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Elements of continuity and discontinuity in the evolution of European Union law

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Abstract:
The phenomena of continuity and discontinuity have a great importance for any science and by default to the science of law in the sense that a legal system is proving effective or ineffective depending on how it handles issues of continuity and discontinuity at the level of legislation. Regarding continuity in matters of law, the Romans knew very well to create a very efficient legal system, on which a large part of modern law relies. A series of important legal institutions of today have their origins in the Roman law, jurists establishing ever since some rules which have acquired undeniable continuity even to the present. A thorough study of continuity-discontinuity relationship as a general rule for the evolution of law is justified by the actuality of the topic, both from the point of view of post-totalitarian evolution of the Central and Eastern European countries as well as from the perspective of their European integration. As for the second aspect, we should start from the premise that the European Union once extended does not cope for the first time with the difficulties of continuity-discontinuity alternation because of this expansion. Throughout history, Europe was confronted with such alternation in legal terms as well and the experience that it has acquired can be used in the continuous process of European Union’s expansion.

Keywords: continuity, discontinuity, European Union law, Roman law, the legal system.

The evolution of the international and European law and the processes of continuity and discontinuity have also made their presence felt at the level of relations between states, thus the issue of enactment at this level being much more sensitive as compared to the legal transplant of international and European legal norms at the level of states’ internal law.

The current international realities bring a series of problems of interpretation and modulation in terms of enactment, states’ sovereignty being an example which in this context no longer appears in its classical form but involves a modulation meaning that states no longer have sovereignty over all their prerogatives as is the case of the member states of the European Union. This aspect supposes an element of discontinuity or better said a modification of one of the essential elements of continuity existing at international level.

Other elements of indubitable continuity result from the common history of the European countries, including their legal systems and legal cultures [1]. The elements mentioned above had and it is natural to still have an important role in the process of integration by facilitating it. In continental Europe, there is the common
tradition of the Roman law (*jus commune*), of humanism, enlightenment and modern codifications.

In the specialized literature [2] they insist on the idea that, despite the many cultural differences, Europe originates from Christianity, the tradition of the Roman law and the Greek perception of the beauty. This affirmation is valid for the Western and central Europe, and yet we may not deny the existence of some religious, cultural and political connections with the Eastern Roman Empire and the Byzantine version of the Roman law for Russia and South-Eastern Europe. The proof of law Christianity may be found in the Ecclesiastes [3]: “what has been will be again, what has been done will be done again; there is nothing new under the sun”. Therefore, the continuity of law relied on the *moral and religious norm* people obeying from times immemorial to a divine superior authority which addressed their consciousness and symbolized their belief. As shown in doctrine, the origin of law is found in the ancient times of appearance and development of human communities when practices and rules are combined with tradition and habit, and the latter governed the relations of understanding or of fighting between tribes. [4] Thus, individuals’ behaviour was guided by those moral precepts that were emphasized by the religious norms from times immemorial. These norms have not lost their applicability or validity over the years and after so many generations. The fact that the legal systems of the European Union member states have common congenial roots is confirmed by their history. [5] The European community area is essentially identical with the European part of the Roman Empire being governed by the Roman law. The entrance of the central and Eastern Europe countries into the sphere of Soviet domination after the Second World War did not mean their breaking with the European history.

The history of law [6] also shows elements of discontinuity such as the abandonment of the superior classical culture of the Roman law and the culture revived in the Eastern Roman Empire after the fall of the Western Roman Empire and this decay of the Roman law represented a regress of the European legal culture. However, the Roman inheritance has survived lying at the bottom at juridical legalism and positivism specific to the European legal culture. The notion of *jus commune* of Europe has been maintained throughout the evolution of European legal thinking and it proved capable of rebirth.

Another constant of the European legal culture consists in the conceptualization of the empirical legal material and the systematization of legal
phenomena starting from the formation of concepts owed to the Roman jurists and less prone to change and, thanks to the Roman jurists and their European successors, the ground for the great codifications of the modern time was broken. Examples of specialized papers are: Codex Justinianus (529) contained all imperial constitutions ever since the reign of Emperor Hadrian. It was rotted in both Codex Theodosianus and other law books such as Codex Gregorianus and Codex Hermogenianus. The first edition of the book could not be preserved. The second edition of the Code was issued in 534. Digests or Pandects (533) were a compilation of weighty comments of the great Roman jurists from the classical period, most of them from the 2nd and 3rd centuries A.D. Many of them held authority in justice. The reform of Justinian in this field aimed at the unification of the legal system and the elimination of contradictions from the Roman legal system by gathering the entire jurisprudence in a coherent legal system. Institutiones (533) (Institutions) were a law book for the law schools based on the model of the manual of the famous Roman jurist Gaius. It contained excerpts from the other two books with an updated legislation. Novellae were the imperial constitutions issued after 534 most of them in Greek. Though their issuance in one volume had been designed ever since the reign of Justinian, the new book was published after the death of Justinian. They were reunited by a Byzantine jurist, Athanasios of Emesa, in 572–577, in a collection for jurists, Syntagma.

The modern European law is the product of absolutism which needed a centralized organization, comprehensive regulations, and a law that may contain abstract formulations and fulfill both administrative and judicial bureaucratic functions, and be enforced in a uniform and predictable manner. In order to be valid the modern law has to be directly or indirectly authorized by the state. Thus, a formal and reasonable law has come out which Max Weber [7] referred to and whose main model was the codified law which spread in the 19th century in the whole Europe. Regarding the codification of international law, it is shown that this operation represents systematization of international customs in the international treaties, with a huge advantage and very adequate of modern international society has a great need for legal accuracy ... the main actors in the codification of international law are states as the main subjects of international law. [8] The totalitarian regimes from the 20th century marked another period of discontinuity in the European legal history affecting for a long or less long time the legal culture of the countries where such
regimes were instituted. The concept of the rule of law which formed and was affirmed in Europe based on the enlightenment, in the spirit of the American Declaration of Independence and the philosophy of the French Revolution became deformed, useless and inoperative in the context of totalitarian regimes of the past century.

The law has lost its relative autonomy and authority which resulted from its role of control exerted on the state. The state has acquired the control over the law, the latter becoming a simple instrument of state domination. The serious depreciation of the principles of the rule of law also resided in the total domination of the individual by the state, an individual who was subjected to surveillance and control exercised in all aspects of their life and lived in a situation of legal insecurity. An interruption of the evolution of the modern European law was caused by postmodernism which also inevitably influenced the law. At the same time, it must be noted that the application of legal norms in different areas as economic and socio-cultural development, with as recipients diverse subjects of law, may in some cases be a serious violation of the rights of subjects of law, that is it is therefore necessary to draw up rules to take as its starting point the general principles, rules with a high degree of generality, suitable to various interpretations. [9].

By comparison to the illuminist modernism which excludes the claims and values of other paradigms, postmodernism consists in a new concept about the human society considered to be a differentiated society where different communities and different domains such as economic, civic, cultural coexist, to which we add the public domain with the role of conciliation and mediation of the other domains, their balancing, and the interiorization and mitigation of conflicts among domains. [10] Each domain is made up of its own and distinct norms, goals, procedural rules, values, processes, transformations and balances. Consequently, in the society there is not only one justice but a multitude of justices and postmodernism considers that ways of adaptation of the pretensions of rival concepts on justice [11] must be found.

The 20th century marked the beginning of the transition from modernity to another social-cultural paradigm which might be called postmodernity [12] in default of a better name. Modernism was characterized by a formalist legal science culminating with the extreme variant of the legal pure theory elaborated by Hans Kelsen [13]. Starting from the 19th century, the law of the modern state has been a unique, automatic and maximal law.
Prior to the end of the last century, the orientation towards a new understanding of the law came out manifested in studies dedicated to juridical pluralism in complex societies. They started from the idea that in the same geopolitical space there is not only but several legal orders and sustained that state’s pretention to hold the monopoly in the creation of law was absurd and that there were legal orders and legal communities that superposed. The law, in general, and the state law, in particular, is relativized and desacralized. [14] In the last decade of the past century, they noticed the aging of the state law, the undermining of its role of social modeling and innovation or future planning and ephemeral and renegotiable forms of law appeared such as the regulation of the relations between corporations and the European regulation. A series of social issues may not be settled by the modern law whose limits become more and more obvious. The alternative solutions impose more and more, state’s monopoly over legality being put to an end and juridical minimalism starting to manifest which means that legal relations become more and more power relations.

One of the solutions that may seem adequate in these conditions is the postmodern fight for the law having as an objective the combination of the state law with law non-state forms. It starts from the idea that, since they identify with the normative regulation technique, the modern legal systems have become the instrument of a state, hierarchic and bureaucratic government form unable to organize a healthy and prosperous civil society. The modern legal system has become neutral from the cultural viewpoint which means that the reign of law as a juridical technique does not have a social or cultural impact but the design of modern law is more asocial than antisocial.

The European Union law represents a set of regulations approved through the treaties concluded by the Member States and through the documents approved by the European Union institutions governing the organization and functioning of the European Union.

The European Union set out an autonomous law order which is “the expression of a special perception of values, together with a European legal community”. [15]

Autonomy consists in the fact that the European Union law is the result of its own legal sources and comes off – with the materialization of its basic notions and
principles – the basic elements of international law as well as its historical assignation to the law principles of Member States.

Autonomy is the result of the structure and constitutive principles, a distinctive feature for the European Union, of the direct authority and of the primacy of the European Union law.

As any other legal order, the European Union legal order consists in an organized set of rules whose value is the result of the basic legal rules included in treaties. Therefore, we may distinguish the primary law, consisting in the rules included in the constituent treaties, from the private law, which further includes legal rules issued on the basis of constituent treaties and in compliance with the provisions particularly provided by these treaties. [16] The legislative basis in the European Union system consists of over 300,000 normative documents, available both as texts commented upon at various university lectures or as special papers as well as in digital forms. The legislative server of the European Union (EURLEX) provides the access to a multilingual data basis which structures a wide range of normative documents, starting with the European Union treaties to international agreements, preparing papers, jurisprudence and parliamentary interpellations. Certain documents from the above mentioned ones are available in the Romanian language, due to its quality as an official language of the European Union besides the languages of the other Member States. The translation process of such an extensive legislative set of documents is undoubtedly a long one and one cannot estimate the time when the Romanian citizens will be able to consult the European legislation completely in the Romanian language. For the time being, it is mandatory to translate all the new normative documents into Romanian, even before the date they are signed and come into force.

The brief analysis of the normative documents within the European Union involves the description of the main sources of primary law (treaties), derived law (regulations, decisions and directives) but also a brief description of the unwritten sources (tradition, jurisprudence and the general principles of the European Union law on the whole).

The European Union primary law consists in the three Treaties which laid the bases of the European Community, as well as in the Treaties and documents issued to amend, complete or adjust them. In other words, we refer to an impressive number
of conventional tools, appropriate to either of the Communities or even common to the three of them.

The legal order of the European Union is a supranational legal order[17], relying on the approval of the transfer, by the Member States of the European Union, of certain decisional competences towards the European Union institutions. Within this legal order there are maintained certain competences, not at all unimportant, on the national level of the states belonging to the European Union.

The unity of the European law rises above the diversity of national contexts, requiring that the application of the European Union law in Member States be conditioned by both observing the particularities of every national legal system and, especially, by nationally applying the European Union rules “with an identic content and an equal effectiveness” [18].

Originality consists in the fact that jurisprudence establishes the unity of the European Union law as being compatible with a certain social and cultural pluralism; national legislations pursue a justified purpose regarding the European Union law, as the States shall be competent to choose the most adequate means and to observe the requirements resulting from European Union law, especially those related to the principle of proportionality. One can also notice the fact that the European Union law asserts firmly its own originality, being a compromise between the three systems of European law: continental, Anglo-Saxon and German.

The legal order of the European Union, different from the national legal order, is the result of creating a law system capable to ensure the achievement and observance of the basic objectives of the European Union. This law system does not prevent the development of the state activity, or the existence of the national law systems of Member States, but it integrates these systems into the European Union order, in compliance with its principles.

More exactly, the European Union law consists of a set of rules [19], called the legal order of the European Union. These are mainly the constitutive treaties of the Union, to which we can add the directives, regulations, general and individual decisions, recommendations, approvals, resolutions of the European Parliament. We must also add the jurisprudence of the European Union Court of Justice in Luxemburg. We shall not omit the general principles of law, in their quality as unwritten sources, otherwise integrated to the traditional law and the tradition itself.
The European Union law operates beside the domestic law of every Member State; yet we cannot say it integrates into the law of these states, as it is a specific, autonomous law, providing an equable application of the European Union rules; in all Member States it has a direct, progressive effect, having primacy over the national rule, especially due to the systematic jurisdictional control.

The European Union is established as a new legal order of international law, for the benefit of which the states have limited their sovereign laws, although in certain fields only, and whose subjects are not only the states but also their citizens, the European Union national or otherwise said the European citizens.

As a consequence, the most important challenge the law must face at a global and European level is the reintegration of the social and juridical spheres through a more pluralist approach because the historical separation of the law from the society was not inevitable and, appreciated a posteriori, it brought few benefits to the mankind.

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References:


Considerations on the issue of multiple citizenship

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Abstract
This paper addresses the topic of citizenship, considered an issue of internal law, on the grounds that the state, based on the principle of national sovereignty, is the one that sets, on the one hand, the criteria and methods for obtaining or losing its citizenship, and, on the other hand, the rights and obligations of the persons who have/acquire its citizenship based on these. The emergence of the cases of dual/triple citizenship or of statelessness may be regarded as the result of concepts and regulations of the states, which are sovereign in the case of granting and withdrawing citizenship.

Keywords: citizenship, national membership, nationality, multiple citizenship, statelessness, affiliation

Preliminares

The institution of citizenship and the status of citizen express first and foremost the steadfast connection between the individual and the state, which, in general, is defined as national membership; in order to name it citizenship, the scope of the definition should be more restricted [1]. It may be considered that citizenship is only the national membership where the relationship between the individual, called citizen, and the state considers reciprocal rights and obligations: the citizens constitute the state [2], they are its members, they participate in the leadership of the state, and the state represents the expression of the will of citizens. The condition opposing that of citizenship in a national membership is that of obedience, encountered under form of slavery [3]. If in citizenship the rights prevail, in obedience the obligations are the ones which prevail.

National membership (ressortissance, French) represents the individual affiliation to a particular state. As a consequence, there will be as many national memberships (and as many citizenships) and as many kinds of nationals (and citizens) as there are states. In relation to the nationals of a particular state, the nationals of other states and the stateless persons are called foreigners [4]. Therefore, the opposite condition of “national” is that of “not-affiliated-to-a-state”, referred to as stateless (without country, Greek), apolit (stateless, Greek) or heimatlos (without country, German).

It is worth mentioning that citizenship refers not only to the legal relationship between the individual and the state (given by the objective right), but also to the
quality of the individual bound to the state through that legal connection (based on the subjective right) [5].

The relation citizenship - nationality

In Romania, to explain the concept of “citizenship” used by the fundamental law requires some clarifications concerning the delimitation of citizenship from nationality, considering the fact that the latter has been employed for a certain period of time in the Romanian law [6]. In the legal language both notions are employed - nationality and citizenship – fact which raises some questions. Is citizenship synonymous with nationality or does it represent a separate legal category? A possible answer to this question was given by Professor Paul Negulescu, in 1927, in his Constitutional Law Course, where he offered some clear explanations of what nationality stands for: “That human group consisting of the reunion of several families living in a particular territory and subject to the same authority represents the people. But if this group of people, living under the same authority, has a common conscience, given by the fact that its members and their descendants have lived together for a long time on the same territory, suffering various influences and being animated by the same ideal, we no longer have a people, but a nation. If, in a nation, we find unity of race, language, religion, we call it nationality”.[7] We conclude that nationality is the result of unity of race, language and religion of those living under the same authority in a given territory, considering and that they have a common conscience and history, a common ideal [8]. These issues delineate nation from nationality.

An observation that deserves to be highlighted is related to the fact that citizens, having teamed up to form a single political body – the people – also establishing the regime to be adopted, sign a “pact of allegiance” with those who have the authority in exchange for their protection and the protection of the commons [9]. However, difficulties arise when attempting a more accurate determination of the relationship between the individual and the political community to which he or she belongs, of his or her capacity of integration in the group to which he or she belongs, the recognition of his or her identity as a citizen.

Nationality should be considered an attribute of the person, i.e. any person belongs to a group that is delimited by another through the unity of language, culture, religion, ethnicity, customs etc. A nation represents all those who share this attribute
[10], it is the result of the common destiny of certain individuals, based on specific elements of cohesion and solidarity. [11]

Between citizenship and nation there is a historical connection [12], as within the nation legitimacy and the democratic practices are built [13]. In the modern sense, the notion of citizen was first used in “The French Declaration of the Rights of Man and of the Citizen” of 1789, although in the legislation of the states the term “citizenship” had existed since 1795, but only in 1948 it began to be established consistently [14]. A “citizen” is the natural person receiving citizenship, a term used with other wider or narrower meanings [15]: person, national, subject, active citizen.

Citizenship is the special legal status of the individual, a situation resulting from that person’s affiliation to a particular state and that gives fullness of existence and the exercise of the rights and obligations under the constitution and laws of that state [16]. Most constitutions and laws [17] currently use the term “citizenship” to describe this affiliation, although, initially, citizenship was designated by the term “nationality” [18], a term which can be seen today in the Constitution of France (1958) in Article 34.

Modern citizenship is informal, open [19], in close relation to the fact that “the relationship between state and the citizen is not given in the definition of a citizen of the state... it is a theme of freedom”[20].

Aspects generated by multiple citizenship

“What is citizenship?” and “What does it mean to be a citizen?” are two complex questions, born on the foundation of postmodernism and globalization, driven by new challenges, as the nation-state borders have become increasingly permeable [21].

A fundamental premise from which the formal-legal approach of citizenship starts is that it represents exactly the “reflection of the society in which it is built” [22]. If we analyze it in terms of context, as a concept in continuous dynamics, citizenship allows the capturing of specific differences which outline a framework defined in both space and time.

It is commonly recognized and accepted that citizenship is exclusively a matter of internal law since the state, based on the principle of national sovereignty, determines, by itself, the criteria and methods for obtaining or losing its citizenship, as well as the rights and obligations of its citizens based on these qualities [23]. At
international level, only the state, as a primary subject of international law, is recognized such jurisdiction, as confirmed by the international customary law and the conventional and jurisdictional international practice.

The plurality of states, each with its own conceptions and regulations, but sovereign when granting and withdrawing citizenship, together with the mobility of people from one state to another are two of the premises for the situations of dual/triple citizenship, i.e. subjects of mixed nationality, or of statelessness, when people remain without any citizenship, being thus considered stateless, apolit or heimattlos [24].

In some cases, dual citizenship can lead to a number of complications for the person concerned and to certain conflicts of interest in the relationship between the two respective states. Such a situation arises in connection with the exercise of diplomatic protection by one of the two states against another. In international practice, in such cases, there has been observed a general tendency to establish and foster, between the two citizenships in conflict, the real and effective one, or the so-called “dominant citizenship”.

The conflict of citizenship may occur as a consequence of the mismatch of laws of various states in connection with the acquisition of citizenship. We have in regard the situation contrary to dual citizenship, namely statelessness, a feature of people who have no citizenship, or those who lose their original citizenship, without acquiring the citizenship of another state. In order to avoid conflicts of citizenship, national laws of the states regarding citizenship must be in full compliance with international law.

As such, in international law, be it public or private, numerous concepts and theses were promoted, and also there appeared conventions and resolutions of international organizations, aimed at avoiding statelessness and the plurality of citizenship. These aimed to promote the right of every person to have a citizenship from birth, a citizenship to return to in case they would lose a possible citizenship acquired in their lifetime. Thus, two fundamental principles were emphasized: the need for each individual to have a citizenship (citizenship universalization) and only one (unique citizenship), principles enshrined in Article 15, paragraph 1 of the Universal Declaration of Human Rights as: “Everybody has the right to a nationality (citizenship)” and “no one shall be arbitrarily deprived of their citizenship, nor denied the right to change their citizenship”.


It was found that the solving of problems caused by the phenomena of multi-citizenship or statelessness cannot be done only by national laws, as improved as they may be, but by international conventions [25], whose object is not confined to the resolution of conflicts of citizenship starting with their termination, but also contain the solving of situations that may arise, considering at the same time, the future needs of each state community [26].

An important role went to The Hague Conference, which concluded, on 12 April 1930, an International Convention and three protocols, the stated goal being to eliminate conflicts of citizenship in absolute respect of the right of each state to determine/establish their nationals. According to this Convention, each Contracting Party has to respect the nationals of other countries, as each of these determines them. Although the Convention was a step forward in terms of the modern approach to the issue of conflicts of citizenship, it was not ratified, remaining important through the studies generated by its preparatory work, and also through extensive dialogue between the parties involved in these works.

Another international document that addresses the issue of citizenship is the Convention on the Nationality of Married Women of 29 January 1957 [27], to which Romania adhered by Decree no. 339/1960. According to Article 1 of the Convention, “neither the celebration nor the dissolution of a marriage between marriages, shall automatically affect the nationality of the wife”.

In the matter of international law, without concluding bilateral agreements to resolve conflicts of citizenship, there have also been conventions limited to the engagement of the parties to communicate to each other the citizenships granted to the nationals of the other party.

In case of multiple citizenship difficulties appear in terms of determining the obligations of “giving” and “doing” of the persons concerned. The obligations of “giving” concern, inter alia, the payment of taxes, an issue resolved by bilateral agreements between states to eliminate double taxation or for the finding of tax avoidance. The obligations of “doing” are primarily aimed at military obligations, which were the subject of The Convention on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality (1963) where Romania did not participate. The Convention was ratified by 13 countries: Germany, Austria, Belgium, Denmark, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Great Britain and Sweden [28].
This document has established the principle of the binding and automatic loss of the citizenship of origin for the nationals of the signatory states, who voluntarily acquire the citizenship of another state among the parties. By “voluntary acquisition”, within the meaning of the Convention, it is understood naturalization, option or withdrawal. Thus, any person holding the citizenship of at least two of the signatory states can renounce at least one of the citizenships in their possession, with the consent of the state whose citizenship is renounced.

The Convention of 1963 was amended by two protocols, one in 1977 and another in 1993. The former followed two aspects: to simplify the procedures of renunciation to one of the citizenships and to clarify the possible deficiencies of interpretation arising in pursuance of the provisions concerning military service. The latter contains provisions that facilitate the retaining of the citizenship of origin in case of acquiring a new citizenship. According to it, any person who acquires the citizenship of one of the parties, can retain their citizenship of origin, provided that the person be born or reside in the country of the citizenship to be acquired or for them to have had their habitual residence before being 18 years old. Also, it was allowed to retain their citizenship of origin, in case the acquisition of the new citizenship occurred through marriage.

The Convention of 1963 and the following protocols have not been ratified by all states. This determined that the initial convention was applied between the states that have not adhered to the subsequent protocols.

The European Convention on Nationality, signed in Strasbourg on 6 November 1997 [29], establishes principles and rules on the matter of citizenship of natural persons and rules that determine the military obligations in cases of multiple citizenship to which the internal law of the parties must comply. According to the Convention, it is deemed as “multiple nationality” only the simultaneous possession of two or more citizenships by the same person (Article 2 letter b) [30]. On the competence of the state regarding citizenship, the Convention provides in Article 3 that each state shall determine under its own law who its nationals are and this law shall be accepted by the other states, provided it is in accordance with the applicable international conventions, with the customary international law and with the principles of general law recognized with regard to citizenship. The Convention establishes as a principle of legislation in the field the avoidance of statelessness, requiring the states
parties to not allow the renouncing to citizenship if by this the applicant would remain stateless, at least for the citizens who do not normally live abroad.

Despite the existence of these Conventions, multiple citizenship is treated quite differently in the national law of the European states [31]. If in accordance with the English law dual citizenship is allowed almost unrestrictedly, the German law allows it only exceptionally.

The causes of dual citizenship include the adoption of a national by a foreign citizen. If the legislation of the person who adopts provides that the adoption confers the citizenship of the adopter to the adopted, then the adoption may lead to the situation of dual citizenship.

Another common situation is the adoption of an under aged foreigner, which results in the acquisition of the citizenship of the adopter by the adopted, as long as the legislation of the country of the adopted does not provide for loss of citizenship of origin.

Also, other situations that can lead to dual citizenship are the voluntary acquisition of a foreign citizenship by a national and the voluntary acquisition of citizenship by a foreigner.

The numerous debates that took place at international level in order to eliminate gender discrimination in national legislation on citizenship contents have led to the elimination of those provisions which automatically granted the nationality of the husband to the woman who held a different citizenship. Currently, the provisions contained in national legislations consider the acquisition through marriage only of naturalization, according to simplified procedures. Thus, marriage has the same effects as the voluntary acquisition of citizenship by foreigners.

Another aspect worth mentioning is that, according to the 1963 Council of Europe Convention, all laws provide the opportunity for people who have more citizenships to voluntarily renounce one of them.

Conclusions

Multiple citizenship, along with statelessness, is currently considered a special problem, closely related to human rights. Given the finding that, within the national state which recognizes it as its own, respectively which confers it, a citizenship constitutes mainly an advantage, multiple citizenship can be considered a real
privilege at international level, as its owner, compared with all the other people who have a single citizenship, is privileged.

If a person refuses to express their option among several citizenships that are provided, the criteria by which to determine their citizenship should be clearly set out.

In case of conflicts of citizenship, i.e. the certification of several citizenships where the states fail to reduce to one, the criteria [32] to determine the citizenship should be developed by all states party to the conflict, which would limit the conflict only to the states concerned.

The regulation of these criteria would effectively reduce conflicts of citizenship, without bringing into question any harm to the sovereignty of the states, namely of their right to regulate, under the international conventions to which they acceded, the entry and establishment on their territory, the asylum, expulsion and the right to grant citizenship.

References:
[3] David Dudley Field, Projet d’un code international propose aux diplomats, aux homes d’Etat et aux jurisconsultes de droit international..., [1872, 2nd ed., 1876], translated from English Alberic Rolin, Paris, 1881, p. 4: "the members of a nation in which the sovereign power belongs to a special person or persons are called subjects; the members of a nation in which the sovereign power belongs to the people are called citizens".
[14] D.1229/1948 and D. 125/1948 are considered, and in administration the term appears with the circular orders of the Ministry of Internal Affairs 110179/2 March 1946 and 110188/6 March 1946, mentions made by Corneliu Rudescu and Mircea Anghene (1947), Codul cetateniei si nationalitatii, Bucharest, pp.91-92, in Barbu Berceanu, Cetatenia– Monografie juridica (1999), All Beck P.H., Bucharest, p.6.


[28] Spain, Great Britain and Spain ratified only the part of the Convention referring to military obligations.


[30] In Article 2 letter b it is stated that “multiple nationality” means the simultaneous possession of two or more citizenships by the same person.


Approach on the Settlement of Labor Conflicts in Labor Jurisdiction

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Abstract:
Individual or collective labor conflicts can be triggered when one of the parts does not honour certain rights or does not fulfill certain obligations established by law or by the terms of the collective or individual labor agreements. In order to settle, if the mediation has not succeeded, the certain conflicts can be subjected to the settlement procedures before the court. Labor jurisdiction is an attribute of the courts and has the purpose of solving labor conflicts regarding the closure, execution, modification, suspension and termination of the individual labor agreements or, as appropriate, collective labor agreements provided by the code in force as well as the requests regarding the judicial relations between social partners.
Keywords: labor conflicts, mediation, labor jurisdiction, arbitration, the settlement of the labor conflicts procedure

Preliminary considerations

The labor relation is a social relation and as in every social relation the parts can have both convergent and contrary interests.

Mainly, both the interest of the employers and the one of the employee is performing an activity within those certain units. Thus, employees want to obtain profit therefore they are obliged to pay the employees and to offer them work conditions in order for them to work for the benefit of the certain units. In return, the employees want to obtain some benefits in order to satisfy certain social needs, thus they are obliged to perform labor in order to receive, mainly, their rightful remuneration.

However, within the labor relation there can occur certain tensions determined by the opposite interests of the parts, tensions that, if an agreement is not reached, expressly or tacitly, can lead to the triggering of labor conflicts.

According to the definition given by art. 248 align (1) Labor Law, the labor conflict is represented by any disagreement that interferes between social partners within the labor relations.

Labor conflicts can be triggered when one of the parts does not honour certain rights or does not fulfill certain obligations established by law or by the clauses of the collective or individual labor agreements. The labor conflicts thus triggered can be individual or collective. If the parts do not reach an agreement regarding the labor conflict, the interpretation of the applicable judicial laws is necessary for their
settlement so that the court can issue an obligatory solution for the part that does not honour the legal or contractual provisions. Accordingly, the certain conflicts can be subjected to the settlement procedures before the court. These types of conflicts have been identified by the legislation, jurisprudence or doctrine of many states as conflicts of rights.

On the other hand, without considering the obligatoriness of the judicial laws and the observance of the rights and obligations provided by them, it is possible that one of the parts to want a future modification of them (employees to want the regulation of some rights or some new wider rights or the employers to want the restriction of some rights of the employees) while the other part to disagree with the certain modifications. The law exclusively being the attribute of the statal authority, of course that these conflicts can occur only during the collective negociations¹ or in relation to them.

The collective negociation has appeared due to the necessity of continuous adaptation of the judicial laws that regulate labor relations to its dynamic character, to the different economic and social situations, satisfying both the interests of the national economy and the specific interests of every patronal and professional cathegory. Likewise, the possibility of a separate negociation of the rights of different cathegories of employees allows an appropriate approach on their judicial regime as well as detailed regulation of their certain rights, for the interest of the employees, aspects that the law can hardly satisfy due to the general character of the legal norms.

Since these conflicts do not have as object the observance of some rights and obligations provided by the judicial laws but the eventuality (interest) of a certain regulation of some rights and obligations the legislation, jurisprudence or the doctrine of many states has identified them as conflicts of interests. Considering that the settlement of such conflicts does not require the interpretation of some judicial laws in order to apply them, it cannot be the attribute of the court, certain special procedures of settlement provided by law being applicable in this case.

¹Collective negociation has appeared from the necessity of continuous adaptation of the judicillaws that regulate the labor relations to its dynamic character, to different economic and social situations, satisfying both the interests of the naional economy and the ones specific to every professional or patronal cathegories. Likewise, the possibility of a separate negociation of the rights of different cathegories of employees allows a proper approach of their judicial regime as well as a detailed regulation of their certain rights, for the interest of the employees, aspects that the law can hardly satisfy because of the general character of the legal norms.
The history of the labor conflicts regulation [1, 253-256], [2, 770-772]

Labor conflicts have been regulated for the first time in our country at the beginning of the XXth century when the workers had began to organize their fight for obtaining and protecting their professional rights and the labor conflicts had become a social reality and the necessity of regulating these conflicts had occurred.

In 1902 the law for the organisation of jobs, credit and worker’s social assurance founded the arbitrators committee that had the attribution to reconcile the employee and employer in the case of a conflict. If the committee could not reconcile them the judgement of the labor conflict was made by the court of law.

Amongst the laws that were adopted from the beginning of 1909 within a social politics programme promoted by the minister of industry of that time, Mihai Orleanu there was also the law against unions, professional associations of the statal, county, commune and public establishments adopted in 1909 through which the association ad strike of all workers and clerks, employees of the state, counties, communes and all public establishments with industrial, economic or commercial character was prohibited.

During the following years Romania has registered a considerable evolution in the regulation of social labor relations domain. In this context, our country has participated as a founding member to the constitution of the International Labor Organization in 1919 and has integrated in the international tendencies regarding the regulation of labor relations both individual and collective. The most important normative acts adopted in this domain were the Law for regulating collective labor conflicts of 1920 and the Law for labor agreements of 1929, regulations that were old in the regulations of the employee – employer relations domain although, at that moment, they represented a debut in approaching collective labor relations and labor conflicts.

The law for regulating collective labor conflicts of 1920 [3], or the Trancu – Iași Law, after the name of its author, truly is the first normative act of this domain. The law regulated both the triggering of collective labor conflicts and the collective termination of labor and their solutions. Thus, aspects of great interests and actuality for that time have been approached: freedom of labor, collective labor termination, conciliation, arbitration, sanctions, sabotage, general dispositions of procedure.
The notion of collective labor conflict was not defined by law. However, the procedures regulated by law were applied, according to art. 7, in the case of the occurrence of „a litigation refering to the labor conditions, susceptible of causing a collective labor termination”.

The domain of law applicability was expressly limited. Thus, according to art. 6, the law was applied to the „industrial and commercial establishments, of any kind, that usually use a number of at least 10 employees”.

Likewise, the causes of collective labor termination and, implicitly, the object of the collective labor conflicts were limited. Art. 4 align (2) provided that any collective termination of labor for causes foreign to those refering to labor conditions was prohibited.

Although chapter II of the law that regulated the trigger, development and settlement of the collective labor conflicts was entitled „collective labor termination”, under the form of strike or lock-out², the termination of labor was regulated as a final step with extreme character within this process.

Thus, the law regulated in detail the reconciliation procedure that was obligatory for the parts of the conflict. If there occurred a litigation refering to labor conditions susceptible of causing a collective labor termination the representatives of the employees along with the owner of the enterprise or his representative and the presence of a delegate from the Ministry of Labor were obliged to find solutions for settling the conflict through reconciliation [4, 77-83].

From the way in which the reconciliation procedure is regulated as well as from its obligatory character it can be observed that the legislator of that time has not given priority to the regulations regarding the solutions of the collective labor termination (strike) but to the amiable settlement of any collective labor conflict.

If the reconciliation led to an agreement it was registered in the official report and the decision registered in the official report was obligatory for the period on which it was given in all the enterprises touched by conflict both for the owner or the owners and for all the employees from the category represented by the litigation. The law expressly provided the obligativity of displaying the closed agreement in all the interested establishments.

²Lock-out consists of the closure of an establishment, workshop or a service, due to a collective conflict. It represents the employer’s refusal to offer employees conditions to perform labor or to pay them.
According to law, if through the reconciliation attempts a settlement is not reached “an official report of non – reconciliation” and the parts could refer the judgement of the litigation to an arbitration committee. Thus, usually, the arbitration procedure had a facultative character.

As an exception, the arbitration was compulsory and any collective labor termination was forbidden in all the enterprises and institutions of the state, county or commune, of any nature, as well as in the enterprises expressly listed by law “that function for the public interest and if stopped they can jeopardize the existence and health of the population or the state’s economic and social life”.

The arbitration procedure was expressly regulated by law. The decision pronounced by the arbitration committee was compulsory for the time it was pronounced in all the enterprises participation to the conflict both for the owner or owners and for all the employees of the categories presented or interested in the litigation.

Therefore, if a collective labor agreement occured the parts were obliged to firstly go through the reconciliation procedure. If the parts reached an agreement the conflict stopped. If the parts did not reach an agreement they could either resort to the arbitration procedure, case in which the decision of the arbitration committee ends the conflict, being compulsory for both parts, or they could move to the collective labor termination.

By collective labor termination it was understood, according to art. 5 of the law “the termination of labor of at least 1/3 of the total number of employees of the industrial or commercial establishment or of the number of employees occupied in one or more sections of that establishment”.

The law regulated in a different chapter “the sabotage”. There were „sabotage offenses” destruction, deterioration, theft, falsification, fraudulent fabrication by deliberate errors, fraudulent maneuvering or manipulation of the machinery, instalations, labor instruments, materials, merchandise and products, completely or partly when the offender was bound by a labor agreement to the person that owned

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2The law also includes provisions regarding the protection of the employee’s delegates. Thus, the employees delegated either by the reconciliation committee or by the arbitration one were entitled to miss work in order to execute their mandate and this could not constitute for the employer or the owner of the establishment a reason to terminate his labor agreement. In all this period the employer or owner of the establishment were obliged to pay the delegated employees a daily salary equal to the average salary (“medium salary”) of the last 7 worked days as well as the other rights.
the certain objects. “The sabotage offense” was also represented by „the passive resistance that paralyses production preventing the enterprise from working normally” if the offender was bound by a labor agreement to that certain enterprise. These offenses were punished by prison and committing the sabotage during and because of a collective labor termination was forbidden by law and represented an aggravating circumstance.

The law for the labor agreements of 1929 [5] contained some dispositions referring to the settlement of the labor conflicts, completing the provisions for regulating the collective labor conflicts of 1920.

The law guaranteed labor freedom for every person, „the right to work at will”. Thus, there was incriminated the act of any person that „through serious, immediate and direct threats or through factual violence will prevent or obliges or try to prevent or obliges somebody to work during or with the occasion of a collective labor termination”.

Thus, according to this law, strike or lock-out were not valid motives of terminating the individual labor agreement. The individual labor agreement was suspended in all its effects during the strike or lock-out with the exception of „benefits in kind” that the employee currently had. However, the refusal of one of the parts to resort to the reconciliation or arbitration procedure in the case of a collective labor conflict, if the arbitration procedure was obligatory, represented a valid motive of terminating the individual labor agreement.

However, The Law for the labor agreements of 1929 also contained derogatory dispositions in relation to the law of 1920. Thus, for settling „the actions that occur from the collective agreement” there was provided a procedure different from the one provided in the prior law for settling the collective conflicts.

According to these new regulations, contractual or adherent associations, with judicial personality, could introduce actions in damage interest for any prejudice caused to the professional interest by violating the provisions of the collective labor agreement.

Likewise, these associations could exercise in the name and benefit of their members, individually or collectively, actions caused by the collective agreement, without needing a special warrant from the members, with the condition that the member or members in the benefit of whom the action is exercised to be notified and to not object to it in term of 3 fee days from the first notification.
Law no. 13/1933 for the foundation and organisation of the labor jurisdiction has given to the competency of the labor judges the settlement of the collective labor conflicts if the parts have not chose the facultative arbitration and the arbitration panel has not been constituted. Through this law there has also been regulated the settlement of the individual labor conflicts by the labo judges founded in addition to the labor chambers by panels formed by a judge and two assessors, one of the owner and the other of the employees.

By the Decree-Law of July 24th 1940 [6] for establishing the labor regime in exceptional conditions, strike and lock-out, provided by the Law for regulating the collective conflicts, were forbidden. Any challenge of collective labor termination was punished by the double of the sanctions provided by law.

There was provided the possibility of the Ministry Council to, in case of collective labor termination in any commercial, industrial or transport enterprise, decide the confiscation of the premises, materials, managing and executing personnel, as well as everything necessary for ensuring the function of those enterprises.

Triggering a collective labor conflict was not forbidden but these, if not solved by reconciliation, were going to be obligatorily solved by arbitration, the collective termination of labor being forbidden to the parts.

The Decree-Law no. 2741 of October 2nd 1941 regarding the labor regime in war time [7] has repealed the Law for the regulation of collective labor conflicts. According to the new regulation any termination of labor, individual or collective, was prohibited without the advance permission of the military commander of the militarized enterprise, the military supervisor or the director of the military establishment of the army and in the case of the other enterprises without the advance permission of the Labor inspectorate, given with the approval of the management of the enterprise, with the exception of the force majeure cases.

Consequently, this Decree-Law has instituted the obligatory arbitration and strike and lock-out were forbidden, being considered „sabotage crimes‟.

Law no. 711/1946 [8] for the reorganization of labor jurisdiction has constituted the only regulation regarding the settlement of labor conflicts of that period.

The law regulated two types of labor conflicts: labor litigations that were individual conflicts, and collective labor conflicts. According to the provisions of the Title II, entitled „the settlement of the collective labor conflicts‟, the labor conflict was
defined as „a dispute that collectively regards the labor conditions of an enterprise, a
group of enterprises or their sections or branches only if at least 10 employees are
interested”. Labor conflicts were of two types, namely: „the ones where the
employees want to fulfill some collective claims, born from the performed labor” and
„the ones where employees want to change the existent labor conditions or to form
new ones”. There is observed the tendency of the legislator of that time to separate
the conflicts related to the rights of the employees from the legislation or the
collective agreements and the conflicts related to the negociation of the labor
conditions.

The competency of solutioning the individual labor litigations belonged to the
union committees of research and arbitration, to courts and to the courts of appeal.

In the case of collective labor conflicts if the parts had not reconcile after the
reconciliation conducted by the labor inspector the conflict was obligatorily subjected
to the arbitration procedure of the committee of collective arbitration4 that functioned
near every county court. In the case of collective conflicts where the employees
desired the change of the existent labor conditions or the establishment of new ones
the arbitration committee established the labor conditions „according to equity, social
necessity of labor protection and economic necessity of production promotion”.

The labor code of 1950 had abrogated [9, art. 139] Law no. 711/1946 for the
reorganisation of the labor jurisdiction and the Law regarding the labor agreements of
dispositions regarding the collective labor conflicts. Besides, all the provisions of the
labor legislation of 1950-1990 contained only dispositions regarding the settlement of
the individual labor litigations or refering to the collectivelabor agreements. Thus, in
this period strikes were implicitly forbiden, their trigger not being possible within law
provisions.

The competence of settling individual labor conflicts has been given, by the
coming into force of the Labor Code of 1950, to the committees for settling the labor
litigations, formed by members designated by the unit’s management and the union’s

4The collective arbitration committee was composed of: the president of the court's labor section(who
was also the chairman of the committee), a delegate of the labor unions of the professional cathegory,
a delegate of the professional organizations of the owners, a delegate of the employees in conflict, a
delegate of the owner or the owners in conflict.The decisions of the committee were enforceable, but
could be appealed to the Labor Appeal Committee near the labor section of the Court of Appeal of
Bucharest.
committee. The decisions were unanimously taken and in case of divergence the competence of settling the cause firstly belonged to the court. The decisions of the committees could be fought by appeal to the public court.

By Law no. 59/1960 the judgement committees have been founded as organs of labor jurisdiction with plenitude of competence. They settled any labor litigations that were not given by an express disposition of the law to the competence of the courts or other organs. The decision of the judgement committee could be fought by a complaint to the court.

In this period the judgement committees usually had competence in settling the labor litigations and, in situations expressly provided by law, with exceptional character, the courts, administrative organs hierarchically superior, collective management organs, disciplinary councils, other organs with jurisdictional attributions.

After 1990, the liberalization of economy and the essential changes that took place in the social life of Romania had determined radical transformations[11] in the labor relations field as well. Labor relations had begun to be characterized by a free and real evolution and manifestation. The occurrence of collective conflicts between the social partners whose manifestations were no longer subjected to any social and political constraints, besides the individual labor conflicts, was imminent. While the individual labor litigations were settled by courts, according to the dispositions of the Code of Civil Procedure and the Law nr. 92/1992 for judicial organization, with the exception of situations expressly provided by special laws, regarding the settlement of collective labor conflicts there was adopted a special law.

Law no. 15/1991 regarding the settlement of the collective labor conflicts has defined labor conflicts as „conflicts regarding professional interests with economic and social character of the employees, organized or unorganized into unions, resulted from the development of labor relations between the unit, on one hand, and its employees or their majority, on the other.”

The law regulated [12, 3-14], [13], [14, 411-447], [14, 411-447], [15, 298], the obligatory reconciliation procedure of the conflicts of interests in two steps: direct reconciliation and the reconciliation organized by the Ministry of Labor and Social Protection, through its territorial organs. The direct transition to the collective termination of labor (strike) without going through the procedure of reconciliation was illegal.
If after the reconciliation the parts reached a total agreement regarding the settlement of the collective labor conflict this was obligatory throughout the established period and for all the conflictual parts.

If after the reconciliation the parts reached a partial agreement in the official report were recorded both the claims agreed upon and the ones remained unsellted along with the point of view of every part regarding them. Triggering a strike for settling the claims that were solved through reconciliation was illegal.

Only after going through both steps of the obligatori reconciliation procedure the strike could be declared. The strike was no longer prohibited but the law expressly provided the conditions of its triggering and it could be developed as a final stage of the collective labor conflict.

The law regulated two cathegories of strikes: the actual strike and the warning strike. The content of the law did not also refer to lock – out. There has been appreciated that without some express legal dispositions the lock – out was inadmissible [17, 27].

The law expressly enumerates the cathegories of people that could declare strike as well as the situations when strike could be declared with the condition of ensuring some essential services.

During the developement of the strike, its organizers and strikers had a series of obligations established by law in order to protect the general interest as well as the rights and interestsof the other employees.

The law expressly provided the procedure according to which the unit’s request to declare the strike illegal as well as the request to suspend it was settled.

The strike could be terminated in one of the following situations: if a certain number of strikers give up the strike, if the parts agree, if the strike is declared illegal by the competent court, is noticed to be illegal or if the arbitration decision is pronounced after subjecting the conflict to an arbitration committee.

Labor jurisdiction.

According to art. 281 of the Labor code the labor jurisdiction has the object of settling the labor conflicts regarding the closing, execution, modification, suspension and termination of the individual labor agreements or, as appropriate, the collective labor agreements provided by the present code as well as the requests regarding the judicial relations between social partners.
The labor jurisdiction represents [18, 302], [19], [2, 798] the entire settlement activity made by certain organizations of the labor conflicts and other requests regarding the labor relations and all the relations connected to them, including the regulations regarding the organs competent to settle these conflicts and demands as well as the applicable procedural rules.

The labor jurisdiction is an attribute of the courts. As an exception, labor conflicts and the other requests regarding labor relations and the relations connected to them can also be settled by other organs expressly provided by law, after a special procedure.

The settlement procedure of the labor conflicts

Represents all the rules based on which the competent courts solve the disagreements born from the judicial labor relations.

The main procedural rules applicable to labor conflicts refer to [20]:

1. the referral act: the courts can be referred to through a petition of the employee or the employer;
2. terms of referral: the labor code establishes different terms, depending on the nature of the litigation that is to be subjected to settlement to the competent organ; the petition can be formulated within:
   — 30 calendar days from the date of communicating the unilateral decision of the employer regarding the closure, execution, modification, suspension or termination of the individual labor agreement;
   — 30 calendar days from the date of communicating the decision of disciplinary sanction;
   — 3 years from the date of issuing the right to action if the object of the individual labor conflict consist of paying some salary rights that were not granted or some compensations to the employee as well as in the case of patrimonial responsibility of the employees towards the employer;
   — the period of the agreement’s validity, if there is solicited the establishment of the nullity of the individual or collective labor agreement or of some clauses of it;
   — 6 months from the issue of the right to action if the collective labor agreement or some clauses of it are not respected;
   — 3 years from the issue of right in any other situations.
The terms of referral to the organs of labor jurisdiction are prescribed terms; for objective motives, the interested part has the possibility to solicit the reinstatement in term;

3. **the material and territorial competence:** the judgement of the labor conflict is the competence of the established institutions according to the Code of civil procedure; in terms of the territorial competence the the petitions related to the labor conflicts are given to the court that is closer to the plaintiff’s home or, as appropriate, headquarters;

4. **the evidence task:** in labor conflicts the the employer evidence task; the rule is traditional and practical since the employer is the most able to prove the legality and rationality of the decisions or measures taken;

5. **exemption from the payment of judicial taxes of stamp and of judicial stamp:** in front of the labor jurisdiction organs all petitions and procedural documents are exempted from the payment of stamp taxes;

6. **judgement terms:** labor conflicts are settled in emergency regime; the judgement terms cannot exceed 15 days; the citation procedure of the part is legally considered fulfilled if it is made with at least 24 hours before the judgement term;

7. **administration of evidence:** the administration of evidence is made respecting the emergency regime the court being entitled to decline part of the benefit of the admitted evidence if its administration is inexcusably delayed;

8. **the regime of the decisions:** the pronounced decisions, in this matter, are final and rightly enforceable.

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[5] The Gazette No. 74 of 05.04.1929
The Refusal of the Assigned to Consent to the Substitution of the Assignor in the Contract Assignment

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Abstract
The new Romanian Civil Code assumed from the Italian Civil Code the requirement that the assigned party would have to consent in order for the assignor to be able to substitute within the contractual relations a third party, called assignee, third party that would assume the contract in its integrality, namely both the active side as the passive side. The consent of the assigned becomes thus an essential condition in order to have an operational assignment of contract. But what will happen if the assigned refuses to consent to the assignor? The hereby paper is trying to present the judicial nature of the right of the assigned to refuse a new contractual partner and thus also to refuse a transfer of contract from the assignor to the assignee.
Keywords: assignment of contract, refusal of the assigned, free of will

1. Some preliminary considerations regarding the consent of the assigned to the contract assignment.

The national Civil Code, which started its existence at 1.10.2011, assumed from the Italian Civil Code, almost completely, the provisioning of the assignment of contract.

Article 1315 of the current Civil Code states that: “A party may be substituted by a third within reports born from a contract only if the benefits have not yet fully been executed, and the other party consents to it”.

The condition of consent given by the assigned party becomes an essential legal condition to allow the substitution of the assignor with the assignee it wishes to bring in his place within the original contract.

We previously stated, in a different paper, that article 1315 of the Civil Code would impose the consent of the assigned as a validity requirement of the contract assignment, being that which triggers the permutation between the assignor and the assignee.

The Italian doctrine, that has the same provisioning of the contract assignment, has known the same kind of controversy regarding the role of the consent with the assigned party. The majority of Italian doctrine and jurisprudence adhered to the thesis according to which the consent represents a constitutive
element of the assignment that is thusly presented as a plurilateral convention with a translative effect [1].

There have been voices within the French doctrine that, embracing the subjective conception which regards the consent of the assigned as a validity element of the assignment, have explained the mechanism of the assignment as being one specific to the birth of a contract. The offer of the assignee to contract with the assigned expressed within an assignment agreement perfected with the assignor is followed, or preceded, by the acceptance of the assigned [2].

The French doctrine also expressed the contrary of the above, stating that the consent appears as an authorization from the assigned party with a liberator purpose towards the assignor.

Thus the consent of the assigned is not to transform the latter in a party to the assignment convention but to avoid an obstacle that may stand in front of the assignment. It is an authorization which does not entirely create a new prerogative and which only completes the use through the possibility of exercise. This authorization, which may be general (being specified within the main contract) or special (being given at the moment of the assignment), makes a contract assignable. If such an authorization would not have been given within the initial contract, it was appreciated that the refusal of the assigned may be subject to the control of the Courts [3].

As an argument against the need of the consent, it has been underlined within a dualist approach, that the assignment of contract should be considered as beyond an opposability towards the assigned, producing actually a real effect in what regards the latter. The consent of the assigned is only needed to release the assignor. Also within contracts that present an intuitu personae character in the benefit of the assigned, its consent is necessary, but not as a validity condition of the assignment, but to deny its injunction [4].

Within judicial doctrine a distinction has been proposed between the consent creating deed, which is identified with the classic consent notion, namely the manifestation of will that leads to the creation of a legal act, and the effectual consent, through which the legal deed produces specific effects. The issuer of the latter is not a party of the deed itself, but only “triggers”, through its will manifestation, the effects – to self, generated by that type of contract. In the category of consent that creates contracts, diverse types of consent have been identified: a. the consent
of the original parties of the contract (validating consent), b. the empowerment consent – being represented by the consent of the legal guardian that empowers and “completes” the consent of the person with a limited exercise capability and c. the gratification consent – which has as a field of action the credit agreements, gratification clauses and the conventional assignment of contract [5].

We also appreciate, along other authors [6], that we find ourselves in the presence of a consent that enables an assignment whenever we have the consent of the assigned within an assignment of contract.

The role of the consent given by the assigned party is exactly pointed to transfer the contract from the assignor party to the assignee party, freeing the assignor being not a purpose of the operation but merely an effect. It is the case, of course, of the perfect contract assignment, as with the imperfect contract assignment, the assignor will still be responsible within the contract, along the assignee.

The consent of the assigned is itself the element that validates this exercise of the free will, giving the assignability character to a contract.

In French jurisprudence, the consent of the assigned party validated itself the assignment of a contract with an *intuitu personae* character, with the assignee, getting thus the character of an element that forms a conventional assignment of contract.

In that acceptation, there was expressed the opinion according to which the contract “becomes an assignable asset only when both parties (trust presumes at least two parties) are in complete agreement with the substitution of the assignee in the place of the assignor party” [7].

Within specialty doctrine the question has been asked if the consent of the assigned represents a discretionary or non-discretionary potestative right, which may allow the intervention of a judge in order to limit its exercise.

2. The Judicial Nature of the Refusal

The refusal of the assigned to consent to the assignment is, actually, a refusal to contract.

The contract represents, as it appears within the texts of the new Civil Code, an agreement of will which births, modifies or depletes judicial reports between the contracting parties.
With this definition of the contract, we appreciate that the refusal to contract represents the other side of the consent, namely the option of the bearer (of consent) to not contract.

The refusal to contract may be constituted from a negative fact – the abstinence of the recipient of the proffer, a positive fact – the refusal of the offerer to proceed to a closure of contract and an intermediary form between the abstinence and the positive fact [8]. An example to illustrate the third option is the case of the offerer which includes in its offer the refusal to contract with a certain category of parties.

To contract or not contract represent the positive and negative expressions of one and the same principle – the principle of free contracting. Even if the law does not regulate this principle in its negative meaning, it is implied, protecting thus the freedom to contract understood from its negative side – the refusal to contract, through for example, the regulating of consent vices, legally sanctioned by the nullity of the contract [9].

The refusal of the assigned to consent to the contract assignment represents a potestative right, the assignor having the possibility, but not the obligation, to consent to the contract assignment and thus to a change of contractual partner.

The judicial doctrine has not stopped to establish the judicial nature of the refusal of the assigned as being a potestative right, but withheld the question if weather it is a discretionary right.

It is true that the practice from most national Courts doesn’t help us provide an answer to the above question, this due maybe to the recent entry of the conventional contract assignment within the national legislature.

But, unlike our national practice, the French jurisprudence considered that even the category of the potestative rights should be exercised in good-faith, the Court having the possibility to intervene in order to sanction an exercise beyond its natural limits, stepping thusly on the grounds of legal abuse.

By discretionary rights, the contemporary literature understands the rights who’s exercise – even founded on dishonesty – may not be sanctioned, either because it has no real sanction or because the law or the judge considers it futile or out of place, in the specific case, of a supplementary protection brought by a censorship of the exercise of a given right [10].
And then, is the right of the assigned to refuse an assignment a discretionary right as it is a part of the potestat category of rights?

We appreciate that the answer to the above question is not necessarily simple to give and it may be different based on the thoughts of the author upon the mechanism of the assignment of contract.

Thus, we believe it would be much easier that the refusal of the assigned to be considered a non-discretionary right by the authors that perceive within the consent of the assigned party a simple authorization to the purpose of the effects of the assignment, then by the authors that regard the requirement of consent as a validity condition of the assignment.

Within the first category presented above we present Philippe Malaurie and Laurent Aynes [11] which begin from the idea that the consent of the assigned to the contract assignment refer only to the objective elements of the contract, namely the cause and object, and not to the party of its co-contractor. Beginning from this hypothesis, since the object and cause remain the same, there would be no reason for the assigned to oppose the assignment of contract. But if the assigned should oppose to the replacement of its co-contractor that would mean a breach of the principle of the compulsory force of the contract.

From our point of view, this theory is debatable, starting from a strictly objective conception of the contract, contract which is brought to its objective elements (object and cause), with no consideration towards the subjective element, given by the contracting party and the element of trust that is established between the contractual partners.

The argument brought by the above French doctrine members, namely that the opposition of the assigned would be a breach of the compulsory force of the contract, also gives the possibility of debating.

Which would be the elements that would create a compulsory force within a contract?

It is true that, by assigning the contract, its object and cause remain the same, but one of the contractors is different. By changing the party does that not bring consequences to the force of the initial contract?

In the end, the compulsory force of the contract assumes exactly that – conventions that are legally drafted have the power of law between its parties.
Or, the assigned is tied through its agreement by the assignor, that which calls for a reiteration of the agreement, meaning a consent to change the assignor, a party to which it has agreed, with the assignee, a third to the initial contract.

We appreciate that this reiteration of the agreement represents the foundation of the compulsory force of the assigned contract, compulsory force that will bind, from the moment of the assignment, the assigned and the assignee.

L. Aynes [12] regards the consent of the assigned as a simple authorization that may also be given previously, and not the expression of a will manifestation in order to create a new contract with the assignee. From that, the author deduces that the refusal to give consent may be overpassed by an order of the Court, which should appreciate the benefits of the parties and decide.

But who’s benefits? The benefits of the assignor, as the party that choses to abandon the contract, from maybe purely subjective reasons, the benefits of the assignee, a third that wants to intervene within a contract, or the benefits of the assigned, as an initial party that will have to continue a contract with an assignee it does not know, has not chosen and does not agree?

Of course, the reason to recognize, as autonomous, the conventional assignment of contract is to perpetuate the existence of the contract until it would have been fully accomplished, videlicet until the considerations of its purpose have been met.

But if we affirm that the consent of the assigned represents a potestative right, but not a discretionary one, it means that the Court may appreciate the refusal to agree with the assignee would be an abuse, and as a consequence to pronounce a decision through which the assignment would be validated, without the consent of the assigned.

Proceeding thusly, is it not a change of the assignment from conventional to judicial, as the refusal of the assigned to consent to the contract assignment is overpassed or replaced by the Court who declares it abusive and as a consequence the assignment is stated as valid?

The internal legislation could have settled this dispute easily by stating expressly that the Court of Law may decide if the refusal to agree a certain assignee is abusive and thusly to decide to replace it.

In the lack of such provisioning, all is let at the will of judicial practice, to offer an answer in situations due to be settled in Court, having as object the refusal of the
assigned to agree with the assignee from subjective reasons, that may be appreciated as abusive.

The legal abuse intervenes, in general, as a sanction in the case in which a party may exercise its rights outside the internal and external boundaries, causing damages to other parties.

Within national doctrine, even the adepts of the theory of consent as a validity condition with effect of creation of the assignment appreciate that the refusal of the assigned to agree with the assignee is a clearly potestative right and not a discretionary one too, and may and should be censored by the Court of Law when drawn by low morale considerations [13].

Such examples of Court intervention in censorship of the refusal have been given by the French jurisprudence: intent to prejudice the assignor, racial or religious discrimination towards the assignee [14].

French jurisprudence admitted even the assignment of a contract completed \textit{intuitu personae} as the agreement of the assigned party was given. Starting from the analysis of this solution, the French doctrine started a debate regarding the legal nature of the \textit{intuitu personae} character of a contract, creating thus two parties: those whom sustained the subjective theory according to which the \textit{intuitu personae} character is founded on a feeling of affection or trust and those that would propose an objective conception founded on a feeling or a risk.

This subjective conception has been considered objectionable, as the control of the Court upon this character would be very limited if not non-existent. Regarding the objective conception it has been sustained that when founded on an emotion, it would constitute the cause of the legal document, being in the presence of an act with free title, and when being founded on a risk, we would be in the presence of an onerous act. The risk is perceived as the eventuality of an event tied by the legal operation and that raises the finality problem of this operation. Taking into account of the party, being part of the stipulations that have as a purpose the indemnification of contractual finality, it brings a solution to the contractual risk. The solution would be subjective when the risk is attenuated because of human qualities (ex: the contract between the attorney and client), also the solution would be objective when the risk is attenuated by the objective qualities of the party, as such are technical abilities, experience, competence. The objective vision would lead to the parties’ substitution between themselves when they present the same amount of qualities. If the
requirement of the consent of the assigned has been extended to all existing contracts, it has been stated that it is no longer a part of only the *intuiu personae* contracts, but the objective conception would impose a distinction. The consent of the assigned would no longer be necessary when the taking into consideration of a party would be an objective risk, the assignor being capable to determine the profile of its substitute without the help of the assigned. At the same time it has two obligations, first to assign the contract to a third, at least as capable as itself and second to inform the co-contractor of the substitution. If taking into consideration of the party is the subjective solution of a risk, then the consent of the assigned is necessary, as only it may decide if the qualities of the assignee satisfy its interests [15].

National doctrine also, in what regards *intuitu personae* contracts, stated the opinion according to which in the case of assignments based on an objective *intuitu personae* character, the right of the assigned to agree the party of the assignee – although potestative – is not discretionary, its refusal being subject to control from the Court of Law. The explanation consists in the fact that reiterating the professional qualities presented by the assignor in the party of another specialist in this field is possible, and appreciation of those competences by the new-comer is, if needed, subject to Court control [16].

3. Conclusions

The problem of consent of the assigned, to the assignment represents a controversial element not only within national doctrine, but within the Italian and French also, having opinions expressed both towards considering it a validity requirement of the assignment, but also that it would represent only an authorization which has as effect the liberation of the assignor.

The problem of the refusal to consent to the assignment as a potestative and discretionary – or non-discretionary right has only been discussed adjacently. In principle, the authors that presented a point of view in this way, have sustained that the non-discretionary character of the refusal, and as a consequence the possibility of the Court of Law to intervene and decide through a civil decision as being abusive a refusal to accept an assignment and as such stating the assignment completed even in the absence of the consent of the assigned.
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References:

Abstract

The contents of this paper analyzes the relationship between morality, religion and commercial law through an interdisciplinary research of the issue. The approach of such a vast topic aims to provide a view that demonstrates the moral and religious foundation of commercial law.

Keywords: morals, religion, commercial law, private law, public law, European Union law

Argumentum

The contents of this paper analyzes the relationship between morality, religion and commercial law through an interdisciplinary research of the issue. The approach of such a vast topic aims to provide a view that demonstrates the moral and religious foundation of commercial law, especially because, according to some contemporary authors, there are three main concepts in the philosophy of law regarding morality, religion and law. We’ll not dwell on them, they only be mentioned.

The first concept, with which we also agree, refers to the undeniable moral content of law, and we'll try to further demonstrate without being labeled as some apologists in the religious, but only to argue that the establishment in business and in our daily life of a moral and religious behavior, respecting the rule of law in obedience to God, the supreme legislator, is about the divine essence of man.

The second concept was founded by philosopher Hans Kelsen who in his fundamental “Rechtslere Reine” - Pure Theory of Law, published in 1934, removes morality from the content of the law and does not identify any link between the two. Kelsen assigns legal norms two features: the validity and effectiveness; the first designates prerequisite of the rules and is a Sollen, the second expresses their role and belongs to Sein. More specifically, rules and facts, respectively must be and it is are part of different worlds because they do not derive from each other and the validity of any rule of law in any legal system legislation is only a logical approach towards a clear distinction between legal norm analyzed as reality (Sein) and the rule of law taken as ideal (Sollen), Kelsen recognizing a single relationship of law, the

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relationship with the state, the law complying with state (“Alles ist Staatsrecht Recht, Staat ist jeder Rechtsstaat”) [1].

The third concept is sociological, mixed, recognizing the existence of legal norms with moral content, and of the rules in no relation to morality. To these, we present comparatively the three major areas of social life (morality, religion and law) starting from their common denominator, their interferences, but also what distinguishes them.

About morality

So what is morality? Morality is defined as "all rules of coexistence, of behavior of people to each other and to the community and whose violation is not punishable by law, but by public opinion " [2], and French dictionary "Petit Robert" in 1982 edition defines morality as "the science of good and evil; the theory of human action in its quality of being subject to duty and aims good; the rules of conduct considered absolute manner; set of rules of conduct arising from a certain conception about morality".

In the same vein is the term from the Greek, dikaios, expressing what is right and what is just, moral, and there is no other notion to define the two terms separately. Aristotle, in the Nicomachean Ethics Book V, defined law as any behavior that conforms to moral laws.

Morality has a prominent place in society, is a phenomenon always present, whether it is widely recognized or appears in a "hidden" form and morals is based on several principles: dignity, responsibility, freedom, solidarity, justice and charity and in a first meaning, the narrowest, would address the relationship between individuals of the same family, then the individuals of the same community, because in its widest sense to define all human relationships and all kinds of human activity regardless of their particular content and meaning. However, the moral term is equated with the ethics, although some authors have contrary opinions and avoid putting the sign of equality between these terms. Therefore, we have to see and what is ethics.

“Explanatory Dictionary of the Romanian language" in its 1975 edition defines ethics as “the science that deals with the study of moral principles, their laws of historical development, their class content and their role in social life; all rules of moral conduct of a given class or society".
Ethics is a science, and its development was delayed by perpetuating the same type of knowledge, and in general, the same methods of Aristotle, and an understanding of ethics is difficult for us as individuals, as a sound ethics is the very essence of a civilized society. Ethics is the foundation on which all our relationships are built, it means our whole to relate to our neighbors, employers, employees, colleagues, customers, subordinates, suppliers and to the community in which we live. Ethics is not about the connections we have with others - all have links with each other - but the quality of these links.

Studying ethics as a practical discipline - called applied ethics - as the last current approach to this science, had a very important contribution in the fields of law, medicine, in which the legal ethics - or jurisprudence - and medical ethics are well-established topics, but also in business, approaches that have had an important contribution to the development of Business Administration as a subject in most faculties. For example, Harvard University, at Faculty of Business launch adopted pedagogical models developed by its faculties of law and medicine, in which the ethical approach of discipline has an important role. This was due to the fact that some teachers and businessmen found it necessary to impose the values accepted in business practice. There was a legal basis for incorporating this concept of business ethics; is supposedly contained in a decision of the U.S. Supreme Court, in 1906, which stated: „Corporation (company) is the creation of the state, and is meant to exist for community's good."

Finally we can say that the ethics knowledge developed in space “in width”, by bringing new events or other determinations in the field of morality and less in depth, by widening the meanings and deepening the determination of moral considered phenomenon; otherwise said, the history of ethics is more a history of continued development of a single integrated way. In addition, the class character of the moral and social-historical determination of ethical doctrines was also factors that have hindered the realization of such an integrative approach [3].

**About Law**

### 3.1. Introductory Matters Regarding Law

An attempt to define law is as bold as it is delicate, especially that during the time law was given more definitions and is unlikely to encompass in an analysis. Yet, the concept of law has its origin in Latin directus which means straight line, direction.
In Latin, the notion of law as a set of rules is designated as jus, which denoted formulas justice was expressing, both notions translated into Romanian by one term: drept. A similar solution we find in English where right has the meaning of straight, direct, fair, or of the right of person (individual right), and the notion of objective right is designated by the term law.

In common law countries we translate right by law, and the primary source of law in the United Kingdom or the United States is found in the case law and not in codes, rather in the cases the judge decides than the paths indicated by the state [4].

The first definitions of the law are assigned to Roman Juris consults. Among these we note the definition of law by reference to the morality given by Celsus in Digesta: jus est ars boni et aequi (law is the science of what is good and fair); Ulpian said that “law is the knowledge of things divine and human, the science of what is right and wrong” (iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque inijusi scientia); Cicero wrote in De Republica that the law is quidem vera lex, recta ratio, nature congruens difussa in omnes, constants sempiterna (it is a true law, right reason, in conformity with nature, spread in all, constant, eternal). Later, other authors have defined the law by the idea of equality (Thomas d’Aquino), by individual freedom (Kant), by the common good (Jean Dabin) or social interest (J. Rawls). Mircea Djuvara identifies law as “representative of a sacred ideal, bearer of highest aspirations which society has, towards justice and morality.” [5]

Law bases its existence and functionality on principles, is directed by essential norms which support the whole legal framework, as in morals and religion we have principles, strict or holy rules we respect without hesitation or, at least, avoid to violate.

3.2. Principles of law

Principles of law are those guiding ideas of the content of all legal norms. They guide the development and application of legal rules in a branch of law or of the entire legal system, with strength and significance of superior general rules that can not be expressed in the texts of normative acts, usually in the constitutions, or that are not expressly formulated but are drawn in the light of promoted social values.

According to contemporary views the principle is defined as “a standard that must be respected, not because it will advance or protect an economic, political or social situation, considered desirable, but because it is a requirement of justice and
equity or another dimension of morality and "principles have a dimension that rules do not have - the dimension of weight of importance." [6]

The word principle comes from the Latin principium - beginning, origin, having also the meaning of fundamental element. Every principle is thus a start, in the ideal plan, a source or cause of action [7]. Principles of law are persistent elements, structurally perennial of legal normativity, true "invariants of the law", but not yet immutable, recording a socio-historical content and slower dynamics. A renowned contemporary professor, in a known work [8] retains and analyzes the principles of law: legality (legal functioning of the state with the principles of sovereignty and democracy), freedom and equality (reference is made to comply with both general and individual freedoms without any discriminatory elements), responsibility (individuals relate to legal norm actively and consciously), equity and justice (without which there would be no safety of social life).

Aristotle said that it is a peculiarity of the people to possess a sense of justice and injustice, and that they share a common understanding of justice, which creates polis. Principles of justice define an appropriate route between dogmatism and intolerance, on the one hand, and reductionism, on the other hand, which considers religion and morality as mere preferences [9].

3.3. Moral ontology of law. The ethical and legal system

About morality in the development of legal rules, about compliance with a moral foundation in close connection with the society requirements, we can only say that it is still of great interest, even if it was and continues to be an issue that has preoccupied the great theorists, philosophers and practitioners of law. The moral is, as I said, a social phenomenon by genesis, by its structure, by its functions and its historical evolution, a phenomenon that led to creation of a moral system governing the nature of human relations, morality appeared at a certain stage in history and it lasts as long as mankind.

Regarding the analysis of the occurrence of the law it shows that it is formed and acquired personality through gradual separation of religious and moral norms and customs, and in its embryonic stage extracted essential legal and moral norms, customs representative to human communities and their specific religious rules [10]. Morality, designed as fully homogeneous in which elements intertwine, can be regarded as a system, surpassing unilateral analysis and recognizing the complexity
of this phenomenon. Seen thus, the ethical system has so many common points, spheres of interference with the legal system that often law was defined by morals, considering that it is nothing but a “minimum of moral.”[11]

The law, unlike ethical system, there is not a coexistence of individuals, but their coexistence based on axio-ethical criteria. The law is limited to people relations between them; these relationships involve self-awareness, crystallized in self and the other’s consciousness, crystallized in you, he, that otherness, ad alterum; a ratio of cooperation, i.e. to commit to work together, or adversity, i.e. misfortune and cannot be other reality than self-conscious individuals and of the other able to choose partners or opponents on a value criterion[12]. As juridical and ethical are dimensions of the same social activities through which are established relationships between people, relations which often are both legal and moral, legal reference to the moral rules seems natural. Not the same opinion has Oliver W. Holmes, rising up against the confusion between law and morality, which is almost impossible to accomplish[13].

4. About Religion

4.1. The concept of religion

According to dex online religion means that “system of beliefs (dogmas) and practices (rites) regarding the sense of divinity that unites in the same spiritual and moral community all those who adhere to this system; all relevant institutions and organizations; religion; faith; belief; worship; discipline taught in schools, aimed at educating and training students in the spirit of religion.”

Etymologically the term religion is derived, as is known, from the Latin word religio, whose etymology is, however, controversial. Thus in a first draft and supported among others by Augustine it was indicated as a source both religio (relegere=to bind, to collect, to gather), meaning that it requires belief in the existence of a link between man and divinity. A second version, with the source relego (relegare = gather again, to resume, rereading), which would have implied meaning of bringing acts of worship to the deity has been deducted by Cicero[14]. This word contrary to nerelegare (neglecting) refers in its primitive meaning, at the respect of all concerned worshiping gods, echoing the Roman conception of religion. Another etymology less grammatically correct, but given the proper meaning of Christian religion is that of Lactantius[15], who inferred the word religion from
religare (to bind, to join) in the sense of union with God. However, this purely etymological aspect will continue to inspire philosophical debates until God will light the best sense.

But what is meant by religion? This is where discussions between researchers of religious phenomenon intervene. Most of them agree that the idea of Deity is part, of necessity, from the concept of religion, others reject this view. The definition of religion is therefore a controversial issue. Things can be simplified if we take the meaning of the word religion in the ordinary sense of „set of beliefs, feelings, moral rules and rites from the consciousness of individuals or communities that are related to a supreme being or beings more superior they depend on” [16].

From another perspective a definition states that every religion is a „form of social consciousness which is characterized by belief in supernatural beings or forces through a religious ceremony and the existence of appropriate institutions and organizations." [17]

Religiosity, as an attitude of respect and attraction to invisible and therefore its reporting to visibly is shown to be an attested feature of the human, of humanity in general. Everywhere and always, the man was, is, and undoubtedly, will be homo religious (religious man), just as is the homo faber (man creator), homo ludens (man who plays) etc.[18]

From a doctrinal, psychological, institutional, etc. point of view the great religions know an incomparable historical stability relative to other social and spiritual phenomena. Viewed overall, the main religions known today (Christianity, Islam, Judaism, Confucianism, Buddhism, Hinduism) presents a multi-secular and millennial historical continuity. Changes in the historical development of major religions have steps and specific forms. It is no less true that the historical development of religions exists and, despite appearances, the trends of modernization of religion is not an invention of our time. [19] Religion is essentially an act of faith, expressing itself through denominations and religious practices. Faith is of another order and operates with another language than science. In the concept of the believer, is the certainty that God does not need to be demonstrated (appealing to evidence such as miracles, angels army etc.) to exist [20]. Characteristics of some religions, especially Christianity and Islam, through the eyes of report it laid with moral and legal rules are subject to distinct sections.
4.2. Religion and law. Moral rules and legal requirements

The link between religion and law are inevitable in history and contemporaneity. Nowhere law was born with secular physiognomy which has in modern times: Authority that has law finds its basis in the divine origin attributed to rules of law. It was noted that the state is built on three different forces: material force, of coercion, specific to law which is effective when employed against a minority, the majority giving its moral support to the law; the force of reason (specific to morals) on the logical necessity of the law and enforced by man as a social being, considered present only to a tiny minority, even in civilized societies; mystical sense based on emotionality, intuition, belief in divinity (of religious origin).

If religion is based unquestionably - by definition – on mystics, moral and law also rely mostly on the mystical feeling. Of course, at first, in the history of states, the law was be confused with religion in the sense that rules of law are considered as emanating from the divine. Little by little, the institutions secularize leading to demarcation more or less pronounced between religious and secular functions and institutions, to separate church and state. But in this case the connection is kept latent, diffuse, at psycho-social level, between law and religion. Traditionally in the evolution of religion and law in the minds of Al. Vălimărescu has shown the existence of three phases:

a) a first stage represented by the total confusion, both on the field of public law and that of private law, the law with religion (here are met two forms: theocracy - direct rule of society by gods like Pharaoh in Egypt or Jehovah in Hebrew and monarchy by divine right - government by representatives of divinity, at ancient peoples: Persians, Chinese, Greeks, Romans);

b) the second stage puts us in the presence of gradual emancipation of private law from religion, by the emergence of economic, political, social, demographic factors;

c) the third phase is the separation of religion by law, at least in a formal sense, on the political ground when sovereignty will not be of divine right, but as popular right.

Secularization of public law was achieved with the French Revolution. The father of modern democracy itself, JJ Rousseau, has called his system a „civil religion”. As the absolute monarch had lives and property of its subjects in the name of God, so the „general will” as Rousseau conceives, will have life and property of
citizens. As I said, “Thou shalt not steal!” is not only a moral rule or a "commandment" of religion, but a regulatory or legal prescription. Even if not afraid of divine punishment and even if no qualms thief should fear the "long and relentlessly arm" of the law. Clear distinctions can be made between legal and moral prohibition of theft?

First, the authority that requires legal prescription is, like God, heteronymous, but unlike the Divine Being, it belongs to the earthly world, it is always a political institution, administrative or judicial Parliament, Government, Presidency, Prefecture, City and so on. Requirements imposed by the legislative power are protected and enforced, if necessary, by force by the police, prosecution, courts, courts of appeal, etc. Rather, the moral norm is autonomous, being respected as an individual is himself convinced of his reason and will, of its universal validity. He who doesn’t steals only by fear to withstand the rigors of the law can always be tempted to acquire other property whenever it feels safe from the legal consequences of his act - whether it is satisfied that it will never be found, whether rely on certain immunities possible a corrupt and inefficient judicial system. While a truly moral person will not steal again, whether or not exposed to danger from the rigors of the law after his act.

Secondly, the subject of legal requirements is always circumscribed within groups "subject" of certain institutional authority. As a citizen of Romania I have a legal obligation to pay the taxes I owe the Romanian state, according to our road code I’m bound to drive with the car on the right, when traveling in England, however, I’m obliged to respect the laws of British, to pay at British customs for certain products I introduced in their country and if I want to get to the destination safely, I must drive on the left side, as unnatural and uncomfortable as it may seem. Instead, the subject is always generic moral norm: Nobody has the right and is not right to steal, whether Romanian citizen, British or Pakistani and whatever the law on theft in each country.

The most significant difference appears between legal and moral sanctions. Typically, law doesn’t provide awarding penalties, only punitive. Respect for the law is not rewarded, as it represents a duty or obligation, at most one can say that law enforcement entails an indirect reward as citizens gives the correct entitlement to state protection in the exercise of his freedoms. Nobody expects a reward from the authorities for not stealing, lying, cheating or not killing anyone. Instead, the scope of the law is full of penalties for violators. These punitive sanctions are most often
physical or material fines, damages, confiscation, imprisonment, suspension of certain rights, etc. Repentance or remorse of the convict matters little or not at all. No one will be exempted from legal punishment due to after stealing because he is sorry; on the other hand, after having served his sentence, a thief on the loose resumes life as though nothing happened, even if to himself he has no regrets at all for stealing, but only the misfortune of being caught and convicted. In the sphere of morality, things are not so at all. On the one hand, moral behavior entails awarding penalties - like praise, respect, admiration and gratitude of others - or punitive - blame, reproach, scorn and disgust of others. Beyond these rewards or punishments from outside, the strongest and most specific moral sanctions are those that come from within each individual consciousness. They are mental or spiritual distress; one who has sinned against conscience is punishable only by regret, repentance, remorse or shame, in which a strong moral will is born desire and determination not to repeat the same mistakes and, if it can, the intention of correcting the wrong done to himself or others.

The form of normative expressions can be of great use when we want to distinguish moral rules from legal requirements. Most times, a legal prohibition is accompanied by a moral prohibition, but not vice versa. “Thou shalt not steal,” “Thou shalt not kill,” “Thou shalt not lie” etc. are both legal and moral prohibitions. “Thou shalt not be greedy,” “Thou shalt not be lazy!” are moral prohibitions that have no equivalent in legal terms. But the most characteristic difference is that, where the law only issue a ban, adds moral duty or obligation that cannot be imposed by external authority of the law, but only the inner consciousness of each individual. Morality requires you, as the law, do not steal, do not lie, do not murder, etc. but only morality requires you to be generous, selfless and even magnanimous. It's not good enough to not take from another; a man with a strong moral conscience accepts it's his duty to impart from his fullness to those who need and deserve support. It's not enough to not lie, a moral man feels compelled to tell the truth, even if this takes some risks. Not enough to not murder; morality requires you to do everything in your power to save a life in danger. No one can be called before the judge because he wanted to give his brother or neighbor a sum of money he needed to treat his sick wife or child to send to school. No one may be legally condemned for being silent when not asked, did not disclose the injustice or wickedness of which he was aware. As no one can be charged to court for not trying to save a drowning child or a woman in a house in fire.
From the moral point of view, however, these behaviors without altruism are more or less blamed. We thus understand that legal rules prohibiting anti-social acts - such as stealing, lying, deceit, murder, tax evasion – are designed to ensure a minimum of sociability, without which society would turn into a jungle, while moral norms asking altruistic behavior, seek to establish a maximum sociability, so society to facilitate personal development and improvement of the human condition.

The distinction between moral norms and legal requirements is of utmost importance in the business world. Many people believe that the only obligation of an honest businessman is to respect the laws in force; the corollary is that any management decision maximizing profit within the law is not only legitimate, but also morally binding. Things are not so, for several reasons. First, the very decision to comply with the law is a moral. As good on paper, the laws are laughable and ineffective in a social environment whose ethos cultivates and encourages dishonesty and corruption. What is happening today in Romania painfully illustrates this fact.

On the other hand, legal rules as such are subject to moral judgment. Some legal requirements are downright immoral. Black slaves in the U.S., for example, have long been legally established until moral progress of American society has imposed its abolition. Unfortunately, today there are a number of laws ambiguous or ill prepared; the effects could not be less morally legitimate. On the other hand, in some situations, it may be law more progressive only partly than ethos at a time in a specific company. There are countries that have legislated artificial insemination, organ transplants, cloning, gay marriage, consumption of certain drugs or euthanasia, but the bulk of citizens reject these new freedoms for moral reasons. Essential is the fact that in a democratic society the respect for the law is a moral decisive value. A bad or outdated law requires changes by constitutional methods, but until its change has to be respected as is, because the force of law is more important than any possible transient inconvenience of a law or another. Finally, the law cannot and should not regulate everything, impeding the work and social initiative in some overly rigid patterns. Most dynamic and best performing in all areas companies are based on fewer laws, short and clear, applied with full probity and transparency.

With our life after the fall, when good is required to be helped, and evil fought, for the organized freedom to acquire a value and a positive role in our lives, the only
organizer of freedom is the law. Human society has no other effective means for creating and maintaining the order within it, than law and natural law is written in the law of nature. Indeed, as the Apostle of the Gentiles said, "the heathen who have not the law do it by nature, the law, these, not having the Law, are law nonetheless. Which shows that the law written in their hearts, by the testimony of their conscience and their judgment that blames them or defends them." [21] Natural law and moral law, planted in the heart of man from creation, is thus stated by the power of human reason, which is destined for the human being, regardless of whether or not a religious or moral.

It was said that the ancient people (Babylonians, Egyptians, Romans, etc.) made confusion between law and morality. But that, unlike the other nations, the Romans have overcome this confusion, evidence that as early as the old age rules were designated by the "Jus" and the religious ones and the term „Fas”. First, it should be noted that - at that time - there were no distinction between the religious and moral norms and legal ones, because both were considered to be the result of the same divine will and their content would only express moral and religious precepts, this „voluntas Dei” imposed as „lex vitae” (rule of life). Then, it should be noted that in old age, at the Romans, the laws had a religious garb so as linguistic expression and on their contents. Indeed, in old age, even legal institutions, such as contracts were concluded in the form of religion. For instance, the form of contract to become agreement had to be religious. The most important contracts in this form are sponsio (promise) and jusiurandum liberty (oath of liberated).

Initially, international law (jus gentium) also had a religious character. We know, for instance, that at the Romans, international issues were within the jurisdiction of the Senate and a sacerdotal college (Fetial College) led by a pater patratus, which had an important role in cutting disputes, starting the war, conclusion of peace, treaties of alliance, after a certain ritual. Fetials applied the rules contained in a religious code called jus fetiale, including the first germs of international law.

A comprehensive process of desecration of Roman society, and, ipso facto, a distinction between jus and fas took place after the expulsion of the last king and the establishment of the republic, only in 509 B.C. As an immediate consequence, „Pontifex Maximus” had largely lost its political powers. But we can still speak of a so-called "cult" of the laws of the Romans? It also stated that in the concept of primitive Romans, rural and superstitious the cult laws figured with the cult of gods, whose
goodwill was invoked for the purposes of social relations. Of course we can not speak of a culture of law, much less a religious parallel - of laws and gods - but only a sacralization of laws. Their sacred character derives from the worship of the gods, who were considered the source of the law itself, hence, the obligation of observing and applying them as divine commands. But, it should not be understood that these laws involved a cult like brought to the gods, and even less so to talk about the "cult of the laws" without risking to frieze ignorance of religious reality of primitive Romans, and especially submitting our thinking in the area of ideological mindsets, revolute, from the so-called "golden age".

So in old age, we cannot speak of a so-called confusion, since by then, all divine and human laws were considered definite or arising from the will of the deity, hence the common expression at the time: "fas est", i.e. allowed (by the gods) or permitted by law. As we know, in 449 B.C. were published "leges XII tabularum" (Laws of XII Tables); engraved in brass plates, they were fixed in sight. So just at this time we can speak of a distinction between what is allowed or permitted by the gods and that is not permitted by law (per legem non licet), although any act of obedience to the will of the Roman legislature meant another submission to the will of Deity. This should be highlighted and withheld the more since we do not know the original text of the law of XII Table, because we have not received them, as bronze tablets were destroyed early in the fourth century B.C. when Rome was burned by the Gauls. It should also be evident and the fact that this law on which the impressive building of the Roman law was built, it was never repealed. From the formal point of view, it has been in force since 11 centuries. The meaning that it expressed by the notion of "lex", submission to the will of the gods, was indeed expressed and embodied by the legislature in the Empire era (27 BC - 565 AD), when at least in the principality era (27 BC and 284 AD), all power was concentrated in the hands of the emperor, the autocratic leader of the state, the "Saint" (Augustus), revered by virtue of his election by the will of the gods. Moreover, during this period, although the senate and old magistrates survive, they are nothing but a smokescreen behind which conceals monarchy, the Romans of old school thought was - like other peoples of the time - divinely willed the law.

The real distinction between "fas" and "lex" we can talk in the fourth century, when Christianity became the religion of the Roman Empire (year 380). The emperor, however, continued to be considered "God's Anointed" until the collapse of the
Roman Empire, the Eastern (Byzantine), in 1453, where the idea was in fact transferred to all countries in Europe, including the Romanians, and the laws have continued to be issued in the name of Deity and the legislature, alias, king, prince etc.

Even from these brief details we can realize that it is inappropriate to speak of a so-called confusion between law and morality or an overcoming of this confusion by conveying the two notions, “fas” and “lex” because, on a real divorce between the sacred and the profane can not only speak in modern times, but even then, it was in part and not everywhere. That it was not consumed in its entirety, shows us the practice today that we find in some of Europe courtrooms or oversea where the oath on the Bible or on behalf of Divinity is still a reality. Motto „In God we trust“ also testifies the same faith in the Supreme Legislator! The same specialists in Roman law state that in classical texts, especially in the Juris consults writings, reflect the old confusion between law on the one hand, morality and religion, on the other hand.

First, we must specify that it is not a so-called confusion between legal and moral name of religion, but a true expression of these peoples conception of the idea of law, and, ipso facto, their conception of the relationship between divine and human. Moreover, the Romans thought about law, was quintessential in those utterances about the nature and purpose of law, expressed by legal consultants in those concise, unique formulas, which attested the fact that for them, the principles of law and morality have their common source. This reality confirms us Celsus and Ulpianus. For Celsus, for example, that “jus est ars boni et aequi” (law is the art of good and equity), means that just word has both a moral and legal sense. Also, for Ulpian, the Roman law principles intertwine – in their utterance or their definition - with the moral in an organic and osmotic way. Indeed, for him, “Juris praecepta sunt haec: honeste vivere, alteram non laedere, suuiti cuique tribuere” (principles of law are these: to live honestly, to injure no other, to give each his own).

According to some experts, in the theory of Roman law, in the definition of Ulpian we learn that "a moral principle is put together by two legal principles, for if not to injure another and to give everyone what are his are principles of law, to live honorably is a moral principle." However, as can be easily found in Ulpian’s definition we cannot, however, identify a moral principle put together with two legal principles, as stated by respective Romanists, but three principles with a common content, and more specifically, a moral and legal content. Moreover, no harm another is above all
a principle of moral law - enshrined in the Law of the Decalogue [22] - and then a
principle in legal utterance. A moral principle also - before one of the legal nature - is
to give everyone what is his. Here's why, in Ulpian’s famous definition we must see a
fortunate expression of both principles, both legal and moral, which, at that time
defined the very conception of Romans about the relationship between the sacred
and earthly, hence the requirement "divanarum atque humanorum notitia"
(knowledge of things divine and human), and, ipso facto, "what is just and what is
unjust" (insti atque injusti).

Moreover, the definition of the same famous Roman jurist, Ulpian (Sec. II),
resulting in the most eloquent possible way that the very science of law is “justi atque
injusti scientia” (the science of what is right and wrong). However, to distinguish
between what is right and wrong - both conceptual and factual - requires first of all
having clear understanding about what is moral and immoral, good and evil, allowed
and disallowed etc. in accordance with the precepts of the natural moral law.
Therefore, that from this definition of Ulpianus we have to remember this intrinsic
relation that exists between the moral law and legal law, and to be taken into account
when evaluating, categorizing, or judge human act, rather than refer to only its social
aspect. That even a "political" law must take into account the principles of "religious
and moral law", we hold true even some theorists of law for which the State is “a
moral person political and territorial”.

Naturally, moral norms have no legal value and do not operate through
coercive measures (constraint). And yet, they are binding even in international law, is
often observed under public pressure. The principles of the moral law actually affect
all branches of international law, civil and criminal. For example, „international
morality” – regardless the religious principles (Mosaic, Buddhist, Christian, Islamic,
etc.) – is influencing international law in the sense that more and more rules of
moral and justice are respected by states enriching international law, turning into its
rules. “Violation of the rules of morality and fairness exercised contrary, a negative
effect on international law. Conversely, respecting international law - writes Mr.
Professor I. Diaconu - ensure the promotion of a moral element in relations between
states, in which moral values, even unprotected by rules of law are respected."

Under its appearance as human institution, the Christian Church needed and
needs to fulfill its mission - the legal rules. Therefore it means that the Church has to
achieve its purpose, subject to some forms of law. “In reaching the state on the other
hand – a Romanian Orthodox canonist wrote at the end of the nineteenth century -
and contacting a church with another result again some relations that have to be
determined by principles of law." But the Church being a divine-human institution,
with spiritual nature, its rules based on law have binding power, but not constraining
as civil laws. Therefore, in terms of the nature of laws, religious law bases its
authority on moral actions, not on the coercive aspect (binding) as civil laws. It should
also be known that, in the Church, any offense shall be tried first as sin, and
according to its severity is assessed the seriousness of the offence, hence the
evaluation through the Christian moral law.

4.3. Religion and International Law

Regarding the place and role of religion in international law, it was noted that
this is only one aspect of culture, sometimes marginal, sometimes essential,
especially when defined as an interpretation of life [23]. When religious culture is
linked to the social, political and ethnic culture, cultural accumulation process can be
discerned more easily. State appearance in ancient cities integrated human sphere in
the religious one. Thus the laws, creation of states passed through the filter of
religious ideas and concepts with positive aspects sometimes or negative in other
periods.

The great religions of the world, among Christianity and Islam have an
important place, seem make controversial candidates to play a constructive role in
building an era of human rights, as sacred texts and canons refer more to the
commandments and obligations than the freedoms and rights. Religious nature of
man reveals an essential and permanent aspect of humanity, the first representations
which the individual made about the world being of religious inspiration. In contrast,
international law attempts to define religion based on elements of authority failed
although there are numerous international legal instruments accepted worldwide,
including in some Islamic states.

To be accepted by all States contemporary public international law had to
avoid focusing on the adoption of a law of religious inspiration, because it resulted in
a weakening of its universal and secular character. More and more lawyers, although
aware that Western values are not mandatory to be shared by other cultures, are
reluctant to speak with people from other cultures. They appreciate that the scientific
approach to law should exclude religion and that the law cannot be truly "modern" and "rational" unless is totally separate from religious beliefs.

From this point of view, it is argued that the old law of nations of Christian inspiration was abandoned just because it relied too much on religion. Religion invariably intervenes in all aspects of international relations. In ancient times the most restrictive religious covenant, brought God's intervention or of protecting gods against the party who didn't respected the commitment. Rules of conduct of states were more or less religious in relation to different periods of law history. Even so, social sanctions and penalties were pronounced at state institutions based on legal arguments. The importance of the religious law, to understand the predominance of religion on international law, is now a reality especially in countries that comply with Muslim tradition.

As in recent years, conflicts have seen an unprecedented scale, researchers have tried to determine their underlying causes, taking into account not only the political, ethnic or social factors, but religious too [24]. It's almost impossible not to notice the destructive force that may have a conflict between two cultures, two religions respectively. Such conflicts not only maintain „boundaries” between religious and national cultural identities, but they also are emphasized [25]. Therefore, in the spirit of tolerance and in accordance with the international law, the Romanian state law, given the fundamental nature of the rights of thought, conscience and religion, provides no restriction on the exercise of these rights.

In conclusion, we can say with good reason, that religion plays an important role in shaping the legal rules, but is not the only factor. Among the latent functions of religion may be mentioned legitimizing the goals of society itself (makes believers more caring, serving as the Supreme Court), conferring an identity of individuals and communities and strengthen the sense of identity and social control of the emotions of the masses, which can quickly escalate the disruption of social order [26]. Religion becomes vital, transforming itself in the ideology of a community only when it is perceived as absolutely indispensable in perpetuating identity of that community.

Political instrumentalization of any religion is built on exacerbation of actions on behalf of the faith. After Russian researcher, Nonka Bogomilov, “political instrumentalization of religion mechanisms is primarily related to the operation of a doctrinal reductionism on religion. [27]Group mythology eliminates universal appeal of religion, placing it in orbit of a heroic past. Sacralization of the past develops
aggressive strategies for cultural and political preservation, exacerbating the political hostility.

The second mechanism characteristic to political instrumentalization of religion is to move the focus from moral and spiritual value that it has for the individual, to the symbolic functions it holds within the society. The Iranian Islamic revolution, for example, rapidly surpasses the religious barriers, its binders representing collective hate to Western modernism held responsible for profound social inequalities.

This social component supports the third mechanism of “politicization” of religion, which is its active mobilization in transforming the religious doctrine from one with defensive and self-purifying nature, oriented towards inside ego into an aggressive strategy with political finality. In traditional Islam, patience, non-resistance, tolerance, peaceful coexistence, spiritual overcoming of sufferance is the focus of religion. Interpreted by a fundamentalist movement, Islam is support of an active type group manifestation and terrorist claims often have a political background.

The current trend is that the values of the modern age and religion are incompatible and mutually exclusive especially in the Western world. Question of the relationship between religion and political power is central to debates in the world today. From Western perspective, Islam aims at capturing all political, economic, social spheres, which does not allow a separation of the spirit from time. From this point of view, Islam is not a religion of individual salvation dealing with its eternal destiny but a normative model of a society that bears the mark of the sacred. Muslims reply to this way of the question it is that Islam, like any religion, expresses, at the same time, eternal aspirations and practical needs of man. [28] There is therefore an emphasis on the process of secular and religious institutions removal. This is the consequence of the tendency of separation between political bodies and religious institutions developed over the centuries due to the conflict between the representatives of the church and kings, and were specific to Western Europe and North America.

For monotheistic religions, as Christianity and Islam, the distinction between universal matters, timeless valuable of religion and the temporary expression specific to daily life newspapers is not something new. In these respect, in Muslim societies this event is increasingly obvious, witnessing both a return to the religion that is called upon to provide solutions to current problems and an approximation around religious ideas by asserting a common identity. For many Muslims conservation of
values and religious heritage of Islam attests modernity. This view is seen as a reaction to secularism and secular nation’s actions, to barbarism and ignorance. Rejecting these views influences the acceptance or rejection of international law.

Typical values of the Islamic world are beyond geographic boundaries and form a strong legacy shared by Muslim countries having charia as a common denominator. Currently members of the Muslim world have become part of most treaties of international law and the principle pacta sunt servanda is accepted and reflected in Islamic law in a specific design. Any Muslim state insists on the law of Muslim origin and often refers to “fundamental principles” and "values" of Islam to emphasize convergence with international law.

The current trend is to individualize cultures after religious criteria which could have the effect of supporting logic of confrontation. The challenge in these conditions is to identify solutions to establish a dialogue individually or collectively, in a world where differences are emphasized, as well as the tendency to demonize the other. “Intercultural dialogue and “interreligious dialogue” in this context can be a solution to the resurgence of terrorism. Without knowing other cultures, we might be inclined to believe that Islam or Christianity seek to assimilate other cultures, and this justifies the need to promote a dialogue between people of good will from all over the world. The fear that foreigners may have something different that affect us should be removed and the solution is to train future generations to discover the diversity of cultural riches, adopting other treaties which they must comply. Resistance to the temptation to follow the promptings which calls for "defending their own identity, which is in danger" and “discovering common cultural heritage of humanity" [29] is a gateway to a universal world humanity can be proud.

Even if in international law there is a strong tendency to secularization, the role of religion in determining commercial law and the means of influence it is more than evident. Consequently, religious factor can not be ignored and must be taken into account both in military and especially in the development of legal regulations with general validity, especially as the society remains attached to religious values, the relation between religion and society being two-way.

4.4. About the relation between religion and society

The society is founded on the existence of institutions, and it is a fact that can not be avoided. According to the Dictionary dex-online institution is a “body or
organization (of state) carrying out social, cultural, administrative, etc. activities, a form of organization of social relations, according to the legal rules established on activity fields", a significant practice, a relationship or an organization in a society or a culture [30]. Local neighborhood association is an institution that unites neighbors. Church, synagogue or mosque are institutions that creates a bond between believers. Automobile company that produces cars that we drive is built on a similar type of institution that brings together employees, shareholders and directors, and our city has an institution that unites people between them.

The relationship between society (Gesellschaft) and community (gemeinschaft) of a state grows stronger to the extent that this relation is resolved and manages to unite its subjects by indestructible bindings. Germany was such a state that has imposed almost by itself, but which had in substrate the guarantee of a perfect social cohesion. For these reasons, it has to be given religion a special role. A society does not became organic unless religion acts to approach all citizens. Citizens of a country should feel as parishioners of a parish community to ensure progress. We have much to learn from the work of specialists. Fortunately, nowadays concerns are more than generous. From the Bible to the present day the book market has been honored with many philosophical and religious creations. We who live in an atmosphere of suspicion and discord we also need encouragement coming over time and from other geographical areas to restore our spirits. Religion can be such a landmark. In these works there are dissociations and appromimates of finest nuances are made, showing those neurotic joints of a society and how they can be treated. It also show us which are the cures of community stiffness. Although religion leaves spaces of communication, we must have insights that prevent excessive individualism. It is necessary to understand that a nation is much more than a population gathered within borders. This is a patriotic attitude for the future of our country will be grateful. And not only this.

The relationship between religion and society is indestructible, and God's word is not indifferent and produces in us an outstanding vibration. When treating such subjects you feel at ease. That fact that I treat this subject is not accidental. In my fiber there is a dimension of imperishable tradition. In everything I've done I've tried to reach a haven of serenity. I aspired to that "calm of values", I wanted to do not only education but also culture, without getting wasted in useless duels. Literacy is above all passion, and over the years I have closed to God without ever flaunt my religious
commitment. I like to think I made my faith a discreet vehicle for wearing and affirmation of ideas, as I considered the treasure of knowledge of humanity with devotion, feeling that in everything written so far was felt the presence of God who inspired the authors. The relationship between a moving world and a divine timelessness should be seen staring at the stars’ sky without being tormented by mode, a man of culture being beyond the vagaries of time. That is why we try to see some historical cultural determinations of ethics.

4.5. Historical cultural determinations of religion

What we expect in this excursus to culture is to put in light specific aspects of customary and conventional nature of ethics, which ensures the whole field the guarantees of compliance with provisions stipulated in religious canons. Closely related to those mentioned is the intention to familiarize those interested with the peculiarities of manifestation of Christian and Islamic cultures, to facilitate their acceptance as key factors in business. Also, given the profound echo the confrontation between the two cultures and civilizations has in the public consciousness, the present approach can be viewed as a contribution to harmonize views on compliance with ethics in international affairs.

Achieving a balanced analysis regarding the influences Christian and Islamic cultures have had on crystallization of rules of doing business, is not an idea full of originality, but it certainly is one of the pioneers. Approach in theory, but especially in business ethics in action plan from a religious perspective, is a relatively recent concern to us, if we consider that the structures and institutions with exclusive responsibilities in this area are more recent. And we refer here to expanding corporate social responsibility across the European Union, especially that the purpose to implement such a strategy, according to the European Commission, is to have a process to integrate social, environmental, ethical aspects, issues concerning human rights and the consumer’s in social activities.

To achieve these objectives, we will focus on identifying the elements necessary for a comparative analysis between traditional secular legal system and legal system built around Christian canon law and of Charia (Islamic law). Our attempt is based on a set of arguments, among which we highlight the most important ones. First, we should bear in mind that this issue is recommended by reality of today's world, in which the coexistence of different cultures and civilizations,
the globalization of phenomena and the international community's involvement in solving social and economic problems requires a knowledge of the cultural and religious particularities in a globalized business environment.

Then, historical, geographical position of Romania and the involvement of our country as a member of the UN, NATO and the European Union, at international trade in areas under the influence of other cultures and civilizations, recommend this approach. Commitment and availability of these organisms and thus their members to comply with legal instruments forming the commercial law. Taking into account the specifics of the application of legal rules in relation to local customs and traditions is an important dimension of the behavior of economic agents.

It is a requirement, as people, as Samuel P. Huntington believes, are tempted to divide peers into "us" and "them", in those who are within the group and others, "our civilization" and "those barbarians" [31] with the repercussions of conflict in several times. Non-Muslim researchers, shows the same author, analyzed the world in terms of East and West, North and South, center and periphery. In turn, Muslims have traditionally divided the world into dar-al Islam ("House of Peace") and Dar-al Harb ("House of War") [32]. To identify on these coordinates the commonalities and understand the differences, are major concerns in the international community.

Relevant in terms of our approach is that participation in the international exchange of goods and values is necessary activity given the sensitivities of multinational and with local and regional environmental respect. Analysts and experts have shown that this principle has its justification in the lessons learned lately when globalization has included the business conducted in areas with a culture and a civilization significantly different from the Euro-Atlantic area. From these experiments it was concluded that, to know and to respect cultural particularities means taking into account a factor that can foster their success, while neglecting the customs, traditions and local culture can bring major disservice to achieve the objective are present there.

Another category is based on the characteristic of the contemporary world that there is an increasingly strong mutual interference of religion with politics. This phenomenon can not be ignored in the context of the international community, through the UN or other regional alliances (NATO, EU, OSCE, OAS, ASEAN, the Arab League, etc.) attends high international standards in countries under Islamic influence in that normality implies the application of religious precepts, including the
organization and functioning of the state in all its dimensions. Initiating and promoting actions for bringing the two worlds together and with the specific knowledge of the business environment to act in addressing this theme makes a test, with the intention to establish a dialogue which, for various reasons, was avoided, although it was necessary.

Addressing the issues mentioned, with the express purpose of investigating the particularities of the two major world religions, there will not be a predominantly religious character. It is intended primarily to highlight similarities and differences they are perceived, interpreted and applied some aspects of commercial law from the perspective of two legal systems created, developed, affirmed and promoted by Christian and Islamic cultures. Recourse to some religious explanations only for understanding and reasoning the role in shaping the religious factor specificity of the two systems submitted to our attention. Aspects of the relationship between culture and business ethics were an important research direction, and for this we have examined other dimensions of culture, such as those pertaining to religious side which are equally important for achieving the objective pursued the material.

We also appreciate that our approach fits into the broader context of contemporary ideas, concerns, to communicate the specific aspects of various branches of social science applied to business. It also contributes to the understanding of economic phenomena in its complexity, which in addition to addressing the correlation between war and different areas of the social system - politics, economics, demography, science and technology, law, ideology, suggests treating their relations with civilization, culture and religion. Expected consequence of this endeavor will be to overcome the narrowness and unilateralism determined strictly or exclusively by specialized approaches and providing openings to other horizons and dimensions required by current realities.

On the set of presented arguments, we consider that approaching a subject with this content can only serve to broaden the horizon of knowledge of businessmen and streamline their actions in a certain geographical area.

Although the main objective of this work was to address business ethics from historical and theoretical perspective, it could not escape the practical aspects of a cognitive approach to the conflict side of human action - profit. Although we have not pursued in our research to pay special attention to the works with religious character, I must admit that they were an important source in an attempt to present somewhat
symmetrical way are understood and addressed various aspects of economic phenomena, the cultural and civilization standards and how they were reflected in bridging the case of Christianity, namely Islam. In literature there are few approaches studied from the perspective that we propose. They are prevalent worldwide and almost absent in Romania. Many papers refer only to specific aspects of Islam on the one hand, Christianity on the other, to highlight areas where they are in an open confrontation. Our approach was to investigate the influences that cultural particularities have on the system of law based on Christian canon law and Charia and traditional legal system based in a particular area, the business, and in particular which are aspects that can contribute to improving their own conditions.

Of the many bibliographic sources we refer to two of them, who have supported and shaped the image on the realization of a synthesis of relations between cultures. One of them is the work The Clash of Civilizations, S. Huntington, makes frequent confusion between culture and civilization, which presents a wide variety of belief systems or values. The consequence of this error based on an ambiguous semantics, has resulted in the inclusion in the agenda of the UN General Assembly of point „dialogue of civilizations”, which in fact could deepen the split between the alleged civilizations such as the Western and Islamic. This approach weakens the call to a unique civilization and effective action to safeguard them. Basing his reasoning on the causes of conflict in this conception, Huntington believes that awakening civilizations and their entry in the competition, in the context of globalization of the economy and globalization of computerization is a general feature of the XXI century. Excluding those civilizations that are less developed in the context of renaissance of secular conflict Islam and the West, it is considered that this is one of the major risks of the present days. Paradigm supported by him exacerbates conflicts of momentum and neglects local conflicts within civilizations, where the cultural factor may be the real engine of collisions. This is confirmed today by large-scale movements, unprecedented in Islamic space, but which may extend to the entire planet.

A second paper belongs to Anghel N. Rugina, who, in his Principia Economica, New and old foundations of economic analysis, published by Romanian Academy, Bucharest in 1993 tried to build a new paradigm in economics with particular regulatory elements of an economic system (concern for social, social justice, equity, etc.), in a word moral values as catalyst forces, revealing of a general
manner the significance of the moral factor. Our approach sought to identify and highlight impact of specific moral values on Christian and Islamic cultures and conflicting relations between them.

Each footprint on the setup of business ethics is reflected in role in the creation of some rules to ensure their protection. The importance attributed by Professor Rugina of moral forces and his insistence that he returns on it in different chapters of the work are arising from interpreting commerce as a social activity in which people fully engage around the values that configures their own identity. That is why the issue of moral factors held a special attention during our analysis to identify the elements that give us terms of comparison of the two cultures and civilizations.

5. Conclusions

Complying to the scope of this approach of research, I’ve adopted the decision to submit with priority the issues from the position of the scientist, who must be familiar with the cultural peculiarities of the environment in which he operates, including the religious, which put their strong imprint on his way to behave and understand the facts, rather than to meet some rigorous scientific principles. Free from political constraints, career in military, grew and formed a Christian spirit - the army is Christian – of order and discipline, converted from the profession of arms to the legal norms, I deliberately take responsibility to discuss the issues of life, with arguments of course, even risking, in my turn, to be labeled as "political". In this respect, specifying the manner to which I’ve appealed for investigating problems, I was encouraged by the appreciation of the historian Ed Meyer who addressed to professionals regarding the way followed in his research, stating: "...I saw no other option than to refrain myself to obey principles". [33] It is possible that by acting in this manner, to have committed another error, otherwise inevitable when trying to condense a subject so rich that offers a vast literature and includes both specialized fields, such as economics, business ethics culture, civilization, religion.

I noticed, as a conclusion regarding the literature that I managed to get, that the most interesting works that sought to provide practical solutions to conflicting issues are those who derive their ideas from finding correspondences to facilitate understanding and tolerance. It is also the only principle which we have tried to obey to.
References:
[29] Ibidem, p. 100.
[32] Ibidem, p. 44.
“The sun will shine only on free men”
“Le soleil n'éclairera plus sur la terre que des hommes libres” (Condorcet)

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Abstract:
Freedom is inseparable from the knowledge of the laws. This is an idea that the article seeks to develop, showing the development of legal concepts during the modern era. A decisive factor for knowing and complying with legal laws is the education level within a social space. Social inequalities can be reduced only through knowledge and recognition of the rights and liberties of every social subject. Punishment balances the presence of justice in the relations between citizens. In the Romanian medieval legal language stands a proper term, that of common law. It deserves clarification in order to be distinguished from the legal norm and to trace its presence in the collective mind.
Key words: freedom, laws, justice, common law, norm.

“The world” described by Condorcet seems to be the same picture that unfolds under our very eyes, those of us who are experiencing the beginning of the third millennium. Information circulates everywhere, the power of technology reaches beyond the understanding of its user and the whole world show is the one described by Marquis Jean-Antoine-Nicolas de Caritat at the late eighteenth century: inequality, poor and rich nations, the need for freedom and liberation from domination, the development of new constitutions that can manage the new state configurations, the need to improve man in order to face new challenges. This is the world map of Condorcet and the map of our own world, a conjunction which proves that “the eternal human” wants rights, freedoms, the power to master comprising nations and sacrificing the individual. The individual sacrifice stands in the assumed freedom of the word, in the gesture of protecting the other, in the gesture of being happy. Despite so many institutions with a protective role, fear and uncertainty seem more present than ever. Freedom requires sacrifice and protectionist state intervention reduces liberties, offering public disclosure. Only the state can guarantee safety through the punitive force of laws. The purpose of law is to order society. The giving over of the natural human force (Rousseau) to a system ensuring the equality and freedom of all represents the purpose of rights and of justice for the state organization. The organization of social life requires a certain form of state organization; each social individual is subordinated to the entire society. Legal
security means giving up the “total” freedom with the inclusion of a “portion” of freedom in the social contract. “We live in a time when, in the end, there is nothing that makes you wonder” [1]. It is a conclusion showing the relationship between liberty and security nowadays. You can not be absolutely free as long as you accept the juridical order to regulate and sanction, through specialized institutions, the violation of the laws and legal norms. The wonder occurs only when you assume the legal order for the achievement of a social project accepted by most community members.

A century before Condorcet, Thomas Hobbes distinguishes between *jus* and *lex*: “the right consists in the freedom of doing or not doing, whereas the law determines and compels to one of them, so that law and right are as different as obligation and freedom, which are incompatible when applied to one and the same thing” [2]. In this sense, the father of liberalism develops the concept of renouncing a right: “To deprive yourself of the right over one thing means to deprive yourself of the freedom to prevent another from benefiting from their own right over the same thing” [3]. As we can see, assuming certain obligations implies the diminishing of freedoms which may differ depending on the restrictions provided by laws. Everything that violates human rights and freedoms, as Kant reminded us, “intends to use other persons only as a means, without considering that they should be respected as rational beings always, at the same time, as ends therefore having to contain in them the purpose of the same action” [4]. Kant’s idea, that man can not be someone’s means, is based on the fact that men are not things, thus they cannot be someone’s means, “but must in all his actions be always considered as an end in himself”. It seems that this status of the human being, of the being seen as an end in itself, no longer works in modern times. Man becomes a means of power to someone else, that content of justice which Robert Musil takes from a psychiatric textbook in the content of his treatise *On stupidity* [5], namely “the punishment of the other”. Giving a punishment means, paradoxically, maintaining the social freedom. Punishment is no more than the price paid for the abuse assumed by the violation of common rights. More than two hundred years ago, the issue of civil rights and freedoms represented a priority, leaving a secondary role to ancient reason. Condorcet develops a comprehensive work “*Esquisse d’un tableau historique des l’esprit humain progressive*” (1793-1794), which analyzes aspects related to the evolution of the human spirit from its origins to the appearance of the first forms of organization and
progress social, “l'esprit humain progressive dance in Greece, the division jusqu'au temps des sciences, verse siècle d'Alexandre them”. “Progress depuis leur des sciences division jusqu'à leur decadence”. We will highlight, following Condorcet’s analysis, the main elements that encourage the affirmation of the human spirit in the history of its manifestation. The reason of the approach is based on the ever-present approach of the scientist and philosopher Condorcet, who crossed a complex field of concerns, from mathematical analysis and calculus of probability, continuing with innovative ideas in business administration and economics, not overlooking the effort aimed to support civil rights and liberties, efforts that have resulted in a Constitution which he supported until the coming of the Jacobins to power.

We start by analyzing what Condorcet called “the human space”, with all the features necessary for social life. He argued for the need of equality among the peoples of the world, among the members of the same people, claiming the actual human perfection.

“Nos espérances sur l'état à venir de l'espèce humaine peuvent se réduire à ces trois points importants: la destruction de l'inégalité entre les nations; les progrès de l'égalité dans un même peuple; enfin, le perfectionnement réel de l'homme.” [6]

To describe the image of a perfected society Condorcet used the symbolic image of the sun, which reminds us of Plato’s myth of the cave where the sun was the truth that tore the shadows off the eyes of viewers. In his optimism, he considered quite close the moment when the sun would shine only on free people who would recognize reason as the only master; where tyranny and slavery would become history or theater plays, where no one would find themselves as victims; when the barriers of reason would be acknowledged, superstition and tyranny would not appear ever again. These are utopian ideas that no political program managed to achieve.

“Il arrivera donc, ce moment où le soleil n'éclairera plus sur la terre que des hommes libres, ne reconnaissant d'autre maître que leur raison; où les tyrans et les esclaves, les prêtres et leurs stupides ou hypocrites instruments n'existeront plus que dans l'histoire et sur les théâtres; où l'on ne s'en occupera plus que pour plaindre leurs victimes et leurs dupes; pour s'entretenir, par l'horreur de leurs excès, dans une utile vigilance; pour savoir reconnaître et étouffer, sous le poids de la raison, les premiers germes de la superstition. Et de la tyrannie, si jamais ils osaient reparaître!” [7]
Focusing on the history of societies, Condorcet notes that there is no big difference between the rights the law recognizes citizens and the rights they actually enjoy; that the equality established by political institutions is not removed by the equality of individuals; that the difference stands between “the main causes of destructuring freedom in the ancient republics, the storms which had shaken them, the weaknesses brought by foreign tyrants”. The analysis brings forth the causes of inequality and destruction of the old republics, identified in the “inequality in wealth, inequality in status between the man whose means of subsistence are hereditary and the man whose means are dependent on the length of his life, or, rather, on that part of his life in which he is capable of work; and, finally, inequality in education”. But removing the source of inequality may “harm” the rights and freedoms of the people. If we follow the analysis of wealth inequality, we observe the Hegelian ideas of the relationship between master and servant, where there are mutual dependencies; one can not exist without the other. At the same time, Condorcet highlights that there are several causes that may determine more profound inequalities, which reinforces the idea that they can not disappear without unpredictable effects.

“En parcourant l’histoire des sociétés, nous aurons eu l’occasion de faire voir que souvent il existe un grand intervalle entre les droits que la loi reconnaît dans les citoyens et les droits dont ils ont une jouissance réelle; entre l’égalité qui est établie par les institutions politiques et celle qui existe entre les individus: nous aurons fait remarquer que cette différence a été une des principales causes de la destruction de la liberté dans les républiques anciennes, des orages qui les ont troublées, de la faiblesse qui les a livrées à des tyrans étrangers. Ces différences ont trois causes principales: l’inégalité de richesse, l’inégalité d’état entre celui dont les moyens de subsistance assurée pour lui-même se transmettent à sa famille, et celui pour qui ces moyens sont dépendants de la durée de sa vie, ou plutôt de la partie de sa vie où il est capable de travail; enfin, l’inégalité d’instruction. Il faudra donc montrer que ces trois espèces d’inégalité réelle doivent diminuer continuellement, sans pourtant s’anéantir; car elles ont des causes naturelles et nécessaires, qu’il serait absurde et dangereux de vouloir détruire; et l’on ne pourrait même tenter d’en faire disparaître entièrement les effets, sans ouvrir des sources d’inégalité plus fécondes, sans porter aux droits des hommes des atteintes plus directes et plus funestes”. [8]

Education plays an important role on the human condition. Only through knowledge people can be free, know their rights and eliminate prejudices by the force
of reason. Education represents the means of rescuing health, freedom, opinions and individual conscience.

“On peut instruire la masse entière d’un peuple de tout ce que chaque homme a besoin de savoir pour l’économie domestique, pour l’administration de ses affaires, pour le libre développement de son industrie et de ses facultés ; pour connaître ses droits, les défendre et les exercer; pour être instruit de ses devoirs, pour pouvoir les bien remplir; pour juger ses actions et celles des autres, d’après ses propres lumières, et n’être étranger à aucun des sentiments élevés ou délicats qui honorent la nature humaine; pour ne point dépendre aveuglément de ceux à qui il est obligé de confier le soin de ses affaires ou l’exercice de ses droits, pour être en état de les choisir et de les surveiller, pour n’être plus la dupe de ces erreurs populaires qui tourmentent la vie de craintes superstitieuses et d’espérances chimériques ; pour se défendre contre les préjugés avec les seules forces de sa raison; enfin, pour échapper aux prestiges du charlatanisme, qui tendrait des pièges à sa fortune, à sa santé, à la liberté de ses opinions et de sa conscience, sous prétexte de l’enrichir, de le guérir et de le sauver.” [9]

Education is the decisive factor for correcting natural inequalities, as laws “remedy the means of sustenance; just as institutions bring equality, coordinated by the constitution, which eliminates the savage state”. Art fulfils its purpose socially, that of providing the joy of common rights. “L’instruction bien dirigée corrige l’inégalité naturelle des facultés, au lieu de la fortifier, comme les bonnes lois remèdent à l’inégalité naturelle des moyens de subsistance ; comme dans les sociétés où les institutions auront amené cette égalité, la liberté, quoique soumise à une constitution régulière, sera plus étendue, plus entière que dans l’indépendance de la vie sauvage. Alors, l’art social a rempli son but, celui d’assurer et d’étendre pont tous la jouissance des droits communs, auxquels ils sont appelés par la nature.” [10]

Education remains the universal right of every state, ensuring basic knowledge for a large number of people, enabling them to handle their activities, “and a fifth of them to exercise their talents in various fields”.

“Nous ferons remarquer comment une instruction plus universelle dans chaque pays, en donnant à un plus grand nombre d’hommes les connaissances élémentaires qui peuvent leur inspirer, et le goût d’un genre d’étude, et la facilité d’y faire des progrès, doit ajouter à ces espérances; combien elles augmentent encore, si une aisance plus générale permet à plus d’individus de se livrer à ces occupations,
puisqu'en effet à peine, dans les pays les plus éclairés, la cinquantième partie de ceux à qui la nature a donné des talents reçoivent l'instruction nécessaire pour les développer; et qu'ainsi le nombre des hommes destinés à reculer les bornes des sciences par leurs découvertes devrait alors s'accroître dans cette même proportion.” [11]

As observed, Condorcet assigns education a primary role in the free-consented manifestation of every citizen, contributing to the overall progress of each country. Therefore, instruction facilitates knowledge of the duties in each field of activity and objectifies the area of responsibility present in each social subject. Intellectual faculties are related to the moral values and norms. The good-evil polarity is a binomial expression of the degree of understanding and assuming facts. Condorcet claims that few people are aware of their duties in the societies in which they are members; “that questions remain regarding social relations, the area of action of individual rights, the social status of each”.

“Mais il est aisé de voir combien l'analyse des facultés intellectuelles et morales de l'homme est encore imparfaite; combien la connaissance de ses devoirs, qui suppose celle de l'influence de ses actions sur le bien-être de ses semblables, sur la société dont il est membre, peut s'étendre encore par une observation plus fixe, plus approfondie, plus précise de cette influence; combien il reste de questions à résoudre, de rapports sociaux à examiner, pour connaître avec exactitude l'étendue des droits individuels de l'homme, et de ceux que l'état social donne à tous à l'égard de chacun!” [12]

Condorcet focuses on the moral aspect of human behavior, showing that moral norms are important in human manifestation, regardless of the activity or life situation experienced. The influence of moral norms on the progress of society resembles the one offered by practical sciences.

“Les hommes ne pourront s'éclairer sur la nature et le développement de leurs sentiments moraux, sur les principes de la morale, sur les motifs naturels d'y conformer leurs actions, sur leurs intérêts, soit comme individus, soit comme membres d'une société, sans faire aussi dans la morale pratique des progrès non moins réels que ceux de la science même.” [13]

The greatest inequality between people is due to prejudices, those barriers which condition a certain understanding of each life event or situation and which
hinder, to the point of blocking, the progress in every area of social life. A prejudice with immediate effects is the one between genders.

“Parmi les progrès de l'esprit humain les plus importants pour le bonheur général, nous devons compter l'entièṛe destruction des préjugés, qui ont établi entre les deux sexes une inégalité de droits funeste à celui même qu'elle favorise. On chercherait en vain des motifs de la justifier par les différences de leur organisation physique, par celle qu'on voudrait trou-ver dans la force de leur intelligence, dans leur sensibilité morale. Cette inégalité n'a eu d'autre origine que l'abus de la force, et c'est vainement qu'on a essayé depuis de l'excuser par des sophismes.” [14]

While Condorcet was fighting for rights and freedoms between genders, ethnicities, black and Hebrew, in the Romanian country several measures initiated by the Byzantine legislation were emerging. A work with implications on the Romanian legal life is Pravilniceasca condică, a collection of laws developed under the reign of Alexander Ipsilanti for the Romanian Country, published and put into force in 1780, inspired by Michael Fotino’s legal textbooks, collected from the extensive legislation of the Byzantine Empire, alongside the local common law and the royal legislative initiatives, visible in the case law of central and local courts. The reforms comprised in the book aim at measures designed to ease the situation of the main contributors, peasants. For this social category, Prince Ipsilanti imposed fixed, regular taxes, together with measures improving the agricultural activity. These regulations had the role of encouraging a new culture. To fill labor shortages, the legislative measures had encouraged the immigration Transylvanian Romanians (“ungureni/Transylvanian”). In the historical heritage, keeping archives had an important role, together with the registration of all chronicles kept by setting up “logofeţia de obiceiuri/the officers of customs”. At economic level, the legislative measures encouraged the development of manufactures and the emergence of glass, cloth, paper, etc “factories”. Some measures included in the legal act were done to promote and protect local merchants.

As a conclusion, we intend to highlight some terms specific to the Romanian medieval legal language, which prove the legal organization of the Romanian Country, under the influence of the Byzantine law. The terms that define the complementarity of the Romanian medieval legal act are common law, perceived Byzantine law and royal legislative initiative. Common law is a term that has been revealed from the perspective of the Romanian-Ottoman relations or at popular level
by the folklore perception of the idea of law and justice. It is a term that retains its actuality in the Romanian social mindset. The Byzantine Rule and its penetration channels lie at the north of the Danube; it aimed to influence the legislative and institutional strengthening of the Romanian medieval state. As for the royal law ("ius novum"), the report and positioning of the royal legislation initiative to codex and customs were followed; cases, eloquent cases, cases pertaining to the church (the founder), civil, criminal, family law. Hence appeared the term “eritocrisia” in legal proceedings.

Perhaps our incursion will offer answers to questions or concerns about the legal status of current Romania, a series of legislative changes being difficult to include in the dynamics of economic, political or cultural relations. The development of new criminal and civil codes represents the result of European requirements in the Romanian common law, respecting their perception from the perspective of the notion of law and justice. The market of legal ideas suffers from a lack appropriate education, the education claimed by Condorcet for the free consented manifestation. We revisit the idea supported by Condorcet, according to which education plays the same role as the institutions that bring equality, and, coordinated by the constitution, eliminates the savage state.

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Customary Law as a Main Source of the International Law

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Abstract
The emergence of the international law belongs to time immemorial. It was formed and evolved within the international relationships, which it created, consolidated and developed. The international law is tightly connected to the organization of the human society, to the state formation and to the international relationships between various subjects of international law. The international law as well as law in general represents a consequence of the social needs, aiming at the regulation of some specific relationships. Besides the treaty, the custom is a main and traditional source of the international law. Obviously, it cannot be ignored the important contribution of the principles of law in the formation and consolidation of the international law. We should specify that the modern society has begun “to require” the law codification in general, therefore also the codification of the international law, requirement that is based on the accuracy of the written form of law. On this background, the role and the importance of the custom in the system of the sources of law has started to decrease.

Keywords: international law, customary law, codification, treaty, principles of law

The emergence of the international law belongs to time immemorial. It was formed and evolved within the international relationships, which it created, consolidated and developed. The international law is tightly connected to the organization of the human society, to the state formation and to the international relationships between various subjects of international law. The international law as well as law in general represents a consequence of the social needs, aiming at the regulation of some specific relationships.

As Giorgio del Vecchio showed “Law is a life relationship of coordination, a guarantee-limit of the social relationships.” [1]

The first norms of international law emerged in the Antiquity. Most of them were customs. Thus, traditionally the international law is customary law, being the result of the agreement between states and not the expression of a higher political will. [2]

Besides the treaty, the custom is a main and traditional source of the international law. Obviously, it cannot be ignored the important contribution of the principles of law in the formation and consolidation of the international law.
As it is known, the custom is an unwritten rule of law, with binding character. Apart from this, the custom is characterized, by the tacit expression of the state agreements regarding the recognition of a certain rule and having a binding character in their relationships. The tacit expression of will is mirrored in the long practice of the states.

The international custom is an essential component in the configuration of the national legal systems and cultures. In this regard, in the literature it was considered that the relationship between the various legal cultures and the norms of the international law represent systems of integration and differentiation of the individual legal cultures as regards the collective perspective of the international law [3].

Art. 38 of the Statute of the International Court of Justice leads to the conclusion that not any practice of the states can represent and create legal rules. Article 38 refers to “the international customary law as an evidence of a general practice accepted as law.”

Defining the international custom, professors Dumitra Popescu and Adrian Nastase characterized it as a quite long general practice, repeated in the relationships between the states, accepted by them as a compulsory rule in their international relationships. [4] The recent doctrine defines custom as that practice applied by certain subjects of law believing that it represents a binding juridical form. [5] Custom is an efficient instrument, especially for the regulation of some fields of the international law, in which the process of codification is in the initial stage, contributing to the development of newer branches (such as spatial law etc.), fulfilling a similar role with that of the general principles [6].

As Charles Rousseau stipulates: “The international customary law results from a position adopted by a state in its relationships with another state, a position determined by a legal certitude and accepted in the same spirit by that state. It is the expression of a line of conduct that the international practice reveals as a consequence of the belief that it corresponds to the fulfillment of an obligation.” [7]

As it is known, the custom is the oldest source of the international law. The international customary law created the maritime law, the diplomatic law, and the war norms.

The literature [8] considers sources of the diplomatic law: the custom, the treaties, the internal laws and jurisprudence. As regards the diplomatic law, a branch of the international law, professor Dumitru Mazilu shares the opinion according to
which *antica comitas gentium*, the international courtesy, even if it is not a real source of law, represents “a precious source of information offering criteria and rules that eventually can favour the diplomatic relationships.”

According to Ion M. Anghel “All the rules regarding the inviolability of the diplomatic agents, of the headquarters of the diplomatic mission and of the residence of the agents and the exception from the state jurisdiction are examples of diplomatic norms of law of customary nature.” [9]

On the other hand the role of the custom in the field of the consular law was shown in the Vienna Convention on 24.04.1963 concerning the consular relationships, which stated in Preamble that “the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention.”

Aurel Bonciog draws attention on the fact that “the local custom or the internal practice of that state, even if it is not an international practice, recognized in unanimity, must be complied with; it is the case of the religious practices in the Muslim states according to which the Christian women cannot enter the mosque.” [10]

We should specify that the modern society has begun “to require” the law codification in general, therefore also the codification of the international law, requirement that is based on the accuracy of the written form of law. On this background, the role and the importance of the custom in the system of the sources of law has started to decrease. It is relevant in this regard the situation regarding the increasing number of treaties concluded and adopted by various states.

The literature considers that in certain situations the commercials customs do not have the character of sources of law. [11]

Out of the uniform commercial customs done under the patronage of the International Chamber of Commerce in Paris, special importance belongs to those known as INCOTERMS (*International Rules for the Interpretations of Trade Terms*), international rules for the interpretation of the commercial customs with large application in the international commercial buy-sell contracts. [12]

The customs, representing the most direct expression of the activity of the participants to the national and international business have a great capacity to adapt to the new contexts emerged in various business fields, their role being to complete the possible legislative and contractual faults. [13]
According to professor Paul Guggenheim, even if there is no objective criterion to establish the moment from which the formation of the customary rule is complete, yet certain circumstances allow distinguishing the custom from the simple habits. To be a custom, that conduct has to be constant and effective; on the other hand, breaking the rule has to be susceptible to be sanctioned. [14]

The international customary law is the expression of the practice that displays the following features:

- The customary practice, resulting from precedents. Unlike the national customary practice that can exceptionally be grounded on a single precedent, the international customary practice is formed in general only by the repetition of some conclusive acts, through an imperceptible process of elaboration that can be seen as a phenomenon of “juridical alluvion”;

- The uniform practice or at least the concordance, the clarity of the positions adopted by various states in a determined problem can lead to the conclusion of the existence of a customary practice with a certain generality [15];

- The evolving practice. [16]

So that the practice of the states has legal force, the repeatability of the conduct has to be characterized by uniformity and continuity. Consequently, the casual or contradictory actions cannot be accepted.

As regards the time factor and the duration of the practice the question is if there is any limitation of the duration of the conduct of the subjects of law. In this regard, Al. Bolintineanu and A. Nastase show that the duration of that practice does not have to be long and the fact that it covers only a short period of time does not prevent the custom to be formed [17].

On the other hand, it is true that certain principles of law or institutions of international law have been formed with a long or very long practice of those states. For instance, principles of international public law, such as the principle of sovereignty, equality and non-interference, norms of maritime or consular law have been established through codification only in the post-war period.

For example, in the modern era, after 1947, when India obtained the independence, the peaceful coexistence became essential element in the foreign policy of this country. In this regard, the contribution of India can be exemplified though the defence and promotion of the concept of Panchsheel. [18]
The five principles of Panchsheel are present in the preamble of the treaty of 1954, concluded between China and India, which aimed at the commercial relationships between these two countries and the intercourse between Tibet Region of China and India. The five principles which regard the peaceful coexistence between the two countries are:

- Mutual respect for each other’s territorial integrity and sovereignty.
- Mutual non-aggression.
- Mutual non-interference in each other’s internal affairs.
- Equality and cooperation for mutual benefit.
- Peaceful co-existence [19].

These principles were established by the prime ministers of those countries, Chou En-lai and Jawaharlal Nehru. The principles of this international convention were later adopted by more international documents and recognized as rules of the international law. Unfortunately, this treaty and the principles could not prevent Sino-Indian war of 1962.

The international custom played a very important role also in the fields of the international legal protection of the human rights and humanitarian law.

Thus, in the field of international legal protection of the human rights, a series of juridical rules was established by the customary law, such as the slavery abolition, forced labour prohibition etc.

As professor Corneliu Liviu Popescu showed “These legal norms do not have only conventional values but also a customary value. Obtaining a customary value, these legal norms are compulsory and impose as international customary law in the field of human rights and the states that are part of the international treaties containing those legal norms and establishing the human rights.” [20]

The humanitarian international law as a branch of the international public law contains norms of conventional and customary law, having as object of regulation the issues of international and non-international armed conflicts.

According to professors I. Closca and I. Suceava “Some customs of humanitarian law such as the warning of the enemy before the attack, the immunity of the members of Parliament, the suspension of the obligations etc. preceded with thousands of years the written norm Currently, the international humanitarian law, especially that applicable to the naval and air wars is based on customary norms. The importance of the custom in the international humanitarian law was revealed by
ICJ in the decision of 1986 in the case of “Military and Paramilitary Activities in and against Nicaragua”, which acknowledged an equal status with that of the conventional law.” [21]

As regards the time factor, as professor Gh. Moca showed, nowadays, when the rhythm of the international events accelerated and the needs of the legal regulation are often urgent, the time factor has diminished its importance in the process of the formation of a custom. Today not long or quite long periods of time, but quite short of only a few years are sufficient so that a repeated and uniform conduct of the states lead to the emergence of some customary norms.

Institution of the continental shelf, codified in the Convention of Geneva in 1958 was formed by customary means, as a result of some unilateral acts of the states (approximately 25), starting with Truman Declaration in 1945 and some bilateral treaties. [22]

In conclusion, nowadays “the long practice” does not represent any more a basic elements for the emergence and formation of a customary law. It is sufficient a period of time which can be longer or shorter according to the needs of codification.

Yet, to gain the character of legal norm, the practice of the states has to include also the subjective, psychological element. This element consists of the belief that a certain behavior has legal value, a binding force that corresponds to some regulation requirements (opinio iuris sive necessitatis).

The will of the states is based on the tacit agreement expressed in a continuous, repeated and uniform practice of the states that appreciate that behavior as compulsory. It is obvious that in the absence of the subjective element, that behavior will have the value of a custom, a simple habit, emptied of the legal force and that finds its recognition at the level of the international courtesy that applies between states on a reciprocity base.

Unlike law, the custom is not a written legal norm and therefore its existence has to be proved. The existence of opinio iuris generated often disputes between states and various issues referring to a certain practice can be at the base of a different interpretation from state to state. In this regard, we can exemplify by the Decision of the International Court of Justice of 1950 referring to asylum, which stipulates that a practice inspired from courtesy, good neighborhood and political opportunity cannot generate binding legal force as it does not lead to the “feeling of a legal obligation”. [23]
The actions or the non-actions must be concrete, not fictitious, repeated, not sporadic, and must be issued from the official institutions of the states. If a succession of unilateral actions excluding protests or reserves of the state about a certain conduct can gain the character of tacit recognition, abstention, the silence cannot have always the same meaning.

As concerns a certain practice, it is considered that in the absence of the protests or reserves, simultaneously with the actions of the state, we assist to the tacit recognition of that practice. The abstention, the silence cannot have the meaning of recognition. In this regard, in “Lotus” case, the Permanent Court of International Justice showed that “Only if the abstention is motivated by the conscience of an obligation to abstain it could be the case of an international custom.” [24]

As regards the subjective element of the custom the International Court of Justice pointed out that “those acts (of the international practice) have to represent not only a constant practice, but they should represent the proof of the belief that the practice is made compulsory by the existence of a norm. The necessity of such a belief, i.e. of the existence of the subjective element is involved in the notion of opinio iuris sive necessitatis. Those states have to manifest the feeling that they comply with something that equals to a legal obligation. The frequency or even the common character of the acts is not sufficient. There are many international acts, for example in the fields of ceremony and protocol which are done almost invariably, but which are motivated only by courtesy or tradition and not by a feeling of a legal obligation.” [25]

The practice and also the doctrine admit unanimously the fact that a certain customary norm cannot bind a state that manifested clearly and constantly the disapproval towards a certain practice and refused to apply it. In this regard, Raluca Miga-Besteliu exemplifies this situation by the case of establishing the limit of the territorial sea to 3 miles.

The International Court of Justice held that “establishing the international territorial sea limit to 3 miles does not represent a customary rule generally opposable to Norway, as it always opposed to any attempt to apply such a rule as regards the Norwegian coast.” [26]

We have to specify that a state can invoke its constant objection to the formation of a customary norm if the objection is express, and the simple doubts or
Abstentions to pronounce cannot be claimed in this regard. Secondly, the objection has to be constant; if a state does not object each time in similar situations it can be assumed that according to the circumstances it abandoned its objection. [27]

The duty of proving the existence of a custom belongs to the state that claims it (onus probandi incumbit actori).

The elements of the custom can be established by:
- any acts of some institutions of the state, authorized to receive certain attributions in the field of the international relationships (acts of some ministers, diplomatic notes, declarations of foreign policy, diplomatic correspondence etc.);
- the opinions expressed by the delegates of the states during international conferences or in the deliberations of some international organizations;
- domestic normative acts (laws, executive decisions, acts of the local administration etc.) and decisions of some institutions with jurisdiction on the international relationships;
- the provisions of some international treaties can be invoked as customary norms not between the state parties but in the relationships between the former and the third states.[28]

The custom can be proved by:
- multilateral treaties;
- the practice of the states and the diplomatic practice;
- international court decisions;
- domestic laws and judicial practice.

The doctrine shows that the substance of the international law is customary.

As we have mentioned above, an international custom is formed in time by a long and constant practice of the states. However, at the formation of the international law an important role is also played by the treaty. In this regard it is relevant the Vienna Convention of 1969 on the law of treaties which stipulates in art. 38 that: “Nothing in the provisions regarding the treaties and the third states precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”

The jurisprudence of the International Court of Justice established three conditions for the formation of a custom on the basis of a conventional norm:
- the conventional norm should gave a normative character and can represent the base of a general norm of law;
- there should be a very large and representative participation to the convention;
- the practice of the states in the sense of the invoked norm must be frequent and uniform. [29]

The interaction treaty-custom under the normative aspect functions this way:

1. there are treaties that create new rules that can be accepted as custom;
2. there are treaties that codify or reflect the custom in their provisions. [30]

Through this mechanism the customary norms included in the international treaties will become binding for all the states that signed, but also for those that did not sign the international convention, but adhered later to it, as well as for the states that opposed to the included customary norm.

In this field the treaties of codification of the international public law are very important.

In the literature [31] it was also expressed the opinion according to which the effects produced by some treaties would cease on the grounds of the international customary law. In this regard it was taken into account the non-application of the treaty as a consequence of the formation of a contrary derogatory custom, denunciation of the treaty when one of the contracting parties of a bilateral treaty broke its provisions, the disappearance of a contracting party, the application of
*rebus sic stantibus* clause, the clauses of review (analyzed by the author in relation to the international law customary), the effect of a war on the treaties.

**Conclusions**

Custom is besides the treaty another main and traditional source of the international law. Its main characteristic is the tacit expression of the state agreements regarding the recognition of certain rules as binding norms of behavior in the international relationships.

Although humanity has moved to the stage of written law, the role of the custom cannot be ignored in the category of the sources of law and its contribution to the formation of some essential institutions in fields such as the maritime law or the international organizations.

The process of codification of the customary norms is relevant for specialists, a process that simply burst out shortly after the foundation of UNO in 1945. The
systematization and the specification of the international customary laws transformed the international law in a precise and smooth instrument meant to answer the current needs.

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Cyber Diplomacy – A New Component of Foreign Policy

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Abstract
Nowadays, the boundary between virtual and real security is diminished, organized attacks in cyberspace can cause serious consequences in physical reality. Cyber threats have a significant international component, which determines the approach of cyber security in terms of foreign policy.

This analytical approach pays particular attention to the factors determining the need for developing diplomatic instruments specific to cyber space, as a component of foreign policy. The paper focuses moreover on the operationalization of the cyber diplomacy concept and on the analysis of cyber diplomacy mechanisms developed by the European Union.

Keywords: cyber security, cyber diplomacy, European Union, multi-stakeholders cooperation

Introduction
Using computer and internet infrastructure, in addition to the economic, social and political benefits created for the international society actors, can cause political and military tensions, misperceptions in their relations or even conflicts between them, thus becoming a new challenge to national and international security. Along with terrorism and the non-proliferation of nuclear weapons and of weapons of mass-destruction, cyberspace represents one of the unconventional threats to international security. [1]

The specific features of cyberspace and the multinational impact of cyber attacks emphasizes the need for a public policy with a stronger international component. Due to the nature of cyberspace and its asymmetric and transnational features, the cyber threat represents a challenge for political leaders, which requires a diplomatic effort similar to the efforts in fighting terrorism.

Cybersecurity has complex valences; the cyberspace can be used as a threat from the terroristic, criminal or political – military perspective, depending on the purpose pursued by the attacker but also on the effects that a cyber attack produces. From this point of view, experts identify four dimensions of cyber insecurity, with different implications, but which may overlap in certain circumstances:

- Cyber-crime;
- Cyber-espionage;
- Cyber-terrorism;

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- Cyber-warfare.

In this latter perspective, the cyberspace becomes part of the diplomatic and military conflicts between states.

With regard to the actors who use cyberspace as a military territory, attacks can be launched by government structures, either military, intelligence or of another nature, by hackers who are loyal to a government or who are sponsored by governments and by non-state actors, including terrorists. Terrorist organizations use the Internet for recruitment, fundraising, organization and propaganda.

The events of the last decade represent factors of economic, societal and political-military nature that favour the cyber security process. The cyber dependence of the economic sectors and the estimated global cost of cybercrime and cyberespionage are economic factors that have contributed to the enhancement of cyber security.

The societal impact caused by Edward Snowden’s revelations on cyber espionage activities of the US government on NATO allies, but also the mass surveillance program of the population in the United States and in some European countries had a diplomatic echo at a global scale. In consequence, the Western European countries have reconsidered their position towards the US-centric model of internet governance. [2] Among the most important political-military factors favouring the enhancement of cyber diplomacy we mention the cyber attacks on IT infrastructure from Estonia in 2007, the hybrid war fought in 2008 in the conflict between Russia and Georgia, the cyber attacks on the uranium enrichment program from Iran in 2010 and the current crisis in Ukraine which has a strong cyber component. Once with the outbreak of hostilities between Russia and Ukraine, the virtual attacks aimed not only Ukraine’s IT infrastructure, including the military communication system, but also the ones of Russia, European countries and NATO allies. [3]

In this context of significant increase of politically and military motivated cyber attacks, the trust between political leaders is reduced, especially with regard to control regimes (such as China or Russia), where Internet access is limited, censored or the informatics systems are surveilled. Therefore, along with appropriate defence capabilities, cyber diplomacy development and diplomatic strategies designed to outline the present security environment, are necessary.
The Organization for Security and Cooperation in Europe adopted a set of confidence-building measures to increase trust in cyber security (CBMS). OSCE aims to be a platform for dialogue between Member States in the cyber security field. [4]

**General considerations on the concept of cyber diplomacy**

At a state level, the activity in cyberspace can create diplomatic disagreements, as national interests and positions of the states can be divergent. Cyberspace becomes a component of foreign policy in the situation where states intensively debate in international fora the issues of the applicability of existing public international law to cyber attacks, the rules of acceptable behaviour in the virtual environment or the respect of human rights in cyberspace. [5]

Cyber diplomacy mechanisms are at an early stage of development. The difficulties in approaching the issue globally arise primarily from the differences in terminology and the different legislation on punishment for the acts committed in cyberspace, both in the stage of investigation and conviction. We consider important to agree upon an international agreement that contains definitions of specific concepts such as global cyber security, aggression in cyberspace and cyber weapons. For example, the Romanian and American legislation use the term cyber security, in the European Union the term is network and information security, while Russia uses the concept of information security.

One of the confidence-building measures stated in OSCE Decision No. 1106/2013 is developing a glossary of terms specific to the security of information and communications technology. The wording of this document will be made in collaboration with all participating states, which voluntarily submit a national list of specific terms with explanations or definitions. This exchange process is being facilitated by the OSCE bodies, including the Conflict Prevention Centre, through its Secretariat.

The concept of cyber diplomacy summarize a series of behaviours and attitudes of the international actors, among which we highlight the availability for dialogue with international partners, the identification of multilateral consultation mechanisms, the acceptance of compromises in order to overcome misunderstandings, the creation of a global culture regarding cyber security, the confidence building between states, the encouragement of transparency in communication, the identification of common advantages offered by cyberspace, the
attention for internal vulnerabilities rather than external threats and the awareness of stakeholders about the cyber risks, threats and vulnerabilities.

Political decisions regarding the cyberspace have strong international implications that require international commitment and collaboration. Therefore, the diplomatic activity in the cyber domain has an important dimension of cooperation, of concluding diplomatic engagements and multi-level agreements, including with the private sector stakeholders. Concluding bilateral and multilateral agreements on cyber security, aims at coordinating policy and harmonizing the legal framework at national level, in areas such as data protection or police and judicial cooperation in cybercrime matters (for instance, extradition and mutual legal assistance agreements). The only international legally-binding instrument in force is the Budapest Convention on Cybercrime adopted by the Council of Europe in 2001. Because of the fact that there are differences between states regarding the punishment of the acts committed in cyberspace, as some states considers a certain act an offense, some sees it as a misbehaviour or even a legal fact, the Budapest Convention is an instrument designed to harmonize the national legislations through its provisions on the activities and practices considered illegal in cyberspace. [6]

Pan-European or transatlantic trainings and multinational joint exercises, represent an important way of establishing common response procedures to cyber incidents. Throughout these trainings and exercises, governments cooperate with representatives from the specialized private sector.

Another way of cooperation consists of information exchange and the exchange of good practices between computer emergency response teams (CERTs), but also between law enforcement bodies and government departments responsible for cyber security.

Investing in innovation, research and development projects, providing technical support to enhance cyber resilience capabilities (technological resources and human resources with specific skills) are also ways of cooperation in the cyber field.

**Cyber diplomacy mechanisms at European Union level**

At the state and international level, cyber security has been identified as a threat to international security. The European Union considers that transnational
threats to EU security include cyber security, along with nuclear proliferation, international terrorism and organized crime.

According to the EU Security Strategy, cyber security is almost exclusively a national prerogative. Given the functional EU interdependence, the level of national cyber security could strengthen or weaken the collective security of the EU as a whole. [7] However, the EU’s role is to coordinate, supplement or establish a minimum legislative level or in the matter of technical capabilities.

The European Union aims to become a strong global player in foreign policy issues with regard to cyber security, identifying six pillars of union cyber diplomacy that reflects the EU values, interests and objectives. [8]

1. **Applicability of rule of law and human rights law in cyberspace**

   The protection and promotion of the human rights is a principle applicable also in cyberspace. Moreover, increasing cyber security must not cause an impairment of fundamental human rights, especially the right to privacy, protection of personal data and freedom of speech.

2. **Norms of behaviour in cyberspace**

   The European Union reiterates the elements set out in the United Nations Report [9], which established the applicability of public international law, including the UN Charter provisions for cyber attacks. It is also noted the need to adapt the existing legislation or to create new rules to reflect the particularities of cyberspace.

3. **Cyber capacity building** of technological and institutional nature, but also with regard to the human resources skills. At EU level, bodies have been created to manage incidents of various natures that can occur in cyberspace, such as the European Network and Information Security Agency (ENISA) in 2004. The EU uses the existing institutions and mechanisms and structures them in order to respond to the cyber threat - for example, creating the European Cybercrime Centre (EC3) within Europol or the preparatory body of the Council the Friends of the Presidency Group on Cyber Issues.

4. **Internet Governance**

   The European Union promotes the enhancement of the multi-stakeholders Internet governance model, which involves cooperation and coordination between
stakeholders: governments of Member states (law enforcement bodies, cyber incident response agencies, intelligence services), private companies from the information and communications technology and defence industry, international intergovernmental organizations, NGOs, civil society, the academia, technical experts, think tanks.

5. Enhancing the competitiveness and promoting EU economic interests, due to the fact that information and communications technology plays a key role in strengthening the EU Single Market.

6. Strategic engagement with key partners and international organizations

Cyber security cooperation between the EU and third states or international intergovernmental organization, in order to achieve global effects, but also between the Member States, as the EU encourages a general legal framework for bilateral agreements.

A special role in the diplomatic activity of the EU plays the strategic partnerships with the ten states (USA, Canada, Mexico, Brazil, South Africa, India, China, Japan, South Korea and Russia). The EU-US partnership is the most developed in cyber security, especially within the Working Group on Cybersecurity and Cybercrime – WGCC, established in 2010.

Russia is not considered by the EU a strategic collaborator in the cyber security field, the situation being similar with China; both states are considered sources of cyber insecurity due to espionage activities and politically motivated attacks that they perform. [10] The EU's relationship with Russia has deteriorated since the beginning of the conflict with Ukraine. Russia and China cooperate in the cyber security field especially in the Shanghai Cooperation Organization, founded in 2001.

Within the United Nations, in the ‘90s, Russia was the initiator of a cybersecurity regulation process. In 1999, the diplomatic efforts resulted in the adoption of the General Assembly Resolution on the Developments in the Field of Technology and Telecommunication in the Context of International Security. [11]

Conclusions

From a regional point of view, the diplomatic activity has increased due to the significant contributions of international intergovernmental organizations; unlike the global perspective that is not very well developed. Therefore, we consider necessary
the promotion of an international cyberspace policy involving all multi-stakeholders, in order to obtain social development and economic and political progress at a global level.

The Budapest Convention is one of the most appreciated instruments of diplomatic effort at a global level. However, the peculiarities of cyberspace can cause controversy about the extent to which cyber security international conventions respect human rights and state sovereignty.

We moreover highlight the opportunity for cyber security to be the central theme of regional and international summits, since the field is currently mostly addressed in correlation with transnational crime or terrorism.

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Introduction in DCFR – *Draft Common Frame of References*

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**Abstract**  
*Draft Common Frame of References* is the most ambitious attempt to create a model of common legislation at European level in the field of private law, being called the European model of a Civil Code. Although its scope and applicability are not yet clearly defined and there is also plenty of criticism regarding its purpose within academia, DCFR is a work of undeniable legal value in that it succeeds in gathering rules and regulations from most European countries into one legislative work. At European and even international level, DCFR has been extensively analysed in the literature, but internally DCFR is less known. This paper aims to be a short presentation of the DCFR based on its purpose and content, structure and basic principles as presented even by the authors in the introduction to this paper.  
**Key words:** European private law, contract law, principles of European law, standardization of law.

**Section 1. Introduction**

*Interim Outline Edition of Draft Common Frame of Reference* (DCFR), the first version of the DCFR, was published in February 2008, following that the final version to be published in 2009. The final work includes model rules, commentaries and comparative notes structures in 6 volumes and approximately 6,100 pages. Explanations and examples for each rule regarding its applicability are provided in the chapter dedicated to comments. The notes reflect legal solutions provided by the Member States’ national systems for the subjects covered by the DCFR; when appropriate, there are also mentioned the Community legislation and international instruments such as the CISG and UNIDROIT.

The DCFR project was launched and funded by the European Commission and is the result of over 25 years of collaboration between lawyers from across the European Union. In 1982, the Commission on European Contract Law (CECL) was constituted under the leadership of Professor Ole Lando, the working group that created *PECL – Principles of European Contract Law*. The study was taken over in 1998 and continued by the Study Group on European Civil Code (briefly called The Study Group), an working team led by Professor Christian von Bar. In drawing DCFR, several working groups were created, each of them with clearly defined goals and objectives. The Research Group on the Existing EC Private Law – also called *The Acquis Group*, founded in 2002, was tasked with the integration of existing European legislation mentioned in the acquis communautaire in the model rules of the DCFR.
In May 2005, Joint Network on European Private Law was founded in the sixth research program of the European Commission, with the aim of creating the Common Frame of References for European Contract Law. The network included the following working groups and study group on a European Civil Code: The Study Group, The Acquis Group, Project Group on a Restatement of European Insurance Contract Law, Association Henri Capitant together with Société de Législation Comparée and the Conseil Supérieur du Notariat, Common Core Group, Research Group on the Economic Assessment of Contract Law Rules or “Economic Impact Group”, “Database Group” and Academy of European Law (ERA).

The study group worked in research teams made up of students and young graduates of law, teams that were aimed at comparative research of the laws of the Member States, development of threads and assemblage of material needed to create notes in the final part of the paper. Each research team worked under the supervision of a senior leader in research and had a consultative body allocated. The working versions were submitted for discussion and improvements to the coordinating group – the decision-making body of each study group. In 2004, the coordinating group had representatives from all jurisdictions of EU Member States before the accession of new Member States. DCFR texts were written by individual drafting teams, than they were subjected to further discussion to the drafting committee and the group for terminology, following to be approved in their final form within plenary sessions convened twice a year. All the proposals for regulation were discussed several times and presented and discussed with representatives of business environment prior approval. The project was funded by the National Research Councils of Member States and, since 2005, has been funded by the European Commission through establishing the CoPECL Network of Excellence group within the 6th research program.

Section 2 - The DCFR purpose and structure

DCFR is an academic text, the work of a large group of researchers. The purpose of DCFR is to be a working material for education and research of law. DFCR can be also used as inspiration beyond academia, in order to find optimal solutions on private law following the example of PECL (incorporated into DCFR in a revised form) which was used by many European legislative authorities in modernization of contract legislation. It is possible that DCFR to be also an inspiration
for a Common Frame of References CFR- \textit{Common Frame of References} as common contract law at European level, but this aspect is a political one at community level, thus exceeding the purpose of DCFR. In particular it is expected that the DCFR will help highlighting the similarities and differences in national laws of the Member States.

Regarding the structure, it was agreed from the outset that the text should be structured in Books, each book divided into Chapters, Sections and Subsections where necessary, and articles. There is an exception to this structure in the book IV dedicated to special contracts which, due to the huge volume, was divided into Parts, each part being dedicated to a particular type of contract. The numbering mode is similar to the technique used in modern European codes, the Books being numbered with Roman numerals, the chapters, sections and subsections – with Arabic numbers and the Articles are numbered with Arabic numbers, in sequence for each book.

First Book is a general guide on using the entire text, interpretation and identification of key terms and definitions. Books II and III deal with contracts and other legal acts: Book II regulates the formation, interpretation, invalidity and content, and Book III covers both contractual and non-contractual obligations. The division, different from the approach of most European civil codes, was made to distinguish clearly between the contract, as type of agreement between the parties, and the contractual relationship that involves a series of reciprocal rights and obligations arising from this agreement. Another issue discussed within Book III was the treatment of both contractual and non-contractual obligations. One of the ways could be to treat the contractual obligations first and the non-contractual ones second. But this method was not chosen, considering that it will lead to unnecessary duplication and interference between articles. The solution chosen was the integration of articles dealing both contractual and non-contractual obligations in Book III, in a more general approach so that the applicability of both types of obligations to be possible, and when an article deals only with contractual obligations, this is expressly mentioned.

Besides a coherent structure, a special attention was paid to the terminology as being chosen clearer terms that cannot have double meaning. The language in which the DCFR was published in English, which is also the language of the editorial team. Also, the terminology was chosen so as to be suitable for multiple translations, with the avoidance of interpretations which could be given in one legal system or another.
DCFR addresses topics exceeding the contractual sphere. While PECL contained general rules related to contracts, such as the formation, validation, interpretation and content of the contract, applicable by analogy to other legal acts, DCFR also contains, in addition to the contractual area, rules for the so-called special contracts and the rights and obligations arising therefrom. DCFR also covers other aspects of the private law, such as the non-contractual obligations, which include: unjust enrichment, negotiorum gestio or torts law. DCFR also contains aspects related to the ownership rights of movable assets, respectively acquiring and loss of the ownership right and the regulation of trust (in Books VIII, IX and X). Topics concerning the individual capacity, will and succession, family relationships, labor relationships, real estate, commercial law, civil procedure regulations and enforcement of judgments are excluded from the DCFR.

Section 3 – Content of the DCFR

DCFR contains principles, definitions and model rules. The term “principles” is not agreed by the European Commission (point of view express within the release regarding the CFR) being susceptible to several interpretations. The word “principles” appears in the communications of the European Commission, but accompanied by the adjective “fundamental”, suggesting a core, abstract value. The model rules comprised within the DCFR are built on these fundamental principles, regardless of whether this aspect is expressly stated or not. The inclusion of separate parts containing core principles, mentioning no less than 15 such principles, was also considered. However, it was emphasized that the principles inevitably come into conflict with each other, so that their reconciliation is possible based on the model rules. This is the reason why a separate chapter dedicated to the fundamental principles does not exist within the DCFR, but these are presented within the introduction.

The definitions are intended to enable the development of a uniform European legal terminology. Definitions are placed in a separate appendix of the DCFR, both to maintain the first part of the DCFR shorter and because the terminology can therefore be modified, without changing the model rule. It was considered that no maximum benefit can be obtained from inconsistently used definitions; therefore, apart from the definitions contained within a dictionary which consist of a series of terms originating from different sources, the definitions from the DCFR appendix are
tested and integrated within the model rules, being modified along with their development.

The model rules form the largest part of the DCFR. The use of the adjective “model” indicates that the regulations do not possess normative force, being *soft law* regulations, such as PECL or similar.

**Section 4– Basic principles within the DCFR**

DCFR does not contain a special chapter dedicated to the underlying basic principles. As priorly mentioned, this option was chosen due to the fact that the term ‘principles’ is susceptible of several meanings, but also due to the fact that in many cases the principles come into conflict with each other, being best reconciliated through the model rules. The introduction presents the basic principles explicitly or implicitly recognized by the DCFR, as well as the way in which the editing team introduced these principles within the model rules.

The first fundamental principle explicitly recognized within the DCFR is the Protection of human rights. The superiority of this article is recognized by its consecration in one of the first articles, art. I-1:102(2), which stipulates that the model rules shall be interpreted so as to apply the instruments which guarantee the protection of the human rights and fundamental freedom.

Another principle found within the DCFR regards the solidarity and social responsibility. This principle, especially considered to belong to the public law, is found within the DCFR in the model rules governing the negotiorum gestio, donation and tort law, but also in contractual law.

Apart from the so-called “fundamental principles”, there are some basic principles considered in the process of drafting the DCFR; these basic principles are the principle of freedom, the principle of security, the principle of justice and the principle of efficiency. These principles have several aspects, interact with each other but may also come into conflict. Compared to the other principles, freedom is more important in contracts, unilateral acts and obligations arising therefrom. Security, efficiency and justice are important in all areas, but this does not mean they have an equal value in any situation. For example, the principle of justice is surpassed by the principles of security and efficiency in relation to prescription. In other situations, the principle of security is surpassed by the principle of justice, as in Books IV and V and when the reduction of the obligation of a disadvantaged party is permitted. Liberty,
particularly contractual, may be limited for reasons of justice, such as the prevention of discrimination and prevention of the abuse of the dominant party.

Section 5 – Conclusions

By highlighting the principles underlying the aquis communautaire, DCFR shows the way in which the existing directives can be made more consistent and the way in which various sectorial provisions may have a clearer application, in order to eliminate gaps or overregulations. DCFR also aims to identify the best solutions, taking into account the national legislation on contracts (including case law), the aquis communautaire and the relevant international instruments, such as the 1980 UN Convention on International Sales Contracts. DCFR therefore contains recommendations based on an extensive analysis and comparison work. DCFR does not offer a greater protection in terms of, for example, the right to information than provided within the national laws, this not being suitable for an academical work. Such issues are related to politics and are sensitive issues, which do not have, in the first instance, a legal nature. DCFR only issues a proposal on the way in which regulations may be advantageously modified and may be made more consistent, given the current adopted policy.

Another purpose of the DCFR is the improvement of the aquis by developing a consistent terminology. Directives frequently use legal terms and concepts, but fail to define them. A European CFR comprising definitions will create a presumption that a word or a concept used within a directive has the meaning used within the CFR, unless otherwise provided within the Directive.

Shall the European legislation be harmonized with the laws of the Member States and particularly if the creation of gaps or incisivenesses of the European legislation within the national ones is not intended, the legislator shall own information on different regulations of the Member States. The DCFR notes are a useful tool in this regard.

The purpose of this article is to present the issues related to designing, drafting and structuring of the DCFR, as well as the way in which this can be used, making use of the information comprised within the introduction of DCFR. Knowing the DCFR, even with the lack of perspective in the near future, adopting a binding European CFR based on the DCFR constitutes an advantage for the law specialists.
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The review of constitutional norms concerning local public administration in the view of the European Commission for Democracy through Law (Venice Commission)*

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Abstract
The proposals of the Commission to review the Constitution of Romania were subject to the analysis of experts from the European Commission for Democracy through Law (the Venice Commission), who expressed their opinion in a report adopted at the 98th plenary session of the European body. The article analyzes the recommendations of the Venice Commission regarding the proposed changes to the constitutional norms governing local public administration, comprising some general aspects concerning the role and importance of this advisory body of the Council of Europe.

Key words: constitutional review, local public administration, the Venice Commission, constitutional court, Constitution

1. Preamble
The experience gained in the 25 years after the fall of the communist regime together with the permanent changes in the Romanian society require a rethinking of constitutional norms. After two and a half decades of democracy, during which Romania became a member of the Council of Europe, NATO and the European Union, decision makers consider, and the state practice proves it, that there exists a need to refresh the meaning of certain constitutional norms in order to give expression to internal changes and also to conquests of doctrine, jurisprudence and state practice at European level. The Constitution, as any normative act, must keep up with social developments, adapt to the social, political, economic context and be able to respond to both internal and international trends. Although the essence of a Constitution is represented by its stability [1], its continuous adaptation to social reality is an objective necessity, since a lack of adaptation of the constitutional text would become an obstacle to the evolution of society [2]. As stated [3] by the Venice Commission, constitutional changes must be made so as not to affect the stability, predictability and protection offered by the Constitution, nor to block the adoption of the reforms necessary for society.

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After the adoption in 1991 of the Constitution which led to the disruption from the previous constitutional order, Romania witnessed, during this period, the first revision of the Constitution adopted in 1991, the amendments of this process mainly aiming at the construction of the constitutional framework for the accession to the European and Euro-Atlantic structures. Like other European countries, our country included in the fundamental act, with its review, a series of institutional guarantees for the obligations arising from the status of member of the European Union and NATO. If, at the time of the first constitutional review, the Romanian state was situated outside these organizations, at present, the constitutional review is approached from the standpoint of a member state of the European Union, which implies a new understanding of this important and complex process. The process of improving the fundamental act must take into account the European standards in the field, the changes in the European legal order, characterized by a rich normative production, a result of the work of European institutions, but also of the creative and strongly activist contribution of the Court of Justice in Luxembourg [4], as well as best practices and the need to enhance the clarity and coherence of the fundamental text.

In terms of European standards, the entity able to determine whether the proposed changes to the constitutional text are compatible with these standards is the European Commission for Democracy through Law (the Venice Commission).

2. The Venice Commission - the guardian of the rule of law and constitutional democracy

A specialized body of the Council of Europe, the European Commission for Democracy through Law has earned its place in the European institutional architecture, managing, since its creation, to give a strong imprint on the constitutional development at European level.

The Commission is based in the Italian city of Venice and is composed of independent experts who have contributed through their work to the strengthening of the law and political sciences in the state which appointed them [5]. The term of office for the members of the Venice Commission is of four years. The management of the Commission is ensured by a Bureau consisting of a president, three vice-presidents and four members. The Bureau is elected for a term of two years, with the right to reelection.
The activity of the members of the Commission takes place in plenary and Sub-Commissions. The plenary sessions are usually held four times a year and the Sub-Commissions meet whenever necessary. The working languages of the Commission are English and French. The Commission shall submit an annual report on its activities, together with an outline of its future actions to the Council of Europe Committee of Ministers.

With its vast experience in the field of constitutional law, the Venice Commission has managed to promote the democratic values and the principles of the rule of law, ensuring the informational support required for all the processes of modernization and strengthening of the democratic institutions in the countries that have requested support. Romania has benefited countless times from its experience.

3. The revision of the Romanian Constitution and local public administration

As a legal and political operation of the utmost importance, the constitutional review could not avoid the norms governing local public administration. Local public administration, from a constitutional perspective, enjoys a special status that allowed it to develop and diversify its forms of manifestation. The dynamics of the local administrative phenomenon implies a rethinking of the constitutional provisions that establish the general directions for action in the field [6]. The Commission proposals to review the Constitution in matters of local public administration proved to be largely in conflict with the norms relating to the limits of the review, which is why the Constitutional Court requested that some be eliminated and others reformulated or included in other parts of the fundamental act.

These proposals were mainly aimed to introduce new rights, such as the right to good administration, and new principles of organization and functioning of local public administration, such as the principle of subsidiarity and that of full insurance of financial resources for the transferred powers following decentralization; to include the region among the administrative-territorial units, along with the administrative-territorial units already covered by the constitutional text (commune, town, county); to enable the creation, within the region, of territorial-administrative subdivisions called traditional areas; to raise the constitutional status of the function of prefect; to eliminate the lawful suspension of the actions of local authorities in the appeal of the prefect before the administrative court [7].
4. The opinion of the Venice Commission regarding the review of constitutional norms governing local public administration

The proposals of the Commission to review the Constitution of Romania were subject to the analysis of experts from the European Commission for Democracy through Law, who expressed their opinion in a report adopted at the 98th plenary session of the European body. Moreover, the Venice Commission was asked to express its opinion [8] on the first constitutional review of 2003 in connection with those proposals, and also in 2012, when it was asked to verify the compatibility with the constitutional principles and the rule of law of the actions undertaken by the Romanian Government and Parliament in July 2012 with regard to other state institutions. Through its Report [9], adopted in December 2012, the Commission underlined the importance of loyal cooperation between the state institutions and recommended the clarification and improvement of a number of provisions of the Constitution of Romania.

Regarding the current draft revision of the Constitution of Romania, it was analyzed by the European Forum and the conclusions drawn from the analysis were included in Report no. 731/2013, adopted at its plenary by the Venice Commission in March 2014, and then sent to the Romanian authorities in order to harmonize the draft revision with the European standards and the Constitutional Court Decision no. 80/2014.

The Venice Commission found that the draft revision includes a considerable number of amendments, which would lead to a substantial review of the fundamental act. The Commission considers that a process with such implications for society should be characterized by full transparency, through a constructive dialogue between the government and the opposition and by involving all relevant actors in society, both from the public and private sectors, in the construction and polishing of the new constitutional edifice.

The Commission recalls in its report that “transparency, openness and inclusion, the appropriate timeframe and the appropriate conditions that allow pluralism of opinions and the proper debate of the controversial issues are all essential requirements of a democratic process of drafting the Constitution”. In its view, “a broad and substantive debate involving the various political forces, NGOs and citizens associations, academia and the media is an important condition for the
The Venice Commission report also includes observations regarding the amendments formulated for certain constitutional provisions governing local public administration.

Like the Constitutional Court of Romania, the Venice Commission considers that the concept of the traditional area included in Article 3 dedicated to the territory and the administrative-territorial division of the country, is unnatural, highlighting in the context the lack of clarity of this concept and of the type of administrative subdivision. Also, it expresses its surprise at the reasons underlying the initiative for granting the possible establishment of these traditional areas solely within the regions.

The Constitutional Court of Romania declared this amendment unconstitutional, considering that it violates the limits of the review. These limits are laid down in Article 152 of the Constitution and represent guarantees against any undemocratic constitutional changes [10].

Another assessment of the Commission is connected to the constitutional provision governing the right of EU citizens to vote and to be elected in local elections. The Commission considers that this provision is welcome, but proposes its relocation from Article 16 paragraph 4 concerning equal rights, in the constitutional provisions governing the electoral rights, namely Articles 36-38.

A significant proposal of the Commission experts is linked to the new right included in the catalogue of fundamental rights and freedoms, namely the right to good administration. The proposed wording for this is as follows: “Any person, in their relations with the public administration, has the right to benefit from an impartial, fair treatment and to obtain, within reasonable time, a response to their requests”. As seen, the exercise of this right by a person triggers the obligation of the public administration to offer a response to the request made. However, the Venice Commission rightfully considers unclear the nature of the response that a person is entitled to receive for their requests addressed to the public administration. In the absence of an express provision, the administration may treat this obligation of responding to the petitioner as a mere formality, something that it is frequently encountered in administrative practice. In order not to remain just a mere text contained in the Constitution, we consider that it must be clearly specified that the response of the administration must be motivated.
Other proposals analyzed by the Commission are those regarding the right of the prefect to address in court those acts of local and regional authorities that they consider illegal. According to these proposals, the legal action of the prefect no longer attracts the suspension of the contested measure, the suspension being then decided by the competent court. The Venice Commission considers that the court should be able to cancel the illegal acts of local and regional public administration authorities, not only to suspend the legal effects. But, at this time the court is able to both suspend the legal effects of administrative acts, and to cancel them. That is why we believe that the Commission proposal should be seen as an invitation to find a constitutional formulation showing that the prefect may ask the competent court to suspend both the act, and its cancellation in the event that they consider it illegal.

As for the review of the proposals that added to the already existing principles of organization and functioning of local public administration another two new principles (the principle of subsidiarity and that of ensuring the financial resources necessary for the powers transferred as a result of decentralization), the Commission considers this initiative valuable and encourages its materialization.

5. Conclusions

From the analysis it is clear that the recommendations of the Venice Commission are designed to strengthen the national fundamental act and to make it according to the common standards of democracy and the rule of law. Through its proposals, the Commission grants an important technical support to national decision makers to modernize the Constitution by providing solutions that lead to improving the clarity and coherence of the fundamental text and to harmonize the proposed wording with those encountered in various European documents. Such solutions were offered, as seen, also to improve the constitutional norms governing the field of local public administration. We hope that both the proposals coming from this prestigious European body and those of the Constitutional Court shall be considered by the Parliament when adopting the final form of the draft on the review of the Romanian Constitution.
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[9] Adopted by the Venice Commission within the 93rd plenary session, held in Venice, on 14 and 15 December 2012.
The state’s intervention on the labor market

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Abstract:
The state’s intervention on the labor market, which is not a new concept, occurs today as a greater necessity of the state’s implication in the process of ensuring general wellbeing, promoting social security as a state’s duty towards its citizens.
The embodiment of the state’s legislative implication is realised by numerous legislative acts, the most important being the Labor Code.
By legislative measures the state grants major importance to the social protection of employees, thus a series of imperative norms have been passed regarding: the minimum gross salary of the country guaranteed in payment, establishment of the maximum work time, the minimum rest time, regulation of the collective and individual dismissal.
According to law, the state deals with legalising the protection and promotion of the rights of disabled people including their admission to employment.
We consider that by applying the appropriate measures regarding: workplaces, qualification and re-qualification, unemployment benefits for those that cannot find a workplace, the state will fulfil one of its most important functions, the one of protecting the members of the community.
Keywords: Labor market, workplace, unemployment, social protection, social security.

The state’s intervention in labor relations mainly occurs by judicial norms to establish a beneficial general setting of the social partners’ activity, of the development of collective negotiation, of professional training as well as of the stimulation of economical growth. This action of the state helps to control the manner in which the labor legislation, the rights and obligations of the employees are respected. [1, pp. 231 – 232]
Occasionally, through specialized organs, the labor allocation issues labor license to strangers but it also ensures the protection of Romanian citizens, residents of Romania, who work abroad.
The most important fields of state action in labor relations:
— legislative activity
— stimulation of economical growth
— stimulation of work force
— organisation of professional training
According to the object of the regulation, the norms that form the labor legislation are divided into two major categories:
— judicial norms that regulate individual labor relations;
— judicial norms that regulate collective labor relations.
Being a labor legislation, the norms of the labor legislation have a minimal nature except for the norms of the public sector personnel that have a quantum predetermined by law.

The materialization of the legislative intervention of the state has been realised in numerous normative acts, the most important being the Labor code (Law no. 53/2003), being considered a new type of Labor code. Through legislative measures the state granted a major importance to the social protection of employees. Thus there are adopted imperative norms regarding: the minimum gross salary of the country guaranteed in payment, establishment of the maximum work time, the minimum rest time, regulation of the collective and individual dismissal.

According to Law no. 448/2006 the state handles the legalization of protection and promotion of the rights of disabled people, as well as their admission to employment.

To decrease the unemployment rate it is necessary to take some measure regarding the stimulation of the workforce, this being indirectly done by the state’s intervention. The measures necessary to occupy the workforce are found in art. 53 of Law no.76/2002:

| — the increase of the chances to employ people looking for a workplace; |
| — encouraging employers to hire unemployed people and creating new workplaces; |

The stimulation of the employers to hire unemployed people by virtue of art. 77 of Law no. 72/2002 is made by:

| — financing the work places; |
| — obtaining the workplaces in favorable conditions in order to found new work places; |
| — granting some facilities. |

The measures for encouraging the work force are supported by a complex of active measures stated in the National Strategy for Occupying the Work Force 2004-2010 [2].
The work assignment of some categories of people like: the unemployed, people who receive social aid, disabled people or people that perform alternative military service is made by the specialized organs of the state. Law no. 76/2002 regarding the unemployment insurance system and the stimulation of employment has established a new perspective on social protection but has prioritized measures for employment.

Throughout time there have been several researches regarding the unemployment insurance system, the natural rate or the unemployment balance. The idea that the unemployment balance rate has grown in the same direction as the current rate has been emphasized by the high unemployment rate that has been persisting in Europe since 1980; this is caused by more generous unemployment benefits systems.

Nevertheless, the causes of a high and persistent unemployment rate are the increase of unemployment benefits. However we must not forget the ones that develop certain activities abroad. According to art. 1 of Law no. 156/2000 the Romanian state ensures the protection of the Romanian citizens, residents of Romania, who work abroad. The provisions of this normative act regards only Romanian citizens that are residents of Romania and who work abroad under an individual labor agreement.

At present, Romania has closed agreements referring to work places only with Germany, Czeh, Liban, Hungary, Switzerland and other countries. Activities of mediating the employment of Romanian citizens abroad will be carried out by the agents of employment that meet the conditions provided by art. 9 of the law. [3, pp. 18 – 20]

The mediation of the citizens working abroad can only be done based on the agreements closed by the accredited employment agents with individuals, juridical person and foreign patronal organisations that have firm offers of work places. The labor legislation is of territorial application. [1, p. 231]

Therefore the Romanian state cannot unilaterally make a spatial extension of its labor law norms to the labor agreements of the Romanian citizens working abroad.
LABOR AUTHORISATIONS – HAVE AN IMPORTANT ROLE BOTH FOR THE EMPLOYER BUT ESPECIALLY FOR THE EMPLOYEE.

According to the Emergency Ordinance of the Government no. 56/2007 regarding employment and detachment on Romanian territory, the labor authorisations are official documents which entitle the holders (non-nationals) ought to be employed in or to be detached in our country.

The labor authorisation can be issued, at the employer’s request, by the Romanian Immigration Office to citizens that meet the conditions provided by the specialized Romanian legislation.

This is also issued to foreigners who:

— come from states that have closed agreements with Romania;
— benefit from the right of temporary residence for family reunion;
— benefit from the right of temporary residence for studies and solicit employment based on an individual labor agreement part time with a programme of maximum 4 hours a day
— are detached on Romanina territory.

Types of labor authorisations that can be issued to foreigners:

— labor authorisation for permanent employees;
— labor authorisation for detached employees;
— labor authorisation for seasonal employees;
— labor authorisation for athletes;
— nominal labor authorisation;
— labor authorisations for interns.

In other words, the law takes into account the norms of international private law, of the communitary law but also, on a larger scale, the norms of general international law.

For a better functioning of things from an economic point of view the existence of an indisputable administrative organ is necessary, regardless if the state interferes or not in labor relations, this organ being known as Labor Inspection. Labor Inspection has been financed and organized by Law no. 108/1999.

According to article 1 of this law, Labor Inspection is a specialized organ of the central public administration being subordinate to the Ministry of Labor, Social protection and Family, that has legal personality.
It exercises authority attributions of the state regarding labor, labor relations, security and health in labor, more precisely, it controls the unitary application of legal dispositions in its competence domains, in its units of the public sector, private sector as well as of other categories for employees.

Labor Inspection has in its structures Territorial Labor Inspectorates that are organized both in Bucharest and in every county. The Territorial Labor Inspectorates are units without legal personality but through the organization and functioning regulation of the Labor Inspection, gain legal personality.

The personnel of this specialized organ is made of labor inspectors and other personnel categories.

THE ORGANIZATION AND FUNCTIONING OF THE LABOR INSPECTION

According to art. 2 of Law no. 108/1999, the Labor Inspection has as subordinates the territorial labor inspectorates that are units with legal personality organized in every county and in Bucharest.

The requirements regarding the organization of Labor inspection are an important part in a series of documents of the European Union. Besides, in the member states of the European Union, there are organized authorities of inspection and control over the way in which the labor social security regulation referring to employed people are applied and followed, such as:

- England;
- Belgium;
- Denmark;
- France;
- Germany.

The organizational structure of the Labor Inspectorate according to law provision is:

- a general inspector of state – who represents the institution in relation with the authorities of public administration, individuals or legal persons;
- two deputy inspectors of state;
- a control body for the quality of the inspection.
Within the Labor Inspection there functions a College that meets periodically under the leadership of the general inspector of state, to establish the strategy and to debate the special problems. [1, p. 231]

Labor Inspection can found units with legal personality that develop their activity within its domain of competence, namely: [4, pp. 135 – 137]

- training and perfecting the professional training of the personnel of the Labor Inspection;
- training and perfecting the personnel of other activity sectors in the labor protection domain;
- other types of actions related to the specific of its activity.

THE MAIN OBJECTIVES OF THE LABOR INSPECTION ACCORDING TO ART. 5 OF LAW NO. 108/1999 ARE:

- controlling the application of legal provisions regarding labor relations, security and health in labor, protection of employees who work in special conditions and of legal provisions referring to social insurances;
- informing the competent authorities of the deficiencies regarding the correct application of the current legal dispositions;
- providing information to those interested about the most efficient ways to follow the labor regulation;
- technical assistance of employers and employees to prevent professional risks and social conflicts.

THE ATTRIBUTIONS OF THE LABOR INSPECTION ARE FOUND IN ART. 3 ALONG 1 OF LAW NO. 08/1999 AS WELL AS IN THE GOVERNMENTAL DECISION AND HAS THREE MAIN CATEGORIES:

- general attributions;
- attributions specific to the establishment and control of labor relations;
- attributions specific to security and health in labor.

The personnel of the Labor Inspection is made of labor inspector and other categories of personnel. The function of labor inspector can be taken by people with superior technical, legal, economic, psychosociology and labor medicine studies.
THE RIGHTS OF THE LABOR INSPECTORS:
— to get evidence, to do investigations or examinations, to request the presentation of the necessary documentation, to make measurements or to collect samples of substances used in the production process;
— to request that the observed deviations to be fixed immediately or in a limited time;
— to request to the management of the legal person or individual the necessary documents and information in order to make the control or to investigate the labor accidents.

THE OBLIGATIONS OF THE LABOR INSPECTORS:
— to not be an associate or a member of the management, administration or control organs of the individuals or legal persons, public or private, that are verified; [5, p. 273]
— to not have any interest of any nature in the units that are under verification;
— to keep confidentiality over the identity of the person that reports the deviation from the legal provisions in the domain regulated by the current decision and to not tell the employer that the verification is the result of a report;
— to not divulge secrets of fabrication or trade, and, in general, the procedures of exploration that they acknowledge while exercising their function both during the existence of work relations and for 2 years after their termination.
— to respect the ethics of the public function.

In 1944, in Philadelphia, The International Conference of Labor has completed the Constitution, the adopted text being named “The Declaration of Philadelphia”.

The document has stated that “labor is not a merchandise” and that “the liberty of association is an indispensable condition of an uninterrupted progress.”

After World War II, after the Treaty of Versailles of 11th of April 1919 The International Organization of Labor has been founded.
The first session of the International Conference of Labor, the supreme organ, took place in Washington in October 1919, where there was elected the director of the first International Bureau of Labor.
The International Organisation of Labor had an active role in promoting the international technical cooperation, adopting some judicial labor laws with worldwide vocation, preoccupied by the increase of the organization’s implication in debating and solving the great problems of development and peace.

**THE STRUCTURE OF THE INTERNATIONAL ORGANIZATION OF LABOR**

- General gathering;
- International Labor Conference;
- an executive council – The Administration Council and a permanent secretariat;
- The International Bureau of Labor;
- other organs of work or regional conferences, different committees and expert reunions.

The International Labor Conference is the supreme organ and has the following attributions:

- elaborates the international labor norms and controls their application
- decides the admission of new members
- chooses the Administration Council;
- votes the budget of the organization.

The International Labor Conference is made of the ensemble of the delegations of the member states, it has sessions anytime necessary, at least once a year (usually in June).

The Conference has a president and a prime vice president elected from the governmental representatives and two vice presidents elected from the representatives of the workers and employers.

The conference designates in each session:

- a committee for the preliminary examination of every issue submitted to vote
- a committee for applying the conventions and recommendations, a committee of resolutions.

Four big international union organizations, namely the International Conference of the Free Unions, The Worldwide Conference of Labor, The Worldwide Union Federation and the African Union Unity Organization have the status of observers at the International Organization of Labor. This gives them the right to
participate at any conference and reunion of the other management organs but they do not have the right to vote.

The Administration Council – is the executive organ of the International Organization of Labor that leads its activity between conferences. It normally meets three times a year in a spring session (March-April), one immediately after the conference and an autumn session (November).

The Administration Council has 56 members:
— 28 governmental representatives;
— 14 representatives of the employees;
— 14 representatives of the employers.

Out of 28 governmental representatives 10 are named by the member states and the rest are elected by the government delegations of the Conference. The representatives of the employers and of the employees according to regulation represents the interests of the ensemble of patronates and of the employees of the member states not the states they come from. [5, p. 273]

**THE ADMINISTRATION COUNCIL HAS THE FOLLOWING ATTRIBUTIONS:**

— schedules the daily order of the Conference
— keeps record of the adopted acts and takes measures for their application
— controls the application of the international labor norms.

The International Bureau of Labor – is the permanent secretariat of the Organization and has its headquarters in Geneva. The structure of the bureau is:
— the general director;
— 3 deputy general directors;
— 7 general sub directors, several departments.

The attributions of the International Bureau of Labor are:
— elaborates documents and reports for the conferences and reunions of the organization and does secretary papers for them;
— recruits experts in technical cooperation and establishes the directives for the technical cooperation programmes of the whole world;
— gathers information and statistical situations
— publishes a wide range of papers and specialized periodics regarding labor and social problems
— supports the governments of the member states on problems related to its activity object.

The competence of the International Organisation of Labor is both material and personal.

In what concerns the material competence there have been some issues in the first years after its foundation. The Permanent Court of International Justice from Hague was solicited to give several consultative notices regarding the interpretation of the Constitution in what concerns the right of the organization to regulate certain relations. The conclusion of this notices was its general social and labor competence. The Declaration of Philadelphia has confirmed this conclusion through the conception of the general principles stated to replace the ones of the Treaty of Versailles. [6, pp. 15 – 20]

Instead, the personal competence regards both the manual and the intellectual workers, as well as co-operators, both the workers from the private sector and the ones from the public sector, including the public servants [7, 8, pp. 31, 28].

The Norms of the International Organization of Labor are divided in two categories:
— conventions
— recommendations.

Although the Constitution allows the adoption of both a convention and a recommendation, the two categories are different. Conventions represent judicial instruments that regulate aspects of administrating the work force, the social welfare or of the fundamental human rights and liberties. The ratification of a convention implies a double obligation of the state.

Recommendations are judicial instruments similar to conventions but they are not submitted to ratification and include orientations, ideals or preferences addressed to the states.

The purpose of the recommendations is to state, to objectify the semnifications of the convention. The recommendation is not subjected to ratification, does not create obligations for the member states, it includes only simple directives having the purpose to guide the states’ actions on a national level. Throughout time there have been ratified several Conventions, in the second session of the
Convention of 1920 there have been adopted three Conventions, Romania ratifying the Convention regarding the minimal age for admitting children in nautical work, of 1922.

But starting with 1940, without soliciting withdrawal from the International Labor Organisation, Romania stops being a member, not paying its monetary obligations. In 1942 the Conference has acknowledged that our country is no longer a member of the International Organisation of Labor.

It continued its activity, however, in 1956 as she was included on December 14th 1955 in the United Nations Organisation.

In our country there have been organized important international manifestations, such as:

— the 8th World Congress for preventing labor accidents and professional illnesses
— the symposium on practical application of the industrial ergonomics, agriculture and forest economy

The representatives of Romania have been elected in the management of the International Labor Organisation three times vice president of the Conference and three times member of the Administration Council.

Since 1976 Romania has not ratified any convention being simultaneously accused of not respecting the ratified norms especially those referring to the right to associate, union liberty, forced labor, labor duration.

During 1991-1992 the International Bureau of Labor through the Regional Bureau for Europe has undertaken 14 missions in favour of Romania regarding:

— union liberty
— professional relations
— collective conflicts
— social protection
— professional rehabilitation of the disabled
— assistance for union organisation etc.

At the 82nd session of the International Labor Conference of 1995 the government representative of Romania was elected vice president of the Confederation, facilitating the development of the technical assistance programmes.
Romania has made its presence known especially at the International Labor Organisation by assigning a governmental representative of our country as reporter of the Committee of applying the international labor norms of 1997.

Although the intervention of our country in the International Labor Organization has not been a very balanced one, Romania has managed to stand out through its many proposals and ratifications of conventions as well as occupying an important function within this organization by the governmental representatives of our country.

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The Principles of New Criminal Procedure Code

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Abstract
Principles regarding Codes of law are the basic foundation of that piece of legislation. The new Code of Criminal Procedure states in its first articles, the principles upon which the rest of it are based. Taking into consideration the previous Code, this paper aims to present the newly-implemented provisions, while comparing them with the ones that existed. Also, commentaries shall be made regarding the necessity of codification of other principles, in relation to the moment in which the new Code was implemented.

Keywords: principles, criminal procedural law, rights, judicial functions, defence

Introduction
The implementation of new criminal codes is an important moment in the existence of an autonomous and independent legislation. A code must provide a persistence over time as long as possible, must meet social realities which gave rise to the need for its implementation.

The new Code of Criminal Procedure, in the version promulgated by Parliament, consists of two distinct parts, each with six titles. Of these, this paper is interested in Title I of the General Part, entitled Principles and limits of the criminal procedure law.

"The fundamental principles of the criminal trial represent the structure on which other procedural rules are built." [2], therefore there is a need to be transposed in the first articles of the code, preserving the vision in earlier legislation and newly introduced legislation.

In this first title the legislative body had a vision of reform, keeping a number of existing principles in the Code of Criminal Procedure recently repealed, and introducing new ones.

LEGALITY OF CRIMINAL TRIAL
Article 2 of the former Code of Criminal Procedure, entitled "Legality and officialdom of the criminal trial" [2] was split rightly, in two separate articles, each representing one of the "fundamental principles underlying the Romanian criminal trial" [3], as follows: Article 2 of the new procedure code encodes the principle of legality, stating that "criminal proceedings shall be conducted in accordance with provisions of law" and Article 7 shows officialdom regarding the criminal trial - "the
prosecutor is legally required to start the criminal action ex oficio when there is evidence (...) and there is no legal stopping cause" [4]

SEPARATION OF JUDICIAL FUNCTIONS

The legislative body included in Article 3 a new principle, of separation of judicial functions, in order that it will significantly improve the quality of justice, an initiative which we consider appropriate for the purpose of establishing provisions that may expressly disposed by magistrates, and setting limits on incompatibility of judicial functions with one another. We express reserve also on the provision contained in paragraph (3) of that article, which states that, although judicial functions are incompatible, the verification of the legality of sending or not sending the case file from the prosecutor's office (reserved for a judge), is compatible with the trial court, on the following grounds:

Paragraph 3 of Article 3 of the new Code of Criminal Procedure states in sentence 2, an exception to the incompatibility of judicial functions, i.e. if the judge of the preliminary chamber, vested with the verification of documents issued by the prosecutor, has the function of judging the case in subsequent pleadings. Although the article does not show an aspect of temporal order it is commonly understood that the trial is subsequent to the procedure in the preliminary chamber, according to other provisions of the Code of Criminal Procedure.

When the preliminary chamber judge verifies the legality of prosecution acts regarding a person and finds that the acts were legally made, the act of establishing the legality makes the judge know the case file, and at least at a legal level, consider that the prosecutor’s acts were in perfect accordance with the law. The situation in which the judge does not agree with the prosecutor means that he expresses disapproval towards the acts carried out by the prosecutor. Thus, we believe that in each case, the judge has already expressed an opinion regarding the case, even if it is only about the legality of the acts, because, at least on a formal level, considering that all the acts were legal or some acts/all the acts were illegal, means that the judicial truth has been uncovered by the prosecutor, following the legal implementation of evidence, and the judge expresses an opinion regarding the case.
PRESUMPTION OF INNOCENCE

The presumption of innocence is implemented as a principle of criminal law by reinstating the former Article 5^2 "Everyone is presumed innocent until proven guilty by a final criminal judgment" [5], adding known principle in dubio pro reo in paragraph (2) of the same article: "after analysing all evidence, any doubt in the formation of judicial bodies shall be construed in favor of the suspect or defendant."

We consider appropriate the insertion of the principle in dubio pro reo in the fundamental principles, but we believe that it is necessary to separate it from the presumption of innocence by establishing a separate article. The legislator, because of the need for clarity and fluidity of the Code of criminal procedure considered expedient to group the two principles together, but we believe that in dubio pro reo is a principle that transcends the criminal procedure law, and it is part of the principles of law, latto sensu, being found in other branches of law as well – i.e. civil law - Article 983 of the Civil Code of the 198 "when questioned, the Convention shall be interpreted in favor of the person who commits"[6] transposed the new Civil Code - "If, after applying the rules of interpretation, the contract remains unclear, it shall be interpreted in favor of the person who commits "[7], and in matters of misdemeanors.

For these reasons we consider necessary to separate Article 4 - the presumption of innocence, into two distinct principles – the presumption of innocence, a principle enshrined in both current legislation and the previous one regarding criminal procedure, and the principle in dubio pro reo, given the fact that Article 6 has also a Latin name - ne bis in idem, and in accordance with its role as a fundamental law principle, not only a criminal procedural law.

THE DISCOVERY OF TRUTH

In Article 5 we find what current doctrine considers to be a "principle enshrined in all the work of criminal procedural law, whether it is called reality principle, the principle of establishing real truth (objective, material)" [8], under which the entire criminal process is placed. We also believe that the hiding of truth, for whatever reason - whether it is due to "dishonesty of witnesses, the failure of evidence or even the ambiguity of experts"[9] can lead to a number of miscarriages of justice, where innocent people could be found guilty, or persons responsible could not be held accountable.
The previous Code of Criminal Procedure recognized in paragraph (1) of Article 1 that: the criminal procedural code aims at timely finding all facts that constitute crimes, so that any person who has committed a crime will be punished according to his guilt and no innocent person should ever be prosecuted.

The new Code of Criminal Procedure does not distinctly provide a purpose of criminal proceedings, showing, however, in Article 1 that the rules are designed to ensure effective judicial functions towards the safeguard of rights, to comply with the provisions embraced by the Romanian state in regards to human rights.

With such a change we observe the new vision of the Criminal Procedure Code, since its first article, not being a purpose, as defined by previous legislation, the focus is no longer on the citizen, as a subject of law, but on the judiciary, which must be effective and exercise tasks in due process.

The disappearing of its overarching goal - finding the facts, so that any person who is guilty to respond, and the innocent shall not be held responsible, creates no direct guarantee of protection, which must now be sought in other articles – such as the guidance contained in Article 5 towards the judicial bodies in the sense of their activity - criminal investigation or trial - to ensure truth based on facts is obtained legally and loyal. In response to the disappearance of a purpose, in Article 7 fairness is provided as a principle - specifically stated in the new Code of Criminal Procedure, given that the previous legislation there was no such provision, but the doctrine regarded it as one of the fundamental principles of procedural law.

However, we believe that the discovery of truth - latto sensu – is not a simple principle of criminal law, but the very foundation under which the need for criminal proceedings was established. The role of finding the truth in criminal proceedings and its purpose is also to ensure criminal liability of the guilty and protect the innocent.

Article 6, named ne bis in idem, states that no one can be subject to criminal proceedings twice for the same actions.

THE PRINCIPLE OF OFFICIALDOM

The principle of officialdom, found in Article 7 provides the procedural rule that judicial acts are made ex officio, without the necessity of consulting those involved in criminal proceedings. Limitations to this principle are expressly contained in paragraph (2) which states that in the cases and conditions provided by law, the
prosecutor may waive the exercise of criminal action if (...) there is not a public interest present in achieving it.

Establishing the criteria of opportunity is to be welcomed, given the number of existing cases being under criminal investigation, this principle is the right successor of former Article 18^1 of the Criminal Code recently repealed - "an act does not constitute a crime (...) if there was a minimum disturbance to the values protected by law and its concrete content, it is irrelevant, and does not show the seriousness of an offense" establishing the policy that action which have a small degree of social danger, with limited repercussions in social life, should not be considered crimes.

We cannot help but notice the discrepancy between the predecessor and the form in which the principle is laid today - following the introduction of small reform law Article 18^1 has taken the form: "the prosecutor or the court may impose one of the penalties of an administrative nature" having in mind that, in addition to the prosecutor, the court may also find undesirability of continuing criminal action, given, on the one hand, the active role of the courts and secondly that the court is the one who states, ultima ratio, the criminal liability of a person.

Although not expressly provided, when the trial court is entrusted with the case in which the social values minimally offended, and with a reduced gravity, it has the opportunity of implementing the institution known as Cancellation of penalty provided for in Article 80 of the new Criminal Code, and the court applies the offender a warning.

Although in this way the possibility of a judge to determine the existence of the principle of opportunity is covered, we believe that the application of such an institution pertainess to the Code of Criminal Procedure, and not the Criminal Code. If during the period between 1969 and 2010 such a principle was not expressly provided in the Code, by adopting the small reform law - even within the criminal code - the judge should have the same right as the prosecutor about considering if an offense that undermines minimum social values, expressly stated in the Criminal Procedural Code.

THE RIGHT TO LIBERTY AND SECURITY

The right to liberty and security - one of the fundamental human rights is recognized by the Constitution and procedural law, as a guarantor of social order, is expressly stated in the new Code. According to it, everyone has the right to be
informed about the grounds of their arrest, the right to challenge the measure, and the right to compensation for damage suffered if it was unlawfully taken. The fact that a deprivation or restriction of liberty can be taken only under certain conditions, expressly prescribed by law, comes as a guarantee of the fundamental right to freedom, and such procedural measures are considered to be taken in extraordinary cases, such as crimes of an increased severity.

THE RIGHT TO DEFENCE

Under Article 10 of the Code of Criminal Procedure, the right of defense is the ability of a person to have a lawyer of his choice or to defend himself in the trial. We believe that the explanation is a limiting one, and the right of defense includes, in addition to the right to have a lawyer, the full exercise of the rights in the process, the right to propos evidence, and the possibility of a person not to incriminate oneself.

Self-defense is the "right of the suspect or the accused to make their defense by themselves during trial, guaranteed whether legal aid is compulsory or not and regardless of the existence of a particular lawyer, chosen or ex officio" [10], any person having the right and faculty to defend himself in a case, the law establishing a limitation in cases provided by law. However, by introducing a court-appointed lawyer, self-defense is not prejudiced, the person who wishes to defend himself can still do it, just that its defenses will be complemented by those of a lawyer.

THE RESPECT FOR HUMAN DIGNITY AND PRIVACY

Respect for human dignity and privacy is another fundamental human right guaranteed by the Constitution and treaties to which Romania is a party. Being the successor of former Article 5 of the Code of Criminal Procedure recently repealed, this principle guarantees the prohibition of any ill-treatment during the criminal trial, torture or any acts that could undermine human dignity.

THE OFFICIAL LANGUAGE AND RIGHT TO AN INTERPRETER

Article 12 provides that the official language in criminal proceedings is Romanian, instituting safeguards regarding the address in their native language of Romanian citizens belonging to national minorities and providing ex officio an
interpreter for parties who have difficulty expressing themselves, or for parties who do not understand Romanian, such as foreign people, during criminal proceedings.

THE APPLICATION OF THE LAW

The application of the criminal procedure law in time and space is the last item in the principles of criminal law, coming to substantiate the notion that criminal procedure law applies from the time of entry into force for the future, and for crimes committed in the state of Romania.

CONCLUSIONS.

We can state that the legislative body intended to have a number of existing principles within the previous legislation codified within the new one - procedural legality, presumption of innocence, discovery of truth, officialdom, the guarantee of freedom, rights of defense, respect for human dignity, the official language. The new code also introduced a number of new principles - the separation of judicial functions, ne bis in idem, fairness and reasonable time, and respect of private life.

We believe that the changes in the new Code of Criminal Procedure were appropriate, but we must express our reservations on a few issues:

First it can be seen that there is no provision regarding the active role of the judiciary, as a principle expressly provided in the previous code. We believe that the absence of this principle is not appropriate, although elements relating to the duties of judicial bodies arising from other articles of the Code. In most cases people who are subjects of criminal proceedings do not have legal studies, and "the prosecution and the court have the right and obligation to actively intervene in criminal proceedings in order to legally and thoroughly resolve criminal cases." [11] Excluding this principle means that, at least in the textual framework, that the role of judicial bodies, as guarantors of the rule of law is changed, their role being one of finding and sanctioning. We believe that the judicial body must continue to have an active role, because it is the one who leads or investigation or trial, and is entitled to take the legal measures in cases.
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The Positive Obligations of States Under The ECHR To Protect Individuals Against Unlawful Acts On The Internet

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Abstract
Nowadays the problem of wrongful acts committed on the internet represent a very controversial issue with regards to the incrimination of these kind of acts and jurisdiction over them. This is why a great number of cases arrive to the European Court of Human Rights (ECHR) to seek for justice that could not be found at the national level.

The Court has not settled on drawing the negative obligations for States parties at the European Convention on Human Rights not no breach its provisions, but has established throughout its case law the so called “positive obligations” under its article 8, that are meant to offer a concrete protection of individuals against wrongful acts that occur on the internet. However even this proves not to be enough.

The Internet is a forum where freedom of expression is often used under anonymity. In addition, it could be difficult to identify the real sender. Thus different elements have to be taken into consideration while weighing the freedom of expression and right to respect for private life on the Internet.

Key words: internet, human rights, protection, jurisdiction, positive obligations.

Introduction
To begin with, we must first define the notion of “positive obligations” under the jurisprudence of the European Court of Human Rights. First of all we need to mention that the Court has established two types of obligations for the states parties to the European Convention of Human Rights [1]:
- negative obligations;
- positive obligations [2].

While the negative obligations, which essentially require states not to interfere in the exercise of rights guaranteed by the present Convention, the positive ones suppose and imply an active attitude from the states in order to protect them [3].

However there is no clear definition in the case law of the Court of this notion. Thus, in Belgian linguistic case [4], the applicants, taking this as the basis for their complaints, argued that such obligations should be recognized as “obligations to do something”.

Still, all positive obligations pursue the same goal, which is the effective application of the European Convention and the effectiveness of the rights it secures. What distinguishes positive obligations from negative ones is that the former require
positive intervention from the state, whereas the latter require it to refrain from
interference.

Violation of the Convention will result in the first case from inaction, passivity,
on the part of the national authorities, and in the second from a positive action
diminishing the protection of a certain right.

Another fundamental distinction made by the European Court is that between
“procedural” obligations and “substantive” obligations. The criterion underlying the
distinction here appears to lie in the substance of the action expected from the state
in cause. Substantial obligations are therefore the ones that require the basic
measures needed for full enjoyment of the rights guaranteed, like for example
equipping prisons, providing the instruments necessary for sending letters in prisons
[5] or even giving legal recognition to the status of transsexuals. As for procedural
obligations, they are those that call for the organization of domestic procedures in
order to ensure better a protection of persons, those that ultimately require the
provision of sufficient remedies for violations of rights.

We must add that on the present article we will focus on the positive
obligations required on the grounds of article 8 of the European Convention on
Human Rights, although we can find them in the context of article 2, 3, 10 of the
same Convention.

Preliminary issues on internet jurisdiction

Passing on, we further need to explain why we choose the positive obligations
with regard to the unlawful acts on the internet.

First of all the internet is a proper space for unlawful acts to be committed due
to the fact that it is very hard sometimes to trace the person guilty for a certain act
and the states tend to ignore this category of crimes/unlawful acts. There is always
typically some way to circumvent the technology: encryption can be cracked, copy
protection is regularly defeated, and passwords can be obtained under false
pretenses.

Second, even if access is correctly granted, once content has been delivered,
there may be inadequate means to control its subsequent use. Furthermore
pornography and sexual abuse are very frequent on the electronic environment,
especially in states that do not have a criminal system that incriminate these kind of
actions. The human rights discourse around the Internet is often concentrated on the extreme questions of hate speech or even child pornography.

This is why we need to emphasize here the role of positive obligations of States in this particularly environment.

What is more, these aspects raise the question, inter alia, of the circumstances in which a court can exercise jurisdiction over a defendant located or domiciled in a country other than the country in which a complaint has been made about an alleged offence or civil wrong committed over the Internet. However, that is a question to be answered, we believe by the domestic courts applying the relevant principles of private international law on jurisdiction. The Court is not directly concerned by this question, issue that was confirmed in the recent case of Premininy v. Russia [6].

The applicants were two Russian nationals living in Russia. They were detained in Russia on suspicion of hacking into the online security system of an American bank, stealing its database of clients and extorting money in exchange for the promise not to publish that database on the Internet. The first applicant complained about being beaten while in pre-trial detention and the lack of effective review of his bail application. The case had been heard by the Russian courts, which had determined that they were competent to hear the case.

Thus, there was no suggestion before the European Court that the Russian courts were not an appropriate forum for examination of the case and therefore the Court examined the case, without any further references to jurisdiction.

**Unlawful acts on the Internet**

An important case in the jurisprudence of the European Court is K.U vs. Finland [7] due to the fact that it raises some important issues because it opens up a wider and more generable test regarding the Internet.

What protective measures should the national authorities take?

What special concerns on the Internet must be addressed by creating a framework that protects individuals from infringement by other individuals?

In this case, mentioned above, a twelve-year-old boy was the victim of an unknown individual who placed a sexual advertisement about him on an Internet dating site. His father had not been able to bring proceedings against anyone, because the legislation in Finland at the time did not allow police or the courts to
require Internet service providers to identify the person who had posted the advertisement.

As we see, like we stated before in this case we are facing a state whose legislation does not incriminate these kind of acts.

The Court, after stating the principle that certain conducts require criminal sanctions, found that the State had failed to fulfil its positive obligation to protect the child’s right to respect for his private life, as the protection of the child from physical and mental harm had not taken precedence over the requirement of confidentiality.

The concept of physical and mental integrity is protected as an aspect of private life under Article 8 and freedom of expression on the Internet guaranteed under article 10 of ECHR must not prevail in this particular case, when other legitimate imperatives, such as the prevention of disorder or crime prove to be more important.

Appropriate and effective investigations and proceedings must therefore be provided for by the national authorities to deal with such issues [8]. The problem in this case seemed to be like we stated before, the fact that the identity of the person who had placed the advertisement could not be obtained from the Internet provider and the legislation in place did not have any enforcement procedure to address such a situation.

We thus believe that the message of this judgment is that, while the Internet, the electronic environment is different in many aspects compared to traditional media, this should in no way not prevent the application of the established positive obligation case-law to this context [9].

In the Copland case [10] the Court appreciated that monitoring by the employer of an employee’s personal use of an Internet connection, together with the collection and storage of data (sites visited, dates and duration of visits), without the employee’s knowledge, has been found to fall under Article 8. Moreover, the employer in this case being a public body, the question related to the negative obligation on the State not to interfere with the applicant’s private life.

As regards the lawfulness of this interference, the Court stated that “as there was no domestic law regulating monitoring at the relevant time, the interference in this case was not ‘in accordance with the law’ as required by Article 8 § 2 of the Convention. The Court would not exclude that the monitoring of an employee’s use of a telephone, e-mail or internet at the place of work may be considered ‘necessary in
The reception of undesirable communications could be regarded as interference with private life. However, e-mail users, once connected to the Internet, could no longer enjoy effective protection of their private life and were exposed to the reception of undesirable messages that they could control by the use of computer "filters".

A number of countries and network operators encountered objective difficulties in combating the spam phenomenon and tracing the senders of such messages, and technical resources were not always able to help. In such circumstances the Court did not hold the State responsible for not assuming its positive obligations with regards to the situation presented above and appreciate that more efforts should have been made. Moreover she observes that, in the fight against the phenomenon of spam, many countries and computer operators encounter objective difficulties, that the technical means are not always able to overcome, agreeing thus with the idea that the Government rightly points out. We appreciate that particularly in this type of cases lies the problem. It is extremely difficult to find the person responsible in these circumstances and States easily avoid to assume any obligations.

Another case worth to be analyzed here is Perrin v. the United Kingdom [12] (dec.) (no. 5446/03, ECHR 2005-XI). The case concerned the applicant’s conviction and sentence for publishing an obscene article on a website. The applicant was a French national living in the United Kingdom. The website was operated and controlled by a company based in the United States of America that complied with all the local laws and of which the applicant was a majority shareholder. The Court accepted the reasoning of the Court of Appeal, namely that, if the UK courts were only able to examine publication-related cases if the place of publication fell within the courts’ jurisdiction that would encourage publishers to publish in countries in which prosecution was unlikely. The Court further found that as a resident in the UK,

"a democratic society’ in certain situations in pursuit of a legitimate aim. However, having regard to its above conclusion, it is not necessary to pronounce on that matter in the instant case. There has therefore been a violation of Article 8 of the Convention in this regard.” § 48
the applicant could not argue that the laws of the United Kingdom were not reasonably accessible to him. Moreover, he was carrying on a professional activity with his website and could therefore be reasonably expected to have proceeded with a high degree of caution when pursuing his occupation and to take legal advice.

As regards the proportionality of the applicant’s conviction, it is also interesting to note that the fact that the dissemination of the images in question may have been legal in other States, including non-Parties to the Convention such as the United States, did not mean, for the Court, that in proscribing such dissemination within its own territory and in prosecuting and convicting the applicant, the respondent State had exceeded the margin of appreciation afforded to it. The Court declared that the application was manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

Conclusions

States are obligated to ensure that national law protects the freedom of expression, providing appropriate safeguards and remedies in the event of infringement but the problem is that this freedom of expression on the electronic environment leads too often to the breach of the article 8 of the European Convention of Human rights.

Thus the positive obligations play a very important role in ensuring the respect of human rights guaranteed by the present Convention, offering an effective protection. States must take action! Abstaining themselves from interfering with this rights it is not sufficient. They must take stance in order to assure the legal frame to prevent and punish the wrongful acts that occur on the internet.

Despite the efforts provided by the States, the European Court proves to be reticent in some particular cases due to the fact that it is difficult to trace the perpetrators in this electronic environment and another reason would be the jurisdictional matter that we exposed in the beginning of this article.

Thus, we appreciate that these problems could be solved with a more clearly legal frame at the European level that would assure a proper incrimination of these wrongful acts. The requirement to adopt a protective legal framework is typical of the Internet era and its potential problems regarding the protection of the right to private life.
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Legal Theories for Explaining Legal Basis of Application for Security Council Resolutions within EU, and Their Critics

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Abstract:
The United Nations (UN) and European Union (EU) have as the common aim, the international peace restoration/maintaining, they could act together or separately, and sometimes complementary, for achieving this goal. Therefore, Security Council (SC) sanctions could be applied separately by EU Member States or solely by the EU, or concomitantly by the EU and its Member States.

Keywords: resolution, United Nations, European Union, Security Council

1. Preliminary consideration.
According to Article 47 Treaty on the Functioning of the European Union (TFEU), the European Union (EU) has legal personality being bound by international law insofar as it has legal capacity to have rights and obligations under international law. Consequently, it meets the objective criteria for being a subject of international law and it is, from the perspective of the EU founders and members, able to reach international transactions/treaties. Therefore, international customary law and general principles apply to the EU, while treaties only apply to it as far as EU is signatory party to them.

Security Council (SC) Resolutions are binding upon all EU Member States as contracting UN parties, but the EU itself is not a contracting party of UN Charter, and therefore, it is not bound by the measures taken by an UN body, such as the Security Council is. The Member States are allowed to implement their obligations under such Resolutions within the international agencies in which they are members, and consequently, within the EU considering it as an “international agency” in the sense of Article 48(2) of the Charter. Even so, it does not mean that the EU is bound itself to implement UN obligations.

2. The first theory explanations.
Trying to accredit the idea that EU is directly bound by SC Resolutions under Chapter VII of United Nations (UN) Charter, the first theory shows that, being an international organization endowed with legal personality, EU is also bound by
general principles of international law, and consequently, EU is bound by UN Charter as long as it codifies general principles of public international law (which are enclosed in Chapter I of UN Charter entitled “Purposes and Principles”). Sebastian Bohr agreed to this theory in his article “Sanctions by the United Nations Security Council and the European Community” showing that the Articles (Art.) 5 and 234(2) of the Treaty of Rome had required the loyalty of Community institutions to international law, but neither this duty, nor the argument of codification of general international law principles in UN Charter cannot be interpreted as legal basis for considering that EU bears international obligations under UN Charter, because it could comply with general international law principles in virtue of customary international law, but not because they are enshrined in the Charter [1].

The theory of “virtual inheritance”.

This theory was reminded by ECJ in International Fruit concerning the succession in GATT [2]. This theory deems that EU has de facto powers (competences) delegated by its Member States in certain areas, and consequently, it is the successor ad subrogatio of their rights and obligations in areas concerned being directly bound by such obligations, including the application of the SC resolutions in accordance with Art 301 of European Community (EC) Treaty (or Art 215 TFEU).

This theory could be criticized in the sense that it defends the exclusive competence of the Union to fulfill the obligations of its Member States under UN Charter, due to the substitution in their rights and obligations.

This fact could be hardly accepted whereas Article 25 of UN Charter is pre-existing to Article 307 EC Treaty (Art 351 TFEU), and the latter seems not to disturb the pre-existing treaties. According to the article aforementioned, Member States (MS) must respect the pre-existing obligations arising from treaties with third countries concluded before 1 January 1958 or, for acceding States, before the date of their accession, but MS have to eliminate any inconsistencies and to adopt a common attitude when doing so: “The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.”
To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude”.

We could deduce from the aforementioned provisions that Article 307 (Art 351 TFEU) only has introduced the obligation for EU members to consult each other, but has not deprived them by their power to implement SC resolutions. Moreover, if a lex potest would try to deprive EU Members by their powers to implement SC resolutions, it will be a “dead letter” as long as Article 103 of Charter has imposed the prevalence of UN Charter obligations in the case of a conflictual norm between its dispositions and another treaty. The same, Article 297 EC Treaty (Art 347 TFEU) referring to measures taken by the SC under Chapter VII of UN Charter, calls Member States to consult each other without restricting their powers: “(Member States) shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security”. This ratio is normal as long as EU is responsible for failing to implement Security Council resolutions neither before Security Council, nor before international courts, but solely the Member States are [3].

3. The third theory.
Supporting the direct obligations of the Union under the UN Charter, the third theory is the theory of the constitutional character of UN Charter.

In this regard, we recall that UN Charter was adopted on the basis of general international law at that time, and was signed on June 26, 1945, in San Francisco, when the President Harry S. Truman compared it with all national constitutions which have a conventional character and in which several delegations had expressed different views.

This statement triggered a strong debate whether the Charter could be more than an international treaty, in the sense of a World Constitution which would correspond better to its place and its importance in the international legal order.
The term “constitution” has emerged in international law in order to give rise and describe an international organization (IO), being usually, a new legal person bearing rights and obligations in the international area (World Health Organization’s Constitution, International Labor Organization (ILO) Constitution, etc.). Used in this context, the term “constitution” is understood as “constituent instrument” with paramount importance in relations between the new organization and its members or others IO. Therefore, Wolfgang Friedmann considered that all IO “constituent instruments” form the so-called international “constitutional” law, which is a new branch of international law endowed with the comparative study of different “constitutions” of intergovernmental organizations. In this approach, UN Charter is the constituent instrument of the United Nations which, after almost all states have joined to it, became the world community, and inherently, the Charter could be called “World Constitution”.

Such as Professor Pernice stressed in his article “The Treaty of Lisbon: Multilevel Constitutionalism in Action” [4], a constitution should reflect three functions of government: executive, legislative, judicial. Some authors found the germs of these functions in UN Charter: for example, the Security Council has the power to issue binding decisions under Ch. VII of the Charter being considered as a genuine legislative (law-maker) in the area limited rationae materiae to international peace maintaining/restoration, while International Court of Justice (ICJ) has the judicial power to control the legality of UN bodies’ actions in some special requirements of UN Charter.

Moreover, Professor Verdross deemed as being primary rules of a constitution, all those rules on which the international community of states is constituted, such as the principle of consensualism. Based on this doctrine, the UN Charter could not be considered a “constitution of the world community” because it was built on the primary rules, but not composed by them. Later, the Charter has been described as including the rules of general international law, which would enclose the primary rules, such as the general legal principle “pacta sunt servanda”. However, when a State ratifies the Charter, he believes unquestionably as being valid “pacta sunt servanda” (the Charter is binding on the parties). Other primary rules of the UN Charter concern the prohibition of the use of force, the obligation to respect human rights, etc [5].
The critics of this theory concern the consensual character of the international constitutional law. Constitutional law has not sanctions enclosed within its norms, being founded on consensual acceptation of its character. When the constitutionality of UN Charter is denied, such as in the cases brought before ECJ where SC resolutions were challenged (Kadi [6], Hassan [7], Ayadi [8], etc) the Charter is lacking its consensual constitutional character, especially when European Court of Justice (ECJ) stressed the autonomy and, even separate regime of European legal order (Kadi Appeal [9] on which we will turn again in the next paragraphs).

4. The fourth theory trying to justify the direct effect of UN Charter obligations on EU.

This theory is based on complementary competences between UN and EU in international security’s field.

Such as we showed already in the introductory chapter, the EU and UN share some powers in international security’s field. In this regard, Vera Gowlland Debbas showed in her book “The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case” that “concurrent jurisdiction of political and judicial organs is made possible by the constituent instruments themselves” [10], concluding that the SC does not have exclusive competence in international security field.

Indeed, in the Preamble of EC Treaty, the aim of EU is, according to its founders’ view, the promotion of peace, European values, and well-being of its people:

“INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations, RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts…”

As a consequence, EU is a regional organization promoting peace in accordance with Art 33 and the Chapter VIII of UN Charter.

The United Nations also promote, as the principal aim, the international peace and security in accordance with Article 1 of Charter. In this field, Security Council has
the primary responsibility to decide what binding measures could be adopted for maintaining and restore peace and security in accordance with Article 24 of the Charter:

"1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

Because the UN and EU have as the common aim, the international peace restoration/maintaining, they could act together or separately, and sometimes complementary, for achieving this goal.

5. The fifth argument supporting that EU is bound responsible internationally for the failure of its Member States to fulfill their obligations under UN Charter.

This theory is justifying on the grounds that the EU Member States have not free choices of their action in regard of. Therefore, EU should act to perform those obligations.

This theory is sensitive as long as the Draft Articles of UN International Law Commission (ILC) concerning the International Responsibility of International Organizations has not mandatory force and there is not, at least for the moment, an international jurisprudence crystallized in the sense of.

European Court of Human Rights (ECtHR) itself was prudent in showing the international responsibility of EU for the action of Ireland concerning the infringement of human rights during the application of the Council Regulation 990/93 within EU territory (Bosphorus case), stating only that Ireland was without free political will in implementing the aforementioned regulation and, therefore, without being international responsible [11].

Sixthly, the internal law of EU system was considered as being able to determine the status of foreign law - in our case the UN law - in EU legal order analogous to national legal systems. The obligations under SC Resolutions are reflected in EU internal law because, through conflictual norms, the latter controls the influence and impact of the foreign law within the EU legal system. (the so-called "bridge model" according to Paul Kirchhof [12]).
This theory is dubitative as much as the EU law is analogous to domestic legal order as far as it is valid in the sense of its conformity with EU fundamental rights’ system.

Moreover, in this theory, the interrelations of the legal systems are treated as a network, where the courts are competent only to control the law of their legal systems, and consequently, in this rational, ECJ cannot control SC resolutions and their conformity with EU human rights system. However, ECJ stated in its *dicta* of *Kadi* Case, that EU and UN are separate legal orders and SC resolutions should comply with EU human rights system, which is the competence of the ECJ to assert [13].

6. Conclusions.

It seems that, until the accession of the EU to the UN (difficult to imagine, but inciting), the EU is not bound by SC Resolutions, at least, under *pacta sunt servanda* principle (EU is not a signatory party to UN Charter).

In this regard, the EU and UN have some concurrent competences in the area of SC economic sanctions because these sanctions interfere with the sector reserved exclusively to the EU - the common commercial policy and single market - such as we already showed. Moreover, Lisbon Treaty provided increased powers in relation to foreign security policy, and EU could play an important role in international security field, at least, at regional level, its actions being more efficient in the larger UN context than acting alone (in fact, it is synonym with changing its character from a regional organization to an universal one). As such, it is not impossible to speculate that EU could join to UN ratifying a revised UN Charter taking into account the similarities in their fields of action. Until then, however, these speculations are only possible scenarios …

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[3] EU could not be kept responsible for failing to implement Security Council Resolutions because it is neither an UN member, nor an addressee of Art 2(6) of UN Charter. It cannot be responsible before other international courts because of the lack of hierarchy in international law.
[13] Paul Kirchhof was judge at the German Federal Constitutional Court drafting the Maastricht decision. The “bridge model” qualifies the EC/EU not as a federal state, but something less and transitory—a “Staatenverbund” (cited in Isabelle Ley: Legal Protection Against the UN-Security Council Between European and International Law: A Kafkaesque Situation?, German Law Journal, vol. 8, 2007, pp. 279-294, p. 288

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European Court of Justice – www.curia.europa.eu
European Union Law – www.eur-lex.europa.eu
European Court of Human Rights – www.echr.coe.int

List of abbreviations:
- United Nations – UN
- Security Council – SC
- European Community – EC
- European Union – EU
- Common Commercial Policy – CCP
- Court of First Instance – CFI
- European Court of Justice – ECJ
- Treaty on the Functioning of the European Union – TFEU
- International Organizations – IO
- International Labor Organization – ILO
Opening insolvency proceedings at creditors request. Conditions for application submission

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Abstract

By association with other legislation, where the economic and social considerations are more important than other legal factors, the main objective consists in saving the debtor and the research for viable solutions to the detriment of payment of liabilities, in our insolvency legislation, trying to satisfy the interests of both creditors and debtors, covering the debt with reorganization of the debtor. The paper analyzes the circumstances in which creditors are entitled to make application but also the legal consequences of non-compliance with these conditions.

Keywords: insolvency, creditor, debtor, threshold value, reorganization

In order to open insolvency proceedings it have to be presented an application to the competent court, by the persons to whom the law recognizes the locus standi in this regard. [1]

Law 85/2014 provides on art. 65 that, procedure is opened by a petition filed in court by the debtor, by one or more creditors, or by persons or institutions expressly provided by law. (2) Financial Surveillance Authority file a petition against entities regulated and supervised by itself, according to available data to meet the criteria laid down by special legal provisions for initiating proceedings under this law.”

Article 70 of the Insolvency Code reveals that „any creditor entitled to request the opening of proceedings under this title may apply for the opening of proceedings against a debtor's alleged on insolvency ... ".

In judicial practice it was observed that most of the times, creditors are applying for opening the insolvency proceedings of the debtor, whereas termination of payments due by the debtor has negative consequences for creditors heritage. The new insolvency code defines the "creditor", both by reference to the opening of insolvency proceedings, as well as by the participation in the insolvency procedure. [2]

Article 5, point 20 gives the legal definition of "creditor" showing that it is 'creditor entitled to apply for opening the insolvency proceedings the creditor whose claim on debtor's assets is quarrel, liquid and chargeable for more than 60 days.
Point 19 of article.5 shows that creditor means those entitled to participate in the procedure meaning the holder of a right on a claim on the property of the debtor, which has registered a request for that claim following her admission either is receiving rights and obligations settled by this law for each stage of the proceedings.

The quality creditor ends as a result of the failure to register or by removal from the tables of creditors made successively in the proceedings or by procedure closure; Are having the quality of creditors without making personal statements of claim, the debtor's employees. " [3 ]

In the new Insolvency law we meet also other creditors categories such as art. 5 pt. 21 - ,, current creditor or creditor with current claims " ; art. 5 pt. 22 - ,, unsecured creditors " ; art. 5 pt. 23 - ,, indispensable creditors " and art. 5 pt. 24 - ,, foreign creditor " .

All these creditors are part of the creditors entitled to participate at the insolvency proceedings.

As stated in the old regulation of insolvency on art. 31 para. 1 Law 85/2014 stipulates in art. 70 , paragraph 1 , that any creditor who wishes to request the opening of insolvency proceedings presumed to be insolvent debtor must specify:

a) The amount and basis of claim;

b ) the existence of a right preferably constituted by the debtor or established by law;

c ) the existence of precautionary measures on the assets of the debtor ;

d ) the declaration of any intention to participate in the debtor's reorganization , in which case you will have to specify, at least in principle , how wishes to participate in the reorganization procedure. "

From the two major categories of creditors, only those who have the quality of ,, creditors entitled to request the opening of insolvency proceedings " have the locus standi for submitting an application in court. [4 ]

We appreciate that was determined correctly the person that is able to submit the application in court covering the opening of insolvency proceedings, as it has locus standi quality.

This determination of the person with an active locus standi of the application submission was made by reference to the requirements posed by the debt claimed , given the definition of insolvency , which is ,, the state of the debtor's assets which is characterized by insufficient funds available in order to pay certain debt that is
uncontested, liquid, and enforceable against the company, insolvency being obviously presumed when the debtor, after 60 days in arrears do not pay his debt to one or more creditors, and imminent when it turns out that the debtor cannot pay at the maturity the outstanding liabilities incurred with the funds available on the due date.

The outstanding debt on purposes of Law 85/2014 means that debt whose existence follows from the very act of debt or, from other documents, even unauthentic, emanating from the debtor or recognized by him. [5]

Claims based on which is triggered the insolvency proceedings must accomplish the same conditions as those for which it can begin forced tracking on movable and / or immovable property of the debtor.

In order to initiate insolvency proceedings, a creditor who has an outstanding debt, amount and debt that is uncontested, liquid, and enforceable against the company, that exceed the threshold stipulated by Law 85/2014, does not require obtaining an enforceable title, as in common law.

Once opened the procedure, even other creditors are no longer required to hold an enforcement order to be able to lodge claims on the list of creditors, they can just submit a simple request for such procedure, which attach documentary evidence of claims. (art 102 par. 3 provides that ,, the request for claims must be made even if they are not established by evidence.)

The easiest way through which a creditor may achieve his own claim against the insolvent debtor is the consensual procedure, given the demands of collective procedure opening but also the declaration of claims, all this being also subject to a stamp duty of only 200 lei [6] regardless the amount of the claims, while their actions on common law are charged according to art. 3 of OUG 80/2013. Art. 3 para. 1 of OUG 80/2013 stipulates that ,, actions and claims valued in money, brought to the courts, are charged as follows:

a) up to 500 lei - 8% but not less than 20 lei
b) from 501 lei to 5,000 lei - 40 lei + 7% for exceeding 500 lei
c) between 5001 and 25000 lei - 335 lei + 5% exceeding 5000 lei
d) between 25,000 and 50,000 lei - 1355lei + 3 % for exceeding 25,000 lei
e) between 50001 and 250000 lei - 2105 lei + 2% in excess of 50,000 lei
f) over 250,000 lei - 6105 lei + 1 % for exceeding 250,000 lei.
When the insolvency proceedings are opened, all creditors are able to lodge claims in such way they came into the contest as the distribution of amounts resulting from the liquidation of the debtor's property.

Through all the creditors coming at the distribution of amounts always the unsecured creditors will be in benefit.

Art. 72 para. 1 of the Act provides that ,, in case of the application for opening insolvency proceedings brought by the creditor on the debtor's request, made within the period specified in par. 3, the syndic judge may order, upon closing procedure, on the creditor task, a surety of up to 10% of the claim at a certain bank, but not more than 40,000 lei. Bail will be recorded within 5 days from the notification of the measure, under penalty of rejection the procedure initiation."

Considering the requirements of this article, as legal practice has shown [7], [8], the court must examine the file correctly, with ought making any abuse in admitting applications for the imposition of bail, and with ought making use of this possibility just to get rid of the file.

The law limited the amount of the bail to the value of 40,000 lei, in order to avoid excessive sizing bail at the expense of the creditor heritage.

Insolvency Code provides as novelty, how it can be used to compensate the creditor bail filed by the debtor, where the application for opening insolvency proceedings is rejected.

Align. 4 of art. 72 of the Insolvency Code provides that ,, if the syndic judge establishes that the debtor is not insolvent, rejects the creditor request, which will be considered as not having any effect even registered. In this case, bail will be used to cover the debtor's damages for bad faith introduction of such a request, as disposed by the syndic judge."

The debtor must submit an application to the insolvency proceedings, showing that the application to initiate the procedure was made in bad faith, that he suffered an injury and that there is a causal link between the act of making a claim in bad faith and injury.

Being an amount of money to be deposed by the creditor as guarantee for covering the expenses in case of an unmeritorious claims covering the opening of insolvency proceedings, the bail is based on the idea of creditor risk and debtor anticipated warranty, which shall provide a safe means to cover damage they would suffer if the creditor's claim will be rejected. [9]
Where the court agrees with the debtor's request, ex officio the syndic judge cannot oblige the creditor to pay any amount under this head [10], recording of the bail being a prerequisite condition of admissibility of the application of creditors.

If there is no record of the set bail amount the claimer creditor action will be dismissed de plano without analyzing the application, only the tax authorities being exempt under Art. 177 para. 3 Tax Code, by any bail [11].

The doctrine stated that the establishment by the legislature of an exception to the general rule of payment of fees, taxes, commission or bail for claims, actions and any other measures that the tax authorities are undertaking for the purposes of tax debts administration does not represent an infringement of the provisions of art. 124 para. 2 of the Constitution, according to which justice is unique, impartial and equal for all, all exceptions found its justification in that, in the event that creditor belongs to the government, the risk that the debtor damaged by the effect of insolvency proceedings cannot obtain compensation for damage due to creditor insolvency do not exist, according to the principle that the government is never in default.

As the new insolvency code lays down no derogating rules, bail refund will be ordered by the court conclusion, if the conditions provided for by art. 1063 par. 1, 2 and 4 of the new Code of Civil Procedure are accomplished.

If was explicitly triggered by the debtor that is not intended that the applicant be required to pay compensation for any damage caused by submitting the request to initiate the procedure, by decision of rejecting the claim of the creditor itself, the syndic judge shall order the restitution of the bail.

If the debtor does not make such a statement the refund of bail can only be made at the request of the interested party (creditor), after a period of at least 30 days after the final decision of rejecting the application for opening procedure. Even if the syndic judge would divest the request will be solved also by the same judge.

The term ,, any entitled debtor " used by the legislator in the new insolvency code emphasizes the fact that in order to open the consensual procedure not discrimination between unsecured creditors and those with preference cause will be made.

Also, no discrimination to the nature or source of the claims is made, the legal text inferring that a single creditor may initiate one or more claims. It is however certain that further, the proceedings shall be mandatory collective. [12].
According to par. 3 of art. 70 of the insolvency code, ,, if between the time of the application and the moment of the judgment of such request are submitted applications by other creditors against the same debtor , the court , through the registry , will verify , ex officio , at the time if the case is pending and shall submit the application to the existing file .

The Syndic judge shall determine the accomplishment of the conditions relating to minimum quantum of claims in relation with the aggregate claims value of all creditors who have submitted applications and respecting the threshold stipulated in this title and shall communicate the debtor requests.

As a debtor with unpaid debts due at least at 60 days in amount of 40,000 lei , may be subject to insolvency proceedings , then thereof , a fortiori should be passive subject of such and similar debt debtor close to this level , and also salary arrears to a single creditor , obligations that collected exceed the specified amount .

Conclusions

By opening insolvency proceedings, all the creditors want to recover the debt. Both guaranteed creditors , as well as the unsecured ones in order to be able to recover the debts should be required to submit statement of claim within the time limit imposed by the court, otherwise it is likely to be exhausted all chances to cover the debts of the debtor assets in insolvency proceedings.

Therefore, in the framework of the insolvency proceedings, recovery of debts is much stricter in comparison with the foreclosure, such recovery being subject to detailed rules and time limits provided for, by law.

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Abstract

Humanity is faced with a series of problems, most of them in connection with the overturning of our system of values as contemporary society is dominated by consumption, by economic aspects. It's all about the economy. Population around the world is increasing, we are dealing with poverty and, paradoxically, there are areas in which food is wasted and resources fully exploited. What can we do when we have to feed billions and maintain the quality of the environment, conserve and protect? Political decisions are influenced by economic aspects and political decision makers behold helplessly, or with indifference, everything the environment loses every moment. Things must be changed; we must not focus only on organization of and participation in conferences on environmental problems. Everything is in vain if the conclusions we draw are not accompanied by concrete actions.

Keywords: environment, sustainable development, global warming, politics

Introduction

The human being is an important element of the environment, as it can create and destroy with the same ease. For decades now, a series of events have been organized at international level, alarm signals have need drawn, and still, we are in the presence of major problems: Global warming, atmospheric pollution, drought, famine, deforestation, genetically modified organisms and the list could go on. Barry Commener made the following statement: "Environmental degradation is due to a shortcoming of human activity. Earth is polluted, but not because man would be a particularly dirty animal and neither because the human species is too numerous. Blame goes to the human society - the way society understands to obtain, classify and use the riches human labor draws from the planet."[1] The statement is as fair as possible, with one single amendment: contemporary problems are caused by the increase in population which led to the excess exploitation of resources. It is true that human society didn't know it, but at this time we can affirm with certainty that it is not in a position to address all issues, because the economic factor dictates politics.

There are a number of aspects that have been raised, not only by the civil society, but also by officials of different states concerned about environmental damage. Of these, the following may be brought up for discussion: global warming
and the greenhouse effect, atmospheric pollution, drought, deforestation, famine, GMOs\(^7\), etc.

This paper aims to approach these problems, to bring to the foreground studies conducted on these themes and the consequences that we all must endure due to non-adherence to protecting nature and the environment in which we live, but also the possible solutions that we should embrace to counterbalance the effects of such disastrous consequences. Damage to the environment is not just a local problem, for the decaying and pollutant factors would not assume a static approach. Affecting an area inevitably triggers damage to other areas, sometimes irrecoverably.

Increase in the globalization process, particularly economic-wise, but also standardized objectives and instruments for achieving this as a result of globalization of environmental problems. [2] These issues concern the international community, which proves helpless a lot of the time, but a positive thing is that they started to adopt measures in this respect.

In literature a number of principles governing the environmental policies have been identified and they are important for keeping these issues under control [3]:

- prevention principle - the best strategy is to prevent, being much more efficient than to fix the effects of pollution. The principle is to be found mainly in international law, being evoked as well in the jurisprudence of the International Court of Justice;
- precautionary principle - has been enshrined in legislation in 1974, in Germany, in the context of air pollution and means that public authorities must take action regarding the factors which may affect the environment and human health, and this principle is linked to the prevention principle, i.e. not hindering the developments in technology;
- integration principle - public authorities take into account the implementation and definition of their policies and actions. The principle has sparked a series of debates, and at EU level the importance of integrating environmental requirements in public policies is brought to the foreground;

\(^7\) GMO - Genetically modified organisms
polluter pays principle - the principle was launched in recommendation of the OECD\textsuperscript{8} in 1972 and takes into account the fact that the polluter should bear the costs of measures taken to ensure environment protection.

Global warming and greenhouse effect

One of the definitions of global warming refers to that phenomenon of increase in average temperatures in atmosphere at ground level and also ocean level. In the ‘60s, following the industrial development which resulted in an increase in concentrations of greenhouse gases, regarded as the main cause of this phenomenon, there have been concerns in this respect. Several studies show a tendency towards global warming and what worries the most is the continuous heating up of polar areas. \[4\]

The United Nations, on a number of occasions, has asked authorities that until the year 2050 to give up using coal as the main source of energy, replacing it with alternative energy sources. This would help to really limit global warming and would allow getting 0.5 °C nearer to the objectives drawn by the UN. \[5\]

Activities carried out by humans are closely related to the environment and the resources, but health, economic stability and social safety are important for shaping the quality of life. The Stockholm Conference in 1972 brought to the foreground issues that may affect humanity in the long term. The aspect regarding sustainable development is included in the founding treaties of the European Union, in the sense that internal market is acting for the sustainable development of Europe, being based on balanced economic growth, on a social market economy with increased competitiveness, which is aimed at full employment, social progress, but also a high level of protection and improvement in the quality of the environment. \[6\]

Another important protocol was signed in Kyoto, Japan in 1997. Since the international community was aware of the changes which had arisen at climate level, signing the treaty and especially assuming responsibility was necessary. It was not well received by all nations, particularly by those which were also among the largest polluters. One of the conditions for the enforcement of this agreement was to be ratified by at least 55 nations, a condition which was not to be carried out until 2004, when Russia ratified the protocol.

\textsuperscript{8} OECD- The Organization for Economic Cooperation and Development
The Protocol came after signing the Framework Convention of the United Nations on climate change, and its goal was lowering gas emissions in developed countries to 5%, up to the year 2012, as compared to 1990. [7] Policies proposed by the Kyoto Protocol were meant to be implemented at European level as well. The Commission was authorized by the Council to participate on February 4, on behalf of the European Community, to the negotiations on the Framework Convention of the United Nations on climate change, adopted in May 1992. The European Community ratified the Convention by Decision 94/69/EC of December 1993, enforcing it one year later. This Convention set in place some key principles in an effort to fight climate change. One of the most important principles was that of common, but differentiated, responsibility. A minus of this Convention is that it does not contain commitments in figures broken down in detail for each country regarding the reduction of greenhouse gas emissions. At the meeting held in Berlin in 1995, states that were part of the Convention decided to sign a protocol in this respect. Thus the Kyoto Protocol took shape, and the European Community signed the protocol in April 1998 and 3 years later the Council of Laeken confirmed the Union's desire that the protocol be enforced before Johannesburg Summit in 2002. By Decision 2002/358/EC the protocol is hereby approved on behalf of the European Community. [8] Even if there are concerns in this respect, the efforts do not seem to give results. There must be some action beyond its purely declaratory nature. USA, responsible for a large part of the issues which were the subject of the Kyoto Protocol, did not wish to become a party to this Protocol.

Another problem that concerned society at international level was the greenhouse effect. In normal parameters, this greenhouse effect does not cause damage to the environment, on the contrary, it helps plants grow, thereby creating an ambient conducive to their growth. As in other cases, it is about exceeding the parameters. "Carbon dioxide and other substances allow ultraviolet rays to pass very easily, reach the surface of the ground and transform into thermal energy; this energy is hard to penetrate back, thus causing the greenhouse effect... But, in too large quantities, these elements responsible for the greenhouse effect will lead to an increase in temperature... Carbon dioxide is a food for plants, but when it is in excess, becomes a pollutant. Currently the carbon dioxide amount is 0.03%. Assuming that this quantity will be doubled, temperature around the globe may increase by 1.3 to 3 degrees Celsius." [9]
Atmospheric pollution

Atmosphere is defined as being the gaseous envelope surrounding Earth which, not having a precise limit, reaches into the extra-terrestrial space. It is intended both for the protection of Earth, as well as for maintaining temperatures favorable for the development of life. Air is polluted because of natural phenomena, but also because of the activities carried out by humans, who produce changes in the concentration levels of natural constituents. Sources of pollution are: natural (terrestrial radioactivity, lightning and electrical discharges, decomposition of organic materials, etc) and anthropogenic (those which result from human activities which may lead to air pollution: industry, household heating sources, etc). [10]

Unfortunately, we live in a society that encourages consumption. It is not only about the quality of life, because in this case progress must be part of community life. It is about the excesses which may lead to resource exhaustion, as there is an increasingly large offset between rich countries and poor countries, with most of the latter being source of resources to be used by highly developed countries. There should be consistent, easy to enforce environmental policies. "Also, the policy on the environment is disregarded. Competing to attract big companies that create job opportunities in their countries, almost all governments have given up their plans for eco-reform or have postponed them... Little by little, governments everywhere in the world lose the ability to interfere in the development of their nations...The economy is devouring the politics." [11]

At national level, the ability to draw up the legislative framework lies with national legislative bodies, which are the supreme representatives and have a responsibility not only resulting from their duties, but also a moral responsibility for those they represent. [12]

Municipalities, under their right, and their self-governing abilities, under their own responsibility, may adopt administrative acts, policies, strategies to help the community to grow and also to protect the surrounding environment. [13]

Romania’s Constitution recognizes, in Article 35, every person's right to a healthy and ecologically balanced environment. But, natural and legal persons share the obligation to protect and improve the environment. Citizens have sufficient means to protect their rights, and can even take matters to Court in this respect. [14]
Drought and famine

Environmental disturbances have also caused large humanitarian crises. With a population on the rise and the depletion of water resources, humanity is faced with such problems. Poor countries can no longer cope and need help from the developed countries to get out of the crisis. On the other side, the latter are not completely foreign to the causes of humanitarian disasters. Former great empires, they were not concerned particularly about implementing policies that would have resulted in developing the former colonies.

Main cause of famine is drought, which would affect not only countries on the African continent, but also continents who believe that they are sheltered from this phenomenon. In Africa, drought is: "a direct consequence of climatic factors that have changed the direction of precipitations in such a way that they are heading mainly towards the Indian Ocean. According to the latest research, a key factor of these changes in the direction of floods is the rapid heating, in the past 30-40 years, of the Indian Ocean surface ... But there are also other factors linked directly to the human activity that contribute to the current humanitarian catastrophe, namely the inability of the countries struck by severe drought to cope with this phenomenon. In the first place, the political situation in these countries plays an important role: the nature and style of executives and high level of uncertainty induced by civil wars and other conflicts." [15]

Drought will be a problem not only for poor countries, as more and more studies show that Europe included, all will be affected by drought, particularly Southern territories thereof, which will face an increase of 80% in the periods of drought to the present period, by the end of this century. The European Commission has carried out a study which provides that the drop in water reserves will be caused, among other things, by an increase in population and a rise in water consumption, with economic and social consequences - losses of 100 billion Euros are estimated at the level of European Union countries only in the last three decades. [16]

Instead of conclusions:

There is no doubt that humanity is faced with a number of problems that result directly from human action. Uncontrolled deforestation, excessive use of water resources, atmosphere pollution, etc, all cause major social problems. Failure to apply, in a consistent and responsible manner, the policies on environmental
protection will certainly result in a natural disaster. The good news is represented by
the mental awakening of individuals regarding these problems; thus, people become
more concerned about protecting the environment, and those countries that until now
were considered among the biggest polluters (USA and the People's Republic of
China), have stated at the latest UN press conference in 2014 that they will submit
greater efforts to protect climate. A big step forward.

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Means and Methods for Documentation Used in Legislative Work

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Abstract
Law-making involves a complex process conditioned by complex realities, in which two aspects prove equally important and also interdependent - the aspect pertaining to social realities and the technical and formal aspect, pertaining to the elements on the structure of the enactment style and language of corporate and specific procedure for adoption. In this process, an essential role is played by documentation that allows the issue of value judgments in choosing the best solutions to be incorporated in the proposed regulation. Documentation, as an activity is not considered an end in itself, rather it creates prerequisites for a thorough understanding of social phenomena and relations which are to be subject to legal regulation.

Keywords: law-making, documentation, empirical method, dogmatic method.

Introduction
Before the expression of will, any law constitutes a reflection of a form of thinking. Depending on the quality of this thinking the law can produce, when applying it, positive or negative consequences, the subsequent social practice is what will validate or invalidate solutions enshrined therein.

The phase of determining solutions for future regulation appears thus extremely important and must leave normative construction that the law intervenes to meet a social need which requires scientific knowledge of reality.

The process of documentation refers to both the state of affairs as well as the state of consciousness, which embraces a wide range of facts and attitudes and concerns not only the present state, but also scientifically anticipates possible future effects.

1. Scientific Substantiation of Legislative Activity
The authorities involved in lawmaking should bear in mind that lawmaking involves foresight and responsibility. Thus, the preparation of laws would require methodic activities, a founding of laws on actual results of scientific research to prevent and exclude "routine empiricism"[1].

The necessity for scientific substantiation of legislative activity is currently determined firstly by the increasing complexity of life caused by the emergence of completely unique social relations. The rapid development of medical science, genetic experiments, "artificial intelligence", information flow and cosmic activity are just a few examples. A legislative intervention in such areas, unsupported by scientific evidence or insufficient research on the scope of such relations can produce socially dangerous effects.

In these conditions, knowledge of reality should be a serious scientific approach of interdisciplinary nature, accomplished on the basis of economic, sociological, psychological, criminological inquiry and prior studies, a scientific documentation and specialized research in the field in which a law is to be developed by involving specialists in those areas, of certain investigatory and analytical bodies, based on documentation done by experts, analyzing the laws of other countries, and last but not least the legislative tradition.

2. Documentation Activity – The Intrinsic Dimension of the Development and Enforcement of the Law

As an act of social decision, the law requires that in the preparation stage extensive documentation be done in order to allow an issuing of value judgments concerning the choice of the best solutions to be incorporated in the proposed regulation. The documentation activity cannot be considered an end in itself. It creates the prerequisites for a thorough understanding of phenomena and social relations that are to be legally regulated, providing relevant factors in choosing the corresponding solutions [2]. According to article 20 of Law 24/2000 on legislative technique "drafting legislation should be preceded, depending on the importance and complexity, by documentation and scientific analysis for a thorough understanding of economic and social realities that are to be regulated, the history of that part of legislation and of similar regulations in foreign countries, in particular those in the European Union".

From a strictly legal perspective, the documentation process is an intrinsic dimension of law enforcement. As part of this process, besides the establishment of facts, the interpretation of law and the application for issuing the act, the choice of the law [1] constitutes an independent stage. However, at the same time, documentation also involves the development process of the law, the goal of which is to acquire
general knowledge of future legal regulations, identify legislation in force which will possibly be repealed, adopt legal regulations in the new law or keep some existing regulations in force, either integrally or partially.

3. Means and Methods of Documentation. A Brief Presentation

Generally, if knowledge is based on documentary research that aims to gather all the human, sociological, philosophical, political, economic, social, historical and other forms of data about the problem which is to be the subject of scientific research, research of positive law or of current legislation aims to pool existing legal elements about the problem meant to be solved. Beyond the subject of scientific research, the performance of this research is subject to two intellectual endeavors: analysis of documentary material and its synthesis.

In the framework of research for documentary material, certain methods are used, most often, putting into question the empirical method and dogmatic method [3]. The empirical method involves using only empirical experience without resorting to a theoretical framework and consists of researching solutions that have already been delivered in identical situations by administrative courts by judicial authorities or other public authorities. On the other hand, the dogmatic or theoretical method is based on a general theory, with direct reference to the legal schools of thought, the history of law, comparative law, general principles, legal categories or other theoretical tools [3].

Usually, a new legal provision appears either to take the place of another which has become obsolete, or to fill a legal vacuum. Thus, in the eventuality of preparing a new law to first carry out an inventory of relevant national legislation. Making an legislative inventory cannot be limited to mere identification of names of laws, but should take the form of a background study aimed at considering both new regulatory issues and issues of existing normative acts in the area to be the object of new provisions.

The necessity to make an inventory and analyze legislation in the area to be regulated subsequently is necessary from several points of view: it helps determine the legislative shortcomings which require legislative intervention and oriented towards finding appropriate solutions, the current law plays the role of a social experiment; it helps determine the issues of the new regulation, by avoiding the creation of legislative holes; it helps legislative correlation, by offering the possibility
of resolving problems of the new legislation confronting current one; it determines the laws to be repealed, amended or completed; it helps systematize legislation by determining provisions to be concentrated in uniform regulations and avoiding duplication in regulation.

Within the framework of documentation, not only knowledge of national legislation is necessary, but also knowledge of the laws of other countries, which may be as useful as their legislative experience may provide some relevant factors in determining future regulatory solutions. However, this should not mean copying the legislation of other states, but should consist of a comprehensive study of comparative law. Simply copying provisions from other states, as certain institutions sometimes appear (e.g., the administering of another person's property and fiduciary contract), in our New Civil Code does not constitute an actual legislative activity because there is the risk that the way certain institutions are regulated in other states the right may not correspond to the environment where its implementation is desired which can lead to a lack of finality of certain rules [4].

In the contest of modern society, the study of comparative law is no longer a simple approach to foreign laws, but comparative law represents a philosophical and social science, which legislature cannot ignore. Thus, in the midst of diversity converge the fundamental principles common to the laws of the main countries. Sometimes, that is true, the same principles are developed differently and produce different effects, though these laws were introduced in the same period. Obviously, it is not about acquiring knowledge of all national legal systems, which is impossible, but the referral of essential mechanisms to understand the approach developed by these systems. This approach in particular is forced upon the legislator especially if we take into account the fact that today we are part of large communities that exceed national entities and which quite often just aim at close legal solutions. Thus, at EU level, the work to harmonize laws is often preceded by an analysis of comparative law which seeks to produce the solutions and techniques acquired in different Member States [5]. Currently, comparative law is considered as "the most appropriate and meaningful way to respond to each and every one of the requirements of first-order contributions in terms of work to create the law that modern law so desperately needs [6]".

Also, according to article 21 of Law 24/2000 "in the activity to obtain documentation for the base of a legal bill, the practices of the Constitutional Court in
that field will be examined, case law of the European Court of Human Rights, the judicial practice in applying the regulations and legal doctrine in the field". Therefore, besides analyzing legislation, an examination of the practice of the courts in this field is necessary. In litigation, courts acknowledge the existence in the content of certain laws of certain obscure, less explicit provisions or lack of regulations. For example, if there is something missing in the law, the case must be resolved nonetheless, and in such situations the judge calls on general principles, in time outlining a certain practice in that field, or, in the case of unclear and obscure regulations, to create a unitary practice throughout the proceedings to which those provisions, the High Court of Cassation and Justice issues decisions of principle in the resolution of appeals on points of law by showing the application of legal provisions and thereby directing the work of courts of law. Thus, in general, jurisprudence is an extremely important documentary source to develop new legal rules.

Another useful documentary source for the normative construction is legal doctrine. Firstly, it feeds the thinking of lawmakers by law ferenda proposals made subsequent to the critical analysis of the legal system. It is recommended that the lawmaker know the doctrinal views expressed on the subject matter of legislation in order to find the best legislative solution.

The literature [3] shows that in documentary research, as a rule, classical documentation is usually used or, more recently, computer documentation, or the two combined.

Firstly, the researcher that uses traditional documentary research should determine the scope of documentation, i.e. to establish whether to investigate legislation in a particular field, case law, administrative authorities or practice of legal doctrine or all of these at once. Then, he will move on to the discovery of documentary sources (directories, catalogs, bibliographic files, etc.) to identify materials that will form the subject of the documentation. After the identification of sources, there is the extraction of legislative texts, of judicial and administrative solutions, conclusions and proposals made by legal doctrine, useful for drafting the law bill or of other regulations. Subsequent to the analysis performed on the documentary material there is a synthesis operation, which ultimately leads to finding the most important principles, concepts, notions and legal solutions that will shape the new legal regulations. Among all this documentation, an irreplaceable instrument for any person who performs a public function is the Romanian Law Directory,
published annually by the Legislative Council, legal and administrative documentation instrument that helps identify any enactment of legislation in Romania, issued by the public central authorities [7].

Nowadays, classical documentation tends to be taken for electronic documentation. The databases include various, legal information, which are interconnected creating national, regional or international computer networks. The computer has become indispensable in current society in the legislative work "the right, by using the computer as valuable auxiliary documentation, to draft laws and repetitive decisions" [8]. However, the role of information technology in developing legal rules should not be generalized as artificial intelligence will never be capable to replace the reflective capacity for and the study of specific legislative work.

Conclusions

Documentation must involve not just a thorough knowledge of the legislative, jurisprudential or doctrinal "starting point", but also the discourse of people, their grievances, claims and ideals. This obedience only brings an advantage in creating the rule, the lawmaker must always bear in mind that the recipient of the law is the human person, and the purpose of the legal norm should be to ensure individual rights, freedoms and the "common good".

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References:
Right to A Name. Insight into the Evolution of Legal Provisions.*

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Abstract
In order to individualize the personality of an individual in relation to another individual, the name of the physical person (surname and forename) must be used. The name is a component part of the usage ability as well as a non-patrimonial, civil, subjective right, presenting their characteristics. The name is a complex notion whose birth, historically speaking, represents primarily the result of a long usage, as any element related to language. The name becomes a legal concept, its structure and rules of assigning are the subject of the regulations, and not the name itself. The name is attached to privacy, as demonstrated in the first place by being a means of individualization of a person. The social, individual and family interest are all joined by name. Each of these interests are legitimate and an excess of one of them threatens the existence of the others. Humans can not be outside the legal life at no time.

Keywords: person, right to a name, surname, forename, provisions.

PRELIMINARY ISSUES

Constituent of the language of every people, every person's name is in fact a sound sequence used constantly in the community to designate a person. [1] To search someone is called the use of names, who are expressing the necessary distinction between members of a community. The appearance of names is conditioned by the existence of a human group, of peoples as a social being. On the other hand, the name is an emblem of the family. Visible sign of belonging to a particular family, a sign of relationship to a house, the name implies a family connection, and applies only to those who descend from a common author.[2]

Carrying, choosing, changing the name for primitive populations was determined by the people's faith in the power of the name. According to a conception of that period, the name was identified with the life of the person who wore it, the power of the name consisting in the name itself. To the ancient Egyptian, the name (ren) was held as being part of the individual elements with the soul (ba) and the alter ego (ka) [3] which do not die once with the body. In ancient Greece, the assignment system for the names was simple, people having a "unique" [4] name, such as: Solon, Demosthenes, Aristotle, Plato. The same system is used by the Hebrew and

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Egyptian people. Instead, the Roman name was composed of three elements: nomen (was common for members of the same tribe), praenomen (a personal name used in the family) and cognomen (the nickname). After the fall of the Roman Empire, the use of this system was abandoned and replaced by the patronymic name system.

According to old Romanian Law, legal personality begins at birth and ends with death, applying the Roman rule *infans conceptus pro nato habetur quontis de commodis ejus agitur*. According to art. 34 of the Calimah Code: "Laws care for those conceived, since the time of their conception, because they are considered as newborn babies when the cause is reached by themselves, and not the third person" and art. 986 applies this rule in successions matter. It was required for the newborn "to be alive and viable and have human appearance", solution taken also by the current legislation, except for the requirement of viability. The moment of birth is particularly important to establish legal personality and the appearance of birth records marked the beginning of the era of Augustus. Therefore they imposed the obligation to declare a birth within 30 days and the obligation to give a name to the newborn - the name being assigned on the eighth day of life for girls and on the ninth day for boys. That day was called the name day, which was preceded by various ceremonies, including purification by fire. [5]

In Romania, there was the unique and non-transferable name system, at the beginning, people simply called John, Peter. Later, it became more difficult the people's individualization almost those who wore the same name, so they started to use phrases such as John, the son of George. Then it came to indicate lineage by appending suffixes such as: -escu, -eanu, who determined names such as: Ionescu, Petrescu. These names are the result, in principle, of the development of culture in schools and churches.[6] Legal literature has proposed several definitions, of which we retain the one that states that the name is "that attribute of the physical person which consists in the human right to be individualized, within the family and society, by the words set out in the law, in this meaning ".[7] Such a definition presents the failure to not reveal the essential quality of the name, that of being a personal non-patrimonial right, from the class of identification attributes.
HISTORICAL VIEW OF THE PROVISIONS CONCERNING THE RIGHT TO A NAME

In our country legislation, Organic Regulation provided that any person should have a double name, that is composed of a forename and a surname. The name achieved in this way was written on the birth certificate of each person.[8] In addition, "Romanian Civil Code of 1865 contains provisions concerning the name in Chapter II (" On Birth acts ") of Title II (On Civil Status Acts"), Book I ("About people"): art. 43 states that the birth certificate will show "with clearly" the first name "which will be given at baptism" to a child and the "surname"; art. 44 para. (2) requires that "the record index of all surroundings" drown up if the child is found must also show the "name that will be given to"him . It is required that the civil status of persons must be individualized by their full name, meaning the surname and the forename.[9]

Later on November 28, 1866 is issued the Regulations of civil status acts service which in its forms attached emphasizes the need to be puted down the newborn's name and surname as well as "surname, name, age, profession and address of his father and mother".[10] In addition, it is regulated a standard protocol to be completed by the person who finds a child. Also, art. 14 of the decree imposes the obligation to issue "birthday card" [11] needed to identify the child. If in Caragea Act, all the "registry books" on which it was meant the main events in a person's life, such as: birth, death, marriage was largely the responsibility of priests, according to the Decree of 1866 that responsibility lies on the civil status "officer" [12] from each commune.

The first law governing the whole name issue is the "special" Law from March, 1895, which offers concrete solutions for different situations, not containing "scattered provisions " [13] like the Code. Due to legislative provisions that were void until then it draged in serious problems. There were some foreigners who carried on a trade in a corner of the country, they went bankrupt, therefore they went to another corner of the country and Romanized theirs names, changing it completely, because there was no relative formality to change the name. So Rosenfeld changed into Rosetti, Rosenzweing into Roznoveanu and Braustein in Brateanu. Although this law was fought with great talent by Delavrancea Barbu it was, however, adopted to meet the needs of those times.[14]

Under this law any person must have a surname. No one was allowed to use a patronymic name other than the one that was registered in the register of civil status. If they did not had such a surname, they were forced to give a statement to the
mayor of the place of origin. Thereby demonstrating that they agree to have as a surname the father's Christian name plus one of the endings “-escu” or “-eanu”, being designed to differentiate name by surname. For example, if the father had the first name as “Ștefan”, his son was to be called “Ștefănescu”. So, most of the villagers who did not have a patronymic name formed one, thus the name acquired was written down on the birth certificate of the person.

In art. 4 states that both legitimate and legitimated children had the same legal fate bearing the surname of their father and art. 47 shows the obligatory passage in the certificate birth of the child of the surname of his father. Article 6 of the same law states that when a child was not recognized at all by any of the parents, it will be recorded in the register of civil status under two names. If, later admitted he will be able to wear the surname of the father who recognized him since that time.[15] The Law also provides the fact that the woman was taking her husband's surname once she married, name lost if she divorced.

Art. 1 of the law states that it is not possible any voluntary change of name, being illegal; but sets no penalty for changing the name. Furthermore, the same article states that the name can be changed only for "cause blessed", leaving the court the freedom to appreciate what are these causes and how they can be determined. In general, it is considered as accepted a request to change the name where this was "ridiculous, obscene or immoral". The request for changing the name was addressed to the Ministry of Justice, following to be published in the Official Gazette and in newspapers. If in a certain time there was not any opposition, it had to be approved by the Council of Ministers. This change fully operate upon the wife and minor children, if necessary.[16]

The name would be for the bearer, as discussed in the French doctrine, the subject of a genuine right of ownership [17]. Each would be the owner of his name. The idea of the patronymic name property can be seen as a vestige of the feudal system in which the surname often represented the name of the lands. Element of personality, the name is not a heritage value and can not be considered as a heritage good, susceptible of property[18]. The ownership right implies a relation between a thing and a person, this right of ownership being, according to the definition, exclusive and individual. Analyzing the situation of co-ownership by joint tenancy, we can see that the property is owned by several people but none of them has exclusive use of the property. As a result, reporting these principles to the right of ownership of
the name, we find that the surname is assigned to the whole family, with situations where there are more than one family with the same surname, without being linked between them. In addition, the owner of the property right has also the right of alienation or use of the property, which demonstrates once again that the name is not susceptible of ownership.

Law of March, 1895 considered in Article 20 that the surname may be subject to a real property constituting by itself a right. Alexandresco stated that "One of the main tasks of the human personality is to have a patronymic or family name. This name is a sui generis property, which no one can uzu"[19]. Therefore, if "the usurper would have taken a name on which has no right or continue to bear a name that has been decided that it is not his, he will be followed after an order devoid of effect, by those of whose names were usurped, in front of the respective courts. Since this provision, it was concluded that "the right to pursue the usurper is not linked to any manifestation of particular interest, the identity of the name is sufficient to require the cessation of usurpation ". [20] In addition, it was believed that the public prosecutor also has the right to follow the usurper, considering that the name protection has a penal and not civil nature. So it is given to all individuals a right of action to quest others to adopt his name, without being considered the moral or material damages to such a "usurpation". Case law has established that it is necessary that the surname of the applicant to be identical to that of the defendant phonetically and spellingly, such as to be in the presence of an usurpation of name, situation that the legislature intended to remove.[21]

The Law above mentioned was repealed with the advent of Law no. 72 of April 1936, law that provided uniform provisions for the entire country, establishing the procedure for resuming the Romanian names in all the provinces that were united with the country [22]. This stated that the legitimate child takes the surname of the father. Illegitimate child, but admitted takes the surname of his mother. Another important provision was that the married woman could add her husband's name along with his own family name. The adopted child added to his name the surname of the adopter, putting this name even before his name, if it were consented. In addition, the name change administratively it could be done only by royal decree and it had an effect on the wife and minor children. Regaining lost or alienated ancient Romanian names was approved by the Ministry of Justice.
Another regulatory was Law no. 29 from January 1942. It provided that the approval of regaining one's name is given by the court. Law no. 29 of January 1942 stated that the benefit of regaining one's name belongs only to Romanian people. The Law no. 26 from 1944[23], expressly provided that the court decision entrusting regaining one's name should be published in tabular form by the Ministry of Justice in the Official Gazette and only after publication, the person in question could bear the name regained. Law no. 646 from 14 of August 1945⁹ repealed Law no. 72 from 1936 and retained the previous rules relating to the acquisition of surnames by law and the administrative name change was approved by the Minister of Justice. Decree no. 54 of 10 February 1949¹⁰ fills up Law. 646 of 14 August 1945. It gives the right to administratively change the name not only the family name, but also the forename. Until this moment the forename could not be changed, its award was linked to the rite of baptism. By Decree no. 272 of 30 December 1950¹¹, civil status is under the management, direction and control of the Department of State for Foreign Affairs, by the General Direction of the Militia (GDM). Decree no. 272 of 30 December 1950, on the name changing, provided that the name change administratively was approved of the Department of State for Foreign Affairs by D.G.M. and it had no effect on the wife and minor children.

Once with the Decree no. 182 of October 19, 1951, it was created the institution of adoption, which is actually an adoption that produces all the effects of natural parentage. Family Code came into force on February 1, 1954. This contained provisions regarding the name in article 27, article 28, article 40, article 62 and 64. According to art. 27 and 28 of the Family Code, there are referrals to the name, only in the sense of the family name that would be used by the couple during the marriage.

In art. 12 of Decree no. 31 of 1954¹² regarding the name of natural and legal persons, it was held that "everyone has the right to a name established or acquired under the law", establishing the name structure and referring to how to change the name administratively. Provisions concerning the name contained also Decree nr. 975 from 1968¹³. Meaning of the name was used in a broader sense in both

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⁹ Published in the Official Gazette No. 183 of 14 August 1945.
¹⁰ Published in the Official Gazette No. 34 of 10 February 1949.
¹¹ Published in the Official Gazette No. 124 of 30 December 1950.
¹² Published in the Official Bulletin No. 8 of 30 January 1954.
¹³ Published in the Official Bulletin No. 136 of 29 October 1968.
regulations, namely art. 12 of Decree no. 31 of 1954 and in art. 1 of Decree nr.975 of 1968, a person’s name includes both family name and Christian name. According to these legal provisions "the name contains last name and first name"[24]. Likewise the expression family name was used in the old Civil Code, specifically in art. 47 and art. 312. In this sense, the family name indicates and appoints all members of a family, applying only to those who descend from a common author. Article 3 of the normative act establishes the rule that "Civil rights are protected by law."

The main argument supporting the concept that identification attributes ,and implicitly the names, are personal non-property rights is provided by art. 54 of the Decree. 31 of 1954. "The person who has suffered damage to his right to name or pseudonym, to denomination, to honor, to reputation, in his personal non-propety right as an author of a scientific, artistic or literary , of inventor work or any other personal non-patrimonial right, it could request the court the cessation of committing the act affecting the rights above mentioned"[25].

There are also a number of other special national laws contain numerous providingd concerning the right to name such as Law 119/199614 regarding civil status updated. In accordance with art. 1 of Act 119 of 1996 on civil status, proof of all these events and activities related to the marital status of the individual, is made by authentic documents, called civil status, in the interests of the State and of the individual. The voluntary nature manifests with this provision, leaving the freedom of parents to choose their child's first name. However, the law imposes conditions that require limited intervention of public administration. Thus, in art. 18 para. (2) provides that "civil status officer may refuse registration of that name if it is made up of indecent or ridiculous words, parents could opt for a suitable name."

From the point of view of private international law in art. 14 para. (2) of Law no. 105/199215 on the regulation of international law stated that: "Protection against acts of infringement to name, committed in Romania, are ensured according to Romanian law".

The Romanian Government Ordinance no. 41 of 200316, regulated the procedure for the acquisition and administratively change the names of individuals.

14Published in the Official Gazette No. 339 of 18 May 2012.
15Published in the Official Gazette No. 245 of 1 October 1992.
16Published in the Official Gazette No. 68 of 2 February 2003.
This ordinance was approved with amendments by Law no. 323of 2003\textsuperscript{17}. The absolute novelty brought by the above-mentioned ordinance consists in regulating express the "main cases which the legislature considers to be reasonable grounds for changing administratively family name and first name, unlike art. 4 of Decree no. 975/1968, which was content to provide that the name change could be obtained for good reasons, not to give explanations in this regard "[26].

Law 272/2004\textsuperscript{18} on the protection and promotion of children's rights, as amended by art. V of Law. 257from 2013 establishes in art. 9 para. (2) that every child has the right to be named immediately after birth, once he is registered. Law 273from 2004\textsuperscript{19} on adoption includes provisions relating to the name in art.53 and art. 59. It was amended by Law no. 233from 2011. Another piece of legislation regulating aspects of the name is the methodology approved by Government Decision no.64 of 2011 on civil status.

Convention on the Rights of the Child, adopted by the UN General Assembly provided in art. 7 the right to a name of the child: "The child shall be registered immediately after birth and shall have the right to a name at this time ...". It is noted in connection with this formulation that the right to a name of the child is born not from the date the child is registered "immediately after birth", but from the date on which it was born alive [27].

With the coming into force of the new Civil Code, the 1-st of October 2011, the right to name receives wider provisions in Book I, TITLE III, Section III- Identify individuals, Section 1-Name in art.82-85. Provisions on the right to a name we find in the title concerning the marriage (art.282, art.383) and in the chapter on adoption (art.473, art.470, art.482), affiliation (art.438, art. 448, article 449, art. 450) or in the chapter on parental authority (art.492) and not least in book VII of the provisions of private law, art. 2568 and art. 2576.

The name structure is established by Article 83 of the new Civil Code which provides: "The name consists of a surname and forename". In addition, art. 1 para. (1) of Government Decree no. 41/2003 [28] repeats the same idea and develops it in the provisions regarding the acquisition and change of names administratively. Family connections are the ones that determine that part of the name called

\textsuperscript{17}Published in the Official Gazette No. 510 of 15 July 2003.
\textsuperscript{18}Published in the Official Gazette No.159 of 5 March 2004.
\textsuperscript{19}Published in the Official Gazette No.557 of 23 June 2004.
"surname", often used in everyday speech as the expression "family name". It is acquired according to the law, without possibility of any manifestations of voluntary choice. As an exception, a limited manifestation of voluntarism is allowed when the child's parents do not share the same name. In this case, the child will bear the name agreed by the parents, that may be the surname of one of them or their surnames combined. If parents cannot agree, the court of guardianship will decide according to Article 18, paragraph (3) of Law no. 119/1996 on civil status papers, republished in 2012.

Voluntarism is manifested as far as assigning the forename by the parents is concerned, designated in common speech as "Christian name". Assigning the forename is voluntary, meaning that the parents are the ones who choose their child's forename. However, the law allows, under certain conditions, limited intervention of the public authority in this area. Thus, according to art. 84 para. (2) second sentence of the new Civil Code, "the registrar must prohibit the registration of indecent, ridiculous forenames which are likely to affect the public order and the morality or interests of the child, as appropriate".

The binary structure of the name was also provided by Article 12 para. (2) of Decree no. 31/1954, which had the same wording as that of art. 83 of the new Civil Code. Therefore, from the perspective of civil law, the name represents the reunion of two non-patrimonial civil subjective rights of an individual, the right to a surname and the right to a forename. Thus, unjustifiably, the component elements of the only right recognized as such by law, the right to a name, reached the status of independent rights. The wording of the provisions of Article 82 of the new Civil Code (text with the same wording as that of Article 12 para. (2) of Decree no. 31/1954, which states that "everyone has the right to an established name or to a name acquired according to the law" ) in conjunction with those of the art. 83 of the new Civil Code, allows no other interpretation than the one according to which the surname and forename are just components of a single right: the right to a name.[29]

Regarding the name, para. (1) of Art.2576 from the new Civil Code provides that one's name is governed by its national law, the family name and first name are included in the area of national law.[30] The provisions of par. (2) of the same article is accepted that determination of the child's name at his birth is governed, by choice, by the law of the common nationality of both parents and the child or by the law of the State where the child was born and lives in childbirth. If the person has no
nationality, according to par. (3), the applicable law shall be the law of the State where it has his common residence.

Establishment and change of name due to marriage, parentage or adoption are subject to the law governing non-material effects of these institutions being in the action area of personal law. In addition, the name change administratively set everything in the personal law unless another legal provision provides otherwise. Protecting name, for acts of violation of the law committed on the territory of Romania, according to the law of our country is ensured. This conflict rule established by par. (3) of art. 2576 specifies only the scope of its law, and without referring to foreign law.[31]

Our Civil Code draft, having as primary inspiration the Civil Code of Québec, which expressly regulates the right to a name in the category of personality rights, made reference in an early stage to the non-property rights and regulated such rights, without specifically using the phrase “personality rights”. Therefore, the new Romanian Civil Code expressly regulates in the Article 58 only the right to life, health, physical and mental integrity, dignity, the right to privacy and the right to a good image. The enumeration made by the legislator is a declarative one and there are also other rights that may be characterized as personality rights. Due to this situation, the law implementing the new Civil Code, Article 20 paragraph 9 was renamed from “Personality Rights” to “Rights of Personality”, and Article 58 was further improved in the way that there are also called personality rights, "such other rights recognized by law." Therefore, we also take into consideration the rights contained in Article 59 of the new Civil Code, namely the right to a name, the right of domicile and the right targeting the civil status.[32] The right to a name is one of those personality rights that are simultaneously identification attributes of the person.

CONCLUSIONS

Nowadays the name of the person and the problems imposed by its use are covered by specific provisions. Every human being, as bearer of civil subjective rights and civil liabilities should be individualized in the legal relationships in which they participate. The name, as an element or mean of identifying physical persons in civil right, contributes to determinate the status of one’s individual holder of rights and obligations in a legal relationship. Peoples can not be outside the legal life at no time,
the individualisation of the physical person being "a permanent, general, social and personal necessity" [33]. A person’s name concerns his family and private life.

References:
Legal Duties Of The Beneficiary Of The Building Works

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Abstract
Based on the analysis of the legal regulations concerning building works, in relation to the quality thereof, the legislature preferred to establish a series of obligations for the beneficiary, even though they may have been regulated as rights of the latter. This method emphasizes once again the importance granted to building works. We have to mention the fact that, this way, the beneficiary becomes the factor determining the quality of building works, more than any other entity taking part in the execution of building works. Pursuant to the law, the beneficiary has all the necessary means to execute the building and to provide the quality thereof, thus being the one in charge with the quality of the works.

Keywords: building works, obligations of the beneficiary, quality of the works, verification, acceptance, execution of the works.

Introduction
The execution and operation of building works involve a series of factors for which, due to the social and economic importance of buildings, the legal regulations in this field set a number of obligations and responsibilities. These responsibilities are largely provided by the legislation concerning the quality of building works. The cause of these regulations is the execution and operation of adequate quality building works, aiming to protect people’s lives, their property, the society and the environment.

The regulations concerning the quality of building works set a minimum standard of quality, the involved factors being free to execute higher quality buildings [1]. Thus, art. 10 of Law no. 10/1995 on the quality of building works provides that technical regulations mainly set the minimum quality requirements for buildings, for the products and processes used for building works, as well as the determination and verification thereof. These technical regulations are established by rules or procedures regarding the design, calculation, composition, execution and operation of buildings.

Concerning the factors involved in the execution of buildings, the beneficiary and the builder are known to have a major role. The beneficiary is the natural or legal

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person making the investment is encountered, which is why it is referred to in the specialized literature as the investor or the owner, also due to the fact that it is the owner of the building (n.n. after the acceptance upon the completion of the works). The builder is the one executing the building works which is why it is also referred to as the executor or the contractor.

In addition to these to major factors, other persons are involved, such as: researchers, designers, project inspectors, manufacturers and suppliers of building products, owners, users, persons in charge with technical execution, technical experts, as well as public authorities and specialized professional associations. Each of them has an important role and adequate responsibilities for the execution of durable and high quality buildings.

The quality of building works is provided by a set of organizational structures, responsibilities, regulations, procedures and means applicable in all the stages related to the design, execution, operation and further use of buildings.

The following requirements must be met and maintained throughout the existence of the buildings, in order to provide the high quality thereof: (i) mechanical resistance and stability; (ii) fire safety; (iii) hygiene, health and environment; (iv) operational safety; (v) noise protection; (vi) energy saving and thermal insulation. These requirements must be considered by all the factors involved in the execution of building works.

We shall further try to identify the attributions and responsibilities required by the Romanian legislation in force for the beneficiaries as well as their obligations under the building contractor agreements they conclude.

**General considerations**

The motivation of the beneficiary for starting the design and execution of a building is necessity, which may be social, in case they have to execute a residential building, or economic, aiming to gain profit, either directly by the sale or lease thereof, or indirectly, by the operation of the building for carrying out an economic activity. Necessity is an absolute requirement for humans. In the absence thereof, the execution of a building is useless and unimportant.

As buildings are executed by humans, but especially as they meet their requirements and as they are used by people for whatever purpose, the quality of building works is extremely important. Actually, in art. 3 of Law no. 10/1995 on the
quality of building works focuses on the protection of human lives and subsequently lists the other purposes of the law such as the protection of people’s property, of the society and the environment. In my opinion, quality should be put first, even before costs [3].

If the need exists, the investor shall start the design and execution of the building according to the urban regulations in force. The investor shall need the building permit to make the investment. There is a dedicated principle that every building needs the approval of the competent authorities. This principle is included in the provisions of art. 1 and of art. 2 paragraph (2) of Law no. 50/1991 on the granting of permits for building works, stating that “the execution of building works is allowed only based on and according to a building/decommissioning permit issued by the local public administration authorities”. The permit is issued “upon the request of the holder of a real property over a real estate - land and/or building - identified with a real estate registration number […], based on and according to the legally approved town planning documentation, to the requirements of the town planning certificate, to the granted permits/approvals, and, as appropriate, based on the opinions/administrative deeds of the competent environmental protection authorities”.

In terms of the building permit, building works are divided into two categories: (i) works for the erection of a building of any kind and (ii) works for the decommissioning or demolition of a building of any kind.

In order to obtain the building permit the investor must comply with a series of regulations. Some of which is being related to the location of the land or building and others being related to the quality of the design and of the materials to be used. As this survey does not imply the limitations and requirements imposed by the location of the investment, we shall focus on the requirements related to the quality of the design and of the building works generating obligations towards the entities taking part in the execution of building works.

For this purpose, the legislature establishes a set of general rules to be complied with by all participants, regardless of the stage of the investment. Thus, the legislature sets an absolute interdiction for all the entities taking part in the execution of building works to use materials with uncertified quality for the execution of the said works, this certificate attesting the quality level according to the requirements [4]. This way, the obligation to use exclusively certified products lies with all the responsible factors involved in the design, execution and use of the buildings. The
certification of the products used in the execution of the building works must be granted by the manufacturers or importers [5].

Another interdiction which is also imposed by the legislature for all entities taking part in the execution of building works, is not to execute any building works based on designs that have not been verified in terms of the compliance with the technical regulations regarding the requirements of attested specialists in the field of design verification, other than the specialists having drafted the designs [6]. Moreover, the technical expertise of the designs and buildings must only be performed by attested technical experts.

Based on the above-mentioned regulations we may notice that the legislature tried not to leave anything at hazard, regulating the quality of the products as well as that of the design, in this case imposing a verification of the compliance with quality requirements to be performed by qualified participants.

The contractor has the major role in the execution of the building according to the requirements, within the execution stage of the building works. However, the legislature preferred to require a continuous monitoring of the quality of the execution to be performed by the investors pursuant to the legislature. For this purpose, investors represented by specialized managers or consulting businesses, must check the quality of the execution of building works.

The execution stage of the works is completed upon the acceptance thereof by the investor. Article 17 paragraph (1) of Law no. 10/1995 on the quality of building works provides that “the acceptance of erected buildings is the certification of their execution based on direct examination, pursuant to the execution documentation and to the documents comprised in the building log book”. We may thus note that the legislature also imposes certain requirements in this stage. On the one hand it requires for the acceptance to be performed on site (direct examination [of the works]) and on the other hand the executed works must be checked in terms of their compliance with the execution documentation and with the documents comprised in the building log book. Provided that the two requirements mentioned above are met, the acceptance can be performed.

Article 21 of Law no. 10/1995 defines investors as being natural or legal persons financing and investing in new buildings or in certain interventions to existing buildings. The said article also establishes the major obligations of the investor in the stage of design, execution and acceptance of the building works.
Duties of the investor

**Investor's duties during the building works in design stage**

**Setting the quality level**

The first major obligation of the investor in the stage of design and execution of the works is to set the quality level to be met by design and execution obviously based on the minimum quality standards provided by the regulations in force.

This moment, considering several factors, such as the location of the real estate, the existing purpose thereof, the best use of the property, the demand on the market, the user profile and others, investors shall practically determine the quality level required for the building to be erected. It is obvious that the above-mentioned factors may also act in certain cases as limitations of the quality level, but the major constraint of the investor is usually determined by the market and by the budget allocated for the execution of the building.

The market is the major factor determining the budget for a building. Thus, in a developing economy such as the one in Romania, the budgets allocated to building works are very limited because although there is a need [given for example the housing market where many Romanians would like to buy a home] the purchasing power of many categories of people is very limited. Under these circumstances, investors may often decide for the budget to be minimum, and, if possible, they may further reduce it during the investment.

We consider that in these cases, the state institutions controlling the quality of building works should be extremely vigilant, and that strict controls should be performed concerning all the requirements mentioned in article 5 of Law no. 10/1995. Unfortunately, this is not the case, and there are also cases in which the buildings are accepted with no actual verification, which hardly meet the quality requirements concerning resistance and stability and fire safety.

A good thing is that there is a number of investors preferring to raise the quality level of the works concerning one or more requirements [7], which grants certain advantages when the buildings are capitalized by leasing or sale.

**Attaining the necessary permits for the investment**

The second major obligation of the investor is related to the attainment of all the permits and authorizations provided by the law as well as of the building permit.
This obligation is very important, as certain authorizations may directly affect the investment and the design.

Generally, these permits and authorizations prior to the attainment of the building permit, impose certain limitations for designers and investors. These limitations may be related to technical or town planning issues.

The investor shall find out what are the permits and authorizations necessary for making the investment after requesting and attaining the town planning certificate. The town planning certificate shall comprise the technical, legal and town planning requirements to be met by the building to be erected.

In order to perform the design and to attain the permits and authorizations required based on the town planning certificate, the beneficiary has two possibilities: they may either perform the design themselves or contract third persons to perform the design. The first solution is rarely encountered in practice, as the beneficiary must have qualified personnel attested for all the specializations required by the law.

The second solution is frequently encountered in practice. For this purpose, the beneficiary shall hire a person to be in charge with the necessary qualified personnel. There are three possible cases involved by this solution. In the first case, the person employed by the beneficiary shall perform the design of the building works. This person is usually the architect who shall also attain the necessary permits, approvals and authorizations related to the building. In the second case, the design shall be performed by the person monitoring and checking the quality of the executed works, namely the consultant. In the third case, the beneficiary shall appoint the contractor to perform the design.

Both if the design is performed by the architect or by the consultant, the risk related to the design shall be borne by the beneficiary of the works under the contractor agreement. Thus, in case of any design defects, the contractor shall be entitled to claim, as appropriate, the extension of the execution term, the payment of additional costs and of the profit rate. In case the design is performed by the contractor, the related risk shall be undertaken by the latter, and the beneficiary shall not have the obligation to extend the execution term, or to pay the additional costs or the profit rate to the contractor.

There are numerous cases in which the investor does not wish to perform the design and assigns this task to the contractor of the building works. Even if the design is performed by the contractor, the obligations related to the authorization of
building works are legally binding for the investor which has two possibilities: (i) to attain by themselves the necessary approvals, authorizations and building permits based on the documentations drafted by the contractor or (2) to authorize the contractor for this purpose based on the building contractor agreement. In the second case, the contractor shall perform the design and based on the granted authorization it shall attain all the necessary approvals, authorizations and building permits for and on behalf of the investor.

In practice, there shall be cases in which the design is undertaken by the so-called "specialized consulting businesses [8]", which are practically referred to as Engineers or Consultants. This solution may be chosen by the investor for economic or organizational reasons. It is definitely more efficient from an economic point of view for the person having performed the design to provide technical assistance on site and to also check the quality level of the works throughout the execution thereof. The second reason for which the investor may choose such a solution is of organizational nature. In certain cases, it is preferable to communicate to fewer people in order to make a decision. It is very difficult to be in the place of the investor which is supposed to make a decision concerning a technical issue for which the contractor, the designer and the consultant have different and even contradictory solutions [9]. The design of the works by the consultant may generate many disputes. Thus, in the event of any defects concerning the design, the contractor must inform the consultant and the beneficiary in this respect. As the consultant drafted the design, it will be difficult for the latter to accept any defects concerning the design and it shall postpone its decision as much as possible. Thus the consultant, which is the specialized representative of the beneficiary on the site, shall be in a conflict of interests. On the one hand it represents the beneficiary and it is the author of the design, and on the other hand it should admit that there are certain defects concerning the design. If the consultant admits that there are defects related to the design, it admits its fault. Otherwise, the consultant shall have to use the contractual mechanisms in order to solve the dispute.

In order to avoid additional costs and the delay of the works, it is recommended that the time allocated for the planning and design of the works to be in accordance with the complexity of the works, regardless of the design being undertaken by the beneficiary or by the contractor. If the time allocated for the design is too short in relation to the complexity of the works, the beneficiary shall have to
cope with the problems arising from the latter’s requests to change the design. These requests to change the design shall lead to the extension of the execution term of the works and may generate additional costs.

**Verification of the designs**

The third major obligation of the investor is to provide the verification of the designs concerning the execution of the building works. This obligation is binding for the investor regardless of the person to which the design works are assigned. After the verification of the design works, after the completion of the design stage and after the attainment of the building permit, the building works may be marked.

Concerning this component of the building quality insurance system, the legislature issued several regulations concerning the verification of both the types of designs and of the subjects able to perform such verifications.

The legislature provides that the verification of the designs is the obligation of the investor and that the designs may be checked by specialized persons [10] attested for the performance of this activity. More than that, there are certain special regulations concerning the quality and experience [11] required for a certain person to be attested to perform this activity. The legislature continued and also regulated the fact that, depending on the training and experience of the applying persons, the latter shall be attested for certain specializations [12] in the field of building works.

Considering the extremely detailed regulation established by the legislature for a person to be certified for the verification of the designs as well as concerning the designs to be checked, we may conclude that the obligation to check the designs is essential in terms of providing the quality level of the building works according to the requirements [13] provided by the law.

In practice, although the legislature grants a specific importance to the verification of the designs, this activity is disregarded by most of the involved factors and is performed by default [14]. The beneficiary shouldn’t neglect this legal obligation, not necessarily based on the penalties under the law. The motivation of the beneficiary is the fact that a lot of time and material resources could be saved if the verification of the designs were made responsibly.
Investor’s duties during the building works in construction stage

Delivery of the site

The beneficiary must deliver the site to the contractor for the execution of the building works. Although this is an essential obligation of the beneficiary, it is not expressly provided by the law. The provisions of art. 1875 paragraph (1) of the Civil Code only stipulate the obligation of the beneficiary to grant the contractor’s access to the access ways to the site and to the water supply plants or other units on the site. The obligation to deliver the site is determined by the cause of the contractor agreement and by the object thereof. Thus, the immediate objective of the agreement would be the execution of the building works against the payment of the equivalent value thereof. The particular nature of the building contractor agreement compared to other contractor agreements is the very object of the agreement, namely the execution of works for a certain building. Consequently, if the execution of a building work is not the immediate object, the agreement shall be null and void [15] and if the object does not involve the execution of works for an existing building, the agreement cannot be classified as a building contractor agreement.

Concerning the concept of site, it is not defined by the law, but according to the arguments in the previous paragraph, the site is the place where the building works are executed. Generally, the object of the agreement requires the performance of both permanent and temporary works. Permanent works are the building works representing the immediate object of the agreement and temporary works are the building works performed in order to facilitate the execution of the permanent works to be decommissioned once the permanent works are completed.

A problem that may be encountered in practice is whether the site concept comprises both permanent works and temporary works. While the contractor agreement stipulates a definition of the site that may include or not the location of temporary works, the problem is solved. If the agreement does not stipulate any definition of the site and a conflict arises between the beneficiary and the contractor concerning the delivery of the site, things get more complicated.

For example, the builder must build a dam comprising a hydropower plant, involving the deviation of the water course and the execution of a series of temporary buildings such as aqueducts and other embankments. None of the contractual documents stipulates the location to be delivered, only mentioning the fact that the beneficiary shall deliver the site. These temporary works were provided in the initial
documentation but the location of these works was not delivered. The beneficiary states that they met their obligations by delivering the site where the permanent works shall be executed. The builder claims that they cannot start the execution of the works if the location of the temporary works and the building permits are not delivered. In my opinion, as long as the initial documentation provides the temporary works, the location thereof, as well as the design for the execution thereof, the beneficiary also has the obligation to deliver the location set for the execution of the temporary works. In this case I consider that the concept of site also includes the location of the temporary works. If the contractual documents include no provisions concerning the temporary works necessary for the execution of the permanent works, it means that they must be executed by the contractor and their location may not be included in the concept of site.

Thus, depending on the complexity of the works, the parties concluding the contractor agreement should define the concept of site. If general contractual terms are sued, where the concept of site is generally defined as the location of the permanent works, the parties should maintain or amend the existing definition depending on the works to be executed.

**Payment of the price**

The beneficiary of the building works must pay the price of the works. This obligation is provided in the definition of the contractor agreement included in the provisions of art. 1851 paragraph 1 of the Civil Code, stipulating that: “under the contractor agreement, the contractor undertakes to execute a certain work, either material or intellectual, at its own risk, or to provide a certain service to the beneficiary, in exchange for a certain price”. The price of the contractor agreement may be an amount of money, a product, a service or a combination between the latter. The Civil Code stipulates three types of prices for building contractor agreements: the estimate price [16], the price based on the estimate [17] and the lump sum price [18].

If the contractor agreement has an estimate price, the beneficiary of the works does not have any obligation to pay a higher price requested by the contractor. If the contractor makes such a request, the latter must prove the causes having led to the increase of the price as well as the fact that the said causes were unpredictable upon the conclusion of the agreement.
If the contractor agreement provides that the price is to be established based on the equivalent value of the executed works, of the provided services or of the delivered goods, the beneficiary must pay the contractor the equivalent value of the works depending on the actual amounts executed. In this case, the contractor agreement usually provides the unit value of the works depending on the types of works to be executed. Thus, upon the conclusion of the agreement, the parties do not know the value of the works, but they do know the unit prices for each type of works. The total value of the works shall be known on the date of acceptance when all the amounts of the executed works shall be known.

If the price of the contractor agreement is a lump sum price, none of the parties shall be entitled to request an increase or a decrease of the said price. The only exception is in the case of the amendment of the initial terms and only if the agreement provides this case. In the lack of such an express contractual provision, the price shall remain unchanged.

In case the beneficiary fails to meet its payment obligations towards the contractor, the latter shall be entitled to a legal mortgage over the works pursuant to art. 1869 of the Civil Code to be established and preserved pursuant to the provisions of art. 2377 of the Civil Code.

On the other hand, if the contractor fails to pay its subcontractors or suppliers, the latter shall be entitled to take direct action [19] against the beneficiary for the recovery of the outstanding amounts until the concurrent coverage of the outstanding amount due by the beneficiary to the contractor.

Assessment of the execution of building works

As we stated before, the legislation on the quality of building works aims the compliance with quality standards in all the stages related to the design, execution, operation and further use of buildings. Once the building permit is attained, the investor shall have new responsibilities. One of the major obligations of the investor when executing building works is to check the correct execution throughout the performance of the works, pursuant to the execution documentation.

This obligation set by the legislature for the investor is logical and it is meant to continue the verification and control process required by the legislature for all the participants in the execution of building works.
As shown [20], in the design stage when the designer has the obligation to comply with quality standards but it is also verified by attested project inspectors employed by the investor. Like in the execution stage when the contractor must execute the building works pursuant to the standards stipulated in the execution documentation, the investor shall check the quality level throughout the execution of the works.

As in most cases the investor does not have the necessary training or qualification to provide the verification of the correct execution of building works, the law [21] requires for the verification to be performed by means of specialized managers or specialized consulting businesses.

Just as in the case of regulations concerning the verification of projects by attested project inspectors, the verifications concerning the correct execution of the works also involve detailed regulations regarding both the objective of the works undergoing verification and the subjects having the capacity to perform the said verifications.

In our opinion, in this stage, if all the participants to the execution of building works act responsibly and professionally, any design or execution errors shall be remedied and the quality of the executed works shall be according to the execution documentation. For this reason we consider that the legal provisions concerning verification throughout the execution of the works should be interpreted as a continuous verification, without being limited only to the determinant stages. This does not imply that the site managers should be permanently present on the site, except for the case in which the rhythm of the execution of building works so requires.

**The remedy of nonconformities**

The fifth major obligation of the investor implies “taking action for the remedy of the nonconformities and defects incurred during the execution of the works, as well as of project deficiencies [22]”.

Thus, in addition to the obligation to check the quality of the executed works, the investor must also take certain measures for the remedy of any execution nonconformities or deficiencies. Moreover, if the designs are ascertained to be deficient, they must be corrected by the investor during the execution stage.
The obligation to remedy the deficiencies observed in the execution stage, even if it is not expressly mentioned by the law, should be reasonably assigned to the investor, as otherwise the works may be continued and even completed and the acceptance committee may reject the acceptance as a result of the fact that the quality level of the building is not according to the execution documentation.

We consider that this obligation was expressly stipulated in the law in order to provide economic effectiveness on the one hand, but also to emphasize that the obligation to verify the execution must render a certain result, namely the execution of a quality building.

In this context, we consider that upon the acceptance of the building works at the completion thereof, the acceptance committee is not entitled to recommend the acceptance of the building works as long as there are major deficiencies regarding the quality of the works for one of the requirements [23], especially if these deficiencies are likely to endanger people’s lives, their property, the society or the environment.

**Obligation to accept the building works**

The building works execution stage ends upon the completion thereof by concluding the acceptance protocol upon the completion of the works. The legislator binds the investor to take all the necessary measures for the acceptance of the building works.

Pursuant to the legislation in force, the acceptance of the building works is performed in two stages [24]. The first stage is the acceptance upon the completion of the works and the second stage is the final acceptance after the expiry of the warranty period.

The main effects of the acceptance are the transfer of the risk [25] from the contractor to the investor and the beginning of the warranty term of the works. Based on the desire to transfer the risk to the investor, and on the other hand to begin the warranty term of the works, it is natural for the contractor to seek the acceptance of the works as soon as possible after the completion thereof.

What happens if the investor fails to meet its obligation to organize the acceptance? In case the investor does not take the necessary steps to organize the acceptance, the contractor is entitled to request the competent court of law to force...
the investor to organize the acceptance under the penalty to pay the conservation expenses and damages.

**The building log book**

The building log book comprises all the technical documents concerning the design, execution, operation and monitoring of the operation behavior of the building, as well as the further use thereof, including all the necessary data, documents and evidence for the identification and determination of the technical state of the respective building and of its further evolution.

It is the obligation [26] of the investor to draft the building log book and to deliver the latter to the owner. Pursuant to art. 75 paragraph (1) letter a) of the Methodological Regulations of 12 October 2009 for the enforcement of Law no. 50/1991 on the authorization of the execution of building works the building log book “must be drafted and filled in during the execution by all the entities involved in the execution of the works, supervised by the site inspector”. With respect to these provisions we would like to emphasize that the reference of the legislature to “the site inspector” may only be construed as a reference to the site manager based on the following arguments: (i) the investor must draft the building log book, and the latter is legally bound to employ certified specialized staff for monitoring the quality of the building works, namely the site manager, and (ii) the phrase “site inspector” is never mentioned in the legislation on the quality of building works in direct connection to any obligation of the investor.

**Building expertise**

Another major obligation of the investor is to perform a technical expertise drafted by a certified technical expert in case the investor makes any interventions to the existing buildings involving rebuilding, reinforcement, transformation, extension, partial decommissioning or repair works.

The investor shall employ a certified technical expert only if the initial designer of the building does not approve with the new design. The expertise shall be performed by a technical expert certified for the performance of such expertise.
Attainment of the energy certificate

The investor has the obligation to attain [27] the energy certificate for the building prior to the acceptance upon the completion of the works. The original copy of the energy certificate must be provided by the investor to the acceptance committee. A copy of the energy certificate for the building shall be appended to the acceptance protocol upon the completion of the works and shall be an integral part of the building log book.

The energy certificate is the deed certifying the fact that the legal requirements concerning energy saving and thermal insulation, as well as those concerning environmental protection, are affected by the quality level of building works. The energy performance certificate is the only deed certifying the extent to which building works meet the quality standards concerning energy saving and thermal insulation. For this reason, the legislature considered that the acceptance may not be performed in the absence thereof, and if the committee dodges these provisions, the acceptance protocol upon the completion of the works shall be considered “null by default [28]”

The investor has the obligation to attain the energy performance certificate for the building when executing new buildings as well as [29] when the intervention works for the structural and architectural rehabilitation of the building also involved thermal rehabilitation works. In the second case as well, the energy performance certificate for the thermally rehabilitated building shall be drafted, upon the request of the beneficiary, by a certified energy auditor for buildings, and shall be financed based on the funds of the beneficiary.

Other obligations of the investor

The investor has the legal obligation to inform the issuer of the building permit and the State Inspectorate for Constructions on the date and time of commencement of the authorized building works and on the time of completion of the authorized building works.

The investor shall visibly display the investment identification board pursuant to the provisions of appendix no. 8 to the methodological regulations [30] of 12 October 2009 for the enforcement of Law no. 50/1991 on the authorization of the execution of building works. The investment identification board must have the size of at least 90x60 cm and must comprise the following information: the name of the
investment, the address of the building, the beneficiary, the name of the general designer, the name of the builder/contractor, the number of the building permit and the date of issuance thereof; the building execution terms (the commencement and the completion date).

The investor shall conclude [31] labor agreements or temporary labor agreements, pursuant to the law, in order to employ the legally certified design inspectors, or it shall conclude a services agreement with an authorized natural person or a legal person having the quality and capacity to perform design inspections.

In the event of any disputes arising between the certified design inspector and the designer, they may be settled by a quality technical expert to be employed [32] by the investor. The expert's decision shall be binding for both parties, and the said expert shall bear the related responsibility.

The investor shall employ a site manager to monitor the correct execution of the building works in terms of quality pursuant to the execution documentation.

The investor shall bear the costs related to the supervision of the execution of building works. The execution of building works shall be monitored by entities certified for this purpose by the authorities: (i) the site manager employed by the investor and (ii) the technical expert certified in terms of execution, representing the contractor (a legal person involved in building activities). The costs related to the monitoring of the execution of the building works by the technical expert certified in terms of execution and by the site manager, throughout the execution, are included in the amount of the general estimate of the investment.

The investor must [33] pay 0.70% of the amount of the expenses incurred for the execution of the buildings and works provided in art. 2 of Law no. 10/1995 subject to the issuance of building permits, pursuant to the law. The owners acting as natural persons executing reinforcement and repair works to their own homes are exempt from the payment of the said amounts. The calculation and transfer of these amounts is done in installments, together with the payment for the building works.

The investor also has the obligation [34] to pay the State Inspectorate for Constructions, on the date of commencement of the execution of the building works, 0.1% of the amount of the works according to the building permit. This amount shall be adjusted on the date of acceptance according to the real value of the building works.
The investors and the other entities taking part in the execution and operation of building works, as appropriate, have the obligation to include in the designs and to use materials with valid technical arguments, and the use thereof must be in compliance with the relevant provisions [35].

Conclusions

Pursuant to the law, the beneficiary has full rights, as well as a series of essential obligations aiming to provide a high quality level of the building works. We noticed that the legislative technique used by the legislature, especially in terms of the quality of building works, is not to grant any rights to the beneficiary, such as the right to inspect the designs or the execution of the works. Based on the importance granted to quality, the legislature preferred to impose certain obligations to the beneficiary, such as the obligation to inspect the designs or the execution of the works.

Moreover, the legislature imposed a dualistic quality check system. Thus, while the designer has the obligation to comply with quality related regulations, pursuant to the law the beneficiary also has the obligation to inspect the quality of the design. The execution stage was also regulated, the contractor having the obligation to inspect the quality of the design, to act in compliance therewith and to employ a specialist to be in charge with the quality of the execution. Furthermore, in the works execution stage, the beneficiary also has the obligation to inspect the quality of the works.

Based on the analysis of the related legal provisions concerning the quality of building works, we may conclude that the beneficiary of the works has a major role in determining the quality level of the works. Thus, if the building works do not meet the quality standards, the beneficiary shall be held liable in the first place, followed by the contractor.

References:

[1] See art. 7 paragraph (2) of Law no. 10/1995 on the quality of building works providing that "Agreements cannot stipulate any quality related levels or requirements inferior to the regulations in force, concerning the requirements provided in art. 5."
[2] See art.5 of Law no. 10/1995 on the quality of building works
[3] Unfortunately in the field of public procurements there is a generalized practice that the sole criterion for awarding the works is the lowest price.
[4] See the provisions of art. 11 of Law no. 10/1995 on the quality of building works
[5] See the provisions of art. 11 of Law no. 10/1995 on the quality of building works and of art. 7 of the Regulation of 7 February 2000 on the exercise of control over the quality of the materials, building elements and products used in building works.

[6] See art. 13 paragraph (2) of Law no. 10/1995 on the quality of building works

[7] These are the provisions of art. 5 of Law no. 10/1995

[8] within international building contractor agreements, the Engineer or the Consultant generally provide, throughout the execution of the building works, the verification of the quality of building works according to the execution documentation. Law no. 10/1995 on the quality of building works includes a single reference in this respect in art. 21 paragraph (1) letter d) where they are referred to as specialized consulting businesses.

[9] This was the case in 2001 when the subcontractor in charge with all installation, electrical, plumbing, heating and air conditioning works for an office building in Bucharest reported that the technical solution concerning the electrical installation works was wrong. At first, both the investor and the consultant, as well as the designer and general contractor took no measures whatsoever. The subcontractor raised the problem one more time right before starting to supply the specific materials. This time, only the general contractor reacted and requested a meeting with the involved factors after a few days. The meeting took place but no decision was made. The specialized subcontractor didn’t want to take any responsibility in this respect and sent a notification by means of the judicial executor to all the involved factors, including to the State Inspectorate for Constructions, suspending the execution of the electrical installation works until the date a decision is adopted concerning the said issues. On this occasion, the specialized subcontractor also notified that, in case the initially designed solution is not changed, it shall not undertake the execution and it shall terminate the agreement concerning the said works. The solution proposed by the subcontractor was adopted after about 25 days, and the latter was appointed to redesign all the electrical installation works. The entire project was delayed by about 20 days compared to the initial completion term.

[10] See art 21 paragraph (1) letter c) of Law no. 10/1995 on the quality of building works.


[12] See the provisions of Art. 8 of the regulation of 20.11.1995 on the verification and technical expertise of the quality of designs, of the execution of the works and buildings approved by Decision no. 925/1995 and the provisions of the Technical Regulation of 26 May 2003 "Guideline for the technical and professional certification of specialists involved in building works" approved by Order no. 777/2003

[13] See art.5 of Law no. 10/1995 on the quality of building works

[14] I was often confronted with the situation in which the design verification term was extremely short compared to the term required for the completion thereof. Another criterion to be considered in order to determine whether the verification of the designs was performed according to the importance granted by the legislature in this respect, is the amount of the fee due to the inspector compared to the fee of the designer for the same specialization.


[16] See the provisions of art. 1865 of the Civil Code

[17] See the provisions of art. 1866 of the Civil Code.

[18] See the provisions of art. 1867 of the Civil Code.

[19] See the provisions of art. 1856 of the Civil Code.

[20] See subsection 3.1.3. above.

[21] See art 21 paragraph (1) letter d) of Law no. 10/1995 on the quality of building works.

[22] See art 21 paragraph (1) letter e) of Law no. 10/1995 on the quality of building works.

[23] See art.5 of Law no. 10/1995 on the quality of building works

[24] See the provisions of art.21 paragraph (1) letter f) of Law no. 10/1995 on the quality of building works and of art. 3 of the Regulation of 14 June 1994 on the acceptance of building works and related installations


[26] See the provisions of art. 21 paragraph (1) letter g) of Law no. 10/1995 on the quality of building works

[27] See the provisions of art. 20 of Law no. 372 of 13 December 2005 on the energy performance of buildings, republished based on art. VIII of Law no. 159/2013 on the amendment and completion of
Law no. 372/2005 on the energy performance of buildings, published in the Romanian Official Gazette, Part I, no. 283 of 20 May 2013, where the texts are renumbered
[28] See the provisions of art. 20 paragraph (2) din Law no. 372 of 13 December 2005 on the energy performance of buildings, republished
[29] See art. 19 paragraph (3) of the Methodological Regulations of 28 September 2011 for the enforcement of Law no. 153/2011 on the measures to be taken for increasing the architectural and ambient quality of buildings
[30] They were approved on 23-11-2009 by Order no. 839/2009
[31] See the provisions of Art. 4 of the regulation of 20 November 1995 on the verification and technical expertise of the quality of designs, of the execution of the works and buildings
[32] This possibility is stipulated in art. 14 of the regulation of 20 November 1995 on the verification and technical expertise of the quality of designs, of the execution of the works and buildings
[33] See art. 40 of Law no. 10/1995 on the quality of building works
[34] See art. 30 of Law no. 50 of July 29th, 1991 on the authorization of building works.
[35] See art. 27 of the regulation of 21 November 1997 concerning the technical agreement for new building products, procedures and equipment.
Considerations on the legal status of third-country nationals who are long-term residents in the EU

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Abstract
This article aims at presenting and interpreting the general terms of the framework comprising the rules and obligations of the legal status of third-country nationals who are long-term residents.
The presentation of these aspects is important because it enables us to understand the entire scene and to seek solutions to align the frame to the current needs of this category of persons.
Keywords: migration, third-country nationals, long term residents, rights, obligations, Directive, EU

Setting up the scene
Migration has become a joint responsibility of the EU Member States following the introduction of this provision by the Treaty of Amsterdam [1]. The second Directive derived from by the introduction of common EU migration competence by the Treaty of Amsterdam, is Directive 2003/109 / EC [2]. This represents an important milestone in the development of EU [3] migration policy. It establishes the rights and conditions for granting and withdrawing long-term resident status of third-country nationals who meet a number of conditions. Besides the necessary criteria to be met for obtaining long-term resident status in the territory of a Member State, the Directive [4] provides travel conditions in another Member State and rules that must be fulfilled to obtain long-term resident status in that State.

Long-term residents is defined as third-country national who is in has long-term resident status and has met the conditions on the acquisition in question, conditions on the duration, and order and public security [5].

Obtaining long-term resident status is allowed only for third country nationals residing legally in a Member State [6]. Certain categories of legal residents have the right to obtain long-term status resident: those conducting studies or training courses, those who benefit from temporary protection or expects decision on obtaining this protection, those who reside due to subsidiary forms of protection or have applied for such protection pending the decision on the admission or rejection, are refugees or awaiting a decision in this regard, temporary residence as an au pair or seasonal workers are posted in the provision of cross-border services or the provider's organization border if the residence permit has been formally limited or if they have a
status governed by the Vienna Convention on Diplomatic Relations and Consular special missions on the Representation of States in dealing with organizations with universal character.

Long-term resident status is granted to nationals of third countries who meet legal and uninterrupted residence provided for five years in a Member State [7].

Are not to be taken into account such periods of residence in order to fulfill legal residence requirements for obtaining long-term resident status for the following categories of persons: persons who have temporary residence in the territory of a Member State in quality au pair, seasonal workers or seconded to the provision of cross-border services or cross-border services provider if the residence permit has been formally limited or if they have a status governed by the Vienna Convention on Diplomatic Relations and Consular special missions on the Representation of States in relationships with organizations with universal character [8]. Instead, people who perform studies or training courses and legally residing in the territory of a Member State and hold a residence permit that allows them to obtain long-term resident status will be taken into account in calculating the period of five years half the duration of studies. The time period needed to be fulfilled doesn't need to be read literally, but in virtue of the law. It says that the resident may be absent from the territory of more than 6 consecutive months fits into a maximum total of 10 months over the five years [9]. If these conditions are met, inwardly given period, they will be taken into account in calculating the period of five years. For special or exceptional reasons but must be temporary and in accordance with the legislation of the Member State, it may accept that 5 year period is not interrupted by a period of absence longer than 6 consecutive months or 10 months inwardly term five years [10]. But in this case, the absence will be considered in calculating the period of five years. However when posting periods of absence is due to reasons of service or within cross-border services, Member States may take into account periods of absence. Besides the condition length of stay of third country nationals must prove for themselves and family members who have dependents that they have sufficient resources, stable and regular health insurance to cover risks in general for nationals of the Member State concerned. Member States may add integration provided that the conditions under national law.

Cumulative fulfillment of conditions and lack of danger on grounds of public policy or public security lead to obtaining long-term resident status.
Third-country national must make a request to the competent authorities. He must also add documents established by the national law, among which may be required, in case of need, a valid travel document or certified copy thereof. In six months maximum authorities shall notify the applicant of the decision and of the rights and obligations they have. The consequences of the absence of a decision after the expiry of six months will be regulated in national legislation.

If the decision to grant long-term resident status is positive, then the third term resident receives permanent status and long-term residence permit and in accordance with approved unique model. The validity of the residence permit of at least five years. It may be renewed by law, upon application, if required [11].

If the decision to grant or renewal of the permit is negative, the applicant shall be notified in accordance with relevant national legislation. This decision will be motivated and will provide legal options that you have access to regarding national legal term.

According to article 13 law may provide more favorable conditions than the present Directive [12], to issue residence permits of permanent or unlimited validity. Residence permits in question can not grant the right of residence in other Member States.

Although long-term resident status is permanent, it can be withdrawn or lost when they are found to have been obtained by fraudulent means or when to take measure of expulsion for national concerned or when he was absent for more than 12 consecutive months the EU [13]. Member States may derogate special or exceptional reasons for withdrawal or loss of long-term resident status for the absence of the EU for 12 months [14]. Even when obtained long-term resident status to see that no threat to public order, it can this status as a result of committing a crime that generates such a threat. Another situation that may lose status in question occurs when obtaining long-term resident status in another Member State. Loss of status occurs when there is an absence of six years of its territory. However, Member States may derogate from this rule when there are special reasons for absence over six years.

Permit expiration is not a fact that causes withdrawal or loss of long-term resident status. Expulsion is not a prerequisite when a license expires or is withdrawn. National legislation may provide for cases in which a national of a third country or territory not to leave when they lose or residence permit is withdrawn only
if it meets a number of conditions and not high on a threat to public policy or public security.

**Equal Treatment [15]**

Article 11 provides for the rights which the third when a third country acquires long-term resident status.

Third-country nationals who acquires long-term resident status recognized as equal treatment with nationals on many rights that they have. Member States may provide in national legislation and other areas in which to apply equal treatment.

Access to a job as an employee and self-employed, terms of employment, work, payment and dismissal will be the same for the two categories of residents. The exception imposed by the Directive [16] refers to restrict access to employment in all conditions involving the exercise of public authority. For some jobs or for some independent activities restrict access Member State may apply long-term residents, whether under national law they are reserved to nationals.

Across the long-term resident of the Member State shall be guaranteed access, within the limits provided by law.

Education, training, grants and scholarships that are related rights which has long-term resident. According to the law, they can be restricted to registered or usual place of residence in the territory of the Member State. If these rights are required for family members, it can be restricted to their residence. Complementary to this law, but without influencing each other, long-term residents enjoy under domestic law, the right to recognition of diplomas, certificates and professional qualifications. Moreover, Member States may require proof of appropriate official language as long-term residents can have access to education or training.

It gives equal treatment with regard to social security, social assistance, social protection and tax benefits recognized national citizens. The State may choose to limit equal treatment to core benefits.

Access to goods and services and the provision of public goods and services and access to procedures for obtaining housing are guaranteed to long term residents as well as national citizens. Freedom of association, affiliation and participation in an organization of workers or employers or any professional organization and rewards are guaranteed long-term residents.
Expulsion [17]

Long-term residents can be expelled from the territory of the Member State only when it is a genuine and sufficiently serious threat to public policy or public security. If such a decision is adopted, the resident may exercise jurisdictional way both. To assess such a case, it will consider the following elements: length of stay, age, consequences on the person and his family ties with the country of residence and origin. Economic reasons can't generate as resident considering such a threat. Long-term residents who do not have the sufficient resources will receive equal treatment with nationals regarding legal assistance.

Another Member State, Dealines and Family Member

To obtain the right to stay for longer than three months in another Member State, long-term resident must meet a number of conditions. Member States may limit the total number of persons who have the right to stay wish, if they have a prerogative in force in this regard in the domestic law, the coming into force of the Directive [18].

The motivation of the need for residing on the territory of the second Member State may be: do business as an employee or self-employed worker, studying or training classes or for other purposes. Not within the scope of this article deadlines and stay a long residence in the Member States as an employee seconded by a service in a cross-border provision of services firms or service or borders. Border workers and seasonal workers may be under guardianship by the provisions of domestic legislation.

Member States may intervene when long term resident of another Member State wishes to pursue an economic activity as an employee or independent worker to make an analysis of the labor market and apply their national requirements for engaging in such and pursuit of them. It can be applied preference for Union citizens, nationals of third countries if required by the Union acquis for third country nationals or legal residents who receive unemployment benefits in the Member State concerned. Article 21 (2) [19] add the prerogative of states to restrict access for up to 12 months salary in other activities than those for which they were given the residence permit for residents carrying out economic activities as an employee or self-employed. Member States may determine in the national legislation the
conditions of access to a place of work as an employee or self-employed, for residents who hold a residence permit.

Long-term residents must meet a number of conditions to obtain a residence permit on the territory of a Member State [20]. In addition to the provisions of this Directive, Member States may require third-country nationals to comply with integration measures in domestic legislation. For example, school attendance may be required for learning.

Within three months from the date of entry in the Member State must submit to the competent authorities, an application for residence permit. This may be submitted to the competent authorities of the second Member State while still residing in the territory of the first Member State, if MS. According to paragraph (4) shall be accompanied by a residence permit valid travel document or a certified copy of it and other supporting documents established by national legislation. One of the acts may be evidence of possession of adequate housing.

If interested person, attend education or training courses could also be asked proof of registration from an accredited institution for their performance.

If interested person may be required to wages is evidence of a contract of employment, a statement attesting the existence hiring employer or a labor contract proposals.

If interested person is self-employed worker who will have to prove that the company has the necessary funds for such activities by submitting the necessary documents.

Residents must demonstrate the stable and regular resources that can support the maintenance of his and his family without recourse to social assistance. These resources can be assessed by comparing them with the states in local labor wages and pensions.

Another condition that must be met is that the existence of a health insurance that includes risks normally covered in the Member State concerned for its nationals. May be required to undergo a medical examination may be free for both long-term resident and his family members. This exam can't have a systematic character.

Following the application for obtaining the permit, the competent authorities shall examine the application in more than four months. The term may be extended by 3 months in exceptional circumstances related to the complexity of the application or when the necessary documents are missing.
Once it is found that all the conditions, the residence permit for residents and family members. It may be renewed upon request at expiration. The decision taken will be communicated by the second Member State to the First Member State. Regarding the residence permit issued to family members it can be renewed for the same period for which the residence permit was issued long-term resident.

If the decision of the second Member State is to refuse the issue or renewal of the permit, the long-term residents will have a judicial review on his territory.

If the decision by the competent authorities of the Member State is to provide a residence permit, then it will be analyzed to ensure equal treatment Article 11.Membrii family will benefit from the rights provided by the article 14 Directive 2003/86 / EC .

Long-term residents who exercise their right of residence in the territory of one second Member State may be accompanied by family members already established in the first Member State [21].

Family members must be those specified in Directive 2003/86 / EC of 22 September 2003 on the right to family reunification. Article 4 (1) indicate that family members can accompany it: the sponsor's spouse, minor children of the sponsor and of his spouse and minor children adopted minors and minor children of the sponsor adopted when it exercise parental rights of children or when it is in its maintenance. Besides family members tutelage of Article 4 (1) of Directive 2003/86 / EC may be authorized to accompany or join him and other family members already established. Supporting documents which may be required family members are: residence of the sponsor, a valid travel document or its certified copy, proof of membership of the family in the first Member State holding evidence satisfactory stable and regular resources for maintenance safari resort social welfare, health insurance covering all risks in the second Member State.

In case the long-term resident exercising the right of residence in a second Member State wishes to be accompanied or to join people who were not part of the family established in the first Member State shall apply the provisions of Directive 2003 / 86 / EC [22].

Family members and long-term resident will be refused to grant long-term residence permit if a threat to public order or public security [23]. For making such a decision will be analyzed severity or nature of the offense or the danger of the person
who committed the crime. The decision refusing to grant the permit can’t be justified by economic reasons.

Another cause may be denied a residence permit application is the threat to public health that are long-term residents or their family members [24]. Which diseases constitute grounds for refusal to enter the country or issue a residence permit defined by the World Health Organization and infectious or contagious parasite when they are subject to protection provisions nationals in the country of destination. If the disease is contracted after issuing a residence permit in the second Member State shall not constitute a refusal to renew or expulsion.

Member States may define more restrictive provisions in domestic legislation.

Long-term residents of the first Member State and family members may be required under national law to leave the territory of the second Member State, until obtaining a residence permit [25]. Withdrawal or non-renewal of the license may be motivated by the threat it represents to public policy or public security, or if not all conditions that led to its issue or if not lawfully residing in the territory of the second State member.

If you decide to withdraw or refuse to renew a residence permit in the second Member State, the first Member State shall be informed by the second on the decision. Following the decision taken long-term resident of the first State and his family members will be admitted immediately to the first Member State.

If it is decided the expulsion of long-term resident until issuing the permit for reasons of public order and public security, the second Member State shall consult the first Member State. If the decision taken as a result of consultations with the first Member State is expulsion, then the second Member State shall provide information on the implementation of the removal decision.

Can’t be permanently rejected for cases where the expulsion decision for not fulfilling the conditions of giving the permit and the cases when the third country national doesn’t fulfill any more the condition if residence on the Member State in question.

In case the long-term resident was denied renewal or residence permit was withdrawn in the second Member State, the readmission obligation remains valid for the first Member State without being detrimental to the possibility of a third move into a third Member State.
Conclusions

Third country citizens who have long-term resident status are the most predictable and stable of all categories of migrants. Their status is defined by the EU acquis and consider it the most extensive confer rights of the given categories of migrants.

Limited rights for family members and the significant conditions that they must meet, individualize a restrictive regulatory framework.

We consider that it is important to recognize more rights for this category of migrants. We opt as being important to extend the guarantee of equal treatment of in terms of social security.

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[7] Idem, Art.4
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[9] Idem, Art. 4 (3)
[10] Idem, Art. 4 (1)
[13] Idem, Art. 9 (1)
[14] Idem, Art. 9 (2)
[15] Idem, Art. 11
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[19] Ibidem
[20] Ibidem, Art. 15
[21] Idem, Art. 16
[24] Idem, Art. 18
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The divorce in national and european practice

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Abstract
According to international and national law, divorce or separation of parents should not have a negative effect on the relationship between parents and children, unless the parent would endanger the minor. Civil Code regulations must conjunction with Law 272/2004, with the Charter of Fundamental Rights of the European Union and the provisions of the 2006 Strasbourg Convention on personal relationships concerning children.

The article presents legal proceedings regarding divorce, and how to handle accessories applications in accordance with national law and international law.

Keywords: divorce, custody, housing, application

Introduction
Dissolution of marriage by divorce is a legal procedure [1] that takes effect for the future be instrumented by the court or by the notary or officer of civil status. On the basis of dissolution through divorce but are specific reasons but limiting and distinct from those that determine the invalidity of which are expressly and exhaustively required by law. In addition, divorce produced legal effects for the future, unlike the nullity where they relate to both past and future.

Conceptual [2] divorce became a consent of the spouses divorce which is given in reverse to that of marriage and in the same time a family law specifies penalties, considered as true remedy for the parties.

Legal issues
Regarding fault divorce parties, the application is submitted by the applicant to the competent court or the court in whose jurisdiction the latter family residence is located or as an exception to the residence of one of them. Please note that the common residence includes both the spouses actually live and that of the residence of her husband where the children are in that moment, if the spouses live separately. According to legal regulations spouses during the marriage may have separate houses with their consent, for good reasons and have the right to decide which of them will live to their children. Once the home in which the minors reside was established, it can not be changed except by a new agreement of the spouses or if it
can not get through a court ruling. Thus, if the spouses did not had a common household will be competent[1] to judge of the court having jurisdiction over the defendant husband's house, or if the defendant does not live in the country house husband applicant.

Regarding the competence of the court, if it was legally referred, it will be competent to rule on applications and accessories divorce in accordance with art.918 of the Code of Civil Procedure, respectively the exercise of parental authority, the child home, personal connections between parents and children and the costs of raising and educating. Because of these issues, the application for summons for divorce must include [3] besides the general elements the names of minor children or the name of the adopted or otherwise mention that from the marriage did not result children. Of course, if the spouses have agreed on these accessories requests they will be accepted by the court only when they were made in accordance with the law.

Previous Constitutional Court's decision on compulsory procedure for informing the possibility of a divorce settlement through mediation prior to filing for divorce was compulsory for spouses to undergo this procedure. The provisions on mediation can be found in Law no. 192/2006 and were intended to give spouses the possibility to agree on divorce and on accessories applications and relieving the courts by this procedure of the taking of evidence in this regard. Mediation offers the opportunity for the parties to achieve a partial understanding of aspects of divorce, following that the court will hear evidence only related with issues that could not be resolved by spouses consensus. Previous legal provisions specify that the lack of informing of the spouses about the advantages of mediation will determined the rejection the application for divorce by the court as inadmissible. Thus spouses were forced to Annex to the application for divorce a minutes that included their understanding of the issues of divorce and accessories, procedure that currently is not required.

On the other hand, before the divorce court decided on divorce applications and accessories, the law provided including the legal possibility for the parties to understand in particular on the maintenance obligation of parents towards minors, collecting government benefits, setting minors or use family dwelling house. Of course, all these measures could be taken by the court only provisionally, even during the divorce judgment.
Legal practice

In the present case, the applicant requested the court to pronounce judgment on:

1) exercise of parental authority by the applicant solely on the basis of the provisions of article 398 NCC for minor result of marriage or alternatively if you will not admit this request jointly exercise parental authority by both parents

2) determination of residence of the minor to the applicant

If the court will not allow these applications, alternatively applicant request to this institution to allow him personal connections with minor through a schedule of visitation at his home, under Article 401 paragraph 1 C prev pr civ.

In proof [4] of his claims the applicant said that in fact the parties were married and from this marriage resulted a minor, matrimonial relations between spouses after becoming irreparable. It states that the defendant left the shared residence of marriage for months, and now having a relationship with another man who lives with rent, undocumented, in a building small comfort. In his view this property the defendant lives for a while, can not provide minor corresponding growth conditions, which generates instability directly, and not covering its needs according to his age of 6 years.

The applicant informs the court that it had in his exclusive property adequate housing conditions and the location of this home is several minutes difference to minor school. This home offers the minor the possibility to attend school safely, because the minor in this case will not cross any street traffic. In this flat, said the applicant, the minor increased from birth and until when his mother left to shared residence with another man in a rented apartment.

In addition, it is noted that is very best known the minors attachment to the house where they lived from an early age, given the habits acquired by them. Keeping former minor home in which he has grown, does not mean the impossibility for the mother to have permanent access to it.

However, permanent change of home produce imbalance in development and daily life of the child, but it is necessary that the minor personal program should not be affected. Availability and attention of the applicant to the needs and requests of minor, are emphasized and prompt compared to those of his mother, who has no patience to achieve the child's needs.
Change of residence of the minor, on the one hand, it makes it no longer benefit from the presence and support of the complainant and because of that will violate both parental rights in terms of duties of care, upbringing and education.

In this regard, the applicant may change at any residence without knowing where they will be able to move, resulting in lack of access to a minor. Moreover, the minor shall be separated irreparable to the opportunity to benefit from the help and support of the complainant, support with which it is used. It is noted that the applicant, due to its flexible working program, can offer to the minor permanent material and emotional assistance, supplying his mother's absence who did not want to get involved in his care. The complainant show that the situation created by the defendant who choose to left the minor in the care of the applicant, was created because his mother has a limited time to spent with him, due to its program of work. On the other hand the presence of another man in the minor life is not beneficial for him, because it does not develop the ability to discern this type of events and in the end he will be affected emotionally.

The notion of the child's best interest. CEDO practice

The origin of the concept of the child's best interest stems from the realization that this is an individual who has different needs and rights distinct of those of the parents. Hence his interest might be different from the parents or guardians. Therefore it is normal that the child's interests prevail over other interests when taking action on child. Recommendation 874/1979 of the Council of Europe Parliamentary Assembly as a first principle states: "The children should not be considered the property of the parents but must be recognized as individuals with their own rights and needs". The same recommendation states that children need to have their own legal representation in the event of conflict between parents. Therefore divorce and separation procedures should be improved, and based on the principle that the child's interests are paramount.

The concept of contact with the minor was introduced by the 2006 Strasbourg Convention on contact concerning children is a broader concept which replaced the notion of "right to visit the children" commonly used in the past with a more complete phrasing that focuses on child rights law separated from one or both parents to maintain personal relations and direct contacts with both parents. The Convention also expanded the number of people with whom the child has the right to maintain
personal relations, including in this list not only parents but also others grandparents, brothers etc. In the literature, older necustodian parent's right to maintain personal relations with the child and the child's right to maintain personal relations with a parent or other significant person in his life is called the right of access but which, in the modern view brought by law [5] is only a component of the right to personal relationships. There are several embodiments of personal ties such as the right to access, access rights, the right to housing, the right to correspondence, the right to receive personal information about the child and the child's right to receive information about significant people in his life. All this is covered by art. 15 of Law 272/2004.

Conclusions

Measures applied to the court thus considered only minor interest to be protected in terms of physical and mental integrity. The interests of the child falls within the child's right to physical and moral development normal to socio-emotional balance, family life, as asserted by art. 8 of the European Convention on Human Rights. The exercise of parental authority by both parents prescribed by the New Civil Code, is a right of the child, but there are exceptions.

Thus, according to art. 401 of the Civil Code, parents separated from their children have the right to have personal contact with them. This law is the expression of the constitutional principle of the right to family life and special protection of children's rights. As a result, according to art. 14 para. 1 of Law no. 272/2004, "the child has the right to maintain personal relations and direct contact with parents, relatives, and other persons to whom the child has become attached".

In this regard, in the Official Gazette of Romania, Part I, no. 607 of 30 September 2013 was published Law no. 257/2013 amending and supplementing Law no. 272/2004 on the protection and promotion of child rights, planning to consider all legislation.

Exercise of parental authority exclusively by a single parent can be motivated through its capacity to provide greater stability, both physical and emotional, as well as the existence of possibilities much larger than the other parent resulting from better professional training, which would provide the optimum environment for the harmonious development of minor.
Determination of domicile of the minor to a different address than the one to which the minor resides and joint custody can create the opportunity for the defendant to close the relationships between the other parent and the child. On the other side, establish exclusive custody of the minor can create opportunities for better coverage of the need for growth and education.

References:
5. Law no.272/2004 on the protection and promotion of child rights.
Considerations on the freedom to work

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Abstract
The concept of the freedom to work has, or, at least, should have, a very broad meaning. We believe that this concept refers to both the freedom to choose a job (or not to work) and the right, had by every citizen of an EU Member State, to move to other Member States to seek and accept a job in those countries, without discrimination, regardless of the country of origin, the level of education, gender or any other discriminatory criteria, under the same conditions as the nationals of that State. Discrimination is basically a restriction of the freedom to work or even its total annihilation. Freedom to work also requires another aspect, namely the prohibition of forced labour, considered a crime by the criminal laws of all the EU Member States. Only understood together, these issues can highlight the true dimension of the freedom to work. 

Keywords: freedom to work, forced labour, human rights, right to work

PRELIMINARIES
The fundamental principles governing the labour relationships are expressly set out in the Romanian Labour Code, Title I, Chapter II (Articles 2-9). Moreover, these principles are also outlined in the literature [1] and in domestic and international provisions regarding the recognition of and guaranteeing the fundamental human rights in the European Union norms and in the conventions and recommendations of the International Labour Organisation, and in the rules of international labour law. The human rights can be divided into civil and political, economic, social and cultural rights. Some rights that are considered ‘mixed’ are added to the already mentioned ones, such as the right to freedom of association, considered as a civil and a political right at the same time.

The freedom/right to work
The provisions of Article 3 paragraphs (1) and (2) of the Romanian Labour Code state, ‘The right to work is guaranteed by the Constitution. The right to work may not be abridged. A person shall be free to choose his/her job and profession, trade or activity to perform’. According to this principle, anyone is free to work, anywhere in Romania or in the Member States of the European Union without administrative conditionality. These provisions resulting from the Article 3 paragraph (2) of the Labour Code are consistent with the provisions of the International
Covenant on Economic, Social and Cultural Rights, which, in Article 6 paragraph 1 state that the right to work includes the right of everyone to earn a living by work freely chosen or accepted. The Romanian Constitution recognizes the nature of a fundamental right of the right to work, stipulating at Article 41 paragraph (1): ‘The right to work can not be restricted. Choice of profession and employment are free’. We can notice that, unlike the constitutional provision which refers to the 'right to work', the Labour Code refers to freedom to work.

The general theory of law admits that ‘the idea of right’ presupposes a correlative obligation. The notion of ‘freedom’ does not imply a corresponding obligation, so it was accepted [2] that the constitutional provision must be interpreted as freedom and not as a right, as the state’s correlative obligations do not include that of ensuring a place of work. The freedom to work enables free choice of employment and profession, occupation, work, and the freedom not to work effectively prohibits the state or any other person to compel someone to work.

The principle of freedom to work is also found in the Universal Declaration of Human Rights, which, in Article 23 paragraph 1 'proclaims that everyone has the right to work, to free choice of profession and type of work, to just and favourable conditions of work performance'.

Everyone has the right to appropriate facilities for vocational guidance, in order to help him choose an occupation suited to his personal aptitude and interests. [3]. No one can be denied access to appropriate facilities for vocational training. [4].

According to Article 15, paragraph (1) of the Charter of the fundamental rights of the European Union, ‘Everyone has the right to engage in work and to pursue a freely chosen [5] or accepted occupation’ [6], having the right to same working conditions as other citizens of the EU. The expression “working conditions” must be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union [7]. Article 156 (ex Art. 140 TEC) states that the Commission shall encourage cooperation between the Member states and facilitate the coordination of their action in all social policy fields, particularly in matters relating to: employment; labour law and working conditions; basic and advanced vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene, the right of association and collective bargaining between employers and workers. An essential component of the recognition of the freedom to work is also the recognition – in the Charter, at the same Article 15, paragraph (2) – of the freedom of the
workers’ movement, the freedom to seek employment, to work, to exercise the right of establishment and to provide services in accordance with Articles 26, 45, 49 and 56 of the Treaty on the Functioning of the European Union. The freedoms to which we referred above assume no discrimination based on nationality, regardless of the nationality of the person (if originating from a Member State). The only limitations that can be made are those arising from reasons of public policy, public security or health [8]. Without these limitations, the worker has the right to accept offers of employment, to move freely – in order to work – on the territory of any Member State; to stay on the territory of a Member State in search of work, in conditions similar to those of the citizens of the Member State; to remain in the Member State after having been employed.

The right to work was also guaranteed by the provisions of Article 2 of the previous Romanian Labour Code adopted before 2003, which provided that any citizen had the right to conduct business in a particular area, according to his ability and/or training, depending on the needs of the whole society.

The principle of freedom to work can not be violated, even if an agreement between the contracting parties is signed, such an agreement being null and void.

The freedom of individuals to work does not imply the employer’s obligation to employ any person, without personnel selection. The only restrictions on exercising the right to work can be provided by special laws designed to protect the employer or the employee. For example, the non-compete clause envisages a restriction on the freedom to work, the employee being required not to work for the competition. [9]

Under the provisions of Article 41 of the Romanian Constitution, the right to work can not be restricted, and the choice of profession and employment is free.

The existence of the right to work does not imply the obligation to work, such an obligation being removed in Romania with the abrogation of the Law no. 25/1976 and the Decree no. 153/1970, after December 1989.

Nowadays, in Romania, because the Romanian Constitution specifically refers only to the fact that the right to work can not be restricted, without providing a citizen with a working place by the competent agencies of the State, we cannot talk about guaranteeing the right to work, but we can talk about the possibility to work, if the citizen finds himself a job.

Under the provisions of the Decree no. 153/1970, all individuals able to work were obliged to perform a socially useful activity. Those who were able to work but
refused to do so could be sentenced to up to 6 months in prison for this offence. Work had therefore the legal physiognomy of an obligation for those with a working capacity until their retirement. The State was required to provide every citizen a job that was as much as possible according to their training and skills.

Currently, the regulation of the right to work does not mean the obligation to work; each person is free to choose the option to work or not to work, forced or compulsory labour being prohibited. Moreover, the State, through its institutions, including the education and training ones, no longer takes any responsibility in providing employment for graduates. The European Social Charter provides that, for the effective exercise of the right to work, the parties (employer and employee) are committed to achieving and maintaining the highest and most possible stable full-time employment, protecting the worker’s right to earn a living through honest and freely undertaken work [10].

Freedom to work necessarily also involves prohibiting any form of discrimination. Under the provisions of the European Convention on Human Rights [11], exercising any right provided by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Romanian legislation prohibits any direct or indirect discrimination among employees, discrimination which may occur for reasons such as: gender, nationality, age, race, ethnicity, religion, political orientation, social origin, disability, membership or trade union activity, sexual orientation. By discrimination one should understand any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, beliefs, sex or sexual orientation, membership of a disadvantaged group or any other criterion which aims or affects the restriction or elimination of recognition, enjoyment or exercise, under equal conditions, the human rights and fundamental freedoms recognized by law in the political, economic, social, cultural or any other field of public life. At Article 6, the Government Ordinance no. 137/2000 lists as grounds for discrimination the following: belonging to a certain race, nationality, religion, social or disadvantaged category, because of beliefs, age, sex or sexual orientation of a person. Any such discrimination in an employment relationship and social protection, except the cases provided by law, falls under the order mentioned and shall be considered an offence.
Discrimination can arise in a worse treatment granted to an employer on one or more of the above considerations, in any employment relationship. Such relationships are, as listed by law:

a) completion, suspension, modification or termination of employment;
b) establishing and modifying duties, employment or wages;
c) providing other social rights than those representing the salary;
d) professional training, reconversion or promotion;
e) enforcement of disciplinary measures;
f) the right to join a union and access to the facilities it grants;
g) any other conditions of work performance, according to law.

In conclusion, we can say that in Romania, guaranteeing the right to work is a reality, but this guarantee of a right does not imply the guarantee of a working place. Under the conditions of a free market economy, it would be difficult for a state to require all its citizens capable of work to carry out such an activity. For this thing to happen, it would be necessary for the state to assume the obligation to provide, to find anyone able to work a job, which would be very difficult, especially when the majority of the traders on the market are private individuals. Through its institutions, the State is only able to take economic measures to provide certain facilities, tax exemptions, etc., so as to stimulate the creation of new jobs and reduce the number of unemployed, especially in situations of economic recession.

In modern law work is no longer seen as a ‘commodity’ that the employee ‘sells’ to the employer. Labour law is part of both private and in public law due to the penalties it contains. The trend that currently exists is to place labour law under the umbrella of private law. Providing real freedom to labour implies the possibility of negotiating the employment contract. According to the principle of negotiation, for the purposes of good labour relations, the participants of the labour relations will inform and consult each other under the conditions of law and collective employment agreements. Article 6 of the European Social Charter states that all workers and employees have ‘the right to bargain collectively’. Article 28 of the European Charter on Fundamental Rights provides the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. Also, workers are entitled to be informed, in good time in the cases and under the conditions provided for by the Community law and national laws and international practices, and
consulted about the company’s problems. [12]. Workers have the right to take an active part in improving the environment and working conditions within the company they work in [13].

PROHIBITION OF FORCED LABOUR

As we have already shown, there is an inextricable link between the freedom to work and the prohibition of forced labour. Moreover, the literature in the field of labour law, most often, does not analyze separately forced labour.

A person is free to work (or not to work) anywhere in Romania or on any territory of the Member States of the European Union without administrative conditionality, so it becomes obvious that no one can be forced to work.

According to Article 5 of the European Convention on Human Rights: ‘No one shall be held in slavery or servitude’ [14], and ‘no one shall be required to perform forced or compulsory labour’. [15]

According to Article 4 of the Romanian Labour Code: ‘Forced labour shall be prohibited’. ‘Forced labour’ means any work or service imposed on a person under threat or for which he/she did not freely express his/her consent.

It is not considered forced labour or activity imposed by public authorities:

a) the fulfilment of the civic duties established by law;

b) the work done by a person on the basis of a final judicial conviction or during probation, under the terms of the law;

c) the work carried out in case of an act of God, respectively war, disasters or disaster danger such as: fire, flood, earthquake, serious epidemic and epizootic, animal or insect invasions and, generally, in all circumstances threatening the life or the normal living conditions of the entire population or a part of it.

Another situation which is not considered forced labour is military service or any other service when military service is denied due to reasons of conscience in the countries where this is recognized as legitimate (it is not the case in Romania where compulsory military service was repealed).

The fundamental law, Article 42 paragraph (1) provides that forced labour is prohibited.

At the international level, the International Labour Organisation Convention concerning Forced or Compulsory Labour no. 29/1930 founded the prohibition of
forced labour, stating that the absence of a legal obligation to work is a guarantee of the freedom not to conduct such an activity.

Since the right to work is regarded as an expression of human freedom and personality, it is considered that a person can not be compelled to perform the work which he has not chosen, or not accepted freely or to work somewhere where he has not accepted freely. No one may be compelled to work or not to work in a particular job, in a particular profession.

The Romanian Labour Code, at Article 4 paragraph (1), states that forced labour is prohibited. According to the provisions of paragraph (2) of the same article, the expression ‘forced labour’ means ‘any work or service imposed on a person under threat or for which he/she did not freely express his/her consent’.

In the new statutory of contravention the provision of the community service is also introduced as a sanction, but such a penalty can not be imposed unless the offender consents to the sanction, solution derived from the view that human rights and freedoms should have priority, including the right to work, not the obligation to work, even if the obligation is determined by a final sentence of conviction [16]. It follows, the author concludes, that if the summoned offender is absent from the proceedings, the court has no right to replace the penalty of imprisonment for minor offences, applied as the result of the transformation of the unpaid fine within the legal period of time.

Forced labour is seen as a crime in all modern European penal codes. The new Romanian Penal Code criminalises forced or compulsory labour in Article 212, which states, ‘The act of subjecting a person, in cases other than those provided for by law, to perform work against his will or compulsory labour is punishable with imprisonment from one to three years’.

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[3] European Social Charter from 1961 (ratified by all member states), pct. 9
[6] Paragraph (2) of the same article states that ‘Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State’; according to paragraph (3) ‘Nationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union’.
[16] D. Țop, Dreptul muncii... ,op. cit., p. 38
Abstract

Although an absolute separation between law and morality is not possible, we can assert that law and ethics approach in different manner notions such as equity, righteousness and justice. It is precisely this different approach, the different acceptations of these notions, that permits us to analyze the principle of equity and justice as a law principle and not only as an ethical one. “Equity” may be considered as both an ethical and juridical principle, which is underlying the social relations in the spirit of righteousness, equality and justice. “Justice” also has a twofold meaning: jurisdictional authorities from a state, an ensemble of laws and courts and, the second meaning, an ideal of impartiality and equity. Once such principles are consecrated by a rule of law, they will act, they will produce specific effects, inside the frame of juridical systems, giving us thus the possibility to analyze them from a juridical perspective.

Keywords: equity, justice, morale, ethics, legal values

INTRODUCTION

Considering that some of the general principles of law originated from values that are not exclusively juridical ones, their content cannot be regarded as being solely juridical. Accepting that between law and morale, between the law and the protection of fundamental societal values and behavioural patterns there are still very strong connections, we must acknowledge the existence of a general principle of law which can be referred to as the “principle of equity and justice”. The joining between justice and equity in this principle surmises the equal, unbiased distribution of justice in a society, but also it may express a sense of ideal, an ultimate goal, or at least a direction that law must follow. The general principle of equity and justice offers a better cohesion to other principles of law. The principle of equity requires the legislature to have an advised behavior in the activity of creating new laws and in maintaining a state of equilibrium for all the recipients of a rule of law [1]. Aequitas has precisely the meaning of fairness, symmetry and equal treatment in similar situations.

EQUITY AND JUSTICE, AS INSEPARABLE LAW PRINCIPLES

According to an author, “Acknowledging that rightly locates the law not behind the wizard’s curtain, or the judge’s robe, or the bureaucracy’s labyrinth, but on the table between the state and its citizens”[2]. Justice has become a less abstract
concept, a product of negotiations and thusly it has even become, somewhat, a concept closer to the idea of democracy. Both Kant and Rousseau were considering justice as an innate quality of human beings. From a Christian perspective, justice has an external source, as it originates from God (Saint Augustine). In another perspective, righteousness and equity appear as a convention between people. Such a conception can be intuited in the works of Plato, who asserts, in Gyges [3], that everyone believes justice is more profitable than injustice and they are right. However, if anyone was to have such powers as Gyges, and he would not touch the property of others, he will be considered as foolish. According to Plato, human beings are not born with a sense of justice, but rather is the fear of punishment that guides their actions, and if they would have the possibility to elude punishment, any human being would violate the rules for obtaining a benefit. In the same work however, Plato supports the idea of good and justice, as an idea that must be transformed into reality by the state, an idea that brings us closer to the gods. Justice is “in itself the greatest good for the soul” and that “you should perform good deeds even if u where to have the ring of Gyges and the helm of Hades also”[4] and thus, by “cultivating virtue one would resemble the gods”[5]. Aristotle begins his *Nicomachean Ethics* [6] saying that any art (skill, craft), any investigation and any action, as well as any decision should seek a good purpose. The “good” is considered either relative or absolute [7]. The intention of any legislator is, according to Aristotle, to make the citizens better, by accustoming them with the good. This is considered to be an important element that differentiates a good law from a bad one. Plato’s disciple was defining justice as a moral precept due to which we can achieve just deeds or we desire to achieve them, and injustice determines us to be complacent in perpetrating or wishing to perpetrate unjust deeds [8]. Aristotle considers as obvious that the one who is acting according to law and honours equality will be considered righteous, therefore the notion of “righteousness” signifies legality and equality and the notion of “unjust”, illegality and inequality; we call “just” that which creates and maintains a political community happy and that also maintains its constitutive elements and justice cannot exist without law [9]. According to Rousseau, the sense of justice is innate in human beings and it is less affected by external constraints.

Whatever the reason would be, that determines peoples not to commit unjust deeds, the idea of equity and justice relies, gains legitimacy today, through its accomplishments, through its efficiency, rather than from the authority that is acting
in order to impose justice. The utility of a rule of law tends to replace the personal characteristics of the legislator or the enunciation of a “good purpose”. It would be unacceptable however, to consider the rule of law, and law in its entirety, as having a sole purpose: the solving of conflicts; or as being only the result of a negotiation between the subjects and the state. Accepting this idea would imply that there is a total separation between law and any moral idea, would mean the abandonment of any ideal of justice and equity. Most of the rules of law are, in fact, statements of value, thus protecting essential aspects of the society as a whole. Law justifies itself by both is capacity to solve conflicts and by the fact that it must follow a finality, it must be lead by certain principles and ideals. Law finalities designate a desirable model of evolution for the legal realities, model that should satisfy the needs and the aspirations of the human individual, the requirements of social progress, in agreement with the values of an historical period, model that should contribute to fulfilling the specificity of law, but also in avoiding its distortion, in its concertation with other systems of social norms [10].

Although between law and morale there are certain common grounds, the obedience towards the rule of law is independent of the moral autonomy of individuals, of their own conception regarding what is just and what is unjust. We should also note that the law cannot be conceived outside the sphere of fundamental human rights, which guarantee the equality of individuals [11]. Admitting that law is, at least in some of its aspects, separated from morality, or amoral, we must also admit that law must also have finality, a purpose that should lead to what is considered as being good. Even if a law cannot be described as “good” by itself, any juridical system must fulfil a positive role. If law is at least partially amoral, that would imply that it can also harm the society. This is why it is not sufficient, for example, to acknowledge certain fundamental rights, without having the possibility of guaranteeing their efficiency, or without ensuring that those rights are not recognized in an equitable manner. A system of law cannot surmise, cannot protect the totality of values that exist inside a society. However this does not mean that it cannot identify behaviours that are compulsory and that it cannot distinguish between the rational and irrational promotion of such values [12]. This is one of the reasons for which law is still connected with morale, the reason why any law system must achieve a hierarchy of values, even if, unlike law morale is a closed normative system [13]. In the state governed by the rule of law, any hierarchy must tend to an ideal of justice
and must imply an equitable enforcement of the rule of law. The ideal of justice surmises the idea of equity, which implies that all individuals must receive equal treatment, in similar situations, but also different treatment when there are significant differences. The idea of rational equality between free individuals is closely related to the idea of justice. The rule of law is guided by the idea of just and the elementary precepts of not harming, of giving to each his own, of maintaining an equilibrium between the conflicting interests, in order to ensure essential order and the progress of the human society [14].

The almost definitive separation between law and religion, as well as the evolution of the social life lead to the emergence of multiple systems of values that coexist, that are more or less clashing in a society, within the boundaries of a legal system. Accepting that between law and morale (laic morale) there are still important interpenetrations, we must admit the fact that the law cannot be considered merely an arbiter, which oversees the clashes between social values, without interfering in any way. There is a certain line that once crossed, the conflicts between values seize to have a constructive role, seize to protect the values that are fundamental for a society and can even contribute to their destruction. In order to avoid such an outcome and to ensure the functioning of the state governed by the rule of law, it is necessary to have a basic knowledge of the values that are becoming axioms for the members of a society, values that are “coagulating” around ideas such as equity or justice. Equity and justice are in fact fundaments of the state governed by the rule of law, state which is an ideal that seeks to be achieved [15].

Law may demand us to act in the interest of other individuals or following a general interest. Law imposes behaviours, values. Such actions would not be achievable, in the state governed by the rule of law, without the acknowledgment of a minimal set of values, which are common to the majority of the citizens and that are not ignoring, in an unjust manner, the value systems of other citizens. Recognizing and guaranteeing fundamental human rights and freedoms is an essential requirement for any modern state. However, human rights cannot be perceived without resorting to principles such as equity or justice. A fundamental right, no matter how beautifully proclaimed, would be nothing but a void statement without equity. Any guaranteed law is a promise, an insurance, which the state is not able to withdraw at a latter point. This is the reason why the recognition of new rights should be carefully analysed. It is certain that the state governed by the rule of law cannot
survive without human rights. However, at the same time, it is clear that acknowledging a large number of rights that cannot be guaranteed, would compromise the idea of equity and justice. Law however cannot be reduced to human rights, as it also has to maintain the legal order, to protect certain values, in a state that is capable of respecting the promises made to its citizens. The doctrine [16] has identified the existence of a "juristocracy", as a danger that threatens the existence of the democratic state, danger that appears as a result of the excessive independence of the judicial power. The independence of the judges must be a means to an end and not a purpose in itself [17]. It is necessary for the judicial power, as well as for the other powers in the state, to be limited, by the balance of power (or, in other words, limited by the "conflict" between themselves) and also by human rights. Not recognizing the judicial enough power in order to fulfil its goals may also lead to inequitable solutions, especially due to the high degree of generality that the rule of law has, which has to be applied to any particular situation that might occur. Recognizing to much power for the judicial might lead to abuses, arbitrary and disregard towards the separation of powers. Equity imposes a constant revaluation in order to correct the incapacity of the law giver to foresee all the situations that might arise [18]. Such a rectification corresponds with a change that the legislator would have made, provided that he would have known that particular situation. Thus, applying a law in an equitable manner, interpreting a rule of law does not constitute, in most of the cases, a violation of the principle of legality. In fact, equity is also a principle of international law. Article 38, paragraph (2) of the Statute of the International Court of Justice provides that the Court has the right to solve a case ex aequo et bono.

As history has shown repeatedly, the harshness of punishment is usually related to poor normative rules. The majority of citizens comply with laws that are effective, equitable and just, even if the punishment is not severe. The expectation for a law to be just may be considered as a legitimate one in a democracy. It becomes thus necessary for the legislator to avoid oppressive lawgiving. Modern law has separated itself from the justice imposed by the gods. Hence the obligation of the state was born, to continuously improve laws, to aspire to an ideal of perfection. Justice, equity, other general principles of law, the powers of the state, the judicial system in its entirety are interdependent. Therefore, in order to reach just decisions, the "whole" must function in a flawless manner. Even totalitarian regimes sought
ways to simulate, to give a just and equitable mask to their law systems, knowing that obedience towards laws and responsibility of the citizens are possible only way the individuals trust the rule of law and the fact that their values and ideals are being protected.

Aristotle has defined distributive justice, according to which, if the individuals are not equal, than the rewards that they are receiving cannot be equal either. This fact becomes a source of quarrel and mutual accusations, when the equals have and receive unequal parts or when the unequals receive equal parts, according to the principle “to give to each his own” [19]. The idea of proportion is decisively, as what each receives from the society must be proportional to his merits and his own contribution. It is obvious that, in this acceptation, distributive justice seems harsh and not necessarily just. This is exactly why joining together equity and justice, as a general principle, is not at all redundant, since the two notions are not synonyms. In a certain degree, justice has to be harsh, cruel, blindfolded (as the famous representation, omnipresent in our courts of law, probably a combination between Themis and the Roman goddess Justitia), immune to human sufferance, as it pursues its only purpose: to give to each his own, to re-establish the ruling of the law. Equity along with other principles, such as the recognition of human rights are the ones that are imposing a certain sensibility, a justice “with a humane figure”, even if this would also imply a certain degree of subjectivity in the decisions of the courts, a justice that may even, in some situations, infringe social or legal norms (for example the principle of error communis facit ius), in order to ensure an equitable decision. According to the European Convention on Human Rights, article 6, paragraph (1), “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. […]”. Similar provisions may be found in multiple international human rights documents (and even other documents that don t have the value of a treaty, such as the Universal Charter of the Judge).

According to Kant, human beings can never be considered as means, but only as purpose. We would dare assert that the purpose is not necessarily the human being, but his becoming. The violation of fundamental human rights cannot be justified, even if such an action would lead to what may be perceived as a benefit for the society. It is certain that human beings must be put in the centre of legal
concerns, but they too are limited, at least to a certain extent, by the fundamental rights and freedoms we have to acknowledge for future generations. Superiority of the law compared to any other human rules comes with a cost: that of the promise that the state makes that he will enact and enforce the rules of law in an equitable manner, while following an ideal of justice, inevitably based on the idea of equity, thus effectively guaranteeing fundamental human rights and freedoms and maintaining the legal order.

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Illegal interception of computer data transmission in the regulation of the New Romanian Criminal Code

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Abstract
The recent explosive development of information technology has triggered new methods of committing crimes, others than those included in the so-called traditional template. As in the text of the new Criminal Code of Romania the legislator pays special attention in the field of computer crime, this paper aims at treating in detail, several specific issues related to the offense of illegal interception of computer data transmission, that has constantly grown to be a substantial threat for the current economic and social reality.

Keywords: crime, illegal interception, computer data, the new Romanian Criminal Code.

1. Introductory remarks
The offenses in the field of computers is a rather new domain because the very substance of criminal legislation has appeared only in recent years, due to the astounding advances that have occurred in the theory of systems, in cybernetics, as well as in the manufacturing of computer technology. [1]

Computers have penetrated the progress of all countries, becoming indispensable tools for various activities. They have had a global impact on daily life, on the way of doing business, on communication and on information management. This new technology has brought a sum of great benefits for administration, business and even on individuals themselves. However, this rapid and radical evolution raises a number of problems both of socio-economic nature with the concerns about jobs, but also of legal nature, for example in the protection of computer programs and data security. [2]

As only a small proportion of criminal offenses related to the use of computer systems can come to the knowledge of criminal investigation bodies, at this point it is very difficult to achieve an overview of the extent and evolution of the phenomenon. Even though it is possible to perform an adequate description of the types of offenses encountered, it can hardly be easy to present a synthesis related to the extent of losses caused by them and to the actual number of crimes committed. [3]

The offense of illegal interception of computer data transmission is seen as complementary criminality in relation to the access, without right, to a computer
system; actually, in many cases, both offenses may exist in a consequential relation. [4] In what follows, a thorough approach to the main elements and modifications of the offense of the illegal interception of computer data transmission is performed, according to the new rules in the Romanian Criminal Code.

2. Legal content

The previous Romanian Criminal Code did not contain specific regulation on the offense of illegal interception of computer data transmission, which does not mean that the crime had not been sanctioned by the Romanian law before the entry into force of the new Criminal Code. The offense of illegal interception of computer data transmission was regulated in a special law, namely the article 43 of Law no. 161/2003 on certain measures to ensure transparency in exercising public dignities, public functions and in business environment, on preventing and punishing corruption, which read:

“1) The interception, without right, of a transmission of non-public electronic data that is intended for a particular computer system, comes from such a system or is carried out within a computer system, is a crime punishable by imprisonment from 2 to 7 years.

(2) The interception, without right, of electromagnetic emissions from a computer system, which contains information that is not public, is sanctioned with the same punishment.” [5]

The entry into force of the new Romanian Criminal Code meant special focus on cybercrime by regulating in the content of the new legal act, more precisely in Title VII, Chapter VI, the offence of illegal interception of computer data transmission. Thus, the article 361 of the new Romanian Criminal Code defines the crime of illegal interception of computer data transmission that is in its formulation, very similar to the previous legal text, namely:

“ (1) The interception, without right, of a transmission of non-public electronic data that is intended for a particular computer system, comes from such a system or is carried out within a computer system, is a crime punishable by imprisonment from 1 to 5 years.

(2) The interception, without right, of electromagnetic emissions from a computer system, which contains information that is not public, is sanctioned with the same punishment.” [6]
It can be easily noticed that almost the entire new text of law only is identical with the previous regulation, being different only in the modification related to the legal sanction on committing such a crime, namely the reduction of its limits. Whereas the Law 161/2003 provided imprisonment from 2 to 7 years for the party found guilty of the crime of illegal interception of computer data transmission, the new Romanian Criminal Code imposes a penalty of one to five years for the same offense.

3. The structure of offense

3.1. The object of offense

The legal object consists of all social relations regarding information privacy (the right to data secrecy). [7] The criminalisation of illegal interception in the new Romanian Criminal Code is a measure, both technical and legal, that eventually aims at the protection of the right to privacy of communications. Moreover, the right to protection of correspondence is formulated in Article 8 of the European Convention on Human Rights, the text focusing on covering any forms of data transmission (by mail, fax, telephone, etc.)

The material object is represented by the stream of the information packets (the sequence of “0” and “1” bits, i.e. the sequence of electrical impulses resulted from the controlled fluctuation of voltage), which are transported from one computing device to another or within the same system of information, and towards which the offender’s interest is focused. [8]

Specifically, in the case of paragraph 1, the material object is the material support through which communication is performed, especially the data transfer via public or private telecommunications and on which the intercepted computer data are stored.

In the case of paragraph 2, the material object is made of the electromagnetic energy (emission), that radiates or is identified in residual form or in uncontrolled/uncontrollable form in the vicinity of the electronic equipment that make up the target computer system. Thus, the electromagnetic emission around a device (printer, monitor, cable, etc.) will not be considered as material object if, at the moment of interception (capture), this was not connected to a computer system according to paragraph 2. [9]
3.2. **The subjects of the offense**

3.2.1. **The active subject**

The new Romanian Criminal Code does not require in the wording of article 361 that the offender of the illegal interception of computer data transmission should meet any special quality. Therefore, the active subject of this crime can be any natural or legal person responsible to criminal law.

For the offense formulation, the offender must necessarily use (directly) certain electronic equipment specially designed for interceptions in the IT environment, the possession of specific knowledge in the field being irrelevant [10]; yet, one statement should be added in this case, namely the fact that this type of crime is most often committed by people who possess expertise in this area or have access to computer systems.

With respect to the prosecution, all the known forms are possible, more precisely, other persons may participate as instigators, accomplices and co-authors in the offense of illegal interception of computer data transmission.

3.2.2. **The passive subject**

The passive subject is mainly represented by any person or entity, legally holding the information system or the components of transmission between two or more computer systems. [11]

In a secondary plan, the passive subject is the rightful owner of the intercepted computer data or the person concerned directly envisaged by the computerised procession of these data. [12]

4. **The content of incorporation**

4.1. **The objective side**

4.1.1. **The material element**

The material element of the crime of illegal interception of computer data transmission is characterised by the action of interception, by any means, of data or electromagnetic emission (the programme submitted by the interaction of electric currents and magnetic fields. [13] The interception (in the technical sense) is the action of capturing by using an electronic device specifically made for this purpose or by a computer, the electrical impulses, the variations in voltage or the electromagnetic emissions transiting the inside of a computer system or manifesting
as a result of its operation time or existing on the route connecting two or more communicating systems. [14]

In order to achieve the material element of the objective side, the action of interception must cumulatively meet the following requirements:

- The interception takes place without right, a condition provided by both paragraph 1 and paragraph 2 for the offense;
- In the first normative variant (paragraph 1), the interception must concern a transmission of non-public electronic data that is intended for a computer system, comes from such a system or is carried out within a computer system. [15] In the case of paragraph 2, the transmission is related to an electromagnetic emission generated by a computer system containing data that are not public.

The European Convention on Cybercrime [16] expressly provides that interception must be carried out by technical means. The Romanian criminal legislator in the text of Article 361 has not expressly provided for it, probably considering that such a provision would be irrelevant, given the fact that interceptions in the digital environment can be achieved exclusively by using technical means.

The technical means include technical devices fixed on the transmission lines to collect or record communications or computer software that facilitates data interception. [17]

The term “non-public” used by the criminal legislator is related to the former normative variant (paragraph 1), namely to the nature of the transmission (communication), and not to the nature of the transmitted data. There is irrelevant whether the transmitted or communicated data are public or not, as long as the parties involved in the transmission process understand the necessity of performing this operation under the condition of confidentiality (privacy). There are also situations when the data are kept secret (protected) until, for example, the access to them (the service) is paid for. In other words, the concept of “non-public” established by the legislature does not exclude per se the communications made via public networks.

The investigation must be concerned with the entities that are involved in the data transmission: between the computer systems, between the components of different systems or between the components of the same system and also with the identification of the material support by which the access is done, regardless of the fact that the data transfer is performed through networks by cable or WLAN or that
the cables and issued signs (wiretapping, Eavesdropping on Emanations) are intercepted. [18]

In the latter normative variant, contained in Article 361, paragraph 2 of the new Romanian Criminal Code, the interception of electromagnetic emissions without right is criminalised. This takes the form of capturing the present radiations or electromagnetic fields (on a scientifically determined distance) around any device subject to the transit of electrical or electromagnetic pulses. For example, by using a special device, people with certain interests can capture electromagnetic radiations around the target computer monitor and “translate” them, that is turning them into electrical impulses and then in alphanumeric characters.

Another requirement for the existence of the crime, present in both normative paragraphs, is that the offender should have acted without right. The act will be legitimate if the party who shall intercept data has the right to benefit from the communicated data, if they act under the disposition or authorisation of the participants or of the recipient of the transmission, if the data are intended for their own use or for public use, or if, due to a specific legal provision, the supervision is authorised in the interest of national security or in order to allow the authorities to uncover certain crimes that were committed. [19]

4.1.2. The immediate result

The immediate result is in the detrimental effect on the interests of the persons legally performing the transmissions of information. The text of the law does not expressly require the production of a particular injury. It is sufficient to intercept transmissions without the requirement that the data thus obtained be disclosed to others. [20]

4.1.3. Causation

With regard to causality, we are of the opinion that it results precisely from the materiality of the offense ex re. The crime of illegal interception of computer data transmission is one of danger (formal), a reason for which causation simply results from unauthorised interception of data transmission.

Even if effective results are not produced, in the cases of social danger offenses, the created state of danger can have the ability to produce a socially dangerous result. Within this category of crime, the social danger, more precisely, the harmful consequence, results from the materiality of the act, i.e. from the forbidden act of behaviour.
In formal offenses or those of social risk, the socially dangerous result and thus, the hurtful immediate consequence is presumed. In terms of probation, it should not be proved. [21]

4.2 The subjective aspect

As far as the mental attitude of the offender at the time of committing the crime is concerned, we should notice that the offense of illegal interception of computer data transmission can only be committed intentionally and not by negligence.

The question is whether it can be committed only with direct intention, excluding the possibility of the indirect intention. There are interpretations that the crime of illegal interception of computer data transmission can be committed only with direct intention (qualified intention). The explanation may be found under the grounds of the analysis of the material element of the objective side, hence it is impossible for the offender, foreseeing the result of its action, to capture (and possibly to record) the communication data packets in a computer system or between two such systems, without pursuing this possibility, accepting instead only the possibility of producing the result. [22]

In other authors’ opinions, [23] it is considered that the subjective element of the offense is represented by the intention, in its both direct and indirect forms.

As for us, we shall rally the latter opinions expressed in practice, due to the fact that the Article 361 of the new Romanian Criminal Code does not require that the offender should pursue a qualified aim in order to commit the offense, an aspect for which we consider that the crime of illegal interception of computer data transmission can be committed with both direct and indirect intention.

5. The forms of the offense. Sanctions and procedural aspects

5.1 The forms of the offense

The preparatory acts, although possible and sometimes even necessary, are not covered by the legal text of the new Romanian Criminal Code. However, they may be the object of an autonomous offense if all the constitutive elements of the offense in question are present.

Regarding the attempt to commit the offense of illegal interception of computer data transmission, we must highlight the fact that it is penalised and punished by criminal legislature. The new Romanian Criminal Code, under Article 366 provides
that the attempt to all the offenses under Title VII, Chapter VI, is sanctioned, the illegal interception of computer data transmission being found in this category. [24]

The consumption of this offense occurs at the moment when the socially dangerous consequence is produced, that is the breach of confidentiality on the content of electronic data transmission, thereby creating a state of danger to the social values protected by law. The exhaustion of the offense of illegal interception of computer data transmission takes place at the time of the last act criminalised by law in any of the normative variants.

The offense can be performed both in simple and continuously repeated forms. [25]

5.2. Sanctions and procedural aspects

Before the entry into force of the new Romanian Criminal Code, the offense of illegal interception of computer data transmission was sanctioned by criminal imprisonment from 2 to 7 years.

The new Criminal Code has opted for a reduction of the sentence limits for this crime, so that at present, the illegal interception of computer data transmission is punished with imprisonment from one to five years. [26]

Criminal proceedings shall be initiated ex officio.

Conclusions

Romania, as well as the entire world need cyberspace – this intense and frequent phenomenon of our times – to be safe, free and open. The new Romanian Criminal Code brings important changes in the category of cybercrimes, treating them with great stringency, managing to correlate the legal provisions on such offences with the current technology and the new methods of committing crimes.

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References:
[8] Ibidem