implică:

• realizarea valorilor fundamentale, respectiv asigurarea drepturilor fundamentale ale membrilor societății: dreptul la pace şi dezarmare, dreptul la patrimoniu comun, dreptul la comunicație şi educație;

• cuantificarea şi aprecierea evolutivă şi comparativă a calității vieții, prin intermediul unor indicatori (dintre care cei specifici mediului şi educației au un rol de prim ordin);

• „educația relativă la mediu" (care nu se substituie ecologiei) ca sinteză a disciplinelor care oferă o viziune omogenă despre lume.

1.5. Asigurarea stării de sănătate a populației

Calitatea vieții influențează pozitiv creşterea produsului intern brut şi a venitului național, deoarece acționează în mod pozitiv asupra sănătății fizice şi psihice a membrilor societății, contribuind la creşterea capacității de muncă a lucrătorului, favorizând creşterea

[5] J., Ecology, Second Edition, Thomas Nelson & Sons L.T.D, Glasgow 1989, p. 142.

productivității muncii, eliminând sau reducând perioadele de boală. De asemenea, prelungeşte durata activă a vieții, reduce cheltuielile cu asistența medicală pentru tratarea bolilor generate sau favorizate de degradarea mediului.

În România, unitățile sanitare au, printre altele, următoare obligații:

• să asigure îmbunătățirea permanentă a condițiilor de igienă în mediul de viață al populației şi la locul de muncă;

• să asigure respectarea normelor de protecție a mediului, pentru evitarea îmbolnăvirilor şi accidentelor;

• să mențină o cât mai bună stare de sănătate;

• să organizeze acțiuni de profilaxie;

• să identifice şi să evalueze factorii care influențează negativ sănătatea populației şi să ia măsuri pentru înlăturarea acestora;

• să asigure un grad satisfăcător de salubritate a localităților şi locuințelor.

Prin norme de igienă se stabilesc condiții de asigurare a calității apei, aerului şi solului, de igienă la locul de muncă şi în unități de folosință publică, de protecția sanitară a alimentelor, surselor şi instalațiilor de alimentare cu apă potabilă, de prevenire a contaminării radioactive, de salubritate a localităților, unităților economice, mijloacelor de transport în comun şi locuințelor, de îndepărtare şi neutralizare a apelor uzate şi a reziduurilor solide. Aceste norme sunt obligatorii la proiectarea şi executarea obiectivelor economico-sociale, în toate domeniile de activitate.

1.6. Obiectivele protecției mediului în aşezările omeneşti

Au fost stabilite în cadrul Conferinței de la Vancouver, 1976; în Declarația adoptată se arată că, fără măsuri pozitive şi concrete la nivel național şi internațional pentru soluționarea problemelor generate de aşezămintele necorespunzătoare (în care trăieşte o mare parte a populației, mai ales în țările subdezvoltate), va urma o agravare datorită:

• unei creşteri economice inechitabile, pusă în evidență de marile discrepanțe între țări şi între oameni;

• condițiilor economico-sociale şi ecologice, care transpun la nivel național şi internațional inegalitatea condițiilor de viață, segregația rasială, şomajul, analfabetismul, bolile şi sărăcia, degradarea resurselor indispensabile vieții (apa, aerul, solul);

• creşterii populației (implicit a nevoilor alimentare, de locuințe etc.);

• urbanizării necontrolate (cauză a suprapopulării oraşelor şi a dispersiunii rurale).

Principalele probleme ale aşezărilor omeneşti sunt: poluarea apei, aerului şi solului prin reziduuri industriale şi menajere; zgomotul; radiațiile; locul de muncă; estetica mediului exterior; accidentele; serviciile de igienă a muncii; asistența socială.

1.7. Protecția factorilor naturali de mediu în aşezările omeneşti

Se realizează în mod special după factorii de mediu – aer, apă, sol etc. – prin metode de combatere a poluării, cu ajutorul unor măsuri şi procedee tehnice ca:

• amplasarea industriilor poluante la distanță față de localități;

• folosirea de metode şi tehnologii care produc cât mai puțini poluanți;

• evacuarea gazelor la altitudine prin coşuri înalte şi viteză mare de expulzare;

• reducerea poluării determinate de mijloacele de transport;

• activități de gospodărie comunală;

• norme standardizate de calitate a apei potabile;

• norme de concentrație maxime admisibile ale poluanților atmosferici.

Pentru asigurarea unui mediu de viață sănătos în așezările umane, în procesul de dezvoltare social-economică, a planurilor de urbanism și amenajarea teritoriului și a localităților, este obligatorie respectarea principiilor ecologice. Potrivit legii, consiliile locale și, după caz, persoanele fizice și juridice, răspund de:

• îmbunătățirea microclimatului urban, prin amenajarea și întreținerea izvoarelor și a luciilor de apă din interiorul localităților și din zonele limitrofe acestora, înfrumusețarea și protecția peisajului și menținerea curățeniei stradale;

• amplasarea obiectivelor industriale, a căilor și mijloacelor de transport, a rețelelor de canalizare, a stațiilor de epurare, a depozitelor de deșeuri menajere, stradale și industriale și a altor obiective și activități, fără a se aduce prejudicii salubrității, spațiilor de odihnă, tratament, stării de sănătate și de confort a populației;

• respectarea regimului de protecție specială a localităților balneo-climaterice, a zonelor de interes turistic și de agrement, a monumentelor istorice, a ariilor protejate și monumentelor naturii;

• adoptarea elementelor arhitecturale adecvate, optimizarea densității de locuire, concomitent cu menținerea, întreținerea și dezvoltarea spațiilor verzi, a parcurilor și aliniamentelor de arbori, a perdelelor de protecție stradală, a amenajamentelor peisagistice cu funcție ecologică, estetică și recreativă;

• reglementarea, inclusiv prin interzicerea temporară sau permanentă, a accesului anumitor tipuri de autovehicule sau a desfășurării unor activități generatoare de disconfort pentru populație în anumite zone ale localităților cu predominanța spațiilor de locuit, zone destinate tratamentului, recreării și agrementului;

• adoptarea de măsuri obligatorii cu privire la întreținerea și înfrumusețarea clădirilor, a curților și a împrejurimilor acestora, a spațiilor verzi din curți și dintre clădiri, a arborilor și arbuștilor decorativi;

• inițierea pe plan local a unor proiecte de amenajare a grupurilor igienico-sanitare și de întreținere și dezvoltare a canalizării stradale.

Unitățile de gospodărie comunală au, în principal, următoarele obligații:

• să răspundă la solicitările cetățenilor și să asigure soluționarea cererilor acestora;

• să ia măsuri pentru realizarea operativă a lucrărilor și remedierilor solicitate de cetățeni pentru restabilirea serviciilor întrerupte temporar;

• să asigure apa potabilă, căldura, canalizarea, reciclarea reziduurilor menajere, prestarea celorlalte servicii de gospodărie comunală cu caracter permanent sau periodic;

• să ia măsuri pentru îmbunătățirea calității prestațiilor de gospodărie comunală etc.

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THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN THE REFERENCES FOR PRELIMINARY RULINGS SUBMITTED BY NATIONAL COURTS

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Abstract

One of the most important consequences of the entry into force of the Lisbon Treaty is the possibility to submit references for preliminary rulings to the Court of Justice of European Union ("ECJ") concerning the interpretation of the Charter of Fundamental Rights of the European Union ("The Charter"). This study aims to examine how various courts of the Member States of European Union understood to exercise this prerogative after the entry into force of the Lisbon Treaty and the ECJ's preliminary rulings, in order to identify the circumstances in which judicial review of the national legislative or administrative acts for compliance with the Charter may be exercised by the national courts. Also, by examining the judicial dialogue on the Charter in the context of preliminary reference procedure, this article attempts to delimit the roles of national courts and of ECJ in ensuring the protection of fundamental rights in the European Union.

Keywords: Charter of Fundamental Rights of the European Union, preliminary reference procedure, Member States, Lisbon Treaty, national courts

Introduction

Following the entry into force of the Lisbon Treaty, the legal status of the Charter has changed, becoming, according to Art. 6 (1) TEU, a list of fundamental rights that are binding on the institutions, bodies and agencies of the European Union and on Member States when they are implementing EU law.

As a consequence, after the entry into force of the Lisbon Treaty, many national courts[1] submitted references for preliminary rulings to ECJ on the interpretation of Charter, concerning the compatibility of national legislative acts with the provisions of the Charter, using the preliminary reference procedure in order to establish the circumstances in which the provisions of the Charter are applicable to acts adopted by national authorities.

According to the preliminary reference procedure governed by Art. 267 TFEU, national courts can, or, in some cases, they even have an obligation[2] to refer to the ECJ

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[1] European Commission, 2012 Report on the Application of the EU Charter of Fundamental Rights, Bruxelles, 8 May 2013, available at http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf, p. 15 (consulted at 20 August 2013).

[2] According to Art. 267 TFEU, „Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

preliminary questions concerning the validity or interpretation of EU law in order to ensure a harmonized application of EU law in Member States. This procedure represents an embodiment of the judicial cooperation between the ECJ and national courts of the Member States (which are the first responsible for implementing EU law) in order to ensure a certain internal coherence of the European normative and judicial system, by helping the national courts without constraining them[3].

Considering that the ECJ's judgments with regard to the interpretation of EU law bind all the national courts confronted with a similar EU law issue[4] and not only the national court which submitted the reference for a preliminary ruling[5], it follows that the ECJ's judgments rendered after the entry into force of the Charter in the context of preliminary reference procedure are a very useful tool to determine those particular situations in which the national action can be reviewed for compliance with the provisions of the Charter.

Although the Charter entered into force recently, the ECJ has already rendered several rulings in the preliminary reference procedure with regard to the provisions of the Charter, especially in the area of social rights, freedom of movement, refugees and European citizenship[6].

Analysis of judgments rendered in the context of preliminary reference procedure

An important decision regarding the scope of application of the Charter was the judgment rendered in Case Zambrano[7]. In this case, the national court referred the question for a preliminary ruling in order to determine whether third-country nationals may be granted residence and work rights under EU law (Art. 20 TFEU) after they became parents of a child – EU citizen – but who has never exercised his right of free movement within the Member States. Although the child of the plaintiff was a EU citizen, by acquiring Belgian nationality, Belgian authorities refused to recognize residence and work rights under EU law for the parents of the EU citizen, because the child has never left the territory of Belgium. To determine whether the provisions of EU law and of the Charter invoked by the plaintiff were applicable in this case, it was essential to determine, first, whether the refusal of the Belgian authorities was an action within the scope of EU law.

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[3] E.S. Tănăsescu, Trimiterea preliminară şi cooperarea judiciară loială, Romanian Journal of EU Law, no. 3/2012, p. 32.

[4] Pursuant to the principle of sincere cooperation laid down in Art. 4 (3) TEU, "the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." Likewise, in case C-61/79 Denkavit, ECJ: "the interpretation which, in the exercise of responsibilities under Art. 267, the Court of Justice gives to a rule of law, clarifies and specifies, when necessary, the meaning and scope of that rule".

[5] C-106/77, Simmenthal, ECJ: „Any national court, within its jurisdiction, is required to fully implement European law and protect the rights it offers to individuals"; Case C-52/76, Munari, ECJ: „the decision rendered in the preliminary reference procedure is binding for the national court wth regard to the interpretation of EU law in question".

[6] Case C-391/09, Runcvi-Vardyn, ECJ; case C-434/09, McCarthy, ECJ; case C-208/09, Sayn-Witgensten, ECJ; case C-145/09, Land Baden-Vfrttemberg, ECJ; joined cases C-57/09 and C-101/09 Bundesrepublik Deutschland, ECJ.

[7] Case C-34/09, Zambrano, ECJ; judgment delivered on 8 March 2011. In this case, the preliminary question concerned the interpretation of Art. 18, Art. 20 and Art. 21 TFEU in conjunction with Art. 21, Art. 24 and Art. 34 of the Charter. In Zambrano Case, the preliminary question was raised in proceedings between Mr. Zambrano, a Colombian national, and the National Office for Employment in Belgium, which came as a result of a refusal to grant unemployment benefits under Belgian law.

The relevance of this case for the application of the Charter by the national courts of the Member States on the measures and actions of national authorities consists in setting the limits of the scope of fundamental rights in relation to the scope of EU law. The ECJ held that Member State's decision to refuse to grant a right of residence and work for a national of a third country, falls within the scope of EU law. Therefore, the ECJ held that Art. 18, Art. 20 and Art. 21 TFEU in conjunction with Art. 21, Art. 24 and Art. 34 of the Charter, must be interpreted as precluding a Member State from refusing to grant such rights under the specific circumstances of the case. In its reasoning, the ECJ argued that the refusal of the national authorities would deprive the children who are EU citizens to fully enjoy the substance of the rights conferred by citizenship of the European Union.

With this decision, the ECJ redefined the criteria used to define the actions of Member States which are implementing EU law in terms of Art. 51 (1) of the Charter and also, the actions of Member States which are not implementing EU law, using EU citizenship as an argument for applicability of EU law and of the Charter.

Another judgment of ECJ with important implications for the meaning of the concept of "implementing EU law" regarding the applicability of the Charter to the action of Member States is the judgment rendered in Case NS[8].

In this case, the national court asked whether a decision taken by a Member State to examine an application for asylum which is not its responsibility falls within the scope of EU law in terms of Art. 6 TEU and/or Art. 51 of the Charter. In response, ECJ ruled that the decision of the Member State to examine an asylum application which is not its responsibility „is implementing EU law, in terms of Art. 6 TEU and/or Art. 51 of the Charter of Fundamental Rights of the European Union"[9]. In this case, ECJ held that national measures violated the Charter, because there was a link between the national measures and EU law. The most important conclusion arising from this judgment is that the Charter applies to acts adopted by Member States even when they exercise a "sovereignty clause" expressly provided for by EU law, if those acts of the Member States violate fundamental rights of EU citizens. Also, a similar judgment regarding asylum was rendered by ECJ in the case of GISTI[10], in which the Court held that where an asylum application has been lodged in one of the Member States by a third-country national, the Member State in receipt of an application for asylum is obliged to grant the minimum conditions for reception of asylum seekers laid down in EU law, even if that Member State is not the one responsible for examining the application for asylum.

In Case Vinkov[11], the reference for a preliminary ruling concerned the question whether non-recognition in national law of the right to a judicial review was consistent with the EU law[12]. Responding to the national court, the ECJ held that the Charter does not apply

[8] Joined Cases C-411/10 and C-493/10, ECJ, N.S. and others, judgment of 21 December 2011. The request for a preliminary ruling was made in proceedings between asylum seekers who were to be sent back to Greece under Regulation No. 343/2003 and, respectively, the UK and Irish authorities.

[9] Joined Cases C-411/10 and C-493/10, N.S. and others, ECJ, judgment of 21 December 2011, paragr. 68 and 69.

[10] Case C-179/11, CIMADE and Groupe d'information et de soutien des immigrés (GISTI), ECJ, judgment of 27 September 2012.

[11] Case C-27/11, Vinkov, ECJ, judgment of 7 June 2012.

[12] The provisions of EU law referred by the national court were those governing the right to an effective judicial remedy enshrined in art. 6 ECHR and art. 47 and 48 of the Charter.

to the measure adopted by the member state, because "the requirements flowing from the protection of fundamental rights are binding on Member States when they are implementing EU law, and in this case, it appears that the contested national legislation is not a measure implementing EU law or is otherwise connected with EU law"[13]. With this decision, although it held that the Charter does not apply to the national legislative act at issue, the ECJ expressly reaffirmed that, in order for the Charter to be applicable to the measures and provisions adopted by the Member States, it is necessary that (i) the act adopted by the national authorities to represent a measure of implementation of EU law, or (ii) there is a link between the act adopted by national authorities and EU law[14].

A similar position was adopted by the ECJ in the judgment rendered in Case Corpul Național al Polițiștilor[15]. The reference for a preliminary ruling concerned the question whether the reduction of salaries imposed by the Romanian Law no. 118/2010 and Law no. 285/2010 violates the rights enshrined in the Charter to property, equality and non-discrimination. Without analysing the details of the legal aspects raised by the national court, the ECJ ruled that it lacks jurisdiction to answer the referred questions, because "the reference contains no specific element under which it can be considered that Law No. 118/2010 and Law. 285/2010 aimed at implementing EU law"[16].

The Case DEB[17] concerned the content of the right to effective judicial protection of the rights conferred by EU law, stipulated by Art. 47 of the Charter, in an action filed against a member state for breaching EU law[18]. The question referred by the national court aimed to clarify whether national legislation which stipulated the refusal of legal aid for companies was compatible with the principle of effective judicial protection, as provided for in Art. 47 of the Charter. In other words, the national court wanted to know whether the principle of effectiveness of EU law can be considered a sufficient "connection" enough with EU law, for the national court to assess the legality of national legislation in relation to the Charter. Reformulating the referred question, the ECJ held that "the principle of effective judicial protection, as enshrined in Art. 47 of the Charter, must be interpreted as meaning that it is possible for the companies to rely on this principle and that legal aid granted under this principle may cover, among others, exemption from the costs of the procedure and/or assistance a lawyer"[19], although national legislation whose compatibility with the Charter has been questioned in question was not part of the harmonization measures adopted at EU level and has not been adopted in order to implement EU law.

In this case, the ECJ considered that the German legislation restricting the possibility for companies to obtain legal aid represents a violation of the right to effective judicial

[13] Case C-27/11, Vinkov, ECJ, paragr. 56, 58 and 59.
[14] With a similar reasoning, Case C-370/12, Pringle, ECJ, judgment of 27 November 2012.
[15] Case C-434/11, Corpul Național al Polițiștilor, ECJ, order of 14 December 2011.
[16] Case C-434/11, Corpul Național al Polițiștilor, ECJ, order of 14 December 2011, paragr. 16.
[17] Case C-279/09, DEB, ECJ, judgment of 22 December 2010.
[18] DEB, a German company involved in supplying energy in Germany, claimed that following Germany's failure to transpose Directives 98/30/EC and 2003/55/EC, which were aiming to facilitate non-discriminatory access to the national gas, it suffered importnant economic loss that led to its inability to continue its business activities. Claiming that it was impossible to pay the costs of proceedings and costs to receive legal assistance from a lawyer, DEB company asked for legal aid in order to initiate an action for damages against Germany, alleged that it breached EU law. Application for legal aid was refused on the grounds that national law does not provide that a legal person can obtain legal aid.
[19] Case C-279/09, DEB, ECJ, judgment of 22 December 2010, para 59.

protection, conferred by EU law and reiterated in the art. 47 of the Charter, which is why the compatibility of German legislation with EU law had to be reviewed for proportionality[20].

Another recent argument in favor of a broad interpretation of the scope of the Charter regarding judicial review of the compatibility of acts and measures adopted by Member States in relation to the Charter is the judgment of the ECJ in Case Åklagaren[21]. In this case, the national court submitted a reference for a preliminary ruling, asking the ECJ to clarify whether the ne bis in idem principle, as provided by art. 50 of the Charter precludes a member state, when faced with a breach of VAT legislation, to adopt laws or measures imposing both an administrative penalty and a criminal sanction on the same facts.

Following this reference for a preliminary ruling, the ECJ has defined the concept of implementing EU law by the Member States, as referred to in art. 51 paragr. (1) of the Charter, because it had to determine whether national legislation which is imposing sanctions for failure to fulfill obligations under the legislation on VAT can be regarded as measures implementing EU law under art. 51 paragr. (1) of the Charter. Thus, in Case Åklagaren, adopting the broad interpretation regarding the scope of the Charter, the ECJ ruled that it had jurisdiction to answer the questions raised and to review the compatibility of national legislation with the Charter, although national regulations in question had not been adopted in order to implement EU law.

To reach this conclusion, the ECJ held, concerning the applicability of the Charter, that "the fundamental rights guaranteed by the Charter must (...) be respected when national regulations fall within the scope of EU law" and "applicability of EU law entails the application of fundamental rights guaranteed by the Charter"[22]. The ECJ also held that, in that particular case, the Swedish state is implementing EU law under Art. 51 (1) of the Charter, even if the alleged national measures have not been adopted in order to transpose, directly, the provisions of a directive, since the application of those national regulations in question aims to sanction a violation of the provisions of the directive and aims to implement an obligation imposed under the Treaties to all Member States[23].

From recent case law of the ECJ rendered in the context of preliminary ruling procedure, with regard to the Charter, after the entry into force of the Lisbon Treaty, the following specific situations can be identified, in which judicial review of the national legislative or administrative acts for compliance with the Charter may be exercised by the national courts:

- when Member States adopt acts or measures of effective implementation of EU law[24], acting as agents of the European Union, executing an EU decision, applying an EU

[20] P. Mengozzi, Ocrotirea pe cale judecătorească a drepturilor individuale şi principiul proporţionalităţii în urma Tratatului de la Lisabona, Romanian Review of European Law, no. 6/2011, p. 48.

[21] Case C-617/10, Åklagaren, ECJ, judgment of 26 February 2013. Facts of the case concerned the cumulation of an administrative and criminal sanctions imposed on Mr. Fransson by the Swedish tax authorities for unpaid VAT and for failure to comply with the obligations to provide tax information in Sweden. Mr. Fransson argued that such cumulation violated the principle of ne bis in idem, stipulated in art. 50 of the Charter.

[22] Case C-617/10, Åklagaren, ECJ, judgment of 26 February 2013, para 21.

[23] Case C-617/10, Åklagaren, ECJ, judgment of 26 February 2013, para 28.

[24] Case C- 5/88, Wachauf, ECJ; case C-442/00, Caballero, ECJ; joined cases C-465/00, C-138/01 and C-139/01 Rechnungshof, Neukomm and Lauermann, ECJ; case C-101/01, Lindqvist, ECJ; case C-555/07 Kücükdeveci, ECJ; case C-78/11, Anged, ECJ.

regulation at national level or transposing an EU directive and when trying to obtain a derogation[25] from the application of EU law[26];

- when Member States are acting within the scope of application of EU law, adopting national law or administrative measures in a particular area governed by EU law, which violate a specific right under the Charter, being sufficient to determine that there is a connection between national act and EU law in order to apply the provisions of the Charter[27].

Although in the current jurisprudence of the ECJ there are both judgments that adopt a flexible approach and judgments that are maintaining the narrow concept of implementing EU law[28], the recent post-Lisbon judgments examined show that the interpretation of the ECJ on the notion of "implementation of EU law by the Member States" did not change significantly after the conversion of the Charter into a legally binding document. Despite the restrictive wording of Art. 51 (1) of the Charter, the ECJ tends to maintain the same broad interpretation expressed in pre-Lisbon case law on the protection of fundamental rights. Furthermore, recent case law of the ECJ can be considered as a possible anticipation of extending the scope of the Charter in relation to Member States, recognizing "the connection between national action and EU law" as a criterion that can be used to determine the application of the Charter at national level for certain situations that were previously considered as being outside the scope of EU law.

Conclusions

From the analyzed judgments rendered by the ECJ in the context of preliminary ruling procedure with regard to the interpretation and application of the Charter, after the entry into force of the Treaty of Lisbon, it follows that Member States are obliged to respect fundamental rights when acting within the scope of EU law. Also, it follows that the entry into force of the Charter does not alter or restrict this system[29] and does not substantially change the way in which the ECJ weighs or applies the fundamental rights with regard to Member States[30].

Following the entry into force of the Charter, it can be noticed a significant increase in the number of requests for preliminary rulings with regard to the Charter, as well as an increased cooperation between national courts and the ECJ. This cooperation is of great importance for the uniform interpretation and application of EU law, particularly from the perspective of interdependence between the national legal orders and the EU legal order,

[25] Case C-260/89 ERT, ECJ; case C-60/00, Carpenter, ECJ; case C-71/02, Karner, ECJ; case C-208/09, Sayn-Wittgenstein, ECJ; case C-36/02, Omega, ECJ.

[26] L. Koen, The Court of Justice of the European Union and the Protection of Fundamental Rights, Polish Yearbook of International Law, vol. 31/2011, p. 83, available at http://ssrn.com/abstract=2218538

[27] Case C-309/96, Annibaldi, ECJ; case C-299/95, Kremzow, ECJ; case C-34/09, Zambrano, ECJ; Case C-33/07, Jipa, ECJ; case C-249/11, Byankov, ECJ; joined cases C-411/10 and C-493/10, N.S. and others, ECJ; case C-279/09, DEB, ECJ; case C-617/10, Åklagaren, ECJ.

[28] M. Safjan, Areas of Application of the Charter of Fundamental Rights of the EU: Fields of Conflict?, European University înstitute, EUI Working Papers LAW, no. 22, 2012, p. 6, available at http://cadmus.eui.eu/bitstream/handle/1814/23294/LAW-2012-22.pdf?sequence=1.

[29] J. Kokott, C. Sobotta, The Charter of fundamental Rights of the European Union after Lisbon, Romanian Review of European Law, no. 5/2012, p. 106.

[30] H. Voogsgeerd, The EU Charter of Fundamental Rights and its Impact on Labor Law: a Plea for a Proportionality-Test "Light", Goettingen Journal of International Law, no. 1/2012, vol. 4, p. 316.

which should be in a constructive cooperation based on the division of powers established by the treaties of the European Union[31].

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RESPECTAREA DREPTURILOR OMULUI LA NIVELUL ȚĂRILOR MEMBRE AL UNIUNII EUROPENE ANALIZĂ COMPARATIVĂ

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Rezumat

O societate în care drepturile omului nu sunt respecte este o societate săracă, murdară. Respectarea drepturilor omului şi a demnității umane sunt valori comune tuturor statelor membre ale Uniunii Europene. Politica Uniunii privind drepturile omului cuprinde aspecte de natură civilă, politică, economică, socială şi culturală. Aceasta urmăreşte, de asemenea, să promoveze drepturile femeilor, ale copiilor, ale minorităților şi ale persoanelor strămutate.

Cu un buget de 1,1 miliarde de euro pentru perioada 2007-2013, Instrumentul european pentru democrație şi drepturile omului sprijină organizațiile neguvernamentale. în special pe cele care promovează drepturile omului, democrația şi statul de drept, abolirea pedepsei capitale, combaterea torturii, şi a rasismului, precum şi a altor forme de discriminare.

Totuşi, prezenta lucrare nu se axează pe evidențierea elementelor comune regăsite în aceste documente ci pe analiza normelor legislative din țările membre, norme care uneori pot ridica întrebări cu privire la respectarea drepturilor omului. Numai dacă ne focalizăm atenția asupra respectării drepturilor femeii, vom putea observa ca acestea sunt interpretate diferit şi parțial respectate în unele țări. În Austria, femeilor nu le este permis să lucreze noaptea. În plus, au fost acceptate în armată abia în anul 1998. În schimb, în Danemarca femeile participă activ atât în cadrul sectorului privat cât şi al celui public, fiind bine reprezentate în Guvern.

Cuvinte-cheie: drepturile omului, Uniunea Europeană

1. Introducere

Uniunea Europeană consideră drepturile omului ca fiind universale şi indivizibile. Țările care doresc să adere la Uniunea Europeană trebuie să respecte drepturile omului. De asemenea, toate schimburile comerciale şi acordurile de cooperare cu țări terțe conțin o clauză care prevede că drepturile omului reprezintă un element fundamental al relațiilor dintre părți.

Prezenta lucrare prezintă o analiză comparativă a modului în care sunt reglementate normele pentru protecția drepturilor omului la nivelul unor țări membre U.E.

2. Analiza comparativă a respectării drepturilor omului la nivelul țărilor membre UE

2.1. Austria

Drepturile persoanelor sunt în cea mai mare parte respectate. Totuşi, se pare că anul sunt primite multe sesizări din partea cetățenilor cu privire la încălcarea drepturile pe care le

au de către membrii ai poliției, prin intimidare, folosirea excesivă a forței fizice sau aplicarea de rele tratamente. Începând cu 1 ianuarie 2013, Austria a introdus în Codul Penal Tortura ca şi infracțiune. În luna Mai, un reprezentant al Ministerului de Interne şi-a cerut scuze unui cetățean din Gambia, Bakery J., care a fost torturat de patru Ofițeri de Poliție în anul 2006, în cadrul unui proces de deportare. Respingerea dreptului de rezidența a fost anulată iar în prezent au loc discuții despre modalități de compensare.

Dreptul de asociere nu este respectat în cazul în care se discută despre organizații neo-naziste sau secte religioase, considerate ca dăunătoare pentru societate. Dincolo de acest aspect, este respectat dreptul fiecărei persoane de a-şi alege apartenența religioasă. Din ianuarie 1998, o nouă lege reglementează procedura de înregistrare a grupurilor religioase pentru dobândirea calității de comunități confesionale. În cadrul procedurii sunt menționate criteriile ce trebuiesc îndeplinite pentru recunoaştere. Există încă discuții cu privire la constituționalitatea acestei legi.

Constituție interzice discriminările pe bază de rasă, sex, religie, limbă, statut social. Totuşi cazurile de violență asupra femeilor sunt numeroase şi, din păcate, multe dintre ele nu au fost raportate oficial. În 1997, a fost promulgată o nouă lege menită să protejeze femeile victime ale violenței domestice. De asemenea, traficul de persoane în vederea prostituției reprezintă o problemă dificilă pentru autorități.

Femeile nu sunt prezente în cadrul serviciilor publice. Lor li se interzice şi munca pe timp de noapte.

Legislația nu garantează persoanelor cu dizabilități niciun drept cu privire la asigurarea accesului în clădiri. În plus, femeile care prezintă un anumit anumit grad de retard mental, pot fi sterilizate fără acordul lor.

2.2. Belgia

De curând, Belgia a adoptat o serie de legi care incriminează violența domestică şi agresiunea față de femei.

Singurele probleme serioase au apărut în cazul azilului. Deşi acest drept este garantat prin constituție, au existat cazuri în care nu s-au respectat drepturile persoanelor. Astfel, în Septembrie 1998, Samirei Adamu, din Nigeria, i-a fost respins dreptul la azil, motivația ei nefiind considerată relevantă. A încercat să opună rezistență în fața poliției, decedând. Necropsia a scos în evidență faptul că a murit asfixiată, 4 reprezentați ai poliției fiind arestați.

2.3. Bulgaria

Deşi în anul 2007, Bulgaria a aderat la Uniunea Europeană, există încă multe probleme cu privire la respectarea drepturilor omului.

Legislația privind refugiații nu asigură condițiile necesare nici măcar pentru supraviețuirea la limită. În luna noiembrie a.c. Amnestry International a îndemnat Bulgaria să acționeze de urgență pentru îmbunătățirea situației inumane în care sunt instalați refugiați într-o tabără, în apropiere de frontiera cu Turcia[1].

Probleme sunt şi în cazul etniei rrome. Accesul la educație, la un loc de muncă şi la serviciile medicale este mult diminuat.

[1] http://www.amnesty.org/en/region/bulgaria/report-2013

Nici situația din penitenciară nu este una favorabilă. În cazul Stanev vs. Bulgaria, Curtea Europeană a Drepturilor Omului a concluzionat faptul că Bulgaria a încălcat şase articole din Convenția Europeană privind Drepturile Omului printre care şi interzicerea torturii.

2.4. Cipru

În proporție semnificativă, principalele drepturile ale omului sunt reglementate prin Constituție şi respectate.

Putem sublinia faptul că deşi femeile participa la viața economică, socială şi cultural nu sunt extreme de active în viața politică deoarece, cea mai mare parte a cipriоților, pun încă accent pe rolul arhaic al femeii.

Sesizări au fost făcute şi asupra violențelor exercitate de reprezentați ai Poliției. Acestea vizau, în special, imigranții sau tinerii care participau la diferite proteste.

2.5. Croația

Croația şi-a îmbunătățit foarte mult normele legislative ca urmare a procesului de aderare la Uniunea Europeană. A fost înființat inclusiv un Tribunal pentru crimele de război.

2.6. Estonia

Şi în Estonia violența domestică reprezintă o problemă deoarece numărul sesizărilor este departe de a fi cel real.

O alte problemă o reprezintă discriminarea minorității vorbitorilor de limbă rusă. Din cauza cerințelor de cunoaştere obligatorie a limbii oficiale, le-a fost refuzată posibilitatea de a lucra în mediul public. În mediul privat, doar 10% dintre angajatori afirma ca i-ar putea accepta ca şi angajați.

Tot din cauza necunoaşterii limbii oficiale, li se refuză posibilitatea de a primi cetățenie. În plus, copiii acestora nu primesc, automat, la naştere, cetățenie. Astfel, ei nu pot avea acces la exercitarea drepturilor politice.

2.7. Finlanda

În Finlanda sistemul social este foarte bine pus la punct. Legea garantează accesul persoanelor cu dizabilități, pedepsind neadaptarea accesului în cadrul instituțiilor publice şi private.

Totuşi, deşi nu sunt înregistrate multe plângeri, femeile sunt prezente în mică proporție în Guvern şi în cadrul pozițiilor de top. În plus, un studiu realizat de curând a demonstrat faptul că 40% dintre femeile peste 50 de ani sunt victime ale violenței domestice.

De asemenea, sunt probleme cu încălcarea unor norme de către membrii ai Poliției. În luna mai a.c., un bărbat de 30 de ani a decedat în timp ce se afla în custodia unei secții de Poliției, după ce i-au fost aplicate mai multe şocuri electrice.

În ceea ce priveşte imigranții, se pare că în 2013 au cerut drept de azil pentru 1300 de persoane. 65% dintre aceştia au fost repartizați în penitenciare, alături de persoane care au fost condamnate pentru diferite infracțiuni, fără a avea acces la diferite servicii sociale. De exemplu, un minor a fost ținut, timp de trei luni, într-un penitenciar pentru adulți, fără a avea acces la sistemul de învățământ şi fără a beneficia de facilități speciale pentru minori.

2.8. Germania

Autoritățile nu au reuşit încă stabilirea unui organism independent de primire a plângerilor şi asigurarea faptului că toți ofițerii de poliție poartă insigna în timpul serviciului. Agenția Națională pentru Prevenirea Torturii nu a primit finanțarea necesară, neputând derula proiectele începute. Autoritățile au continuat să trimită înapoi în Kosovo refugiații de origine rromă, neacceptând căutarea unor variante diplomatice de trimitere a acestora în țări în care riscul de supunere la rele tratamente să fie minim.

În anul 2005, un refugiat a murit într-o celulă dintr-o secție de poliție din Dessau, ca urmare a neglijențelor ofițerilor ce îl aveau în custodie. Până în prezent, nu a fost dată o sentință în această cauză, procesul de judecată amânându-se din varii motive.

Deşi legislația garantează dreptul la liberă exprimare şi libertatea presei, propagarea Nazismului şi a grupărilor care susțin acest curent este complet interzisă.

Cu privire la drepturile persoanelor cu dizabilități, există numeroase reglementări care instituie servicii speciale pentru acestea, inclusiv scutirea de taxe, transport public gratuit, adaptarea bordurilor la nivel, adaptarea clădirilor.

2.9. Italia

Persoanele de etnie rroma suferă cele mai grave încălcări ale drepturilor. Aceştia sunt, de cele mai multe ori, evacuați, inclusiv din taberele autorizate. Accesul la locuințele de tip social este aproape nul. Strategia Națională pentru Incluzine aprobată în luna februarie a.c. a rămas, în mare măsură, neaplicată.

Curtea Supremă a confirmat că, în cele mai multe cazuri, cuplurile de acelaşi sex se pot bucura de aceleaşi drepturi ca alea unui cuplu clasic, cu mențiunea faptului că o căsătorie între aceştia nu este recunoscută şi nici nu produce efecte legale.

2.10. Grecia

În anul 2012, Grecia a fost țara membre U.E. cu cele mai multe încălcări ale drepturilor omului, în instanțe: 108. De asemenea, tot în Grecia a fost şi cele mai multe îngrijorări legată de corupția judiciară.

De asemenea, condițiile din penitenciare nu sunt conforme normelor europene, Grecia primind numeroase avertismente în acest sens.

Tot în 2012, au existat probleme privind stigmatizarea persoanelor purtătoare de virus HIV. În momentul în care peste 100 de persoane au fost arestate preventiv, fiind acuzate de prostituție, Poliția a publicat în presă fotografiile celor 29 de femei purtătoare de virus HIV.

2.11. România

Şi în România apar dese încălcări ale drepturilor persoanelor de etnie rromă. În luna octombrie a.c. Comitetul Consultativ pentru Aplicarea Convenției Cadru privind Protecția Minorităților Naționale din partea Consiliului Europei a subliniat faptul că, în mare parte, copiii de etnie rromă sunt înscrişi la şcoli speciale pentru persoane cu dizabilități, în şcoli sau clase separate. De asemenea, în cazul în care beneficiază de un adăpost, acesta nu beneficiază nici măcar de condițiile minim necesare.

Din păcate, în 2010 România s-a aflat pe locul 1 între cele 27 membre U.E. la momentul respectiv şi pe locul 4 în Europa, la numărul de procese înregistrate la C.E.D.O., pentru încălcarea Articolelor 2 şi 3 din Convenția Europeană, articole ce privesc dreptul la

viaţă şi aplicarea torturii. Şi în 2012 România s-a aflat în top 4, alături de Grecia, Bulgaria şi Polonia, fiind criticată pentru că permite deţinuţilor să conteste legalitatea detenţiei, să fie consideraţi prezumtiv nevinovaţi, până la proba contrarie şi să conteste martorii care depun mărturie împotriva lor.

2.12. Ungaria

Deşi drepturile fundamentale ale omului sunt garantate prin Constituţie, există încă numeroase probleme. Violenţa domestică reprezintă una dintre ele. Până la 1 iulie 2013, aceasta nu era incriminată că infracţiune distinctă. Ea era tratată ca orice altă formă de violenţă, în funcţie de numărul de zile de îngrijiri necesitate pentru vindecare. Era nevoie de plângerea prealabilă a victimei pentru a se efectua cercetări. În Noul Cod Penal, instanţa se poate sesiza din oficiu însă numai după două situaţii de violenţă domestică. Nu se aplică în cazul femeilor care nu mai locuiesc în acelaşi spaţiu cu soţii lor decât în cazul în care, ca urmare a legăturii dintre aceştia a rezultat un copil.

Studiile realizate[2] au subliniat faptul că Poliţia descurajează reclamaţiile femeilor care se confruntă cu astfel de probleme, cerându-le se dea declaraţii în faţa agresorului şi neprotejându-le ulterior.

Parlamentul European a aprobat în data de 4 iulie 2013 un raport critic privind situaţia drepturilor omului. Discriminarea prin lege, intimidarea rromilor de către grupări de extremă dreaptă şi influenţa politică asupra presei. Aceste probleme au fost menţionate şi de Amnesty International, în raportul pentru drepturile omului pentru 2012.

În luna noiembrie, Parlamentul ungar a legalizat posibilitatea arestului preventiv pe termen nelimitat pentru persoanele suspecte de crimă şi care riscă peste 15 ani de închisoare.

3. CONCLUZII

Deşi există norme comune ce ar trebui implementate în legislaţia fiecărei ţări membre U.E., se poate observa ca ele sunt interpretate şi aplicate diferit. Este nevoie de o colaborare intensa a instituţiilor de stat cu instituţiile non-guvernamentale pentru creşterea gradului de responsabilizare a oamenilor şi de pregătirea a celor implicaţi în aplicarea legislaţiei. Aceste diferenţe sunt date, de asemenea, de istoria, regimul politic şi gradul de dezvoltare al fiecărui stat.

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INCREASING EFFICIENCY IN INTERNATIONAL ARBITRATION

CRISTINA FLORESCU

Abstract

In the lucrative area of international commercial disputes, arbitration become in nowadays the normal means resolving disputes.

Lately, the efficiency in arbitration has become an increasingly issue in many respects. In the beginning, arbitration was a relatively inexpensive and rapid alternative method of dispute settlement. But sadly, over the last decades, these aspects changed for the worse, arbitration being perceived as expensive and time-consuming.

Objections have been raised to the judicialisation of the arbitration. Enhancing efficiency could reduce fairness and accuracy requested for an enforceable award and arbitrators are obliged to respect their duties and the principle of due process.

The papers analyses the causes that lead to the lack of proficiency and efficiency in the arbitral proceedings and its effects and then the main struggle and proposals made in this direction by the arbitration community, on how to alleviate and overcome those tactics that deviates arbitration from its finality.

Moreover, in the same respect, the laws continue to evolve to facilitate the use of arbitration and to accommodate all its users,

Consequently, it is normal arbitration, more or less efficient case by case, to dominate certain areas such as international commercial disputes, while national court will focus on other commercial transactions with competence regulated by mandatory national laws and other sectors apart from trade.

Keywords: international commercial arbitration, case management, efficiency, time and costs saving, 2012 ICC Rules

1. Introduction

In the last years, arbitration has become a remarkably successful method for solving disputes, in particular on an international level [Fouchard/Gaillard/Goldman, (1999); Redfern/Hunter, (2009)].

In the beginning, arbitration was a relatively inexpensive and rapid alternative method of dispute settlement. But sadly, over the last decades, these aspects have changed for the worse, arbitration being perceived in some cases, and not just a few, as an extremely expensive and time-consuming way of deciding disputes. Mid-sized arbitrations are rarely concluded within two years, a significant number of them last four years or even longer [Queen Mary, (2006); Queen Mary, (2008); Chartered Institute of Arbitrators, (2011)].

And this happens more often when the procedural law belongs to the common law system rather than to the civil law procedural context, but in both law systems this needs more consideration about efficiency and proficiency. Lately, efficiency in arbitration has become an increasingly important issue in many respects.

Therefore, views, ideas and proposals to improve procedural efficiency in arbitration have been advanced by specialists in the arbitration field in trying to overcome pathological aspects in arbitration case management.

2. The parties' role

For this undesired evolution of the situation in arbitration the parties themselves and their attorneys/counsels should be considered first of all responsible. In practical circumstances of a case, the parties and their external and/or in-house counsels are not willing to accept rules which would really streamline and accelerate the proceedings. They insist on two full rounds of submissions, a document production phase and witness statements, expert opinions, followed by a multi-day hearing and post-hearing briefs, sometimes in two additional 'rounds'. When asked whether a deviation from this standard procedure would not be advisable to save time and costs their typical answer is: 'In principle, we agree with innovative measures to accelerate the proceedings... but not in this case.' [Risse, (2013)].

Nevertheless, the parties together with their counsels must decide on their priorities and balance all their needs. And if they request efficiency then they will have to agree on cutting the costs and reducing the time by lowering the high demands on the developments of the proceedings, all the tactics and the dilatory maneuvers usually used.

Such abusive strategies may include proposing new claims, producing excessive documentation, putting forward endless evidence requirements, challenging the arbitrators' impartiality and independence, complicating the proceedings by proposing extended time-limits, an unreasonable number of submissions, a cumbersome document production process or an excessive and unnecessary number of witnesses and experts to be heard during a long evidentiary hearing.

It almost impossible to reconcile all the three concepts: time efficiency, cost saving and quality of the award. And as parties are calling for all three, then international practice results in long and costly proceedings, qualified as inefficient. The parties should understand that good quality arbitration implies both the accuracy of the award and a high quality of the proceedings. A scholar [Risse, (2013)] makes ten interesting proposals in this respect: a limit of maximum 100 pages for parties' submissions; oral pleadings at a terms of reference meeting and subsequent recommendations by the arbitral tribunal; settlement agreement offers from the parties to be proposed and encouraged; no written witness statements; interrogation by arbitrators; absolutely no document production; directives by tribunal as to material issues; comprehensive opening statements and discussion on the merits; parties' assistance in writing the final award; explicit cost sanction for inefficient handling of proceedings; financial incentive for the arbitral tribunal to render the award quickly.

Although all the proposals for increasing efficiency are supported by very high valuable arguments, some of them are already used in practice even if not all the time, while others are not so easy to implement. I doubt about the willing of the arbitrators and the parties to introduce them all. But these proposals deserve consideration and all the arbitration participants are encouraged to cooperate in reaching efficiency.

3. The arbitrators' role

It is widely agreed that the arbitration's goal is a balanced, fairy due process and efficient settlement of the parties' disputes by specialized arbitrators chosen by their expertise and reputation. The arbitrators rather the parties themselves are mainly the subject

on how to improve efficiency, even if they are nominated by the parties and their authority derives from the parties' collective will[1].

Generally, the particular proposals on efficiency focus on a greater precision in outlining an arbitrator's duties. One explanation could be that arbitrators are entrusted with the powers to conduct and organize the proceedings and therefore it is considered that in their hands lies the duty to ensure the efficiency of the case management. Another aspect to contemplate is that arbitration is well known to be a flexible method as compared to litigation and consequently arbitrators have the discretion to balance the conflicting interests subject to fulfillment of their obligation in their arbitrators' mission. One of the main arbitral tribunal obligations is to act fairly and impartially while ensuring that each party is given a reasonable opportunity to present its case.

One should bear in mind that normally arbitration should flow smoothly forward without special difficulties, given the parties' common interest to settle timely and cost efficiently their dispute. But the ideal picture is changed in the real world, when there are parties' antagonist standpoints shaken by the counsels and the big interests that haunt high profile, complex arbitration cases, which can involve sometimes multiple contracts and parties.

In these cases, the parties advised by their counsels fight strongly for every step, opposing the other party strategies and dilatory tactics that disturb exactly the proficiency and efficiency sought in arbitration. Thus the arbitrators are forced to take position even against the parties' actions and set for a clear procedural timetable where all the disputable aspects be strictly regulated, leaving then no room for any further possible conflict generating waste of time and money.

The big question in this situation, which occurs more and more in practice, is how to reconcile the basic parties' right to be heard with another right, the one of benefitting of the arbitration's efficiency, so much requested by the parties themselves and lately so much debated. It is an inevitable divergence between all the arbitration participants' wish of a speedy and efficient arbitration and the principle of the parties' right to be heard in the procedure, as arbitrators are concerned with their award not being set aside at a later stage and the parties regarding the procedure as a waste of time and money and complaining thereby about the arbitration's finality.

Here comes the arbitral tribunal's skill in not giving priority to one argument over the other, but to balance the positions at stake, by proposing precise directions and set narrower limits to all the matters, assuring the parties' necessary latitude, therefore freedom, to decide how the procedural issue will be developed so that no complains could be raised about the conduct of the proceedings.

The arbitrator is in front of a dilemma as to the party's dilatory behaviour: to allow it or to reject it. Often the principle of the right to be heard is raised by the party which adopts such maneuver and the arbitrator is afraid of taking a wrong step when rejecting a party's request. As a result, the arbitrator is tempted to allow the dilatory tactic and reserve evaluation of its weight at the time of the award deliberation [Bernardini, (2011), pp. 75, 76]. But an arbitrator aware of its authority should be able to overcome these situations and

[1] The parties benefit from their freedom for the organization of the whole procedure and consequently this liability of efficiency should rests primarily with the parties and not mostly to the arbitrators, which are empowered by the parties themselves to conduct their dispute according to their rules.

manage them by efficiently opposing to the counsel's repeated attempts. Therefore, the crucial issue for the arbitrator is to ascertain when the opportunity granted to each party is realized in an adequate manner so that no other further submission be allowed and the proceeding may be closed.

When dealing with such circumstances it is not appropriate for the arbitrators to contemplate a general solution that could fit all, as every dispute has particular features, different legal background and distinct culture of the participants involved in the procedure, with different expectations. The members of the arbitral tribunal have then the duty to reasonably balance the opposed views and to ensure the necessary communication among themselves to make the best and easiest choices in order to achieve the desirable efficiency, keeping accordingly the arbitration goal.

4. The combined role of the parties, the arbitrators and the arbitral institution

The main aspects of an efficient case-management are related to the widely accepted party-autonomy in arbitration, i.e. the freedom of the parties, as arbitration is a voluntary procedure.

Even they are nominated by the parties and their authority derives from the parties' collective will, these arbitrators are especially the subject on how to improve efficiency, rather then the parties themselves, which benefit of their freedom for the organization of the whole procedure.

The will of the parties could also be characterized as a limit for the arbitrators' role and the procedural powers and an arbitrator in exercising its mission and functions should be aware of the extent of such procedural powers. On the other hand, an arbitrator enjoys a measure of autonomy in this exercise and therefore is compelled to support a proactive and at the same time autonomous role, subject to the rules governing arbitration. This freedom assures the legal framework of the arbitration process and the whole conduct of the arbitration, as the parties' impact on the efficiency and cost-effectiveness is made mostly in the preliminary choices and their flexibility.

Among these choices the most important are the rules under the parties' convening to arbitrate, this being related to the arbitration type they consider more adequate, ad-hoc or institutional.

If it is institutional, then which arbitration institution should be elected is a significant issue, as its rules of arbitration shall apply and according to those rules are to be performed all the institutional duties when necessary, like appointing authority, procedures for nomination/removal of arbitrators, time limits and any other intrusion that may deemed indispensible for the course of the procedure.

Hence, the applicable law and procedure are to be established by the parties and their correct choices, adapted to the situation at stake is crucial for the proceedings evolution. It is important whether it is an ad-hoc or an institutional arbitration, as the latter offers and already comes with the institutional rules that norm the whole arbitration process, such as commencing of the arbitration, constitution/removal/replacement/challenge of the arbitral tribunal, arbitral proceedings[2], making of the award, costs and other issues like conservatory and interim measures.

[2] Between the most important rules, are to be mentioned the following: transmission of the file to the arbitral tribunal once constituted, place, rules of law, language, time limits and then conduct of arbitration, terms

Another aspect of the parties' autonomy is related to the seat of arbitration, as this is of primary importance at it determines several aspects, such as (i) which mandatory law is applicable to the arbitration establishing thus the procedural issues, (ii) which national court will be competent in settling various matters regarding arbitration (including award setting aside, award enforcement and recognition), (iii) the possible impact on the arbitral tribunal constitution (regarding the chairman or sole arbitrator) and (iv) the hearing place (even the hearings can be held anywhere, according to the parties' agreement). Consequently, preventing additional delay and spending extra time and money, the arbitration seat could avoid litigation before the national courts.

Next, the arbitrators' appointment mechanism is considered to be a part of the principle of the parties' autonomy, given the right of each party to appoint its co-arbitrator. As substantial amounts might rest in its hands, the arbitral tribunal has a vital contribution to play in the effective proceedings conduct and in the determination of the merits of the case. Usually the nominated co-arbitrator chooses the chairman (the presiding arbitrator) and the co-arbitrators has the role to ensure that each and both parties' cases and legal cultures are given appropriate weight during the entire procedural phases.

Strongly related to the proficiency and efficiency of arbitration is the number of the arbitrators and the arbitrators' independence and impartiality. As of the number, it determines the arbitration cost, but here are some debates related to the three-member arbitral tribunal over a sole arbitrator. It is clear that drafting an award by one person is faster, no additional time being necessary to deliberate and generally one arbitrator incurs less expense. But a three member tribunal is safer in terms of rendering a more balanced award and, in general, a more unprejudiced and well-adjusted procedure. This because each co-arbitrator will try to guide the procedure as each party be heard and be able to benefit form the opportunity to present its case.

And now enters the scene the independency and impartiality of each arbitrator, according to the general standards (guidelines, best practices) and to the institutional ones. If not respected, a biased arbitrator can damage the proceedings even if he can be challenged and then removed and replaced, but these additional procedures take longer time and cost more money and can change the outcome of the arbitration.

This neutrality quality is part of the rights and duties of an arbitrator, which determine its liability. Another important arbitrators' right is the parties' undertaking to comply with the orders and award of the arbitral tribunal. To this end, it is necessary to ensure good order and the police of the procedure.

Other issues arising from the parties' autonomy that may affect arbitration efficiency are the language of the arbitration (which could add considerable expenses and delay of proceedings if interpreters and translators interpose), the law governing the contract (which could determine the performance of the arbitration in terms of the approach: commercial, lex mercatoria or amiable compositeur; no law means the choice of law – conflicts of law –

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of reference in ICC arbitration, case management conference and procedural schedule, pre-hearing, hearing and post-hearing issues, closing of the proceedings, drafting the award; also if necessary emergency arbitrator when applicable, correction, interpretation of award, scrutiny when applicable; arbitration costs and expenses, fees of the arbitrators and also rules regarding the statutes and internal rules of the respective court of arbitration. All these regulations are already in place in an institutional arbitration and the parties and the arbitral tribunal does not need to set them as in ad-hoc arbitration.

which involve a lot of extra time on battles over which law should applied), expert involvement, emergency arbitrator, other arbitration condition precedent of amicable settlement procedure. Other issues that could appear are the necessity of ordering by the arbitral tribunal of document production ('discovery' known in common law systems) or the implication of more than two parties in the arbitration, where specific considerations arise which require careful thought or the needs for the proceedings bifurcation which triggers granting partial or interim awards. All these could lead to supplementary costs and could be time consuming in achieving the promotion of more inexpensive and expedited dispute resolution.

Besides, the wide normative development in international arbitration and the implementation of the legislative process have brought more recognition of greater arbitrators' powers, such as competence-competence, the issuing of conservatory or interim measures or of penalties to the parties, the choice of the applicable procedural and substantive rules, the language and seat of the arbitration in case of parties' silence, etc.

The cooperation between the arbitrators and the parties is also closely connected to the arbitrator's skills to establish a fruitful cooperation with the parties' counsel (interactive arbitration) [Cremades, (1998)]. The first and the most significant step is made in the initial phase of the proceedings [Bernardini, (2011), p. 74]. There and then the arbitrator's more active role may be developed in evaluating jointly with the parties the problems to be faced and establishing a positive climate to be able to dictate the best solutions based on his experience and the peculiarities of the case. Particular importance lies in the active efforts of the arbitrators to provide work for effective case management skills, coupled with the discernment and willingness to make early rulings that will effectively truncate or streamline proceedings and to conduct a thorough preliminary conference and issue comprehensive case management orders and then to have the courage to enforce agreed timetables [Stipanowich, (2010), Protocols]. On the other side provider institutions need to promote real choices in arbitration even if much remains to be done and the answer is not to impose too many rules and to transform arbitration into procedural process similar to litigation.

Therefore, blending efficiency and economy with fundamental fairness in arbitration implies all parties' mutual struggle and cooperation to obtain solutions to the problems and not discovering tactics meant to disrupt the course of proceedings with dilatory behaviour and confrontation.

Consequently, all participants in arbitration must play a role and it is more than arbitrators' duty to ensure proficiency, but all the better is that business users, in-house counsel, outside counsel, other witnesses, experts and paralegals, arbitral institution and arbitrators are together seeking economy, efficiency and a true alternative to the courthouse.

5. The 'judicialisation' cause of less effective arbitration

In order to find solutions to the issue of a better case-management in arbitration, one should identify the cause of the problem, and it is deemed that arbitration has become too much like litigation, i.e. the 'judicialisation' of the international arbitration. This concern is in line with the complaint that international arbitration already suffers from judicialisation, i.e., the loss of distinct arbitration characteristics as a result of the adoption of court-like features [Redfern, (2008)][3]. The most important difference between arbitration and

[3] The paper is a contemporary debate on efficiency.

litigation – and the fundamental value of arbitration – is the ability of users to tailor processes to serve particular needs [Stipanowich, (2010), Arbitration: The "New Litigation"]. The conflict emerges most frequently in discussions about procedural timetable and time-limits for the submissions that are to be made, their number and length, the possible bifurcation of the proceedings, the counsels' behaviour that import trial practices into arbitration (discovery, motion practice, delaying the procedure, strategic or tactical reasons, interposing constant objections, harassing witnesses, redundant testimony, the big amount of production of the documentary evidence confusing and cumbering the case, lengthy and costly expert evidence, etc.).

Nowadays it is perceived by two in-house attorneys for one of the world's leading companies [McIlwrath/Schroeder, (2008)] that arbitration is more about due process:

"The overriding objectives [of businesses in choosing an appropriate forum for resolving disputes] ... are fairness, efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections. These are complementary objectives, and to focus on one at the expense of the others leads to a result inconsistent with the expectations of the business world and denies basic commercial needs. Too often the practice of ... arbitration has done just that, by focusing on perceived concepts of due process to the detriment of efficiency, resolution and certainty. "

And this is because the arbitrators are compelled to render awards that are final and enforceable, without reasons for annulment or non-recognition to any authority called to review the award. By trying to weigh the arbitrators' duty of due process, promoting efficiency, accuracy, fairness, the arbitral tribunals were unable to overpass the issue of the enforceable award [Park, (2007)], so arbitrators are afraid of this consequence and less operative and are considering all the parties' adequate opportunity to be heard. Therefore, enhancing efficiency could reduce fairness and accuracy [Park, (2011), p. 29] and arbitrators are obliged to respect their duties and avoid liability for excess of authority, so it is not an easy task to improve the proceedings proficiency and assure a time and cost efficient management of the case.

6. The ICC's efforts aimed at speed and cost-effectiveness

During the last decade, the arbitration community has increased the efforts in this direction and issued or improved guidelines, standards, codes of best practices and adopted new arbitration rules that address specific tools for an efficient case-management in arbitration. This so-called 'soft law' creates intra-practitioners directives aimed at enhancing procedural uniformity among arbitrators and counsels from different judicial traditions [Park, (2011), p. 25].

The conclusion is that the aspiration towards efficiency in arbitration is balancing fairness and accuracy while reducing any possible delay and/or undue cost [Reed, (2010); Quuen Mary, (2010]].

Reacting to criticism of inefficiency in arbitration, several arbitral institutions have recently undertaken the task of revising their arbitration rules, with the primary goal of making the arbitration process more efficient [Grierson/van Hooft, (2012); Davies, (2012); Earnest/Gallardo/Gunnarsson/Kaczor, (2013)].

By way of example, the International Chamber of Commerce Rules of Arbitration ("ICC Rules") and the Swiss Rules of International Arbitration ("Swiss Rules") have

recently been revised. Several provisions aiming to reduce time and cost were considered. Both the revised ICC Rules and Swiss Rules have followed the example of The Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") and have incorporated provision for the appointment of an emergency arbitrator: "This is intended to reduce the involvement of the state courts where parties wish to apply for urgent interim measure prior to the constitution of the arbitral tribunal" [Davies, (2012)].

The ICC Commission on Arbitration issued in 2007 the guidelines "Techniques for Controlling Time and Costs in Arbitration" [Techniques, (2007)] following the guidelines issued in March 2003 "Guidelines for Arbitrating Small Claims under ICC Rules of Arbitration"[4].

The suggestions made were described in two principles: first is that the parties should work together with the arbitral tribunal and "make a conscious and deliberate choice", as early as possible, regarding all the necessary specific procedures for the respective case, and second, the proactively cooperation between all the participants in arbitration in order to manage better the procedure from the outset of the case [Techniques, (2007)]. Starting from these principles, the "Techniques for Controlling Time and Costs in Arbitration" made some proposals which were followed by the new 2012 ICC Rules. All the provisions culminate with the Appendix IV dedicated to Case management techniques and also Appendix V which set for the Emergency Arbitrator rules, both of these annexes being created to meet the request of efficiency in arbitration.

The 2012 ICC Rules proposals, different from the previous set of rules (1998 ICC Rules), are located in Art. 22 (Conduct of Arbitration), Art. 24 (Case Management Conference and Procedural Timetable), Art. 27 (Closing of the Proceedings and Date for Submission of Draft Awards) and the new emergency arbitrator provisions (Art. 29 and Appendix V).

Art. 22 (1) requires the arbitral tribunal and the parties to "make every effort to conduct the arbitration in an expeditious and cost effective manner having regard to the complexity and value of the dispute".

It is important to note that even these rules especially provide that not only are the arbitrators involved in a good management, but also the parties, as their freedom of choice is the cornerstone of arbitration.

The indication that all the participants have to regard the complexity of the case means that high profile arbitrations should be given more reflection, as this involves high amounts and/or state parties and/or an special arbitral tribunal in dispute. In the following there are a few ideas on these three relevant issues in discussion when high profile cases are debated.

Regarding the first issue, the high amounts, the advance on costs, provisional advance and fee of the arbitrators are involved in measuring the high complexity of the case. All these costs and fees are above the average and distinctive consideration should be paid in such cases, as always has been proved these high amounts need special handling from the Secretariat and the arbitrators.

Also this might involve the request for documents production, but their relevance to the case is measured. Overly substantive briefs may appear, when parties repeat themselves and page limits are required (more common in post hearing submissions).

[4] In fact, quite in the Introduction it is stated that the suggestions made in the guidelines can be used by any party who seek to reduce cost and time for an arbitration, even in "large claims".

Another issue could be the significant numbers of fact witnesses or experts the parties might request, but the arbitral tribunal is called to establish if they are indeed necessary and could be really brought at the hearings.

Other aspects that often intervened are related to bifurcation, parallel proceedings, anti-suit injunctions (conservatory and provisional measures) and arbitrators' challenges that can be covered by a suitable drafting of the first procedural order.

Regarding the second issue, the state parties, this means that arbitrators' appointment process is more careful examined, the number of arbitrators will be three and their neutrality is discussed. Any suspicious political pressure on arbitrators or witnesses (especially when dictatorial states are implicated) should be regarded and more people are dealing with the award in the ICC Secretariat in the scrutiny process.

As concerns the third issue, the arbitral tribunal, in high profile cases it might be possible administrative secretaries be implicated for each arbitrator. It is important that arbitrators should be free of conflict of interests of any type, especially those related with the state parties. Also the arbitrators' availability is another important issue, as being more complex, the case will necessitate more efforts, time and dedication.

Some high profile cases are those when multiple parties and/or multiple contracts are at stake or a class action is brought or when high technically complex arbitrations appear.

Significant is also the publicity made to the case if it is a high profile and complex case involving high value or renowned parties or state parties, as confidentiality of the proceedings is not always guaranteed (but that of the deliberations is, at least in theory!).

Also the case management conference and case management techniques are to be tailored proportionally to the big amounts at stake. Even Appendix IV stipulates that in case of a low value, the cost and time are to be tailored to the amount in dispute, as a low amount does not justify a special and complicated procedure, with a lot of rules for its conduct, being sometime sufficient the paper submission without an oral hearing or other supplementary discovery, witnesses, experts or other measures. But this is not a rule; exceptions are met all the time, when low profile cases need a lot of arbitral tribunal attention, oral hearing, provisional measures, expert and witnesses involvement and so on. So, the way an arbitration is conducted depends on the particular factual and legal circumstances of the case.

The case management conference is a good starting point for any arbitration to ensure effective case management. This could be related to the Terms of reference and, in general, is important for the parties and arbitral tribunal, as it sets the frame of the first procedural order and the procedural timetable. Paragr. 1 in conjunction with paragr. 4 in Art. 24 propose that the arbitral tribunal when drawing up the Terms of reference or as soon as possible thereafter, shall convene a case management conference which may be conducted through a live meeting[5] to consult the parties on procedural measures that may be adopted pursuant to Art. 22 (2). This is a key innovation issue of the 2012 ICC Rules and it is important that even the institutional rules promote for a mutual agreement between the parties and the arbitral tribunal, because only so the efficiency in arbitration can be achieved. Some of the possible measures mentioned in this article could be the ones that are found in the techniques described in Appendix IV to the 2012 ICC Rules.

[5] This means a meeting in person, by video conference, telephone or similar means of communication.

The first procedural order is important for a good start, being regarded as a procedure roadmap, the parties' representative being invited to consult together on procedural measures that may be adopted pursuant to Art. 22 (2). Art. 24 (4) authorizes the arbitral tribunal to request the attendance in person or through a representative, but it is recommendable that these persons have enough authority and be empowered to take the necessary procedural decisions and therefore have real effect on cutting time and costs.

Another aspect newly released in Art. 27 is that the parties should be better informed of the date by which the arbitral tribunal is expecting to issue its draft, the Rules requests the arbitral tribunal to inform the parties as well, not only the Secretariat as it used to before, as soon as possible after the last hearing or the last authorized submissions. These are improvements related to time issue and the issues at stake are the closing of the proceedings and the date for submission of the draft award to the Secretariat for the scrutiny process.

Correlated to decisions on the costs of the arbitration, the arbitral tribunal is encouraged to allow for the relevant circumstances it considers necessary to establish these costs, especially including here a reward for the parties' efforts to insure proceedings' proficiency. Art. 37 (5) stipulates that these costs should be awarded to the extent that each party have contributed to the development of an efficient and cost effective case management.

Finally, Appendix IV is a very useful tool to assist the arbitral tribunal efforts in performing of this more active role, a very delicate task to achieve by balancing between all the incumbent requirements and duties, reconciling speed with justice.

The list of the indicated suggestions made by the institution contains the following case management techniques that should be used by the parties together with their tribunal in looking for efficiency: bifurcation, rendering partial awards, identifying issues that can be resolved by agreement between the parties, identifying issues to be decided solely on the basis of documents, several techniques related to production of documentary evidence, limiting the length and scope of written submissions and written and oral witness/expert evidence, use of IT that enables online communication among the parties, organizing a pre-hearing conference, informing the parties on the amicable settlement facilities. In the end the 2007 "Techniques for Controlling Time and Costs in Arbitration" guidelines are mentioned for complementing these suggestions and to promote appropriate solutions to be found.

All of these norms are not really new, as in practice tribunals have already sought to implement them and have tried even to sanction in costs dilatory or bad faith acts or parties' failure to respect their part of obligations.

7. Conclusion

As I have once heard in an arbitration conference, anticipation is the name of the game. In arbitration it is recommendable to be as well prepared and to foresee as many as possible issues related to an efficient conduct, even if not all can be predicted, but other necessary procedural issues can be covered later by issuing another procedural order when problems occur. In real life there are many other aspects that can appear and should be resolved from case to case, for one cannot take into consideration from the beginning any and all the problems that might arise in high profile arbitration affecting efficient case management.

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MĂSURI SPECIFICE DE PREVENȚIE ŞI COMBATERE A CRIMINALITĂȚII FEMININE LA NIVEL NAȚIONAL ŞI EUROPEAN

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Abstract

The present article regards the current problem of women criminality, in aspects such as prevention and limitations that the state can and shoud bring to this phenomenon. Giving the particular features of this type o criminality, it is important to identify, to create and to apply the most suitable legal methods, in accordance with all social, family and economic aspects, in order to obtain the most effective results in matter of women criminality.

Keywords: women criminality, social, legal methods, prevention

1. Introducere

Criminalitatea feminină reprezintă un fenomen complex, care a generat o multitudine de întrebări de-a lungul timpului, pe măsură ce societatea a fost forțată să admită rolul femeilor la realizarea vieții sociale a unei comunități, să le recunoască contribuția – atât pozitivă, cât şi negativă – la succesiunea unor evenimente inerente existenței speciei umane.

Frecvența şi specializarea formelor de manifestare ale criminalității feminine au făcut din acest fenomen o amenințare reală, în condițiile în care societatea a considerat şi continuă să considere femeile – infractor doar ca o chestiune lipsită de importanță, un segment al criminalității privită în linii generale.

Criminalitatea feminină reprezintă o amenințare la adresa ordinii publice şi siguranței naționale, ce trebuie cercetată sub aspectul cauzelor, manifestărilor şi, mai ales, sub aspectul posibilității de a dezvolta un set de măsuri de prevenire şi combatere a fenomenului.

România a devenit, de la începutul anilor 1990, una dintre țările „furnizoare" de victime ale traficului de ființe umane, ale traficului de droguri şi a crimei organizate, privită în ansamblu.

Femeile ocupă un loc central în desfăşurarea acestor activități ilicite, în ultima perioadă observându-se o trecere de la condiția de victimă la cea de autor ori co-autor a infracțiunilor specifice criminalității organizate.

2. Aspecte generale. Direcții de acțiune

Diversitatea activităților criminale desfăşurate de femei conduce la ideea că nicio măsură de prevenire ori combatere a fenomenului criminalității feminine nu este universal valabilă.

Orice măsură întreprinsă în sensul limitării viitoare a acestui fenomen trebuie să țină seama de diversitatea faptelor penale săvârşite de femei, precum şi a situațiilor în care femeile devin victime ale unor infracțiuni.

Întrucât pentru prevenirea şi combaterea unui fenomen complex este necesară implementarea de măsuri complexe, opinăm că trebuiesc trasate mai multe direcţii de acţiune, pe diferite planuri, în contextul cooperării pe plan intern şi internaţional dintre autorităţile de la nivel local, central şi continental, respectiv între acestea şi organizaţiile de profil, create pentru a asigura drepturile omului, în speţă ale femeilor şi pentru a sprijini reintegrarea socială a femeilor, atât din postura de autor al unei fapte penale, cât şi de victimă a acesteia.

Considerăm că direcţiile pe care măsurile de prevenire şi combatere a fenomenului criminalităţii feminine ca parte a criminalităţii organizate trebuie să fie următoarele:

- o aplicare mai eficientă a legislaţiei existente şi completarea, îmbunătăţirea acesteia;
- cooperarea instituţiilor responsabile în vederea limitării activităţii infracţionale a femeilor;
- crearea unor programe complexe de consiliere şi asistenţă a victimelor dar şi a femeilor care au avut calitatea de autor al unei infracţiunii, în vederea reintegrării acestora în societate.

3. Aplicarea legislaţiei in vigoare

Unul dintre atributele unei norme legale este acela de a contribui la menţinerea ordinii de drept. Prin „ordine de drept" înţelegem desfăşurarea vieţii sociale în conformitate cu prevederile legii (ca nucleu al ordinii sociale). Ordinea de drept se înfăptuieşte prin traducerea în fapt a conţinutului normelor juridice[1].

Apreciem că înţelegerea corectă şi aplicarea corespunzătoare a normei legale de către organele judiciare şi instanţă ar contribui la limitarea fenomenului criminalităţii feminine, prin limitarea formelor de manifestare a acestuia şi aici ne referim la infracţiunile comise de femei.

Observăm, din practică, o anumită pasivitate a celor chemaţi să aplice legea faţă de comiterea anumitor tipuri de infracţiuni, care fie prin frecvenţa ridicată cu care sunt săvârşite, fie prin complexitatea lor, par a descuraja organele judiciare în a aplica legea.

Spre exemplificare, infracţiunea de prostituţie este una extrem de des întâlnită, sub formele prezentate mai sus, şi, în ciuda faptului că există legislaţie care incriminează fapta, precum şi legislaţie procedurală, actul sancţionator nu are loc decât în cazuri foarte rare. Acest fenomen nu are loc numai în România, ci şi în majoritatea statelor din Europa în care prostituţia este prevăzută ca faptă penală.

De asemenea, sunt foarte des întâlnite cazurile în care, asemenea proxeneţilor, şi reprezentanţi ai forţelor de poliţie percep aşa – numitele „taxe de protecţie" de la prostituate sau de la alţi membri ai reţelelor de crimă organizată.

Apare, aşadar, un fenomen de „crimă la crimă", infracţiunii de prostituţie adăugându-se şi cea de corupţie, sporindu-se astfel cifra neagră a criminalităţii.

Suprimarea sau cel puţin restrângerea acestor acte, prin sancţionarea persoanelor care se dedau la asemenea fapte, poate duce la limitarea unor asemenea manifestări şi, în timp, la limitarea infracţiunilor de acest gen.

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[1] F. Paşca, Combaterea fenomenului infracţional de trafic de fiinţe umane, vol. I, Ed. Sitech, Craiova, 2009, p. 205.

Cu referire la judecarea femeilor implicate în fenomenul criminalității organizate, se constată dificultăți în finalizarea actului sancționator, din cauza unor probleme lacunare în efectuarea actului preparator al sancționării, a impedimentelor procedurale nesincronizate cu respectarea drepturilor şi libertăților fundamentale ale omului, prejudecăți cu privire la tratarea victimei ca o persoană imorală şi reticentă, dezinteresul pentru reinserția socială a acesteia[2].

4. Cooperarea instituțiilor responsabile în vederea limitării activității infracționale a femeilor

4.1. Cooperarea instituțională în plan intern

În vederea implementării obiectivelor statuate prin convențiile naționale la care România este parte, precum şi a recomandărilor trasate de Uniunea Europeană, la nivel intern au fost create o serie de instituții şi structuri menită să asigure colectarea şi prelucrarea datelor cu privire la diferitele tipuri de infracțiuni parte a fenomenului criminalității organizate.

Astfel, amintim structuri din cadrul Inspectoratului General al Poliției Române (DGCCO – DCCO, Centrul de Resurse) şi din cadrul Ministerului Administrației şi Internelor (ANITP), alături de organizații neguvernamentale.

Mai mult decât atât, prin Hotărârea de Guvern nr. 1040/2010 a fost aprobată Strategia Națională de ordine publică 2010 – 2013 care prevede activități de informare – conştientizare a riscurilor implicării în activități de crimă organizată, reținându-se că „Imaginea României continuă să fie afectată de criminalitatea comisă de români pe teritoriul altor state. În ultimii 3 ani, numărul cetățenilor români semnalați cu activitate infracțională în străinătate a crescut continuu, ajungându-se ca, în anul 2009, numărul acestora să fie de peste 9000. 90% din criminalitatea comisă de cetățenii români în străinătate se înregistrează pe teritoriul a 8 state (Austria, Italia, Franța, Spania, Irlanda, Belgia, Germania şi Marea Britanie). Deşi majoritatea faptelor ilicite se înscriu în sfera micii criminalități, se constată şi apariția cazurilor în care cetățeni români fac parte din filiere transnaționale de crimă organizată". Pe cale de consecință, s-a statuat ca obiectiv distinct reducerea impactului criminalității organizate, transfrontaliere si terorismului[3].

Opinăm că o mai eficientă punere în aplicare a obiectivelor cuprinse în acest act normativ, prin campanii de informare – conştientizare a populației despre riscurile implicării în activitatea infracțională dar şi despre alternativele potențialilor autori de fapte penale, poate duce la limitarea fenomenului criminalității organizate cu implicarea femeilor.

Campaniile susținute de structuri şi instituții publice se bucură de o mai mare credibilitate în rândul cetățenilor, mai ales în condițiile în care aceste campanii sunt popularizate prin cât mai multe canale de informare, adaptate la grupurile țintă (site-uri de socializare, posturi populare de radio/TV etc.).

4.2. Cooperarea instituțională în plan internațional

Pornind de la caracterul transnațional al infracțiunilor de trafic de persoane, prostituție şi terorism, cooperarea internațională între state este o condiție sine qua non în investigarea

[2] F. Paşca, op. cit., p. 207.

[3] http://www.dreptonline.ro/legislatie/hg_1040_2010_strategia_nationala_de_ordine_publica_2010_2013.php

şi judecarea unor asemenea categorii de fapte penale. Dreptul internaţional conţine o totalitate de norme, sub acest aspect, menite a facilita cooperarea statelor. Convenţia ONU împotriva criminalităţii transnaţionale organizate conţine norme cu referire la extrădare, transferul persoanelor condamnate, anchete comune, tehnici şi anchete speciale, transferul procedurilor penale ş.a. Protocolul privind prevenirea, reprimarea şi pedepsirea traficului de persoane din 15.11.2000, de asemenea, recomandă statelor să faciliteze cooperarea între diferite servicii în scopul schimbului de informaţii, să aplice anumite măsuri de frontieră. Convenţia Consiliului Europei privind lupta împotriva traficului de fiinţe umane cheamă părţile să coopereze între ele, în conformitate cu prevederile prezentei Convenţii şi prin aplicarea instrumentelor regionale şi internaţionale relevante, aranjamentelor agreate în baza legilor interne uniforme sau reciproce şi a dreptului lor intern, în cea mai largă măsură posibilă, în scopul: prevenirii şi combaterii traficului de fiinţe umane.

La nivel european au fost adoptate mai multe acte în materie de cooperare internaţională, respectiv Convenţia europeană de extrădare din 1957, cu două protocoale adiţionale – din 1975 şi 1978; Convenţia europeană de asistenţă juridică în materie penală din 1959, cu două protocoale adiţionale – din 1978 şi 2001; Convenţia europeană asupra transferării persoanelor condamnate, din 1983[4].

Faţă de prevederile acestor documente, considerăm că această cooperare internaţională trebuie să se realizeze pe mai multe planuri, ţinându-se seama şi de specificul fiecărei infracţiuni.

Astfel, ne raliem opiniei din doctrină conform căreia, combaterea criminalităţii organizate trebuie să se realizeze pe trei nivele: nivelul politic şi diplomatic (negocieri, schimburi de relaţii diplomatice); nivelul abordării strategice (care cuprinde analiza pericolului, culegerea de informaţii, studierea părţilor vulnerabile) şi nivelul reacţiilor tactice (acţiuni de răspuns)[5].

5. Crearea unor programe complexe de consiliere şi asistenţă a victimelor dar şi a femeilor care au avut calitatea de autor al unei infracţiunii, în vederea reintegrării acestora în societate

Referitor la aceste măsuri de prevenire şi combatere a fenomenului criminalităţii feminine, considerăm că trebuie create două tipuri de campanii – programe distincte, de informare – prevenire a săvârşirii de infracţiuni sau implicării ca victimă în activităţi de criminalitate organizată şi respectiv de combatere – reinserţie socială a femeilor care au avut calitatea de autor al unei infracţiuni de genul celor în discuţie.

În acest sens, observăm existenţa, în prezent, a mai multor organizaţii, publice sau private, care realizează campanii de prevenire a traficului de persoane şi a exploatării sexuale. Dintre acestea enumerăm Campaniile promovate de Agenţia Naţională împotriva Traficului de Persoane (ANITP) „Mie... Nu mi se poate întâmpla", „Prietenul tău poate fi un Loverboy!" şi „Deschide ochii!"[6].

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[4] M. Vidaicu, I. Dolea, Combaterea traficului de fiinţe umane, Drept penal şi drept procesual. Suport de curs, Ed. Nova Prim, Chişinău, 2009, p. 166.

[5] Fl. Sandu, Gh.I. Ioniţă, Criminologie teoretică şi aplicată, ediţia a III-a, Ed. Universul Juridic, Bucureşti, 2010, p. 194.

[6] http://anitp.mai.gov.ro/ro/

Aceste campanii îşi propun să explice noțiunile de trafic de persoane şi exploatare sexuală, precum şi mecanismele de funcționare a acestora, prezentând date statistice cu victimele acestor tipuri de infracțiuni, precum şi mărturii ale acestora.

Informările se realizează atât în centre specializate, cât şi în instituțiile de învățământ din toată țara, cu precădere în licee.

Opinăm că asemenea campanii ar trebui popularizate şi în rândul elevilor şi mai ales elevelor din ciclurile inferioare de învățământ, dată fiind constatarea scăderii vârstei de la care unele tinere încep să se prostitueze sau să fie implicate în traficul de persoane.

De menționat că una dintre campanii, respectiv „Prietenul tău poate fi un Loverboy!" a pornit de la filmul „Loverboy", regizat de Cătălin Mitulescu, care este inspirat din mai multe poveşti reale ale victimelor traficului de persoane. Apreciem inițiativa realizării unui film românesc, recunoscut la nivel internațional, care atinge această problematică în contextul diversificării informațiilor adresate tinerilor.

De asemenea, site-ul Poliției Române prezintă, pe larg, riscurile şi consecințele traficului de persoane asupra victimelor, precum şi mărturii ale tinerelor victime ale acestui tip de infracțiune[7].

Totuşi, spre deosebire de campaniile de prevenire, despre care am arătat că există, dar despre care opinăm că au nevoie de o mai mare popularizare, programele de consiliere a victimelor şi ale femeilor care au avut calitatea de autor al unei infracțiunii, în vederea reintegrării acestora în societate au rămas, din nefericire, la stadiul de încercări timide ale unor organizații non – guvernamentale.

Chiar dacă Autoritatea Națională a Penitenciarelor a dezvoltat, de-a lungul timpului, programe de recalificare profesională – reinserție socială, printre care menționăm şi Proiectul POSDRU 15/6.2/s/1/ – Creşterea şanselor de incluziune socială a persoanelor aflate în detenției prin o mai bună educație, informarea societății şi îmbunătățirea activităților în penitenciar, considerăm că un program de consiliere eficient trebuie să îndeplinească, înainte de toate, criteriul personalizării.

De asemenea, opinăm că succesul unui asemenea program rezidă din accentuarea laturii de consiliere a femeilor de către persoane cu pregătire specializată şi experiență relevantă în soluționarea problemelor psihice – emoționale pe care traiul într-o organizație criminală care se ocupă cu traficul de persoane, traficul de droguri sau activități de terorism le poate produce pentru o femeie.

Nu în ultimul rând, opinăm că este imperios necesară existența unei continuări a programului de consiliere şi după eliberarea din penitenciar a persoanei în cauză, pentru a împiedica recidiva.

6. Concluzii

Măsurile de prevenire şi combatere a fenomenului criminalității feminine trebuie să aibă în conținut particularizări bazate pe caracteristicile deosebite ale acestui tip de criminalitate. Similar criminalității juvenile, fenomenul criminalității feminine trebuie tratat în mod distinct de către autoritățile locale şi centrale, interne şi internaționale, între care este necesar a exista o cooperare eficientă, axată pe o conclucrare permanentă dar şi pe o

[7] A se vedea http://ms.politiaromana.ro/prevenire/trafic_persoane/trafic_persoane.html

informare reciprocă în referire la noile metode utilizate de reprezentanți rețelelor de crimă organizată în vederea utilizării femeilor ca parte componentă a acestora sau în vederea racolării femeilor ca viitoare victime ale acestor rețele.

Cu privire la ideea de femeie – subiect activ al unei infracțiuni, de *lege ferenda*, considerăm că obligarea unei condamnate (ca şi a unui condamnat) la participarea la un program de consiliere psihologică ar trebui implementată într-o prevedere legislativă, eventual în Codul penal, ca pedeapsă complementară, în vederea eficientizării aplicării acestei măsuri.

De asemenea, este necesară susținerea de către autoritățile publice a demersurilor realizate de asociațiile non – profit care au, ca parte a activității lor, programe de consiliere psihică şi/sau socială, materială a femeilor ce au calitatea de victime ale unor fapte penale.

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ASPECTE ACTUALE PRIVIND PROCEDURA CONTESTAȚIEI LA EXECUTARE ÎN CAZUL BILETELOR LA ORDIN ŞI A ALTOR TITLURI DE CREDIT

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Abstract
The present article presents and analyses the legal challenges regarding a promissory note, from issuing it to putting it into force. In the light of the implementation of the new Civil procedural code in Romania, a lot of the procedural steps have changed and are currently being subject of controversy.

Keywords: promissory note, Civile procedural code, procedural steps

I. INTRODUCERE

Legea nr. 58/1934 reglementează cambia şi biletul la ordin. Potrivit acestei legi, cambia este un Titlu comercial de valoare emis de un creditor, numit trăgător, prin care dispune ca un debitor, denumit tras, să plătească la scadență o sumă de bani către o altă persoană, denumit beneficiar sau la ordinul acesteia[1]. Cambia trebuie obligatoriu să aibă forma scrisă având valoarea unui înscris sub semnătură privată.

Biletul la ordin este un efect comercial, înscris prin care o persoană, numită emitent ori subscriitor, se obligă să plătească o sumă de bani la scadență unei alte persoane numită beneficiar, sau la ordinul acesteia. Fiind un titlu comercial de valoare, biletul la ordin este un titlu de credit, la ordin, formal şi complet, care incorporează o obligație abstractă, autonomă şi necondiționată, de plată a unei sume de bani de către semnatarii săi, ținuți solidar pentru executarea obligației.

Potrivit art. 106 din Legea nr. 58/1934, dispozițiile referitoare la cambie se aplică si biletului la ordin în măsura în care nu sunt incompatibile cu natura acestui titlu, astfel că vom analiza caracteristicile contestației la executare atât pentru cambii, cât şi pentru biletul la ordin, toate considerațiile ce urmează a fi făcute cu referire la cambie fiind aplicabile şi biletului la ordin.

În această materie, legea prevede o cale de atac specifică ce se poate exercita împotriva executării sau chiar a titlului executoriu. Astfel, în temeiul art. 62 din legea nr. 58/1934 astfel cum aceasta a fost modificată prin Legea nr. 76/2012[2], se prevede că în termen de 5 zile de la comunicarea somațiunii, debitorul poate face contestație la executare. Contestația se va introduce la instanța de executare, care o va judeca potrivit Codului de procedură civilă, de urgență, şi cu precădere, înaintea oricărei alte pricini. Hotărârea pronunțată asupra contestației va putea fi atacată numai cu apel în termen de 15 zile de la pronunțare. Instanța

[1] O. Sachelarie, Titlul de credit în comerțul internațional, Ed. Scrisul Românesc, Craiova 1975, p. 39; St. Cărpenaru, Drept Comercial Român, ed. a III-a, Ed. All Beck, p. 474.

[2] Legea de punere în aplicare a Noului Cod de Procedură Civilă publicată în Monitorul Oficial, Partea I nr. 365 din 30 mai 2012.

va putea suspenda executarea numai în cazul în care contestatorul nu recunoaşte semnătura, înscriindu-se în fals, sau nu recunoaşte procura. În caz de suspendare a executării, creditorul va putea obține măsuri de asigurare.

Potrivit normei generale ce reglementează instituția Contestației la Executare, adică Noul Cod de Procedură Civilă, în art. 711 se prevede că împotriva executării silite, a încheierilor date de executorul judecătoresc, precum şi împotriva oricărui act de executare se poate face contestație de către cei interesați sau vătămați prin executare. De asemenea, se poate face contestație la executare şi în cazul în care executorul judecătoresc refuză să efectueze o executare silită sau să îndeplinească un act de executare silită în condițiile legii. Dacă nu s-a utilizat procedura prevăzută la art. 443, se poate face contestație şi în cazul în care sunt necesare lămuriri cu privire la înțelesul, întinderea sau aplicarea titlului executoriu. De asemenea, după începerea executării silite, cei interesați sau vătămați pot cere, pe calea contestației la executare, şi anularea încheierii prin care s-a admis cererea de încuviințare a executării silite, dacă a fost dată fără îndeplinirea condițiilor legale.

Potrivit art. 712 din NCPC, dacă executarea silită se face în temeiul unei hotărâri judecătoreşti sau arbitrale, debitorul nu va putea invoca pe cale de contestație motive de fapt sau de drept pe care le-ar fi putut opune în cursul judecății în prima instanță sau într-o cale de atac ce i-a fost deschisă. În cazul în care executarea silită se face în temeiul unui alt titlu executoriu decât o hotărâre judecătorească, se pot invoca în contestația la executare şi motive de fapt sau de drept privitoare la fondul dreptului cuprins în titlul executoriu, numai dacă legea nu prevede în legătură cu acel titlu executoriu o cale procesuală specifică pentru desființarea lui. Nu se poate face o nouă contestație de către aceeaşi parte pentru motive care au existat la data primei contestații. Cu toate acestea, contestatorul îşi poate modifica cererea inițială adăugând motive noi de contestație dacă, în privința acestora din urmă, este respectat termenul de exercitare a contestației la executare. Creditorii neurmăritori au dreptul de a interveni în executarea efectuată de alți creditori, pentru a lua parte la executare sau la distribuirea sumelor obținute din urmărirea silită a bunurilor debitorului. În cazul procedurii urmăririi silite mobiliare sau imobiliare ori a predării silite a bunului imobil sau mobil, contestația la executare poate fi introdusă şi de o terță persoană, însă numai dacă aceasta pretinde un drept de proprietate ori un alt drept real cu privire la bunul respectiv.

Art. 713 precizează locul unde se introduce contestația, adică la instanța de executare. În cazul urmăririi silite prin poprire, dacă domiciliul sau sediul debitorului se află în circumscripția altei curți de apel decât cea în care se află instanța de executare, contestația se poate introduce şi la judecătoria în a cărei circumscripție îşi are domiciliul sau sediul debitorul. În cazul urmăririi silite a imobilelor, al urmăririi silite a fructelor şi a veniturilor generale ale imobilelor, precum şi în cazul predării silite a bunurilor imobile, dacă imobilul se află în circumscripția altei curți de apel decât cea în care se afla instanța de executare, contestația se poate introduce şi la judecătoria de la locul situării imobilului. Contestația privind lămurirea înțelesului, întinderii sau aplicării titlului executoriu se introduce la instanța care a pronunțat hotărârea ce se execută. Dacă o asemenea contestație vizează un titlu executoriu ce nu emană de la un organ de jurisdicție, competența de soluționare aparține instanței de executare.

Potrivit art. 714 din NCPC dacă prin lege nu se prevede altfel, contestația privitoare la executarea silită propriu-zisă se poate face în termen de 15 zile de la data când:

1. contestatorul a luat cunoştinţă de actul de executare pe care îl contestă;

2. cel interesat a primit comunicarea ori, după caz, înştiinţarea privind înfiinţarea popririi. Dacă poprirea este înfiinţată asupra unor venituri periodice, termenul de contestaţie pentru debitor începe cel mai târziu la data efectuării primei reţineri din aceste venituri de către terţul poprit;

3. debitorul care contestă executarea însăşi a primit încheierea de încuviinţare a executării sau somaţia ori de la data când a luat cunoştinţă de primul act de executare, în cazurile în care nu a primit încheierea de încuviinţare a executării şi nici somaţia sau executarea se face fără somaţie.

Trebuie menţionat faptul că anterior apariţiei Legii nr. 76/2012 pentru punerea în aplicare a Legii nr. 134/2010 privind Codul de procedură civilă, art. 62 din Legea 58/1934 prevedea calea Opoziţiei la executare a biletelor la ordin şi a cambiilor, denumirea schimbându-se odată cu intrarea Noului Cod de Procedură Civilă în vigoare.

În doctrina anterioară intrării în vigoare a Noului Cod de Procedură civilă s-a pus în discuţie compatibilitatea Contestaţiei la executare a biletelor la ordin şi a cambiilor cu Opoziţia la executare. S-a stabilit că potrivit art. 63 din Legea nr. 58/1934, în procesele cambiale pornite fie pe cale de acţiune, fie pe cale de opoziţie la somaţia la executare, debitorul nu va putea opune posesorului decât excepţiile de nulitate a titlului potrivit dispoziţiilor art. 2, precum si cele care nu sunt oprite de art. 19. Numai în cadrul contestaţiei la executare pot să fie formulate critici împotriva modului în care se realizează executarea silită[3].

În aceste condiţii putem afirma că în materia Contestaţiei la executarea biletelor la ordin şi a cambiilor sunt incidente prevederile Noului Cod de Procedură Civilă doar în ceea ce priveşte executarea silită însăşi, iar în ceea ce priveşte contestarea titlurilor executorii sunt incidente dispoziţiile Legii nr. 58/1934.

Astfel în ceea ce priveşte termenul de introducere al contestaţiei la executare, atunci când aceasta priveşte executarea însăşi, acesta este de 15 zile de la data când:

1. contestatorul a luat cunoştinţă de actul de executare pe care îl contestă;

2. cel interesat a primit comunicarea ori, după caz, înştiinţarea privind înfiinţarea popririi. Dacă poprirea este înfiinţată asupra unor venituri periodice, termenul de contestaţie pentru debitor începe cel mai târziu la data efectuării primei reţineri din aceste venituri de către terţul poprit;

3. debitorul care contestă executarea însăşi a primit încheierea de încuviinţare a executării sau somaţia ori de la data când a luat cunoştinţă de primul act de executare, în cazurile în care nu a primit încheierea de încuviinţare a executării şi nici somaţia sau executarea se face fără somaţie. Termenul este de 5 zile doar când se contestă titlul executoriu, nu şi executarea. Apare deci, că avem o normă specială care se aplica cu precădere de la aplicarea normei generale.

În ceea ce priveşte căile de atac ce se pot exercita asupra unei hotărâri pronunţate într-o contestaţie la executare, în ceea ce priveşte contestaţia la însăşi executarea silită se prevede un termen de 30 de zile, termen ce curge de la data comunicării hotărârii. Contestaţia la titlu, în temeiul Legii 58/1934 prevede un alt termen, cel de 15 zile de la pronunţare.

În ceea ce priveşte suspendarea executării silite, trebuie făcute următoarele precizări. Potrivit art. 62 din Legea 58/1934, Instanţa va putea suspenda executarea numai în cazul în

[3] Curtea de Apel Bucureşti – Secţia a VI-a comercială, decizia nr. 433/R din 10.03.2011 irevocabilă – www. portal.just.ro

care contestatorul nu recunoaşte semnătura, înscriindu-se în fals, sau nu recunoaşte procura, stabilind doar aceste condiţii pentru suspendarea executării.

Prin cerere se pot ridica excepţii cambiale sau excepţii personale împotriva titlului executoriu sau împotriva executării silite în ansamblu[4]. Potrivit art. 63 alin. 3 şi 4 din Legea nr. 58/1934, excepţiunile cambiale trebuiesc ridicate la primul termen de înfăţişare. Neîndeplinirea condiţiei atrage decăderea prevăzută de textul mai sus menţionat. Fără îndoială, excepţiile cambiale la care se referă textul de lege au un caracter relativ[5], cunoscut fiind faptul că excepţiile absolute, de ordine publică, pot fi invocate potrivit art. 108 alin. 1 C. pr. civ. în orice stare a pricinii[6].

Doctrina a clasificat excepţiile mai sus menţionate în două mari categorii: reale (obiective), deoarece pot fi opuse oricui şi personale (subiective) deoarece pot fi opuse numai unui creditor[7]. În continuare, fiecare categorie se subdivide, la rândul ei, în excepţii absolute şi excepţii relative[8]. Excepţiile pot fi promovate, deopotrivă, atât în cazul biletului la ordin, cât şi în cazul cambiei[9].

În cadrul unei opoziţii la executarea unui bilet la ordin s-au invocat printre altele: lipsa originalului biletului la ordin, lipsa prezentării la plată şi neîntocmirea protestului. Instanţele de fond au respins opoziţia ca neîntemeiată şi, de asemenea, apelul, iar instanţa de recurs a menţinut decizia recurată, apreciind că, în mod temeinic şi legal, au fost înlăturate apărările debitoarei oponente-apelante privind lipsa originalului biletului la ordin şi neîndeplinirea cerinţelor prevăzute de dispoziţiile art. 67 şi urm. din Legea nr. 58/1934, respectiv prezentarea la plată a biletului la ordin şi dresarea protestului, având în vedere că din cuprinsul art. 61 alin. 5 din menţionatul act normativ nu rezultă obligativitatea depunerii originalului biletului la ordin, ci doar faptul că somaţia la executare trebuie să cuprindă transcrierea exactă a biletului la ordin, iar în conformitate cu art. 58 şi art. 107 din Lege, emitentul biletului la ordin, având calitatea de debitor principal, nu de regres, nu poate opune nici lipsa prezentării la plată nici neîntocmirea protestului de neplată, cu atât mai mult cu cât, în speţă, biletul la ordin în litigiu a fost emis în condiţiile prevăzute de art. 51 din Legea nr. 58/1934, cu scutirea obligaţiei de protest, situaţie în care dresarea protestului nu era obligatorie[10].

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[4] Art. 63 din Legea nr. 58/1934: „În procesele cambiale pornite, fie pe cale de acţiune, fie pe cale de opoziţie la somaţia de executare, debitorul nu va putea opune posesorului decât excepţiunile de nulitatea titlului, potrivit dispoziţiunilor art. 2, precum şi cele care nu sunt oprite de art. 19.

[5] Art. 63 din Legea nr. 58/1934: „În procesele cambiale pornite, fie pe cale de acţiune, fie pe cale de opoziţie la somaţia de executare, debitorul nu va putea opune posesorului decât excepţiunile de nulitatea titlului, potrivit dispoziţiunilor art. 2, precum şi cele care nu sunt oprite de art. 19.

[6] Pentru o abordare amplă a excepţiilor procesuale: definiţie, natură juridică, clasificare, procedura de soluţionare, judecata excepţiilor procesuale etc., v. M. Tăbârcă, Drept procesual civil, vol. I, Ed. Universul Juridic, Bucureşti, 2005, pp. 487-511.

[7] V. Luha, Titluri de credit. Cambia, op. cit., p. 233; V. Luha, Drept comercial, Ed. ALTIP, Alba Iulia, 2003, p. 517; L. Cetean Voiculescu, Procedura de soluţionare a litigiilor comerciale, Ed. C. H. Beck, Bucureşti, 2007, p. 165; St. D. Cărpenaru, op. cit., p. 514**.**

[8] E. Cristoforeanu, Tratat de drept cambial, vol. II, Ed. Curierul Judiciar, Bucureşti, 1936, pp. 86-91; D. Gălăşescu-Pyk, op. cit., vol. II, p. 756

[9] Potrivit art. 106 din Legea nr. 58/1934, „Sunt aplicabile biletului la ordin, în măsura în care nu sunt incompatibile cu natura acestui titlu, dispoziţiunile relative la cambie, privind (…)".

[10] A se vedea C. Ap. Bucureşti, s. com., dec. nr. 192 din 1 martie 2000, în Culegere de practică judiciară în materie comercială pe anii 2000-2001.

Excepțiile reale (obiective) absolute pot fi invocate de orice debitor împotriva oricărui creditor şi privesc: nevalabilitatea formală a biletului la ordin (ca urmare a nerespectării prevederilor art. 104-105 din Legea nr. 58/1934 privitoare la biletul la ordin), prescripția dreptului la acțiune[11]; stingerea obligației prin plata efectuată de tras etc.

Privitor la sancțiunea aplicabilă în cazul lipsei uneia din condițiile esențiale pe care trebuie să le îndeplinească biletul la ordin potrivit art. 104-105 din Legea nr. 58/1934, Curtea de Apel Bucureşti a arătat următoarele: „Nulitatea absolută a biletului la ordin intervine când acesta nu cuprinde numele aceluia căruia sau la ordinul căruia plata trebuie făcută, respectiv a beneficiarului arătat de către emitent care va avea dreptul să pretindă suma de bani înscrisă în biletului la ordin, nu şi în situația în care denumirea emitentului ar fi corectă sau completă”[12].

Curtea de Casație Franceză a dispus că lipsa datei atrage nulitatea biletului la ordin (cu titlu de credit). El poate avea valoarea unei promisiuni de plată însoțită de clauza la ordin[13]. Excepțiile reale (obiective) relative pot fi invocate de către anumiți debitori oricăruia dintre posesorii biletului la ordin în condițiile în care titlul este valabil din punct de vedere formal. Intră în această categorie: nevalabilitatea obligației constatate prin biletului la ordin datorită incapacității debitorului; falsificarea semnăturilor existente pe cambie sau pe biletul la ordin, neîndeplinirea condițiilor pentru exercitarea acțiunilor cambiale; lipsa de reprezentare etc.

II. EXCEPȚILE PERSONALE (SUBIECTIVE)

Sunt opozabile numai aceluia care exercită acțiunea cambială şi privesc, în principal, persoana posesorului cambiei ori raportul fundamental.

Circulația cambiei (şi a biletului la ordin – n.n.) se bazează pe caracterul abstract autonom al dreptului dobândit de posesor. Dacă excepțiile unui subiect ar fi opozabile oricui, încrederea în titlu ar fi distrusă, iar circulația ar fi îngreunată[14]. Excepțiile personale (subiective) absolute sunt excepțiile pe care orice debitor cambial le poate opune anumitor posesori ai cambiei, cum ar fi: lipsa de legitimare a posesorului biletului la ordin, completarea abuzivă a biletului la ordin în alb; incapacitatea posesorului cambiei de a primi plata sau falimentul acestuia etc.

Excepția biletului la ordin în alb abuziv completat este o excepție personală care derivă din nerespectarea convenției dintre emitentul biletului la ordin şi beneficiar. Ea nu poate fi

[11] Art. 94 din Legea nr. 58/1934 (dispoziție aplicabilă şi în cazul biletului la ordin potrivit art. 106 din Lege), dispune: „Orice acțiuni rezultând din cambii împotriva acceptantului se prescriu prin trei ani, socotiți de la data scadenței. Acțiunile posesorului împotriva giranților şi împotriva trăgătorului se prescriu printr-un an socotit de la data protestului făcut în timp util sau de la data scadenței în caz de stipulațiune, fără cheltuieli. Acțiunile giranților, unii împotriva altora şi împotriva trăgătorului, se prescriu prin 6 luni socotite din ziua din care girantul a plătit cambia sau din ziua în care acțiunea de regres a fost pornită împotriva sa. Acțiunea de îmbogățire fără cauză se prescrie printr-un an din ziua în care hotărârea pronunțată asupra acțiunii cambiale va fi rămas definitivă.” A se vedea St. D. Cărpenaru, op. cit., p. 515; Pentru o abordare pe care noi o considerăm exhaustivă în materia prescripției extinctive, v. M. Nicolae, Prescripția extinctivă, Ed. Rosetti, Bucureşti, 2004; cu privire la termenele de prescripție în dreptul cambial, pp. 221-223

[12] C. Ap. Bucureşti, s. a VI-a com., dec. nr. 212/R din 13 februarie 2007. A se vedea G. Valeriu, Cecul şi biletul la ordin. Jurisprudență, Ed. Moroşan, Bucureşti, 2009, p. 75.

[13] Cass. fr., dec. din 7 noiembrie 1979. A se vedea V. Pătulea, C. Turianu, Drept comercial. Practică judiciară adnotată, Ed. All Beck, București, 1999, p. 56.

[14] A se vedea: V. Luha, op. cit., p. 517; L. Cetean Voiculescu, op. cit., p. 166.

opusă decât beneficiarului şi nu poate fi dovedită cu probe testimoniale. Singurele probe admisibile, față de celeritatea procesului cambial, constau în probe scrise. Dacă prin excepție se invocă vicierea consimțământului emitentului prin eroare, dovada se va face „prin probe scrise, iar nu cu martori".

Excepțiile personale (subiective) relative sunt acele excepții care privesc un anumit raport cambial în cadrul căruia pot fi opuse doar de către debitor creditorului. După cum s-a arătat în literatura juridică, intră în această categorie: excepțiile referitoare la viciile de consimțământ, excepțiile referitoare la raportul juridic fundamental, excepții întemeiate pe raporturi juridice ulterioare creării cambiei.

Prin raport juridic fundamental[15] se înțelege acel raport juridic care preexistă biletului la ordin sau cambiei şi care justifică emiterea acestor titluri de credit. Odată emis, însă, acesta (biletul la ordin) urmează a fi perceput el însuşi ca titlu de sine stătător, care face obiectul reglementării speciale – Legea nr. 58/1934 –, diferite de reglementările care guvernează raporturile juridice fundamentale.

Emiterea biletului la ordin nu presupune încetarea raporturilor juridice fundamentale. Acestea îşi produc în continuare efectele, excepție situația în care părțile au convenit o novație cu privire la acel raport, rezultată din raportul cambial. Dacă nu a operat novație prin schimbarea debitorului, raportul fundamental supraviețuieşte transmiterii biletului la ordin şi acest raport devine operațional atunci când nu se poate executa biletul la ordin.

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[15] A se vedea, privitor la relația dintre acțiunea cambială şi raportul juridic fundamental: I. N. Fințescu, Curs de drept comercial, vol. II, Bucureşti, 1929, pp. 31-41; St. D. Cărpenaru, op. cit., p. 475.

COPYRIGHT AND THE RIGHT TO FREEDOM OF EXPRESSION IN THE KNOWLEDGE SOCIETY

TEODOR CHIRVASE

Abstract

From the emergence of the first copyright legislations, European copyright has undergone tremendous changes.

Whereas the first modern copyright systems conceived a wise balance between property and freedom, the wave of technological advances that took place in the late 20th and early 21st century determined a constant increase in the level of protection awarded to intellectual property under copyright regulations, often at the expense of the right to freedom of expression and information.

Case-law from various national courts across Europe, and, since the beginning of 2013, that of the European Court of Human Rights, reflects a growing tendency towards recognizing external limitations to copyright protection, as an effort to preserve the balance that was lost at the normative level.

The aim of this article is to uncover the main areas in which the conflict between the copyright and the freedom of expression arises under the current European copyright legislation.

Based on our findings, we shall argue that a reconciliation between the two rights at the regulatory level would not only help the copyright system overcome the crisis of legitimacy it is currently facing but that it might also have a positive impact on the overall wellbeing of the European community in the age of knowledge.

Keywords: European Convention on Human Rights, Berne Convention of Literary and Artistic Works, Information Society Directive 2001/29/EC, exceptions and limitations, three-step test, technical protection measures, public domain

Introduction

1. In the age of knowledge, where information is mainly exchanged by means of technology, copyright law is rapidly becoming one of the main driving forces to shape our society. Considering the dynamics and unpredictability of technological innovation, the need for a more flexible copyright system, one that balances the interests of both copyright holders and the general public, is self-evident.

In order to prove that adding more flexibility to the current framework would be perfectly in line with the underlying rationales of the copyright system, we need to point out that the first modern copyright law, the Statute of Anne of 1710, arose in a context of general discontent towards the established copyright monopoly, which at the time provided the infrastructure for controlling the publication of heretical and seditious materials. Conceived under the values of Enlightenment, modern copyright had the aim of reforming the existing dogma and of steering its purposes away from censorship and towards the

principles of freedom of expression[1]. Following the French Revolution of 1789, the first continental laws on copyright were adopted in 1791 and 1793[2].

Common to both systems was the fact that they conceived a wise balance between property and freedom; the former, in the individualist approach of the age, was considered the means of ensuring the latter, with the overall aim of ensuring the common good – a dose of property to enable the author to live from his works and a dose of freedom to allow creators to build on what already existed in order to create something new.

Concepts

2. Although the need for a modern copyright system arose in both countries out of similar considerations, the concept has evolved differently under the two different legal philosophies. Although Intellectual Property justifications are outside the scope of this paper[3], in the absence of an exact definition of copyright, a brief overview is required.

Jeremy Bentham identified the will of the legislator as the source of authority of the law[4]. As a consequence of this characteristic, laws in the common law system find their justification in their utility and copyright law makes no exception. In the utilitarian doctrine, the purpose of copyright law is to provide incentives for creators, whom in turn bring their contribution to social development.

Unlike the common law system, French copyright law is based on the natural law doctrine. In the naturalist view, authors' rights are not created by law, but always existed in the legal consciousness of man. Basically, the droit d'auteur doctrine sees copyright as an essentially unrestricted natural right reflecting the bond between the author and his personal creation[5].

Even though utilitarian justifications are frequently deployed in today's European copyright[6], it should be noted that continental European copyright has developed mainly on personality-based justifications, as French copyright laws were the source of inspiration for all other civil law jurisdictions as well as for the Berne Convention of Literary and Artistic Works of 1886[7].

The Berne Convention doesn't explicitly define copyright. In exchange, the concept of copyright is defined in terms of the exclusive rights granted to the authors of qualifying works. Through its Art. 8, 9 and 12, the Convention confers authors an exclusive right to authorize the reproduction of their work in any manner and form, and to authorize the

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[1] Samuelson, Pamela. 2002-2003. "Copyright and Freedom of Expression in Historical Perspective." J. Intell. Prop. 10.: 324.

[2] Loi Le Chapelier, 13-19 January 1791 and Loi Lekanal, 19-24 July 1793; see also Ginsburg, Jane C. 1988. "French Copyright Law: A Comparative Overview." Journal, Copyright Society of the U.S.A. 36.: 270.

[3] For a comprehensive analysis See e.g.: Hettinger, Edwin C. "Justifying Intellectual Property." Philosophy & Public Affairs. 18.1 (1989): 31-52. Print.

[4] See: Golding, Martin P., and William A. Edmundson (eds.), 2008. The Blackwell guide to the philosophy of law and legal theory. Vol. 18. Oxford: Wiley-Blackwell.

[5] Hugenholtz, P. Bernt. 2000."Copyright and Freedom of Expression in Europe." In R. C. Dreyfuss, H. First & D. L. Zimmerman (eds.), Innovation Policy in and Information Age. Oxford: Oxford University Press, p. 2.

[6] See e.g.: Recital 2 of the Directive 2009/24/EC of the European Parliament and of the Council on the legal protection of computer programs.

[7] Ginsburg, Jane C. 1988. "French Copyright Law: A Comparative Overview." Journal, Copyright Society of the U.S.A. 36.: 270.

translation of their works throughout the term of protection of their rights in the original works.

Independent from the "economic" rights, the Convention provides certain "moral rights" for the author to enjoy, namely the right to claim authorship of the works and to object to any distortion, mutilation, modification or other derogatory action in relation to their works which would bring prejudice to the author's honour or reputation[8]. Furthermore, the Convention provides that moral rights can be enforced after the death of the author by those responsible for the enforcement of copyright protection[9], which means that the safeguarding of such rights is left to the legislation of the contracting states.

The Convention also provides that, in respect of original works of art and manuscripts of writers and composers, the creator shall enjoy the inalienable right to an "interest" (pecuniary and not moral) in any resale of the work subsequent to the first transfer by the creator[10].

In view of the balance between copyright and freedom of expression, the most important provision of the Convention is that enshrined in Art. 9 (2). According to it, contracting states may permit certain exceptions to the exclusive right of reproduction conferred on the author, but they may only do so subject to what has become known as the "three-step" test. Under the test, exceptions to liability for copyright infringement are permissible as long as they are confined to certain special cases; they do not conflict with a normal exploitation of the work; and they do not unreasonably prejudice the legitimate interest of the author.

These provisions of the Berne Convention are what lay at the core of the rights of reproduction, making available to the public and distribution granted under copyright protection today, as well as to their exceptions.

3. Following the Declaration of the rights of Man and of the Citizen, a right to enjoy freedom of expression and information has been embodied in various international treaties and instruments. From an European perspective, Art. 10 of the European Convention on Human Rights (ECHR)[11] is, by far, the most relevant.

Freedom of expression and information protected under Art. 10 ECHR consists of the right to foster opinions, as well as to impart, distribute and receive information without government interference in all Member States that belong to the Council of Europe.

We must note that after the recognition of the binding character of the ECHR was embodied in Art. 6 of the Treaty on the European Union[12] and was reiterated in the Treaty of Lisbon[13], the provisions of the ECHR or of the Charter may be invoked directly before

[8] Art. 6bis(1) Berne Convention.

[9] Art. 6bis(2) Berne Convention.

[10] Tritton, Guy, et al. 2008. Intellectual Property in Europe. 3rd ed. London: Sweet & Maxwell.

[11] As well as Art. 11 of the Charter of Fundamental Rights of the European Union of 7 December 200.

[12] "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community law".

[13] Art. 6 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007: "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

courts of the Member States, subject to review by the European Court of Human Rights (ECtHR).

Art. 10 ECHR is intended to be interpreted broadly. It is phrased in media-neutral terms, applying to old and new media alike. The term "information" includes, at the very least, the communication of facts, news, knowledge and scientific information[14]. Whether or not, and to what extent, the protection conferred by Art. 10 extends to commercial speech, has, in fact, been the subject of a number of decisions of the ECtHR[15].

The second paragraph of Art. 10 ECHR provides that the exercise of the freedom of expression and information may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the rights of others. Some legal authors have interpreted the idiom "rights of others" as referring only to the fundamental rights recognized by the Convention itself. The argument for this interpretation is that, if human rights and freedoms could be overridden by any random subjective right, the meaning of the convention would be diluted. However, doctrine and case law have never accepted this view. Instead, the "rights of others" have been held to include a wide range of subjective rights and interests, certainly including the rights protected under copyright.

As it follows, rather then an absolute prohibition to regulate speech, the right to freedom of expression and information as enshrined in Art. 10 ECHR of Art. 11 of the Charter constitutes a presumption against state interference.

The justifications of the right to freedom of speech are threefold. First, there is the epistemic value of expression. As John Stuart Mill put it, free speech allows for a free market of ideas most conducive to truth. Secondly, free speech allows the expansion of diverse political opinions and the good functioning of democracy. The third argument is rooted in its intrinsic value as a fundamental human right. Freedom of expression is valued because it shows respect for the reasoning powers of each individual[16].

The relationship between copyright and the right to freedom of expression

4. Having determined the concepts, a quick inquiry into the nature of the relationship between copyright and freedom of expression is needed.

It is beyond doubt the copyright system of the pre-modern era played an important role in the dissemination of works. However, it was by no means an instrument for promoting free speech, but rather the opposite.

Modern copyright[17], on the other hand, came out as the result of reconciliation between diverging interests. Access to information and copyright fully converged regarding both the rationale and the principles involved.

The principle of striking a balance between the different interests involved is reflected in the very essence of copyright. In principle, copyright does not prevent access to

[14] Hugenholtz, P. Bernt. "Copyright and Freedom of Expression in Europe." In R. C. Dreyfuss, H. First & D. L. Zimmerman (eds.), Innovation Policy in and Information Age. Oxford: Oxford University Press, 2000. 5. Print.

[15] See e.g. Case Mouvement Raelien Suisse v. Switzerland, EctHR, 13 July 2012; and Case of Hertel v. Switzerland, ECtHR, 25 August 1998.

[16] Couto, Alexandra. 2008. "Copyright and Freedom of Expression: a Philosophical Map". In A. Gosseries, A. Marciano & A. Strowel (eds.), Intellectual Property and Theories of Justice. Palgrave, pp. 163-164.

[17] The copyright system that followed the passing of the Statute of Anne in 1710.

information. The exclusive right is in fact subject to a number of limitations, the main or subsidiary aim of which is to ensure free access to information and subsequently, to secure the dissemination of intellectual works[18].

However, since the Berne Convention of 1886, a number of international agreements were concluded, and not less than twelve directives concerning copyright and related rights were adopted in Europe. Unfortunately, due to the size constraints of this paper, an overview of the entire evolution of European copyright is impossible. Nevertheless, it is enough to say that that while rights were extended, new rights were created, new actors were introduced and the range of works that qualify for protection grew, neither the European legislator, nor the international lawmakers seem to have spent as much effort as the drafters of the first copyright laws to preserve the balance between the diverging interests in the copyright system.

To substantiate the above, we will continue with a short discussion on the current state of the balance between copyright and the right to freedom of expression, mostly with the aid of the Information Society Directive, the first and only horizontal copyright directive that was adopted so far[19]. Three main aspects need to be stressed upon considering the aim of this paper, and those are the Information Society Directive's provisions regarding exceptions and limitations to copyright protection, technical protection measures and the three-step test.

Before this, however, a fundamental aspect needs to be addressed, namely the expansion of the term of protection.

Although the Statute of Anne of 1710 introduced a limited term of protection, it was not until 1774 that the idea of a perpetual copyright was rejected for the first time in history[20]. The moment represents the emergence of the public domain. Simply put, from this point on, booksellers were no longer in a position to control the development of culture. Accordingly, the public domain became an essential part of the copyright philosophy in what concerns the balance between protection and the values embodied in Art. 10 ECHR, as it contributes to a great extent to enabling access to information and thus insuring future creativity[21].

Considering that the French copyright laws which inspired the Berne Convention provided for a 5 year long term of protection post mortem auctoris while the latter provided for a 50 years term, to which the Term Directive of 1993 added another 20, a major balance shift becomes quickly noticeable, obviously to the detriment of the right to freedom of expression and information.

Proceeding to the issue of exceptions and limitations to copyright protection, we need to consider that the wave of technological developments that occurred in the early 21st century has prompted fundamental changes in the function and effectiveness of copyright law. Needless to say, the advent of the digital environment has brought additional stress in the relationship between the two rights.

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[18] See Geiger, Christophe. 2009-2010. "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law." Vanderbilt J. of Ent. and Tech. Law. 12.3: 524.

[19] Horizontal in that it brings its application to all substantive aspects of the copyright law of Member States.

[20] Donaldson v Beckett, 1774, 2 Brown's Parl. Cases 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257; 17 Cobbett's Parl. Hist. 953 [1813].

[21] Geiger, Christophe. 2009. "The Extension of the Term of Copyright and Certain Neighbouring Rights – A Never-Ending Story?." IIC – international review of intellectual property and competition law. 40.1: 82.

Art. 5 of the Information Society Directive introduced limitations and exceptions to the digital environment.

The Community harmonization effort in the field of limitations of exceptions has been widely perceived as a failure[22], with Art. 5 merely providing an exhaustive and optional list of exceptions, from which national legislators could pick the ones that suited, with the additional possibility to adopt a more restrictive wording. However, most critiques were concerned with the fact that the Directive failed to provide any legal tool to preserve the effective enforcement of copyright exceptions in the digital society[23].

In response, the Commission adopted in 2008 a Green Paper on Copyright in the Knowledge Economy, in order to "foster a debate on how knowledge for research, science and education can be best disseminated in the online environment"[24]. On this occasion, the Commission acknowledged that that it is exceptions and limitations that ensure the dissemination of knowledge within copyright law and which are the key to the balance to be sought by Community legislation[25].

However, at least three limitations that are vital to the accommodation of freedom of speech within the copyright framework were not addressed in the Green Paper, namely the exception for quotation, the private copy exception and the exception to the right over transformative uses. We are going to address the latter further in the paper.

Regarding the first, which is essential for democratic debate and free criticism, it was held that the optional character of the exception led to uneven implementation in Member States and, in effect, both its content and its scope vary widely from state to state[26]. Actually, the fact that national provisions seemed insufficient as a satisfactory guarantee of the freedom to create was one of the main reasons for national courts in Europe to resort to applying external limitations in copyright enforcement cases.

Concerning the limitation for private copying, it was argued that in spite of granting a powerful new right to the right-holders, the Information Society Directive does not clearly define the legal status of the private copying exception, nor does it refer to private copying for transformative uses. Moreover, as in the case of the exception for quotation, the Directive leaves the Member States complete discretion regarding the implementation of the exception[27]. This led to varied implementation among Member States and thus, to uncertainty regarding the actual application of the limitation.

As it was emphasized, economic arguments have been used both to justify and to limit private copying and associated levy schemes in Europe. The "market failure" inherent in the absence of practicable licensing and enforcement mechanisms vis-a-vis consumers of

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[22] The Commission itself agrees; See: "Creative content in a European digital single market: challenges for he future", a reflection document of DG INFSO and DG MARKT. 2009. p. 15.

[23] See e.g.: Mazziotti, Giuseppe. 2008. EU Digital Copyright Law and the End-User. 1st ed. Berlin: Springer.

[24] Green Paper of the Commission of the European Communities on "Copyright in the knowledge economy", Brussels, COM (2008) 466/3.

[25] Communication from the Commission, 19 October 2009, "Copyright in the knowledge economy" COM (2009) 532 final,. p. 10.

[26] Geiger, Christophe, Franck Macrez, Adrien Bouvel, Stephanie Carre, Theo Hassler, and Joanna Schmidt-Szalewski. 2009. "What Limitations to Copyright in the Information Society? A Comment on the European Commission's Green Paper" Copyright in the Knowledge Economy"." IIC – international review of intellectual property and competition law. 40.4: 412-433.

[27] Art. 5(2)b Information Society Directive.

copyright works has been a powerful argument in favor of statutory licenses permitting private copying. Nevertheless, the emergence of digital rights management technologies that allow copyright holders to engage in individual end-user licensing has cast into doubt the survival of private copying exemptions[28].

This leads us to the next point of discussion, namely the Directive's provisions regarding technical protection measures.

The advent of the networked environment has certainly raised new threats to copyright protection. However, it was soon that the potential of technology to provide new tools and means to protect copyrighted works in the digital environment was understood[29].

Consequently, the WCT introduced the obligation for the contracting parties to provide in their national legislations measures against the circumvention of effective technical measures, as well as to provide remedies against infringers[30]. The anti-circumvention provisions were introduced at the European level by means of Art. 6 and 7 of the Information Society Directive, which provides a wide definition of the technical measures to be protected.

Moreover, the definition of technical devices protected against circumvention refers not to the exclusive rights of the copyright owner, but to what the copyright owner is able to protect through technology. Consequently, limitations and exceptions do not even apply to this new scope of copyright protection. As it follows, the legitimacy, under copyright law, of making a private copy, a parody, or educational research, is merely relevant as soon as a technical protection measure is able to inhibit such a use or copy of the work. Simply put, copyright holders are granted some legitimacy in controlling, through technology, acts of use traditionally exempted by copyright law[31].

Moreover, it was argued that the transposition of these provisions in the Information Society Directive is in open violation of Art. 11 of the WIPO Copyright Treaty, as the former failed to immunize copyright exceptions from the operation of access and copy-control mechanisms[32].

Indeed, the Information Society Directive implies that the circumvention of a digital rights management device is unlawful, regardless of whether it is carried out for the purpose of infringing copyright[33]. As a result, the act of defeating a technical protection measure in order to engage in acts permitted by law would, in any case, attract liability.

As a matter of fact, despite the attempt of Art. 6 (4) to rectify the potential difficulty for exceptions to operate where the right-holder has in place a technical protection measure, the vast majority of defenses can be rendered ineffective by copy protection technology, since most of them are not mentioned in the text of paragr. (4)[34].

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[28] Helberger, Natali, and P. Bernt Hugenholtz. 2007. "No place like home for making a copy: private copying in European copyright law and consumer law." Berkeley Technology Law Journal 22.3.

[29] Dusollier, Severine. 2012. "DRM at the intersection of copyright law and technology: a case study for regulation" In E. Brousseau & M. Merzouki (eds.), Governance, Regulations and Powers on the Internet. Cambridge University Press, p. 298.

[30] Art. 11 and 12 WIPO Copyright Treaty.

[31] Id. 29, p. 299-309.

[32] Mazziotti, Giuseppe. 2008. EU Digital Copyright Law and the End-User. 1st ed. Berlin: Springer.

[33] Art. 6 and 7 Information Society Directive.

[34] In spite of Recital 39 of the Directive which states that the right to private copy should not inhibit the use of technological measures or their enforcement against circumvention.

What is more, due to these restrictions of legal access, judges may not always be able to review ex post the legality of unauthorized uses since these uses could prove to be a priori entrenched. This, in turn, renders the newly introduced three-step test inapplicable, and consequently, the possibility for the user to be excused at times when access to the work is effectively restricted by a DRM measure and the user is forced to circumvent this measure in order to carry out one of the above-mentioned privileged uses[35].

Lastly, before moving on to discuss the three-step test, we need to point out that TPMs continue to prevent the work from entering the public domain even after the fulfillment of the term of protection, thus contributing to the decline of the public domain in much the same way a perpetual term of protection would.

Since the introduction of the three-step test at the European level, concerns were expressed regarding the impact of this decision on the law of copyright. As previously argued, the scope of this legal instrument has been steadily extended. Whereas the Berne Convention only provided for the test to be applied in relation to the author's right of reproduction, the TRIPS Agreement and the WIPO Treaties provided for the application of the test to the full range of authors' and related rights[36].

According to Art. 5 (5) of the Information Society Directive, exceptions and limitations "shall only be applied in certain special cases, which do not conflict with the normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right-holder". The test in the directive appears, thus, to have an even broader scope since it seems to be addressed not only to the national legislature but also to national judges[37]. Needless to say, this approach has brought a risk of arbitrariness when the test is applied on a case-by-case basis[38].

Moreover, whereas the catalogue of exceptions provided in the first part of Art. 5 suggests that the drafters opted for the droit d'auteur model of narrow, pre-defined copyright exceptions, this understanding stands in contradiction with provision of paragr. (5) which introduces the three-step test at the European level[39]. Regarding this decision of the European legislator, it was argued that the technical accommodation of free uses is hindered by the ambiguous model of copyright exceptions set out by the Directive. Although the test has established an effective means of preventing the excessive application of limitations and exceptions, the Directive failed to provide a complementary mechanism prohibiting an unduly narrow or restrictive approach.

To conclude, we must emphasize that the public interest is not well served if the copyright framework fails to accommodate the more general interest of individuals and groups in society when establishing incentives for right-holders. Furthermore, the public

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[35] Id. 33, p. 186.

[36] Geiger, Christophe, Reto Hilty, and Jonathan Griffiths. 2008. "Declaration A Balanced Interpretation Of The "Three-Step Test" In Copyright Law." IIC – international review of intellectual property and competition law 39.6: 707.

[37] Geiger, Christophe. 2006. "The Private Copy Exception, an Area of Freedom (Temporarily) Preserved in the Digital Environment." IIC – international review of intellectual property and competition law. 37.1: 74-81.

[38] Geiger, Christophe. 2006. "The Three-Step Test, a Threat to a Balanced Copyright Law?." IIC – international review of intellectual property and competition law. 37.6: 692.

[39] Id. 33, p. 183.

interest is particularly clear in the case of those values that underpin fundamental rights. Considering the above, it appears that these values must be given special consideration when applying the three-step test[40].

5. In view of our aims, only those aspects which are essential to understanding the difficulty of preserving the initial balance in the digital age have been addressed in this paper.

However, it was long ago that courts across Europe have acknowledged the loss of flexibility at the normative level. In order to preserve the lost balance, courts have often resorted to applying external doctrines to copyright, such as the right to freedom of expression and information.

For instance, as early as the 1960s, German courts have decided on a number of copyright cases in which free speech limitations have been recognized.

The first case regarded an unauthorized re-broadcasting by a West German television of news produced in the German Democratic Republic. The court allowed it, on the grounds that the freedom of expression guaranteed by Art. 5 of the Federal Constitution provided an extra-statutory justification[41].

In a later case[42], another German court held that copyright law should be interpreted in the light of the right to free speech[43].

Eventually, in a decision from 1985 the German Supreme Court has recognized that "under exceptional circumstances, because of an unusually urgent information need, limits to copyright exceeding statutory limitations may be taken into consideration"[44].

Dutch courts were also among the first to consider the application of Art. 10 ECHR in copyright cases. In a case concerning the publication of a photograph by a newspaper[45], the Court found that under certain circumstances copyright may conflict with Art. 10. Later, the same reasoning was adopted by the Dutch Supreme Court[46].

A notorious Dutch case[47] concerned the publication on the Internet of a number of court documents used previously in an American federal case[48], containing criticisms towards the Church of Scientology. After a ten year long trial, the case arrived in front of the Dutch Supreme Court which did not issue a judgment following the withdrawal of the claim by the Church. However, the judgment of the lower court, which held that Art. 10 of the ECHR prevails in front of the Dutch national legislation on copyright, became final.

French courts, in spite of their prolonged reluctance to apply free speech defenses in copyright cases, were the first to apply Art. 10 of the ECHR directly. In the judgment issued

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[40] Id., 37, p. 708-709.

[41] Hugenholtz, P. Bernt. "Copyright and Freedom of Expression in Europe." In R. C. Dreyfuss, H. First & D. L. Zimmerman (eds.), Innovation Policy in and Information Age. Oxford: Oxford University Press, 2000. 9. Print.

[42] Bild Zeitung Case, Berlin Court of Appeal, 26 November 1968, [1969] UFITA 296.

[43] Id. 42, p. 10

[44] Pelzversand Case, German Federal Supreme Court 10 January 1968, [1968] GRUR 465.

[45] Boogschutter Case, District Court of Amsterdam, 19 January 1994, [1994] Informatierecht/AMI 51.

[46] Dior v. Evora Case, Dutch Supreme Court, 20 August 1995, [1996] Informatierecht/AMI 51.

[47] Scientology vs. XS4ALL RB et al Case, The Hague Court, 9 June 1999, [1999] Informatierecht/AMI august/september 1999, p. 113-115.

[48] Church of Scientology International v. Fishman and Geertz Case, U.S. District Court for the Central District of California. 1993. Case No. CV 91-6426 HLH (Tx).

in the case of Maurice Utrillo, the Paris Court of First Instance emphasized that Art. 10 of the ECHR is superior to the national law, including the law of copyright, and concluded that, in light of Art. 10, the right of the public to be informed of important cultural events should prevail over the interests of copyright owners[49]. However, the decision was eventually overruled by the French Supreme Court, which held that the argument based on the violation of Art. 10 was "invalid"[50].

To the contrary, the Austrian Supreme Court held, in a similar case, that the use of copyright with the sole objective of hindering criticism cannot justify any restriction to freedom of expression in a democratic society. Consequently, the Court found that the reproduction of newspaper articles on a website belonging to the person the articles were about was covered by freedom of expression under Art. 10 of the ECHR[51].

However diverse outcomes they had, such decisions issued by national courts were welcomed in the literature; indeed, they opened the discussion on the adaptation of copyright limitations to the new social context prompted by the ever-increasing use of technology[52].

Nevertheless, the conflict between copyright and freedom of expression started to receive even more attention after the adoption of the Information Society Directive.

The Mulholland Drive case[53] concerned the limitation through technical protection measures of the private copy exception. As the Information Society Directive was not yet implemented by the French legislature, the law did not provide any solution for this conflict. Faced with this gap in the legislation, the judges in the first instance held that the beneficiary of the legal limitations did not enjoy a right of action and dismissed the user's petition.

Overruling the previous decision, the Paris Court of Appeal went further and noted that even though the user did not benefit from a "right to the private copy" since this was a legal exception to copyright, such an exception could only be limited under the conditions specified by the legislative texts. The Court went on and analyzed the legitimacy of the exception under the three-step test provided by Art. 5 (5) of the Directive, and found that the conditions for a restriction to the exception were not satisfied in this specific case.

Nevertheless, by holding that the exception for the private copy cannot be "disabled" by technical protection measures, the Court recognized its imperative nature, thus making an important statement in the subject matter[54].

However, this second decision was later overruled by the French Supreme Court[55], which illustrated the tendency of most national courts in Europe to read the three-step test through the prism of the exploitation of the work and from the point of view of the interests

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[49] Case 98/7053, Court of First Instance Paris, 23 February 1999, (unpublished).

[50] Maurice Utrillo Case, French Supreme Court, 1st Civil Chamber, 13 September 2003, [2004] 35 IIC 716.

[51] Medienprofessor Case, Austrian Supreme Court 12 June 2001, [2002] GRUR Int. 341, 33 IIC 994.

[52] Geiger, Christophe. 2006. ""Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union." IIC – international review of intellectual property and competition law. 37.4: 381.

[53] Case Perequin and UFC Que Choisir v. SA Films Alain Sarde, Ste Universal Pictures video France et al., Paris District Court, 30 April 2004, [2005] 36 IIC 148.

[54] Id. 37, p. 74.

[55] Case DVD Copy III, French Supreme Court, 1st Civil Division, 28 February 2006, [2006], DVD Copy III, 37 IIC 760.

of the right holders, rather than a legal instrument that guarantees a fair balance between diverging interests.

A particularly innovatory approach on copyright limitations was put forward by the Swiss Supreme Court[56]. In its interpretation of the three-step test, the Court noted that the wording of the third step in the TRIPS Agreement departs from the original version provided by the Berne Convention, by replacing the word "author" with "right-holder". The Court then noted that, as the interests of the authors do not always coincide with those of the right-holders, the test serves to protect the author's interests at least as much as those of the exploiters. Consequently, the Court concluded that the test must under no circumstances be interpreted solely in the light of the latter's interests[57].

Back at European level, while the European Court of Human Rights has delivered in the past few years several judgments in which it asserted that the Internet has become one of the principal means of exercising the right to freedom of expression and information[58], the decision in the case of Ashby Donald and others v. France[59] was the first decision of the ECtHR on the matters in a case concerning the enforcement of copyright on the Internet and Art. 10 of the ECHR.

In its judgment, the Court has emphasized a number of important aspects.

First of all, it explicitly recognized the applicability of Art. 10 in the case, hereby confirming its approach that while freedom of expression is subject to exceptions, these must be narrowly construed and convincingly established.

Secondly, the Court stated that a wide margin of appreciation is to be given to the domestic authorities in this case, since the publication of such pictures was not related to an issue of general interest for society but was merely a form of "commercial speech"[60].

Thirdly, the Court held that in cases that require a balance to be struck between two fundamental rights, such as the right to property provided by Art. 1 of the First Protocol to the Convention[61], and the right to freedom of expression enshrined in Art. 10, national authorities enjoy an even wider margin of appreciation.

In the present case, the ECtHR found no reason to consider that the national authorities exceeded their margin of appreciation and consequently did not find the need to undertake itself the balancing exercise. Reiterating the decision of the Paris Court of Appeal, the ECtHR found the conviction justified in that the applicants had knowingly disseminated the pictures in question without permission from the copyright holders and were therefore guilty of forgery under French copyright law. At last, the Court held that the fines and the substantial awards of damages were not disproportionate to the legitimate aim pursued.

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[56] Swiss Federal Supreme Court, 1st Civil Division, 26 June 2007, [2007] GRUR Int. 1046, IIC 990

[57] Geiger, Christophe. 2008. "Rethinking Copyright Limitations in the Information Society – The Swiss Supreme Court Leads the Way." IIC – international review of intellectual property and competition law. 39.8: 943-946.

[58] See e.g. Times Newspapers Ltd. v. United Kingdom, ECtHR, 10 March 2009; Editorial Board of Pravoye Delo and Shtekel v. Ukraine, ECtHR, 5 May 2011; Ahmet Yildirim v. Turkey, ECtHR, 18 December 2012.

[59] Case Ashby Donald and Others v. France, ECtHR, 10 January 2013.

[60] See e.g. Case Mouvement Raelien Suisse v. Switzerland, ECtHR, 13 July 2012; and Hertel v. Switzerland, ECtHR, 25 August 1998.

[61] The ECtHR had previously decided that Art. 1 of the First Protocol is applicable to intellectual property; see e.g. Case Melnychuk v. Ukraine, ECtHR, 7 July 2005; and Case Anheuser-Busch Incl. v. Portugal, ECtHR, 11 January 2007.

Nevertheless, the Court has confirmed in this case that copyright enforcement, restrictions on the use of copyright protected works and sanctions based on copyright law can ultimately be regarded as interferences with the right to freedom of expression and information.

Just several weeks later, in the "Pirate Bay" case, the two co-founders of the famous file-sharing service complained before the ECtHR that their conviction for complicity to commit crimes in violation of the Swedish copyright law had breached their right to freedom of expression and information[62].

Before the ECtHR, the judgment followed largely the same pattern as in the case of Ashby v. France. Even though the Court found file-sharing to be covered by the right to receive and impart information enshrined in Art. 10 ECHR, it once again acknowledged the wide margin of appreciation of the national authorities in striking a fair balance between fundamental rights, and as it found that the domestic courts had properly undertook the balancing exercise, the Court dismissed the application as manifestly ill-founded.

The examples from jurisprudence discussed above imply good reasons to re-introduce a measure of flexibility in the European copyright system. While the historic perspective we acquired suggests that the system lost a good degree of flexibility over the course of the last century, the need for more openness in copyright law is almost self-evident in this information society of highly dynamic and unpredictable change[63].

Conclusion

6. To bring this article to an end, we will reiterate the idea that a reconciliation between the two rights within the boundaries of the copyright system would not only help it overcome the crisis of legitimacy it is currently facing, but that it might also be the most fruitful and democratic path to take.

What needs to be stressed upon first of all is the fact that the European copyright aquis leaves considerably more room for flexibilities that its closed list of permitted limitations and exceptions suggests. As it was observed, the enumerated provisions are in many cases categorically worded prototypes rather than precisely circumscribed exceptions, thus leaving the Member States broad margins of implementation[64].

Secondly, as already mentioned, the Commission failed to address in its Green Paper one very important exception for the accomodation of the right enshrined in Art. 10 ECHR in the copyright system, namely the exception to the right of adaptation. However, at the time this right is still unharmonized. Through the prism of the pressing need to reconcile the European copyright system with the values embodied in the right to freedom of expression and information, this lack of harmonization could be interpreted as an opportunity for Member States to proceed in this direction.

Considering the length of the European legislative cycle, we argue that a far better option for achieving this end would be for Member States to take advantage of this policy space and develop national models of limitations and exceptions permitting fair

[62] Case of Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden, ECtHR, 19 February 2013.

[63] Hugenholtz, P. B. and Senftleben, Martin. 2011. "Fair Use in Europe: In Search of Flexibilities". Available at SSRN: http://ssrn.com/abstract=1959554.

[64] Id. 63.

transformative uses that can be first tested in practice[65]. The most effective features of these systems could then become the premises for the reconciliation of the two rights as the European Union level as well.

Of course, some might argue that in the digital age, a developed society such as the European Union is highly dependent on strong protection of intellectual property in order to preserve its position in the global context[66], and that a concession in favour of the right to freedom of speech might render weaker copyright protection.

Without arguing that strong property rights are the foundation of a stable and predictable society, we will nevertheless state the conviction that, rather than construing copyright legislation solely based on economic theories, the main care of the legislator should be to ensure the possibility for future generations to be creative. However profound and insightful economic theories might be, a society that lacks the necessary creativity to overcome the obstacles that ceaselessly arise is deemed to fall.

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CONFISCATION OF CRIMINAL PROCEEDS IN THE EUROPEAN UNION CRIMINAL LAW

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Abstract

The confiscation of proceeds of crime has long been seen within the European Union and beyond as an important tool in the armory of weapons to fight organized crime. The rationale for focusing on the confiscation of criminal proceeds is at least two-fold. First it addresses concerns that enormous criminal wealth, generated most notably by various forms of trafficking offences, risks destabilizing financial systems and corrupting. As such the confiscation of criminal assets seeks ultimately to reduce and prevent crime by making known that criminals will not be allowed to legitimate society. Second it attempts to undermine the "raison d'être" behind most organized crime activity, namely the maximization of profit by illicit means. As such the confiscation of criminal assets seeks ultimately to reduce and prevent crime by making known that criminals will not be allowed to enjoy their illicit wealth. By the same token, focusing on confiscation of criminal wealth can send an important message by removing negative role models from local communities.

Key words: criminal proceeds, confiscation, reduce and prevent, the European Union criminal law, Joint Action and Framework Decision

I. Confiscation is defined by the Council Framework Decision 2005/212/JHA of 24th February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property[1], as a judicial order "resulting in the final deprivation of property". That includes property of any description "whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property" (Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence).

Related Proceeds Instrumentalities and Property defines the notion of criminal proceeds as "any economic advantage from criminal offences". To avoid the likely dissipation of suspected criminal assets prior to a confiscation order, the latter is frequently preceded by the freezing of assets during the course of an investigation. Freezing means a court or other competent authority order "temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property" (Council of European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of 16 May 2005).

II. Focusing on confiscation of criminal wealth can send an important message by removing negative role models from local communities.

[1] Convention Implementing the Schengen Agreement.

As such the confiscation of criminal assets seeks ultimately to reduce and prevent crime by making known that criminals will not be allowed to enjoy their illicit means[2].

The rationale for focusing on the confiscation of criminal proceeds is at least two aspects:

- it addresses concerns that enormous criminal wealth, generated most notably by various forms of trafficking offences, risks destabilizing financial systems and corrupting legitimate society.

- it attempts to undermine the „raison d'être" behind most organized crime activity, namely the maximization of profit by illicit means.

The confiscation of proceeds of crime has long been seen within the European Union and beyond as an important weapon to fight organized crime.

III. The first serious attempt at international level to promote the confiscation of criminal proceeds was the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, named the Vienna Convention, of 1988. While focused only on drug related crime, the Vienna Convention contains far-reaching and innovative provisions on the confiscation of criminal proceeds which have shaped and influenced many other instruments addressing criminal confiscation at international, regional and local and levels[3]. To enable confiscation to take place, the states of European Union who has been notified in November 1990, the Vienna Convention must ensure that bank, financial or commercial records are available and that bank secrecy is not an obstacle. It addresses issues of international cooperation and mutual legal assistance relevant to giving effect to confiscation orders issued by competent authorities of another state. It provides for confiscation of income derived from criminal proceeds and of the confiscation of property in proportions representing the value of illicit property, where criminal proceeds have been intermingled with legitimate assets. It raises the issue of sharing confiscation assets among authorities of different states who have combined efforts to ensure effective confiscation and the possibility that confiscated assets may be used for crime prevention or other measures designed to reduce crime. Perhaps most significantly the Vienna Convention raises the possibility that states may consider reversing the onus of proof regarding the lawful origin of alleged criminal proceeds[4].

The United Nation Convention against Transnational Organized Crime[5], named Palermo Convention, of December 2000[6] is designed to promote cooperation to prevent and combat transnational organized crime more effectively. The Convention identifies the confiscation of criminal proceeds as an important means to achieve this aim. It requires states to introduce measures to allow the confiscation of property derived from criminal activity and raises the possibility of reversing the onus of proof in confiscation proceedings.

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[2] Treaty on European Union.

[3] Hague Programme for strengthening freedom, security and justice.

[4] A.Weyembergh, Approximation of Criminal Law, The Constitutuional Treaty and the Hague Programme.

Common Market Law Review, p. 1567-1574.

[5] Council Decision setting up Eurojust-of 28.02.2001 amended by Council Decision of 18.06.2003.

[6] Framework Decision on Euro Counterfeiting 2000.

The United Nation Convention against Corruption, named UNCAC, of december 2005[7] is designed inter alia to promote international cooperation against corruption including in asset recovery. It contains many of the confiscation related-provisions of the above United Nations Conventions. In addition the UNCAC sets out detailed provisions on recovery and return of confiscated assets including the obligation on states to adopt legislative measures to allow them to return confiscated property to the prior legitimate owners or to compensate the victims of the crime. The UNCAC also requires states (who ratified Convention) to consider taking any necessary measures to allow confiscation of property without a criminal conviction in circumstances where the offender cannot be prosecuted due to "death, flight, absence or in other appropriate cases"[8].

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, named the 1990 Strasbourg Convention, is a real milestone in promoting the confiscation of criminal proceeds. This Convention considered that one of the most effective measures to fight organized crime was the confiscation of criminal proceeds. With this objective the Convention seeks to promote international cooperation in the identification, tracing, freezing and confiscation of criminal assets. The states must adopt legislative measures to allow confiscation of proceeds of crime and provisional measures with a view to ultimate confiscation, they are obliged to cooperate to the greatest extent possible as regards investigations and proceedings aimed at confiscation and have to take provisional measures such as the freezing of bank accounts, with a view to confiscation[9].

The Second Strasbourg Convention – May 2005 – has been supplemented by the Council of European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing of Terrorism and are recognizing both the similarities and the distinctive features between money laundering and the financing of terrorism. But it has a wider scope and acknowledges that money used to support terrorist groups and carry out attacks does not necessarily have criminal origins. Like the First Convention (1990), the Second Strasbourg Convention allows for the possibility of an all crimes approach to confiscation but also allows[10] states to make reservations. The Second Convention sends an important message that mandatory confiscation may be desirable as regards certain very serious offences such as people trafficking but does not go so far as to oblige parties to legislate to this effect. On the other hand, the Second Convention does require states, in respect of serious offences to adopt legislative or other measures requiring an offender to demonstrate the lawful origin of alleged criminal proceeds.

Another significant development in the Second Strasbourg Convention includes obligations on states parties of this Convention (European Union states) to provide information to requests from other states parties as to whether a natural or legal person who is the subject of a criminal investigation, has a bank account, to provide information on banking transactions and to monitor banking transactions[11]. These provisions are largely

[7] Framework Decision on combating terrorism 2005.

[8] Convention of 15.05.1972 The Council of Europe Convention on Transfer of Proceedings of 15 May 1992.

[9] Convention Implementing the Schengen Agreement.

[10] Green Paper on Conflicts of Jurisdiction and the Principe ne bis in idem 2005.

[11] European Commission, Directorate General Justice Freedom and Security, Unit D 2 – Figh against Economic, Financial and Cyber Crime.

drawn from the European Union Protocol of 16 October 2001 to the Convention on mutual assistance in criminal matters between the member states of the European Union. But there are more members in the Council of Europe, including such diverse country as Albania, Azerbaijan and Moldova and the potential impact of such provisions may go well beyond the European Union instrument from which they are inspired.

IV. The European Union Action Plan to combat organized crime of April 1997 stated: "The European Council[12] stresses the importance for each European Union states of having well developed and wide ranging legislation in the field of confiscation of the proceeds from crime…". Similarly three years later the Prevention and Control of Organized Crime: A European Union Strategy for the Beginning of the New Millennium, called European Union Millennium Strategy states that "The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime"[13].

So, the European Union has made important steps to highlight the role of criminal confiscation and to establish European Union states approach to freezing and confiscation of criminal assets.

The Joint Action of 3rd December 1998 adopted by the Council on the basis of Article K3 of the Treaty of European Union, on money Laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime was a first attempt to ensure an European Union wide implementation of the Council of Europe Strasbourg Convention. This Joint Action was modified by a Framework Decision of 26th June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. Taken together the purpose of the Joint Action and Framework Decision was to ensure a common minimum approach of states in terms of those criminal offences for which they should provide for confiscation[14]. The approach is generally that if an offence[15] is punishable by imprisonment of a maximum of more than one year, it must be possible under national law, to order confiscation of proceeds generated by that offence. The Joint Action and Framework Decision also require European Union states to have in place a system of value confiscation and to ensure that all requests from other European Union states relating to asset identification, tracing, freezing and confiscation, are processed with the same priority as is given to such measures in purely domestic proceedings[16].

For example[17], the Joint Action says that to promote mutual assistance[18] in the European Union and the European Union states should prepare and regularly update "a

[12] Council Framework Decision 2005 – Council Framework Decision 2005 – 24th February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

[13] Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property of evidence.

[14] Council of Europe Convention on Laundering, Seaech, Seizure and Confiscation of the Proceeds of Crime and Financing of Terrorism of 16 May 2005.

[15] United Nation Convention againt Corruption of December 2005.

[16] Strasbourg Convention on 1990 – on Laundering,Search, Seizure and Confiscation of the Proceeds from Crime.

[17] Second Strasbourg Convention – May 2005.

[18] European Union Protocol of 16 October 2001 to the Convention on mutul assistance in criminal matters between the Member States of the European Union.

user-friendly guide including information about where to obtain advice" on identifying, tracing, freezing and confiscating criminal assets, and the states[19] "shall encourage direct contact between investigators… and prosecutors making appropriate use of available cooperation networks" to reduce where possible the number of formal requests for assistance. It is an apparent precursor to the Camden Assets Recovery Inter-Agency Network (CARIN) who is an informal network made up principally of European Union states experts working in the area of criminal asset identification and recovery and which aims to improve inter-agency cooperation in cross borders identification, freezing and confiscation of criminal proceeds[20].

The Council Act of 16 October 2001, establishing in accordance with Art. 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the member states of the European Union, requires European Union states to respond to a request from another state as to whether a natural or legal person who is the subject of criminal investigation, holds or controls one or more bank accounts on its territory[21]; to provide on request of another state the details of bank accounts and banking transactions and to request the monitoring of banking transactions.

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TRANSPUNEREA DIRECTIVELOR EUROPENE ÎN DOMENIUL ASIGURĂRILOR GENERALE ÎN LEGISLAȚIA ROMÂNEASCĂ

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Rezumat

Procesul de armonizare al legislației românești cu cea a Uniunii Europene, este un proces continuu şi complex şi trebuie să cuprindă şi legislația din domeniul asigurărilor, un domeniu foarte important în condițiile economiei de piață.

Prin demersul nostru de cercetare dorim să scoatem în evidență importanța sistemelor de asigurări, să semnalăm unele aspecte din legislația națională care nu sunt în acord cu legislația europeană şi să facem propuneri de *lege ferenda*, având la bază şi directivele Uniunii Europene din domeniu.

Rezultatele cercetărilor noastre sunt utile studenților, profesioniştilor din domeniul asigurărilor, tuturor celor care au legătură cu sistemele naționale şi europene de asigurări.

Cuvinte-cheie: asigurări, legislație, directive, norme, contract, asigurat, asigurator

CONȚINUT

Primul act normativ important în domeniul asigurărilor, este Legea nr. 136 din 29.12.1995 privind asigurările şi reasigurările din România. Aceasta reglementează contractul de asigurare şi principiile de bază ale principalelor tipuri de asigurări, respectiv asigurările de bunuri, persoane, răspundere civilă, asigurările obligatorii de răspundere civilă pentru pagubele cauzate terților din accidente de autovehicule şi alte asigurări.

Anul 2000 este anul de referință în ceea ce priveşte începutul armonizării legislației românești în domeniul asigurărilor cu cea comunitară.

Până în anul 2000 activitatea de asigurări era guvernată de legea 47/1991 care reglementa in principal condițiile de autorizare şi de exercitare ale activității asigurătorilor şi de Legea 136/1995 care tratează în principal aspecte referitoare la contractul de asigurare.

Procesul de armonizare al legislației românești cu cea Europeană începe cu Legea 32/2000 care pune bazele unui sistem legislativ modern în domeniul asigurărilor, pornind de la criteriile de autorizare şi de exercitare a activității întreprinderilor de asigurare şi a intermediarilor în asigurări şi mergând până la înființarea Comisiei de Supraveghere a Asigurărilor, autoritate legislativă, de supraveghere şi control organizată după modelul european.

Legea 32/2000 creează cadrul legislativ general, pe baza căruia s-a armonizat legislația românească cu aquis-ul comunitar. Legea are un caracter flexibil care permite ca prevederile cuprinse în special în Directivele de Prima Generație să fie introduse prin norme în aplicarea legii.

Un deziderat foarte important impus de procesul de aderare la Uniunea Europeană este perfecționarea cadrului legal, în aşa fel încât acesta să permită exercitarea unui control din ce în ce mai eficient asupra pieței, în scopul de a se asigura respectarea drepturilor asiguraților şi menținerea unei solidități financiare a întreprinderilor de asigurare.

În cadrul Comisiei de Supraveghere a Asigurărilor a fost înființată Direcția Generală de Integrare Europeană şi Relații Internaționale care a elaborat Capitolul 3 – Libera circulație a serviciilor, Secțiunea asigurări din Documentul de poziție al României, care a fost transmis Comisiei Europene.

În documentul de poziție au fost transpuse obligațiile asumate de Comisia de Supraveghere a Asigurărilor privind sectorul asigurărilor din România şi s-au stabilit termenele la care legislația românească trebuia modificată prin preluarea prevederilor din Directivele europene, procesul de armonizare încheindu-se în anul 2007.

Procesul de transpunere s-a bazat pe preluarea legislației europene amendată la zi, gradul de transpunere fiind unul ridicat. Pentru o mai bună urmărire a gradului de armonizare a prevederilor din legislația românească s-au întocmit tabele de concordanță.

În aplicarea legii 32/2000 Comisia de Supraveghere a Asigurărilor a emis în anul 2001, având în vedere cele 23 de directive emise în domeniul asigurărilor până la acea dată, norme care au reglementat aspecte foarte importante ale pieței asigurărilor, în special în ceea ce privește creşterea solidității financiare a asigurătorilor şi obținerea unor efecte pozitive în planul credibilității şi dinamizării pieței.

Anii 2000 şi 2001 s-au caracterizat printr-un proces legislativ bogat care a vizat dezvoltarea legislației în domeniul asigurărilor şi începutul procesului de armonizare al acesteia cu legislația europeană.

Directivele Europene care reglementează condițiile de autorizare şi exercitare a activității de asigurări generale, respectiv 73/239/CEE, 76/580/CEE, 78/473/CEE, 84/641/CEE, 87/343/CEE, 88/357/CEE, 92/49/CEE, 95/26/CEE şi 2000/64/CE au fost transpuse parțial în Legea 32/2000 şi în Ordinele Preşedintelui Comisiei de Supraveghere a Asigurărilor emise în cursul anului 2001.

Ordinul 2/2001, modificat şi completat prin Ordinul nr. 16/2001, privind informațiile şi documentele cerute pentru autorizarea asigurătorilor şi criteriile pentru aprobarea acționarilor semnificativi şi persoanelor semnificative ale asigurătorilor, prin care s-au stabilit condițiile şi documentațiile în baza cărora Comisia de Supraveghere a Asigurărilor poate acorda autorizarea pentru constituirea şi funcționarea societăților de asigurare, precum şi criteriile pentru aprobarea acționarilor semnificativi ai persoanelor semnificative ale asigurătorilor, transpune prevederile Directivei 73/239 CE. Prevederile „Primei Directive" cu privire la clasele de asigurări sunt preluate în Ordinul 3/2001, prin care s-au stabilit clasele de asigurări ce pot fi practicate de asigurători potrivit obiectului de activitate prevăzut în autorizația eliberată de Comisia de Supraveghere a Asigurărilor.

În scopul protecției asiguraților şi creşterii solidității financiare a asigurătorilor au fost emise trei ordine importante in cursul anului 2001: ordinul 5/2001 prin care în conformitate cu prevederile art. 21 alin. (1) din Legea nr. 32/2000, s-a stabilit metodologia de calcul şi de evidență a rezervelor tehnice ce trebuie constituite şi menținute de către asigurători pentru activitatea de asigurări generale, Ordinul 6/2001 privind categoriile de active admise să reprezinte rezervele tehnice ale asigurătorului care practică asigurări generale,Ordinul 10/2001 privind limita minimă a marjei de solvabilitate a asigurătorilor care practică asigurări generale. Aceste ordine transpun prevederile Directivei 73/239 CE cu modificările ulterioare.

Ordinul nr. 12/2001 privind insolvabilitatea asigurătorului şi administratorul special, prin care s-au stabilit determinarea gradului de solvabilitate a asigurătorilor şi procedurile

legale de urmat în caz de insolvabilitate şi ordinul Ordinul 14/2001 privind transferul de portofoliu, prin care s-au stabilit condiţiile legale în care asigurătorii autorizaţi să practice activitatea de asigurare pot să îşi transfere portofoliul de contracte de asigurări către una sau mai multe societăţi de asigurare stabilite în România, transpun prevederile „Primei Directive" şi prevederi ale Directivei 2001/17/CE privind reorganizarea şi lichidarea societăţilor de asigurare.

În anul 2002 a continuat activitatea de emitere de norme tehnice şi contabile pentru îmbunătăţirea cadrului de desfăşurare a activităţii de asigurare şi pentru o protecţie sporită a drepturilor asiguraţilor. Întregul proces de legislativ a avut în vedere armonizarea legislaţiei cu directivele europene şi cu Standardele Internaţionale de Contabilitate. Au fost emise şi o serie de norme care au modificat şi completat normele emise în 2001.

Un act normativ important a fost Ordinul nr. 3/2002 privind constituirea, utilizarea şi gestionarea fondului de protecţie al asiguraţilor Prin acest act normativ s-au înlocuit prevederile Ordinului nr. 1998/1996 al Ministerului Finanţelor şi s-au adaptat prevederile acestuia la noua legislaţie în domeniul asigurărilor.

În anul 2003 a fost adoptată Legea nr. 76/2003 prin care au fost modificate prevederile Legii 32/2000, act normativ important pentru acea perioadă şi care a reprezentat conform angajamentelor asumate faţă de Uniunea Europeană o primă etapă de modificare a Legii 32/2000. Principalele amendamente au fost legate de definirea şi redefinirea unor termeni şi expresii în concordanţă cu directivele europene (ex. broker de asigurare,acţionar semnificativ direct şi indirect, prime brute subscrise), lărgirea atribuţiilor Comisiei de Supraveghere a Asigurărilor şi asigurarea mijloacelor necesare pentru creşterea eficienţei activităţii de supraveghere privind acţionarii semnificativi şi persoanele semnificative ale asigurătorului. Legea introduce pentru prima dată obligativitatea asigurătorilor de a furniza asiguraţilor sau potenţialilor asiguraţi, înainte de încheierea contractului de asigurare, informaţii minimale cu privire la modul de derulare a contractului.

În anul 2004 a întrat în vigoare Legea 172/2004 prin care se modifică şi completează celălalt pilon al legislaţiei primare în domeniul asigurărilor din România, Legea 136/2005 privind asigurările şi reasigurările. Prin aceasta lege s-au materializat angajamentele asumate prin documentele de poziţie ale României la capitolul trei de negociere – Libera circulaţie a serviciilor.

Modificările stipulate în Legea 172/2004 au contribuit la redefinirea unor noţiuni în concordanţă cu dreptul Uniunii Europene, liberalizarea dreptului de încheiere a contractelor de asigurare cu societăţi străine, stabilirea unui cadru legal conform căruia asigurătorii sunt obligaţi să pună anumite informaţii la dispoziţia asiguraţilor sau a potenţialilor asiguraţi înaintea încheierii contractului de asigurare şi pe durata derulării lui şi o reglementare mai eficientă a fondurilor de protecţie prevăzute de lege. În ramura asigurării obligatorii de răspundere civilă auto pentru pagube provocate terţilor, legea îmbunătăţeşte cadrul legislativ necesar creşterii gradului de cuprindere în asigurare şi deschide calea spre liberalizarea tarifelor practicate pentru acest tip de asigurare.

Două obiective importante în procesul de aderare la Uniunea Europeană au fost legate de elaborarea de norme privind managementul asigurătorului şi activitatea de control intern. Ordinul nr. 3104/2004 pentru punerea în aplicare a Normelor prudenţiale privind managementul asigurătorului preia parţial, în limita legislaţiei primare în vigoare la acea dată, principiile guvernanţei corporative, a transparenţei procesului decizional al asigurătorului, în conformitate cu recomandările experţilor Comisiei Europene.

Ordinul nr. 3105/2004 pentru punerea în aplicare a Normei minimale privind activitatea de control intern preia de asemenea în parte, recomandarea de a reglementa proceduri de gestionare a riscului la nivelul societăţilor de asigurare.

A doua etapa de modificare a legii 32/2000 a fost realizată în anul 2004 prin adoptarea Legii 403/2004.

Conceptul cel mai important reglementat de această lege în conformitate cu directiva Europeană 73/249 CE modificată prin Directiva 92/49 EEC este dreptul de stabilire şi libertatea de a presta servicii, pe principiul autorizaţiei unice, atât pentru societăţile de asigurare, cât şi pentru intermediarii în asigurări. Sunt preluate totodată prevederile Directivei 2002/92/CE referitoare la intermediarii în asigurări, în scopul creşterii profesionalismului acestora şi a creşterii calitative a serviciilor oferite asiguraţilor. Modificările aduse Legii 32/2000 prin Legea 403/2004 au determinat schimbarea normelor privind autorizarea brokerilor de autorizare prin Ordinul 3110/2004 şi emiterea Ordinului 3111/2004 privind informaţiile pe care asigurătorii şi intermediarii în asigurări trebuie să le furnizeze clienţilor.

Tot în anul 2004 este publicată în Monitorul Oficial şi Legea 503/2004 privind privind redresarea financiară şi falimentul societăţilor de asigurare. Legea transpune prevederile Directivei 2001/17/CE privind reorganizarea şi lichidarea societăţilor de asigurări şi creează premisele unei intervenţii rapide şi eficiente pentru restabilirea situaţiei financiare a unui asigurător.

În perioada 2005-2006 legislaţia primară în domeniul asigurărilor a fost îmbogăţită cu două acte normative importante, respectiv Legea 283/2005 pentru modificarea şi completarea Legii 136/1995 privind asigurările şi reasigurările din România şi Legea 113/2006 pentru modificarea Legii 32/2000.

Prin Legea 283/2005 s-au transpus complet directivele europene din domeniul asigurării răspunderii civile auto, până la acea dată, urmând că până în anul 2012 să fie crescute anual limitele de despăgubire pentru pagube materiale şi vătămări corporale.

Legea 113/2006 a schimbat denumirea legii 32/2000 în Legea 32/2000 privind activitatea de asigurare şi supravegherea asigurărilor. Legea 113/2006 conţine prevederi importante cu privire la activitatea asigurătorilor compoziţi, în fapt li s-a permis acestora să îşi continue activitatea practicând ambele categorii de asigurare cu respectarea principiului separării managementului. Prin separarea managementului care cuprinde conduceri executive separate, contabilitate operativă separată, calculare separată a marjei de solvabilitate, evidenţierea distinctă a activelor luate în calculul fiecăreia din cele două marje de solvabilitate, se asigură o mai bună protecţie a intereselor asiguraţilor şi reducerea riscului ca activele care acoperă obligaţiile aferente asigurărilor de viaţă să acopere obligaţiile izvorâte din activitatea de asigurări generale.

O altă prevedere importantă a acestei legi este constituirea fondului de protecţie al victimelor străzii reglementat în anul 2005 prin Ordinul 3108/2005. În conformitate cu prevederile Directivelor Europene în domeniul răspunderii civile auto, Fondul de Protecţie al Victimelor Străzii îndeplineşte cele 3 funcţii principale, şi anume: centru de informare, organism de compensare şi fond de protecţie al victimelor străzii. Legea 113/2006 actualizează Legea 32/2000 cu prevederile Directivelor 2002/83 CE, 2002/92/CE, Directiva 78/660/CEE, Directiva 77/91/CE şi Directiva 78/473/CEE.

Normele privind constituirea, administrarea şi utilizarea Fondului de Garantare au fost adoptate prin Ordinul nr. 3115/2005.

În anul 2006 Legea 32/2000 a fost modificată din nou prin Ordonanța de urgență nr. 87/2006, care a avut în principal rolul de a armoniza prevederile Legii 32/2000 cu prevederile altor acte normative emise până la acea dată.

Anul 2006 este un anul premergător aderării la Uniunea Europeană şi este caracterizat printr-o activitate legislativă bogată a Comisiei de Supraveghere a Asigurărilor în ceea ce priveşte legislația secundară. Au fost emise acte normative care au întrat în vigoare la emitere dar şi o serie de acte normative care au întrat în vigoare la data de 01.01.2007, data aderării. Sunt armonizate complet prin aceste acte normative prevederi referitoare la domenii importante precum marja de solvabilitate, rezervele tehnice, activele care acoperă rezervele tehnice, coasigurare, transfer de portofoliu, control intern şi management al riscului la asigurători, dobândirea sau renunțarea la calitatea de acționar semnificativ, asigurări de credite, asigurări de protecție juridică.

În anul 2006 s-a finalizat procesul de armonizare al legislației în domeniul asigurărilor, gradul de transpunere al Directivelor Europene fiind de 100%. Cele mai importante ordine ale Preşedintelui Comisiei de Supraveghere a Asigurărilor cu rol de armonizare legislativă prin care s-au transpus prevederile Directivei 73/239/CEE şi/sau ale Directivelor care o completează şi o modifica, Directiva 87/343/CEE, 97/344 CEE, 88/357/CEE, 92/49/CEE, 2002/87/CEE sunt următoarele:

- Ordinul 113107/2006 privind privind metodologia de calcul a marjei de solvabilitate minime şi a marjei de solvabilitate disponibile, pentru asigurătorul care practică asigurări generale prin care se transpun prevederile Directivei 73/239/CEE cu modificările ulterioare.

- Ordinul 113108/2006 privind transferul de portofoliu între asigurători care transpune prevederile Directivei 73/239/CEE modificată prin Directivele 88/357/CEE şi 92/49/CEE, precum şi ale Directivei 2002/83/CEE.

- Ordinul 11309/2006 privind asigurările de credite care transpune prevederile Directivei 73/239 CE modificată prin Directiva 87/343/CE.

- Ordinul nr. 113114/2006 privind practicarea de către asigurători a clasei de asigurări de protecție juridică care transpune prevederile Directivei 87/344/CEE din 22 iunie 1987 privind coordonarea legilor, reglementărilor şi dispozițiilor administrative privind asigurarea de protecție juridică.

- Ordinul nr. 113124/2006, pentru punerea în aplicare a Normelor privind dobândirea calității sau renunțarea la calitatea de acționar semnificativ la asigurători/reasigurători persoane juridice române care transpune prevederile Directivei 92/49/CEE şi 2002/83/CEE.

- Ordinul nr. 113129/2006, privind modificarea şi completarea Ordinului nr. 3.109/2003 pentru punerea în aplicare a Normelor privind metodologia de calcul şi evidență a rezervelor tehnice minimale pentru activitatea de asigurări generale care transpune prevederile Directivei 73/239/CEE cu modificările ulterioare.

- Ordinul nr. 113130/2006 privind activele admise să acopere rezervele tehnice brute pentru asigurătorul care practică activitatea de asigurări generale, dispersia activelor admise să acopere rezervele tehnice brute, precum şi coeficientul de lichiditate care transpune prevederile Directivei 92/49/CEE şi anexa 1 la Directiva 88/357/CEE.

- Ordinul comun al BNR, CNVM, CSA nr. 23/120/113.136, privind cerințele suplimentare de adecvare a capitalului, tranzacțiile intragrup şi concentrarea riscurilor la nivelul unui conglomerat financiar care transpune prevederile Directivei 2002/87/CE.

- Ordinul nr. 113113/2006, privind coasigurarea comunitară preia prevederile Directivei 78/473/CE din 30 mai 1978 privind coordonarea dispoziţiilor legale, de reglementare şi administrative în domeniul coasigurării comunitare.

Au fost de asemenea emise Ordinele 113139/2006 şi 113140/2006 prin care se specifică forma şi conţinutul raportărilor financiare pe care trebuie să le întocmească brokerii de asigurare respectiv asigurătorii.

Un alt ordin semnificativ din punctul de vedere al armonizării legislative este Ordinul nr. 113117/2006 privind principiile de organizare ale unui sistem de control intern şi management al riscului la asigurători prin care s-a prevăzut că începând cu data aderării la Uniunea Europeană societăţile de asigurare sunt obligate să deţină un sistem de control intern şi de gestiune a riscurilor. Implementarea acestui sistem este un prim pas în introducerea sistemului Solvency II prin care societăţile de asigurare pot să îşi definească şi să îşi cuantifice expunerea la risc, să gestioneze riscurile şi să acţioneze în consecinţă, mărindu-şi astfel eficienţa activităţii şi eficienţa utilizării capitalurilor. Prin aplicarea programului Solvency II asigurătorii trebuie să aibă în vedere identificarea şi evaluarea riscurilor care pot fi controlabile sau necontrolabile, atât la nivelul de ansamblu, cât şi la toate nivelurile organizatorice. Procesul de identificare al riscurilor trebuie să ţină cont de factorii interni legaţi de complexitatea structurii organizatorice, natura activităţilor desfăşurate, calitatea personalului şi fluctuaţia acestuia şi de factorii externi cum ar fi condiţii economice, schimbări legislative sau legate de mediul concurenţial.

Procesul preluare al aquis-ului comunitar a continuat şi în anul 2007 în conformitate cu obligaţiile pe care le are România în calitate de membru cu drepturi depline al Uniunii Europene.

Începând cu anul 2007 s-a aplicat în România modelul de solvabilitate Solvency I, model care ţine cont de mărimea capitalurilor proprii în cadrul cărora rezultatul financiar are un rol foarte important. Anul 2007 a reprezentat primul an în care tarifele practicate de asigurătorii de răspundere civilă auto au fost total liberalizate şi poliţele de asigurare RCA au fost emise cu valabilitate în întreg spaţiul european.

În ceea ce priveşte legislaţia primară este de menţionat Legea 304/2007 prin care se completează Legea 136/1995, în special cu prevederi privind extinderea obligativităţii acoperirii prin asigurare a riscurilor de răspundere civilă a vehiculelor pentru toate vehiculele omologate să circule pe drumurile rutiere (vehiculele înmatriculate ori înregistrate în România), precum şi introducerea cadrului legal cu privire la constatarea amiabilă de accidente.

În ceea ce priveşte legislaţia secundară sunt completate prevederile privind metodologia de calcul a marjei de solvabilitate de care dispune asigurătorul care practică asigurări generale prin ordinul 4/2007 şi prevederile privind metodologia de calcul şi evidenţa a rezervelor tehnice minimale pentru activitatea de asigurări generale prin Ordinul 14/2007.

Un alt Ordin cu relevanţă pentru legislaţia care reglementează contractele de asigurare este Ordinul 3/2007 privind legea aplicabilă contractelor de asigurare. Obiectul acestui ordin sunt contractele de asigurare care reglementează riscuri situate în statele membre ale Uniunii Europene sau în cele aparţinând Spaţiului Economic European. Ordinul transpune prevederile Directivelor 88/357/CEE şi 2002/83/CE.

În anul 2008 s-au emis de către CSA două ordine importante, respectiv Ordinul 21/2008 privind utilizarea formularului de constatare amiabila de accident prin care

România se aliniază la legislația majorității statelor din Uniunea Europeană în ceea ce priveşte simplificarea măsurilor de soluționare ale accidentelor şi a încasării despăgubirilor şi Ordinul 22/2008 privind cerințele de informare şi raportare referitoare la auditul financiar statutar al societăților de asigurare/reasigurare prin care se transpun prevederile Directivei 2006/43/CE şi se pregăteşte terenul pentru implementarea conceptului Solvency II.

Pentru transpunerea la zi a Directivei 73/239/CEE modificată prin Directivele 2002/13/CE, 2002/87/CE, 2005/68/CE sunt emise norme referitoare la metodologia de calcul a marjei de solvabilitate pentru asigurările generale prin Ordinul 3/2008. Este reglementata metodologia de calcul a rezervelor tehnice minimale pentru asigurările generale prin Ordinul 7/2008 şi sunt completate normele privind activele care acoperă rezervele tehnice brute pentru asigurătorul care practică activitatea de asigurări generale, dispersia activelor admise să acopere rezervele tehnice brute, precum şi coeficientul de lichiditate, puse în aplicare prin Ordinul preşedintelui Comisiei de Supraveghere a Asigurărilor nr. 113130/2006.

Activitatea de reglementare în anul 2009 în ceea ce priveşte transpunerea legislației comunitare se evidențiază prin trei acte normative.

Ordinul 4/2009 pentru punerea în aplicare a Normelor privind dobândirea calității sau renunțarea la calitatea de acționar semnificativ la asigurători/reasigurători persoane juridice române, transpune prevederile Directivei 2007/44 CE privind normele de procedură şi criteriile de evaluare aplicabile evaluării prudențiale a achizițiilor şi majorărilor de participații în sectorul financiar, ale Directivei 92/49/CEE de coordonare a actelor cu putere de lege şi a actelor administrative privind asigurarea generală directă, ale Directivei 2002/83/CE privind asigurarea de viață şi ale Directivei 2005/68/CE privind reasigurarea.

Sunt completate şi modificate prevederile referitoare la marja de solvabilitate prin Ordinul 12/2009 şi se actualizează sumele în funcție de inflație conform directivelor europene 92/49/CEE, 2002/83/CE şi 2005/68/CE.

Ordinul 18/2009 pentru aprobarea Normelor privind principiile de organizare a unui sistem de control intern şi management al riscurilor, precum şi organizarea şi desfăşurarea activității de audit intern la asigurători/reasigurători abrogă prevederile Ordinului nr. 113.117/2006 şi pune bazele unei abordări manageriale bazată pe evaluarea riscurilor la care este supusă societatea pentru atingerea obiectivelor de eficiență, rentabilitate şi protejare a patrimoniului în conformitate cu proiectul Solvency II.

După zece ani de la emiterea legii 32/2000 prin care s-a început procesul de armonizare legislativă în domeniul asigurărilor în România, putem concluziona că obiectivele Comisie de Supraveghere a Asigurărilor privind armonizarea legislației naționale cu cea comunitară au fost atinse. Procesul de armonizare legislativă încheiat în termen până la data de 01.01.2007 a avut un grad de transpunere ridicat, depăşind gradul de armonizare al sectorului bancar şi pe cel al piețelor de capital. Anul 2005 a marcat încheierea procesului de transpunere a aquis-ului comunitar în legislația primara, iar în perioada 2005-2007 s-a continuat procesul de armonizare al legislației secundare.

Legislația Europeană a fost adoptată şi aplicată gradual, în conformitate cu capacitatea pieței româneşti a asigurărilor de a absorbi schimbările legislative fără a se crea dezechilibre.

Conform recomandărilor Directivelor Europene şi ale Asociației Internaționale a Supraveghetorilor în Asigurări (I.A.I.S.) Comisia de Supraveghere a Asigurărilor a devenit

o instituție independentă, stabilă, competentă în a reglementa şi supraveghea sectorul asigurărilor, autorizația emisa de aceasta fiind un paşaport european în baza căruia asigurătorii şi intermediarii în asigurări români pot furniza servicii şi produse în întreg spațiul economic european.

În vederea unei cât mai bune apărări ale drepturilor asiguraților şi asigurării unei bune stabilități financiare a sectorului asigurărilor, Comisia de Supraveghere a Asigurărilor şi-a propus încă de la început, pe lângă acceptarea aquis-ului comunitar, obiective strategice în concordantă cu politicile europene în domeniul asigurărilor precum întărirea capacității sale instituționale de supraveghere prudențială şi de control, o supraveghere neutră şi preventivă a operatorilor din piață, creşterea transparenței pieței şi protecția consumatorilor.

Dezideratele de supraveghere prudențială şi preventivă au fost realizate prin implementarea unui program informatic care permite preluarea, centralizarea, verificarea şi analiza informațiilor şi raportărilor primite de la societățile de asigurare şi de la brokerii de asigurare, în orice moment şi luarea de măsuri în situația în care se constată degradări ale solidității financiare. Rezultatul a fost unul bun, numărul de falimente în industria asigurărilor de la introducerea acestui sistem informatic fiind unul redus evidențiindu-se astfel rolul său preventiv.

Creşterea transparenței pieței a fost realizată prin constituirea de registre electronice publice privind asigurătorii, brokerii de asigurare şi agenții de asigurare persoane fizice sau juridice şi prin legiferarea obligației asigurătorilor de a publica anual un raport privind activitatea desfăşurată. Implementarea bazei de date unice CEDAM pentru asigurarea obligatorie de răspundere civilă care cuprinde informații privind vehiculele asigurate şi daunele înregistrate este un alt pas important spre o piață transparentă a asigurărilor.

În scopul protecției asiguraților a fost creat fondul de garantare pentru a se asigura protecția în caz de faliment a societăților de asigurare.

Pe întreg parcursul ultimului deceniu am constatat o preocupare continuă a Comisiei de Supraveghere a Asigurărilor de a îmbunătăți reglementările legate de stabilitatea financiară a asigurătorilor cum ar fi cele referitoare la marja de solvabilitate, rezervele tehnice, activele admise să acopere rezervele tehnice şi coeficientul de lichiditate care s-a materializat în emiterea unui număr mare de ordine prin care se modifică sau se abrogă cele anterioare.

Legislația românească în domeniul asigurărilor foloseşte modelul european prin care se aduc completări şi modificări unor acte normative fundamentale. Exemplul Directivei 73/239/CEE tratat într-un capitol al acestui referat, care a fost modificată prin 14 Directive ulterioare a fost preluat şi în legislația românească în ceea ce priveşte Legile 32/2000 şi 136/1995.

Spre deosebire de Directiva 73/239/CEE, care se regăseşte într-o formă cu toate adăugirile la zi, până în prezent nu regăsim o versiune republicată a celor două legi. Acest lucru reprezintă un impediment pentru persoanele care trebuie să aplice legislația în vigoare deoarece sunt foarte multe modificări, articole abrogate, articole noi. Republicarea celor două legi fundamentale devine o necesitate în contextul în care procesul de armonizare legislativă a fost încheiat. În ceea ce priveşte legislația secundara, respectiv Ordinele emise de Comisia de Supraveghere a Asigurărilor, situația nu este similară cu cea din domeniul legislației primare. În special de la momentul aderării, ordinele care s-au emis pe diferite domenii le-au abrogat pe cele vechi.

Transpunerea prevederilor directivelor europene nu s-a încheiat la data aderării, este un proces continuu, o misiune perpetuă şi o obligație a Comisiei de Supraveghere a Asigurărilor.

De la momentul aderării au devenit aplicabile noi reguli privind solvabilitatea asigurătorilor, calificarea profesionala, implementarea sistemului de management al riscului şi controlul intern, supravegherea grupurilor de asigurare etc.

Principiile de supraveghere aplicate de Comisia de Supraveghere a Asigurărilor cunosc o perioada de tranziţie, de la cele bazate pe verificarea conformităţii la cele bazate în principal pe analiza şi evaluarea riscurilor la care sunt supuse întreprinderile de asigurare. Sunt momente pregătitoare pentru aplicarea modelului de solvabilitate Solvency II.

La nivelul asigurătorilor prin elaborarea şi aplicarea normelor privind managementul riscului şi controlul intern s-a făcut un prim pas în acest sens.

La nivelul Comisiei de Supraveghere a Asigurărilor, implementarea proiectului Solvency II presupune un proces amplu care cuprinde instruirea profesională, participarea activă la elaborarea normelor europene în calitate de membru al Comitetului European de Asigurări şi Pensii Ocupaţionale CEIOPS, elaborarea legislaţiei, implementarea sistemului informatic de preluare a raportărilor şi analiză a acestora, instruirea societăţilor de asigurare cu privire la aplicarea noilor norme, preluarea şi analiza feed back-ului de la societăţile de asigurare. Ca un prim pas CSA a participat împreună cu un număr de asigurători la programul QIS 3 şi QIS 4, o simulare a implementării sistemului Solvency II.

Solvency II este un program care va ridica standardele în ceea ce priveşte managementul asigurătorilor din România. El presupune un project management riguros şi un sistem de management al societăţii de asigurare eficient. Solvency II modifică esenţial modelele de management actuale atât în ceea ce priveşte liniile de asigurări cât şi în ceea ce priveşte investiţiile. Asigurătorii vor folosi modele de management şi informaţionale proprii, adaptate activităţii lor şi cerinţele de capital vor fi determinate de modelul folosit.

Prin implementarea sistemului Solvency II filozofia de Supraveghere se va schimba, Comisia de Supraveghere a Asigurărilor va evalua asigurătorii şi reasigurătorii după riscurile existente în portofoliile lor iar aceştia îşi vor cuantifica activele şi pasivele după principii economice.

Solvency II cuprinde reglementări privind estimarea rezervelor tehnice, sistemul de control intern, alocarea capitalului, calculul necesarului de capital, administrarea asigurătorului şi raportările financiare.

Prin aplicarea Sistemului Solvency II se realizează o îmbunătăţire a realizării principalului obiectiv al autorităţii de supraveghere şi anume protecţia asiguraţilor şi a potenţialilor asiguraţi. Sistemul permite detectarea din timp a posibilelor deficienţe şi adaptează continuu procesul de management al riscurilor, cu impact asupra protecţiei asiguraţilor. Solvency II încearcă să încorporeze cele mai noi tehnici de administrare a riscurilor, pentru a asigura clienţilor din toată Uniunea Europeană un nivel similar de protecţie.

Prin aplicarea Sistemului Solvency II companiile îşi vor aloca în mod optim capitalul, ţinând cont de expunerile la risc măsurate pe principii economice prudente. Asigurătorii vor înţelege mai bine expunerea la risc, îşi vor optimiza costurile rezultând ajustări de preţuri sau apariţia de produse noi, măsuri care vor fi în final în avantajul asiguraţilor.

Solvency II va armoniza reglementările privind solvabilitatea în toată UE, ceea ce va conduce la crearea unei pieţe unice – cu potenţiale beneficii pentru clienţi prin creşterea competiţiei, inovaţie, transparenţă şi flexibilitate.

Proiectul Solvency II a fost adoptat prin Directiva 2009/138/CE a Parlamentului European si a Consiliului din 25 noiembrie 2009 privind accesul la activitate şi desfăşurarea

activității de asigurare şi de reasigurare (Solvabilitate II) şi a fost transpusă in legislația statelor membre până la 31.10.2012.

Împreună cu implementarea standardelor de contabilitate IFRS, Solvency II a remodelat esențial industria de asigurări şi reasigurări românească, conducând la creşterea competitivității şi a profesionalismului asigurătorilor şi a rolului autorității de supraveghere.

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- Legea 32/2000 privind societățile de asigurare şi supravegherea asigurărilor, publicată în Monitorul Oficial, Partea I, nr. 148 din 10 aprilie 2000;

- Ordonanța de Urgență nr. 117/2007 pentru modificarea alin. (19) al art. 35 din Legea nr. 32/2000 privind activitatea de asigurare şi supravegherea asigurărilor publicată în Monitorul Oficial, Partea I nr. 732 din 30 octombrie 2007;

- Ordonanța de Urgență nr. 87/2006 pentru modificarea şi completarea Legii nr. 32/2000 privind activitatea de asigurare şi supravegherea asigurărilor publicată în Monitorul Oficial, Partea I nr. 916 din 10 noiembrie 2006;

- Ordonanța de Urgență nr. 201/2005 pentru modificarea şi completarea Legii nr. 32/2000 privind societățile de asigurare şi supravegherea asigurărilor publicată în Monitorul Oficial, Partea I, nr. 1191 din 29 decembrie 2005, aprobată cu modificări şi completări prin Legea nr. 113/2006 publicată în Monitorul Oficial, Partea I, nr. 421 din 16 mai 2006;

- Legea nr. 503/2004 privind redresarea financiară şi falimentul societăților de asigurare publicată în Monitorul Oficial, Partea I, nr. 1193 din 14 decembrie 2004;

- Legea nr. 76/2003 pentru modificarea şi completarea Legii nr. 32/2000 privind societățile de asigurare şi supravegherea asigurărilor publicată în Monitorul Oficial, Partea I, nr. 193/26 martie 2003;

- Ordonanța de Urgență nr. 51/2001 pentru modificarea art. 44 din Legea nr. 32/2000 privind societățile de asigurare şi supravegherea asigurărilor publicată în Monitorul Oficial, Partea I, nr. 175/06 aprilie 2001;

- Ordonanța de Urgență nr. 116/2000 pentru modificarea art. 45 alin. (3) şi (4) din Legea nr. 32/2000 privind societățile de asigurare şi supravegherea asigurărilor, precum şi pentru stabilirea unor alte măsuri tranzitorii publicată în Monitorul Oficial, Partea I, nr. 311/05 iulie 2000;

- Legea 403/2004 pentru modificarea şi completarea Legii nr. 32/2000 privind societățile de asigurare şi supravegherea asigurărilor publicată în MO, Partea I, nr. 976 din 25 octombrie 2004;

- Directivelor 73/239/CEE, 74/557/CEE şi 2002/83/CE în domeniul libertății de a presta servicii, având în vedere aderarea Bulgariei şi României publicată în JO L 363, 20.12.2006;

- Colecția Rapoartelor CSA privind evoluția pieței de asigurări 2001-2008;

- Directiva 2009/138/CE a Parlamentului European si a Consiliului din 25 noiembrie 2009 privind accesul la activitate şi desfăşurarea activității de asigurare şi de reasigurare (Solvabilitate II);

- Dan Anghel Constantinescu, Istoria Asigurărilor în România, Volum II, Editura Semne ’94, 2002;

- Gh. N. Iosif, Al. Gherasim, N. Crişan, I. Găliceanu. G. Sauer, P. Tănăsescu – Sistemul Asigurărilor în România, Editura Tribuna Economică 1997;

- Dan Anghel Constantinescu, Marinică Dobrin, Adina Nastase, Adina Bejenaru – Dicționar de Asigurări, Editura Semne ’94, 1999.

THE ACADEMIC APPROACH OF THE BAKA PIGMIES FROM CAMEROON. CONCEPTUAL AND ETHICAL PROBLEMS

ADRIAN-DAN VÎLCAN

Abstract:

The problems of the Baka pigmies is an interesting but a delicate subject at the same time. Compared to any other indigenous population, "pygmies" in general and the Baka in particular are dependant on rainforest resources. The economy of Cameroon is largely based on the exploitation of natural resources, especially logging industry, a fact that makes the Baka face even more pressure than other indigenous people in Africa. This mainly happens because of conflicting interest on rainforest resources. There are international provisions which define and safeguard the indigenous populations. Unfortunately the Cameroonian legislation often does not put in practice the conventions that they sign. The present paper found its legal roots in UN, WLO, and World Bank provisions regarding the rights of the indigenous people and data analysis will be undertaken according to these international standards. The paper will analyse the current status of the Baka people of Cameroon, accordingly to the literature available.

Keywords: Baka pigmies; racism; Africa; Cameroon; international provisions; governmental discourse

Introduction

There are many indigenous and tribal groups around the world that have been called 'pygmies' at one time or another but the vast majority live in Central and West Central Africa. The Baka are one such 'pygmy' group, inhabiting large rainforest areas in Cameroon, Gabon, the Republic of Congo and the Central African Republic. One of West Central Africa's oldest ethnic groups, the Baka are believed to have descended from Stone age hunter gatherers[1] and they maintain a hunter-gatherer lifestyle to this day. The Baka are semi-nomadic, deriving most of their resources from the rainforest and living in semi-permanent roadside encampments, often leaving for weeks at a time to hunt or forage. Because of their lifestyle the Baka are difficult to census and estimates for Baka numbers range from eight thousand to thirty thousand or about 0.4% to 1.5% of the entire population[2], though confusions with the related Aka and Twa pygmies contribute to these estimate errors.

Due to their lifestyle, the Baka are almost exclusively hunter-gatherers and, thus, dependent on trade in order to obtain agricultural products. Their main trade partners are their Bantu neighbours, with whom the Baka have shared a co-dependence, almost symbiotic, relationship for centuries. The Bantu provide the Baka with grain, taro, manioc and vegetables and in return the Baka trade bush meat, honey and other forest products.

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[1] Luigi Luca CAVALI-SFORZA, ed. African Pygmies. Academic Press, Orlando, 1986, pp. 148.

[2] Belmond TCHOUMBA "PeuplesIndigènes et Tribaux et stratégies de réduction de la pauvreté au Cameroun", International Labour Organization, 2005, p. 17.

This relationship has stayed the same for several centuries but it altered dramatically with the dawn of European Colonialism. German colonial administrators sought to re-organize nomadic populations such as the Baka or other forest and river people in roadside villages to better manage them. The Baka were particularly targeted due to their perceived value as great hunters, especially big game hunters. German colonists in search of ivory and animal pelts often employed the Baka to hunt for them or serve as scouts and the convenient roadside resettlement of the Baka meant that they would be easier to find and employ. The German authorities built schools and permanent buildings in or around these new encampments and tried to educate the Baka in order to increase their utility but the German rule was short-lived. The laws set in place by the German protectorate and subsequent French rule disregarded the Baka as a people instead focusing on their assimilation. Missionary work by Christian clergymen had a modest impact on the Baka, as their focus was primarily on the dominant Bantu population and to this day the Baka maintain their animist religion[3].

Nowadays, the Baka people live mostly as they have always had, in separate communities from the other populations, oftentimes along well travelled roads. They have preserved their traditional way of life, tribal culture and animist religion but with modernity encroaching on their areas they are under constant pressure to change, both from the neighbouring communities, no longer content with the barter system the Baka employ and from within the tribes themselves. Dwindling natural resources, severe hunting restrictions placed by the state, discrimination and disregard of indigenous rights are altering the Baka way of life.

Current Problems of the Baka

The threats against the Baka people today are similar to the threats faced by all indigenous people in Africa and the world, chief amongst which is deforestation. A problem to all the people in the region and particularly to the Baka who rely on the rainforest to survive, deforestation is rampant in Cameroon with legal logging almost being surpassed by illegal logging[4].

Traditional hunting grounds that have been used by the Baka for hundreds of years are diminishing under the advance of civilisation and agriculture. Poaching and overhunting are making game scarce as well. The dwindling of forest resources are rapidly pushing the Baka away from their rich cultural heritage, as more and more men are forced to abandon the traditional hunter-gatherer lifestyle, getting jobs to provide for their families. However accessing the labour market is not easy for them.

The Baka have a very low literacy rate and a similarly low rate of speaking or understanding French, a fact that makes them virtually unemployable. There is also the matter of racism, as many Baka complain of severe discrimination in work environments and in school.

More importantly, the Baka are denied access to communal hunting grounds, chased off lumber exploitation areas and forbidden from entering the large swathes of rainforest

[3] Luigi Luca CAVALI-SFORZA, (editor) African Pygmies. Academic Press, Orlando, 1986, pp. 162.

[4] UK Government Department For International Development – Crime and Persuasion: Tackling illegal logging, improving Forest Governance p. 40.

that have recently become wildlife reserves[5]. The Baka tribe encampments are not recognized as administrative units, instead being considered part of larger Bantu villages and, in consequence, the Baka do not get represented in local government, nor do they receive a fair part of the annual forest tax paid by the logging companies, a major source of development funds for communities in impoverished rural Cameroon.

Purpose of the Research

The following paper aims to investigate the status of the Baka pygmies, i.e. the lack of recognition as indigenous people, and to discern the relationship between that status and their treatment under state and international laws. Many of the problems highlighted above stem from the fact that the Baka pygmies do not presently possess all the rights granted to other indigenous people around the world such as the Inuit tribes in Canada, the Aborigines in Australia or even other indigenous tribes in Africa.

Therefore we must ask whether dispensations under their status as indigenous would improve their way of life. In order to do this we must first verify if the Baka people fulfil all the necessary requirements under several widely accepted definitions of the term indigenous people. Secondly we must compare this definition with that given by the state and see if the two definitions are compatible with each other and the actual condition and treatment by the state of the Baka people. Lastly we must see if by granting full indigenous rights to the Baka the state of Cameroon would improve the way of life of the Baka.

The current study has the role to draw the public attention to the problems the Baka people face because they are not recognised as indigenous. Moreover, there is little known in Europe in general and in Romania in particular even about the existence of these people. A secondary purpose of this paper is to put the Baka pigmies in the spot light and to encourage further research on the subject.

Also the context was very favourable for this study, working with an NGO which was trying to better the life of marginalized people from Cameroon, in 2010 I got in contact with the Baka people during my one month study visit to Cameroon. I consider that besides the valuable field data that I gathered during my stay, the present study will constitute an aid to the Baka pigmies because the public through the current study will know their problems.

The current research does not aim in militating for granting the Baka people more rights but rather underlines the big status difference and demonstrates how many of their problems are generated by the lack of recognition as indigenous population. Moreover, it is observed how the Cameroonian government signs international treaties and agreements but forgets to apply them by transcribing them into the national legislation and by creating a procedure in the field. This paper does not aim to discredit Cameroon internal and foreign policy but rather to draw the attention upon an aspect that is neglected by this state.

Research Method

The current paper starts from the general question of research would any problems of the Baka be solved it they would be recognised as indigenous population? From this question a hypothesis was created, mainly that, if the Baka will be granted full indigenous

[5] Indigenous Peoples and Protected Areas in Africa: From principles to practice, Forest Peoples Programme, 2003, pp. 35-39. Available at: http://www.forestpeoples.org/documents/africa/foreword_and_intro_eng.pdf, accessed on 24.10.2013.

status, then many of their problems will be solved or at least ameliorated. The best way to verify this hypothesis seemed to combine the literature review with a case study analysis.

For this research, literature review was extensively used, as well as the international and national legal provisions. The fact that there are lots of studies made on the status of Baka people meant considering a literature review, in combination with the critical survey, the most suitable method of analysis for this paper.

Theoretical Framework:

The term 'Indigenous People' has been widely used around the world to refer to a large number of ethnic groups (over 5000[6] groups according to the International Work Group on Indigenous Affairs) or 300 to 350 million people worldwide. As an adjective it is usually used to refer to someone as being 'from' or 'originally inhabiting' a certain area. There is, however, no strict and clear definition of what indigenous people actually are, a major source of the confusion behind the term owing a lot to this fact.

Several definitions exist at the proposal of competent bodies and persons. One of the most widely used is the Definition put forward by the landmark International Labour Organization Convention no. 169 (1989) regarding the rights of Indigenous People which states as follows:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions[7].

It is furthermore specified that self-Identification as indigenous shall be considered a deciding factor rather than recognition of said status by the state though self-identification is not required[8]. ILO 169 is the most important international document safeguarding the rights Indigenous people although it is heavily dependent on ratification. To this day the only African country to ratify ILO 169 is the Central African Republic in late April 2010.

A second definition was put forth by the now defunct Working Group on Indigenous Populations which functioned between 1982 and 2006 as a second tier subsidiary of the also defunct United Nations Commission on Human Rights. In 1986 the following definition was put forward by Special Rapporteur José R. Martínez Cobo as a working definition for the Martinez Cobo Report:

"Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them, by conquest, settlement or other means, reduced them to a non-dominant or colonial

[6] Caecilie MIKKELSEN (Editor), The Indigenous World 2010, International Work Group on Indigenous Affairs, Eks-Skolens Trykkeri, Copenhagen, 2010, pp.10.

[7] Convention no. 169, Art 1, Sec 1 of the International Labour Organization.

[8] Ibid. Art 1 Sec 2.

condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a state structure which incorporates mainly national, social and cultural characteristics of other segments of the population which are predominant"[9].

This definition was recognized as incomplete and annotated in the following years:

a) they are the descendants of groups, which were in the territory at the time when other groups of different cultures or ethnic origin arrived there;

(b) precisely because of their isolation from other segments of the country's population they have almost preserved intact the customs and traditions of their ancestors which are similar to those characterised as indigenous;

(c) they are, even if only formally, placed under a state structure which incorporates national, social and cultural characteristics alien to their own.

In 1986 it was also specified that any individual that identified himself as indigenous and was accepted by the community as such had the right to be called and considered indigenous. After more than twenty years of work and after its dissolution the Martinez Cobo Work Group saw fruition when the General Assembly adopted a Declaration on the Rights of Indigenous Peoples in 2007. The Declaration is non-binding and also fails to provide a definition for Indigenous People as, traditionally 'indigenous people have suffered as a result of definitions'[10].

Finally, another definition that is widely used was put forth by the World Bank[11] in 1991:

Indigenous Peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:

a) close attachment to ancestral territories and to the natural resources in these areas;

b) self-identification and identification by others as members of a distinct cultural group;

c) an indigenous language, often different from the national language;

d) presence of customary social and political institutions;

e) primarily subsistence-oriented production.

An analysis of the three accepted definitions reveals several distinct traits that Indigenous populations are expected to have.

- Traditional territory that they have been inhabiting since before any other population.
- Dependence on a traditional way of life
- Partial or total preservation of traditions, institutions and/or language.
- Identification by themselves and others as culturally distinct.

We can identify the prior traits in the lifestyle that the Baka have guarded for centuries:

- They have inhabited their areas of rainforest before the Bantu migrations[12] and have maintained their way of life.

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[9] Study of the Problem of Discrimination against Indigenous Peoples 1983, chapter V E.CN 4/Sub.2/1982/2/Add. 6/20 June 1982 – http://www.un.org/esa/socdev/unpfii/documents/MCS_v_en.pdf, accessed on 01.10.2013.

[10] Declaration on the Rights of Indigenous Peoples (61/295) from 2006 – http://www.un.org/esa/socdev/unpfii/documents/dec_faq.pdf, accessed on 10.10.2013.

[11] World Bank, OP 4.20, 1991.

[12] World Bank OP 4.10 Art. 4.

- They live a semi-nomadic lifestyle, strongly dependent on the natural resources existent only in the rainforest.

- They conserve their language, traditional institutions (chefferiesystem, social hierarchy) and cultural heritage (traditional dances, craftwork, tools and practices)

- They are considered wholly distinct by both other representatives of the Baka, themselves and other peoples.

As the Baka fulfil all the above criteria they have, for the purpose of the present paper they are considered Indigenous People, according to International Definitions and treated as such.

Indigenous Population provisions according to International Law

It is important to keep in mind that besides the fact that the Baka pygmies are indigenous, as respecting all the characteristics of all the presented definitions on indigenous people; they are without any doubt a minority in Cameroon. It will be observed that their international granted rights as a minority (status accepted even by Cameroon's Government) are violated systematically by the state, loggers and other populations. Being such a delicate and general subject, discrimination of minority groups was treated by international forums such as UN, International Labour Organisation and World Bank.

The first international decision regarding non-discrimination was given in the framework of the League of Nations on 10th April 1923 by the Permanent Court of International Justice (PCIJ) regarding the German colonists from Poland. This decision was mentioning that there are two types of equality – equality of fact and legal equality and at the same time by respecting the rights of the minorities they shall enjoy the same treatment as the others[13].

The Charter of the UN, signed in 1945 stated in the first article, third section as purpose of the UN: "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"[14]. This path was continued in 1948 by the Universal Human Rights Declaration which states in the first two articles that:

Art. 1 All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Art. 2 Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

One of the most important contributions to the international provisions for indigenous populations was brought by the International Labour Organisation by the Conventions no. 169. The Convention no. 169 from 1989 supplements the Convention no. 107 from 1957 which did not recognize indigenous peoples' right to exist as separate, distinct peoples. The

[13] Permanent Court of International Justice (PCIJ), Advisory Opinion Cases http://www.indiana.edu/~league/pcijcases.htm – accessed on 04.10.2013.

[14] Charter of the UN, http://www.un.org/en/documents/charter/chapter1.shtml – accessed on 04.10.2013.

ILO Convention 169 protects the rights of indigenous peoples and their land rights. According to the Convention adopted 21 years ago, it recognizes:

● Land and property rights for indigenous peoples: The Convention recognizes that indigenous and tribal peoples' cultures and identities form an integral part of their lives – and that their way of life often differs from that of the dominant population.

● Equality and Liberty for indigenous peoples.

● Autonomy of indigenous peoples[15].

The Baka culture is very different in comparison with the Bantu – the majority group of the region they inhabit. For this reason we consider that the international provisions regarding cultural identity are very important to be mentioned. There are international agreements which take into account the issue of cultural identity. The first important act that does that is the UNESCO Declaration on Race and Racial Prejudice from 1987. Art. 2 of these declarations states the following: „All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. However, the diversity of life styles and the right to be different may not, in any circumstances, serve as a pretext for racial prejudice; they may not justify either in law or in fact any discriminatory practice whatsoever, nor provide a ground for the policy of apartheid, which is the extreme form of racism"[16].

Another important international act regarding the protection of the minority cultures is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (A/RES/47/135), adopted by the UN in 1992. In the very first article it states that: „States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity"[17]. As it will be observed later on, the Government from Cameroon, instead of encouraging conditions for the promotion of that identity – in our case Baka, it engages in policies that suppress their basic rights.

The Convention on Biological Diversity states in Art. 8 j that: "...respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity... "[18]. As it will be observed further on, the state tries to assimilate and convert the Baka lifestyle to the one of the majority.

The most important international act regarding the rights of indigenous people is the UN Declaration on the Rights of Indigenous Peoples (61/295) from 2006 of which Cameroon is a Party State. The text of this declaration was drafted and debated for more than 20 years. This Declaration represents a major asset for indigenous peoples because it defines the term and moreover it emphasises their rights to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations[19]. On short, "the Declaration addresses both individual and

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[15] ILO Convention 169: 20 Years Later, http://www.unpo.org/content/view/9746/81/, accessed on 04.10.2013.

[16] UNESCO Declarationon Race and Racial Prejudice from 1987, Art. 2.

[17] UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (A/RES/47/135), 1992, Art. 1.

[18] Convention on Biological Diversity, Art. 8j, http://www.cbd.int/traditional/ accessed on 06.06.2009.

[19] Frequently asked questions, Declaration on the Rights of Indigenous Peoples (61/295) from 2006, http://www.un.org/esa/socdev/unpfii/documents/dec_faq.pdf, accessed on 06.10.2013.

collective rights, cultural rights and identity, rights to education, health, employment, language, and others. The text says indigenous peoples have the right to fully enjoy as a collective or as individuals, all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity. Indigenous peoples have the right to self-determination. By that right they can freely determine their political status and pursue their economic, social and cultural development. They have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they choose to, in the political, economic, social and cultural life of the state"[20].

Being part of the UN and party state to this convention Cameroon is obliged to follow these international laws. It is often observed that this state does not do its best to enact regulations in order to follow up with the international provisions. Moreover, it is observed that the Cameroonian government is taking active measures against the Baka people. For example the creation of natural reserves where hunting is totally forbidden in the places inhabited by the Baka without consulting them is a case in which Cameroon infringed the provisions mentioned in the Declaration on the Rights of Indigenous Peoples and more than that an direct offence to the basic rights of the individuals.

Local Law and the general position of the government

In its treatment of the various populations inhabiting the territory of the country, the state of Cameroon has a very peculiar approach towards its indigenous population.

The state of Cameroon is, according to the Constitution's preamble, obliged to ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law[21]. There are, however, no other constitutional provisions regarding the status of minorities or indigenous people in the text nor is there any article dealing with minority issues in the text of the Constitution proper. The National Law however has several provisions regarding the treatment and protection of so-called 'marginal' populations, by that meaning various ethnic groups such as the Mbororo, the highland peoples, the island and creek populations and last but not least the pygmies. Chief amongst these initiative was a call for the drafting of a marginal population bill from 2008[22]. As many NGOs have pointed out this draft was largely written with minimal participation from the people it would affect and their representatives. Furthermore, the term 'marginal' populations was widely considered derogatory, demeaning and stigmatising the populations it refers to as well as impeding their acceptance as indigenous people[23]. Several issues also

[20] Ibid.

[21] Constitution of Cameroon, Preamble; available at http://confinder.richmond.edu/admin/docs/Cameroon.pdf, accessed 06.10.2013.

[22] Ministry of Social Affairs: "Étude en vue de l'Élaboration d'un Projet de Loisur la Promotion des Droitsdes Populations Marginales", Cabinet d'Experts Multidisciplinaires Associés-SARL (CEMA-SARL), Yaoundé, November 2008.

[23] Cameroon: The Committee for the Elimination of Racial Discrimination recommends adoption of a law to protect the rights of indigenous peoples, available at http://www.forestpeoples.org/documents/africa/cameroon_cerd_update_apr10_eng.shtml, accessed 04.10.2013.

sprouted from the Cameroonian understanding of the term indigenous. The abovementioned term 'marginal' is preferred by the state when referring to isolated people with traditional ways of life but its use in connection with indigenous issues causes many problems in the implementation of international conventions. The state still guards a colonial understanding of indigenous peoples and qualifies these as people that have not migrated into an areal from another. Therefore one may understand that all people native to an area are considered indigenous. Indeed, this has been the position of the state for the last decade and a half since this issue was first clarified during a constitutional amendment session in 1995[24].

However, mention must be made that Cameroon is Party State to the United Nations Declaration on the Rights of Indigenous Peoples as previously stated. In an address by the Committee for the Elimination of Racial Discrimination in April 2010 towards the state of Cameroon, the committee urged the reformation of the proposed draft on marginal populations and the compliance with the Declaration in order to ensure the rights of Indigenous people. It added that the current laws and terminology does not comply with the Declaration although the state recognises indigenous populations living on its territory[25]. The state responded by stating that the terminology regarding indigenous people has been recently introduced and its adaptation is not yet complete.

Therefore, one can only conclude that the categorising of the Baka people as marginal people and the severe lack of legislative measures to grant them full rights in accordance to their indigenous status means that the State of Cameroon does not fully respect the letter of the law in regards to Declaration 61/295. Therefore, one will assume that it does not view the Baka as indigenous.

Literature review:

Over the course of the last ten years the Baka problem has been carefully observed and a significant number of articles have been written on the subject. However, most of the texts on the Baka have either been articles or op-ed pieces for various magazines or have sometimes failed to take into account the stringent need for on-site research with the Baka themselves.

One of the major subjects in the literature concerning the Baka is the very issue of them being indigenous or at least considered indigenous people. It has been stated[26] that one of the main reasons for the disregard of Baka as autochthonous people is their lack of 'roots in the soil', i.e. their nomadic lifestyle that somehow makes them less autochthone than their pastoral counterparts. Indeed, much of the literature focuses on land law and the severe deficiencies that it presents in Cameroon when dealing with the status of indigenous populations[27]. The land is the crux of the issue as Cameroon has an out-dated colonial era

[24] National Assembly, 5th Legislature 1995/1996, Extraordinary session, December 1995.

[25] Cameroon: The Committee for the Elimination of Racial Discrimination recommends adoption of a law to protect the rights of indigenous peoples, available at http://www.forestpeoples.org/documents/africa/cameroon_cerd_update_apr10_eng.shtml, accessed 04.10.2013.

[26] Alec LEONHARDT 'Baka and the Magic of the State: Between Autochthony and Citizenship' in African Studies Review vol. 49, Number 2, pp 69-94 September 2006.

[27] Samuel NGUIFFO, Pierre Étienne KENFACK and Nadine MBALLA, "The influence of historical and contemporary land laws on indigenous peoples' land rights in Cameroon", Land rights and the forest peoples of Africa: Historical, legal and anthropological perspectives, No 2, Forest Peoples Programme, 2009, p. 2.

remnant land law that still uses colonial terminology in regards to land ownership[28] and incorporates Bantu customary law typical to pastoral people but ill-suited to hunter-gatherers like the Baka and other 'pygmy' populations[29]. Since 1974, the only way to gain ownership of the land currently inhabited by a population is by registration[30] under conditions difficult to comply with by indigenous populations. Under Cameroonian law in order to be granted the right to exploit and own land the inhabitants must prove man's clear control of the land and evident development[31], that is, permanent dwellings for inhabited land and clear seasonal cultivation on land marked as fields. This does not suit the way of life of the Baka who live off the land and leave little trace of their passage.

Furthermore, a recurring issue is the ambiguity of the language used by the State to define indigenous people[32]. The term 'marginal' population is predominately used, a fact widely considered detrimental and insulting[33]. In local laws the situation is even worse, with several terms used at the same time to refer to groups that might include the Baka in different articles of the same law[34]. Terms such as 'population riveraine', 'population locale', 'communautees villageois' and 'population autochtone' are used separately and independently though their exact meaning seems to be interchangeable, further adding to the linguistic confusion[35]. It has been argued that the term indigenous, used in its 'aboriginal' sense is inapplicable to Africa, where the realities of autochthony are somewhat different but distinguished sources such as UN Special Rapporteur Rodolfo Stavenhagen have mentioned that people such as the Baka and other Pygmy peoples constitute a clear exception[36]. Comparison has been further drawn in the case of the terminology employed by Cameroon to refer to its pygmy population to cases such as the Ainu in Japan or the 'Amerindians' in Guyana, cases where CERD has issued direct recommendations[37],[38] for the adoption of international terminology and clarification of the status of the regarded people. Indeed in April of 2010 CERD has issued a similar recommendation to Cameroon, though its confirmation is still pending[39].

A second issue present throughout the literature is the incompatibility of Cameroonian Forestry Law with Cameroon's indigenous populations as well as the laws regulating access to forest resources. Access to the resources is legally restricted to personal use according to

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Available at: http://www.forestpeoples.org/documents/africa/cameroon_land_rights_study_09_eng.pdf, accessed on 06.10.2013.

[28] Ibid. p. 4.

[29] Ibid. p. 7.

[30] Cameroon – Ordonnance n° 74/1 du 6 juillet 1974 fixant le régime foncier, Art 8.

[31] Ibid., Art 15.

[32] Cameroon: The Committee for the Elimination of Racial Discrimination recommends adoption of a law to protect the rights of indigenous peoples, available at http://www.forestpeoples.org/documents/africa/cameroon_cerd_update_apr10_eng.shtml, accessed 04.10.2013.

[33] Ibid.

[34] The situation of Indigenous people in Cameroon: a supplementary report submitted with Cameroon's 15th-19th periodic report CERD/C/CMR/19, pp. 14-15, 27 January 2010.

[35] Albert K. BARUME, "Etude sur le cadre legal pour la protection des droits des peuples indigenes au Camerun", Bureau International de Travail, Geneva, 2005, pp 52-56.

[36] Rodolfo STAVENHAGEN: "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people", United Nations Paper E/C1\1.412002/97, paragr. 9.

[37] UN CERD recommendation for Japan, 27/04/2001, CERD/C/304/Add.114, at paragr. 5 and 17.

[38] UN CERD recommendation for Guyana, 04/04/2006, CERD/C/GUY/CO/14, at paragr. 10.

[39] UN CERD recommendation for Cameroon 10/05/2010 CERD/C/CMR/CO/15-19 at paragr. 7.

a Cameroon law[40] a fact that severely hinders the Baka who live off the land and use forest products to craft trade goods, a good source of their income, now turned illegal[41]. Moreover the Baka have restricted access to forest resources for their own use as well, as logging exploitation rights and natural reserve boundaries have been drawn out without their consent, another indicator of the disregard of Baka native rights. There have been reports[42] of violence against Baka trespassing on wildlife reserve grounds or logging exploitation areas. Indeed there are clear signs of a pattern of abuses in situations that are legal grey areas in Cameroonian Law, the enforcement of wildlife protection. There has been a disproportionate number of arrests and fines against the Baka hunters as well as accusations of poaching and overhunting of endangered species.

A third issue of grave importance in the literature is the right of Baka to education. The Constitution of the state of Cameroon offers free primary education to all citizens[43] as do international treaties ratified by Cameroon such as the Convention on the rights of Children, In addition there are several national laws[44] adopted by the legislative instituting and guaranteeing a mandatory eight year primary education for all children that is, as of the year 2000, free[45]. At first glance the laws are in total concordance with international guidelines, particularly those that refer to the education of indigenous people. It is every state's right in conformity with international law to educate its citizens according to its means[46] in its official language or languages and there are few rules and regulations constraining states to provide special dispensation to indigenous people. However there has been evidence that there are severe problems maintaining and stimulating attendance in schools, particularly amongst minority groups in rural areas[47]. Furthermore there is distinct evidence of grave problems in schools for Baka children[48]. The constant bullying in school and discrimination based on their Baka origin[49], from both students and teachers, is pushing many children away from education. There is also a significant financial issue[50]. Baka parents cannot pay the various school fees (books, uniforms) to keep their children in school. Although the taxes are not steep (cca 12 euro or equivalent/year[51]) the indigenous lifestyle of the Baka does not earn them money in general. A similar problem is the issue of proper

[40] Albert K. BARUME 'Etude sur le cadre legal pour la protection des droits des peuples indigenes au Camerun' Bureau International de Travail, Geneva, 2005, pp 96-98.

[41] Rapport d'etudesur les moyenstraditionalles de subsistence et les nouvelles forms d'emploi durable chez les Pygmees de Cameroun, Jan 2002 p. 12.

[42] The situation of Indigenous people in Cameroon: a supplementary report submitted with Cameroon's 15th-19th periodic report CERD/C/CMR/19, pp. 18-19, 27 January 2010.

[43] Preamble of the Constitution of Cameroon.

[44] Albert K. BARUME 'Etude sur le cadre legal pour la protection des droits des peuples indigenes au Camerun' Bureau International de Travail, Geneva, 2005, pp 69-70.

[45] Ibid. p. 72.

[46] Ion DIACONU, Identitatea şi Drepturile Specifice ale Minorităților, C.H. Beck, Bucharest, 2006, pp. 189.

[47] Albert K. BARUME 'Etude sur le cadre legal pour la protection des droits des peuples indigenes au Camerun' Bureau International de Travail, Geneva, 2005, pp 72-74.

[48] The situation of Indigenous people in Cameroon: a supplementary report submitted with Cameroon's 15th-19th periodic report CERD/C/CMR/19, pp. 11-13, 27 January 2010.

[49] Ibid. p. 12.

[50] Ibid. p. 11.

[51] Ibid.

documentation[52]. The majority of Baka do not possess any kind of identification nor do their children, especially those at or approaching school age. There are signs of the latter situation improving[53] but the issues of extreme poverty and discrimination are still far from being fixed.

Lastly, an often-mentioned issue in the literature is the rampant deforestation in Cameroon and its effect on indigenous people. It has been suggested that over 50% of the logging in Cameroon is done illegally[54]. It has also been said that much of that illegal logging is done in community forestry areas where there is significantly less security than in private logging areas[55]. This rampant exploitation of forest areas hits indigenous communities like the Baka worst of all. Each year illegal logging is pushing the Baka further into the rainforest[56] and there have been acts of violence against the Baka that resisted[57]. There have been reports of Baka problems with legal logging as well, Baka often being chased off timber exploitations by company guards[58]. The Baka often cut down sought-after trees in order to obtain honey or other PFNL and, lacking a law granting them preferential access to forest goods are actually unwittingly perpetrating criminal trespassing.

Final Remarks

The current research has highlighted the sharp discrepancy between the international provisions regarding the indigenous populations on the one hand and the Cameroonian translation of these international provisions into national normative acts. Besides observing a clear lack of interest in adapting the national legislation to the international provisions to which Cameroon takes part, the state, transposes those international provisions into laws without to much public consultation and in most chases with severe omissions in order to supress the already limited rights that the Baka people enjoy. Issuing laws about land owning and development of the land and putting all the Cameroonian population in the same pot saying that indigenous population is any person who was born in Cameroon shows a clear sign of disregard for the Baka people.

Moreover, the state intolerance and lack of concern for a minority population is proofed by the numerous number of grassroots NGOs in Cameroon and beyond that tackles the issue of the Baka people. In general, the grassroots NGOs appear when the state fails to take cure of a problem or deliberately crates one. The voice of these NGOs is rarely, if ever even listened by the Cameroonian government and legislative.

It is more than clear that in order to solve ones' problems the first step in doing so is recognising the very existence of that person. Cameroonian state does sustained efforts to

[52] Albert K. BARUME 'Etude sur le cadre legal pour la protection des droits des peuples indigenes au Camerun' Bureau International de Travail, Geneva, 2005, p. 75.

[53] Ibid pp 75-76.

[54] UK Government Department For International Development – Crime and Persuasion: Tackling illegal logging, improving Forest Governance, p. 40.

[55] Ibid.

[56] Ibrahim NJOBODI, and Ramatu SALI – 'Cameroon' in Caecilie MIKKELSEN (Editor), The Indigenous World 2010, International Work Group on Indigenous Affairs, Eks-Skolens Trykkeri, Copenhagen, 2010, p. 536.

[57] Ibid p. 537.

[58] The situation of Indigenous people in Cameroon: a supplementary report submitted with Cameroon's 15th-19th periodic report CERD/C/CMR/19, p. 21, 27 January 2010.

close its eyes and not even observe the Baka people. They have absolutely no agency that helps the Baka at least to register as Cameroonian citizens and to make them IDs. Moreover, drafting reservations without even considering the very existence of Baka camps in that region is a clear sign that Cameroon does not want to see, does not recognises the existence and does not want to take any active measures to provide the minimum conditions for a decent life for Baka people.

Even though some Baka cams can count as many as 1000 people, the state refuses to grant them any recognition as administrative units, mostly because they inhabit forest areas and by recognising their cams the state would have to pay them a per cent of the annual forest tax paid by the logging companies. Instead of doing so, the logging companies are encouraged, by being granted exploitation permits in areas inhibited by the Baka pigmies, thing which often leads to violence acts and to a decrease in the no. of wild animals in the exploited area – a vital source of food for the Bakas.

The literature review details about the basic problems of the Baka people. Some of the problems identified in the literature review are real ones such as: deforestation; spreading of agriculture; poaching and overhunting and racism. In order to even think about solving or at least ameliorating these problems, the Baka people need to be recognised as indigenous and their existence and presence has to be taken into account. Other problems such as the lack of education and a very low literacy rate, I consider to be artificial ones, more exactly no problems at all. Baka people do not adhere to our culture and in their system of values knowing how to read or to talk French is much less valued then knowing the plants of the forest or being a good hunter. Therefore, for them to be able to carry on their way of life and to preserve their values and identities, the majoritarian population and the state has to respect the set of values, norms and beliefs of the Baka people. They have the right to choose whether they want to learn to read or not.

The purpose of the current study was to put in spotlight the existence and the problems that the Baka pigmies confront with. Their situation remains unknown to the most of the world, maybe because of lack of interest or maybe because in Africa there are other populations that confront with bigger problems such as war and genocide. However, this does not mean that the problems that the Baka people confronts with is not a serious one or that less attention should be paid to it because it is in essence a clear breach of fundamental rights, aggravated by the fact that the Cameroonian state takes active part in this process.

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ASPECTE JURIDICO-PENALE ŞI MEDICO-LEGALE PRIVIND UCIDEREA NOU-NĂSCUTULUI DE CĂTRE MAMĂ

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Rezumat

Autorul surprinde principalele aspecte privind uciderea nou-născutului de către mamă atât din punct de vedere juridico-penal cât şi medico-legal.

În realizarea demers, autorul începe prin a evidenţia opinia lui Beccaria, care surprinde particularităţile sociale, morale şi juridice ale uciderii nou-născutului de către mamă. În continuare, este prezentată opţiunea legiuitorului român de incriminare a faptei mamei de ucidere a nou-născutului, în Codul penal din 1864, Codul penal Carol al II-lea, Codul penal în vigoare şi noul Cod penal. De asemenea, pentru a evidenţia unele aspecte particulare ale incriminării acestei fapte, sunt prezentate şi opţiunile legiuitorului italian, portughez, rus, elveţian.

Prima problemă evidenţiată în acest studiu este cea a naturii juridice a infracţiunii de ucidere a nou-născutului de către mamă, respectiv ca infracţiune autonomă sau formă atenuată a omorului. În legătură cu aceasta, este analizată şi problema încadrării juridice a faptei persoanelor care determină sau ajută, cu intenţie, mama să săvârşească fapta, dar şi a mamei care, în acelaşi context, determină sau ajută, cu intenţie, alte persoane să ucidă nou-născutul. Dovedirea existenţei vieţii extrauterine şi, mai ales, a calităţii de nou-născut ridică unele dificultăţi, punctate de autor. O mare atenţie este acordată problemei cerinţei temporale a elementului material, respectiv după naştere, criticându-se opţiunea legiuitorului român de particularizare a acesteia cu „nu mai târziu de 24 de ore" şi oferindu-se soluţii care să nu genereze controverse. Nu în ultimul rând, este evidenţiată legătura dintre această cerinţă temporală şi starea de tulburare în care se găseşte mama la momentul comiterii faptei, propunându-se particularizarea acestei stări în sensul „în legătură cu naşterea".

Concluziile formulate, ce reprezintă, în sinteză, opiniile dezvoltate în cuprinsul studiului, fundamentează propunerea de *lege ferenda* formulată, privitoare la conţinutul articolului care incriminează uciderea nou-născutului de către mamă în noul Cod penal.

Cuvinte cheie: ucidere a nou-născutului, incriminare, natură juridică, sancţionare participanţi, dovada vieţii extrauterine, copil nou-născut, imediat după naştere, stare de tulburare, noul Cod penal, propunere de *lege ferenda*

1. Consideraţii generale

Uciderea nou-născutului de către mamă, ca faptă antisocială, îşi are originile în cele mai vechi timpuri, primind diferite aprecieri, atât din punct de vedere socio-moral cât şi juridic.

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Cesare Beccaria[1], cu toate că afirmă că nu ar pretinde că ar diminua oroarea pe care astfel de crime o merită, consideră necesar a descoperi sursele de unde izvorăsc, plecând de la constatarea că uciderea unui copil din afara căsătoriei ar fi efectul unei crude dileme în care se găseşte femeia sedusă datorită propriei slăbiciuni sau prin folosirea forței, respectiv propria infamie sau moartea unei ființe care ar fi incapabilă să simtă pierderea vieții.

Beccaria acordă o oarecare clemență femeilor care se găsesc în astfel de situații, întrebând cum ar putea evita alegerea uciderii copilului față de inevitabila mizerie pentru ea şi nefericitul copil şi considerând că cea mai bună metodă de prevenire a unei astfel de crime ar fi o protecție eficace a femeilor slabe împotriva tiraniei care exagerează toate viciile care nu pot fi ascunse sub mantia virtuții.

Concluzia la care ajunge este uimitoare: pedeapsa pentru o crimă nu poate fi pur şi simplu pentru că este necesară, dacă legile nu au căutat să prevină această crimă prin cele mai bune mijloace pe care timpul şi circumstanțele ar permite.

Astfel, pe măsură ce societatea umană a evoluat, legiuitorul a adăugat în textele normelor de incriminare, mai multe elemente care să nuanțeze această formă de ucidere, ținând cont şi de situațiile speciale în care această faptă se săvârşeşte.

2. Incriminarea faptei de ucidere a nou-născutului de către mamă în legislația românească

În legislația românească, incriminarea faptei de ucidere a nou-născutului de către mamă a cunoscut unele nuanțări influențate şi de legislațiile moderne ale celorlalte țări.

2.1. În Codul penal din 1864[2], în capitolul I „Crime şi delicte în contra persoanelor" al titlului IV „Crime şi delicte în contra particularilor", din Cartea a II-a „Despre crime şi delicte în special şi despre pedepsele lor", era incriminată, în art. 230 şi 332 alin. (2), pruncuciderea.

Potrivit art. 230, „pruncuciderea" se numea omorul copilului său născut de curând iar pedeapsa prevăzută pentru această faptă era munca silnică pe viață.

Potrivit art. 332 alin. (2), când se săvârşea pruncuciderea asupra unui copil nelegitim, pedeapsa era recluziunea.

Interesantă această diferențiere între copii legitimi şi nelegitimi, sub aspectul pedepsei, diferențiere care nu era făcută de art. 302 din Codul penal francez.

2.2. În Codul penal Carol al II-lea[3], în capitolul I „Crime şi delicte în contra vieții şi integrității corporale" al titlului XIII „Crimele şi delictele contra persoanelor", din Cartea a II-a „Crime şi delicte în special", era incriminată, în art. 465, crima de pruncucidere.

Potrivit acestui articol, săvârşea crima de „pruncucidere", mama care îşi ucidea copilul natural înainte de a fi expirat termenul de declarare la oficiul stării civile; pedeapsa prevăzută era temniță grea de la 3 la 5 ani.

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[1] A se vedea C. Beccaria, An Essay on Crimes and Punishments (trad.), fourth ed., Pocket Library, Boston, 1983, p. 77.

[2] Codul penal din 1864 a fost republicat în „Monitorul oficial al României", partea I, nr. 185 din 22 octombrie 1912.

[3] Codul penal din 1936 a fost publicat în „Monitorul oficial al României", partea I, nr. 65 din 18 martie 1936; a fost denumit „Carol al II-lea" potrivit legii intitulate „Denumirea Codurilor de unificare a legislației", decretată sub nr. 577/1936 şi publicată în „Monitorul oficial al României", partea I, nr. 73 din 27 martie 1936.

De remarcat faptul că legiuitorul a prevăzut un termen cert numai înlăuntrul căruia făptuitoarea putea beneficia de sancțiunea mai puțin severă, respectiv înainte de a fi expirat termenul de declarare la oficiul stării civile.

2.3. În Codul penal în vigoare[4], în capitolul I „Infracțiuni contra vieții, integrității corporale şi sănătății" al titlului II „Infracțiuni contra persoanei", din partea specială, este incriminată, în art. 177, fapta de pruncucidere.

Aşa cum se cunoaşte, textul prevede că uciderea copilului nou-născut, săvârşită imediat după naştere de către mama aflată într-o stare de tulburare pricinuită de naştere, se pedepseşte cu închisoarea de la 2 la 7 ani.

După părerea noastră, actuala normă de incriminare, chiar dacă a născut numeroase controverse în practica judiciară comparativ cu precedentele incriminări, prin cerințele pe care le prevede, justifică (în bună măsură) acest tratament penal mai puțin sever.

2.4. În noul Cod penal[5], sunt incriminate, în titlului I „Infracțiuni contra persoanei", din partea specială, atât fapta de ucidere ori vătămare a nou-născutului săvârşită de către mamă, în art. 200, capitolul III „Infracțiuni săvârşite asupra unui membru de familie", cât şi fapta de vătămare a fătului, în art. 202 alin. (4)-(5), capitolul IV „Agresiuni asupra fătului".

Potrivit art. 200 din noul Cod penal, constituie infracțiune de „ucidere ori vătămare a nou-născutului săvârşită de către mamă", (1) [u]ciderea copilului nou-născut imediat după naştere, dar nu mai târziu de 24 de ore, săvârşită de către mama aflată în stare de tulburare psihică se pedepseşte cu închisoarea de la unu la 5 ani; (2) [d]acă faptele prevăzute în art. 193-195 sunt săvârşite asupra copilului nou-născut imediat după naştere, dar nu mai târziu de 24 de ore, de către mama aflată în stare de tulburare psihică, limitele speciale ale pedepsei sunt de o lună şi, respectiv, 3 ani.

Potrivit art. 202 alin. (4)-(5) din noul Cod penal, constituie infracțiune de „vătămare a fătului", [v]ătămarea fătului săvârşită în timpul naşterii de către mama aflată în stare de tulburare psihică se sancționează cu pedeapsa prevăzută în alin. (1) şi alin. (2), ale cărei limite se reduc la jumătate; (5) [d]acă fapta a fost săvârşită din culpă, limitele speciale ale pedepsei se reduc la jumătate.

Aşa cum se poate observa, comparativ cu legea penală în vigoare, noul legiuitor a reglementat situația vătămării fătului în timpul naşterii, precum şi situația vătămării nou-născutului (după finalizare procesului naşterii).

Sub aspectul formulării, noul legiuitor a operat în textul normei de incriminare, unele modificări, particularizând momentul „imediat după naştere" cu „dar nu mai târziu de 24 de ore", şi lărgind sfera cauzelor care pot determina o astfel de faptă, la orice stare de tulburare psihică.

De asemenea, cu toate concesiile prezentate mai sus, limitele speciale ale pedepsei au fost coborâte sub cele prevăzute de legea în vigoare, respectiv de la 1 ani la 5 ani (comparativ cu de la 2 la 7 ani).

Nu împărtăşim soluția legiuitorului care, din punctul nostru de vedere, a acordat o clemență mult prea mare unor astfel de fapte, ceea ce nu va conduce la prevenirea lor.

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[4] Legea nr. 15/1968 Codul Penal al României, publicată în „Buletinul oficial al României", partea I, nr. 79-79 bis din 21 iunie 1968.

[5] Legea nr. 286/2009 privind Codul penal, publicată în „Monitorul oficial al României", partea I, nr. 510 din 24 iulie 2009.

3. Aspecte de drept comparat privind incriminarea faptei de ucidere a nou-născutului de către mamă

Unele legislații penale moderne, au renunțat să mai incrimineze distinct fapta de ucidere a copilului nou-născut de către mamă, urmând ca la individualizarea pedepsei să se aibă în vedere situația acesteia.

În alte legislații, într-o formă sau alta, este incriminată fapta de ucidere a copilului de către mamă, în timpul şi/sau ulterior naşterii.

3.1. În Codul penal italian (în vigoare)[6], în titlul XII „Despre delicte contra persoanei", capitolul I „Despre delicte împotriva vieții şi integrității individuale", din Cartea a II-a „Despre delicte în special", este incriminată, în art. 578, fapta de pruncucidere în condiții de abandon material şi moral.

Potrivit art. 578, săvârşeşte infracțiunea de „pruncucidere în condiții de abandon material şi moral", „[m]ama care provoacă moartea propriului nou-născut imediat după naştere, sau a fătului în timpul naşterii, când fapta este determinată de condiții de abandon material şi moral legate de naştere" şi este pedepsită cu închisoare de la 4 la 12 ani.

De asemenea, „[c]elor care concură la fapta de la primul alineat", se aplică închisoarea de cel puțin 21 ani.

Cu toate acestea, „[d]acă aceştia au acționat doar cu scopul de a sprijini mama", pedeapsa poate fi micşorată de la o treime la două treimi.

Nu se aplică agravantele stabilite de art. 61 din codul penal.

Se poate observa că legiuitorul italian, a prevăzut şi situația uciderii fătului în timpul naşterii (prezentă şi la momentul adoptării Codului penal român din 1936).

De asemenea, este prezentă condiționarea acestui regim sancționator mai blând de un abandon material şi moral al mamei, dar care trebuie să fie în legătură cu naşterea.

Este interesantă concepția legiuitorului italian care prevede expres, pentru participanți, o pedeapsă similară omorului intenționat (închisoarea de peste 21 ani).

Cu toate acestea, în situația în care se dovedeşte că participanții au acționat doar cu scopul de a sprijini mama, se lasă posibilitatea judecătorului de a aplica o pedeapsă redusă destul de substanțial (de la o treime la două treimi)

De observat şi limitele de pedeapsă prevăzute pentru mamă, destul de ridicate (închisoarea de la 4 la 12 ani).

3.2. În Codul penal portughez (în vigoare)[7], pruncuciderea este incriminată în titlul I „Crime contra persoanei", capitolul I „Crime împotriva vieții", din cartea a II-a „Partea specială", în art. 136.

Potrivit art. 136, „[m]ama care ucide copilul în timpul sau la scurt timp după naştere, şi fiind încă sub influența perturbatoare a acesteia" săvârşeşte infracțiunea de „pruncucidere" şi este pedepsită cu închisoarea de la 1 la 5 ani.

Şi aici se poate remarca acea dublă condiționare, şi anume la scurt timp după naştere şi influența perturbatoare a naşterii, care atrage o sancțiune destul de mică (pedeapsa închisorii de la 1 la 5 ani).

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[6] A se vedea Codul penal italian din 1930, actualizat la 03.06.2013, disponibil la http://www.altalex.com/index.php?idnot=36653, accesat la 10.08.2013.

[7] A se vedea DL nr. 48/95, Codul penal portughez din 1995, actualizat la 21.02.2013, disponibil la adresa http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?ficha=101&artigo_id=&nid=109&pagina=2&tabela=leis&nversao=, accesat la 10.08.2013.

3.3. În Codul penal al Federației Ruse (în vigoare)[8], uciderea de către mamă a copilului său nou-născut este incriminată în art. 106, secțiunea VII „Crime împotriva persoanei", capitolul 16 „Crime împotriva vieții și sănătății umane".

Potrivit art. 106, constituie infracțiune de „ucidere de către mamă a copilului său nou-născut", „[u]ciderea de către mamă a copilului său nou-născut, în timpul sau imediat după naşterea acestuia, sau uciderea de către mamă a copilului său nou-născut, în condiții de traumă psihică sau în stare de tulburare psihică care nu exclude responsabilitatea" și se pedepsește cu închisoarea de până la 5 ani.

Este de reținut această opinie a legiuitorului rus, care precizează expres că uciderea (de către mamă a copilului său nou-născut), atunci când se realizează în condiții de traumă psihică sau în stare de tulburare psihică, aceste condiții/stări să nu excludă responsabilitatea.

3.4. În Codul penal elvețian (în vigoare)[9], în titlul unu „Infracțiuni contra vieții și integrității persoanei" a cărții a doua „Dispoziții speciale", în art. 116 este incriminată fapta de infanticid.

Potrivit art. 116, „[d]acă o mamă îşi ucide propriul copil fie în timpul naşterii fie în timp ce se află sub influența efectelor naşterii", comite infracțiunea de „infanticid" și este pasibilă de o pedeapsă privativă de libertate de cel mult trei ani sau de amendă.

Şi de această dată se poate observa condiționarea aplicării acestui regim sancționator exagerat de blând (pedeapsă privativă de libertate de cel mult trei ani sau de amendă) de săvârşirea faptei de ucidere (a propriului copil) de mama aflată sub influența efectelor naşterii.

4. Principalele aspecte discutabile specifice infracțiunii de ucidere a copilului nou-născut de către mamă

După prezentarea şi scurta comentare a incriminării faptei de ucidere a copilului nou-născut de către mamă în legislația românească şi a altor țări, punctăm principalele aspecte discutabile specifice acesteia.

4.1. Una dintre problemele controversate este natura juridică a infracțiunii de ucidere a copilului nou-născut de către mamă.

În doctrină s-au conturat două opinii, şi anume: a) pruncuciderea ca infracțiune autonomă şi b) pruncuciderea ca formă atenuată a omorului.

Conform primei opinii, pruncuciderea ar fi o specie autonomă de omucidere, consacrată într-un text distinct, cu denumire proprie şi sancțiune diferită.

Conform celei de a doua opinii (majoritară în doctrină), pruncuciderea nu ar fi o infracțiune autonomă, ci o formă atenuată a omorului, supusă unui tratament penal special, mai puțin sever.

Oricum, fără a intra în detalii, trebuie precizat că opiniile exprimate în doctrină au suferit, în timp, modificări; însuşi profesorul Dongoroz a exprimat opinii diferite privitor la această problemă:

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[8] A se vedea Codul penal al Federației Ruse din 1996, disponibil la http://www.russian-criminal-code.com/, accesat la 10.08.2013.

[9] A se vedea Codul penal elvețian, actualizat la 01.07.2013, disponibil la http://www.admin.ch/opc/en/classified-compilation/19370083/index.html, accesat la 10.08.2013.

a) în lucrarea „Codul penal Carol al II-lea adnotat" (1937)[10], preciza „[d]in modul în care legiuitorul nostru a incriminat pruncuciderea, acest fapt constituie un tip aparte de omucidere (variantă de specie) cu denumire *(nomen juris)* proprie, astfel că situațiunea victimei şi a infractorului constituiesc elemente esențiale ale acestei infracțiuni, iar nu circumstanțe atenuate ale omorului din art. 465";

b) în lucrarea „Explicațiile teoretice ale Codului penal român" (1972)[11], preciza „[i]nfracțiunea de pruncucidere fiind în esență o faptă de omor, supusă însă unei sancțiuni atenuate (...)".

4.2. Altă problemă controversată, în legătură cu cea prezentată mai sus (natura juridică), este încadrarea juridică a faptei persoanelor care determină/ajută cu intenție (instigator/complice) mama să săvârşească această faptă.

În opinia potrivit căreia pruncuciderea este o infracțiune autonomă, se susține că toți participanții ar trebui să răspundă potrivit art. 177 C. pen. întrucât încadrarea faptei participanților în mod distinct de fapta autorului ar fi în dezacord cu principiul unității de infracțiune şi cu caracterul dependent al acțiunii participanților în raport cu cea a autorului şi nu s-ar putea admite coexistența în cuprinsul aceleiaşi unități a mai multor conținuturi de infracțiuni.

În opinia potrivit căreia pruncuciderea este o formă atenuată a omorului, se susține că mama ar trebui să răspundă potrivit art. 177 C. pen. iar ceilalți participanți să răspundă potrivit art. 175 C. pen. întrucât fapta săvârşită, în raport de toți participanții, ar fi un omor, fiecare urmând a răspunde în raport de întrunirea sau nu, în propria persoană, a circumstanțelor specifice care atrag înăsprirea sau îmblânzirea regimului sancționator.

Ultima opinie a fost îmbrățişată şi de instanța supremă care a decis[12] că mama va răspunde potrivit art. 177 C. pen. iar ceilalți participanți vor răspunde potrivit art. 175 C. pen.

4.3. De asemenea, problema încadrării juridice a faptei mamei care, aflându-se în stare de tulburare pricinuită de naştere, determină/ajută cu intenție (instigator/complice) o altă persoană să-i ucidă copilul nou-născut imediat după naştere, este mai controversată.

În opinia potrivit căreia pruncuciderea este o infracțiune autonomă, se susține că din moment ce nu sunt îndeplinite cerințele esențiale specifice pruncuciderii şi autorul răspunde pentru omor calificat, ceilalți participanți vor răspunde pentru omor, inclusiv mama (ca instigator/complice) chiar dacă s-a aflat în starea de tulburare specifică pruncuciderii.

În opinia potrivit căreia pruncuciderea este o formă atenuată a omorului, se susține că starea de tulburare specifică pruncuciderii va profita mamei întrucât altfel s-ar ajunge la o situație discutabilă ca mama să beneficieze de tratamentul mai puțin sever doar atunci când ar comite nemijlocit fapta, nu şi atunci când contribuția ei la săvârşirea acesteia ar fi mai puțin importantă (instigator/complice).

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[10] A se vedea V. Dongoroz, Comentare (Pruncucidere), în Codul penal Carol al II-lea, adnotat de C.G. Rătescu, H. Aznavorian, I. Ionescu-Dolj, T. Pop, I.G. Perieţeanu, M.I. Papadopolu, V. Dongoroz, N. Pavelescu, vol. III, Editura Librăriei SOCEC & Co., S.A., Bucureşti, 1937, p. 44.

[11] A se vedea V. Dongoroz, Pruncuciderea, în V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, V. Roşca, Explicații teoretice ale Codului penal român, vol. III, partea specială, Editura Academiei RSR, București, 1972, p. 202.

[12] A se vedea Decizia de îndrumare a (fostului) Tribunalului Suprem nr. 2/1976.

De precizat că şi profesorul Dongoroz, în lucrarea „Codul penal Carol al II-lea" (adnotat, 1937)[13], cu toate că susţinea (la acel moment) autonomia infracţiunii de pruncucidere faţă de omor, preciza „Care va fi însă soluţiunea în cazul când mama a îndemnat pe altul să-i ucidă copilul natural? Va fi ea pedepsită conform art. 120 la fel ca autorul sau i se va aplica pedeapsa din art. 465? Credem că mama beneficiază şi în acest caz de scuza care justifică pedeapsa mai mică din art. 465, fiindcă această scuză e bazată pe o stare psiho-fiziologică care este identică şi în cazul uciderii cu propria mână şi în cazul instigării (...)";

Faţă de aceste precizări, nu putem să nu remarcăm soluţia de bun simţ, logică, mai puţin juridică, şi ne permitem să apreciem că o rezolvare doctrinară, la adăpost de orice critici, este foarte dificilă.

În aceste condiţii, ar fi de dorit, pentru a pune capăt acestor controverse, ca legiuitorul român, urmând exemplul legiuitorului italian, să prevadă expres atât situaţia participanţilor la săvârşirea infracţiunii de pruncucidere, cât şi situaţia mamei (aflată în starea de tulburare specifică) ca participant la săvârşirea infracţiunii de omor.

4.4. Pentru a putea discuta de ucidere a copilului nou-născut de către mamă, trebuie dovedită existenţa vieţii extrauterine, aceasta constituind, aşa cum s-a apreciat[14] în literatura de specialitate, medico-legală, „cheia de boltă" a expertizei medico-legale.

Tot în această literatură s-a precizat[15] că instalarea respiraţiei extrauterine este aproape unanim admis ca fiind criteriul instalării vieţii extrauterine. Alături de acest criteriu au mai fost reţinute[16] pătrunderea aerului în tubul digestiv şi pătrunderea aerului în urechea medie.

Instalarea respiraţiei extrauterine se observă[17]:

- macroscopic, plămânul respirat este expansionat, umple cavitatea toracică, suprafaţă neregulată, marginile rotunjite, coloraţie roză, la palpare este elastic, cu crepitaţii la presiune, pe secţiune o spumă fină;
- microscopic, alveolele sunt dilatate, bronhiile sunt destinse, cartilajele sunt apropiate de lumenul bronşic, fibrele elastice sunt bine întinse (dispuse în lamele şi fascicule);
- hidrostatic (docimazie pulmonară), dacă fragmentele de plămân plutesc la suprafaţa apei [pozitivă, cu unele rezerve (fals pozitivă, în cazul putrefacţiei, îngheţării etc.)].

Pătrunderea aerului în tubul digestiv se observă[18]:

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[13] A se vedea V. Dongoroz, Comentare (Pruncucidere), în Codul penal Carol al II-lea, adnotat de C.G. Rătescu, H. Aznavorian, I. Ionescu-Dolj, T. Pop, I.G. Perieţeanu, M.I. Papadopolu, V. Dongoroz, N. Pavelescu, op. cit., p. 44.

[14] A se vedea Gh. Scripcaru, M. Terbancea, Patologie medico-legală, Editura Didactică şi Pedagogică, Bucureşti, 1978, p. 473.

[15] A se vedea A. Kraus-Manolescu, Pruncuciderea, în I. Morar, Medicina legală, Editura Medicală, Bucureşti, 1967, p. 624.

[16] A se vedea Z. Ander, I. Bilegan, V. Molnar, Medicină legală, Editura Didactică şi Pedagogică, Bucureşti, 1966, p. 155-156; V. Iftenie, D. Dermengiu, Medicină legală, Editura C.H. Beck, Bucureşti, 2009, p. 369.

[17] A se vedea Z. Ander, I. Bilegan, V. Molnar, Medicină legală, op. cit., p. 154-156; A. Kraus-Manolescu, Pruncuciderea, op. cit., p. 624-626; Gh. Scripcaru, M. Terbancea, Patologie medico-legală, op. cit., p. 474-477; V. Iftenie, D. Dermengiu, Medicină legală, op. cit., p. 377.

[18] A se vedea Z. Ander, I. Bilegan, V. Molnar, Medicină legală, op. cit., p. 156; Gh. Scripcaru, M. Terbancea, Patologie medico-legală, op. cit., p. 477; V. Iftenie, D. Dermengiu, Medicină legală, op. cit., p. 377.

- macroscopic, stomacul şi ansele intestinale sunt destinse;
- hidrostatic (docimazie gastro-intestinală), dacă stomacul pluteşte la suprafaţa apei [pozitivă, cu unele rezerve (fals pozitivă, în cazul putrefacției)] iar la secționare ies bule de aer.

4.5. De asemenea, stabilirea calității de nou-născut a copilului ucis constituie o problemă ce comportă discuții.

În doctrina penală, în mod generic, s-a considerat că un copil este nou-născut atâta timp cât poartă pe corp semnele unei naşteri recente[19].

În literatura de specialitate, medico-legală, s-au făcut următoarele precizări, referitor la calitatea de „nou-născut":

a) din punct de vedere medical, copilul este considerat nou-născut cât timp păstrează pe corp semnele vieții intrauterine sau ale naşterii (vernix caseos, bosă serosanguină, meconiu în intestine); ultimul semn care dispare fiind rana ombilicală care se cicatrizează (epitelizându-se) după aproximativ 7-10 zile[20];

b) din punct de vedere juridic, perioada de timp imediat următoare naşterii, în care copilul păstrează semnele naşterii recente, cel mult 3 zile; din punct de vedere medical, prima perioadă de existență a copilului în mediul extern (extrauterin), ce s-ar întinde pe durata a 28 zile[21];

Stabilirea stării de nou-născut se face pe baza urmelor şi criteriilor morfo-fiziologice caracteristice acesteia, şi anume[22]:

- greutate de 2,8-3,5 kg;
- lungime de 48-54 cm (50 cm, în medie);
- corp (umerii, în special) acoperit de lanugo;
- păr la nivelul capului, cu o lungime de 1-3 cm;
- unghii care ajung la nivelul pulpei degetelor (la picioare) sau o depăşeşte cu puțin (la la mâini);
- la băieți, testicule coborâte în scrot iar la fete, labiile mari acoperă labiile mici;
- bosa serosanguină localizată în funcție de prezentație, edem epicranian, nerespectând suturile;
- cordon ombilical (cel mai important semn care caracterizează această stare) care este lucios, turgescent, roz-albăstrui, de consistență elastică;
- urme de sânge şi vernix caseos în plăcile axilare, inghinale, ale gâtului, în dosul pavilionului, urechii şi (uneori) pe torace, spate şi abdomen (dacă nu au fost acordate imediat îngrijiri postnatale).

4.6. Calitatea de nou-născut a subiectului pasiv, aşa cum se constată din cele de mai sus, este în legătură cu cerința temporală a elementului material, imediat după naştere, cerință la fel de controversată.

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[19] A se vedea V. Dongoroz, Pruncuciderea, în V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, V. Roşca, Explicații teoretice ale Codului penal român, op. cit. p. 203; O. Loghin, A. Filipaş, Drept penal român – partea specială, ediție revizuită, Casa de Editură şi Presă „Şansa" S.R.L., Bucureşti, 1992, p. 44, V. Dobrinoiu, Drept penal – partea specială, Teorie şi practică judiciară, vol. I, Editura Lumina Lex, București, 2000, p. 103.

[20] A se vedea Z. Ander, I. Bilegan, V. Molnar, Medicină legală, op. cit., p. 153.

[21] A se vedea V. Iftenie, D. Dermengiu, Medicină legală, op. cit., p. 369.

[22] A se vedea A. Kraus-Manolescu, Pruncuciderea, op. cit., p. 621; V. Iftenie, D. Dermengiu, Medicină legală, op. cit., p. 373-374.

În doctrina penală doar s-a precizat că această expresie priveşte un interval de timp foarte limitat, foarte apropiat de momentul naşterii[23].

În noul Cod penal, legiuitorul, pentru a pune capăt discuțiilor în legătură cu această cerință temporală, a particularizat momentul „imediat după naştere" cu „dar nu mai târziu de 24 de ore".

Din punctul nostru de vedere, această opțiune a legiuitorului apare nejustificată întrucât, aşa cum explică specialiştii, medici legişti, perioada de timp imediat următoare naşterii, în care copilul păstrează semnele naşterii recente (nou-născut), poate să fie de 3 zile sau chiar 7-10 zile.

Şi din punct de vedere al probațiunii va fi foarte dificil de dovedit, fără dubiu, că uciderea s-a produs nu mai târziu de 24 de ore de la naştere (cum se prevede expres), pentru angajarea răspunderii penale pentru săvârşirea infracțiunii de pruncucidere.

În aceste condiții, ar fi de dorit, înlăturarea din conținutul art. 200 din noul Cod penal a condiționării cerinței temporale „nu mai târziu de 24 de ore".

Dacă totuşi legiuitorul, pentru a pune capăt acestor controverse, apreciază că s-ar impune un termen înlăuntrul căruia uciderea copilului nou-născut de către mamă, să fie considerată pruncucidere, ar putea să recurgă la soluția adoptată de legiuitor în 1936, înlocuind în text „imediat după naştere, dar nu mai târziu de 24 de ore" cu „înainte de expirarea termenului de declarare a naşterii".

De altfel, aceleaşi controverse au existat şi față de formularea „născut de curând" din art. 230 din Codul penal din 1864 (discuții care existau şi în Franța, la acel moment) iar legiuitorul, pentru înlătura aceste „dificultăți ivite în doctrină şi jurisprudență" (cum sunt calificate în expunerea de motive) a optat pentru fixarea unui termen înăuntrul căruia fapta mamei care suprimă viața copilului să fie considerată pruncucidere.

Potrivit art. 14 alin. (3) teza I din Legea nr. 119 din 16 octombrie 1996 cu privire la actele de stare civilă, republicată[24] „[d]eclararea naşterii se face în termen de 15 zile pentru copilul născut viu (...)"; acest termen de 15 zile este identic cu cel stabilit în (fostul) Decretul nr. 278 din 23.07.1960 cu privire la actele de stare civilă[25] (art. 15 par. 1).

În literatura de specialitate, medico-legală, au fost punctate principalele repere care permit aprecierea duratei vieții extrauterine, şi anume[26]:

a) la nivelul tegumentului:

- prezența vernix caseos în plăcile axilare, inghinale, ale gâtului, în dosul pavilionului, urechii (de regulă), în primele 2-3 zile de la naştere;

- coloraţia roşie a pielii, timp de câteva zile de la naştere;

- apariția descuamării fiziologice furfuracee sau în lambouri, după câteva zile de la naştere;

- dispariția părului fin (lanugo) de pe corp (umeri, în special), în câteva zile de la naştere;

b) la nivelul cordonului ombilical:

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[23] A se vedea V. Dongoroz, Pruncuciderea, în V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, V. Roşca, Explicații teoretice ale Codului penal român, op. cit., p. 204.

[24] Republicată în „Monitorul oficial al României", partea I, nr. 339 din 18 mai 2012.

[25] Publicat în „Buletinul oficial al României", partea I, nr. 13 din 28 iulie 1960.

[26] A se vedea Z. Ander, I. Bilegan, V. Molnar, Medicină legală, op. cit., p. 156-157; A. Kraus-Manolescu, Pruncuciderea, op. cit., p. 630-631; Gh. Scripcaru, M. Terbancea, Patologie medico-legală, op. cit., p. 477-478; V. Iftenie, D. Dermengiu, Medicină legală, op. cit., p. 376-377.

- mumifierea bontului ombilical, în primele 3-4 zile de la secționare/rupere;
- formarea inelului de demarcație sau șanțului de eliminare la nivelul implantării cordonului, doar dacă copilul a trăit;
- căderea bontului ombilical, într-un interval de 5-10 zile de la secționare/rupere;
- închiderea plăgii ombilicale (prin epitelizare), la 2-3 zile de la căderea bontului ombilical;
- vindecarea completă a plăgii ombilicale, în a treia săptămână de viață;

c) la nivelul capului:
- resorbirea bosei serosanguine, în câteva zile de la naştere (până la 1-2 săptămâni);
- resorbirea cefalhemetomului, în 1-2 luni de la naştere;

d) la nivelul aparatului cardio-vascular:
- închiderea orificiului interatrial Bottal, funcțional la naştere şi anatomic până la 6 săptămâni (poate persista sub forma unei fante);
- închiderea canalului arterial, funcțional în 1-3 ore de la naştere şi anatomic după 2-3 luni;

e) la nivelul tubului digestiv:
- prezența aerului, în stomac la 10-15 minute de la naştere, în intestinul subțire în cel mult 6 ore şi în intestinul gros în 12-20 ore;
- eliminarea meconiului, din intestinul subțire în primele 2-3 zile de la naştere şi din intestinul gros în următoarele 2-3 zile.

4.7. Cu toate că în ce priveşte actul de conduită interzis prin norma de incriminare, nu au fost discuții semnificative în doctrina penală[27], fiind acceptată atât comisiunea (în cazul pruncuciderii active) cât şi omisiunea (în cazul pruncuciderii pasive), apreciem că este foarte important de stabilit şi delimitat acțiunile/inacțiunile voluntare de cele accidentale, întrucât acestea din urmă (cele accidentale) pot atrage încadrarea faptei ca ucidere din culpă sau chiar achitarea.

În ce priveşte uciderea voluntară a copilului nou-născut, în literatura de specialitate, medico-legală, au fost menționate[28]:

a) în cazul pruncuciderii active (acțiuni voluntare):
- traumatisme (cranio-cerebrale, în special), prin lovire cu/de corpuri dure (cu piatră, obiecte din lemn, metal etc.; de perete, duşumea, closet etc.), aruncare de la înălțime, călcare etc. (cu fracturi, contuzii, rupturi ale organelor interne, hemoragii etc.);
- asfixii mecanice, prin strangulare (cu mâna, batistă, fular, basma, cordon, şiret etc.), sufocare [prin compresie a abdomenului/toracelui, aplicare pe față a unor obiecte moi (pernă, plapumă, prosop etc.), introducere de obiecte în gură sau faringe (vată, hârtie, batistă etc.), închidere în diverse obiecte (sac, pungă, geantă, cufăr etc.), îngropare (în pământ, nisip, cenuşă)], înecare (în closet, găleată/lighean cu apă, râu, baltă etc.);
- plăgi tăiate/înțepate în zona capului, gâtului, toracelui, abdomenului (cu cuțit, foarfece etc.);

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[27] în practica judiciară (sub reglementarea Codului penal Carol al II-lea) s-a considerat (în mod greşit) că pruncuciderea se putea săvârşi numai prin acțiune – a se vedea O. Loghin, A. Filipaş, Drept penal român – partea specială, op. cit., p. 44, nota 67.

[28] A se vedea Z. Ander, I. Bilegan, V. Molnar, Medicină legală, op. cit., p. 160; A. Kraus-Manolescu, Pruncuciderea, op. cit., p. 640-642; Gh. Scripcaru, M. Terbancea, Patologie medico-legală, op. cit., p. 481-483; V. Iftenie, D. Dermengiu, Medicină legală, op. cit., p. 371-372.

- otrăvire (cu alcool, arsenic, fosfor etc.);
- ardere (în sobă, cămin, pe câmp etc.);
- expunere intenționată la acțiunea nefavorabilă a factorilor de mediu (temperatură ridicată/scăzută, ploaie, ninsoare etc.)

b) în cazul pruncuciderii pasive (inacțiuni voluntare):
- inaniție, prin nealimentarea nou-născutului (după aproximativ 7 zile);
- hipotermie/hipertermie, prin expunere la temperaturi joase/ridicate (mai mici de 10^0C, respectiv mai mari de 32^0C).

În ce priveşte uciderea involuntară a copilului nou-născut, în literatura de specialitate, medico-legală, au fost menționate[29]:

a) naştere/expulzare precipitată, urmată de traumatism cranio-cerebral (în special), asfixie mecanică, înec (în funcție de locul unde se produce) etc.;

b) scăpare a nou-născutului din mâinile celor ce asistă naşterea, urmată de traumatism cranio-cerebral (în special);

c) asfixie accidentală (cu sânge şi lichid amniotic, membrane fetale etc.);

d) expunere neintenționată la acțiunea nefavorabilă a factorilor de mediu (când mama şi-a pierdut cunoştința ca urmare a unui travaliu prelungit).

4.8. O ultimă problemă controversată este legată de starea de tulburare a mamei în momentul uciderii nou-născutului şi atitudinea psihică a acesteia față de faptă şi urmări.

În doctrina şi jurisprudența penală s-a susținut[30] că, sub reglementarea Codului penal în vigoare, ceea ce atrage încadrarea faptei ca pruncucidere nu este starea de tulburare determinată de împrejurări exterioare procesului fiziologic al naşterii (împrejurarea că inculpata este necăsătorită, că a născut pe ascuns, că după săvârşirea faptei a avut o reacție psihogenă depresivă), ci tulburarea cauzată de o stare psihofiziologică anormală ce, uneori, se poate produce în timpul naşterii; complexul de situații conflictuale premergătoare şi exterioare naşterii, ca şi consecințele acestora asupra psihicului femeii (teama de reacția părinților sau oprobiul celor din jur) nu ar fi decât mobiluri ale săvârşirii faptei, cărora nu li se poate da efect juridic, în înțelesul „tulburare pricinuită de naştere", astfel cum prevede art. 177 C. pen.

În literatura de specialitate, medico-legală, anterioară Codului penal în vigoare, chiar dacă norma de incriminare (art. 465 din Codul penal din 1864) nu impunea vreo condiție în legătură cu starea de tulburare a mamei, s-a precizat[31] că starea particulară de suferință fizică şi psihică, emoția deosebită (chiar la femei normale din punct de vedere psihic) în caz de naştere clandestină, care decurge fără ajutor, pot duce la acte de scurtcircuit, soldate cu moartea fătului.

Relativ recent, tot în această literatură[32], în legătură cu starea de tulburare a mamei (de natură să-i diminueze discernământul), se face distincție între pruncuciderea medicală,

[29] A se vedea Z. Ander, I. Bilegan, V. Molnar, Medicină legală, op. cit., p. 159-160; A. Kraus-Manolescu, Pruncuciderea, op. cit., p. 639-640; Gh. Scripcaru, M. Terbancea, Patologie medico-legală, op. cit., p. 466-467.

[30] A se vedea Decizia nr. 3865/1971 a Tribunalului Suprem, Secția penală, în V. Papadopol, M. Popovici, Repertoriu alfabetic de practică judiciară în materie penală pe anii 1969-1975, Editura Ştiințifică şi Enciclopedică, Bucureşti, 1977, p. 347; O. Loghin, A. Filipaş, Drept penal român – partea specială, op. cit., p. 45, V. Dobrinoiu, Drept penal – partea specială, Teorie şi practică judiciară, op. cit., p. 104.

[31] A se vedea Z. Ander, I. Bilegan, V. Molnar, Medicină legală, op. cit., p. 161.

[32] A se vedea V. Iftenie, D. Dermengiu, Medicină legală, op. cit., p. 370.

în care tulburarea este legată de naştere şi pruncuciderea socială, în care tulburarea este legată de condițiile socio-economice (condiții care ar fi intricate), precizându-se că diminuarea discernământului şi, implicit, a capacității psihice de apreciere a conținutului şi consecințelor socio-negative ale faptei comise, cu reducerea autocontrolului, va determina o îngustare relativă a câmpului de conştiență, ce poate traduce o tulburare psihică tranzitorie (ce constituie adevărată tulburare psihică post partum), dar şi alte tulburări (cum ar fi un episod acut pe un fond preexistent morbid sau debutul unor tulburări psihice endogene) ce nu constituie fundamentul psihic al tulburărilor la care face referire art. 177 C. pen.

În unele studii[33] a fost evidențiată ca şi cauză a numărului mai mare de nou-născuți de sex masculin uciși, starea de ură a mamei față de sarcina pe care a fost nevoită să o poarte şi care a putut fi consecința unui raport sexual întâmplător, a unui viol sau incest.

Aşa cum am mai precizat[34], trebuie avut în vedere faptul că naşterea nu este un proces pur fiziologic, ci un proces psiho-somatic complex care înregistrează şi o serie de emoții, sentimente, dispoziții, afecte (ca teama sau frica de naştere, temerea de a nu muri în cursul naşterii, teama de a nu naşte un copil mort sau cu malformații, temeri care izvorăsc din perspectivele nefavorabile ale propriei situații materiale şi sociale sau ale copilului, ori din sentimentele de ruşine şi dezonoare, în cazul naşterii în afara căsătoriei etc.) ce sunt considerate ca făcând parte din cadrul proceselor afective „normale" şi care, chiar dacă ar putea fi considerate de natură să poată „justifica" (într-o oarecare măsură) uciderea copilului nou-născut, având în vedere actuala formulare a normei de incriminare, nu sunt asimilate stării de tulburare pricinuită de naştere pentru ca fapta să poată fi considerată pruncucidere (în sensul art. 177 C. pen.).

Cu toate acestea, aceste stări nu pot fi ignorate, sunt în legătură cu naşterea şi, (aşa cum precizam mai sus) din moment ce legiuitorul a înțeles să lărgească sfera cauzelor care pot determina o astfel de faptă, la orice stare de tulburare psihică, apreciem că ar fi oportună totuşi, particularizarea acestei stări în sensul de „stare de tulburare în legătură cu naşterea".

Privitor la această condiție (stare de tulburare) combinată cu particularizarea (nu mai târziu de 24 de ore) cerinței temporale (imediat după naştere) a elementului material, trebuie avut în vedere şi faptul că pot apărea situații controversate de genul o mamă care îşi ucide copilul nou-născut în limita celor 24 de ore, aflată într-o stare de tulburare psihică care nu are legătură cu procesul naşterii, să beneficieze de tratamentul penal mai puțin sever iar o mamă care îşi ucide copilul nou-născut după cele 24 de ore, aflată într-o stare de tulburare pricinuită de naştere să nu beneficieze de acest tratament.

Revenind la opiniile exprimate în doctrina penală şi în literatura de specialitate, medico-legală, este interesant că, în literatura de specialitate, medico-legală, psihozele post-partum şi psihoza de lactație sunt considerate[35] tulburări psihice care abolesc discernământul (şi, astfel, dispozițiile art. 177 C. pen. ar fi inoperante) iar în doctrina penală acestea sunt considerate că doar diminuează discernământul (în doctrina penală se foloseşte termenul generic de febră/psihoză puerperală/post-partum atunci când se face referire la starea de tulburare în care se găseşte mama în momentul săvârşirii faptei).

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[33] A se vedea V. Hădăreanu, L. Cocora, Al. Nistor, Analiza cazurilor de pruncucidere în județele Mureş şi Sibiu, în Romanian Journal of Legal Medicine, vol. 15. issue 4, December 2007, p. 293.

[34] A se vedea Gh.-I. Ioniță, Drept penal – partea specială. Analiza dispozițiilor Codului penal (titlul I-V) – pe înțelesul studenților, ediția a II-a revăzută şi adăugită, Editura Universul Juridic, Bucureşti, 2012, p. 79.

[35] V. Iftenie, D. Dermengiu, Medicină legală, op. cit., p. 370.

Mai mult, în doctrina penală[36] chiar s-a ridicat problema (şi se va menține şi sub reglementarea noului Cod penal) dacă această cerință nu conduce la subordonarea soluției (juridice) instanței de concluziile (medicale) raportului de expertiză medico-legală.

De remarcat, şi de această dată, opinia profesorului Dongoroz, în lucrarea „Explicațiile teoretice ale Codului penal român" (1972)[37], conform căreia „[r]ămâne, desigur, ca şi în alte cazuri în sarcina medicinei de a stabili dacă, cum şi când se produc aceste tulburări, existența, intensitatea şi durata lor, odată însă stabilite este rolul dreptului penal de a reține şi a da efecte juridice cuvenite unor asemenea situații".

5. Concluzii şi propuneri de lege ferenda

Față de cele expuse mai sus, în legătură cu problematica uciderii copilului nou-născut de către mamă, redăm succint principalele puncte de vedere exprimate în cadrul acestui studiu menite, considerăm noi, să contribuie la o rezolvare corectă a subiectelor în discuție.

Pentru a pune capăt controverselor privitoare la situația participanților la săvârşirea infracțiunii de ucidere a copilului nou-născut de către mamă, cât şi la situația mamei (aflată în stare de tulburare) ca participant la săvârşirea infracțiunii de omor (precizate mai sus), am apreciat că ar fi de dorit ca legiuitorul român, urmând exemplul legiuitorului italian, să prevadă expres situația acestora introducând, în cuprinsul art. 200 C. pen., două noi alineate [(3) şi (4)] cu următorul conținut:

„(3) Determinarea sau ajutarea, cu intenție, a altei persoane, de către mama aflată în stare de tulburare în legătură cu naşterea, să săvârşească faptele prevăzute în alin. (1)-(2), se sancționează cu pedepsele acolo prevăzute.

(4) Persoana care, cu intenție, determină sau ajută mama, aflată în stare de tulburare în legătură cu naşterea, să săvârşească faptele descrise în alin. (1)-(2), se sancționează cu pedeapsa prevăzută la art. 188 sau art. 193-195, după caz".

În ceea ce priveşte opțiunea legiuitorului de particularizare a momentului „imediat după naştere" cu „dar nu mai târziu de 24 de ore", am apreciat ca apărând nejustificată întrucât (aşa cum explică specialiştii medici legişti) perioada de timp imediat următoare naşterii, în care copilul păstrează semnele naşterii recente (nou-născut), poate să fie mai mare (3 sau chiar 7-10 zile) iar starea de tulburare, chiar cauzată de naştere, poate să survină şi ulterior celor 24 de ore (post-partum-ul precoce) stabilite de legiuitor pentru aplicarea regimului sancționator mai puțin sever.

Întrucât pot apărea situații controversate de genul o mamă care îşi ucide copilul nou-născut în limita celor 24 de ore, aflată într-o stare de tulburare psihică care nu are legătură cu procesul naşterii, să beneficieze de tratamentul penal mai puțin sever iar o mamă care îşi ucide copilul nou-născut după cele 24 de ore, aflată într-o stare de tulburare pricinuită de să nu beneficieze de acest tratament şi (din punct de vedere al probațiunii) va fi foarte dificil de dovedit, fără dubiu, că uciderea s-a produs nu mai târziu de 24 de ore de la naştere (cum se prevede expres, pentru angajarea răspunderii penale pentru săvârşirea infracțiunii de pruncucidere) am apreciat că s-ar impune (pentru evitarea unor astfel de situații nedorite) înlăturarea din conținutul art. 200 din noul Cod penal a condiționării cerinței temporale „nu mai târziu de 24 de ore" sau înlocuirea cerinței temporale şi a

[36] A se vedea V. Dobrinoiu, Drept penal – partea specială, Teorie şi practică judiciară, op. cit., p. 104.

[37] A se vedea V. Dongoroz, Pruncuciderea, în V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, V. Roşca, Explicații teoretice ale Codului penal român, op. cit., p. 204.

condiționării acesteia cu cerința „înainte de expirarea termenului legal de declarare a naşterii” (soluția adoptată de legiuitor în 1936).

De asemenea, privitor la cerința ca mama să se afle în stare de tulburare psihică atunci când ucide copilul nou-născut, am considerat că ar fi oportun particularizarea acestei stări în sensul de „stare de tulburare în legătură cu naşterea”, întrucât doar aceasta ar putea fi considerate de natură să poată „justifica” (într-o oarecare măsură) uciderea copilului nou-născut.

În ce priveşte limitele pedepsei fixate de legiuitor, am apreciat că acesta a acordat o clemență mult prea mare unor astfel de fapte, cu toate „concesiile” ce le-a operat, ceea ce nu va conduce la prevenirea lor; considerăm că ar fi mai potrivită păstrarea limitelor de pedeapsă din Codul penal în vigoare.

Având în vedere cele ce preced, propunem ca art. 200 din noul Cod penal să aibă următorul conținut:

„(1) Uciderea copilului nou-născut imediat după naştere săvârşită de către mama aflată în stare de tulburare în legătură cu naşterea, se pedepseşte cu închisoarea de la 2 la 7 ani”.

(sau)

„(1) Uciderea copilului nou-născut înainte de expirarea termenului legal de declarare a naşterii, săvârşită de către mama aflată în stare de tulburare în legătură cu naşterea, se pedepseşte cu închisoarea de la 2 la 7 ani”.

„(2) Dacă faptele prevăzute în art. 193-195 sunt săvârşite asupra copilului nou-născut imediat după naştere de către mama aflată în stare de tulburare în legătură cu naşterea, limitele speciale ale pedepsei sunt de o lună şi, respectiv, 4 ani”.

(sau)

„(2) Dacă faptele prevăzute în art. 193-195 sunt săvârşite asupra copilului nou-născut înainte de expirarea termenului legal de declarare a naşterii, de către mama aflată în stare de tulburare în legătură cu naşterea, limitele speciale ale pedepsei sunt de o lună şi, respectiv, 4 ani”.

„(3) Determinarea sau ajutarea, cu intenție, a altei persoane, de către mama aflată în stare de tulburare în legătură cu naşterea, să săvârşească faptele prevăzute în alin. (1)-(2), se sancționează cu pedepsele acolo prevăzute.

(4) Persoana care, cu intenție, determină sau ajută mama aflată în stare de tulburare în legătură cu naşterea, să săvârşească faptele descrise în alin. (1)-(2), se sancționează cu pedeapsa prevăzută la art. 188 sau art. 193-195, după caz”.

RISCURI POTENȚIALE PENTRU SECURITATEA ECOLOGICĂ ŞI, IMPLICIT, PENTRU ORDINEA PUBLICĂ ŞI SECURITATEA NAȚIONALĂ A ROMÂNIEI

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Abstract:
Relația dintre mediu şi securitate a fost în atenția specialiştilor dar şi a opiniei publice.
Conceptul de securitate ecologică a fost, inițial, promovat de militanții pentru protecția mediului şi organizațiile neguvernamentale, devenind, în prezent, de o extremă actualitate.
Aşa cum au susținut experții, adevăratele riscuri la adresa securității naționale sunt de natură nemilitară, şi se manifestă în domeniile economic, financiar, social şi ecologic.
Riscurile pentru securitatea ecologică şi, implicit, pentru ordinea publică şi securitatea națională, se pot materializa în catastrofe, cu efecte atât în plan intern şi extern.

Keywords: securitate națională, ordine publică, securitate ecologică, riscuri

1. Conceptul „securitate ecologică”

Conceptul de securitate ecologică a fost avansat la sfârşitul anilor 1980, de către militanții pentru protecția mediului, organizațiile neguvernamentale şi acceptat de oamenii politici responsabili şi devine, în prezent, de o extremă actualitate[1].

Acest concept a fost enunțat politic pentru prima dată în Romania[2] în Platforma Program a Forumului Ecologic al PDSR în anul 1996, rămânând până în prezent nedetaliat şi neaplicat în practică prin acte legislative.

Potrivit acestuia, ***securitatea ecologică*** „poate fi reprezentată printr-un pachet de politici locale şi/sau regionale, reglementări, măsuri, standarde, instrucțiuni, proceduri, teorii, concepte ş.a. aplicate încă din fazele de preconcepție şi de preproiectare, ca parte integrantă a oricăror proiecte sau activități umane, cu risc semnificativ de mediu, real sau potențial, menite să asigure organizarea, managementul, desfăşurarea, supravegherea şi controlul oricăror activități sau evenimente în deplină siguranță de funcționare sau desfăşurare, pentru personalul tehnic, populația din zonele înconjurătoare şi mediul ambiant, să preîntâmpine şi să limiteze consecințe ale accidentelor de mediu, catastrofelor naturale sau ale actelor de terorism ecologic, ale perturbării echilibrului şi calității ecosistemelor Terrei, să asigure menținerea calității vieții”.

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[1] A se vedea şi Duțu M., Un concept ignorat: securitatea ecologică, articol disponibil la http://www.sfin.ro/articol_4923/un_concept_ignorat_securitatea_ecologica%0D%0A.html.

[2] A se vedea şi NHN ECOINVEST S.R.L., Considerații asupra conceptului de „securitate ecologică”, articol disponibil la http://www.nhn.ro/articole.htm.

2. Riscuri potențiale pentru securitatea ecologică şi, implicit, pentru ordinea publică şi securitatea națională a României

Studiile de specialitate[3] au relevat trei categorii de amenințări care ar ***defini dimensiunea ecologică a securității***:

- *amenințările din partea mediului natural la adresa civilizației umane*, care nu sunt rezultatul acțiunilor umane (ca exemple, menționăm: cutremurele, erupțiile vulcanice, căderile de meteoriți, ciclul natural de întoarcere la o epocă glaciară);

- *amenințările cauzate de acțiunile umane asupra sistemelor naturale sau structurilor planetei*, atunci când schimbările făcute par a constitui amenințări existențiale la adresa unei părți sau a întregii civilizații (un exemplu evident este poluarea, care are ca efect distrugerea ecosistemelor, dar şi a stratului de ozon);

- *amenințările cauzate de acțiunile umane asupra sistemelor naturale sau structurilor planetei*, atunci când schimbările făcute nu par a constitui amenințări existențiale la adresa unei părți sau a întregii civilizații, însă, pe termen lung, există efecte perverse (de exemplu, exploatarea resurselor minerale).

Aceste trei categorii descrise mai sus ar cuprinde *o varietate de probleme*, precum[4]:

- distrugerea ecosistemelor cauzată (în special) de poluare, modificarea climei, distrugerea stratului de ozon, pierderea biodiversității, defrişarea pădurilor, deşertificarea, etc.;

- probleme energetice cauzate (în special) de reducerea, raritatea şi distribuția inegală a resurselor naturale, etc.;

- probleme demografice cauzate (în special) de creşterea populației şi (implicit) a consumului în raport cu resursele disponibile, condițiile insalubre de trai şi răspândirea bolilor infecțioase, urbanizarea irațională, etc.;

- probleme legate de hrană cauzate (în special) de sărăcie, foamete, consum în exces, degradarea terenurilor cultivabile şi a resurselor de apă, etc.;

- probleme economice cauzate (în special) de menținerea unor modele nesustenabile de producție, instabilitate socială legată de existența lipsurilor şi a distribuției inegale a resurselor etc.;

- conflicte sociale cauzate (în special) de războaie (care generează şi pierderi ecologice).

Aşa cum se poate constata, cu excepția categoriei „distrugerea ecosistemelor", nici una dintre celelalte probleme nu reprezintă una exclusiv ecologică.

Din nefericire, aceste probleme se intersectează cu celelalte dimensiuni ale existenței umane, şi implicit, ale securității, fiind privite din punctul de vedere al impactului pe care îl au asupra mediului natural; mai mult, degradarea mediului include un lung şir de disfuncții majore şi complexe, care se întrețin unele pe altele, sporind lanțul vulnerabilităților[5]. Astfel, despăduririle conduc la degradarea solului, care influențează negativ producția agricolă; scăderea producției agricole afectează rezervele de hrană ale populației, determinând scăderea coeziunii sociale şi, implicit, mişcări sociale[6].

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[3] Buzan B., Waever O., de Wilde J., Security: A New Framework for Analysis, Lynne Rienner Publishers Inc., Colorado, USA, 1998, citat de Băhnăreanu C., în Băhnăreanu C., Dimensiunea ecologică a securității, în Colocviu Strategic, nr. 2/2008, p. 2.

[4] A se vedea Băhnăreanu C., op. cit., p. 2.

[5] Idem.

[6] Idem.

Așa cum afirmau specialiștii în securitate[7], chiar dacă România nu este și nu se va afla (în viitorul apropiat) în fața vreunei amenințări majore de tip militar clasic, unele estimări realiste evidențiază adevăratele riscuri la adresa securității naționale, care sunt de natură nemilitară, și se manifestă în domeniile economic, financiar, social și *ecologic*.

Aceste riscuri pentru securitatea ecologică și, implicit, pentru ordinea publică și securitatea națională, se pot materializa în catastrofe, cu efecte atât în plan intern și extern.

2.1. Rezervoarele subterane de saramură reziduală

În România, activitățile miniere de sare prezintă unele particularități[8].

Astfel, întrucât formațiunile saline apar (de regulă) ca aflorimente la suprafață (sau suportă formațiuni de acoperiș cu grosime scăzută), activitățile de exploatare a sării sunt (de regulă) foarte aproape de suprafață. În cele mai multe din cazuri, formațiunile inițiale din acoperișul zăcământului au fost îndepărtate în urma acestor activități miniere de suprafață și, datorită acestei situații complexe, procesele de dizolvare datorate apelor de suprafață sunt foarte extinse.

Rezultatul mai multor secole de exploatare îl constituie o concentrare de lucrări miniere diverse (de exemplu, puțuri vechi, găuri de foraj, cariere, cavități etc.) în care rambleierea artificială este rară iar închiderea abatajelor, galeriilor și a camerelor abandonate s-a produs (de regulă), prin prăbușire necontrolată. În aceste condiții, majoritatea camerelor prăbușite sunt umplute cu noroi sau saramură, fapt care conduce la o subsidență minoră care se va intensifica însă cu siguranță în viitor.

În cadrul aceluiași masiv de sare, influența activităților miniere istorice necunoscute și a activităților de exploatare prin dizolvare, poate conduce la o situație hidrogeologică și geomecanică impredictibilă.

Ca rezultat al particularităților enumerate mai sus, pe structurile din Ocna Mureș (în apropierea râului Mureș), Ocnele Mari – Govora (în apropierea râului Olt) și Tg. Ocna, (în apropierea râului Trotuș) s-au format imense rezervoare subterane de saramură reziduală, care reprezintă un real pericol la adresa securității ecologice.

Deversarea unor cantități mari de saramură, în mod accidental, în râurile Mureș, Olt și Trotuș, afluenți direcți și indirecți ai Dunării, poate transforma acest fluviu dulce într-un mediu sărat, ostil și greu de refăcut (pentru fauna și flora acestuia); exceptând efectele asupra mediului pot fi produse și alte efecte directe asupra populației și pagube materiale (deteriorarea sau scoaterea din uz a stațiilor de apă potabilă); de asemenea, nu ar trebui neglijate nici litigiile care pot apărea cu statele din vecinătatea României (Ungaria, Iugoslavia, Bulgaria și Ucraina)[9].

O deversare notabilă de saramură s-a produs la Ocnele Mari, la 13.09.2001, în pârâul Sărat și râul Olt, ca urmare a scufundării (în zona sondei 337) și deversării acesteia pe versanți la SC Miniera SA. Au fost înregistrate depășiri ale concentrației maxime admise pentru cloruri, au fost distruse 12 locuințe și evacuate 120 familii. Fenomenul s-a repetat în

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[7] Marin I., Comunitatea de informații, Ed. Academiei Naționale de Informații, București, 2004, citat de Rizea M., Terorismul ecologic și biologic Coșmarul lumii contemporane nu trebuie să devină realitate!, în Gândirea militară românească, nr. 2, (aprilie) 2007, p. 87.

[8] WISUTEC - Mon Tec - ICPMRR, Manual de închidere a exploatărilor de sare, p. 7, disponibil la http://ump.minind.ro/Documente/Manual%20Sare/Romana/Salt_Manual.pdf.

[9] Rizea M., Terorismul ecologic și biologic Coșmarul lumii contemporane nu trebuie să devină realitate!, op. cit., p. 88.

2002, 2004, 2005, 2009. La Ocnele Mari sunt 4 câmpuri de sonde de exploatare a sării, iar datorită metodei de exploatare, „exploatare umedă", dar şi datorită exploatării iraționale, nepăsării şi neluării măsurilor de siguranță, perimetrele de exploatare s-au unit, formând adevărate caverne care s-au prăbuşit. Interesant este faptul că însăşi existența oraşului Ocnele Mari este pusă sub semnul întrebării întrucât, din ce 26 km^2 cât are oraşul, 20 km^2 cuprinde zăcăminte omologate de Agenția Națională a Resurselor Minerale (ANRM)[10].

Probleme apar nu numai în zonele de exploatare, dar şi în zonele traversate de conductele de transport a saramurii; o astfel de deversare s-a produs la Oneşti, la 19.09.2009, ca urmare a încercării de sustragere a unui ventil de la conducta de retur, 12 tone de saramură fiind deversate[11].

2.2. Minele de cărbune şi petrol închise necorespunzător

Ca urmare a programelor de restructurare energetică, şi datorită unor proiecte şi tehnologii de închidere care s-au efectuat şi aplicat în mod empiric, de către firme neautorizate şi fără posibilități financiare şi logistice adecvate, zecile de mine de cărbune şi petrol închise în ultimii 20 ani, în diverse zone ale țării, constituie un real pericol.

Dacă ținem cont că sunt peste 16.000 sonde abandonate de fosta SNP Petrom, putem anticipa amploarea fenomenului.

Potrivit specialiştilor[12], conservarea minelor de poate realiza în mai multe variante:

- conservarea în vederea posibilei valorificări;
- conservarea în vederea închiderii;
- conservarea cu asistență tehnică şi inspecție permanentă;
- conservarea pasivă monitorizată;
- conservarea în vederea închiderii.

Dintre aceste variante, conservarea cu asistență tehnică şi inspecție permanentă, atrage în mod deosebit atenția întrucât se aplică minelor cu degajări importante de gaze de zăcământ, pericol de autoaprindere, cantonate în/între orizonturi acvifere care generează ape subterane sau de zăcământ (ape acide, etc.) şi care necesită menținerea căilor de acces, a aerajului, evacuării apelor precum şi a facilităților de suprafață pentru tratarea apelor de mină, etc.

Cu toate acestea, nu este aplicată întrucât aceste mine presupun menținerea unui număr de angajați care execută lucrările legate de aeraj, evacuare şi tratare a apelor precum şi alte lucrări specifice menținerii în stare de funcționare a galeriilor din rețeaua generală de aeraj şi de evacuare a apelor.

În aceste condiții, datorită acestor închideri necorespunzătoare, se produc surpări şi alunecări de teren, acumulări de „gaze de mină" şi explozii devastatoare.

De amintit cazul de la Zemeş din 08.12.2010 (în jurul orei 03.00) când s-a produs o explozie de mare amploare, ca urmare a acumulării unei pungi de gaze, cauzată de alunecările de teren din anul 1992. Această acumulare de gaze ar fi fost produsă din cauze

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[10] EcoMagazin, Blestemul sării la Ocnele Mari, 21.01.2009, disponibil la http://www.ecomagazin.ro/blestemul-sarii-la-ocnele-mari/.

[11] Observator – ediție de Bacău, 12 tone de saramură deversate la Oneşti, disponibil la http://www.observatordebacau.ro/?s=12+tone+de+saramur%C4%83+deversate+la+Onesti&x=0&y=0.

[12] DGRM-GCPIM, Manual de închidere a minelor, p.14-15, disponibil la http://www.minind.ro/domenii_sectoare/minerit/MANUALUL_DE_INCHIDERE_A_MINELOR.pdf.

naturale, la care au concurat cauze antropice, respectiv lucrările tehnice de exploatare a petrolului constând în săpături şi rambleuri ale drumurilor, platformelor de sonde, precum şi pozarea de conducte, rezervoare sau bataluri. În urma exploziei un bărbat a suferit arsuri grave (care ar fi necesitat pentru vindecare 90-95 de zile de îngrijiri medicale) iar o altă victimă a suferit arsuri de gradul II şi III (rămânând în spital 25 de zile). Explozia a distrus şi locuința precum şi toate bunurile mobile aflate în imobil. 160 copii care învățau în şcoala din apropiere au fost evacuați iar alte şase familii şi-au părăsit gospodăriile[13].

2.3. Iazurile de decantare şi haldele de steril

Exploatările miniere, prin activitățile specifice pe care le implică, au un impact semnificativ asupra mediului. O mare parte din acest impact este reprezentat de depozitele de produse miniere şi de steril rezultate din procesele de extracție şi de procesare, care pot genera accidente ecologice. În funcție de modul de transport şi stocare a acestora, se face distincție între:

- halde, unde depozitarea şi stocare se face în stare uscată;
- iazuri de decantare, unde depozitarea şi stocare se face în amestec cu apă.

Printre problemele asociate acestor depozite, de menționat[14]:

- instabilitatea taluzurilor,
- generarea de ape acide şi descărcarea de substanțe toxice, conducând la contaminarea apelor de suprafață şi subterane din aval,
- poluarea cu praf şi eroziunea,
- degradarea terenurilor.

Potrivit Direcției Generale Resurse Minerale din cadrul Ministerului Economiei, Comerțului şi Mediului de Afaceri, în prezent (iulie 2012), pe teritoriul țării ar exista în jur de 700 depozite de deşeuri miniere aparținând obiectivelor miniere cu activitate sistată, 627 halde[15] şi 68 iazuri de decantare[16].

Dintre aceste iazuri de decantare, cea mai mare parte se găsesc în Carpații Orientali (în apropierea minelor/unităților miniere Borşa, Herja, Băiuț, Cavnic, Valea Roşie, Tăuşani, Gura Băii, Bolduț, Bălan, Puț, Fagul Cetății, Santimbru, Ostra, Călimani, Leşu Ursului, Dealu Negru, Ostra, Rodna, Dobrei Est, Harghita Băi); urmează Munții Apuseni (în apropierea minelor/unităților miniere Certej, Roşia Montana, Iara, Brad, Brusturi, Zlatna, Cuprumin, Baia de Arieş, Băița), Carpații Meridionali (în apropierea minelor/unităților miniere Deva, Teliuc, Boița, Baia de Aramă, Ocna de Fier, Sasca Montană, Ruşchița, Tăuşani, Baia de Fier, Petrila) şi Munții Dobrogei (în apropierea minei Altân Tepe).

Din nefericire, în ce priveşte haldele, situația este chiar mai delicată întrucât deasupra multora dintre ele au fost construite oraşe, cartiere, unități sanitare sau de tratament.

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[13] Deşteptarea.ro, Cercetări finalizate, dosar trimis în instanță: OMV Petrom va plăti pentru dezastrul de la Zemeş, 17.02.2012, disponibil la http://www.desteptarea.ro/cercetari-finalizate-dosar-trimis-in-instanta-omv-petrom-va-plati-pentru-dezastrul-de-la-zemes.html.

[14] Ministerul Economiei, Comerțului şi Mediului de Afaceri, Direcția Generală Resurse Minerale, Reabilitarea haldelor de roci sterile şi a iazurilor de decantare, p. 3, disponibil la http://www.minind.ro/domenii_sectoare/minerit/Mine_Anexa_9.pdf.

[15] Ministerul Economiei, Comerțului şi Mediului de Afaceri, Direcția Generală Resurse Minerale, Inventarul depozitelor de deşeuri miniere aparținând obiectivelor miniere cu activitate sistată, iulie 2012, Halde, disponibil la http://www.minind.ro/resurse_minerale/Inventar_Halde_iulie_2012.pdf.

[16] Ministerul Economiei, Comerțului şi Mediului de Afaceri, Direcția Generală Resurse Minerale, Inventarul depozitelor de deşeuri miniere aparținând obiectivelor miniere cu activitate sistată, iulie 2012, Iazuri de decantare, disponibil la http://www.minind.ro/resurse_minerale/Inventar_Iazuri_de_Decantare_iulie_ 2012.pdf.

Specialiştii afirmă[17] că localităţi precum Ciudanovița, Lisava, Dobrei, Natra, Mehadia, Anina, Reşița, Ruşchița, Rusca Montană (județul Caraş-Severin), Otvos, Bârzava, Moneasa (județul Arad), Grințieş şi Tulgheş (județul Neamț), Valea Varniței şi Vf. Boul (Munții Poiana Ruscăi) ar trebui monitorizate atent întrucât sub ele există încă mari cantităţi de deşeuri active care pot provoca boli grave.

De asemenea, prefabricatele din deşeuri, generează probleme de sănătate; astfel, la începutul anilor '90, presa locală şi cea centrală au relatat, pe larg, riscurile la care fuseseră expuse, ani de zile, mai multe familii ploieştene care locuiau în apartamente construite din cărămizi (tip BCA) fabricate din deşeuri din haldele de la fostul Combinat chimic „Romfosfochim" – Valea Călugărească[18].

În aceiaşi ordine de idei, de amintit accidentului ecologic din 30.01.2000, de la Baia Mare, catalogat drept cea mai mare catastrofă ecologică din Europa după explozia de la Cernobîl[19].

Atunci cca. 100.000 m^3 de apă contaminată cu cianuri, prin deversarea apelor reziduale din iazul de decantare de la Bozânța (aparținând societății Aurul Baia Mare), au pătruns prin râurile Săsar, Lăpuş, Someş şi Tisa, în Dunăre.

Din fericire, raportul întocmit de experții internaționali care au venit să constate urmările accidentului au arătat că poluarea nu a fost atât de gravă, cum au pretins „vecinii" unguri, întrucât concentrațiile de cianură şi metale grele au scăzut rapid în Tisa şi Dunăre, iar habitatul de plante şi peşti s-a refăcut (aproape complet) la câteva zile după scurgere, efectele toxice asupra ecosistemului acvatic neregăsindu-se prea departe de sursa poluării. Cu toate acestea, România a plătit ungurilor 100 de milioane de dolari despăgubiri şi a fost „trasă de urechi" de toată Europa[20].

Oricum, şi din nefericire, „istoria" s-a repetat, dar, de această dată, vinovați au fost „vecinii" unguri.

Conform relatărilor presei[21], un rezervor al companiei Magyar Aluminium (MAL ZRT) a cedat, provocând o „inundație de nămol roşu". Patru persoane (printre care şi un bebeluş) au fost ucise, 10 persoane erau date dispărute şi alte peste o sută au fost rănite.

Guvernul de la Budapesta a decretat marți starea de urgență în trei comitate din vestul Ungariei. Reziduurile chimice scurse din rezervorul avariat au inundat, luni după-amiază, 230 de case de pe 19 străzi, din localitatea Devecser. În mai multe zone din apropiere nivelul inundațiilor cu aceste reziduuri, de culoare roşie, atingeau doi metri[22].

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[17] Rizea M., Terorismul ecologic şi biologic Coşmarul lumii contemporane nu trebuie să devină realitate!, op. cit., p. 90.

[18] Idem.

[19] Lucacel I., Crişan M., Exploatările miniere trec, iazurile de decantare rămân, 14.06.2007, disponibil la http://www.hotnews.ro/stiri-presa_regionala_arhiva-1704460-exploatarile-miniere-trec-iazurile-decantare-raman.htm.

[20] Libertatea.ro, După accidentul ecologic din anul 200, noi le-am plătit ungurilor 100 de milioane de $, 17.10.2010, disponibil la http://www.libertatea.ro/detalii/articol/dupa-accidentul-ecologic-din-anul-2000-noi-le-am-platit-ungurilor-100-de-milioane-307560.html.

[21] Goțiu M., Dezastru ecologic în Ungaria. Poate fi comparată Roşia Montană cu Kolontar?, în voxpublica, din 06.10.2010, disponibil la http://voxpublica.realitatea.net/politica-societate/dezastrul-ecologic-din-ungaria-poate-fi-comparata-rosia-montana-cu-kolontar-53087.html.

[22] Stoica M., Iana C, Sbîrn C., Dezastru ecologic în trei comitate din Ungaria. Presa avertizează că poate fi afectată întreaga Europă de Est, în adevărul.ro din 05.10.2010, disponibil la http://www.adevarul.ro/international/europa/Ungaria_a_instituit_stare_de_urgenta_in_trei_comitate-dupa_dezastrul_ecologic_0_347965473.html.

2.4. Rețelele de transport de petrol şi produse petroliere

România dispune de una dintre cele mai vechi şi mai dense rețea de conducte transport țiței şi alte produse petroliere din lume; încă din anul 1901 au fost puse bazele activității de transport țiței prin conducte, fiind construită prima conductă de transport țiței între Buştenari şi gara CF Băicoi[23].

În țara noastră, rețeaua de transport a țițeiului (intern şi din import), derivatelor sale (gazolină, condensat şi etan lichid), precum şi a altor produse petroliere, are în jur de 4.000 km. de conducte şi este concentrată în Dobrogea, Muntenia, Oltenia, Banat şi Crişana.

Pericolul potențial pe care îl prezintă aceste rețele este foarte ridicat întrucât sunt destul de vechi şi neîntreținute.

Potrivit specialiştilor[24], disfuncțiile care pot genera un accident tehnic sunt:

- de natură tehnică, asociate concepției, realizării şi exploatării acestor rețele;
- datorate factorului uman;
- asociate pregătirii şi organizării defectuoase a activității de mentenanță şi exploatare tehnologică;
- datorate incompetenței şi lipsei de informare;
- datorate factorilor externi aleatorii.

Ultima inspecție tehnică a conductelor s-a făcut în perioada 2004-2005, în vederea stabilirii costurilor pentru retehnologizare şi modernizare; numai pentru conductele de transport Ploieşti-Constanța, Ploieşti-Bucureşti şi Midia-Constanța, costurile cu retehnologizarea depăşeau, în acea perioadă, suma de 135 milioane euro[25].

Dacă luăm în considerare şi faptul că majoritatea traseelor conductelor magistrale de țiței, derivați şi produse petroliere, supra/subtraversează principalele cursuri de ape curgătoare (ca Dunărea, Oltul, Mureşul, Argeşul, Trotuşul, Prahova, etc.), ce constituie şi sursele de apă potabilă ale marilor oraşe din țară, avem conturată o imagine a gravității şi amplorii unui potențial dezastru.

De altfel, mass-media sesizează periodic accidente tehnice ce se produc la aceste rețele şi urmările, din fericire, locale (în cele mai multe cazuri), pe care le produc. Cu toate acestea, consecințele nu se limitează doar la poluarea suprafeței de teren adiacente ci se produc şi decesul celor care le exploatează sau intervin pentru remedierea situației.

2.5. Depozitele de deşeuri radioactive

Potrivit specialiştilor[26], în țara noastră, sunt trei tipuri de activități principale care generează deşeuri radioactive:

a) extracția şi prepararea minereurilor de uraniu, care generează deşeuri radioactive rezultate din mineritul şi prelucrarea minereurilor de uraniu;

b) producerea de energie electrică pe cale nuclear, care generează

- combustibil nuclear uzat rezultat din operarea reactorilor nucleari energetic;

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[23] CONPET, Cine suntem, disponibil la http://www.conpet.ro/cine_suntem.html.

[24] Dumitran C., Ghid pentru prevenirea poluării accidentale în activitatea de extracție, separare şi transport țiței, gaze, 12.02.2012, disponibil la http://www.aevum-consult.ro/fara-categorie/ghid-poluari-accidentale.

[25] Stoica A., Viitorul rețelei naționale de transport al produselor petroliere, disponibil la http://www.petroleumreview.ro/index.php?option=com_content&view=article&id=409:sub-semnul-intrebarii&catid=47:oil-a-gas&Itemid=165.

[26] Agenția Nucleară şi pentru Deşeuri Radioactive, Surse şi tipuri de deşeuri radioactive, disponibil la http://www.agentianucleara.ro/?page_id=277.

- deşeuri radioactive rezultate din fabricarea combustibilului nuclear şi operarea reactorilor nucleari energetic;
- deşeuri radioactive rezultate din dezafectarea instalaţiilor nucleare din sectorul energetic;

c) activităţi instituţionale (aplicaţii ale tehnicilor şi tehnologiilor nucleare în medicină, industrie, agricultură şi cercetare), care generează:

- combustibil nuclear uzat rezultat din operarea reactorilor nucleari de cercetare;
- deşeuri radioactive rezultate din operarea reactorilor nucleari de cercetare;
- deşeuri radioactive rezultate din producerea şi utilizarea radionuclizilor;
- deşeuri radioactive rezultate din dezafectarea instalaţiilor nucleare din sectorul instituţional;
- surse închise uzate.

Problema deşeurilor radioactive este una extrem de controversată datorită pericolului potenţial pe care acestea îl prezintă pentru om, în special.

În literatura de specialitate[27] au fost prezentate *soluţiile propuse* pentru rezolvarea acestei probleme:

a) *expulzarea în spaţiu*, o soluţie posibilă din punct de vedere tehnic, datorită volumului mic al deşeurilor, dar care este costisitoare, întrucât implică costuri mari de lansare, dar şi periculoasă, întrucât există riscul exploziei rachetei purtătoare, transformându-se într-o armă de distrugere în masă[28];

b) *stocarea în depozite special amenajate*, o soluţie adoptată de SUA, dar şi aceasta prezintă riscuri întrucât, pe lângă faptul că pot fi sustrase, recipientele se degradează în timp şi permit substanţelor radioactive să ajungă pe sol, în apă, etc. [29];

c) *reprocesarea deşeurilor şi reciclarea unei mari părţi a acestora*, este soluţia la care au recurs unele state dezvoltate (Franţa, Marea Britanie, Japonia, etc.), care, cu toate că este costisitoare, este ecologică întrucât 97% din deşeuri sunt recuperate[30];

d) *depozitarea geologică* (la peste 100 metri sub pământ sau în minele de sare), este o soluţie ecologică, care prezintă unele avantaje, respectiv blochează radiaţia, întrucât sunt geologic stabile, nu conţin apă, plasticitatea terenului produce fenomenul de „curgere" acoperind şi cele mai mici fisuri etc.[31]

În România, depozitarea intermediară a deşeurilor radioactive se realizează la unităţile generatoare (SNN/CNE Cernavodă, SNN/FCN Piteşti, RAAN/SCN Piteşti, IFIN-HH Măgurele, CNU Feldioara, CNU Suceava, CNU Bihor şi CNU Banat)[32].

Depozitarea definitivă a deşeurilor radioactive se realizează la IFIN-HH Băiţa (Bihor), singurul depozit de acest gen din ţară, situat la 840 m., în două galerii de exploatare abandonate ale minei de uraniu Băiţa, care a început să funcţioneze în anul 1985, având o capacitate de 5.000 m^3 şi stocate 1.949 m^3 (la nivelul anului 2011).

Încă din anul 2009, se încearcă construirea unui nou depozit de deşeuri radioactive la Saligny (Constanţa), dar se întâmpină dificultăţi din partea societăţii civile, chiar în legătură cu securitatea ecologică a unui astfel de amplasament, la mai puţin de 2 km de zonele populate.

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[27] Ioniţă G. I., Dreptul protecţiei mediului, Ed. Universul Juridic, Bucureşti, 2010, p. 306.
[28] Idem.
[29] Idem.
[30] Idem.
[31] Idem.
[32] Agenţia Nucleară şi pentru Deşeuri Radioactive, Raport de activitate anual, 2011, p. 13-14, disponibil la http://www.agentianucleara.ro/Doc/Raport%20de%20Activitate%20Anual%202011.pdf.

CHALLENGES OF THE BAKA PIGMIES FROM CAMEROON. AN EMPIRICAL STUDY

ADRIAN-DAN VÎLCAN

Abstract:

The current study is a continuation of a previous study that has put in the spot light the legal international and national framework that regulates the rights and obligations of the Baka pigmies. Having already analysed what the literature has to say about this subject, I oriented the current research to be an empirical one in which the Baka people were interviewed in order to find out more about their mundane problems and their real life interaction within the legal frameworks set by the international scene and the Cameroonian government.

Keywords: baka pigmies; racism; Africa; Cameroon; international provisions; questionnaire, respondents

INTRODUCTION

Baka people are a group of 'pygmies' that live in Central and Western Africa. They are present in large rainforest areas in Cameroon, Gabon, the Republic of Congo and the Central African Republic. Their lifestyle is semi-nomadic, based almost entirely on the rainforest resources. Baka pigmies are almost exclusively hunter-gatherers, and, thus, dependent on trade in order to obtain agricultural products. Their main trade partners are their Bantu neighbours, with whom the Baka have shared a co-dependence, almost symbiotic, relationship for centuries[1].

Baka people were analysed in a series of texts and their problems were attentively analysed. Some of their biggest challenges are: deforestation, poaching, overhunting, difficulties in accessing the labour market, very low literacy rate, racism, lack of representation.

These problems are more or less mentioned in the literature. However, there direct impact and other more detailed and intimate problems remain in most cases hidden from the eyes of general public. Therefore, this research is an empirical one in which two Baka camps are investigated by using a questionnaire about their problems and about their interaction with other population in the legal international and national framework. The context was very favourable for such a study study, working with an NGO which was trying to better the life of marginalized people from Cameroon, in 2010 I got in contact with the Baka people during my one month study visit to Cameroon. The current study presents the results of the data that I have collected while living with two different Baka tribes in Cameroon.

Research Method:

This study is the result of a Field Study that took place in Cameroon between 30th March and 31st April 2010. More specifically, in the Reserve of DJA near Mindourou a

[1] Vîlcan A.D. – Vîlcan A.D. – Challenges of the Baka Pigmies from Cameroon. A theoretical perspective, 2013, p. 3

questionnaire was applied to two different Baka camps. I also questioned in Mindourou the representative of a local NGO called OADIPE which was working on Baka pigmies' issues, the representative of the Pallisco logging company and the chef of district. The other inquiry was held if Yaoundé with the representative of an International NGO called St. Nejos which was building schools for the Baka people in the South of Cameroon at that time.

This study is an exclusively qualitative one aimed to seek responses from key persons; for example in the Baka people interviews they were organised into focus groups, so they could express more freely and state their problems as a community. These focus groups consisted of a tribal authority figure (tribal spokesman), an elder, a middle age man or woman and a youth but due to field constraints the others were allowed to participate if they requested. When dealing with NGOs, I went directly to their representatives, considering them the most knowledgeable persons in terms on projects, aims and previous realizations. I tried very hard to get in touch with a representative of the state but all I obtained was a discussion with the chef of district from Mindourou which I was not allowed to record and with quite vague answers.

All the interviews were quite freely held in the sense that they were cumulative, for instance, one question may have led to another which was not originally planned. This way aimed to obtain the necessary information as well as extra relevant information that would otherwise have easily been missed. Before the interviews it was made clear to the respondents that the attributes of the public were studied, and they were always asked to answer the questions on behalf of the people in general, especially in the interviews with the two Baka camps. Therefore the opinions presented in this study are considered to be the general thoughts of the Baka people although the respondents from the focus groups were not representing groups of people in the formal sense. Moreover, I kept in mind when I formulated the questions that the qualitative interviews must be conducted at the level of language of the respondents[2].

When conducting the interviews with the Baka pigmies Mr. Nzol Bissack Honoré was interpreter due to the fact that the Baka generally did not speak French or English. There are some disadvantages in using an interpreter, such as not obtaining the 100% accurate translations and that the translations can be affected by the interpreters' own opinions. Another disadvantage is that by using a middleman one may not be able to establish the greatest desirable contact with the respondent, but this was not our case, as both tribes were actually thrilled that somebody cares about their problems and is willing to pay them for an interview. This study did not experience many problems regarding the translation due to the professionalism of Mr. Nzol Bissack, a person who had previously conducted many field studies with his NGO. He tried to be as impartial as possible.

Also, great importance was paid to interpretation – which is much more subjective, resulting from the effort of sense making – a human activity that includes intuition, past experience, emotions[3]. For example, in this case, there is no official statement on what can

[2] Bruce L. BERG (editor), *Qualitative Research Method for the Social Sciences,* 4th ed. Boston, 2001, Allyn and Bacon, p. 87.

[3] Ibid pp. 33.

be done to improve the life of the Baka people, but by making use of the past experience and thinking about the context in which they live and the interests of the government, the paper will make some predictions, which are expressed in the final part of this study.

All the interviews were video recorded with the permission of the respondents, but one (with the chief of district). The presence of the video-camera did not affect substantially the respondents' answers and selected quotations translated in English will be presented. It is also taken into consideration that several factors such as the general political climate with a high degree of corruption and poverty, the state institutions and programs, the legal local framework, financial benefits, etc. influenced the public attitudes. Moreover, I was also aware of my own situation as visitor in a foreign culture (or several foreign cultures), and the difficulties that might emerge because of that.

A critical approach towards the respondents as sources of information is used in the analysis of the interviews. This is done by taking into account personal characteristics of the respondent, as for example the political affiliations and societal status.

One of the strengths of performing qualitative interviews is that the situation resembles an ordinary conversation where the researcher practices as little influence as possible. Statistical generalisation and representativity are not central purposes of qualitative interviews.

There were created five large themes/issues and questions were especially designed in all four questioners to find some answers on these specific topics. The analysis is focused on particular themes of interest: education; discriminatory law; access to justice, administration and work; non-indigenous status problems; environmental and development issues. The literature review was consulted in the designing of these particular themes of interest[4].

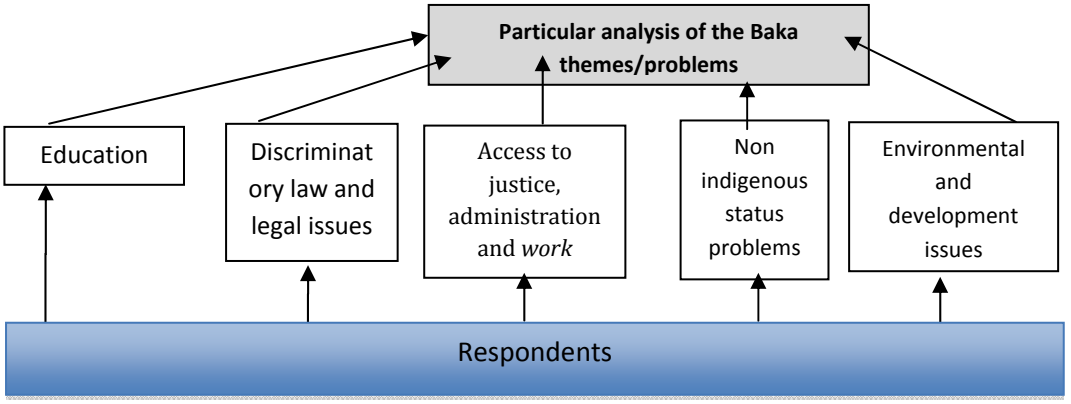
The basis of the analysis is that the responses of the interviewees in themselves are texts containing statements about different issues, which are connected to our topic. The partial analysis presumes one can divide the text into different statements to be categorised and calculated on. An interview may be seen as a text reflecting certain values and fundamental opinions of the respondent. These answers make us structure the analysis in a way where words or statements in the text are categorised. The purpose is to distinguish the important aspects of the individual interviews, and from this create a more complete understanding of the material[5].

This process may be divided into three phases: 1.) Choice of themes/problems; 2.) Formulation of questions based on the themes/problems; and, 3.) A systematic analysis of the interviews based on the themes/problems. The partial analysis makes us reach conclusions about the different opinions of five key aspects: education; discriminatory law and legal issues; access to justice, administration and work; non indigenous status problems; and, environmental and development issues.

[4] See Vilcan A.D. – Challenges of the Baka Pigmies from Cameroon. A theoretical perspective, 2013, p. 3.

[5] Sharan MERRIAM and Associates, *Qualitative Research in Practice: Examples for Discution and Analysis*, Jossey-Bass Publishers, San Francisco, 2002, p. 64.

Figure 1: Model of analysis



This paper bases its relevance in the fact that it tries to sensibility the public opinion to the problems of the Baka pigmies and draws the international public attention upon the lack of interest in solving their problems by the government of Cameroon. At the same time, the most positive outcome of this paper is that underlines how the ignorance and the financial interests of the state can make the lives of the Baka more difficult.

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Case study analysis:

The interviews used in the following section have all been recorded during the month of April 2010 in various places in Cameroon. A description of the respondents follows along with their respective organisations if necessary.

Mr Nzol Bissac is the President of the NGO OAPIDE (Organisation d'Appui aux Initiatives de Développement et d'Environnement) based in the rural Eastern Province of Cameroon, in the commune of Mindourou. Located along the edge of the Campo-Maan wildlife reserve the commune of Mindourou offered us access right in the heartland of Baka territory Having considerable prior contact with the Baka including several studies on their lifestyle and forest habits Mr Nzol Bissack served as our translator during our visits to the Baka tribes as well as answering our questions on behalf of his organisation.

Mr Francis Guzman is the President of a Spanish NGO, St. Nejos that has done extensive work with the Baka people, particularly in the area of education. Mr Guzman and his team of volunteers have been working with the Baka for over two years, helping them build schools and learn important skills such as agriculture and masonry. We sought Mr Guzman's expertise because of his long-time contact with the Baka as well as his perspective on them as a non-native.

Our third Interviewee was Mr Fousseni Feteke, is a local level site chief in the Mindourou branch of a large logging company (PALLISCO). In prior years he has had extensive contact with the local Baka tribes and was able to provide information on the

relationship between the Baka and logging companies as well as insight into the programs the company was pursuing to stay in touch with the needs of the Baka.

Finally, we interviewed the District Chief for the District we conducted the study in. We considered that a response from the part of the authorities was crucial in regard to the Baka but most officials were reluctant in answering our questions. Of the four we contacted only the District Chief agreed to see us and only under the provision that we do not mention him by name, do not record the interview and only take notes.

Apart from the interviewees already mentioned we conducted two focus-group style panels amongst the Baka. Each panel consisted (initially) of a tribal authority figure (tribal spokesman or the like), an elder, a middle age man or woman and a youth. However in both cases the whole tribe soon joined in and we received collective answers. The two tribes were located in the Campo-Maan hinterland, one of them being right on the edge of the reserve and the other one further from it, near the commune of Mindourou.

All Interviews were conducted in French, then translated into English for the purpose of this paper. For the two Baka tribes an interpreter was employed in order to translate the local Baka patois into French then similar steps were taken.

Results of the interviews:

1. Education

As evidenced in the literature review chapter, the Baka population has significantly less access to education, secondary and superior, reason why their level of education is considerably lower than that of the other peoples. Even more so in the case of girls and no indigenous person attends university at the present time[6]. In order to investigate the problems related to education we decided to include questions related to the subject in every questionnaire that we applied. In the following paragraphs the questions and the different sets of answers will be analysed.

Because an official position on education was needed our inquiry on education begins with the answers given to us by the Mindourou District Chief. The 10th question that we asked the Chief was: What measures are taken by the state and the local government to increase the education level among the Baka pigmies? The response that he gave was that the local authorities are encouraging the Baka to go to school. He added that new schools are being built at the time near their encampments from the forestry tax funds by the government and in one case by an NGO. This short and vague answer only reinforces the fact that even though the Cameroonian Constitution guarantees equal access to primary education for all, there are no procedural provisions regarding the enforcement of the Constitution.

We followed up with a question regarding the ORA teaching method: Why is the ORA method not accepted as an official teaching method for the pigmies? He said that he does not know many things about this method but he thinks that it is because it does not comply with the national minimum standards of education. It is legitimate to consider ORA as incompliant with the national standards of education even though it teaches the French language. However, this method cannot be integrated in the educational system because apart from language skills it teaches no other general school subject (eg. mathematics,

[6] The Situation of indigenous people in Cameroon: a supplementary report with Cameroons 15th-19th periodic reports (CERD/C/CMR/19), 27 January 2010, p. 4.

writing, reading, etc.). Furthermore, every state according to the international law has the right to promote one or several languages as it sees fit not being compelled to fund education in any minority language[7].

After we obtained the official position we turned our attention to the representatives of NGOs who work on this problem. They would present a more balanced view between the official one and the point of view of the Baka. Question no. six from the NGO questionnaire deals with the amelioration of the problems faced by the Baka. Mr Nzol Bissack Honoré from OAPIDE told us that the key in solving their problems is education: better literacy for the Baka children and permanent lobby by the NGOs to improve school conditions and school treatment. When asked the same question, Mr Guzman from the St. Nejos organization considers that the most important thing is education and that the Baka need a level of education that would make them feel equal to the Bantu and make the latter understand that the Baka are their equals. It can be clearly seen that both NGO representatives consider education tantamount to the improvement to the Baka way of life.

When Mr Guzman was asked whether or not the Baka are really discriminated against, he told us that this is most visible in the educational system. He added that the education system is designed to work well for the majority but when it comes to particular cases such as the Baka it fails entirely, almost all of them being unable to speak French or even sign their name. This further reinforces the fact that even though the state claims to offer free and equal education for all, it is observed that theory is far from practice. The fact that the Baka are semi-nomadic people, and often take days or even weeks to hunt makes them totally incompatible with any modern teaching method.

Last but not least, the two Baka tribes were consulted on the issue of education. They were asked what they thought about education for their children. The first tribe answered that they have problems sending their children to school. Some parents do not send their children to school, others do, but eventually their children skip classes. Added to this is the financial issue, many parents being unable to afford paying the minimal school fees but the problem of negligence has a further extended impact. Some children are bullied and mocked in school further reason for them to skip it. On the other hand the second tribe that was interviewed affirmed that they were making great efforts to send their children to school, both in the village as well as the newly built nearby school. This latter answer was quite evasive, in the sense that no actual measures that they took were mentioned. However they did stress out the importance of education for them. The two semi-contradictory answers are indicative of no clear attitude of the Baka towards education as evidenced by the literature as well. They admit that it is important for their children to study but present no inclination towards taking actual measures for this. Further evidence can be considered to be the fact that although they stressed the importance of education for their children, all their answers were provided in patois (their local dialect), most Baka people being totally unable to speak or understand French.

To conclude it is observed that the lack of education among the Baka population is the result of a mixture of factors. On the one hand, their lack of ID Cards and Birth Certificates makes the enrolment of children harder, on the other hand, their different and ambiguous attitude towards school is holding them back. The fact that the Baka are not acknowledged

[7] Ion DIACONU, *Identitatea şi Drepturile Specifice ale Minorităţilor,* C.H. Beck, Bucharest, 2006, pp. 222.

as indigenous by the authorities, nor accepted as equal and part of the community makes the Baka outsiders. Their rights to cultural identity and access to different schooling methods (ORA) will not be granted by Cameroon, at least not before they will be recognized as indigenous.

2. Discriminatory law

Being different from the others in terms of culture, language and way of life, the Baka people face certain levels of discrimination. While it is true that discrimination can be of many types, unfortunately, the Baka pigmies face legal discrimination as well as societal. Not surprisingly many of the legal issues that they endure are generated by their lack of recognition. As it was mentioned in the literature review the legal provisions regarding forestry and land are skewed against the Baka. We designed questions to verify how this legal discrimination occurs in particular cases.

Firstly we are to identify specific activities of the Baka that are against the national laws. In order to do this we asked the Chef of District, the Pallisco executive, NGO representatives as well as the Baka tribes which are the Baka activities that are illegal according to the law. The Chef of District mentioned that there are many law infringements perpetrated by the Baka. He told us that they do a lot of illegal hunting, stir up trouble drunk and using marijuana and last but not least they fail to send their children to school. The fact that the Baka overhunt was mentioned by Mr Nzol Bissack from OAPIDE who told us that the Baka hunters are often paid by the Bantu to hunt large animals for them. Mr Guzman mentioned that there is hardly a difference between the Baka and the Bantu way of hunting and fishing – so the impact is mostly the same. The Baka tribes were also quick to point out that hunting is forbidden although they mostly emphasised that they were forbidden to hunt in certain areas (reserves and logging sites) rather than the numbers or species of animals hunted. As seen from the literature, the Baka were not consulted when logging and reserve sites were created. However, mention must be made that the Baka hunt forbidden species (elephants, gorillas) but should they be granted full indigenous people rights they would be allowed to do that to some extent. The hunting laws are too restricted seeing as the Baka way of life is dependent upon hunting.

Another frequently mentioned incapability between the forestry laws and the Baka. Mr Feteke of Pallisco mentioned that the law does not take into account the needs of the Baka people in the sense that they do not receive their fair share of the forestry tax but that a reform is on the way. The representative of OAPIDE also stated that the Baka often cut down trees sought by the loggers and illegally enter logging exploitation premises. This thing was confirmed by the Baka tribes as well, who told us that the logging companies forbid them to cut trees or gather PFNL and also mentioned that they do not receive any forestry revenues. These aspects are direct indicators of the fact that the Baka are not considered to be indigenous, status which would grant them both the right to forestry tax and the right to cut trees. However, the District Chief offered a different perspective stating that the forest tax is paid to the local community and divided equally among member villages. He failed to mention that the Baka encampments are not considered to be individual villages by law, but rather attached to a Bantu village, leaving the distribution of the forestry tax at the latitude of the village chief[8]. Another question concerning whether the

[8] The Situation of indigenous people in Cameroon: a supplementary report with Cameroons 15th-19th periodic reports (CERD/C/CMR/19), 27 April 2010, p. 19-20.

land law can be adapted to fit the needs of the Baka was posed to Mr Nzol Bissack. He stated that the law should be changed as soon as possible and that the NGOs were working to mark the areas the Baka are dependent upon and lobbying the state to recognise the right of the Baka to their own land. He further told us that the initiative should move from local NGOs to national ones and final to International Organisations – which have a more powerful voice.

We also inquired the District Chief on what measures the state takes to protect minorities and safeguards the rights of the Baka, putting an emphasis on land rights, education and welfare. He answered to us that the Baka enjoy the same rights as all the citizens of Cameroon, including access to free primary education but because of their primitive lifestyle it is hard to adapt to a modern world and take advantage of all their rights. He offered us as an example the low school attendance rate of the Baka children. This answer is quite inconclusive and vague because Cameron failed to implement special rights for minorities and indigenous people. Furthermore the literature and the other respondents' answers have shown the Baka enjoy less rights than the others.

One of the most important question asked to the NGO representatives was: Do you consider that the Baka population is really discriminated against? If so, how and by whom? They both answered positively. Mr Nzol Bissack said that "yes, they don't receive the advantages they deserve", ant that they do not get a share of the forest tax and are considered dependents of the Bantu villages. Mr Guzman mentioned that the other people and the Baka did not start from the same levels of development, and that they do not own the land they live upon, often times having to work in a state of semi-slavery for the Bantu in ordered to be allowed to live on their land. This question revealed further evidence of the status of the Baja as dependants and gross infringements of their rights both international and as guaranteed by the Cameroonian Constitution.

Finally, the Baka were asked directly whether their rights were refracted de facto by the state and the logging company. The first group answered bluntly that they do not share the same status as the rest so their rights are not respected. The second group also mentioned that the state does not respect their rights but added that nor do the loggers who forbid them to hunt, cut wood or make fire in the forest.

Our study revealed many cases of particular and general legal discriminations. We consider that the granting of a special status to Baka would reduce the conflicts that they have with the law and consequential their conflicts with other people.

Even though some laws such as the hunting and forestry exploitation laws are totally discriminating towards the Baka, one should note that granting them full indigenous status will not make other offences pardonable such as drunken and disorderly conduct or not sending their children to school, such laws being applicable all indigenous, minorities and majority.

3. Access to justice, administration and work

One of the directions where the Baka encounter problems caused by their lack of recognition is related to their access to the public scene. As presented in the literature review part it is well known that the Baka encounter plenty of difficulties when it comes to accessing the justice system, interacting with the administration or even trying to find work. This part has the role of analysing particular difficulties that Baka encounter according to

our respondents when the Cameroonian Constitution states that all the people of Cameroon are treated equally and enjoy the same rights and obligations[9].

When we asked the District Chief how the Baka interact with the local administration and if they had access to the public services he replied that because they live isolated their interaction with the state is limited and it is hard to implement even compulsory education in their communities because of their lifestyle. Moreover, when he was asked whether a Baka came with an issue to him he told us no, because they solve their problems among themselves. Unfortunately, not all their problems are between the Baka, most of them are the result of the interactions with other people such as the Bantu, loggers, etc. This question reveals the level of interest of local authorities in the Baka problems.

Further on, the District Chief was questioned about the employment rate of the Baka in the local services. He mentioned that just a few Baka are working, but there is even one Baka working in the local council and plenty of them for Pallisco; thing which shows that the Baka who want to work share the same status as the others. We observed that by this answer the District Chief was putting all the blame for the low employment rate on the Baka. According to him, the state or the companies are offering equal chances to the Baka but because they simply do not want to study or work they cannot be hired. A similar answer was given to us by the representative of the Pallisco Company who mentioned that there is no difference in the selection process for the Baka and the Bantu at Pallisco and that they have around a dozen Baka in management and around 400 in the field.

Mr Nzol Bissack from OAPIDE has a totally different opinion and claims that firstly because they do not have ID cards they are unable to vote or to be taken into account in the public sphere. This answer only what it was already been written on the subject, underlining a serious issue – the one of non-representation. Having no ID they are not taken into considerations as citizens, so they cannot access citizenship rights or droits des riveraines. When the Baka tribes were asked what they thought about their status in comparison with the other populations, they both answered similarly. The first tribe said that that the others live better than the Baka because all the advantages were reserved to them. The second tribe mentioned that they are behind the others in terms of development mainly because they lack a lot of means such as money, clothes and houses.

Finally, the Baka were asked about what types of rapports are there between themselves and the Bantu population, Pallisco and the state. The first tribe stated that they do not get along well amongst themselves and nor with the Bantu thing which is generated mainly because the state does not respect the Baka as it respects the other populations. The aid programs and share of the forestry tax is not paid to them either because they are not considered to be population riveraines even though they have inhabited that forest for centuries. Moreover, they said that they are stopped and forbidden to hunt by the game wardens. The other tribe mentioned that they solve their little problems among themselves because the state does not take their needs into consideration at all. Regarding their rapports with the Bantu people they said that the Bantu are the only ones that make their lives difficult.

It can be easily observed that the Baka people are really discriminated against when it comes to justice, administration and work. They are not acknowledged as citizens nor are they granted an indigenous people status. They are required to follow the standards of the

[9] Cameroonian Constitution, art. 5.

Bantu if they want to access a public service, but they do not speak French, neither do they know how to write. The forestry tax aspect is one of tremendous importance because the money that the Baka should receive is given to the Bantu chiefs who do not live literally in the forest and do not forward any part of the gains to the Baka. Our survey posed personal questions that received general answers, most of them mentioning problems that we already read about in the literature.

4. Non indigenous status problems

This sub-chapter is of particular importance for the current paper. It is the part which treats about the direct problems generated by the Baka non recognition as indigenous people. We will empirically analyse the consequences of Cameroon's treatment of the Baka. Being the most important part of our study, several questions on the topic were addressed to each interviewee. The relation between particular problems that we identified on the field and Baka non-recognition is most poignant here.

Firstly, the District Chief was asked to provide an official position on the Baka status according to the state and its compatibility with the WLO Convention No. 169/1989 Provisions. He responded by saying he never heard of this convention but that in Africa, and particularly in Cameroon all the people are indigenous. Stating that all the people in Cameroon are indigenous provides a telling image on how informed the local authorities are on the Baka subject and on the term of indigenous people.

Our next subject of inquiry was aimed at finding out whether, if the Baka would be recognised as indigenous, the area would be affected and in which way. We sought an answer to this from several of our respondents. The District Chief considered that a change of status would not affect the district, nor the life of the Baka. Regarding this issue, Mr Feteke from Pallisco told us that the Baka are simple people with simple lives and their interests do not come into conflict with the interests of the company. He added that Pallisco already treats the Baka fairly and any problems the Baka encounter in getting their fair share of the forestry tax is a state oversight. Next, we asked Mr Nzol Bissack how this change in status would affect the relationship with the other people and the state. He told us that the rapport would definitely change, as the Baka would finally be represented in local structures and would be able to defend their rights. Our respondents gave us varied responses to similar questions highlighting an uncertainty regarding what would change if the Baka would be granted indigenous status.

Another question asked to the Pallisco representative was what can be done to improve the general situation of the area. He mentioned that regardless of what actions are taken the needs of the Baka have to be taken into account. He added that they are simple people who cannot be forced to change abruptly.

It is also important to see what the representatives of NGOs had to say about Baka people identity in the contemporary society and how the recognition of their indigenous status will contribute to the safeguard of their identity. Mr Honoré told us that the logging companies cannot hire Baka people because often times they "forget" that they work for the company and head out to hunt in the forest for days or even weeks. He added that the Baka are content to live one day at a time. Mr Guzman said that modernity, especially in this age of globalisation affects us all, even the Baka; but in their case their identity is actually regained through modernity. As it can be observed, the fact that NGOs work on the Baka subject and international forums such as UN and WTO is a direct result of the modernity.

However there is a significant negative impact, in the sense that their traditions and values are slowly being eroded. This statement is confirmed by our first Baka tribe which stated that most of the Baka abandoned their customs and only a minority still keeps them. Mr Guzman agrees with them in that, although they regained their identity as a people they lost part of their traditional way of life. The second Baka tribe, the one further from civilisation said that they still keep many of their traditions (traditional hatchets and spears, musical instruments and music, dances and legends, the "running" hunt). It can be observed that the more remote tribe preserves more traditions than the other. Whether or not the Baka preserve their tradition, both tribes mentioned that although they sometimes do things like their ancestors, they prefer the modern way of life and try to live like the Bantu.

When asked whether or not they knew that their traditional values granted them a special status and particular rights the first tribe said that they did not know and, had they known, they would have guarded their traditions better. The second tribe even though more remote, was better informed and mentioned they know about their indigenous rights but nobody cures about that. On this topic, Mr Nzol Bissack from OAPIDE stated that the Baka have indeed traits typical to indigenous people but until the state will recognise them as such their rights will not be granted.

Our most important question from the set was addressed to the two NGO representatives. We asked them what part of the Baka problems stems from them not being recognized as indigenous and, should they be recognised as such their problems would diminish. Mr Honoré told us that, indeed, the Baka problems would diminish considerably if they would be considered indigenous and that this lack of recognition is one of their greater problems as the state fails to do many things to protect the Baka. Mr Guzman also stated that recognising them as indigenous people would help them to hold on to their identity and that because they are unrecognised they are considered tenants on a land that should be theirs.

As it was seen there are plenty of direct negative consequences to the fact that the Baka are not accepted as indigenous. Except for the state official, the District Chief, all our respondents mentioned issues generated by the un-recognition. Moreover, it was not necessary to be an inhabitant of Cameroon to observe problems generated by this fact. For instance the Baka lived isolated marginalised by the other people who used them as cheap labour.

5. Environmental and development issues

The impact of local development and environment issues was one of the most important fields that our study touches upon as the Baka are particularly vulnerable to rampant deforestation, poaching and the diminishing of natural resources.

Our first question was addressed to the District Chief regarding whether or not the Baka people represented a threat to the development of the district. He told us promptly that the Baka are not a problem to anyone but themselves. They refuse to work and go to school and make things harder for their own tribe in the process. Mr Feteke, when asked a similar question about the impact of the Baka presence on logging grounds on the company's plans answered negatively as well stating that the Baka are not a problem for anyone.

We followed up by asking whether environmental issues such as poaching and logging represent a threat to the region and the Baka. The Chief told us that it is the Baka who

usually overhunt and cause problems for themselves and destroy the wildlife and that legal logging is not a problem for the Baka. We noticed the shift in blame towards the Baka and decided to further investigate and see if the trend verifies.

Next, we went to Mr Feteke from Pallisco to see whether he thought that his company's environmental development policy preserves the resources the Baka were dependent upon, particularly taking into account the views of the District Chief. Mr Feteke told us that in his opinion logging, done responsibly and legally, does not cause any problems as the Baka are consulted at every step, their holy sites are marked and avoided and their roaming areas are avoided and not marked for exploitation. Mr Nzol Bissack of OAPIDE was of a different opinion. He told us that the forestry law is designed without taking into any consideration indigenous people issues and that this has a significant impact on the Baka and may, in time, lead to a gradual disappearance of the resources they need and in turn a disappearance of the Baka traditional lifestyle. As we can see from the responses the main environmental issue for the Baka is also a legal issue. The logging companies do their best to account for the needs of the pygmies but with ineffective legal design and no instruments to protect native people the Baka are often overlooked as more of a curiosity than an issue.

We asked a final question on development issues to the three interviewees regarding measures that should or already were taken to improve the life standard of the Baka. The District official told us that the most important thing is one the Baka should do themselves, that is sending their children to school to get properly educated, learn to read, write and speak French and English. Mr Feteke told us that Pallisco and all other certified logging companies send field representatives to ask the Baka what they need on a regular basis and try to see to those needs afterwards. Of the three interviewed on development and environment issues, Mr Nzol Bissack was the most direct, telling us that permanent aid and education programs are needed rather than seasonal passing interest. We can observe in the above the reasons for the lack of actual aid of the Baka: the state holds the Baka responsible rather than devoting time and money to help them, logging companies such as Pallisco do their best, asking the Baka what they need and trying to provide but will not otherwise help, as they already pay dues to the state and NGOs do not have the time, funding or interest to sustain programs with the Baka over several years. The interest the Baka receive is therefore pointless as nothing comes out of it.

We asked a final series of questions to Mr Feteke regarding the relationship between the company and the Baka. First we inquired how he thought that the Baka saw the company. He replied that oftentimes the Baka blame the big logging companies for their problems and see them as diminishing natural resources. He added that it is sometimes justifiable as some companies do not understand the Baka way of life and their resource needs. We asked him what kinds of conflicts arise between the Baka and the company and whether or not there are instruments of solving these issues. He replied that usually there are no conflicts between the Baka and the company, as Pallisco, like all certified logging companies takes the needs of the Baka into consideration, but that, should conflicts arise, they are solved amiably through the Baka liaison. We can therefore see that there are indeed as previously mentioned steps taken by the companies to cater to the Baka exist, just that oftentimes they are ineffective or wrongly applied.

Finally we sought to consult the Baka themselves on various issues regarding to development and environment. We asked the participants from the two tribes whether they

felt that part of their problems was their own fault and part the fault of the companies, Bantu or state. The first tribe felt that it held no responsibility as, for example, when their children go to school they are bullied and they do not receive a fair share of the money they are due. It therefore considered the other peoples of the area and the state as the main problem generators. The second tribe was more balanced in its answer recognising they might have a small part of the blame for their situation but by no means all or even most of it especially as the Baka are disregarded in regards to other people passed over by development projects by the state and considered slaves or second class citizens by the majority Bantu group. We next asked whether the tribes considered that their way of exploiting the goods provided by the rainforest as well as those of the logging companies would ensure that other generations can take advantage of them as well. They replied that the forest is bountiful, and that the resources would last despite clear-cutting, although the second group was less sure that there would be enough left for their descendants. Next we asked one of the most important questions of the survey, who exactly the Baka hold responsible as the source of their problems. It was interesting to notice the variety of responses we got. The first tribe considered that the Bantu are holding them down and discriminating against them, not giving them any land and impeding their development, as well as the state who does not recognize the Baka chefferies and does not take the Baka seriously. The second tribe considered the state the mainstay of their problems as it limits the Baka from hunting or logging but allows others, such as the Bantu.

Lastly we asked the Baka what they considered priorities in local development and whether those priorities took their needs into consideration. The first tribe emphasized work issues, requesting more work from the logging companies and stressing out that with more money they could better their lives. The second tribe however stressed education as a major goal, stating that if their children speak French and go to school they would be better able to represent their rights.

As we can see above the issues relating to development and development are many but can be best summed up as follows: lack of money for development programs devoted to the Baka, lack of state recognition and equality between the Baka and the Bantu in regards to forestry rights and lack of willingness by the state to accept that there are problems in its treatment of the Baka.

FINAL REMARKS:

When we designed the case study analysis we started from the premise that the fact that the Baka people are not recognised as indigenous people creates to them some particular problems. By field questions it was observed how this lack of recognition puts pressure on their culture, way of life, and, most important on their very existence. Because their rights are not safeguarded, and because the Cameroonian state promotes other ways of life the Baka people feel it very hard to maintain their identity. We consider that this is the main reason why the both tribes mentioned that they prefer the modernity to the traditional way of life.

Regarding the issue of education it was observed that the state was not doing much in attracting the Baka population to school. Not having ID cards and Birth Certificates made the process of enrolment in school almost impossible. Besides this, the Baka children were not respected in the school; they are bullied around and attacked. Probably if the state will

start a campaign for non-discrimination the Baka would be more respected by the other people. Moreover, the state does not respect/accept the ORA teaching method. Being accepted as indigenous population, the Baka would also enjoy more respect regarding their own teaching methods and even if they would not be able to speak, read or write in French they will be appreciated for their particular skills.

The Baka people face also legal discrimination. It was observed that they are not consulted when a reserve is created or when the loggers decide with the approval of the state to open a new logging site although their holy sites and some forest areas are guarded, by the companies if not the state. Moreover they do not get a share of the forestry tax and they do not have a right of property on their own lands. They are tenants on the Bantu communal land even though it should be theirs. If they would be recognised as indigenous population the Cameroonian State will have to protect their habitat so it will not be able to bargain the logging sites directly with the logging companies.

We also observed that their access to public services and employment is severely restricted and differing with the District Chief opinion, we do not think that this is entirely the responsibility of the Baka. Of course that they have a particular way of life which reaches some incompatibilities, but it they would be accepted for what they are the interaction between them and the state, loggers and other peoples would be better.

Regarding non-indigenous status direct problems we were able to identify plenty of them. Besides these, it is easily observed that the Baka people are generally treated as second class citizens. Somehow they fell between being accepted as citizens and between acknowledged as indigenous people by the State of Cameroon, meaning that at the present time the Baka people are in the worst position. Moreover, in Cameroon there are more than 250 ethnic groups and sub-groups which leave without conflicts[10]. If the Baka would be recognized as indigenous population by the State, there might be a chance that the overall respect that they receive from the others populations to increase.

This problem is broadened when taking into account the environmental and development issues. The Baka do not receive forestry taxes nor does the state strive to improve their way of life by programmes. The logging companies are more benevolent but as the Baka do not clearly define their needs nor are adapted to a modern way of life there is little that they can do. Furthermore the Baka are restricted from hunting and logging and thus sustaining themselves through traditional means as well as not awarded equal employment rights.

To conclude the case study analysis, it needs to be stated that the hypothesis of this paper was confirmed by the answers of our respondents. Even though a quantitative study would have revealed some problems of the Baka, our qualitative study results are presenting a deeper and more personal insight to the Baka issues. The fact that we were able to identify five categories of themes/issues to every of each almost all respondents had something to say is another indicator of the fact that all the Baka face some particular types of problems. Therefore, we consider that the purpose of the current paper was more than attained and that our work could constitute a solid base for further studies.

[10] World Directory of Minorities and Indigenous Peoples – Cameroon : Overview – http://www.unhcr.org/refworld/country,,MRGI,,CMR,,4954ce5f23,0.html, accessed on 13.10.2013.

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HUMAN DIGNITY – A HEURISTIC DISCIPLINE OF HUMAN RIGHTS

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Abstract:
Dignity is an appeal to human nature. Transposed in the juridical field, human dignity highlights the necessity to establish (in favour of the individual) a juridical treatment compatible with human nature. Our disquisition is destined to analyse the contributions brought by the concept of human dignity in the process of the juridical avowal of human rights and to study, at the same time, the category of relations between two frameworks of analysis: human rights and human dignity. We propose the thesis of conceptual correspondence human-rights-human dignity, in the attempt to demonstrate two fusing frameworks of analysis, that can almost mutually define one another. The intricacy, the hardship of legal reconnaissance, the variety of significance, give the precise nature of human dignity and human rights, pleading in favour of this conjugate study. The defining of man – as an analytical category – is seated within human dignity, pointing out, as natural consequences of this seating, the human rights.

Keywords: human dignity, human rights, conceptual correspondence, heuristic research

1. SOME PERSPECTIVES UPON THE IDENTIFICATION OF HUMAN DIGNITY

We realize that, by selecting a juridical framework of analysis, we assume the risk of defining a term upon which the juridical field did not go on record. Despite this fact, in order for our study to commence in logical parameters, we will assume the risk of exploring the scientific darkness and the fantasy of establishing some personal conclusions.

As we can forestall, the emergence of human dignity must be refered to man, to the manner in which he exists and evolves. It is also true that, raw human reality wolud fail in the process of immortalize such a broad dimension like human dignity. Thus, human reality is segregated in plans and paradigms that advance the illustration of the concept of human dignity.

For instance, philosophical reflections present human dignity in connections with the human status. Stocism presents dignity as a special possibility offered to all human beings which are gifted with reason and who live in compliance with nature. The followers of the kantian theory depict man in a cvasi-ideal manner: man is endowed with reason; moreover, he is the author an the addressee of universal moral laws. Kant's doctrine proscribes the instrumentation of man (he will be ogled as purpose and never only as a mean) and elicits respect for each human being[1]. Clergymen estimate that dignity is the sacred right of Self,

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[1] Ciucă Aurora, Conceptul de demnitate a fiinţei umane în bioetică şi drept (The concept of the dignity of human beings in bio-ethics and in law), article published in The Romanian Journal of Bio-Ethics, no. 2, Iasi, 2009, p. 6.

emanated from the eidos that man is the image of God. Dogma shows us that man is the sole being that was created after God's likeness; only man has soul, only he can be wrongful or virtuous[2].

Opposite the philosophical and religious reasons, the juridical conceiving of human dignity is more custom... Surprisingly or not, the juridical field dose not monopolize the meaning of human dignity and is much reserved in clarifing the term. The encounter between law and dignity is dominated by the feeling that – regarding human dignity, everything has been already said (through philosophical, religious and sociological theories) therefore, the mention of dignity within law is sufficient and saviour in front of the requests of the civilized world[3].

The law is taciturn where is its place to clarify the definiton, the status and the juridical utility of human dignity. Speculations absorb our framework of analysis and advance multiple hypostasis: dignity as right, as juridical value, as juridical principle, as source of human rights. Each of these ideas can be genuine due to pauper and rough legal benchmark.

In front of this kind of stituation, we would be tempted to peer human dignity as the possibility of each perspective that scientifically proves to be the most plausible and the most logically demonstrated. We would not make a mistake.

All the same, we choose to take a step back and to appraise more openly the subject. Human dignity is summa scientia because it operates like a revealing concept – like a concept that amasses significance from various fields and exposes them in an integrated way by restoring a higher meaning. The meaning of human dignity is valiant because it egresses from common patterns and it enforces an integration paradigm.

Hence, human dignity has a precious meaning because, within this meaning we can find the religious, philosophical, literary, behavioral or psychological facet by reporting to a specific field. It is peculiar that, the concept of human dignity, is simultaneously present in all these fields, without lacking a self-governing meaning – it masters this meaning beyond the enclosures of any particular field. All this recommends human dignity as an instrument of exploration and knowledge, that paradoxically, helps to the understanding of other concepts, but is reluctant to reveal itself to the scholar.

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[2] Drăganu Tudor, Declarațiile de drepturi ale omului şi repercusiunile lor în dreptul internațional public (Declarations of human rights and their consequences for the international law), Publishing House Lumina Lex, Bucharest, 1998, p. 84.

[3] The Universal Declaration of Human Rights (adopted by the United Nations General Assembly on 10 December 1948) recognizes the importance of human dignity from the preamble: Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (…) Also, the first article specifies: All human beings are born free and equal in dignity and rights.They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. The European Union Charter Of Fundamental Rights (proclaimed solemnly by the European Commission, the European Parliament and the Council on 7 December 2000 at The European Council of Nice and binding be the Treaty of Lisbon) evokes in its preamble: Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. Likewise, in the first Chapter, first article is stipulated: Human dignity is inviolable. It must be respected and protected. The European Convention of Human Rights and Fundamental Freedoms (signed on 4 November 1950 at Rome), determines in the third article: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

2. HUMAN RIGHTS-HUMAN DIGNITY. A CONCEPTUAL RELATIONSHIP

Human dignity cannot be isolated from human rights as we cannot isolate, within a logical argument, the premises from the final judgment. With regard to dignity, we cannot aver its status – that of premise or final judgment because the scarcity of practice is much experienced. The connection between law and dignity dosen't necessarily arise from the normative process but, the inclusion between those two concepts is indissoluble from the intuitive point of view. The insertion of the dignity concept in the framework of analysis of human rights is truly intuitive and impossible to reject.

Dignity is in juridical connection to human rights in light of two arguments: (I) universal vocation and (II) validation by means of the thesis of natural law. The universal vocation stands to reason: dignity and human rights are a priori notions[4] that always existed in human life. So, the ancestral idea according to which human rights are privileges offered to man out of compassion, privileges that engage man to be obedient and humble – was bypassed. The ancestral idea was replaced with the idea of human rights which are independent and self-fulfilled.

The second argument is slightly more subtle. Like human rights, human dignity bears the symbol of natural law. Documents prior to the Universal Declaration of Human Rights make recurring notes to natural law. Also, in the period which followed the Declaration, juridical documents replaced the thesis of natural law with the ideea of human dignity and human rights. Basically, the thesis of classic natural law comprised simple thoughts, in harmony with man's interests: (1) the law must express what is inbred for the individual; (2) human rights are applied independently of human nature/constitution; if we would particularize the application of natural law, it would be deprived of its perennial character and sentenced to transience; (3) the fulfillment of man's features is made in society, through social networking and self-control.

Selecting natural law to the detriment of positive law is a plausible thing to do. First, the positive norm is the product of human defective authorities, the norm itself is defective, dissimilar from state to state, with confined continuance (the positive norm can be abrogated, modified, completed), whereas the natural norm is universal and immutable, it results from perfect rationality and sensibility and remains unchanged. On the other hand, positive law has a vertical structure (it separates and dosen't incorporate; it establishes the hierarchy of legal norms and their importance); natural law has an horizontal structure (people must make common cause and embrace norms that enhance the value of equality)[5].

The equation of three sizes: human dignity-human rights-natural law leads to the personalism dimension – hence the image of an unique, non-repeatable person that is irreducible to a simple social unit. In this context, we appeal to details. The first and the most relevant detail is the interrelation between concepts. If it is impossible to discuss the subject of human rights without invoking the concept of human dignity and if we cannot argue the subject of human dignity in absence of the subject of human rights, then the two

[4] See Ungheanu Mihail, Dreptul natural clasic şi cel modern: de la virtute şi datorie la hedonism. Schiţare a problematicii drepturilor omului. (Classic and modern natural law: from righteousness to hedonism. A sketching of human rights problem.) Etnosfera Journal, no 2, 2010, p. 30-40.

[5] Sâmboan Cristina, Cum a intrat demnitatea în drept şi ce a adus demnitatea dreptului (How did dignity appeared in law and what did dignity brought in the juridical field), article published in The Juridical Platform Journal, vol. 2, no. 1, June 2012, p. 148-154.

notions are bound through an interrelation. The second detail is the mutual completion. Although in a certain juridical context, human dignity is indistinguishable, its presence is implicit if there are articulate references to human rights. The two details seem to fuse into a relation of juridical inclusion pursuant to which, the elisions enveloped within the law, that refer to human dignity, will be replaced by references regarding human rights and viceversa. Therefore, the relation of juridical inclusion law-dignity derives from the legislator's intention as the truth that lies in common cognitions and common sense. The reverse would speak the lack of perspective[6].

3. HUMAN DIGNITY IN JURIDICAL PROVISIONS. THE EVIDENCE OF ITS REVEALING CHARACTER

By including the concept of human dignity in the attention of the legislator, the need to substantiate human rights is accomplished. The juridical formalization of human dignity brings a supplementary guarantee for human rights, enriching, at the same time, the afferent sphere of significance. The juridical reconnaissance of human dignity sumits the individual to a doubly-addressed respect relation: each individual is entitled to claim respect and each individual is indebted to show respect towards others. At the moment, the notion of respect is ought to be assimilated in a specific way. The respect for human rights – induced by the inclusion of human dignity in the juridical field – subsumes the awareness of a special juridical value. Certainly, human rights must be postulated and protected on account of the humanity of each human being but, we must see that, by this means, it is opened the path of exploring and renewing the significance of the expression human rights. More plainly, when human dignity was regulated, the juridical protection of human rights was strengthened and the paradigm of research was widened.

Taking juridical action in the sphere of human dignity, the meaning of human rights was touched. The United States Declaration of Independence[7] asserts as absolute truth some soulful ideas: We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Among all these, the right to the pursuit of happiness

[6] We built the relation of juridical inclusion by re-interpreting the thesis of logical completeness of the law proposed by Hans Kelsen (Hans Kelsen, Law's Pure Doctrine, Publishing House Humanitas, Bucharest, 2000, p. 142-143, 236 and following.) In his thesis, Kelsen deems that the legal system is complete and coherent, as it is composed of juridical particles that are organically linked. There cannot be a lack in the law because there is a norm for any given situation. Even if at a formal level one cannot categorically detect the suitable norm, this doesn't mean that the norm is absent because it exists in the intention of the legislator. Due to the indissoluble link between the elements of the legal system, a non-suitable norm will show the proper juridical particle. The same reasoning is implemented when construing the relation dignity-human rights: the absence of the concept of human dignity from the legal provisions that regulate human rights does not necessarily mean that there is a legal gap, considering the closness of the two concepts and the indestructible link that connects the particles of the legal system.

[7] Legal document that was ratified by the Continental Congres in 1776, announces the independence of the thirteen North – American colonies of Great Britain.

gives meaning to human dignity. It expresses the fact that man's spirit is given by his actions, that he must voluntary acheive, according to his own morals and conscience. Self existence, the pursuit of personal ideas and their valuation as main orientations – all describe the actions attempted for the quest of happiness and human dignity.

The preamble of the Declaration of the Rights of Man and of the Citizen[8] couch human rights under the palladium of a Higher Power, remembering religiosity and its implications in the matter of human rights. Art. 2 identifies as natural and inalienable rights freedom, ownership, safety and resistance to oppression. The legislator leaves in abeyance the relation human dignity-human rights. The invocation of deity by means of legal texts (the preamble of the Declaration) underlines the status of man as a God-created-creature and, subsequently, the idea of human dignity as a source of human rights.

The Charter of the United Nations[9] is much more stringent in ensuring the respect for human rights and human dignity. Art. 1 of the Charter assumes as major purpose: promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. Art. 13 addresses to the General Assembly of the United Nations – it can initiate studies and make recommendations for the purpose of promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Compliant with art. 62, the Economic and Social Council may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

At three years difference, the release of the Universal Declaration of Human Rights[10] signified the consolidation, at global scale, of an ideational-ethics frame of the individual protection. Bearer of a political and not juridical value, the Declaration refers to individual rights as they are projected in the theory of natural law. The institutional aspect is not used. The compulsoriness of this document springs from mental conception so, the binding force is indirectly incumbent – through conscience and not through constraint. In art. 1, the right to life and the right to dignity are associated: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. This enunciation inspires and organizes at the same time. If all beings are endowed with the same fundamental rights, than human beings will be the subject for the same respect and dignity regardless the numerous differences created by nature and by life circumstances. Hence, equality exists in dignity and rights. Equality is not the equivalent of uniformity; on the contrary, equality allows the tolerance for differences, and for the free development of human personality[11].

The European Union Charter of Fundamental Rights and The European Convention of Human Rights and Fundamental Freedoms are less metaphorical, yet divergent concerning the relation law-dignity. The Charter makes direct references to human dignity from the

[8] The document was adopted on 26 August 1789 by the National Constituent Assembly, establishing a new constitution. Structured in 17 articles, the Declaration exceeds the concept of social iniquity, imposing equal rights for all.

[9] Signed at San Francisco, on 26 June 1945 and juridical recognized on 24 October 1945.

[10] Proclaimed on 10 December 1948 by the United Nations General Assembly.

[11] Voinea Maria, Bulzan Carmen, Pentru o sociologie a drepturilor omului (For a sociology of human rights), Bucharest, p. 33.

first lines, meantime the Convention protects human dignity implicitly, by protecting the right to life or by prohibiting torture and slavery. We cannot deny an obvious truth: the European Convention of Human Rights and Fundamental Freedoms was the first international treaty in the field of human rights which brought into existence the first procedure and Court where one can address complaints regarding human rights; also, it is the most advanced and effective system of securing human rights[12]. It is normal for the Charter to comprise a more elaborated display of human dignity, if we consider the reasons that caused its apparition.

In this direction, bear witness: the evolution towards an increasingly tighter union, the challenge of the single market, Europe's tendency to isolation, the insufficient adaptation to human rights standards – all these are the reasons that presents the discussion about human dignity[13].

Sensitized in this direction, justice and equity-loving states intervened in the discussions about human dignity and inserted, in their fundamental acts, the value of human dignity. Japan regulates in art. 13 of its Constitution: Every person will have the well-deserved respect that its existence requires. The Spanish Constitution provides in art. 10: Human dignity, the inviolable rights inherent to human dignity, the absolute development of the personality, the compliance with the law and with human rights are the foundation of peace and social order.

The Romanian Constitution expresses specifically human dignity, without any subtleties. Title I – General Principles, article one – Romanian State, third paragraph draw the general framework of recognition of the human dignity: Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed. In Chapter II – Fundamental rights and freedoms, art. 22 – The right to life, to physical and mental integrity, second paragraph mentions: No one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment.

In the spirit of legal regulations, human dignity appears as the main component of human dimension, of civilization and progress, being a civilizator factor. That's the reason why the juridical environment considered as its essential mission to return to human dignity its recognition and appreciation. Mirroring the human dignity in legal writings coincides with the formal recognition of humanity. Here intercedes again the relationship of respect. So, nothing prevents the fair guarantee of human rights, if we consider that each individual will receive what is asked by the humanity that he posseses. From this point of view, human dignity is a legal revealing factor which identifies human rights ensuring them against abuse. The defence of human rights by using human dignity can't get over the abusive exercise of human rights. Accordingly, dignity is the promoter and the limit of human rights – this summarizes its heuristic power.

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[12] Balahur Doina, Protecția Europeană a Drepturilor Omului (The European Protection of Human Rights), Notes, Alexandru Ioan Cuza University, Iasi, Centre of European Studies, p. 34.

[13] Cassese Antonio, Lalumière Catherine, Leuprecht Peter, Robinson Mary, Leading by Example: A Human Rights Agenda for the European Union for the Year 2000, AEL, Florence, 1998, p. 1-3.

4. THE DESILUSION OF CONCLUSION REMARKS

Human dignity is the starting point in the formation of human rights. As a potentiality, (in a non legal sense), human dignity enforces human rights in virtue of the greatness of the human being; as legal authority, dignity is founded upon the equality between individuals.

Indeed, equality is the common denominator that makes all differences disappear regarding social status, gender, race, ethnicity, productivity, etc. And yet, the full understanding of human dignity is not feasible. We can find associations, we can assign meanings, we can explore the most profound views concerning this subject and ultimately, we will arrive at the impossible solution. Because of this, we didn't aim to design a clear understanding of human dignity or to militate in favour of a specific regulation. Our stake has been observing, description of concepts, tracking the correlations dignity-law. The legal regulation of dignity was useful in rediscovering the individual inside of an artificial state-context and coincided with the cessation of explanations of the reasons and the relevancy of human rights. The individual requires rights in light of his dignity, from this point falls the development de profundis of human rights. The heuristic discipline of human rights – is not a purely stylistic expression, it expresses the double connotion of human dignity: from the formal point of view, dignity exists through institutional-juridical instruments that depict situations and identifiy problems, from the informal point of view, dignity is the tool used to scan and understand social reality in which human rights are installed. Human dignity leads human rights legislation beyond rules and regulations, transforming human rights in out-of-law, self-sufficient elements in perpetual evolution and rediscovery.

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DREPTURILE PERSONALULUI DIDACTIC DIN ÎNVĂȚĂMÂNTUL SUPERIOR DIN ROMÂNIA

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Abstract

This study, deals with some general notions about teachers rights, from Romanian higher educational sector. Teachers from all educational levels have rights arising from the Labor Code (general rights), and from Law no. 1/2011 (specific rights), University Charter, as well as from individual labor contract.

Among the general rights we mention about the right to work, the right to salary, the right to retirement, and from the specific rigts we mention about free professional initiative, free development of educational activities, free professional opinion.

Cuvinte-cheie: personal didactic, drept, învățământ, angajator, salariați, Codul muncii, Legea nr. 1/2011

1. INTRODUCERE

1.1. Caracterul legal al drepturilor

Faptul că un om devine la un moment dat salariat, îi conferă persoanei respective anumite drepturi. Iar cel mai important drept este acela de a primi salariul[1].

Personalul didactic de la toate nivelurile învățământului are drepturi ce decurg atât din Codul muncii (drepturi generale), cât şi din Legea nr. 1/2011[2] (drepturi specifice), din Carta universitară[3], precum şi din contractul individual de muncă.

În continuare vom analiza pe scurt drepturilor cadrelor didactice, structurându-le în funcție de caracterul acestora, generale şi specifice.

Stabilirea drepturilor cadrelor didactice se face ținându-se seama de locul şi rolul învățământului în statul de drept. Învățământul urmăreşte realizarea idealului educațional, întemeiat pe tradițiile umaniste, pe valorile democrației şi pe aspirațiile societății româneşti, şi contribuie la păstrarea identității naționale. Idealul educațional al şcolii româneşti constă în dezvoltarea liberă, integrală şi armonioasă a individualității umane, în formarea personalității autonome şi creative[4].

De aceea, cadrele didactice nu pot renunța la drepturile ce le-au fost recunoscute prin lege.

Totodată, angajatorul are obligația de a acorda salariaților toate drepturile ce decurg din lege, din contractul colectiv de muncă aplicabil şi din contractele individuale de muncă[5].

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[1] Alexandru Țiclea, Tratat de dreptul muncii. Editura Universul Juridic, Bucureşti. 2007, p. 252.
[2] Legea nr. 1/2011, Legea Educației Naționale, intrată în vigoare la data de 05 ianuarie 2011
[3] Art. 128 din Legea nr. 1/2011
[4] Art. 1 alin. (3) din Legea învățământului nr. 1/2011.
[5] Art. 40 alin. 2 lit. c C. mun.

În literatura juridică[6] au fost formulate mai multe puncte de vedere în acest sens.

Art. 38 din Codul muncii prevede că: salariații nu pot renunța la drepturile ce le sunt recunoscute prin lege. Orice tranzacție prin care se urmăreşte renunțarea la drepturile recunoscute de lege, salariaților sau limitarea acestor drepturi este lovită de nulitate.

În ceea ce priveşte la acest text, Curtea Constituțională[7] a decis că "interdicția de a renunța în tot sau în parte, la drepturile prevăzute de lege în favoarea salariaților este o măsură de protecție a acestora din urmă, menită să asigure exercițiul neîngrădit al drepturilor şi al intereselor legitime ce li se cuvin în cadrul raporturilor de muncă, pentru a-i feri de consecințele unor eventuale abuzuri ori amenințări din partea angajatorilor". O astfel de măsură de protecție nu poate fi considerată a fi un privilegiu, contrar art. 16 alin. l din Constituție, atât timp cât se justifică în considerarea situației unei anume categorii sociale care reclamă o astfel de protecție[8].

În literatura juridică[9], se subliniază faptul că salariații nu pot renunța nici la drepturile stabilite/consacrate/edictate pe cale legală, dar nici la cele stabilite prin negociere colectivă, garantate legal sau prin negocierea individuală, recunoscute legal.

Cu toate acestea legiuitorul ar putea să prevadă posibilitatea renunțării la anumite drepturi: fie total, la drepturile stabilite prin negociere în plus față de drepturile reglementate prin lege, fie parțial, dar până la limita lor minimă – deoarece sunt reglementate prin act normativ sau prin contract colectiv de muncă la nivel de unitate, grupuri de unități şi sectoare de activitate (salariu minim garantat în plată, durata minimă a concediului de odihnă, etc.)[10].

În acelaşi sens, se consideră[11] necesară o flexibilitate radicală a art. 38 din Codul muncii, spre a fi compatibil cu relațiile unei economii funcționale de piață.

Drepturile acordate cadrelor didactice nu reprezintă un act generos pe care statul îl adoptă din considerente ideatice față de categoria profesională a cadrelor didactice, ci din nevoia asigurării unei ordini firești, de funcționare a întregii societăți, printre altele şi cu ajutorul sistemului de învățământ şi inevitabil al cadrului didactic.

1.2. Categorii de drepturi

A. Clasificarea drepturilor

Drepturile cadrelor didactice se clasifică în drepturi generale şi drepturi specifice.

În categoria drepturilor generale se încadrează următoarele drepturi: dreptul la muncă; dreptul la demnitate în muncă; dreptul la cumulul de funcții; dreptul la negociere; dreptul la salariu; dreptul la premii şi distincții; dreptul la prima de instalare; dreptul la formare şi perfecționare profesională; dreptul la concedii şi zile libere; dreptul la securitate şi sănătate

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[6] Ion Traian Ştefănescu. Considerații referitoare la aplicarea art. 38 din Codul muncii. Dreptul nr. 9/2004, p. 81.

[7] Ion Traian Ştefănescu, op. cit., Dreptul, nr. 9/2004. p. 81.

[8] Decizia nr. 494/2004 a Curții Constituționale, publicată în Monitorul Oficial al României, Partea I. nr. 59 din 18 ianuarie 2005.

[9] Alexandru Țiclea. Tratat de dreptul muncii. Editura Universul Juridic, Bucureşti. 2007. p. 472.

[10] Ion Traian Ştefănescu, idem. p. 82-83.

[11] Şerban Beligrădeanu. Corelații între Legea nr. 192/2006 privind medierea fi organizarea profesiei de mediator şi dreptul muncii. în „.Dreptul", nr. 10/2006. p. 96-97.

în muncă; dreptul la asociere; dreptul la protecție în caz de concediere; dreptul la preaviz; dreptul la demisie; dreptul la pensie.

În categoria drepturilor specifice se încadrează: libertatea inițiativei profesionale; libera desfăşurare a activităților didactice; libertatea opiniei profesionale; dreptul la protecție din partea autorităților responsabile cu ordinea publică; dreptul la rezervarea catedrei sau postului; alte drepturi specifice.

În prezentul referat vom analiza pe scurt câteva dintre drepturile generale ale cadrelor didactice.

B. Categorii de drepturi

În continuare vom enumera câteva drepturi pe care cadrele didactice le au:

a) dreptul de a publica studii, articole, volume sau opere de artă, de a candida la obținerea de granturi naționale şi internaționale, fără restricții ale libertății academice;

b) dreptul să facă parte din asociații şi organizații sindicale, profesionale şi culturale, interne şi internaționale, precum şi din organizații politice legal constituite în conformitate cu prevederile legii;

c) dreptul de rezervare a postului didactic pe perioada în care cadrele didactice titulare pe un post didactic din învățământ, ocupă funcții în Parlament, în Guvern sau îndeplinesc funcții de specialitate din aparatul Parlamentului, al Consiliului Legislativ, al Curții Constituționale, al Avocatului Poporului, al Administrației Prezidențiale, al Guvernului sau în Ministerul Educației Naționale precum şi cele alese de Parlament în organismele centrale ale statului, pe toată durata mandatului au posibilitatea cumulului acestor funcții, cu activitatea didactică şi de cercetare;

d) dreptul de rezervare a postului didactic este tot astfel garantat şi pentru cadrele didactice titulare pe un post didactic din învățământ, care îndeplinesc funcția de prefect, de subprefect, de preşedinte şi vicepreşedinte al consiliului județean, primar, viceprimar şi cadrele didactice trecute în funcții de conducere, de îndrumare şi control în sistemul de învățământ, de cultură, de tineret şi de sport. Beneficiază de aceleaşi drepturi şi personalul de conducere şi de specialitate de la casa corpului didactic precum şi didactice titulare pe un post didactic din învățământ numite ca personal de conducere sau în funcții de specialitate specifice din cadrul autorităților şi instituțiilor publice, comisiilor şi agențiilor din subordinea Administrației Prezidențiale, Parlamentului sau Guvernului;

e) de drepturile specificate la al. 6 din art. 302, beneficiază şi personalul didactic trimis în străinătate cu misiuni de stat, cel care lucrează în organisme internaționale, precum şi însoțitorii acestora dacă sunt cadre didactice titulare pe un post didactic din învățământ;

f) dreptul la rezervarea postului i se cuvine şi personalului didactic şi de cercetare din învățământ care este solicitat în străinătate pentru predare, cercetare, activitate artistică sau sportivă, pe bază de contract, în temeiul acordurilor şi convențiilor guvernamentale interuniversitare ori interinstituționale, sau trimis pentru specializare;

g) dreptul la concedii fără plată, pentru personalul didactic titular pe un post didactic din învățământ, care din proprie inițiativă solicită să se specializeze sau să participe la cercetare ştiințifică în țară sau în străinătate. Însă durata totală a acestor concedii fără plată nu trebuie să depăşească 3 ani, într-un interval de 7 ani. Fiind de competența instituției de învățământ superior, sau după caz a consiliului de administrație, aprobarea acestora;

h) dreptul cadrelor didactice titulare pe un post didactic din învățământ de a beneficia d concediu fără plată pentru 1 an universitar, o dată la 10 ani, cu aprobarea instituției de învățământ superior, cu rezervarea catedrei pe perioada respectivă;

i) dreptul la concediu;

j) dreptul la transport şi cazare pentru personalul didactic care domiciliază în alte localităţi;

k) dreptul de a beneficia de asistenţă medicală în cabinetele medicale şi psihologice, în policlinici şi unităţi spitaliceşti stabilite prin protocol încheiat între Ministerul Educaţiei Naţionale şi Ministerul Sănătăţii.;

l) dreptul la întreruperea activităţii didactice, cu rezervarea postului sau a catedrei, pe durata acestei întreruperi, pentru creşterea şi îngrijirea copilului în vârstă de până la 2 ani, respectiv 3 ani în cazul copiilor cu handicap. Însă de acest drept poate beneficia doar unul dintre părinţi sau susţinători legali.

2. DREPTURI GENERALE ALE PERSONALULUI DIDACTIC

2.1. Dreptul la muncă

Astfel cum este stabilit în legislaţia internaţională, unul din drepturile esenţiale ale fiinţei umane este dreptul la muncă.

În acest sens, „Pactului Internaţional cu privire la Drepturile Economice, Sociale şi Culturale”[12], stabileşte că dreptul la muncă cuprinde dreptul pe care îl are orice persoană de a-şi câştiga existenţa printr-o muncă liber aleasă sau acceptată.

Fiecare cetăţean are posibilitatea de a desfăşura orice activitate potrivit aptitudinilor, pregătirii profesionale şi potrivit aspiraţiilor fiecăruia, dar şi în funcţie de nevoile societăţii, fără nici o discriminare bazată pe rasă, sex, apartenenţă politică sau religioasă etc., mergând pe premiza că dreptul la muncă nu poate fi îngrădit.

Constituţia[13] României garantează dreptul la muncă pentru toţi cetăţenii ţării.

În acelaşi sens, Declaraţia Universală a Drepturilor Omului[14] proclamă că „orice persoană are dreptul la muncă, la libera alegere a profesiei şi a felului muncii, la condiţii echilibrate şi satisfăcătoare de prestare a acestei munci”.

Caracterul complex al dreptului la muncă se evidenţiază prin libertatea alegerii profesiei, libertatea alegerii locului de muncă, protecţia sociala a muncii, salarizarea muncii depuse, repausul săptămânal, concediul de odihnă plătit etc.[15]

În legislaţia românească este garantată libertatea dreptului la muncă, ceea ce reprezintă posibilitatea fiecărui cetăţean de a munci liber, fără nici o discriminare directă sau indirectă faţă de salariat, bazată pe criterii de sex, orientare sexuală, caracteristici genetice, vârstă, apartenenţă naţională, rasă, culoare, etnie, opţiune politică, origine socială, handicap, situaţie sau responsabilitate familială, apartenenţă ori activitate sindicală[16].

Din punct de vedere juridic, libertatea muncii, presupune dreptul persoanei de a-şi alege singură şi liberă profesia, dacă doreşte să muncească sau nu, locul unde munceşte, pentru cine vrea să muncească şi în ce condiţii. Această libertate se manifestă prin

[12] Adoptat de Adunarea Generală a Organizaţiei Naţiunilor Unite la 16 decembrie 1966. prin Rezoluţia 2200 a (XXI). România a ratificat Pactul la data de 9 decembrie 1974, cu rezerve în privinţa art. 26, par. I.

[13] Art. 23, pct. 1 din Constituţie.

[14] A fost adoptată în anul 1948 de către Adunarea Generală a Organizaţiei Naţiunilor Unite.

[15] Înalta Curte de Justiţie şi Casaţie. Secţia Contencios-administrativ. Decizia nr. 1558/1998, publicată în „Dreptul", nr. 3/1998. p. 190.

[16] Art. 5 alin. 2 C. mun.

caracterul contractual al tuturor formelor raportului juridic de muncă. Libertatea muncii este asigurată prin reglementarea desfacerii contractului individual de muncă din inițiativa angajatului, care nu este supus nici unei alte limitări sau condiții, în afara obligației de preaviz[17].

2.2. Dreptul la demnitate în muncă

Începând cu secolul XIX, juriştii au acordat o atenție deosebită noțiunii de „demnitate", ca fiind un drept de natură absolută, în documentele juridice ulterioare.

Plecând de la concepția filozofică asupra demnității umane, se fondează noțiunea juridică de demnitate. Demnitatea se înscrie printre normele fundamentale ale dreptului, astfel încât orice comportament sau atitudine, care i-ar putea aduce atingere, sunt lovite de nulitate[18].

În relația de muncă, angajatorul are dreptul de a da ordine, iar salariatul are obligația de a executa aceste ordine.

Angajatorul are dreptul de a stabili organizarea şi funcționarea unității[19], atribuțiile corespunzătoare pentru fiecare salariat, de a da dispoziții cu caracter obligatoriu pentru salariați, de a exercita controlul asupra modului de îndeplinire a sarcinilor de serviciu (ordinele angajatorului) şi a constata săvârşirea abaterilor disciplinare şi a aplica sancțiunile corespunzătoare[20]. Cu alte cuvinte, angajatorul are prerogativa de conducere, de reglementare şi prerogativa disciplinară[21].

Pe de altă parte, salariatul, ca cetățean, are garantate prin Constituție drepturile fundamentale, de care nu poate deroga prin simpla lui calitate de salariat: dreptul la demnitate în muncă, dreptul la viață privată, dreptul la libertate de exprimare etc.

În exercitarea prerogativelor sale, angajatorul nu trebuie să aducă atingere nici unuia din drepturile fundamentale ale salariatului.

Astfel, dreptul la demnitate în muncă, este reglementat la art. l alin. 3 din Constituție. Acest drept este reglementat şi în Codul muncii la art. 39 alin. l lit. e) şi la art. 6 alin. l şi stabileşte faptul că orice salariat beneficiază şi de respectarea demnității şi a conştiinței sale, fără nicio discriminare.

2.3. Dreptul la cumulul de funcții

Termenul de cumul provine din cuvântul latinesc „cumulus", ce avea semnificația de grămadă.

Potrivit Dicționarului de drept al muncii[22] prin cumul de funcții se înțelege acea situație în care, una şi aceeaşi persoană fizică este concomitent încadrată în muncă pe baza a două sau mai multe contracte individuale de muncă sau/şi convenții civile de prestări servicii.

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[17] Sanda Ghimpu, Ion Traian Ştefănescu, Şerban Beligrădeanu, Gheorghe Mohanu. Dreptul muncii. Tratat. vol. I. Editura Ştiințifică şi Enciclopedică. Bucureşti. 1978. p. 51.

[18] Olivier de Tissot, Pour une analyse juridique du concept de "dignité" du salarié, în "Droit social" nr. 12/1995.

[19] Costel Gîlcă, Demnitatea în muncă, Revista Română de dreptul muncii nr. 2/2004.

[20] Art. 40 alin. 1 C. mun.

[21] Randy Hodson, Dignity at work, Ed. Cambrige University Press, 2001, p. 3.

[22] Şerban Beligrădeanu, Ion Traian Ştefănescu. Dicționar de drept al muncii. Editura Lumina Lex, Bucureşti, 1997, p. 78.

Codul muncii, referindu-se la cumul, are în vedere numai activitatea desfăşurată pe baza contractelor individuale de muncă[23].

De aceea, în literatura juridică[24], se arată, întemeiat, că în realitate, există:

a) cumul de funcții *stricto sensu*, care constă în existența a două sau mai multe contracte individuale de muncă, în aceeaşi perioadă, ale aceluiaşi salariat;

b) cumul de funcții *lato sensu*, care constă în existența concomitentă a mai multor contracte de muncă sau/şi convenții civile de prestări servicii ori comerciale sau alte raporturi de serviciu.

Cumulul de funcții în cazul personalului didactic, prezintă un specific aparte, prin natura dispozițiilor Legii nr. 1/2011 privind Educația Națională.

Vom face referire în continuare la cumulul de funcții în cazul personalului didactic, dar şi la posibilitatea pensionarilor de a cumula pensia cu salariul, precum şi la cumulul acestuia cu indemnizația de şomaj.

În învățământul superior funcțiile de rector, prorector, decan, prodecan, director de departament, director de colegiu sau unitate de cercetare, proiectare, microproducție şi şef de catedră nu se pot cumula între ele, potrivit art. 214 alin. 1.

Art. 288 alin. 3 din Legea nr. 1/2011, prevede că: „Susținerea de către personalul titular de activități de predare şi cercetare în alte instituții de învățământ superior sau de cercetare se poate face doar cu acordul scris al senatului universitar".

Se observă o schimbare substanțială între noua reglementare din Legea Educației Naționale, față de ce anterioară, care la art. 93 alin. 4 prevedea că: „personalul didactic din învățământul de stat precum şi cel al instituțiilor de învățământ privat autorizate sau acreditate, poate îndeplini cel mult două norme didactice cu acordul conducerii unității de învățământ unde este titular cu carte de muncă".

Cu privire la acest din urmă text, literatura juridică[25] a considerat, că are drept finalitate, nu îngrădirea dreptului fundamental la muncă, ci asigurarea calității activității didactice din învățământul superior.

Trebuie avut în vedere faptul că în conformitate cu dispozițiile art. 287 şi urm. din actuala Lege a Educației Naționale pentru personalul didactic din învățământul superior de toate categoriile, activitatea este normată. Însă, depăşirea a peste două norme didactice duce, în fapt, la imposibilitatea ca cel în cauză să-şi îndeplinească atribuțiile de pregătire ştiințifică, dezvoltare tehnologică, de proiectare sau de creație artistică, atribuții care (alături de cele de predare, seminarizare, etc.) revin imperativ personalului didactic din învățământul superior în temeiul art. 287 alin. 2 din Legea nr. 1/2011.

Totuşi Curtea Constituțională, prin Decizia nr. 30/1998[26] a hotărât că textul în discuție este neconstituțional. Reținând printre altele, următoarele:

După revizuirea Constituției din anul 2003, şi republicarea acesteia, art. 38 a devenit art.41.

Art. 38 alin. l din Constituție[27] prevede că „dreptul la muncă nu poate fi îngrădit".

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[23] Art. 35 alin. 1 C. mun., publicat în Monitorul Oficial al României, Partea I, nr. 345 din 18 mai 2011.

[24] Ion Traian Ştefănescu. Tratat de dreptul muncii, vol. I, Editura Lumina Lex, Bucureşti, 2003, p. 629.

[25] Şerban Beligrădeanu, Legislația muncii, comentată, vol. XXV, Editura Lumina Lex, Bucureşti, 1997, p. 95.

[26] Publicată în Monitorul Oficial al României, Partea 1, nr. 113 din 16 martie 1998.

[27] După revizuirea Constituției din anul 2003 şi republicarea acesteia, art. 38 a devenit art. 41.

„Alegerea profesiei şi alegerea locului de muncă sunt libere". În acelaşi sens sunt şi dispoziţiile art. 6 pct. l, din Pactul internaţional cu privire la drepturile economice, sociale şi culturale, ratificat de România prin Decretul nr. 212/1974 care prevede că „statele părţi în prezentul pact recunosc dreptul ce îl are orice persoană de a obţine posibilitatea să-şi câştige existenţa printr-o muncă liber aleasă sau acceptată şi vor lua măsurile potrivite pentru garantarea acestui drept".

Astfel se statuează că prevederile art. 93 alin. 4 din vechea Lege a învăţământului, limitând activitatea cadrelor didactice la cel mult două norme, contravin dispoziţiilor constituţionale citate.

De asemenea, textul criticat încalcă şi dispoziţiile art. 49 din Constituţie, care reglementează

expres şi limitativ în ce cazuri exerciţiul unor drepturi sau libertăţi poate fi îngrădit. Acestea sunt: apărarea siguranţei naţionale, a ordinii, a sănătăţii sau a moralei publice, a drepturilor şi libertăţilor cetăţeneşti, desfăşurarea instrucţiei penale şi prevenirea consecinţelor unei calamităţi naturale ori ale unui sinistru deosebit de grav.

Însă, niciunul din aceste cazuri nu motivează restricţia instituită prin art. 93 alin. 4 din Legea nr. 128/1997.

S-a considerat că, prin restricţia impusă se aduce atingere şi principiului autonomiei universitare, instituit prin art. 32 alin. 6 din Constituţie, deoarece interdicţia angajării de cadre universitare, în condiţiile art. 93 alin. 4 din vechea reglementare, afectează desfăşurarea procesului de învăţământ superior de stat sau private, care funcţionează.

Îngrădirea prevăzută de textul atacat contravine şi principiului egalităţii şanselor în faţa legii, reglementat de art. 16 alin. l din Constituţie, deoarece cadrele universitare ar fi astfel într-o situaţie de inferioritate faţă de categoriile de salariaţi care pot presta activităţi prin cumul şi pentru care nu există aceste restricţii.

Limitarea activităţii cadrelor didactice la un număr redus de norme didactice, pe motiv că astfel se poate asigura un învăţământ de calitate, nu poate fi reţinută, deoarece, nu numărul de norme conferă, prin el însuşi, calitatea prestaţiei unui cadru didactic universitar, ci calificarea profesională, experienţa didactică şi seriozitatea cu care fiecare profesor îşi realizează menirea.

În cadrul autonomiei universitare, garantată de art. 32 alin. 6 din Constituţie, instituţiile de învăţământ privat au interesul şi posibilitatea conferită de lege şi de contractul pe care îl încheie cu cadrul didactic, să controleze îndeplinirea tuturor obligaţiilor didactice ce îi revin acestuia, precum şi nivelul ştiinţific al lecţiilor predate de el, înlăturând orice exerciţiu abuziv al profesiei didactice. Potrivit legii fundamentale, deciziile Curţii Constituţionale sunt obligatorii, ele producând efecte *erga omnes*. Aceste efecte nu pot fi înlăturate prin intermediul unei aşa numite clauze de fidelitate, care să limiteze ori să înlăture posibilitatea cumulului de funcţii[28].

[28] Ion Deleanu. Cu privire la cumulul de funcţii în învăţământul superior şi clauza de fidelitate, în „Dreptul", nr. 2/2003. p. 62-69; Romulus Gidro, Despre unele tendinţe privind încălcarea principiului libertăţii muncii şi a dreptului la muncă, în Revista română de dreptul muncii, nr. 2/3003, p. 62-65.

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CONSIDERAȚII GENERALE PRIVIND SOLUȚIONAREA ALTERNATIVE A CONFLICTELOR DINTRE PROFESIONIŞTI

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Rezumat

În ciuda faptului că principiul celerității se bucură de o amplă reglementare în legislația românească, drumul parcurs de justițiabil de la introducerea cererii de chemare în judecată şi până la soluționarea acesteia, continuă să fie unul lung şi anevoios, şi nu de puține ori inutil, timpul trecut făcând de multe ori imposibil de pus în executare hotărârea obținută.

Astfel, unul dintre cele mai importante motive ce au stat la baza adoptării Noului Cod de Procedură Civilă a fost tocmai introducerea unui cadru legal care să ducă la o accelerare a soluționării litigiilor.

Iar una dintre cele mai bune metode pentru a se ajunge la o justiție mai rapidă şi mai eficientă, este degrevarea instanțelor de judecată prin oferirea justițiabililor a unor alternative la procedura de judecată în fața instanțelor judecătoreşti, sau a unor proceduri mai simplificate.

În afara faptului că procedura de drept comun este extrem de greoaie şi durează mult timp, aceasta a devenit şi din ce în ce mai scumpă prin numeroasele taxe şi onorarii. S-a impus aşadar, găsirea unor metode alternative de stingere a diferendelor, mai economice, în măsura în care legislația permite ca aceste conflicte să fie soluționate prin proceduri speciale.

Procedurile prealabile introducerii unor cereri de chemare în judecată: medierea; a celei în procedura contenciosului administrativ sau cele simplificate care se desfăşoară în fața instanțelor judecătoreşti: procedura ordonanței de plată; procedura cu privire la cererile de valoare redusă; procedura arbitrală ş.a., au menirea de a să evite calea greoaie şi costisitoare ce se desfăşoară în fața instanțelor judecătoreşti în procedura de drept comun.

Cuvinte-cheie: celeritate, mediere, arbitraj, procedura ordonanței de plată

CUPRINS

1. Medierea

În ciuda adoptării Legii nr. 202/2010 privind unele măsuri pentru accelerarea soluționării proceselor, şi a intrării în vigoare a Noului Cod de Procedură Civilă, legiuitorul a observat că instanțele continuă să fie aglomerate, iar litigiile aparent banale sunt întârziate din cauza lentorii si a procedurilor greoaie, că deciziile instanței continuă să vină după repetate termene şi înfățişări, în care justițiabilul pierde bani, timp şi nervi, iar rezultatul nu este întotdeauna satisfăcător. În încercarea de degrevare a instanțelor, legiuitorul a adoptat legea nr. 192/2006 privind medierea si organizarea profesiei de mediator, prin care s-a încercat să se deschidă ochii justițiabililor cu privire la o alternativă viabilă la judecata în fața instanțelor, şi anume medierea.

Prin art. 60^{1} din Legea nr. 192/2006, s-a introdus ca procedură prealabilă obligatorie înainte de introducerea acțiunii la instanță informarea cu privire la beneficiile medierii, cu privire la următoarele tipuri de litigii:

a) în domeniul protecției consumatorilor, când consumatorul invocă existența unui prejudiciu ca urmare a achiziționării unui produs sau unui serviciu defectuos, a nerespectării clauzelor contractuale ori garanțiilor acordate, a existenței unor clauze abuzive cuprinse în contractele încheiate între consumatori şi operatorii economici ori a încălcării altor drepturi prevăzute în legislația națională sau a Uniunii Europene în domeniul protecției consumatorilor;

b) în materia dreptului familiei: continuarea căsătoriei: partajul de bunuri comune; exercițiul drepturilor părinteşti; stabilirea domiciliului copiilor; contribuția părinților la întreținerea copiilor; orice alte neînțelegeri care apar în raporturile dintre soți cu privire la drepturi de care ei pot dispune potrivit legii;

c) în domeniul litigiilor privind posesia, grănițuirea, strămutarea de hotare, precum şi în orice alte litigii care privesc raporturile de vecinătate;

d) în domeniul răspunderii profesionale în care poate fi angajată răspunderea profesională, respectiv cauzele de malpraxis, în măsura în care prin legi speciale nu este prevăzută o altă procedură;

e) în litigiile de muncă izvorâte din încheierea, executarea şi încetarea contractelor individuale de muncă;

f) în litigiile civile a căror valoare este sub 50.000 lei, cu excepția litigiilor în care s-a pronunțat o hotărâre executorie de deschidere a procedurii de insolvență, a acțiunilor referitoare la registrul comerțului şi a cazurilor în care părțile aleg să recurgă la procedura prevăzută la art. 1.013 – 1.024 (ordonanța de plată) sau la cea prevăzută la art. 1.025 – 1.032 (cererile de valoare redusă) din Legea nr. 134/2010, republicată, cu modificările şi completările ulterioare;

g) în cazul infracțiunilor pentru care retragerea plângerii prealabile sau împăcarea părților înlătură răspunderea penală, după formularea plângerii, dacă făptuitorul este cunoscut sau a fost identificat, iar victima îşi exprimă consimțământul de a participa la şedința de informare împreună cu făptuitorul; dacă victima refuză să participe împreună cu făptuitorul, şedința de informare se desfăşoară separat.

Raportându-se la valoarea şi natura acestor litigii, legiuitorul a considerat că justițiabilul va fi mai susceptibil de a apela la procedura medierii în cazul acestora, decât ar fi în cazul altor tipuri de litigii.

Astfel este lesne de înțeles că este în interesul ambelor părți ca un conflict în materia drepturilor de familia, să se soluționeze pe cale amiabila, prin intermediul medierii, decât pe calea unei acțiuni în justiție. Mai ales dacă vorbim de un conflict privind continuarea căsătoriei sau despre exercitarea drepturilor părinteşti. În acest din urmă caz, beneficiul acestei proceduri este unul considerabil dacă stăm să ne gândim şi la stresul emoțional de care este protejat minorul.

Motivele avute în vedere de legiuitor la adoptarea acestei legi sunt demne de a fi luate in considerare de justițiabili, apelarea la procedura medierii fiind în măsură să permită conservarea unor relații comerciale, unor raporturi de muncă sau de vecinătate.

Apelarea la o procedură alternativă în care nu există învingători şi învinşi, cum se întâmplă în procedura de drept comun, este ideală pentru rezolvarea acestor tipuri de conflicte.

Medierea reprezintă o modalitate de soluționare a conflictelor pe cale amiabilă, cu ajutorul unei terțe persoane specializate în calitate de mediator, în condiții de neutralitate, imparțialitate şi confidențialitate.

Medierea este un proces de soluționare a disputelor prin metode alternative, în care unul sau mai mulți profesioniști special pregătiți, asistă părțile în soluționarea conflictului, având în vedere nevoile și interesele acestora.

Mediatorii nu impun soluții, iar participarea la proces este voluntară, medierea reprezentând un proces, a cărui evoluție depinde în mare măsură de interesele părților și de gradul de receptivitate al acestora.

Medierea este o metodă confidențială și privată, prin intermediul căreia mediatorii, persoane independente și cu o pregătire specială, ajută părțile să-și definească mai clar obiectivele, interesele și le îndrumă astfel încât să construiască împreună variante reciproc avantajoase de soluționare a conflictului.

Medierea oferă persoanelor oportunitatea de a-și asuma responsabilitatea rezolvării disputelor, și de a menține permanent controlul asupra deciziilor care le afectează viitorul, evitându-se astfel folosirea măsurilor abuzive și deteriorarea relațiilor dintre părți, încurajându-se dialogul, colaborarea și respectul reciproc.

Medierea face parte din marea familie a metodelor alternative de soluționare a disputelor și reprezintă, așadar, o alternativă viabilă la sistemul juridic clasic, menită sa degreveze instanțele de judecată de numeroase cauze și să asigure satisfacerea intereselor părților implicate în conflict.

În cadrul unei proceduri de mediere:

- Părțile stabilesc data și ora procesului de mediere.

În instanță, termenele de judecată sunt impuse și nu țin cont de programul părților. Ședința de mediere poate fi reprogramată la fel de ușor ca orice alt tip de întâlnire.

- Nu există limită de timp pentru ședința de mediere.

Medierile se pot solda și cu înțelegeri parțiale situație în care este posibilă programarea unei alte ședințe de mediere la o dată ulterioară

- Părțile, de comun acord, pot alege mediatorul la care să apeleze.

Această facilitate nu există și în fața instanței de judecată. Alegerea mediatorului de către părți mărește încrederea acestora în obținerea rezultatului dorit.

- Un prim pas spre soluționarea conflictului este prezența părților la mediator.

Medierea este facultativă, iar prezența părților la mediator denotă dorința acestora de a soluționa neînțelegerile.

- Sala în care are loc ședința de mediere este întotdeauna mai primitoare și mai discretă față de sala de judecată: medierea este confidențială.

În sala de judecată domnește formalismul, trebuie respectate anumite reguli procedurale stricte, cuvântul se ia într-o anumită ordine s.a.m.d. Mediatorul este atent asupra voinței și interesului părților. La ședința de mediere este permisă doar prezența părților și a persoanelor agreate de acestea.

- În cadrul unui proces, soluția este impusa părților.

Mediatorul nu impune nimic, părțile alegând soluția avantajoasă și amiabilă pentru conflictul în care se găsesc.

- Medierea este mai elegantă, fiind uzitată în întreaga lume civilizată.

Satisfacțiile părților în cazul ajungerii la o înțelegere sunt cu atât mai mari cu cât se datorează voinței și implicării lor.

- Prin mediere se pot rezolva toate tipurile de conflict.

Pe tot parcursul medierii părțile comunică. Într-un proces în instant, comunicarea dintre părți este alterată, soluția generând noi conflicte de cele mai multe ori.

- Mediatorul nu judecă părțile şi nu dă un verdict.

Menirea mediatorului este să faciliteze dialogul dintre părți, în urma căruia acesta să genereze opțiuni în vederea soluționării divergențelor existente.

- Apelând la mediere părțile nu renunță la justiția clasică.

Dacă nu reuşesc să îşi soluționeze prin mediere conflictul, au posibilitatea de a se adresa instanței de judecată, la fel cum o aveau şi înainte de a apela la mediere.

Nota definitorie a activității de mediere este dată de faptul că părțile recurg la mediere în mod voluntar, iar rezolvarea conflictului este rodul întâlnirii voinței părților.

În urma procedurii de mediere dacă se ajunge la o înțelegere, părțile încheie un acord care este un contract între părți în înțelesul art. 1166 Cod Civil, mai exact un contract de tranzacție conform art. 2267 Cod Civil la care se putea ajunge, evident, şi fără intervenția mediatorului.

Acordul de mediere poate fi încheiat oral sau în scris, nefiind obligatoriu ca înțelegerea părților prin care se încheie disputa să se materializeze în formă scrisă. În multe cazuri acordul, materializat într-un contract, este neaplicabil – de exemplu în disputele obişnuite de familie, cele de la locul de muncă (cele necontractuale), intraorganizaționale (dispute între departamente), interculturale, etc.

Contractul poate fi consemnat, *ad probationem*, într-un document ce are valoare de înscris sub semnătură privată. Pentru a-i da valoare de înscris autentic, părțile au la îndemână două căi, una extrajudiciară şi cealaltă judiciară, în funcție de momentul în care a intervenit medierea.

Astfel, potrivit art. 59 din Legea nr. 192/2006 cu toate modificările şi completările ulterioare, dacă părțile ajung la o înțelegere ea poate fi supusă verificării notarului public, în vederea autentificării sau, după caz părțile pot supune înțelegerea verificării de către instanța de judecată în vederea încuviințării, obținând în acest fel un titlu executoriu.

PROCEDURA LA INSTANȚĂ

Chiar după declanşarea procesului se poate intra în procedura de mediere. Potrivit legii, la închiderea procedurii de mediere, mediatorul este obligat să informeze în scris instanța de judecată dacă părțile au ajuns sau nu la o înțelegere în urma procesului de mediere. Informarea ar trebui sa conțină elementele cuprinse în procesul verbal încheiat la sfârşitul procedurii de mediere.

Astfel, conform art. 63 din Lege, dacă medierea a avut succes şi conflictul a fost soluționat, instanța va pronunța, la cererea părților, o hotărâre de expedient potrivit dispozițiilor art. 438 din Codul de procedură civilă.

Dacă părțile nu doresc încuviințarea, mediatorul nu poate fi obligat să comunice instanței de judecată acordul părților rezultat din mediere.

Judecătorul va dispune la cererea părții interesate restituirea taxei judiciare de timbru plătite pentru investirea instanței (art. 63 alin. 2 din Legea nr. 192/2006). De asemenea, se poate solicita recuperarea onorariului mediatorului pentru persoanele cărora li s-a aprobat cererea de acordare a ajutorului public judiciar în materie nepenală dacă au parcurs procedura de mediere a litigiului anterior începerii procesului sau au solicitat medierea după începerea procesului, dar înainte de prima zi de înfățişare (art. 20 din O.U.G. nr. 51/2008).

Autentificarea dată de notarul public sau încuviințarea făcută de instanța de judecată are rolul de a facilita executarea reglementării amiabile. Astfel, potrivit art. 632 C. pr. civ.,

executarea silită se va efectua numai în temeiul unei hotărâri judecătoreşti ori a unui alt înscris care, potrivit legii, constituie titlu executoriu. Tocmai de aceea, art. 101 din Legea nr. 36/1995 prevede: „Înscrisul autentificat de notarul public care constata o creanţă certă şi lichidă are putere de titlu executoriu la data exigibilităţii acesteia. În lipsa înscrisului original poate constitui titlu executoriu duplicatul sau copia legalizata de pe exemplarul din arhiva notarului public". În mod similar, alin. 3 introdus prin Legea nr. 370/2009 la art. 63 din Legea nr. 192/2006, prevede că „Hotărârea de expedient pronunţată conform prevederilor prezentei legi constituie titlu executoriu".

Caracterul executoriu semnifică investirea cu autoritate publică a unui înscris pentru executarea căruia ar fi nevoie de autoritate statală, ca să fie efectuata la nevoie prin forţa coercitivă a statului. Ca urmare, din moment ce titlurile arătate mai sus sunt executorii în virtutea legii, executarea lor se va face fără nici o altă formalitate, nemaifiind necesară investirea cu formulă executorie, după cum arată în mod expres art. 635 C. pr. civ.

Cât priveşte efectele pe care le are acordul de mediere dintre părţi pe care acestea nu înţeleg să îl supună procedurii de autentificare sau încuviinţare, acestea sunt aceleaşi din dreptul comun; dacă medierea s-a desfăşurat în afara unui proces, în caz de neexecutare a acordului el poate constitui temeiul unei acţiuni *ex contractu* adresată instanţei în scopul de a obţine o hotărâre judecătorească care să îl oblige pe debitor să execute ceea ce s-a obligat prin acordul de mediere; dacă medierea a avut loc în timpul procesului, acordul va constitui un început de dovadă scrisă, urmând a fi evaluat în ansamblul probelor administrate care vor sta la baza unei hotărâri potrivit procedurii ordinare.

2. Arbitrajul

Alături de mediere o altă modalitate de rezolvarea a conflictelor fără apelarea la instanţele judecătoreşti este arbitrajul.

Arbitrajul poate fi definit ca fiind o modalitate alternativă de soluţionare a litigiilor patrimoniale, în care părţile, în urma unei convenţii formale se supun deciziei unei terţe părţi numită arbitru, în urma unei proceduri judiciare, din care rezultă o hotărâre definitivă şi executorie.

Instituţia arbitrajului reprezintă o modalitate alternativă modernă şi eficientă de soluţionare a litigiilor care prezintă o serie importantă de avantaje:

- părţile aflate în conflict au libertatea de a alege arbitrul sau arbitrii ce vor pronunţa hotărârea arbitrală, fapt care nu se poate face în cadrul justiţiei în faţa instanţelor judecătoreşti;

Conform art. 543 din Codul de Procedura Civilă, arbitrajul poate fi încredinţat, prin convenţia arbitrală, uneia sau mai multor persoane, investite de părţi să judece litigiul şi să pronunţe o hotărâre definitivă şi obligatorie pentru ele.

- soluţionarea rapidă a conflictelor între părţi, faţă de mecanismele greoaie ale justiţiei statale, care pot dura ani de zile;

Potrivit art. 567 C. pr. civ., dacă părţile nu au prevăzut altfel, tribunalul arbitral trebuie să pronunţe hotărârea în termen de cel mult 6 luni de la data constituirii sale, sub sancţiunea caducităţii arbitrajului.

Cu toate acestea, în interiorul termenului de 6 luni, părţile pot consimţi în scris la prelungirea termenului arbitrajului.

De asemenea şi tribunalul arbitral are posibilitatea de a dispune, pentru motive temeinice, prelungirea termenului, o singură dată, cu cel mult 3 luni.

Termenul se prelungeşte de drept cu 3 luni în cazul decesului uneia dintre părți.

Termenul se suspendă pe timpul judecării unei cereri de recuzare sau a oricărei alte cereri incidente adresate tribunalului.

- un alt avantaj al arbitrajului este reprezentat de confidențialitatea acestuia;

Astfel spre deosebire de procedura de drept comun, procedura arbitrajului asigură confidențialitatea pe tot parcursul desfăşurării ei, realizându-se în cadru închis, şi permite păstrarea secretului de la înregistrarea cererii de arbitrare, desfăşurarea procedurii şi până la pronunțarea hotărârii arbitrale care nu are caracter public. Natura privată a arbitrajului explică de ce activitatea arbitrală nu este supusă principiului publicității.

Prin aceasta se păstrează secretul cu privire la litigiul în cauza şi se evită publicitatea, aspect deloc neglijabil în litigiile civile sau comerciale. De asemenea, nici hotărârea arbitrala nu este pronunțată în ședință publică, ea fiind comunicată doar părților implicate. În acest fel reputația părților participante la procedura arbitrală rămâne neafectată, indiferent de soluția finală pronunțată de tribunalul arbitral.

Pentru a asigura un climat de confidențialitate pe tot parcursul procedurii arbitrale, la aceasta vor participa doar părțile implicate şi reprezentanții acestora pe baza de împuternicire avocațială sau procură specială.

- părțile pot să decidă legea sau sistemul de drept ce va guverna atât contractul care exprimă voința acestora cât şi modul de soluționare a eventualelor litigii.

Potrivit art. 544 din Noul Cod de Procedură Civilă, arbitrajul se organizează şi se desfăşoară potrivit convenției arbitrale. Sub rezerva respectării ordinii publice sau a bunelor moravuri, precum şi a dispozițiilor imperative ale legii, părțile pot stabili prin convenția arbitrală sau prin act scris încheiat ulterior, cel mai târziu odată cu constituirea tribunalului arbitral, fie direct, fie prin referire la o anumită reglementare având ca obiect arbitrajul, normele privind constituirea tribunalului arbitral, numirea, revocarea şi înlocuirea arbitrilor, termenul si locul arbitrajului, normele de procedură pe care tribunalul arbitral trebuie sa le urmeze în judecarea litigiului, inclusiv eventuale proceduri prealabile de soluționare a litigiului, repartizarea între părți a cheltuielilor arbitrale şi, în general, orice alte norme privind buna desfăşurare a arbitrajului.

- un alt avantaj de loc de neglijat este acela al costurilor arbitrajului care sunt mai reduse în raport cu taxele judiciare de timbru.

Taxele arbitrale diferă în funcție de valoarea obiectului cererii de arbitrare, dar şi în funcție de caracterul intern sau internațional al litigiului. Valoarea taxelor este influențată şi de numărul de arbitri desemnați de părți, arbitrajul cu un singur arbitru fiind cel mai avantajos din acest punct de vedere.

Potrivit art. 595 din Codul de procedură civilă, cheltuielile pentru organizarea şi desfăşurarea arbitrajului, precum şi onorariile arbitrilor, cheltuielile de administrare a probelor, cheltuielile de deplasare a părților, arbitrilor, experților, martorilor, se suportă potrivit înțelegerii dintre părți. În lipsa unei asemenea înțelegeri, cheltuielile arbitrale se suportă de partea care a pierdut litigiul, integral daca cererea de arbitrare este admisa în totalitate sau proporțional cu ceea ce s-a acordat, daca cererea este admisă în parte.

Tribunalul arbitral poate evalua, în mod provizoriu, cuantumul onorariilor arbitrilor şi poate obliga părțile să consemneze suma respectivă prin contribuție egală. Părțile pot fi obligate solidar la plată. Dacă pârâtul nu-şi îndeplineşte obligația care îi revine, în termenul stabilit de tribunalul arbitral, reclamantul va consemna întreaga sumă, urmând ca prin hotărârea arbitrală să se stabilească cuantumul onorariilor cuvenite arbitrilor, precum şi

modul de suportare de către părți. De asemenea, tribunalul arbitral poate obliga părțile sau pe fiecare dintre ele la avansarea altor cheltuieli arbitrale.

În cazul arbitrajului organizat de o instituție permanentă, taxele pentru organizarea arbitrajului, onorariile arbitrilor, precum şi celelalte cheltuieli arbitrale se stabilesc şi se plătesc conform regulamentului acelei instituții.

- hotărârea arbitrală este definitivă şi obligatorie pentru părți.

Conform art. 606 din Noul Cod de Procedură Civilă hotărârea arbitrală comunicată părților este definitivă şi obligatorie.

Hotărârea arbitrală se comunică părților în termen de cel mult o lună de la data pronunțării ei.

Potrivit alin. (3) al art. 603 din Codul de Procedură Civilă, astfel cum a fost introdus prin Legea nr. 206/2012, în cazul în care hotărârea arbitrală se referă la un litigiu legat de transferul dreptului de proprietate şi/sau de constituirea altui drept real asupra unui bun imobil, hotărârea arbitrală se va prezenta instanței judecătoreşti ori notarului public pentru a obține o hotărâre judecătorească sau, după caz, un act autentic notarial. După verificarea de către instanța judecătorească ori de către notarul public a respectării condițiilor şi după îndeplinirea procedurilor impuse de lege şi achitarea de către părți a impozitului privind transferul dreptului de proprietate, se va proceda la înregistrarea în cartea funciară şi se va realiza transferul de proprietate şi/sau constituirea altui drept real asupra bunului imobil în cauză.

Hotărârea arbitrală se aduce la îndeplinire de bunăvoie de către partea împotriva căreia s-a pronunțat, de îndată sau în termenul arătat în cuprinsul acesteia.

Hotărârea arbitrală constituie titlu executoriu si se execută silit întocmai ca şi o hotărâre judecătorească.

2.1. Convenția arbitrală

Convenția arbitrală se încheie în scris, sub sancțiunea nulității. Condiția formei scrise se consideră îndeplinită atunci când recurgerea la arbitraj a fost convenită prin schimb de corespondență, indiferent de forma acesteia, sau schimb de acte procedurale.

În cazul în care convenția arbitrală se referă la un litigiu legat de transferul dreptului de proprietate şi/sau constituirea altui drept real asupra unui bun imobil, convenția trebuie încheiată în formă autentică notarială, sub sancțiunea nulității absolute.

În ceea ce priveşte felurile convenției arbitrale aceasta se poate încheia fie sub forma unei clauze compromisorii, înscrisă în contractul principal ori stabilită într-o convenție separată, la care contractul principal face trimitere, fie sub forma compromisului.

De asemenea, existența convenției arbitrale poate rezulta şi din înțelegerea scrisă a părților făcută în fața tribunalului arbitral.

Prin clauza compromisorie părțile convin ca litigiile ce se vor naşte din contractul în care este stipulată sau în legătură cu acesta să fie soluționate pe calea arbitrajului, arătându-se, sub sancțiunea nulității, modalitatea de numire a arbitrilor. În cazul arbitrajului instituționalizat este suficientă referirea la instituția sau regulile de procedură ale instituției care organizează arbitrajul.

Validitatea clauzei compromisorii este independentă de valabilitatea contractului în care a fost înscrisă.

În caz de îndoială, clauza compromisorie se interpretează în sensul că se aplică tuturor neînțelegerilor care derivă din contractul sau din raportul juridic la care ea se referă.

Prin compromis părțile convin ca un litigiu intervenit între ele să fie soluționat pe calea arbitrajului, arătându-se, sub sancțiunea nulității, obiectul litigiului şi numele arbitrilor sau modalitatea de desemnare a acestora în cazul arbitrajului ad-hoc. În cazul arbitrajului instituționalizat, dacă părțile nu au ales arbitrii şi nici nu au stabilit modalitatea de desemnare a acestora, aceasta se va face potrivit regulilor de procedură ale respectivei instituții arbitrale.

Compromisul se poate încheia chiar dacă litigiul intervenit între părți este deja pe rolul unei alte instanțe.

Încheierea procedurii arbitrale cu sau fără pronunțarea unei hotărâri asupra fondului cauzei nu aduce atingere eficacității convenției arbitrale, sub forma clauzei compromisorii. Aceasta va rămâne valabilă şi va servi drept temei pentru orice nouă procedură arbitrală care ar fi declanşată în temeiul acesteia pentru soluționarea oricărui litigiu apărut între părți derivând din contractul principal.

Conform art. 553 din Noul Cod de Procedură Civilă, încheierea convenției arbitrale exclude, pentru litigiul care face obiectul ei, competența instanțelor judecătoreşti.

Cu toate acestea instanța judecătorească sesizată cu o cauză cu privire la care s-a încheiat o convenție arbitrală se va declara necompetentă numai dacă părțile sau una dintre ele solicită aceasta, invocând convenția arbitrală.

În acest din urmă caz, instanța îşi va declina competența în favoarea organizației sau instituției pe lângă care funcționează arbitrajul instituționalizat, care, în temeiul hotărârii de declinare, va lua măsurile necesare în vederea constituirii tribunalului arbitral. În cazul arbitrajului ad-hoc, instanța va respinge cererea ca nefiind de competența instanței judecătoreşti.

Potrivit art. 554 alin. (2) C. pr. civ., instanța va reține spre soluționare procesul chiar dacă este încheiată o convenție arbitrală în următoarele situații:

a) pârâtul şi-a formulat apărările în fond, fără nicio rezervă întemeiată pe convenția arbitrală;

b) convenția arbitrală este lovită de nulitate ori este inoperantă;

c) tribunalul arbitral nu poate fi constituit din cauze vădit imputabile pârâtului în arbitraj.

Atunci când exista un conflict de competență între un tribunalul arbitral şi o instanță judecătorească acesta va fi soluționat de instanța judecătorească ierarhic superioară celei aflate în conflict

2.2. Procedura arbitrală

În ceea ce priveşte regulile de procedură aplicabile arbitrajului, potrivit art. 576 din Codul de procedură civilă, părțile pot stabili, prin convenția arbitrală aceste reguli sau îi pot împuternici pe arbitri să le stabilească.

Atunci când părțile recurg la arbitrajul instituționalizat, se aplică regulile de procedură adoptate de către conducerea instituției de arbitraj, potrivit normelor sale de funcționare stabilite prin actul de înființare.

În cazul în care părțile nu au stabilit regulile de procedură aplicabile arbitrajului si nici nu au ales sa recurgă la arbitrajul instituționalizat, regulile de procedură ce urmează a fi aplicate arbitrajului sunt cele stabilite în art. 576 şi urm. C. pr. civ.

Comunicarea înscrisurilor litigiului, a citațiilor, hotărârilor arbitrale şi încheierilor de şedință, între părți sau către părți,se face prin scrisoare recomandată cu conținut declarat şi

confirmare de primire, iar dovezile de comunicare se depun la dosar. Înştiinţarea părţilor cu privire la alte măsuri luate de tribunalul arbitral poate fi făcută şi prin telefax, poştă electronică sau prin alte mijloace ce asigură transmiterea textului actului şi confirmarea primirii acestuia.

De asemenea, înscrisurile pot fi înmânate şi personal părţii, sub semnătură.

În cazul în care tribunalul arbitral constată cu ocazia verificării stadiului litigiului pentru dezbatere că este necesară completarea dosarului va dispune măsurile corespunzătoare în acest sens.

Ulterior verificării dosarului, şi daca este cazul completării acestuia, tribunalul fixează termen de dezbatere a litigiului, dispunând totodată şi citarea părţilor. Între data primirii citaţiei şi termenul de dezbatere trebuie să existe un interval de timp de cel puţin 15 zile.

La primul termen de judecată cu procedura legal îndeplinită, tribunalul arbitral are obligaţia de a-şi verifica propria sa competenţă de a soluţiona litigiu, iar în cazul în care hotărăşte că este competent, consemnează acest lucru într-o încheiere, care se poate desfiinţa numai prin acţiunea în anulare introdusă împotriva hotărârii arbitrale, în caz contrar acesta îşi declină competenţa printr-o hotărâre, împotriva căreia nu se poate formula acţiune în anulare.

Asemeni procedurii de drept comun şi în cazul arbitrajului este posibilă solicitarea judecării în lipsă, prin intermediul unei cereri făcute în scris, prin care se solicita ca soluţionarea litigiului să se facă în lipsa părţii, pe baza probelor aflate la dosar.

Dar spre deosebire de procedura de drept comun, tribunalul arbitral va soluţiona litigiul şi în situaţia în care ambele părţi, deşi legal citate, nu se prezintă la termen, şi nici una din ele nu a solicitat judecarea în lipsă. Cu toate acestea, tribunalul arbitral poate să amâne judecarea litigiului daca apreciază că prezenţa părţilor este necesară, sau să acorde un termen pentru ca părţile să îşi poată formula concluzii în scris.

In cazul procedurii arbitrale părţile au posibilitatea de a solicita amânarea dezbaterii pentru motive temeinice, atâta timp cât partea solicită acest lucru cu cel puţin 3 zile înainte de data pentru care a fost stabilită dezbaterea. Aprecierea temeiniciei motivelor absenţei uneia dintre părţi, precum şi a motivelor pentru care absenţa justifică amânarea dezbaterii este de competenţa exclusivă a tribunalului arbitral, hotărârea acestuia nefiind supusă niciunei căi de atac.

Potrivit art. 585 din Codul de procedura civila, înaintea sau în cursul arbitrajului, oricare dintre părţi poate cere tribunalului în a cărui circumscripţie are loc arbitrajul să încuviinţeze măsuri asigurătorii şi măsuri provizorii cu privire la obiectul litigiului sau să constate anumite împrejurări de fapt. La această cerere se vor anexa, în copie, cererea de arbitrare sau, în lipsă, dovada comunicării, precum şi convenţia arbitrală.

Încuviinţarea acestor măsuri va fi adusă la cunoştinţa tribunalului arbitral de către partea care le-a cerut.

În cursul arbitrajului, măsurile asigurătorii şi măsurile provizorii, precum şi constatarea anumitor împrejurări de fapt pot fi încuviinţate şi de tribunalul arbitral. În caz de împotrivire, executarea acestor măsuri se dispune de către instanţa judecătorească.

Cererile şi excepţiile privind existenţa şi validitatea convenţiei arbitrale, constituirea tribunalului arbitral, limitele însărcinării arbitrilor şi desfăşurarea procedurii, pot fi invocate până la primul termen de judecată la care partea a fost legal citată, sub sancţiunea decăderii.

Orice cereri şi orice înscrisuri vor fi depuse cel mai târziu până la primul termen de judecată la care părțile au fost legal citate.

Neregularitatea actelor de procedură se acoperă dacă nu a fost invocată de cel interesat la termenul la care s-a produs ori, dacă a lipsit la acel termen, la primul termen de judecată la care a fost prezent ori legal citat după producerea neregularității şi înainte de se pune concluzii în fond.

În ceea ce priveşte sarcina probei în cazul procedurii arbitrajului fiecare dintre părți are sarcina să dovedească faptele pe care îşi întemeiază în litigiu pretenția sau apărarea.

Probele care nu au fost cerute prin cererea de arbitrare sau prin întâmpinare nu vor mai putea fi invocate în cursul arbitrajului, în afară de cazurile, prevăzute si pentru procedura de drept comun, la art. 254 alin. (2) din Codul de procedură civilă, respectiv:

- când necesitatea probei rezultă din modificarea cererii;
- când nevoia administrării probei reiese din cercetarea judecătorească şi partea un o putea prevede;
- când partea învederează instanței că, din motive temeinic justificate, nu a putut propune în termen probele cerute;
- când administrarea probei nu duce la amânarea judecății;
- când există acordul expres al tuturor părților.

Tribunalul arbitral are competența exclusivă de a decide asupra utilității, pertinenței şi concludenței probelor propuse de părți. Cu consultarea părților, tribunalul arbitral poate fixa termene limită pentru administrarea probelor încuviințate. După expirarea acestor termene, administrarea probei nu mai poate avea loc decât dacă tribunalul arbitral apreciază că aceasta este esențială pentru soluționarea corectă a litigiului.

Administrarea probelor se efectuează în şedința tribunalului arbitral. Acesta poate dispune ca administrarea probelor să fie efectuată în fața supraarbitrului sau, cu acordul părților, în fața unui arbitru din compunerea tribunalului arbitral.

Dacă una dintre părți deține un mijloc de probă, tribunalul arbitral poate ordona înfățişarea lui.

O altă deosebire față de procedura în faşa instanței de judecată este aceea că martorii şi experții sunt audiați fără prestare de jurământ.

Audierea martorilor şi a experților poate fi făcută, la cererea sau cu consimțământul acestora, şi la locuința ori la locul unde îşi desfăşoară activitatea. De asemenea, tribunalul arbitral le cere să răspundă în scris întrebărilor puse, acordând un termen în acest scop.

Tribunalul arbitral nu poate să recurgă la mijloace de constrângere şi nici să aplice sancțiuni martorilor sau experților. Pentru luarea acestor măsuri părțile se pot adresa tribunalului competent.

Administrarea probelor se efectuează în şedința tribunalului arbitral, acesta putând dispune ca administrarea probelor să fie efectuată în fața supraarbitrului sau, cu acordul părților, în fața unui arbitru din compunerea sa.

Aprecierea probelor se face de către arbitri potrivit intimei lor convingeri.

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THE ROMANIAN LENIENCY PROGRAMME BETWEEN CONTINUITY AND CHANGE. AN EMPIRICAL VIEW*

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Abstract:
This brief study tries to give an account on the evolution of the Romanian leniency policy from 2004 until today, under the light of the similar EU legal norms and taking into account the fact that our subject was scarcely studied until now.

Romania has adopted its first leniency policy in competition matters in 2004 and five years later this program was improved. Comparatively to the EU member states, until 2002 only four countries have adopted a leniency policy and thus surpassed Romania in this field.

From a certain perspective, the reluctance of the Romanian Competition Authority (RCA) to adapt a foreign instrument to the national legal system may seem unexplicable. That's why taking a closer look to this phenomenon could certainly help us better understand such a late start.

As the Romanian Leniency Policy (RLP) does not present original features compared to the U.S. and E.U. prototypes, we shall concentrate not on the description of its framework, but rather try to explain the reasons of its malfunctioning.

Keywords: antitrust, leniency policy, Romania, Competition Council

Introduction

This brief study tries to give an account on the evolution of the Romanian leniency policy from 2004 until today, under the light of the similar EU legal norms and taking into account the fact that our subject was scarcely studied until now[1].

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[1] For more details, see: Cristina BUTACU, Legislația concurenței. Comentarii şi explicații [(Bucharest: Editura All Beck, 2005, vii, 278pp.), pp. 243-246]; Carmen Manuela PELI, Chapter 24. Romania [in: Marjorie HOLMES, Lesley DAVEY (eds.), A practical guide to national competition rules across Europe (second edition, International Competition Law Series, vol. 13, The Hague: Kluwer Law International, 2007, pp. 755-757)]; Emilia MIHAI, Dreptul concurenței. Drept comunitar şi drept românesc [(Timişoara: Editura Mirton, 2008, 377pp.), pp. 151-153]; Bogdan BUNRĂU, [Anti-cartel enforcement in] Romania [in: Maher M. DABBAH, Barry E. HAWK (eds.), Anti-cartel enforcement worldwide (vol. 3, Cambridge: Cambridge University Press, 2009, cxix, pp. 887-1.343), pp. 1.005-1.009]; Manuela GUIA, Cătălin SULIMAN, Romania commentary [in: Competition Law in Western Europe and the USA (Kluwer Law International, 2009, Supplement no. 293, pp. RO.C-19 – RO.C-20)]; Anca BUTA MUŞAT, [Enforcement of Competition Law in] Romania [in: The international comparative legal guide to: Enforcement of Competition Law 2009 (London: Global Legal Group, 2009), Chapter 20, p. 133]; Diana RISTICI, Livia CONSTANTINESCU, The Competition Council adopts revised Leniency Notice for cartel participants (DLA Piper News and Insights, 10 September 2009, 3pp.); Ramona LIE, Cristina VOEDVOSCHI, [Cartels and leniency in] Romania [in: The international comparative

In order to speak about a leniency programme – Romanian or of another origin – one must first see what leniency means. Although the word "leniency" exists since 1753 and has as synonym the noun "mercy"[2], being used for the first time in 1879, by the German politician Eugen Richter[3], the leniecy policy is a recently invented antitrust tool which still is not so famous to deserve an entry in the legal dictionaries[4], but which has allowed some international[5] and national antitrust authorities to discover major secret cartels, apply heavy fines[6] and restore free competition for the benefit of the consumers both in the United States and in Europe.

In 1978, the U.S. Department of Justice was the first competition authority to adopt a leniency policy[7] – which was later developed in a Corporate Leniency Policy[8] (1993)[9] and afterwards followed by a Leniency Policy for Individuals[10] (1994).

At the European level, the European Commission has adopted its first leniency programme[11]

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legal guide to: Cartels & Leniency 2010 (London: Global Legal Group, 2010, Chapter 34, pp. 205-206)]; Remus ENE, Alina DEIAC, [Competition litigation in] Romania [in: The international comparative legal guide to: Competition Litigation 2010 (London: Global Legal Group, 2010), Chapter 26, p. 142]; Valentin MIRCEA, Legislaţia concurenţei. Comentarii şi explicaţii [(Bucharest: Editura C. H. Beck, 2012, xii, 274 pp.), pp. 209-214].

[2] Merriam-Webster Online Dictionary [available at: http://www.merriam-webster.com/dictionary/leniency (accessed 28 November 2012)].

[3] Gordon SCHNELL, Aymeric DUMAS-EMARD, How to catch a thief – corporate leniency and the irrepressible challenge of cartel detection; finding a better way {[CPI Antitrust Chronicle, no. 2/27.9.2011, 7pp.], p. 2 and footnote 3}.

[4] The most recent and well-known works of this kind offer no clue about leniency policy: David HAY (ed.), Words and phrases legally defined (I-II, fourth edition, London: LexisNexis, 2007, 1.317pp., 1.378pp.); Peter CANE, Joanne CONAGHAN (eds.), The new Oxford companion to law (Oxford: Oxford University Press, 2008, lxxxiii, 1.306pp.); Bryan A. GARNER (ed.), Black's Law Dictionary (ninth edition, St. Paul: West, 2009, xxxi, 1.920pp.).

[5] Between February 2002 and December 2005, 167 cartels were turned in to the European Commission by leniency applicants {Tobias KLOSE, Commission Notice on immunity from fines and reduction of fines in cartel cases (Leniency Notice) {in: Günter HIRSCH, Frank MONTAG, Franz Jürgen SÄCKER (eds.), Competition Law: European Community practice and procedure. Article by article commentary [(London: Sweet & Maxwell, 2008, xxx, 2.845pp.), pp. 1.858-1.891], p. 1.860}.

[6] For instance, between 1997 and 2009, in the United States more than 5 billion U.S. dollars were paid by cartelists turned in by leniency applicants [Scott D. HAMMOND, Cornerstones for an effective leniency programme (Paper presented before the 7th Meeting of the Latin American Competition Forum, Santiago, Chile, 9 September 2009), p. 3].

[7] Donald C. KLAWITER, US Corporate Leniency after the blockbuster cartels: are we entering a new era? {in: Claus-Dieter EHLERMANN, Isabela ATANASIU (eds.), European Competition Law Annual 2006. Enforcement of prohibition of cartels [(Oxford: Hart Publishing, 2007, xlix, 624pp.), p. 489-509], p. 489}; Mihai BERINDE, Cartels – between theory, leniecy policy and fines [(Analele Universităţii din Oradea, Seria Ştiinţe economice, vol. 17, no. 1/2008, 4pp.), p. 2]; G. SCHNELL, A. DUMAS-EMARD, art. cit., p. 3.

[8] Its text is available at: http://www.justice.gov/atr/public/guidelines/0091.pdf (accessed 28 November 2012).

[9] Wouter P. J. WILS, Leniency in antitrust enforcement: theory and practice [(World Competition, vol. 30, no. 1/2007, pp. 25-64), p. 26]; M. BERINDE, art. cit., p. 2.

[10] Its text is available at: http://www.justice.gov/atr/public/guidelines/0092.pdf (accessed 28 November 2012).

[11] The Commission Notice on the non-imposition or reduction of fines in cartel cases was published in the Official Journal no. C 207 of 18 July 1996, pp. 4-6 and its text is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996Y0718(01):EN:HTML (accessed 28 November 2012).

in 1996[12], which was improved in 2002[13] and 2006[14].

Regarding the Romanian case, leniency was adopted the first time in 2004 and later improved in 2009. Comparatively to the EU member states, until 2002 only four countries have adopted a leniency policy[15] and thus surpassed Romania in this field.

But from another perspective, the reluctance of the Romanian Competition Authority (RCA) to adapt a foreign instrument to the national legal system may seem unexplicable. That's why taking a closer look to this phenomenon could certainly help us better understand such a late start.

First, we should keep in mind that the first antitrust rules were adopted by Romania soon after the regime change of 1989. Thus, under the pressure of the process of co-operation with the European Communities, by the Law no. 15 of 7 August 1990[16], Art. 85-90 of the E.E.C. Treaty became one of the first – if not the very first – pieces of acquis communautaire implemented in the Romanian legislation[17].

Unfortunately enough, a set of political and economical factors have blocked the application of these norms until February 1997, when Law no. 21/1996 fully entered into force, although on the 1st of February, 1995 came into force the European Agreement

[12] For details, see: Joan D. HUNTER, Stephen HORNSBY, New incentives for "whistle-blowing": will the E.C. Commission's Notice bear fruit? (European Competition Law Review, vol. 18, no. 1/1997, pp. 38-41); Wouter P. J. WILS, The Commission Notice on the non-imposition or reduction of fines in cartel cases: a legal and economic analysis (European Law Review, vol. 22, no. 2/1997, pp. 125-140); Lidwyn BROKX, A patchwork of leniency programmes (European Competition Law Review, vol. 22, no. 2/2001, pp. 35-46); Mona BANU, Instrumente de combatere a cartelurilor. Politica de clemență în Uniunea Europeană (Profil: Concurența, no. 3/2005, pp. 46-50); François LÉVÊQUE, L'efficacité multiforme des programmes de clémence [(Concurrences, nr. 4/2006, p. 31-36), p. 31]; M. BERINDE, art. cit., p. 2; E. MIHAI, op. cit., p. 144 and footnote 128.

[13] The Commission Notice on immunity from fines and reduction of fines in cartel cases was published in the Official Journal no. C 45 of 19 February 2002, pp. 3-5 and its text is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002XC0219(02):EN:NOT (accessed 28 November 2012). For more details, see: Johan CARLE, The new Leniency Notice (European Competition Law Review, vol. 23, no. 6/2002, pp. 265-272); Mark JEPHCOTT, The European Commission's new Leniency Notice – whistling the right tune (European Competition Law Review, vol. 23, no. 8/2002, pp. 378-385); Christof R. A. SWAAK, D. Jarrett ARP, A tempting offer: immunity from fines for cartel conduct under the European Commission's new Leniency Notice (European Competition Law Review, vol. 24, no. 1/2003, pp. 9-18); F. LÉVÊQUE, art. cit., p. 31; M. BANU, art. cit., p. 46; E. MIHAI, op. cit., p. 144 and footnote 129.

[14] The Commission Notice on immunity from fines and reduction of fines in cartel cases was published in the Official Journal no. C 298 of 8 December 2006, pp. 17-22 and its text is available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF (accessed 28 November 2012). For some details, see: Jatinder S. SANDHU, The European Commission's leniency policy: a success? (European Competition Law Review, vol. 28, no. 3/2007, pp. 148-157); George PERETZ, Tim WARD, Ronit KREISBERGER, The Leniency Notice: cartel cases [in: Peter ROTH, Vivien ROSE (eds.), Bellamy & Child European Community Law of Competition (sixth edition, Oxford: Oxford University Press, 2008, ccxxvi, 1.679pp.), pp. 1.312-1.323]; Roberto GRASSO, The E.U. Leniency Program and U.S. Civil Discovery Rules: a fraternal fight? (Michigan Journal of International Law, vol. 29, no. 3/2008, pp. 572-584).

[15] Kris DEKEYSER, Maria JASPERS, A new era of ECN cooperation. Achievements and challenges with special focus on work in the leniency field [(World Competition, vol. 30, no. 1/2007, pp. 3-24), p. 14].

[16] This legislative act was published in the Official Journal of Romania, no. 98 of 8 August 1990.

[17] Paul-Mircea COSMOVICI, La concurrence en droit national et en droit communautaire [(Revue internationale de droit comparé, vol. 45, no. 2/1993, pp. 395-409), p. 403]. For more details, see: Anca Daniela CHIRIȚĂ, The German and Romanian abuse of market dominance in the light of 102 TFEU [(Baden-Baden: Nomos, 2011, 395pp.), p. 19 and footnotes 12-13].

establishing an association between the European Communities and their member states, and Romania, of the one part, and the Republic of Romania, of the other part[18], signed in Bruxelles, on the 1st of February, 1993, and therefore art. 64 on the prohibition of illegal agreements between undertakings, abuses of dominant position and illegal state aids became part of the national law two years before the Romanian Law on Competition.

As the Romanian Leniency Policy (RLP) does not present original features compared to the U.S. and E.U. prototypes[19], we shall concentrate not on the description of its framework, but rather try to explain the reasons of its malfunctioning.

I. The beginnings

When the antitrust enforcement system was designed in 1996, the Romanian lawmakers have chosen to delegate the power to enact a leniency programme to the Romanian Competition Authority[20], which decided to make use of its right not before applying the law "the hard way" during several years.

Thus, the first Romanian Leniency Programme (RLP1) was enacted only in 2004, by Order[21] of the President of the Competition Council no. 93 of 22nd of April, 2004[22].

Adopted soon after the beginning of the Romania's official negociations for the EU accession, RLP1 was naturally consistent with the European legislation, but its regular form was not sufficient for producing any results, which means that during the period between its adoption in 2004 and its replacement in 2009, no application was made for leniency to the RCA under the RLP1[23].

One may see this result as a pure failure of the leniency system in Romania, which probably explains that until now no reason was given for such a misfortune[24]; but examining closer this matter, we shall try to find an explanation for the fact that such an effective antitrust enforcement tool proved to be useless in the hands of the RCA.

Basically, which factors – economical, political, legal, cultural etc. – were so influential that a whole policy simply remained on paper, instead of producing tangible results? The main circumstances of the RLP1's failure could be described as follows:

i) It could not be said, nor proved that the RLP1 didn't work because of the absence of cartels in Romania, knowing that, according to certain sources, every important economic activity on the Romanian market is dominated by a strong anticompetitive agreement.

ii) The RLP1 did not failed because of a poor legal design or any other serious flaw, as such a problem was not detected in 5 years, of which half has passed for Romania as

[18] First, it was published incompletely (i.e. without its 7 Protocols and 19 Annexes) in the Official Journal of Romania no. 73 of 12 April 1993, pp. 2-23, and then in the Official Journal of the European Communities no. L 357 of 31 December 1994, pp. 2-189.

[19] As some authors have said that RLP1 is very similar to the European Commission's Notice on the immunity from fines and reduction of fines in cartel cases issued in 2002 [C. BUTACU, op. cit., p. 243 and footnote 2; E. MIHAI, op. cit., p. 151; B. BUNRĂU, art. cit., p. 1.005], the same finding applies to RLP2 compared to the European Commission's Leniecy Policy published in 2006.

[20] See Art. 56 (2) of the Law no. 21/1996 (the first version, before the amendments of 2010-2011).

[21] The full title of this act is: Ordin privind punerea în aplicare a Instrucțiunilor privind condițiile şi criteriile de aplicare a unei politici de clemență potrivit prevederilor art. 51 alin. (2) din Legea concurenței nr. 21/1996, cu modificările şi completările ulterioare.

[22] This administrative act was published in the Official Journal of Romania no. 430 of 13 May 2004.

[23] C. M. PELI, art. cit., p. 757; M. GUIA, C. SULIMAN, art. cit., p. RO.C-20.

[24] M. GUIA, C. SULIMAN, art. cit., p. RO.C-20.

member of the European Union and a half as associate to the E.U. On the contrary, the efforts of RCA to adapt to the European Commission's standards regarding the leniecy policy were fully recognized even by some authors[25].

iii) Is it possible that a better application of RLP1 was lost by its late adoption? In other words, if the RCA would have enacted in 1996-1997, using the E.C. model of 1996, and not eight years later, would the results have looked different?

On one hand, although a positive answer is very easy to give, such a theoretical projection seems to be merely an intelectual speculation than a solid argument.

On the other hand, from the perspective of the cartelists discovered between 1997 and 2004 and sanctionned by the RCA, it must be underligned that the absence of a leniency programme was not covered by the law, nor invoqued by those concerned before the courts.

iv) The RLP1 was not incompatible with Romania's legal system[26], as no case was brought before the national courts for its annulment.

v) The simple adoption of a leniency policy does not automatically produce a significant positive change in the firms' illegal behaviour, nor it causes overnight a transformation of the former cartelists into national competition authorities' informants[27]. When evaluating the possibilities of a leniency programme, we should not ignore that the best two ways to enforce competition law are: conformity – as a general rule – and the application of sanctions (i.e. administrative fines) – for the exceptional cases in which an infringement of the law takes place. Therefore, leniecy is not a major means to restore competition, but only a secondary tool, which is designed to be used when violations of the legal rules occur.

vi) The gap between the very low limit of the maximum level of fines applicable to the members of a cartel (10% of the total turnover of the year before the indictment) and the probable level of effective deterrence (150% of the same turnover) – according to some specialists[28] – couldn't be filled by the comparatively small advantages offered by RLP1, i.e. zero administrative fines.

vii) Another possible cause for the lack of leniency applications in Romania could be the so-called the "cultural factor", by which we understand the repulsion to turn in to the

[25] C. M. PELI, art. cit., p. 757.

[26] Such a critique could be technically made as far as the origin of the leniency programme is not purely European, but North-American, and if the United States of America is a Common Law country, Romania belongs to the Civil Law family of nations. In the same time, one should remember that the first antitrust laws in history came into being in some U.S. states: Maryland (1867), Tennessee (1870), Arkansas (1874), Texas (1876), Georgia (1877), Indiana (1889), Iowa (1889), Kansas (1889), Maine (1889), Michigan (1889), Missouri (1889), Montana (1889), Nebraska (1889), North Carolina (1889), North Dakota (1889), South Dakota (1889) and Washington (1889), well before the world famous Sherman Act (1890), as the 1982 Nobel laureate in Economics taught us: George Joseph STIGLER, The origin of the Sherman Act [(Journal of Legal Studies, vol. 14, no. 1/1985, pp. 1-12), p. 6]} and even the E.C. and the E.U. competition rules, through the Art. 65-66 of the Treaty of Paris establishing the European Coal and Steel Community (1951) have been inspired by the U.S. experience {Andreas WEITBRECHT, From Freiburg to Chicago and beyond – the first 50 years of European Competition Law [(European Competition Law Review, vol. 29, no. 2/2008, pp. 81-88), p. 82]}.

[27] If one looks at the results of the first U.S. leniency programme, the numbers are really poor: during more than 15 years (1978-1993), just 17 firms have applied for leniency and only 10 requests were approved by the Antitrust Division of the U.S. Department of Justice [E. MIHAI, op. cit., p. 142 and footnote 121].

[28] Wouter P. J. WILS, The optimal enforcement of EC Antitrust Law. Essays in Law and Economics [(European Monographs, no. 33, The Hague: Kluwer Law International, 2002, xvi, 322pp.), p. 66].

authorities a law violation due to the culture of fear which dominated the country before 1990, when the Romanian Home Department was perceived by many as a very powerful and efficient mechanism of oppression mainly due to the use of personal data disclosed by informants recruited from various social spheres.

viii) Last, but not least, it is highly probable that the RLP1 was fruitless because of the lack of RCA's means to ensure the whistleblowers's economic security, i.e. their protection against retaliatory measures taken by their former partners in cartels.

II. The improvements

Almost three years after the Romania's accession to the E.U. membership and five years after the enactement of RLP1, the Romanian Competition Authority had decided to adopt RLP2, which was needed both to increase the legal certainty of the future applicants and to secure a full compatibility with the E.U. corresponding rules.

Thus, the second Romanian Leniency Programme came into force in September 2009, after being adopted by the Order no. 300 of 21st of August, 2009[29] issued by the RCA's President and published in the Official Journal of Romania no. 610 of 7th of September, 2009.

RLP2 is quite similar to the first Romanian Leniency Programme, in the sense that immunity could be granted only to the first firm which submits information about a cartel, all the other applicants from the same agreement being able to get a reduction of the fine (up to 50% of the administrative sanction which would otherwise be imposed), depending on the degree of involvement of those concerned in the cartel's destruction.

Without eliminating all the limitations of RLP1, the second RLP certainly marks a progress comparatively to the first leniency policy, by the introduction of a marker system, which will allow applicants to secure a place on the RCA' immunity list by offering some limited information in the first place, regarding: identification details, the parties to the cartel, the product and territory affected by the cartel and the approximate duration of the illegal agreement.

III. Where do we go from here?

For the moment is would be premature to predict the fate of the Romanian Leniency Programme no. 2, but the experiences of the past allow us to foresee some of the possibilities of the new policy:

a) In the extreme negative alternative, altough the obligation to establish the conditions under which immunity from fines could be offered by the RCA is imperative[30] and therefore the RLP2 could not be abolished without being replaced with a similar programme, the non-application of this policy may transform RLP2 into a dead body of rules and also cause a lack of interest for improvement from the RCA's part[31].

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[29] The full title of this administrative act is: Ordin privind punerea în aplicare a Instrucțiunilor privind condițiile şi criteriile de aplicare a unei politici de clemență potrivit prevederilor art. 51 alin. (2) din Legea concurenței nr. 21/1996.

[30] See Art. 51 (3) of the Law no. 21/1996 (as amended by Government Emergency Ordinance no. 75 of 30 June 2010, published in the Official Journal of Romania no. 459 of 6 July 2010, pp. 3-14).

[31] This alternative has now to be abandoned, as two years ago Dr. Bogdan Marius CHIRIȚOIU, President of the Competition Council, has publicly announced that he has approved the first request for the application of

b) In the pessimistic view, if no serious and positive change of circumstances in which the RCA applies the antitrust rules, chances are great that in the near future that RLP2 will have a similar fate to RLP1's one.

c) In the optimistic alternative, due to the fact that often the context in which the leniency policy is implemented does not objectively depend on the RCA's capabilities[32], it is probable that on the long term, RLP2 will bear some fruits, justify its adoption and improve the overall results of the Romanian competition enforcement system.

d) In the ponderate view, following the U.S. and E.U. patterns related to the leniency policy, the RCA may improve its enforcement system, diversify its means and adopt a more pragmatic approach: for instance, certain applications for leniency shall be made easier in the future if some rewards would be offered to the informants[33], like in the U.S. and Hungary[34].

It is hard to believe that RLP2 will someday become as efficient as its Western models, but taking into account the experiences of the most developed antitrust authorities, it seems that the best way to produce a great number of leniency applications is the classic one, that is the proper enforcement of antitrust rules in the current cases, including but not being limited to: solid legal analysis of the facts discovered, sound economic analysis of the markets and firms involved[35], careful protection of the confidential information of the parties involved[36], proper individualization of the infringements, high respect of the parties' human rights during the investigations[37] and imposition of optimal fines[38].

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the Romanian Leniency Policy no. 2; for details, see: X, Consiliul Concurenței a aprobat prima cerere de clemență a unei firme care a încălcat legislația (Mediafax, 27 September 2010), available at: http://www.mediafax.ro/economic/consiliul-concurentei-a-aprobat-prima-cerere-de-clemenata-a-unei-firme-care-a-incalcat-legislatia-7425094/ (accessed 29 October 2010).

[32] Mutatis mutandis, one must not forget that in the European Commission's case, the first good results of its leniency programme came indirectly, being derived from some applications for U.S. immunity in certain global cartels [Julian M. JOSHUA, That uncertain feeling: the Commission's 2002 Leniency Notice (in: C.-D. EHLERMANN, I. ATANASIU, op. cit., p. 511-541), p. 511].

[33] For a description of the U.S. model of this antitrust tool enforcement, see: William E. KOVACIC, Bounties as inducements to identify cartels (in: C.-D. EHLERMANN, I. ATANASIU, op. cit., pp. 571-595).

[34] Gábor FEJES, Zoltan MAROSI, The Hungarian Parliament adopts new procedural rules rewarding individuals for reporting hard-core cartels (Act CLXIII of 2009 on the protection of fair procedures) [e-Competitions, no. 30.443/December 2009]; Márton HORÁNYI, The Hungarian Parliament amends the Competition Act and introduces rewards for information about cartels (Act CLXIII of 2009) [e-Concurrences, no. 30.634/December 2009].

[35] For some details, see: Tissa MANDAL, The role of economics in cartel detection through leniency programmes (Indian Journal of Law and Economics, vol. 1/2010, pp. 153-159).

[36] On this topic, see: Antonio CARUSO, Leniency programmes and protection of confidentiality: the experience of the European Commission (Journal of European Competition Law and Practice, vol. 1, no. 6/2010, pp. 453-477).

[37] For developments, see: Marius EMBERLAND, The human rights of companies. Exploring the structure of ECHR protection (Oxford: Oxford University Press, 2006, xxviii, 239pp.); Arianna ANDREANGELI, EU Competition enforcement and human rights (Cheltenham: Elgar, 2008, xxv, 272pp.); Thomas BOMBOIS, La protection des droits fondamentaux des entreprises en Droit européen de la concurrence (Brussels: Larcier, 2012, 293pp.).

[38] For details, see: Wouter P. J. WILS, Optimal antitrust fines: theory and practice (World Competition, vol. 29, no. 2/2006, pp. 183-208).

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CONTRACTUAL CONSENSUS – THE EVOLUTION OF THE NOTIONS OF FORMALISM AND CONSENSUALISM

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Abstract

The topic approaches the evolution of concepts such as: form – formalism and consensus – consensualism in the contractual consent, from ancient times to the pre-classical and classical. Formalism is that feature of the legal systems of ancient times and ancient organizations, where literacy was the privilege of certain social class or strata, under which legal provisions were effective, subject to be drawn into a given shape. Consensual contracts rooted in the law of nations ("ius gentium") and developed in the imperial era to enhance the effectiveness of trade agreements and to facilitate their adjustment to social needs in full transformation.

Keywords: consensus, form, formalism, agreement, consensualism

A. The evolution of the notions of form and formalism

Form represents the correlation between the appearance and the content of an object or process.

Form requires some external structure, relatively stable of a given content, is a way of existence, organization and structuring of the elements making up an object or a process.

Formalism is the care and exaggerated concern given to forms and formalities at the expense of content[1].

Strictly legally, formalism is that feature of the legal systems of ancient times and ancient organizations, where literacy was the privilege of certain social class or strata, under which legal provisions were effective, subject to be drawn into a given shape (e.g. the parties had to utter certain sacramental formulas, accompanied by gestures or the document was drawn by a state body, etc). Failure to observe pre-stated formalities entailed the absolute nullity of such document[2].

In the past, the validity and effectiveness of documents was provided by magical rituals, which consisted of the prescription's consistency of a rigid form (through words and gestures) for the fulfillment of the same documents.

The rigidity that characterized this historical age was absolutely essential, meaning that any error or omission triggered the document's invalidity. At the same time, rigidity was enough as the validity of the document did not matter for the actual purpose pursued by the author and, sometimes, the significance of the gestures and words uttered was irrelevant.

Religion with its rituals prescribed by prayer to change the will of the gods could not promote this type of formalism.

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[1] For details see E. Molcuț, Drept roman, Edit Pres Mihaela, Bucharest, 2000, p. 268 and the following.

[2] See V. Hanga, Drept privat roman, Bucharest, 1978, p. 12; M. Teodor, Consensualismul în istoria dreptului roman, Ph.D. thesis I.F.S.D. Chişinău, 2004, p. 16.

It was not the same when using formal schemes, important secrets guarded or kept by the sacerdotal college of pontiffs.

Form was required both for legal acts and for trials.

For instance, a legal document was the document by means of which the head of a family usually in agreement with another head of the family amended the personal legal situation of their own or of those in their power as regards the family or the properties[3].

On the other hand, there were part of procedural documents the documents based on which the head of the family protected their own interest against another and accepted the protection of the right.

However, the sphere of influence of formalism was expanded over the entire law of that age.

The transfer from the ancient age to the pre-classical and classical ones was obviously marked, among others, by the limitation or the exceeding of such formalism.

The Roman law in the ancient age provided, from the very beginning, private subjects, most of them heads of family, with the foundations for a large autonomy, as indicated above.

Formalism was characterized in the ancient age, especially in the legal area, by the exigency with which will was expressed or declared through words and, sometimes, through favored or predisposed gestures by means of the absolute rigidity of the law[4].

When it was powerful, formalism was expressed through a richness of words and was expressed through a richness or prescribed gestures as the effect foreseen and pursued occurred without other interventions, with few exceptions which we will detail below[5].

Thus, literature indicates the magical or magical-religious component of formalism.

The form of ancient trade required, according to its rules, the presence of two subjects with opposed interests, but the utterance of words or expressing some gestures was not strictly necessary.

Sometimes the presence of the two subjects with two different interests, especially the two parties, was not necessary, but the approval of the curiate assembly was necessary, with the participation of the pontiffs [for instance, in case of adoptions (adrogatio), wills etc.].

The origin of the document was most times underlain by a religious-legislative decree, without a purely legal trading nature, but it preserved its form when for them the commercial nature prevailed decisively.

Another feature of formalism was "typicalness". Thus, trade was the only one possible which had pre-established forms as elements. As the norm was rigid, the supplementations made by the parties or other versions were not allowed. Thus, documents were rigid and typical. Legal trading documents which did not meet such restrictions from the beginning were not considered valid.

Each type of document corresponded for a party to a specific purpose and had one or several effects related to such purpose.

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[3] See E. Molcuț, Drept roman, Edit Pres Mihaela, Bucharest, 2000, p. 269.

[4] For details on how formalism was expressed during the ancient age, see the French doctrine: G. Berlioz, Le contrat d`adhesion, LGDJ, Paris, 1976, p. 122; Moeneclaey, De la renaissence du formalisme damns les contrats en droit civil et commercial francais, Lille, 1914, p. 26 and the following; Rouxel, L`evolution du formalisme, Caen, 1935.

[5] See St. Tomulescu, Drept privat roman, University of Bucharest, 1978, p. 114 and the following.

This state of affairs must be judged by the low level of development of the forces and relations of production slave, which, in their turn, did not require the conclusion of numerous legal acts or commercial transactions and having a complex character in an era that was dominated by the natural economy.

The old Roman law, represented by "ius civile", had a rigid and formalistic character. Legal documents, proceedings were held orally, certain formalities had to be fulfilled, certain sacred words had to be uttered and these true rituals were accompanied by gestures or signs of essential significance for the society[6].

The formalism of the old civil Roman law, together with its orality, rigidity and traditional-conservatory spirit, represent the fundamental features of the Roman law.

Moreover, legal documents were quite rare in the field of commercial transactions (and not only), thus they represented true occasions of celebration, but were seen as documents with significant, as well as severe consequences for the contracting parties or their assets.

The excessive formalism, through its visual and audio elements, the presence of witnesses and, of course, of the contracting parties were the underlying conditions for the conclusion of the legal documents.

In the old Roman law, legal relations could exist only within such excessive formalism, which became, in time, the exact nature of such relations.

Through the end of the Republic, together with the development of merchandise production, of trade and significant economic and social transformations for the settlement of the conflicts between Roman citizens or the facilitation of the relations with foreigners, the old formalist and rigid Roman law, which was a significant hindrance in the development of the law, was changed and even replaced as it did not match reality, with legal principles and institutions from the law of the tribes, respectively the Praetorian law.

This important step was fulfilled based on the idea of equity, which represented at the time, the morals and interests of the class of slave owners. At the same time, all the means to fulfill the legal document or the contract were the material proof of the obligation's security.

A mere convention, which was not accompanied by a rigorous formalism, did not create any legal relation and did not cause any legal effects.

The oldest contractual forms in the Roman law root in the ritual of mancipatio, which was a way to alienate things "mancipi" and was fulfilled through certain words; a "libripens" and five witnesses attended and then the loan contract – "nexum" was concluded through the procedure "per aes et libram"[7].

This class of contracts also includes "sponsio" – a verbal contract concluded through the utterance of solemn words and the literal contract ("literis"), which was concluded through the registration in a registry ("codex") of the debts towards a creditor, but only with the consent of the debtor.

The essential element of the obligation in "mancipium" and "nexum" contracts is represented by formalism and consisted in the participation of the parties in the conclusion

[6] See V. Hanga, Tratat de drept roman, Editura Academiei, Bucharest, 1978, p. 211 and the following.

[7] See also the French and Italian doctrines: E. Perrot, Precis elementaire de droit romain, Paris, 1937, p. 3; A.E. Giffard, Droit romain et ancien droit francais, vol. II, Dalloz, Paris, 1967, p. 3; M. Roberti, Storia del diritto romano, Milano, 1969, p. 7.

of the contract, of the five witnesses who had to attend and, respectively, of a balance bearer ("libripens").

Formal contracts ("nexum", the verbal contract and the literal contract) are those contracts whose fulfillment requires certain formalities.

The increase of slave production, the development of commercial exchanges at the end of the Roman Republic and the beginning of the Imperial Age, contributed to the discovery of new legal instruments to replace the rigid formalism and triggered its oblivion. New contractual forms were born, highly simplified, as real contracts, concluded through the mere retention of the object ("re") and the consensual ones, concluded through the mere consensus ("solo consensu") of the contracting parties.

Formalism played an important role in the slave-owning Roman society, especially in the beginnings, in a natural economy, with a low level of development of production forces, but together with the profound economic, social transformations, the development of merchandise production, commercial transactions, represented a limitation of contractual relations, which led to its oblivion and to the birth of new contractual forms without the excessive rigors of formalism.

B. Evolution of the notions of consensus and consensualism

Consensus („consensu") is understood as the consent, approval characterized through the will to undertake, naming the expression of will or decision which can give raise to an obligation.

The act of will is determined by a series of intellectual representations which contribute to the composition of the elements of the legal document, with its economic consequences, with all the changes likely to occur during its execution, with the motivation that the person can agree or refuse[8].

The occurrence of consensual contracts of good will in the Roman law has an outstanding significance as regards the research on the intention of the parties to establish exactly the true will when the contract is concluded.

Gaius showed that consensual obligations are contracted in the field of sale and purchase, rentals, companies and mandates.

The legal regulation of the contract was possible through focusing private property in favor of privileged owners who consolidated their positions through rapid enrichment, aspect fully confirmed by the history of humankind throughout its development.

Of all the contracts indicated hereby, formalism was mostly changed by consensual contracts (which appeared through the agreement of will of the parties because they lack solemn formulas – verbal or written)[9].

Consensual contracts originate in the law of the tribes ("ius gentium") and developed in the Imperial Age to improve the efficiency of commercial transactions and to facilitate their adjustment to the social needs in full transformation.

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[8] For details on the notions of consensus and consensualism in the Roman law, see M. Teodor, Consensualismul în istoria dreptului roman, Ph.D. thesis I.F.S.D. Chişinău, 2004, p. 16 and the doctrine cited by the author; V. Hanga, Drept privat roman, Editura Didactică şi Pedagogică, Bucharest, 1977, p. 284-286; E. Molcut, D. Oancea, Drept roman, Bucharest, 1997, p. 249-250.

[9] It was enough for the contracting parties to agree because such agreements could be concluded between absentees, through a letter or proxy. This was very important because a verbal obligation could not be concluded between absentees.

The Roman legal expert Pedius (who lived during the rule of the emperor Hadrian 117 – 138 A.D.) showed that the essential element of the contract was the agreement of will of the contracting parties and consensual contracts had an important place, triggering in the first centuries of the Empire a maximum development due to the increase of merchandise production and commercial transactions.

Consensual contracts, according to some authors, appeared when economic life was developed and they were accessible even to pilgrims (not only to Roman citizens) in the 2nd century B.C.

The principles of the Roman consensualism remain the theoretical foundation and the identical essence of the consensual obligations in the field of sale and purchase, rentals, companies and mandates, oriented on the fulfillment of good will and equality of the citizen in a state of law.

The principles concern the fundamental content of the legal norms on consensual contract, irrespective of space, time, opening in perspective, the path of the development of the contractual system according to the overall evolution of society, in the economic, social, cultural or religious field, in particular[10].

The importance of consensualism in the history of Roman law and the research of the evolution in the modern law is the correlation of the complexity of the economic and social life, of the creation of the institutional framework proper to the society's development.

In the Roman law, consensualism "defeated" the traditional formalism, burdened by the "sacredness" of the "candid" formulas, rigorous ceremonies which represented a barrier in the way of commercial transactions in a booming period of the Roman Republic[11].

The formless, flexible consensualism adjusted to the needs of the economic and social life matched the requirements of the slave-owning Roman society (tendency noticed in the ages up to the modern law), through its simplicity, expressed in the contractual relations based on the agreement of will[12].

The existence of consensualism was related to the "contractual freedom of parties", closely pursued by the society's interests through legal regulations, which represented an objective way to perceive contractual relations through the "limits" imposed by the "public order" and "good morals".

Through consensualism, the autonomy of will conferred simplicity and vigor to contractual relations and abolished the rigidity of the forms which, throughout history, were a barrier in the way of progress and economic-social development.

In the Middle Age, consensual sale was a way to expand large properties, without other formalities for its validity, while in the modern law, the form of the authentic documents is expressly stipulated by the law, subject to absolute nullity.

Thus, in the medieval law, through laws or individual normative writs, privileges were granted to people in the field of consensual contract to facilitate trade, mining, grazing or fishing and in the modern law, governments, through their economic policy, established facilities, in particular, during the transition period to the market economy[13].

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[10] See J. Ghestin, Traité de droit civil. Les obligations. Le contrat, LGDJ, Paris, 1980, p. 208.
[11] See M. Teodor, Consensualismul în istoria dreptului roman, Ph.D. thesis I.F.S.D. Chişinău, 2004, p. 147.
[12] See E. Molcuţ, Drept roman, Edit Pres Mihaela, Bucureşti, 2000, p. 269 and the following.
[13] See J. Ghestin, Traité de droit civil. Les obligations. Le contrat, LGDJ, Paris, 1980, p. 208.

In the Medieval Age, consensual sale was accompanied by the fulfillment of certain formalities and in the modern law, only in the cases expressed stipulated by the law, thus as exception from the rule of consensualism.

Also, the preemption right in the field of sale-purchase had an oscillating evolution: the institution was known in the Roman law, the documents recorded it in the Middle Age as an essential element for the validity of consensual contract and then it disappeared together with the more frequent limitations included in the system of private property by the purely communist legislation.

The capacity of the contracting parties (as essential element of contracts, consensual contracts included) is differently regulated in the modern legislation. The incapacities established by the Roman law are stipulated by the modern law, especially those related to the person's capacity: guardians, proxies, administrators, public servants etc.

Consensualism sanctified, through his triumph over formalism, the beginning of an age of profound economic and social transformations, prepared the premises for the inoculation of legal will in the field of the contractual system, where it remained, in time, a determining agent in assessing contractual relations.

The history of law confirmed the supremacy of the principle as "contractual system through the diversity of the enforceability areas, through the rapidity of its fulfillment, through the major efficiency of this system, through the immediate legal effects it produces" (s.n)[14].

We would like to point out that the evolution of the contractual system, given the historical conditions under analysis, was not possible without the "revolution" of the notion of consensualism and the flexibility of the legal document (in opposition to the rigidity of the excessive formalism, which, in all ages, represented a severe hindrance in the way of progress)[15].

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[14] Although in the modern age, we witness a "rebirth of the principle of formalism", see J. Ghestin, Traité de droit civil. Les obligations. Le contrat, LGDJ, Paris, 1980, p. 206-207.

[15] See M. Teodor, Consensualismul în istoria dreptului roman, Ph.D. thesis I.F.S.D. Chişinău, 2004, p. 149.