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CONSTANTIN HAMANGIU: A COMPARATIVE STUDY ON THE NECESSITY OF APPLYING THE PRINCIPLE OF LEGISLATIVE UNIFICATION

Professor Gheorghe CALCAN, PhD

Petroleum-Gas University of Ploiești

calcangheorghe@yahoo.com

Abstract

Our paper aims at presenting the vision of Constantin Hamangiu on the necessity to accomplish legislative unification and, implicitly, the administrative one. This process took place in Romania after the First World War, simultaneously with other European countries. A supporter of the idea of legislative unification, Hamangiu conducted a comparative study on the topic by analyzing the process in Romania, as well as in France, Italy, Poland and Czechoslovakia. His conclusions were that achieving unification by means of extending the legislation existing in the "mother state" (i.e. France, Italy) to the provinces integrated in 1918, was correct, and that, in case of Romania (where the process of legislative unification was prolonged), there was the urge to accelerate this process.

Key words: *legislative unification, Romania, France, Italy, Poland, Czechoslovakia.*

1. Introduction

In 1918, the Romanian provinces outside the Romanian state, namely Bessarabia, Bukovina and Transylvania, united with Romania[1]. Therefore, political unification was achieved, but the newly constituted unitary national state also needed administrative and legislative unification.

Legislative unification represents an important direction of our research activity. We may mention in this respect several works, of which we particularly highlight: *Unificarea administrativă a României întregite (1918 – 1925). Integrarea Basarabiei, Bucovinei și Transilvaniei în structurile administrației românești* (The Administrative Unification of Great Romania (1918 - 1925): The Integration of Bessarabia, Bukovina and Transylvania in the Structures of the Romanian Administration), Mega Publishing House, Cluj-Napoca, 2016. When elaborating this monograph, I surveyed the opinions of several

lawyers, such as Andrei Răulescu. In a previous short study dedicated to Constantin Hamangiu, I briefly approached his vision on the issue of administrative unification [2].

This paper aims at further investigating the topic, by analyzing the comparative study Constantin Hamangiu performed so pertinently on the process of legislative unification in several countries that either integrated new territories or constituted themselves as national states after the military operations of the First World War, states such as: France, Italy, Poland, Czechoslovakia.

2. Preliminary considerations

In the Explanatory Memoranda to the Draft Bill for the Enforcement of the Civil, Commercial and Criminal legislation throughout Romania, from 1931 [3], actually the completion of the legislative unification process in Romania [4], Constantin Hamangiu analyzed how this process had been carried out in other European countries. In 1860, Napoleon III introduced French legislation in Nice and Savoy. The Germans did a similar thing in 1871, when they annexed Alsace and Lorraine and extended their national legislation to the newly annexed territories.

After the First World War, when Alsace and Lorraine were integrated back to France, the process was repeated, obviously in the opposite direction. In 1919, there started the process of gradually introducing French legislation in these two provinces, process that had salutary results, as highlighted at that time by several specialists from the University of Strasbourg, such as law professor J.B. Niboyet. A similar series of events took place in Italy, where the unification of constitutional, administrative, criminal and fiscal law had been completed with good results by 1923 [5].

The idea of extending the legislation of a national state throughout its territory was very well understood by the federal states after the First World War. For example, between 1873 and 1890, Germany gradually introduced the German Civil Code in its entire national territory. Such a decision could “reflect the evolution of the federal states to the unitary states”. It was thus certified the fact that “legislative unification is the basis of political unity” [6]. As a matter of fact, this principle was stipulated in the German Constitution of 1919 (Articles 6 and 7). The same thing happened in Switzerland. (In 1905, a Swiss civil code was adopted at the level of the entire state confederation) [7].

Comparatively, immediately after 1918, in Romania, the legislation that had to regulate the functioning of the public services was still not unitary. In the opinion of Constantin Hamangiu, this lack of cohesion would lead to national “prejudice to the exercise of sovereignty” [8]. By maintaining in the provinces united with Romania the traditional, local legislation, there was created a paradoxical situation, namely the fact that the laws of ministries organization were modified by local laws. Specifically, in the field of disciplinary law, prior to the adoption of the Statute of civil servants in 1923 [9], these had been disciplined not in relation to the provisions of the new Romanian unitary national state, but according to the local legislation from the former states, no longer existing at that time [10].

The old legislation was temporarily kept in force in almost all the states that changed their territory after 1918. Immediately after the return of Alsace and Lorraine to France, local laws were maintained. Nevertheless, jurisprudence supplanted the absence of the new legislation, by stating that French law had actually replaced the German one [11].

This phenomenon occurred in the Romanian state, as well. However, in the case of civil laws there were identified serious problems. Specifically, the Romanian supreme court annulled several wills drafted in the Old Kingdom and validated those elaborated in the united territories. Therefore, the need for legislative unification appeared as a necessity, emphasized the Romanian jurist [12].

3. Legislative unification in France

In Alsace and Lorraine, several measures of legislative unification were adopted since the armistice. Civil and Criminal Codes were maintained in force, whereas the laws that contradicted the new situation of the province were disregarded. After the ratification of the Peace Treaty by the French parliament, there effectively started the process of legislative unification by extending the French legislation [13]. Thus, one month after the ratification of the treaty, on November 25, 1919, the French administrative jurisdiction was introduced [14]. There were registered several discrepancies between the old and the newly introduced legislation, and, as a consequence, a special law stipulated the way to

solve these inadvertencies in the field of private law, which represented in fact a new modality to impose the French law [15].

For the newly integrated provinces, there was a similar process to the introduction of the French legislation in Nice and Savoy, in 1860. As, in some respects, the local laws were superior to the French law and “it would have been regrettable to substitute these for rules that were considered to be better” [16], provincial laws were maintained for a while. The gradual extension of the legislation started in 1919 and ended in 1924. In March 1922, the draft law was tabled in the Parliament, and, on June 1st, 1924, the law was passed. On January 1st, 1925, the law entered into force and both civil and commercial legislation was introduced in Alsace and Lorraine. All the process lasted six years [17]. Nonetheless, it is worth mentioning that the public had been previously prepared for this process. The Faculty of Law in Strasbourg had introduced a lecture of Legislative unification since the spring of 1919, and the number of such lectures increased, being doubled by a series of public conferences held by famous personalities of the time in different cities of the provinces [18].

4. Legislative unification in Italy

The situation in Italy was, at the time, almost identical to the one in France. The necessity to extend the legislation in the integrated provinces was considered appropriate. As in Alsace and Lorraine, some of the local legislation was superior to the Italian one and, therefore, it was decided to keep the local one. Consequently, the inherent conflicts between local and national laws were triggered. Contrary to the French, the Italians began to reform their own legislation in accordance with the European reforms. Their goals were to eliminate German and French influences and to strengthen the Italian specificity [19].

Although the post-war difficulties made the reform arduous, at the end of 1923, Italy had achieved most of the legislative unification through the constitutional, administrative, criminal and fiscal legislative unification. The final step of unification was achieved by a Royal Decree, in 1928, when the Italian legislation entered into force in the newly integrated territories. However, there were several norms provisionally maintained that were included in the transitional provisions [20]. The final steps of the harmonization

were carried out between 1929 and 1931, which finalized the legislative unification, for the benefit of the Italian society and its evolution [21].

5. Legislative unification in Poland and Cehoslovakia

These two states had a particular situation with respect to their “legislative unification”, as they either constituted or reconstituted (Poland) after the first world conflagration. In their case, there was no national legislation to be further extended. Therefore, the main concern was to create a legislation that, on the one hand, would support the unification of the whole society, and, on the other hand, it would be in accordance with the newest acquisitions in European legislation.

The process of fulfilling the legislative unification was quite arduous in Poland, as this country was under the influence of three legislative systems: the German one in the west, the Austrian - in the south, and the Russian - in the east. The process of legislative unification and codification of this country was generally completed in 1930 [22].

In the case of Czechoslovakia, the situation seemed a little simpler as there had been into function only two legal regimes, namely the Austrian and the Hungarian ones. The main fields of interest on which the Czechoslovak legislation focused were those related to the Constitution and to the agrarian and administrative issues. More serious problems were posed by the process of administrative unification, an area in which the law adopted immediately after the war, i.e. in 1919, was modified in 1927. The new law represented a return to the centralized administrative system (under the influence of the French law of 1884) [23].

As a conclusion, it was obvious that any state that had achieved its political unification after the First World War was to also fulfill the unification of their civil life as a unique foundation that “supported the very political organization of the state”.

6. Legislative unification in Romania

The legislative unification in Romania was carried out in a similar manner to the one in France and Italy. The topic triggered serious debates among the Romanian jurists: some supported the idea that the legislation existing in the united provinces was superior to that from the former Kingdom of Romania. Nevertheless, after further having analyzed

the situation, one may have concluded that it was rather a sense of pride of the united provinces, in fact of the political leaders of these provinces, and not of the population, in maintaining the former legislation. Constantin Hamangiu considered that the position of these political leaders was a false one because the previous laws had been made by the former neighbouring empires in order to subordinate and annihilate the national spirit of the Romanian majoritary population to the foreign occupants of these territories [24].

The idea of the inferiority of the Romanian law was fought against by the prominent lawyer Andrei Rădulescu and by Vasile Dumitriu, professor at the University of Cluj. Vasile Dumitriu argued that the Transylvanian Romanians were the direct descendants of the Romans, the founders of a superior legal system. Therefore, the Romanians in Transylvania inherited their ancestors virtue, had “justice in their soul” and “the notion of right in their mind”, being forced to endure the “bitter suffering” imposed by the foreign occupation [25].

According to Constantin Hamangiu, it was due to certain technical aspects that the former legal systems were kept in force in the united provinces after the Great Union of 1918. Nevertheless, the needs from daily social life required the gradual, partial introduction of the former Kingdom’s legislation [26].

This process was carried out with positive results, starting with 1919. Very special results were obtained in 1923, as a result of the adoption of the new Constitution [27, 28], and of the Statute of civil servants [29] and especially (with respect to the administrative territorial unification) of the Law for administrative unification of 1925 [30, 31].

However, the complete legislative unification, as Hamangiu noted, was not still achieved ten years after the unification of 1918. Unification by means of law extension was, in Andrei Rădulescu’s view [32, 33], the best way to defend the interests of the Romanian nation. Anibal Teodorescu was in turn a strong advocate of the legislative unification, by establishing a judicious relationship between administrative centralization and decentralization [34, 35]. Constantin Hamangiu considered that any delay in the process of legislative unification represented a “real danger” for the moral and economic interests of the nation [36], reason for which Hamangiu himself proposed, during his term as the Minister of Justice, a draft bill for legislative unification [37].

In the Explanatory Memoranda of this legislative project, Constantin Hamangiu appreciated that the legislative unification could be finalized at that time, as the Romanian society was well prepared for this. Law faculties from the united provinces had already introduced lectures on the Romanian law (including the history of Romanian law). This process was very intense in Cernăuți (Bukovina) and remarkable in Cluj and Oradea (Transylvania). Somehow, Romania repeated the preparatory process carried out by the university environment in Strasbourg, France. Besides the importance of university lectures, one is to mention public conferences held both in the academic environment and in different provincial centers. The conclusion of Constantin Hamangiu was that legislative unification could be finalized by the draft bill he submitted, fact that would have laid a “new stone at the foundation of our state” [38]. Unfortunately, his legislative proposal did not materialize [39].

Constantin Hamangiu was an unconditional supporter of the principle of legislative unification, being the advocate of introducing the Romanian law in the united territories and of the revision of the entire legislation, in order to harmonize it with the requirements of the time. His opinions were similar to those expressed by other specialists, such as G. V. Buzdugan, Andrei Rădulescu, Anibal Teodorescu, or to the ideas promoted by the magazine “Pandectele Române” [40].

7. Conclusions

As revealed by our brief presentation, the lawyer Constantin Hamangiu was an active supporter of the principle of legislative unification of Romania after the completion of the state unification in 1918. He considered legislative unification to be a fundamental element in the consolidation of the unity of the Romanian state. For this reason, C. Hamangiu was extremely critical of the practice of preserving traditional legislation in the united provinces. By supporting the principle of legislative unification, the jurist followed the mainstream of ideas expressed in the Romanian society, after the achievement of the Great Union.

When comparing legislative unification in Romania with the similar process in some Western countries (France, Italy, and sometimes Germany) and in Central Europe (Poland and Czechoslovakia), Constantin Hamangiu identified several similarities with

the unification process from the western states. Explicitly or implicitly, he was a constant supporter of the unification process, by means of extending the legislation of the mother state in the reunited Romanian provinces. Western models consolidated and influenced his opinions. By presenting the efforts of legislative unification from the above-mentioned countries, Hamangiu implicitly pleaded for the national legislative unification.

Furthermore, it should be noted that jurist Constantin Hamangiu was a true exponent of patriotism, which was based on a solid legal training. His plea in favour of legislative unification represented in fact a plea for the consolidation of the national state itself. The process was all the more necessary as it had been carried out in other European states, such as France and Italy, true statal models of that time.

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COMPARATIVE LAW ELEMENTS OF THE ACTION IN TIME OF THE PROVISIONS OF A LEGAL REGULATION

Professor Emilian CIONGARU, PhD.

University Bioterra Bucharest-Romania;
Associate Scientific Researcher – Romanian Academy,
Institute of Legal Research „Acad. Andrei Radulescu”
emil_ciongaru@yahoo.com

Abstract

The legal regulation is a general measure which is applied in all cases which appear under it, for an indefinite period or within the time limit referred to in its contents, in a certain space and for certain subjects who participate in the legal circuit in this space. Therefore, the action of legal regulations presents three necessary coordinates: time, space, persons. A legal report is formed, on the basis of the legal regulation in force, at the time of its creation. Therefore, it is necessary to know, always, what legal regulation is applied to the given legal regulation. In each state, there are legal regulations governing the order of publication and entry into force of the laws and other normative acts. Normative acts are adopted in order to act on social relations, in order to direct the behaviour of the subjects of law for the purposes of compliance with the edited regulations. The problem of the choice between the old and the new law is of particular theoretical and practical importance. As regards the mode of entry into force of the normative act, a rule cannot be established, sometimes until the entry into force of the act a period of time is necessary, in order to ensure the preparation, with a view to introduce the new regulations.

Keywords: *juridical regulation; juridical report; normative acts; system of law; action of juridical regulation.*

Introductory elements

The time of the legal regulation defines its duration, its resistance. The history of the law records legal regulations with long lasting effects in time: The law of the 12 tables, has stood for example for over ten centuries and the Islamic law includes legal regulations from 1300 years ago. In the past, the pace of legislative transformations was slow. [1] The Locrian oligarchy of Ancient Greece imagined, as a matter of fact, the habit that the person who proposed a new law had to appear in front of the people with a noose around his neck, which meant that if the law in question failed, the one who proposed the law was hanged on the spot.

The legal regulation is a general measure which is applied in all cases which appear under it, for an indefinite period or within the time limit referred to in its contents, in a certain space – territory – and for certain subjects who participate in the legal circuit

in this space. Therefore, the action of legal regulations presents three necessary coordinates: time, space, persons.

A legal report is formed, on the basis of the legal regulation in force, at the time of its creation – *tempus regit actum*. Therefore, it is necessary to know, always, what legal regulation is applied to the given legal regulation.

Any legal regulation has its time limits, a beginning and an ending.

The legal regulation is entered in time and produces legal effects at its entry into force and ceases to be legally effective, to produce effects, when it is no longer in force.

A new regulation excludes, in principle, the further enforcement of the old regulation, but does not operate on the past. The changes determined by social requirements involve the succession of the regulations promulgated on different dates. In the action of the legal regulation in time three important moments are of interest: the entry into force of the legal regulation, the action of the regulation and the moment the legal regulation is no longer in force.

Regarding the first aspect, of the entry into force of the legal regulation, this moment is linked to the date of its publication in the Official Gazette, when it is brought to the attention of the public, or the date provided in its text.

Choosing one of these moments of entry into force of a legal regulation is determined by the socio-economic requirements, such as: special organizational measures, essential changes which must be prepared, etc.

In each state, there are legal regulations governing the order of publication and entry into force of the laws and other normative acts. Normative acts are adopted in order to act on social relations, in order to direct the behaviour of the subjects of law for the purposes of compliance with the edited regulations.

The question to be posed is from when and until when to apply the law, question which also raises the problem of its repeal.

Under this aspect, namely that relating to the limitations of the action of the regulation in time, in order to comply with the requirements of legality, normative acts adopted must exist within the time limits laid down, and thus regulations that do not correspond to reality must not be applied, which have therefore fallen in the disgrace of the lawmaker. Regarding the issue of the enforcement of the laws in time, Cicero was

one of the first erudites who talked about the retroactivity of the law, although, at that moment, the retroactive enforcement of the law existed.

Historical references of the action in time of the legal regulation

In the late period of the Roman Empire, Theodosius I strengthened, in the Constitution of 393, the principle of the retroactive character of penal law. Later, the so-called Law of Theodosius, named in honour of the emperor Teodosius II (440), which provided that any law acts only for the future, with the exception of the cases for which the lawmaker directly indicated their retroactive character. These provisions were included in the Code of Justinian. In the era of feudalism, and in particular the early one, issues associated with the action of the law could not even be posed, as the sole source of law [2] was the custom, a feature of it being the long term enforcement since ancient times. Coming to power, the monarchs gave an oath that they will respect and comply with the ancient customs. In France, the acts which were applied retroactively were called declarations. [3]

Savigny, in his work *The Contemporary Roman Law*, was the first to perform an analysis of the collisions of laws in time, stating that only through the determination of the essence of this mutual relationship between the old and the new law, will it be possible to establish the system of law to which it belongs and so as to be connected either to the old law or the new law.

The majority of contemporary jurists give priority to the action in time of the law, but do not exclude the action of the old law in certain, strictly determined, cases, especially in regulating homogeneous social relations.

The action in time of the legal regulation - elements of comparative law

The problem of the choice between the old and the new law is of particular theoretical and practical importance. As regards the mode of entry into force of the normative act, a rule cannot be established, sometimes until the entry into force of the act a period of time is necessary, in order to ensure the preparation, with a view to introduce the new regulations. The same situations also exist in Italy, France, etc.

In Italy, the laws and regulations of each of the palaces of parliament enter into force on the 15th day after their official publication, if another term is not set. As for the majority of the normative acts, they enter into force on the day following their publication.

In relation to the principle of *nemo censetur ignorare legem*, in order for it not to be mere fiction, the conditions of knowledge of the legal regulation must be ensured [4]; however, two exceptions to this rule are allowed, namely:

- when a part of the territory of the country remains isolated, through a case of force majeure, from the rest of the country, in which case lack of knowledge may be objective, not due to personal ignorance;

- in matters of civil or commercial conventions, when a person concludes an agreement, not knowing the consequences which the legal regulation causes to arise from the agreement.

It may request the cancellation of the agreement, invoking that it was a mistake of law, concerning will. It is of the essence of these legal relationships that the will of the contracting parties is not vitiated, is fully valid.

The normative act – the legal regulation – acts only in the present and in the future – while it is in force. The fundamental principle of the action of legal regulations in time is the principle of non-retroactivity. In the specialised literature it is stated that the law is incident, therefore it applies to all the acts during which it is in force. Consequently, the law acts from its entry into force until its removal from force.

In this matter, therefore, acts an absolute presumption of knowledge of the law, which cannot be overturned by evidence to the contrary, precisely because of the compulsory nature of the regulation. Otherwise, the regulation would be ignored, considered doubtful, optional, etc.

Although the law, as we have already stated, acts, in principle, for the present and the future, there are limited situations when it has a retroactive character, when it comes to:

- the adoption of a kinder, more favourable penal law; [L]
[SEP]
- in the case of the adoption of interpretative law; [L]
[SEP]
- if it is expressly provided in the law that this shall also apply to acts committed previously – express retroactivity [L]
[SEP]

In Luxembourg, the law enters into force 3 days following its publication in the Memorial, in Paris, on the day following its publication in the Official Journal.

In the Criminal Code of the state of Puerto Rico, regarding the principle of legality, it is mentioned: no criminal action against any person shall be initiated for a deed which is not specifically defined as a criminal offence in the Code or in a special law, nor shall a penalty or a measure of security that the law has not previously provided be applied.

In the same Penal Code it is mentioned that the penal law shall apply to deeds committed under it and provides the rule of applying the more favourable law for punishments, as well as for safety measures.

The French penal code regulates the enforcement of penal law in time, before regulating the enforcement of the penal law in space, the principle of the activity of penal law, i.e. the deeds which constitute crimes at the time when they were committed will be punished, the principle of the retroactive enforcement of a new, more favourable law, if the judgement has not remained final, are consecrated. From this wording it may be logically deduced that the more strict law is not retroactive. The text does not regulate the hypothesis ultra-activity of the old, more favourable law, nor that of temporary law. However, the situations where the law is retroactive in relation to the time the deeds were committed are regulated. In concrete terms, it concerns the laws of competence and judicial organization - if the Court of First Instance has not decided on the substance, the laws that refer to the methods for monitoring and procedural forms, those relating to the enforcement of sentences in certain conditions, etc.

In the design of the Italian penal legislation [5], regulating the enforcement in time of the law precedes regulating the enforcement in space.

According to the Italian penal code [6], nobody can be punished for a deed which has not been explicitly provided as a crime by the law and punishments which have not been laid down by law cannot be applied. As it can be observed, the principle of the legality of the incrimination and punishment is made by reference both to the idea of the existence of a regulation of incrimination and of penalisation, as well as to the idea of the precedence of the penal regulation in relation to the time the illicit deed was committed. The idea of the precedence of penal law is more clearly expressed in the Italian

Constitution - nobody can be punished unless on the basis of a law which entered into force before the deed was committed.

The Italian Penal Code refers to the succession of penal laws in time and consecrates the following principles:

- the principle of the non-retroactive nature of penal law in the sense that nobody can be punished for a deed which, according to the law at the time when the deed was committed, does not constitute a crime, as a logical conclusion of the principle of the activity of penal law; [1]

- the theory of the non-retroactivity of law, which provides for the decriminalization of the deed – no one can be punished for a deed which, after the subsequent law, does not constitute a crime, and if he was convicted, the execution and the penal effects resulting from the conviction cease; [2]

- the principle of the enforcement of the more favourable law – if the law at the time the deed was committed and the following ones are different, the one the provisions of which are more favourable for the criminal shall be applied – but only in the case of a decision which is not final. [3] In the case of exceptional and temporary laws the provisions above shall not apply.

However, these provisions shall apply in the case of the revocation and the non-ratification of a decree-law, as well as in the case of the decree-law converted into law with amendments. In the Italian doctrine [7] it is stressed that the retroactivity and ultra-activity of the penal law express a superior principle, that the activity of the penal law, *tempus regit actum* - the validity of the penal law is circumscribed to the time it is in force.

Among the exceptions to the principle of the non-retroactivity of the penal law, the Italian authors also included the provisions of the European Convention on Human Rights. According to these provisions, the principle of non-retroactivity of the penal law, which provides for new incriminations, does not prevent the punishment of a person guilty of action or inaction, who, at the time when it was committed, was a crime according to the general principles of law recognized by civilized nations. [8]

Beyond this exception, the principle of the non-retroactivity of the more severe penal law is regarded as a guarantee that no citizen will be subjected to a more severe treatment than the one he knew, all the more so when the new law contains new

incriminations. The opposite principle, of the retroactivity of the penal law finds justification in the need for a more rational protection of the fundamental social values.

The assessment of the existence of the more favorable law shall be made in relation to the actual situation, especially when a law contains both favorable and unfavorable provisions.

In the category of the more favourable law, all the implications of each of the laws in conflict shall be taken into account, including the system of circumstances, of the causes of exclusion of the penal character of the deed, of the penal liability, of the punishment, the procedural conditions.

In accordance with the principle of the intangibility of the thing judged, the more favourable law cannot be applied unless there has been a final decision of conviction. Interpretive law is not part of a succession of penal laws in time, because such a law clarifies the law interpreted; it only appears to be a retroactive law, in fact, it is part of the law interpreted. Also, temporary, exceptional and financial laws are not subjected to the rule of the more favourable law, in this case the rule *tempus regit actum* being applicable.

The German penal law also regulates the enforcement of penal law in time, before the regulation of the enforcement of the penal law in space. [9] The law consecrates the following principles in the subject:

- the principle of the precedence of the penal law in relation to the time the deed was committed - a deed can only be punished if its penalty was laid down in the law before the deed was committed;

- the principle of the activity of penal law stipulates that its penalty and consequences shall be determined by the law in force at the date the deed was committed if the law is changed during the execution of the deed and the law in force at the time the deed was finalised shall be applied;

- the principle of the enforcement of the more favourable law – if the law in force at the time the deed was finalised, before rendering a decision, is changed, then the law, the principle of the ultra-activity of the temporary law shall be applied. The law shall apply to deeds committed while it was in force and after it ceases to be in force, if the law does not provide otherwise.

As it can be observed, German law consecrates the principles known in the matter, which we also find in our penal law.

The Spanish penal code regulates that most of the European penal laws of in force, in the first articles, the enforcement of penal law in time, as follows:

- no act or omission shall be sanctioned if it has not been provided for in law as a crime, consecrating the principle known as the principle of the precedence of the penal law.

- regulating the principle of the enforcement of the more favorable law, a final decision is issued, and the principle of the ultra-activity of the temporary law.

The Spanish penal code includes new provisions such as those concerning the intangibility of the subject of the trial or extending the principle of the activity of the penal law to the execution [10] of the punishment as well, as well as of safety measures.

Principles and rules of the action in time of the legal regulation

The arguments which impose the principle of the non-retroactivity of the legal regulation are related to the stability of the legal order, to the fairness and legality of the enforcement of the regulation and the reason for the presence of the regulation in social life.

The lawmaker cannot force the subject to have a certain conduct as long as such conduct is not prescribed in a legal regulation. [11]

On the other hand, certain relationships which were carried out in the past, based on a law then in effect, cannot be dismantled on grounds that the lawmaker gave a new legal regulation for such relationships. Otherwise, it would cause serious social disturbances, it would open the way for the arbitrary, any safety would disappear and the subject's confidence in the law would be shaken, with damaging consequences for the social order.

The active - non-retroactive - character of the legal regulation reveals interesting practical aspects in the field of private law. In this field, the immediate enforcement of the new regulation is possible under the conditions in which the legal actions and relationships carried out under the old regulation were completed.

For the legal actions and relationships producing successive, long term effects, things become more complicated. The judicial practice is faced with aspects of the retroactivity of the new regulation or the survival of the old regulation.

In classic theory, the distinction between the rights gained and the future rights was operated. It was argued that as long as the new regulation concerns the rights gained under the old regulation, it would derogate from the principle of non-retroactivity – it would be retroactive.

As far as the future rights are concerned, the new regulation is not equivalent to a retroactive regulation. For these, the new regulation does not have a retroactive character.

Modern theory does not share this criterion of the non-retroactivity of the legal regulation, pointing out that, in fact, it is very difficult to make a distinction between the rights gained, also called final rights, and future rights.

In the field of public law, it is a principle that the immediate enforcement of the new regulation is strictly necessary. Here, the issue of the conflict in time of the regulations is posed in other terms. Public law regulations – constitutional law, the regulations that organize public powers and authorities, the regulations relating to the exercise of citizen rights, the jurisdiction regulations, the procedure regulations – shall apply immediately, replacing the old regulations.

The same appears in the case to the mandatory provisions in the field of private law, which concern public order, such as: the regulations governing the organization of land ownership, the regulations relating to the status or capacity of persons, etc.

As regards the principle of the non-retroactivity of the legal regulation – the non-survival of the regulation – it implies that a judicial regulation may not extend its effects after it is no longer in force. The exception to this rule are the legal regulations with a temporary or exceptional character.

According to the principle that nobody can defend himself by invoking not knowing the law, it only concerns the law in force at the time of his own criminal activity, and not any law which may arise in the future.

It would be absurd, as a matter of fact, to impose to citizens obligations of knowledge and prediction of any legislative changes which might occur. Such an

interpretation would correspond and jurisprudence of the European Court of Human Rights that also claims, as a sine qua non condition for the enforcement of a law for a given situation, the requirement that the law in question be accessible. [12] The accessibility condition is met only if the texts of law incident in a specific case are published or, at least, their existence is reported in order to be consulted. In this context, we believe, however, that a distinction must be made between the situation in which the new law is not yet in force but is published in the Official Gazette, and the situation in which it is not yet published. The constitution provides that the entry into force of a law takes place either at the time of publication, or at a later date, provided in its text. If, at the time the previous participant contributes to the perpetration of the crime, the new, more severe, law is not yet published, the accessibility requirement is not satisfied.

As regards the final moment, namely that of the cessation of the action of the normative act, namely the cessation of the action of the legal regulation, this takes place by repeal, by the expiry of the period for which it was promulgated and by obsolescence.

As regards the various ways legal regulations cease to be in force, it is necessary to divide the entire system of legal regulations, by their action in time, into two groups, namely:

1. when the duration of the laws was not limited and then the cessation of their action takes place via one of the forms of repeal;
2. when the duration of the legal regulation is limited and then the legal regulation ceases its action by the expiry of the time limit, without the need for any special observation or decision for this purpose.

The repeal may be defined as the legal and technical process by which the normative acts without a time limit cease their activities through their surrender, i.e. their removal from use.

The repeal has several forms, namely: express – direct or indirect; tacit; total; partial.

The repeal may be express or direct, as it is also called when the new normative act explicitly provides that the old regulation is repealed, or express indirect, when the new normative act does not expressly specify the normative act which is repealed or

certain legal regulations from it, but is limited to the provision that it repeals all previous normative acts which are contrary to the new regulation.

In the Romanian legal literature, tacit repeal is also known under the name of implicit repeal.

Depending on the extent of the legal effects, the repeal may be total or partial.

In the first situation, all the provisions contained in a normative act are repealed, and when only certain provisions, stipulations of an act are repealed, we can talk about partial repeal.

As regards the cessation of the enforcement of a law by obsolescence, this means that it ceases to be valid through non-enforcement. Non-enforcement is a result of transformations which have occurred in society and come into conflict with the provisions of the law in question. It is said that the law is totally surpassed by events and, as such, nobody resorts to it.

Regarding the repeal, a famous jurist [13] invokes the following remarks:

- a normative act can be repealed only through a normative act with the same legal force or with legal force greater than that of the one repealed;
- within one and the same normative act, several forms of repeal may be operated;
- the tacit repeal operates only if we are in the presence of the same kind of provisions;
- the provisions contained in a special law only repeal the provisions contained in a special law;
- through the provisions of a general law the provisions of a special law cannot be repealed, and vice versa: through the provisions of a special law the provisions of a general law cannot be repealed.^[14]

In a system of law with a well-organised legislative technique, the method of direct express repeal is used. In international law, the repeal of treaties may be express or tacit. [14] The express one may result as a manifestation of the will of the signatory parties. The tacit repeal has in view the succession in time of the treaties, in the sense that a new treaty concluded invokes another intent of the parties, or is different and incompatible with the provisions of the previous treaty. [15]

The second way of cessation of the effects of the legal regulations is by reaching their time limit. If the legal regulation provides for a time limit up to which it is applied, reaching its limit removes it from force. There are certain laws which, by their nature, are temporary, for example, the laws enabling the Government to issue ordinances. According to the Constitution, the law enabling the Parliament shall mandatorily lay down the field and the date up to which ordinances are issued.

This way represents the exception to the rule, temporary normative acts having from the beginning their action limited for a specified, preset period of time. The normative acts drawn up in exceptional situations have a temporary character: war, natural disasters, etc. With the end of these exceptional situations, it is natural that the promulgated laws lose their legal effects.

As regards the ultra-activity of the regulation, especially exceptions from ultra-activity, when the provisions of the legal regulation repealed or having reached its term, by the effects which they produce or continue to be applied after their expiry.

Finally, the last form of cessation of the action of a normative act – legal regulation – is obsolescence. A legal regulation is deemed to be obsolete when, though it is still formally in force, it is not reasonable to be applied and this is because of the development of the social relationships, social – political and economic changes changes in society, the fact that the states of things which have determined the necessity of developing this normative act have ceased to exist or can no longer be supported. Regarding this issue, there are several opinions in legal literature. All agree that the customary legal regulations may cease their action by obsolescence. But what is questioned is whether the written legal regulation disappears by obsolescence. The traditional opinion leans towards a negative response, motivating that, although the law is the reflection of special needs which have determined its appearance, it is necessary to be repealed with certainty and extended and general disobedience to the law should not be encouraged, which obsolescence implies.

Another author has a different opinion in this aspect. He considers that obsolescence is an exceptional way of cessation of the action of written legal regulations which entails that the strict fulfilment of certain conditions. According to the above-

mentioned opinion, it is inaccurate to consider that obsolescence is a mere prolonged non-enforcement of the text of the law which leads to its disappearance. [16]

Therefore, in order for obsolescence to operate as a way of cessation of the action of the legal regulation in time, non-enforcement must result not from the desire to avoid the law or from simple indifference, but from the conviction that the obsolete regulation should no longer be supported, as it is incompatible with the current elementary legal and moral convictions in society or simply because it is nonsense.

Conclusions

In conclusion, with a longer or shorter duration, legal regulations exercise a moderator and conservatory role, within the meaning of defending the major social values, but, at a certain moment, legal regulations cease to respond to the social needs and must be replaced. The wear, deformation or death of legal regulations presents itself as a natural process which pertains to their nature and which makes the creation of new regulations a current issue.

Increasing the complexity of the relationships between people amplifies the volume of this creation, calling into question aspects of the coexistence of legal regulations in a specific space, their relationships, finding solutions of legal technique for resolving conflicts which could arise in the specific process for enforcing the rules.

The succession in time of the legal regulations, as well as their coexistence in space, have imposed certain rules which preside over their action. No matter how well constructed, modern and clear legal regulations are, they end up not able to meet the needs of society and to transform into an obstacle to social and legal progress.

The legal regulation, as a fundamental cell of law, has its own cycle, its own genesis, in the sense that it is created, produces effects and may no longer regulate the field in question, since the realities and needs which created it have disappeared. Within a time period and in a determined space, anachronistic legal regulations coexist together with the new, modern legal regulations, between which conflicts may arise in the process of enforcement of its contents. The succession in time of the legal regulations, as well as their coexistence in space have forced the lawmaker to impose rules to keep this situation under control.

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THE TREATY OF LISBON AND ITS EFFECTS IN THE 10 YEARS OF EXISTENCE

Associate Professor Mihaela Adina APOSTOLACHE, PhD.

Petroleum-Gas University of Ploiesti

mihapostolache@yahoo.com

Abstract

The paper addresses the implications of the Reform Treaty, known as the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, starting with December 1st 2009, the time of its entry into force, and up to the present. The document signed in Lisbon complements the relatively long series of treaties adopted through the revision or amendment procedure, being concluded for an indefinite period. The provisions from the Treaty allowed the reform of the legal framework of the Union. At the same time, the Treaty of Lisbon marks an important progress in clarifying the distribution of competences between the European Union and the Member States. Despite the criticisms, the amendments made by the Reform Treaty offer a unified and visible framework for the international representation of the European Union.

Keywords: *reform, institutions, amendment, participative democracy, modernization, simplification*

Introduction

The Treaty of Lisbon represents the first agreement signed by the member states of the European Union after the waves of expansion towards the East, following which Romania and 11 other countries in the region joined the European Union in 2004 and 2007 respectively.

The official title is “The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community”[1], known as the “reform treaty”, intended to replace the Constitutional Treaty as a result of rejection and non-ratification by all Member States.

The legal act of functioning of the European Union was signed by the Member States on 13 December 2007 and entered into force on 1 December 2009, amending the Treaty of Maastricht (Treaty on European Union) and the Treaty of Rome (Treaty establishing the European Economic Community).

Considerations regarding the “birth” of the Lisbon Treaty

It can be stated that the document is the result of a longer process, a process through which the reform of the legal framework of the Union was intended. This was imperative under the conditions imposed by the transition from 15 to 27 Member States, a consequence of the fifth wave of enlargement. At the same time, the reform of the institutions of the Union, as well as of the decision-making process at its level, was required in order to increase the efficiency of the entire Community system. The previous treaties of Amsterdam (1997) and Nice (2001), although they represented prior steps preparing the Union for these transformations, did not contain sufficient and satisfactory changes.

The governments of the Member States have launched the idea of a broader debate on the future of the European Union, a debate focused on four key issues: a simplification of treaties, a clearer delimitation of competences between Member States and the European Union, the status of the Charter of Fundamental Rights and the role of national parliaments. At the end of 2001, the Member States adopted the Laeken Declaration, the basis of which was the need for the Union to become “more democratic, more transparent and effective”. On these considerations, in 2002 the works of the Convention on the Future of Europe were launched, which took place between February 2002 and July 2003.

The Convention brought together representatives of national governments and parliaments from both Member States and candidate countries, as well as representatives of the European Parliament and the European Commission. Following the debates, a Draft Treaty establishing a Constitution for Europe was drafted, a working document negotiated with the governments of the Member States at an Intergovernmental Conference starting in October 2003 and ending in June 2004 with a final version of the Treaty establishing a Constitution for Europe, also known as the Constitutional Treaty [2]. The Constitutional Treaty was signed on 29 October 2004, in Rome, and was ratified by 16 of the 25 member states (by Romania and Bulgaria also, candidate states at that time), but could not enter into force, as a result of the rejection of this document, in May and June 2005, at the referendums organized in France and the Netherlands. Following these, the European Council has decided to take a “reflection break” established between June

2005 and December 2006, the process of institutional reform being re-launched in January 2007.

Based on the Berlin Declaration of March 2007, the European Council of 21-23 June 2007 adopted a detailed mandate for a subsequent Intergovernmental Conference, the works of which ended in October 2007. The mandate provided for the future Treaty to amend the treaties in force at Union level, giving up the idea of replacing them by a single treaty, while the substance of the innovations provided for in the Constitutional Treaty being taken over. The final text of the Reform Treaty, drawn up at the Intergovernmental Conference, was adopted at the informal European Council in Lisbon on 18-19 October 2007.

The treaty was signed within the Lisbon European Council on December 13th 2007, its ratification was finalized on November 13th 2009 and entered into force on December 1st 2009. It was thus intended to achieve the great objective of a truly united European Union, with a political weight depending on the depth of its political integration and the degree to which it develops its own identity [3].

Romania was one of the first Member States to ratify the Treaty, the Romanian Parliament completing the ratification procedure on February 4th 2008. As mentioned in the doctrine [4], the national procedures for ratifying the Treaties have a decisive importance for the successful implementation of the European political projects. Europeans were thus successfully offered an appropriate tool, considered to face the complex challenges of the 21st century, such as immigration, organized crime, energy security, climate change, environment and sustainable development, globalization. The treaty rethinks the ways of addressing political, economic and social issues, so that the Union can reach the level of expectations of its citizens. However, there were successfully kept the constitutional elements of the Constitutional Treaty, which are reformulated in the Reform Treaty.

The question was also raised whether the document adopted in Lisbon represents a treaty to amend or one to reform the existing legal framework. In its translation into Romanian, the Treaty of Lisbon is, as the case may be, a treaty of amendment (French) or a reformatory treaty (English). The two terms can be considered synonymous, but, in

essence, the Treaty of Lisbon includes both: it amends the treaties of the European Union, and it also reforms the institutions of the European Union [5].

The Treaty of Lisbon complements the relatively long line of treaties adopted by the revision or amendment procedure, being concluded for an indefinite period, which signifies the intention of its signatories to grant it a firm and irrevocable commitment [6], without any way of denouncing the Treaty, but solely one concerning the withdrawal agreement.

The relevance of the Lisbon Treaty

The Treaty of Lisbon started as a project aimed at strengthening the Union's power and improving the bureaucratic mechanisms. The new Treaty has "recovered" much of the content of the Constitutional Treaty, but has excluded all the words derived from the term "constitution". The term "Community" was replaced by "Union" throughout the text: the Union took the place of the Community, becoming its legal successor, acquiring legal personality.

In fact, the Lisbon Treaty did not create state symbols for the Union, such as a flag or an anthem. Thus, the use of the flag and the anthem became optional, without forcing the states to give up their use. The statement that the EU was made up of the states and their peoples was not preserved, but a special role was still granted to the peoples, which represent the determining factor of the European decision-making process. Also, the elements related to the explicit supremacy of European law over the national one were eliminated, but the decisions of the CJEU that established this hierarchy remained valid.

Structurally, the Treaty of Lisbon comprises the preamble, 7 articles, protocols, an annex, the final act and the declarations. This document brings amendments to the Treaty on European Union and to the Treaty establishing the European Community according to the incidental provisions; The Treaty establishing the European Community became the Treaty on the Functioning of the European Union (TFEU), and the Treaty on the European Atomic Energy Community (EURATOM) was kept separately.

Although it no longer bears the name of a constitutional treaty, the new text retains the most significant achievements.

The Treaty of Lisbon sets out three fundamental principles: the principle of democratic equality, the principle of representative democracy and the principle of participatory democracy, and has made the Charter of Fundamental Rights a legally binding document. The Charter brings together all the personal, civic, political, economic and social rights of the citizens of the European Union.

A merit of the Lisbon Treaty can also be considered the fact that it has tried to standardize an institutional structure, removing the structure of the three pillars of Maastricht. Pillar II, the Common Foreign and Security Policy has become the subject of special rules and procedures, being implemented by the European Council, which can decide unanimously, but is excluded from the adoption of legislative acts. The Treaty settles an issue that has often been debated in the doctrine, clearly confirming the European Council's membership of the European institutional system. An important novelty brought to the European Council is the resignation of the rotating presidency system in favor of its president, elected by the European Council for a mandate of two and a half years, with the role of ensuring the preparation and continuity of the institution's work.

The coherence of the Common Foreign and Security Policy has been improved by the creation of the High Representative for Foreign Affairs and Security Policy. The position of High Representative with a five-year mandate has been strengthened by combining three previously existing independent positions: the Secretary General of the European Council, the President of the Foreign Affairs Council and the Vice-President of the European Commission.

The major innovation of the Lisbon Treaty was the involvement of national parliaments in the European decision-making process, so that Protocol No. 1, enclosed to the Treaty, is dedicated to the role of national parliaments. In fact, based on this document, the national legislatures directly receive all the draft legislative acts, as well as the amended projects, the resolutions of the European Parliament and the positions of the Council. Within eight weeks from the date on which a draft legislative act is made available to the national parliaments, the position of the respective state must be transmitted [7]. The principle of subsidiarity and proportionality ensure the functionality of the inter-institutional relationship of national parliaments - European institutions.

The practice has shown that the provision introduced by the Reform Treaty allowing national parliaments to present arguments against any proposal from the European Commission is extremely useful. When a third of the national legislations consider that a proposal does not comply with the subsidiarity principle, the Commission re-analyzes its proposal, with the possibility of maintaining, modifying or withdrawing it. However, even if the majority of national parliaments express the same opinion, which is contrary to the Commission proposal, it may decide to maintain its proposal, by reasoning, while the European Parliament and the Council decide on the continuation or interruption of the legislative procedure.

On the basis of Article 289 TFEU, the ordinary legislative procedure is carried out, which allows the European Parliament and the Council to jointly adopt a regulation, a directive or a decision proposed by the Commission. Through this procedure, both the European Parliament and the Council amend the Commission's draft legislation. As with the former co-decision procedure, three readings are used. The Treaty increases the number of areas in which the European Parliament has the right to approve European legislation, together with representatives of the member states of the EU Council.

It can be seen, therefore, that the European Parliament is the institution that has experienced the most pronounced evolution, becoming a real co-legislative and democratic control body, representing the interests of the citizens of the Member States internally and in relation with third parties [8]. Nonetheless, it has not reached and cannot reach the role given, by constitutional norms to a national parliament, the European Union being a construction between states, with the purpose of enhancing their resources and values [9].

Currently, the European Parliament, together with the Council, is a chamber of the Union legislature. Being directly elected by European citizens, the European Parliament is not only the most democratic institution, but in the light of its elective "appointment", it also represents the most supranational institution of the European Union [10]. The qualified majority vote has become the usual voting method within the EU Council. At the same time, the right to veto in many areas of EU action has been renounced, thus strengthening the capacity for union action.

The importance of the Union's neighborhood relations is enshrined in the Treaty as an integrated policy, as the EU has become a more credible international player. Through its structural changes, the reform treaty has come with a new EU dimension in terms of security and defense: a multisectoral approach that determines the integration of the states in the security framework defined in its contents.

December 1st 2019: a decade since the entry into force of the Lisbon Treaty

The leaders of the European Union participated on December 1st 2019, in Brussels, at the ceremony marking a decade since the entry into force of the Lisbon Treaty. Moreover, the celebration of the Lisbon Treaty coincided with the start of a new European institutional cycle.

The tenth anniversary of the Lisbon Treaty took place at the House of European History in Brussels, where the Presidents of the European Parliament, the European Commission, the European Council and the European Central Bank participated. Subsequently, during the months following the European elections, the European Parliament elected a new president in the person of David Sassoli, and Christine Lagarde was appointed the head of the European Central Bank, the new European Commission officially took over its tasks on December 1st, being led by Ursula von der Leyen, while Charles Michel taking the role President of the European Council.

"With the start of the mandate of the new Commission and the new President of the European Council, today we are starting a new European chapter. From addressing climate change to the increase in the cost of living, the Europeans are demanding answers. Now we must work together to fulfill the promises of the last few months"[11], said David Sassoli, the President of the European Parliament.

In addition, the President of the European Council, Charles Michel, spoke about the "common European identity" and the feeling of being European: "We have overcome many obstacles to be here, prosperous and free in the heart of Europe. The Treaty of Lisbon, which we celebrate today, identifies diversity as a crucial part of our European DNA". "Today, we can present to the world a united face", said Michel, who called for "transforming positive reforms into realities for every citizen"[12].

The first woman president of the European Commission, Ursula von der Leyen, mentioned that the European executive is also the “guardian of the European treaties” and delivered a speech full of optimism: “Europe is not just a treasure we have inherited. Europe is a promise. Europe is the future. Europe is something we all have to build, brick by brick, day by day. (...) We are the guardian of the treaties and protector of the spirit of Lisbon. It is a responsibility we have towards Europeans and the founding parents (n.r. - founding fathers and mothers)” [13].

Last but not least, Christine Lagarde, ECB president, wanted to point out the new situation according to which the leadership of the EU institutions was in a perfect gender balance. She requested “the transition to a stage of renewal and hope”, as “an extraordinary challenge awaits us”[14].

The newly elected Presidents David Sassoli, Charles Michel, Ursula von der Leyen and Christine Lagarde symbolically received a “copy” of the Treaty of Lisbon at the Museum of European History.

Conclusions

The Treaty of Lisbon was absolutely necessary for the re-establishment of the Union’s legal framework on new bases, generated by the European and international context. The conditions imposed by the transition from 15 to 28 Member States have made it necessary to reform the institutions of the Union, as well as the decision-making process at its level, in order to increase the efficiency of the whole Union system.

The Treaty of Lisbon urged the Union and the Member States to pay particular attention to reducing the disparities between the levels of development of the various regions and the lagging behind of the most deprived regions. The territorial cohesion has been foreshadowed as a dimension aimed at a more balanced and sustainable development, in accordance with the territory in which every citizen of the EU lives.

Despite the numerous challenges that have arisen over the 10 years since its entry into force, the Reform Treaty is the document that has conferred, for the first time, both the internal policy within the Union and its foreign policy, the same equal importance. Also, the consolidation and increase of the role of the European Parliament took place precisely to compensate for the apparent loss of democratic control it had. In addition, the

upward trend of supranationalism [15] was balanced by the increase of the powers of the European Council, and also of the national parliaments.

The amendments made by the Reform Treaty, despite the criticisms, offer a unified and visible framework for the international representation of the European Union. The Member States holding the Presidency of the Council of the European Union work closely together in groups of three, called “trios”. The trio sets long-term goals and prepares a common agenda, determining major aspects and issues to be addressed by the Council over an 18-month period, and based on this program each of the three countries prepares its own program, in more detail, for six months. The Presidency should act as a facilitator [16], being responsible for advancing the work of the Council on European law, ensuring the continuity of the European Union’s agenda, well-organized legislative processes and cooperation between Member States.

The democratic dimension of the Union has been strengthened by the increased involvement of national parliaments in European affairs. For the first time in European Union history, the Treaty of Lisbon has recognized the role of the national parliament in the process of drafting European legislation, which has the possibility to verify, directly and in each case individually, whether the action at Union level is more effective than the action at national level [17]. However, the measures must be continued. The involvement of national parliaments and the initiative of European citizens are not enough to speak of a complete democratization of the European decision-making process. The Commission can choose whether to take into account or reject the observations and proposals from European citizens or national parliaments. Theoretically, a powerful tool has been introduced through the involvement of national parliaments, but its effectiveness depends on the ability of national parliaments to coordinate their actions within the 8 week deadline.

The treaty has extended the Parliament’s full legislative powers to over 40 new areas, including agriculture, energy security, immigration, justice and EU funds, on an equal footing with the EU Council, also having the power to approve the entire EU budget together with the Council.

The Treaty of Lisbon has conferred the European Parliament new powers of regulation, placing it on an equal footing with the Council as regards the decision-making process related to what the Union has to do and how the funds are spent. This treaty has

changed the way in which the Parliament cooperates with the other institutions, strengthening the power of MEPs to influence appointments to EU leadership positions.[18]

It can be concluded that the Treaty of Lisbon has given the European Union and its Parliament a greater capacity to act and achieve results. All of these sustained efforts are the result of the Union's efforts to become a serious and effective global partner.

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COMPLYING WITH THE PRINCIPLE OF EQUALITY OF ARMS IN ADMINISTRATIVE HEARINGS

Associate Professor Mădălina-Elena MIHĂILESCU, PhD.

Faculty of Social, Juridical and Political Studies, „Dunărea de Jos” University, Galați
madalina.mihailescu@ugal.ro

Abstract

In analysing complaints against the reports on administrative offences, we hereby note that similar problems would perpetuate even in later stages and are included by the parties in the grounds of appeal: the issue of assisting witnesses who signed the reports without having been actually present or having really witnessing the facts, the obligation (or lack of obligation?) of the officials to submit additional evidence in defence, with the exception of the concluded report, not specifying the objections / mentions within these reports, insofar as the heading itself is required to be filled in, if the respective offender wishes, even at the suggestion of the procedural agent.

Since we have relatively recently confronted with these issues on the merits of the case, in administrative hearings, we decided to investigate such practical issues, each with its specific nature, starting from concrete cases in relation to the courts of appeal ought to consider the problems mentioned above in connection the principle of equality of arms, in its form derived from the interpretation of art. 6 of the ECHR.

Key words : *Administrative report, administrative offence, audi alteram partem, equality of arms.*

1. Introduction

It is well known that E.C.H.R. assimilates and analyses administrative offences as being part of the European sphere of autonomous criminal notions (see the case of Anghel v. Romania), all the jurisprudence of this European forum permanently assimilating such facts to those of a criminal nature and reporting their degree of social danger to that of crimes, taking into account in particular the provisions of many European laws regarding such antisocial facts (Criminal Codes or Codes of Administrative Offences).

According to the case law of the ECHR, applicable on the basis of Article 6 of the Convention, although the petitioner in a matter of administrative offence enjoys the presumption of innocence, he must bring evidence that is contrary to that recorded in the legal report in case the evidence administered by the officials can convince the court regarding the culpability of the "accused", beyond any reasonable doubt [1].

The issues that emerge in practice with respect to this reversal of the burden of proof and that are virtually derived from the legislation in force are those set out in the summary of our work. Such matters unquestionably relate to the principle of equality of arms mentioned in art. 6 of the ECHR - the right to a fair trial.

By interpreting the norms of law in force we infer that the report related to the administrative offence is an individual administrative act that benefits from the character (and the presumption) of authenticity and truthfulness precisely because it is concluded by a representative of the state, an official, which lead to the situation in which anyone may be declared an offender from the outset (the equivalent of the defendant in the criminal sphere) and be forced to prove their potential innocence by presenting evidence before the court to counter the statements of the official.

The report concluded by the traffic agent has the character of an administrative report. The mere fact that such a document is being issued does not violate the presumption of innocence due to the fact that the person against whom it was issued is not placed before a definitive verdict of guilt and responsibility. Moreover, the effects of the report can be removed by exercising the remedies provided by law. Besides, according to the theory and jurisprudence of the ECHR, "the problem of establishing guilt in the matter of administrative offences does not consider the extrajudicial phase of the administrative sanction, but its judicial phase", which implies complying with the right to a fair trial and the guarantees provided by article 6 of the Convention. This article fully conforms to the provisions of art. 23 paragraph 11 of the Constitution - according to which "until the definitive stay of the sentence of conviction the person is considered innocent". [2].

2. Analysing the application of the principle of equality of arms in administrative hearings

Starting from two situations recently encountered in practice, we will attempt to demonstrate that in the scope of such hearings, it is very difficult to make sure that there is a balance between the offender and the official since the latter benefits from the opportunity to be credible precisely because law provides him or her with the right to conclude such reports, and more than often, the scope of the evidence that may stand as

evidence as to the authenticity of the concluded document narrows down to the report in itself. If we were to sketch a parallelism (an unfair one, we might say), we would note that the offender is not permitted to bring in his favour a single item of evidence (for example, a single witness present in the applicant's car and a relative / husband / wife with him), being forced to submit at least two items of evidence to be credible (witnesses and records, multiple records, photo boards and witnesses, etc.).

Thus, in one of the cases we wish to bring forwards, the petitioner was fined by an official of TRANSURB SA Galati, who recorded (in an abusive way, we consider) that she was travelling by public bus with a falsified ticket. The official said that the ticket was a forged one, that the passenger had it intervened upon both chemically, using medicinal alcohol, and physically, by having smoothed it with the iron. He also addressed her in an inappropriate and abusive manner, insulting her before all the other travellers in the sense that "she seems to be a person predisposed to commit such deeds constantly". All these happened in the context in which the passenger had used such bus tickets previously and had never had any traffic problems.

In this case, the imbalance was - in our view – given by the fact that the person was confiscated the ticket and was unable to bring a witness to demonstrate what had happened, taking account of the circumstances in which everything happened. The petitioner was fined with 100 lei, and the court of law did not remove the sanction [3].

Returning to the presumptions mentioned above, in its case law, "through art. 6 of the Convention, the Court focused on the balance that must exist between the presumption of innocence specific to the matter and the presumption of legality and validity of the report, existing in national law". However, what the Convention enforces, through the standpoint of paragraph 2 of art. 6 of the Convention, "is precisely that a certain proportion between all these and the presumption of innocence established in favour of the accused, has to be obeyed. What is more, while analysing such proportionality it is necessary to take account of the actual stake of the hearing for the individual on the one hand, and his right to defence, on the on the other hand "[4] .

The failure to comply with the legal provisions and the mere fact of creating an unbalanced situation between the offender and the official were also due to the fact that the latter had not informed the former that she had the right to insert her objections in the

contents of the report, which is, according us, a case of relative nullity and removes without doubt the presumption of the legality and validity of the report, as provided by national law.

Moreover, in the case *Bosoni against France*, the European Court of Human Rights ruled that the probative force of reports or minutes is decided upon by each legal system, and the importance of each item of evidence may similarly be established, “but the court has the obligation to respect the fairness of the procedure as a whole, when administering and evaluating the evidentiary evidence” [5] apud.[6].

According to the GO no. 2/2001, art. 16 paragraph (7), the agent has the obligation that, at the conclusion of the administrative offence report, he shall inform the offender on the right to formulate objections regarding the contents of the report. Not complying with these provisions, may lead to the nullity of the report. “The right of the offender to raise any objections with respect to those contained in the report that notes and sanctions the contravention, objections to be recorded in this report, is a form of the right to defence.” [7].

Starting from the practical situation set out above we consider that in such circumstances the official “takes advantage” of the offender’s lack of knowledge in administrative matters, thus depriving him or her, from the outset, of the possibility to make his or her own observations on how the facts unfolded, a fact that unquestionably violates the future “equality of arms” which the ECHR jurisprudence speaks of and which the offender should benefit from throughout the trial.

“With regard to the evidentiary that is proposed and administered (that may be administered), the competent court will administer the evidence provided by law, necessary to verify the legality and reliability of the report. The courts cannot strictly apply the “onus probandi incumbent actors” rule, but, on the contrary, they themselves must play an active role in finding out the truth, since the administrative offence falls under art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms” [8].

That is why, as regards the merits, according to the ECHR jurisprudence, applicable on the basis of Article 6 of the Convention, although the offender enjoys the presumption of innocence, he must prove contrary to those recorded in the report only if the evidence administered by the respondent can convince the court of his guilt, which

means that the presumption of the facts being found truthful by the agent and recorded in the report is not absolute.

Thus, through the decisions given in the cases *Salabiaku v. France* and *Anghel v. Romania*, it is revealed that the presumptions of fact and of law are recognized in all legal systems, “allowing them to be used in criminal matters as well, in order to demonstrate the offender's guilt, within certain reasonable limits, taking into account the severity of the matter and preserving the rights of the defence”, the presumption of truthfulness of the facts ascertained by the official and those recorded in the report “that may extend to the limit to which by applying it would not lead to the situation in which the person accused of committing the deed is unable to prove otherwise, although from the evidence administered by the accusation the court cannot be convinced of the accused's guilt beyond any reasonable doubt “[9].

This is precisely what has been noted and emphasized by the ECHR jurisprudence - the impossibility of demonstrating the contrary, is in our opinion questionable when the offender does not have any means of evidence or of the only possible means of evidence or when the deposition of an assistant witness, who was not present neither when the alleged fact took place nor when the minutes were concluded is brought as a supplementary evidence against those facts brought forward by the latter. We consider that such situations reveal a violation of art. 6 ECHR and of the principle of equality of arms.

This is all the more so since the doctrine demonstrates that in so far as the witnesses of the accusation are concerned, “the right to interrogate them expressly implies the right to be confronted with them”. For example, it was decided that “a conviction based only on the statements of two witnesses made in front of the police, without the defendant being confronted with them” is being considered as a violation of article 6 paragraph 3 point d of the Convention [10] apud. [11].

In the situation mentioned above, as in other similar situations found in practice, such assistant witnesses are not brought before the judge to confirm what was recorded by the investigating agent in the report, which also implies that the petitioner who made the contravention complaint does not have the possibility to ask them questions or to ask

for their clarifying the facts. This is an evident shadowing of the principle *audi alteram partem* mentioned by article 14 Code of Civil Procedure.

In fact, the role of the *audi alteram partem* principle is to enable the parties involved in the case to "actively participate in presenting, arguing and demonstrating their rights or defences during the trial, having the right to discuss and combat the claims made by each of them, as well as to express their views on the motives of the court in order to establish the truth and to pronounce a legal and comprehensive decision." ([12] apud. [13].

The European Court's jurisprudence has held that the principle of equality of arms - one of the elements of the broader notion of a fair trial - "requires that each party is given the reasonable opportunity to support its cause under conditions that would not put it in a situation of net disadvantage when compared to the opposing party" [14] apud [15].

The right of the offender conferred by law, to address the court in order to file a complaint against the administrative offence report, is liable to remove any injury. "Regarding the signing of the report by a witness, it states that the role of the latter is not to confirm the guilt or innocence of the offender, but to confirm the existence of the circumstances provided by law in case the report is not signed by the offender" [16].

In the situation presented by us, the offender signed the contravention report and as such, there was no need for an assistant witness to confirm those mentioned by the agent, which makes such evidence in such situations not be relevant or conclusive, especially in the context in which such a witness is, in many cases, another agent and especially that the provisions of art. 19 paragraph 2 of the G.O. 2/2001 prohibit another investigating agent to sign as a witness such a report in case the report is concluded in the absence of the offender or when the latter refuses to sign it.

However, we should note that in practice, the courts have found that the provisions of art. 19 of O.G. 2/2001 do not prohibit the hearing as a witness of the agent who is part of the team [17], but the specialized literature stated that "at the moment the progress of the trial is undermined by the disadvantage of one of the participating parties in relation to the other party, the right under litigation falls from the orbit on which it gravitates, an unfair process leading even to the denial of a fundamental right » [18] apud. [19].

The reason why another agent cannot be an assistant witness is obvious, "the equivocation of a partisan attitude has to be removed from the beginning, because there

may be a tendency for two agents from the same institution to leave together on the field and give each other " mutual assistance" in drafting the report, one as assistant witness of the other, situation, considered, of course, inadmissible" Also, it is shown that" the respective quality (of agent) must exist at the time of the conclusion of the report, being admissible that the latter had this quality, but lost it when the report was drawn up. In this situation, the second person is allowed to participate as an assistant witness" [20] apud. [21].

A situation that we also consider to be discriminatory is that of the person who is alone in the car and who was stopped, fined, and at the same time applied the sanction of retaining the driving license. As the only evidence that could have been used were the cameras in the intersection where it is assumed that the contravention was committed, the offender did not have the opportunity to obtain the recordings because such images on the video cameras in the intersections are taken over and managed by the local authorities for a period of 30 days or this term has been exceeded until the case itself has been judged by the court.

Art. 14 of the National Supervisory Authority for Personal Data Processing Decision no. 52 of 31st May 2012 on the processing of personal data using video surveillance means:

" (1)The storage period for the data obtained through the use of the video surveillance system must be proportionate with the purpose for which they are processed, but no longer than 30 days, except for the cases expressly provided by law or of well grounded cases. (2)After the deadline established by the data controller under the conditions mentioned in paragraph (1) has expired, the recordings are destroyed or deleted, as the case may be, depending on the medium on which they were stored".

Again, in this case we were in the situation that, from an objective point of view, the offender was not objectively offered the opportunity to bring evidence in his favour, considering that he was alone in the car and also that the report was signed as in the previous case, by a colleague of the agent, with the role of assistant witness. Obviously, the only "basis" for the application of administrative sanction was the report thus concluded [22].

We consider that art. 6 ECHR and the principle of equality of arms were also violated in this case as the offender did not have the practical possibility of contradicting the ones mentioned by the agent, considering that the only evidence in his defence was the recording of the video cameras and he did not have the opportunity to bring a witness in his support, bearing in mind that he was alone in the car he was driving.

The requirements of article 6 paragraph (3) point d) The ECHR are specific aspects of the right to a fair trial guaranteed in paragraph 1 of this provision, which must be taken into account when assessing the fairness of the procedure. Article 6 paragraph (3) point d) enshrines the principle that, before a defendant can be convicted, "all the evidence of the accusation must in principle be presented in front of him or her in public hearing, for a contradictory debate". The principle in question does not apply without exceptions, "these can only be accepted subject to the right of defence; as a general rule, they require that the accused is given an adequate and sufficient opportunity to challenge the accusations and to interrogate their authors, at the time of their deposition or later"[23].

According to Art. 6 §1 and art. 3 lit. d) of the Convention, which provides the following in its relevant part: 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. 3. Everyone charged with a criminal offence has the following minimum rights: Every accused has, in particular, the right: [...] (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...] ."

From this general principle, according to the Court's case-law, two requirements come forward: the first –“ the absence of a witness must be justified by a serious reason; the second - when a conviction is based wholly or to a considerable extent on the testimony of a person to whom the accused could not ask questions or could not ask to be listened to either in the instrumental stage or during the debates, the right to defence may be incompatible with the guarantees provided in art. 6” [24] apud. [25].

However, in our opinion, the fact that the court assures us that the fact mentioned in the report are real, through the intermediary of an assistant witness, who, in fact, was absent from the scene, is not at all justifiable or correct, taking into account of the lack of

objectivity of such an assistant witness. On the contrary, it does nothing but to destabilise the balance in favour of the official, already in a favourable position, thanks to the legal provisions in the matter, which is equivalent, from the onset with a discrimination of the offender. In so far as the European Convention on Human Rights "is concerned, it actually provides a double ban a in the matter of discrimination, in the sense that art. 14 only establishes a limited prohibition, whereas Protocol no. 12 to the European Convention contains a general prohibition, so that all persons under the jurisdiction of the Contracting States will be able to plead before the European court the violation of the right of non-discrimination by the national authorities not only with regard to the rights and freedoms guaranteed by the Convention, but also with respect to any right recognized in the national law of the Contracting State concerned" [26] apud. [27].

Discrimination "does not tend to manifest itself in an open and easily identifiable manner". Proving a case of direct discrimination "is often difficult, even though, by definition, differentiated treatment" is "openly" based on a characteristic of the victim". As already discussed," the reason for differential treatment is often unexpressed or superficially associated with another factor" [28].

Typically, the person forwarding the action must convince the decision-making body that discrimination has taken place. However, "it may be particularly difficult to demonstrate that differentiated treatment has been applied based on a certain protected characteristic. This is because the reason that underlies a differentiated treatment often exists only in the mind of the author" [29] apud. [30].

However, in our opinion, the two cases that are presented herein and particularly the first situation are relevant both on discrimination and "imbalance of forces", as well as on double abuse by the officials who, by taking over the only one evidence - the alleged fake travel ticket, they did not give the opposing party the possibility of making copy of it or taking a photograph to be shown later, to the court, also being verbally aggressive and offending her, facts that should have been sanctioned disciplinarily by their senior leaders.

3. Conclusions:

Through those discussed and analysed above, we wanted to demonstrate that, in practice, it sometimes is very difficult for the two parties of an administrative hearing to

guarantee a clear balance in terms of the possibility to bring and administer evidence in defence. Though the facts that were presented above, we wanted to point at least two situations when this imbalance seems to be obvious, especially in the situation where the deed took place in a means of transport, and in this situation the and in this case, the opportunity to obtain a relevant testimony of another traveller or to obtain a written document (photo) or supporting evidence demonstrating the cause of the petitioner is non-existent.

All these situations show us that the principle of equality of arms derived from the provisions of art 6 ECHR can be violated or questioned in everyday practice, and this situation will be accentuated as long as the legislator maintains his position in the normative act which gives, from the beginning, a favourable position to agent regarding the evidence, the written report, thus being the legal "beneficiary" of the presumptions of authenticity and legitimacy.

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THE CRIMINAL, MADE TO BREAK THE LAW OR JUST A SIMPLE SOCIAL CIRCUMSTANCE?

Lecturer Carmina TOLBARU, PhD.

Faculty of Economic Sciences and Law, University of Pitești (ROMANIA)
carmina.tolbaru@gmail.com

Abstract

The criminal behaviour was a topic of analysis for criminal researches, the approaches of this deviant manifestation, in terms of identifying its causality, implying a complex many-sided perspective. The prerequisites to explain criminality and deviance cannot neglect the existence of a somatic basis or the fingerprint of a psychic life of the individual, and cannot disregard the social system where the individual is born, exists and develops.

Keywords: *criminal behaviour, causes, factors, free will, social order.*

Introduction

The criminal behaviour raised many discussions in terms of unilateral visions on it. We propose to emphasize the most eloquent ways to explain and construe deviance and criminality. When explaining criminal behaviour, one cannot disregard the existence of a somatic basis, recognising the fingerprint of the psychic life in the general manifestation of the individual, especially regarding the abnormal expression of his/her behaviour within the social life. Practically, the individual, being closely linked to society, comes to be subjected or not to its rules, thus displaying a positive or a negative answer to the characteristics and operation of social systems.

The expression of deviant behaviours is considered as abnormal, weird, primitive and violent, all these reactions coming from the biological structure of the individual, by inheritance or degeneracy, but without excluding the psychological characteristics or the environment particularities [1].

1. Criminality – expression of the "need" of the individual

What raises questions is the fact to understand why more or less individuals, in different ways which lead to common causes or to many connected or interlinked causes,

leave the main road and become stray and, in another way, an illegitimate, inconsistent and illegal one, trying to reach a destination, sometimes pre-set, which many times represent the satisfaction of a need. Actually, the term criminality expresses a variety of behaviours, some similar, some very different one from another, manifested at all levels and structures of social life.

For example, economic criminality refers to those offences committed within the legitimate professional activity, such as corruption, and differs a lot from what violent criminality represents, which takes the shape of some crimes, such as homicides or sexual violence. The amplexness of the phenomenon is recognised at both internal and global level, the highest percentage being registered by consumers, respectively those persons outside organisations, such as agents, service providers, sellers or company clients. Of course, frauds are based on different reasons and circumstances, their knowledge being essential in order to efficiently prevent, detect and fight fraud risks. The continually changing current economic and geopolitical context and the changes in the field of technology, obviously lead to such type of crimes.

A relevant percentage within economic crimes is registered by unprofessional conduct. The presence of weak points within organisations and the importance of the human factor that, in some situations, appears as impossible to be replaced by technology, make fraud possible even by persons inside the company or organisation. Last, but not least, cybernetic crime appears as the type of economic crime having the highest impact in the future.

Organised crime or the serious types of criminality – include other forms of criminality, such as informatics criminality, production, traffic and distribution of drugs, human trafficking, or illegal introduction of traffickers. Organised crime is an essential factor in favour of terrorism, enabling terrorists to purchase weapons and to get financial means. Other forms of crimes recognised at the level of the European Union are represented by forgery of document, money laundry, online illegal commerce with goods and services. Also, organised crime against patrimony refers to different crime-related activities, such as burglaries, thefts and organised robbery, including crimes related to vehicles. Regardless of the type of organised crime carried out, in most cases, offenders use and adapt, with increasing skills, technologies whose impact is more and more

important. Therefore, we ascertain a much more use of internet for all types of illegal commerce with goods and services. [2]

Human trafficking – represents one of the most serious forms of organised crime by flagrantly violating the human rights and it is considered one of the most profitable crime-related markets. Forgery of documents is the main way used by these traffickers in carrying out human trafficking activities. The phenomenon of human trafficking increased more and more, and that is why Directive 2011/36/EU extends such crime-related activity to others forms of exploitation, too, such as forced beggary, referring to an exploitation of crime-related activities, respectively exploitation of a person so that such person commit thefts, traffic of drugs and other similar activities involving a financial gain [3].

Human trafficking for organ trafficking falls under this category, too, including those extremely serious forms where vulnerable persons are involved, especially children or disabled persons, or where the victim's life is jeopardized, or in case the crime involves committing some serious acts of violence, such as torture, forced use of some medicine or drugs, rape or other serious forms of psychological, physical or sexual violence.

Informatics criminality – a newly appeared concept in the current society, remains connected to classical traditional crime, as offenders use more and more the internet both as a way to increase their activities and as a source of acquiring the means and of finding some new ways of committing the crimes. We are talking here about cybernetic attacks, online sexual exploitation of children, payment card frauds.

Terrorism, organised crime and informatics criminality are therefore interconnected fields. It is clear that they are criminal manifestations involving different regions in the world and they refer to the evolution of criminality, its prevention and the need to repress it [4]. It is obvious that the forms of criminality, although very different, determine the interest for understanding the offence itself. The problem of criminality and criminal-related activities is very complex and is not limited to simple solutions, all the more as it refers to more and more diversified and numerous criminal behaviours. What is of interest is the dynamic of such criminal behaviours, their frequency in time and place, age, sex and many other characteristics related to offenders.

1.2. Personality of the offender

The variations in contents and the social conditions tend to favour the execution of crime-related activities or the moment of initializing them, the personality of the individual having to be understood in terms of algorithms of biological, psychological, psychiatric and also social level [5].

The question to be made and to which we wish to answer is To what extent is the individual endowed with absolute free will and reasoning or is he/she totally determined to act or manifest in a criminal way? In other words, if we consider the criminal a voluntarily rational actor, this meaning to accept that he/she is opposed to the determined perpetrator, made to commit the crime.

Examination and interpretation of crime automatically imply an analysis of the social-legal dynamics. Inevitably, there is the conflict between society, as social structure, on one hand, and its subjects on the other hand. The individual manifests himself/herself and acts within such social structures, being the creator and their product at the same time. Against his/her will, he/she can become a victim, too. The social processes and the social change to which, inevitably and incontestably, all social actors are exposed to, imply new forms of problematic situations, of criminality, of victimization, and it is undisputable the fact that the technology has effects on speeding criminality within the most diverse social structures.

In considering all these aspects, the crime-related manifestation always represents the action of a man and it is the catastrophic expression of the personality of the individual.

1.3. Criminal behaviour

In figuring out the criminal behaviour, the interest should not prevail on perceptive aspects, which are common to many similar events seen, but on the report occurring between the checking, or the modality to develop of a single event, and the presence of some concrete conditions in the environment where such event develops. This type of approach belongs to the pathological psychology; respectively each act made by a person is partly linked to his/her condition and partly to the characteristics of the psychological environment at a certain moment. Therefore, we cannot leave out the so-called tendencies of the criminal, respectively his/her predisposition for, his/her attraction for

delinquency [6]. Such tendencies are natural, meaning that they depend inevitably on their organisation, analogous, because of the inferiority of the structure and of the physical and psychical functions. The types of criminals should be observed by relation to the way in which they committed the deed and to the stimuli that made them do that. Thus, we can speak about those wrongdoers who are born with bad instincts and who cannot be changed, those occasional wrongdoers who commit the deeds only within the context of a circumstance that can only appear once in a life time, wrongdoers out of habit who commit illegal deeds as a constant and usual activity, as a common profession, insane wrongdoers characterised by moral insanity, or the passional ones, etc.

Therefore, we have to identify the types of wrongdoers and the forces determining their behaviours. The totality of the social, psychological and biological factors existing at a certain moment in their lifetime, determines the behaviour of the individual. In other words, we are talking about a manifestation based on concrete causes and not about a free and responsible choice of the individual.

Criminality appears as a product of the existence of the individual in the society, being a phenomenon of social life, an abnormal pathological manifestation, contrary to the conditions of existence and development. So, the individual can only have a criminal behaviour if he/she lives in society and comes into contact with the other individuals. The frequent question is: to what extent do the lack of education and the poverty give birth to criminality? However, taking as reference a group of private individuals deprived of the most elementary form of education, not all of them turn to criminal manifestations, although they face poverty, so not all of them become wrongdoers. Some of them come to depression and commit suicide, and others continue to fight honestly for a normal and decent life.

Conclusions

Fighting the forms of criminality supposes getting to know the concrete causes, in order to succeed in constantly and successively diminishing them. As human freedom does not exist, there is not at least one moral responsibility, even if the physical imputation of the crime remains and is sufficient by sanctioning the wrongdoer.

The individual should circumscribe to a certain social order that should be characteristic for any society where rules operate, complemented by sanctioning criteria, so that the free will appears as being negated by imputation of guilt and by punishment of the respective guilty person.

We live in a world of unequal opportunities where we face social inequalities and direct or indirect discriminations which determine a positive or a negative reaction to the social environment to which we relate and in which we can find some individual and physical conditions. Since our birth, we all place ourselves in a certain pre-set situation and in a pre-set status, and the possibilities that we see are always linked to the horizon set up by such status. The possibility to really enjoy the freedom to think or to act is itself reduced, meaning that the need felt by each of us, as an incipient form of existence, appears as being conditioned, and not guaranteed in any way as form of freedom.

Besides those benchmarks, it is true that the biological factor, manifested by degeneracy, atavism, insanity, is the one having a predominant influence, but in some circumstances there can be the physical factor, rendered by climate or temperature, or the social factor, represented by public opinion, habits, religion, family, education, alcoholism, economic and political order and progress.

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CONSIDERATIONS REGARDING CONTRAVENTIONAL LIABILITY IN ENVIRONMENTAL LAW

Lecturer Cristina Mihaela PAUL, PhD.
“Titu Maiorescu” University, Bucharest (ROMANIA)
av.mihaelapaul@yahoo.com

Abstract

A major problem of mankind is the continuous degradation of the environment. In order to protect the environmental components it was necessary for the competent authorities to adopt specific legal norms, which could sanction the possible behaviors of the people towards the environment. Legal liability for the environmental law was necessarily established, due to the national ecological situation increasingly affected by the consequences of industrialization and automation, by the irrational exploitation of natural resources.

Keywords: *environment, legal norm, resources, responsibility, liability, contravention.*

Responsibility and liability in environmental law

In order to be able to enjoy freedom, we must first of all be responsible.

Responsibility is primarily a social phenomenon. It represents an obligation to do something, to answer for something, to be held accountable for something, it is practically the individual's engagement in the process of social integration.

The individual with responsibility refers to the norms and values of a society actively and consciously [1], the principle of responsibility being a fundamental principle of law.

Social responsibility knows several forms of manifestation: moral, religious, political, cultural and legal responsibility.

Although distinct, responsibility and liability, by nature, content and degree of integration, are nevertheless linked, because both refer to the relationship between the individual and the community.

The concrete reality is that the two terms are not equivalent, the term liability concerns the legal-moral field, while the term of responsibility is an object of concern for sociology.

The phenomenon of social responsibility has come along a path parallel to that of enhancing the natural given of man. [2]

The individual's responsibility has been created around the value of justice.

The notion of liability has undergone an evolution similar to that of responsibility. This evolution of liability can be located in the behavior of man within material life, since the idea of responsibility is specific to normal life.

Most actions generate a form of liability, even within unorganized social relations.

Responsibility is not found exclusively within the law [3], it can be found in any area of social life.

The legal liability / responsibility is complementary to the moral responsibility.

The legal norms of ethical character do not generate legal responsibility, the notion of liability being associated more quickly.

Legal liability is normative, belongs to the domain of public authority and seeks to observe the norm.

The legal liability is based on the illicit conduct of the individual towards society. Since each branch of the law knows a specific form, there are several forms of legal liability: political liability (constitutional liability), civil liability, contravention liability, criminal liability and disciplinary liability.

Contraventional liability in environmental law

This form of liability is attracted when a contravention is committed.

The contravention is a fact that presents a lower social danger than the crime, a fact that is explicitly provided by law or other normative act, and which is committed with guilt [4].

The regulation of legal liability in environmental law is based in GEO no. 195/2005 on the protection of the environment.

In environmental law, it is often resorted to administrative (contraventional) liability for preventing or combating non-compliance with legal requirements, given the advantages of such a form of liability. [5].

Contravention liability occupies an important place in the system of legal liability regulations. Contravention liability has a double role: economic role, but also a preventive role.

Contravention liability is a form of the administrative liability, the contravention being a form of manifestation of the administrative illicit, its most serious form, its legal regime being in general an administrative one. [6]

Natural and legal persons who carry out activities that violate the rules contained in the environmental protection rules, or that do not fulfill the legal obligations arising from the environmental legal reports are liable for contravention. Each is liable according to the degree of pollution caused.

A number of specific obligations are incumbent on legal entities, in order to carry out normal social relations regarding the environment [7].

The local councils of the sectors of Bucharest can establish and sanction in many areas: sanitation, maintenance of parks and green spaces, maintenance of streets and sidewalks, schools and other institutions of education and culture, storage and collection of garbage and household waste.

The finding of contraventions and the application of sanctions (fines) are made by the commissioners and authorized persons within the National Environmental Guard, the authorities of the local public administration and their authorized personnel, the National Commission for Nuclear Activities Control, the Ministry of National Defense and the Ministry of Administration and Interior by the authorized personnel in their fields of activity, in accordance with the duties established by law, as well as the personnel of the administrative structures, etc.

The contravention fine in environmental law is applied by the persons empowered on behalf of the administrative bodies, without investigating the polluting agent's guilt.

Responsibility for pollution has an objective character, being able to intervene whenever the environment has been polluted.

The legal responsibility in the field of environmental protection must also be included among the coordinates that lay out the regulation of the content of a fundamental right to a protected environment. [8]

GEO no. 195/2005 regarding the protection of the environment, establishes a series of contraventions sanctioned with a fine in the amount established by the law (art. 96).

Ecological contravention is the deed committed with guilt, of a lower social danger than the crime, through which the environmental factors are harmed.

The environmental contravention includes: the object, the subject, the unlawful act (it consists of what is not allowed, to act in a way forbidden by the mandatory legal norms of the environmental law), the guilt (the offender can act intentionally or negligently).

The penalties that apply to acts considered contraventions can be: main and complementary.

The main sanctions are: the warning, the fine and the provision of an activity for the benefit of society.

Complementary contraventional sanctions are:

- a. Confiscation of goods intended, used or resulting from contraventions.
- b. Suspension or annulment, as the case may be, of the opinion, agreement or authorization to exercise an activity
- c. Closing the company
- d. Locking of the bank account
- e. Suspension of economic activity
- f. Withdrawal of the license or notice for certain transactions or for foreign, temporary or permanent trade activities.
- g. Cancellation of works and bringing the land back to its original state.

By enforcing environmental sanctions, the aim is to determine the polluting agent to promote technologies and techniques that protect the natural and anthropic environment.

The sanction that is established must be proportionate to the degree of social danger of the act.

For an unlawful environmental offense, a single main contraventional sanction and one or more complementary sanctions may be applied.

The limits of the fine are relatively small, given that those who violate the rules imposed can sometimes be multinational companies with very high turnover and can

afford without problems a payment of money that is often symbolic for them. This fact makes the fine a relatively inefficient sanction, which allows some to pay relatively lightly, thus acquiring a true "right to pollute". [9]

The application of the sanction of the contraventional fine is prescribed within 6 months from the date of committing the deed. The provisions of art. 13 of the GO no. 2/2001.

Regarding the contravention procedure, art. 97 paragraph 1 of GEO no. 195/2005 on environmental protection establishes certain special rules.

The provisions of art. 97 paragraph 3 of the GEO no. 195/2005 specifies that the provisions regarding the contraventions are supplemented with the provisions of the GO no. 2/2001 regarding the legal regime of contraventions, approved and modified.

The contraventions are ascertained by commissioners and authorized representatives of the National Environmental Guard, police officers, gendarmes and the personnel of the Ministry of National Defense, empowered in their fields of activity, according to the tasks established by law.

The contraventions can be ascertained by the personnel of the administration structures and the custodians of the protected natural areas, only in the territory of the administered natural area.

The contraventional sanctions represent measures of coercion and re-education that are applied to the offender in order to rectify and prevent the commission of other crimes [10].

Categories of contraventions

The categories of contraventions are provided in different normative acts regarding the environmental protection. These normative acts are aimed at protecting the different environmental factors: air, soil, water, forest vegetation, fauna, human settlements, protecting and preserving the landscape and maintaining the ecological balance.

The protection of the environment is regulated by a legislative package that requires a series of monitoring regarding the impact that the activity carried out by the companies has on the environment.

Thus, the Government Decision no. 127/1994 regarding the establishment and sanctioning of some contraventions to the norms for the protection of the environment, three categories of contraventions have been established, depending on the amount of the fine applied as a sanction. For example, the failure to fulfill the obligations established by various normative acts for the protection of the environment (the failure of the landowners to take measures for the sanitation and management of the unoccupied land productively or functionally in the urban area) or the execution of acts that prejudice the quality of the natural factors (disposal or storage of household waste outside authorized sites, exceeding the emission norms of pollutants).

The environmental protection packages require a series of monitoring regarding the impact of the activity carried out by the legal entities on the environment.

Thus, Law no. 211/2011 and GD no. 856/2002 regarding waste management, Ministerial Order no. 794/2012 regarding the procedure for reporting data on packaging, GEO no. 195/2005 on environmental protection, obliges all economic agents to report monthly/annually, to the National Agency for Environmental Protection (ANPM) or the County Environmental Agencies, a series of situations regarding waste management, packaging, management of waste mineral oils, management of dangerous substances, etc.

The economic agents that do not submit these reports within the deadlines established in the legislation can endure a series of financial sanctions, and in some cases they may end up suspending the activity for non-observance of the environmental protection norms.

Among the sanctions that the control bodies can issue we mention:

- The lack of strict records of dangerous substances and preparations and the lack of providing information and data required by the competent authority for environmental protection constitutes a contravention and is sanctioned with a fine from 25,000 to 50,000 lei, for legal persons,.

- The lack of record concerning the results and the lack of reporting to the competent authority for environmental protection of the results of the self-monitoring of polluting emissions, according to the provisions of the regulatory acts, constitutes a contravention and is sanctioned with a fine of 50,000 lei to 100,000 lei, for legal persons,.

- The lack of records of the generated waste constitutes a contravention and is sanctioned with the fine from 15,000 lei to 30,000 lei. Etc

GEO 196/2005 on the environmental fund, with the subsequent additions and modifications, establishes a contribution of 2 lei / kg to the economic agents who put packaged goods on the market, those who distribute packaging for the first time on market etc.

The European directive on packaging and packaging waste is transposed into Romanian legislation by Law 249/2015 on the management of packaging and packaging waste.

In conclusion, we cannot fail to remember the fundamental principle of environmental law: "the polluter pays".

As an expression of the principle the polluter pays, Law no. 24/2007 regarding the regulation and administration of green spaces in urban areas, provides that, in addition to applying the fine, the offenders must repair the damages brought to the environment through committing the offense.

The means available to the public authorities in the member countries of the European Union, in order to enable the polluters to ensure an adequate depollution are: pollution taxation, the establishment of anti-pollution technical norms and the application of various compensation mechanisms.

GEO 195/2005 retains the old conception on contraventions, but with some adjustments regarding their object and especially of the financial penalties applicable. The amount of fines increases considerably, the difference between the fines applied to individuals and legal entities being also 6-8 times higher.

In art. 96 of the ordinance, three categories of contraventions are foreseen: contraventions consisting of violations of the legal provisions, contraventions consisting of violations of some legal provisions such as, the obligation of the natural persons to request and obtain the regulatory acts, as well as contraventions to the environmental protection regime, considered the most serious, at least from the perspective of the fines applicable (the obligation of natural and legal persons to diminish, modify or cease the activities generating pollution at the motivated request of the competent authorities, to

apply the required measures in full and on time, in accordance with the regulatory acts and the legal provisions, following the environmental inspections, etc.)

Conclusions

We cannot deny the usefulness of the contraventional liability, but it also has a great shortcoming, in the sense that it allows the contraventional “recidivism”, so that by repeating the illegal acts a state with negative impact on the environment is perpetuated, with the price of repeated payment of fines, which in certain cases may be convenient for the offender.

As the jurisprudence also shows, the punishment of legal persons is much more effective by applying complementary sanctions because, according to statistical data, the courts have shown leniency when the question of applying deprivation of liberty penalties for the representatives of the legal person was raised, even in the case of serious acts that resulted in major environmental pollution.

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HUMAN RIGHTS AND ARTIFICIAL INTELLIGENCE

Ingrid Ileana NICOLAU, PhD.
Spiru Haret University, Constanta, Romania
ingridnicolau@yahoo.com

Abstract

Artificial Intelligence has the potential to help human beings maximize their time, freedom and happiness. At the same time, it can lead us to a dystopian society. Therefore, finding the right balance between technological development and protection of human rights is an urgent matter on which relies the future of the society we want to live in.

"Use of Artificial Intelligence in our life is growing, currently covering a wide range of domains. Something seemingly trivial like avoiding traffic jam by use of an intelligent navigation system or getting the offers directed by a trustworthy trader is the result of data analysis that can be used by AI systems", stated Dunja Mijatović, European Council Commissioner for Human Rights.

Keywords: *artificial intelligence, human rights, society, robot laws, robot ethics.*

Introduction

Artificial intelligence (AI) is a smart digital system that learns on its own, develops its own search and learning systems, can even have its own language (without being understood by humans), develops its own artificial neural networks, can write its own programs, but most important is the fact that it has decision-making power. Depending on the knowledge it has, it can decide the actions that it does or does not do, being able to predict their result. In other words, AI is no longer dependent on human command. Therefore, AI evolves alone, by analyzing the data, gradually expanding its neural networks, improving its performance. It learns at a higher speed than humans, it plans its way of learning and structuring the data and, above all, decides on its own [1].

In 1942 the Russian science fiction writer Isaac Asimov conceived the "Three Laws of Robotics": 1) A robot cannot hurt a man or, by inaction, cannot allow a man to be injured 2) A robot must obey the orders given by humans unless such orders would contravene the first rule 3) A robot must protect itself as long as this protection does not contravene the first and second rules.

For 75 years, these clauses have inspired research and cohesion regarding the rights of robots. However, today, Asimov's rules seem rather simplistic and outdated because they focus more on humans than on robots.

The impact of computers on the world since the advent of the first UNIVAC computer in 1946 has been profound. At first, the idea of having a personal computer in the office, home or school seemed inconceivable. Today personal computers are accepted as part of our modern world.

Computer processors are used to operate cars, TVs, offices, airplanes and defense systems, and these are just a few examples. The next stage of the progress of computers as mobile units, robots, can, like the personal computer, become a regular partner at home and at work.

The spearhead of computer technology is the development of artificial intelligence (AI) and the realization of living computer circuits, called biochips. AI development requires a leap in the computer interface, a huge leap over various data, things that a programmable machine has failed to do.

Effectively, the computer must skip the variables, instead of analyzing them individually. One of the essential difficulties in developing such thinking of computers is the conversion of the holistic thinking process into linear descriptions of written language. The analysis of the common sense is not in line with the FORTRAN programming logic language. "For example, there is no programming language today that makes the difference between a dish and a mug" [2].

During these explosive times of high-tech innovation, the contact between machines with artificial intelligence and humans will grow rapidly. Intelligent computer devices, especially specialized systems, now make decisions in medicine, oil exploration, space exploration, air traffic control, trains and graphic design to name just a few of the impact areas. The most important quality of specialized systems is their infinite ability to store even the most insignificant information and to access it at huge speeds and to compare it with other information in order to make instant decisions.

Eric Horvitz, head of the research department at Microsoft believes that with the development of AI, certain problems, such as those of legal, ethical and psychological nature will arise. [3]

The impact of AI in society

AI is no longer a fiction or a laboratory research, it is a reality that has begun to have a major impact on society. For this impact we must prepare. What an AI can do is

pretty much everything a person can do at work. It can handle objects, it can recognize handwriting, it can recognize faces with great accuracy - it can even recognize the emotional state of the human being after the features of the face at that time - it can understand the language and even translate instantly when appropriate, it recognizes fingerprints and can detect obstacles, weather forecasts, medical diagnoses and has the ability to adapt quickly, without problems, under extreme conditions, etc.

Randall Davis of MIT says about artificial intelligence the following: 1) it can solve problems 2) it can explain results 3) it can learn from experience 4) it can structure its knowledge 5) it is able to break rules when necessary 6) it can determine relevance. Currently, computers are capable of accomplishing the first three tasks, but they cannot be reprogrammed alone, nor can they break rules. [4].

An essential thing that should be considered is the privacy, the protection of personal data in the interaction with an AI. Personal data are information relating to the person, that is, that information concerning the personal, public or professional life - information regarding the physical or physiological identity, physical or digital address, information posted on websites, medical information, information related to digital codes of accession.

The collection and / or processing of personal data means any operation that is carried out on personal data, which one does. This data can be collected by an AI which is able to find out the most intimate things about a person in a very short time. From blood pressure, blood composition and the diseases they suffer from, to physical or digital addresses, where that person was, with whom and what he/she talked about that day, or what his/her bank accounts are.

In the context of the above, this question is also essential: what freedoms and rights will we have in the "AI era"? How far will be the right to privacy respected?

On the occasion of the Davos meeting in January 2018, at the World Economic Forum, the ability to adapt companies to the new and revolutionary AI challenge was discussed. What has been made very clear was that "the fourth industrial revolution will eliminate millions of jobs" [5]. Another essential aspect that has been specified and must be kept in mind is that we need a concomitant revolution in training and education, encouraging innovation and adaptability.

Let's not overlook the fact that AI can "reproduce" itself by programming AI-robots [6], with an efficiency that man cannot reach. A single AI can program 10,000 robots at a time, says Kai Fu Lee, President and CEO of Sinovation Ventures, while pointing out that about half of all jobs will soon disappear and be replaced with AI. [7]

Singapore announces that by 2022, it will introduce public driverless buses [8]. The Swedish Transport Agency announced in December 2017 that, starting from 2018, it will introduce driverless buses in public transport [9].

As you can see, AI can do - and even with much higher efficiency (- everything that man does at present, at work.

Will entrepreneurs prefer to implement AI in their companies or will they prefer human staff? There are companies that have already purchased and developed AI [10]. So, we think the answer is predictable: yes, companies will prefer AI because the costs are much lower, and the efficiency increases considerably. AI does not get tired, does not need a meal break, does not need rest and does not have to work only 8 hours a day; moreover, it does not need a salary. [11]

If we look at what an AI can do in relation to human capacity, then it is even more effective and it can be considered superior. Will it be so? If so, how will society approach such a situation, such a change?

Society has to learn much more quickly to adapt to the new, otherwise personal misunderstandings and tensions will give rise to conflicts that can lead to wars. It is necessary to realize that it is a responsibility on our part to educate the new generations, considering the future from this perspective. Everything is based on education and lifelong learning, respect for moral principles and especially respect for everything arounds us.[12]

Romania and IA

AI already exists in Romania, for the time being in the security systems of companies and in call centers, but more and more entrepreneurs are interested in implementing it even more in companies, thus replacing the human labour force.[13]

Another interesting news is that Romania will be the first country to have AI as an ambassador. It will answer questions about Romania, to all foreigners, make

recommendations for visiting certain tourist areas in the country, talk about people's habits and their way of life. In November 2017, the Association of Business Services Leaders in Romania (ABSL) met in a conference discussing, among others, about the influence of artificial intelligence on the performance of the service industry. "The leaders of the business services industry in Romania pointed out that the technology and the introduction of artificial intelligence was an instrument that could give more meaning and more value to the human being, by taking over the repetitive, routine activities. Therefore, the implementation of artificial intelligence does not in any way diminish the importance of the human capital, but it repositions it, traditional values such as: responsibility, attention and respect for those around us, verticality and transparency, being essential in the future. The technology is constantly changing, and the investment in education prevails, so that, in the years to come, there will be more mentors than heads or hierarchical superiors." [14]

IA will replace the unskilled staff in Romania said in an interview Iulian Stanciu, the general manager of eMag, the largest online retailer in Romania and the owner of the Flanco store chain. The official says that eMag is already investing in artificial intelligence because it saves time. [15]

Whether we are talking about multinational or state-owned private companies, if we are just thinking about replacing the staff with AI, from jobs such as drivers, cashiers, couriers, salesmen, there are millions of people who will remain out of work. Replacing the human labour force with AI is no longer just a discussion, it is a reality, it is no longer just a SF matter, but it is something that society should think about and anticipate by updating legislation and social protection in a way or another of the people. The issue is not if, but how soon will the social and statistical loss of jobs begin to be observed?

There are some people who believe that there is no threat on jobs, that we should be calm and that it will take at least 50 years until robots replace the human staff. Will it be so? We do not think that we need to be "calm", we must rather carefully and responsibly look at the labour market and education, precisely so as not to get into the situation of losing our jobs and being unprepared for those times. It will not take 50 years, because AI does not need 50 years to evolve nor generations in a row to experiment. It

has a very large and very fast learning capacity. What we need to do is to be active and learn from the mistakes of the past, observe the labour market and society's needs and adapt using new technologies, improving our way of life and work, being creative, but at the same time proposing legislative regulations having view of the future needs of society. However, even in the event that these transformations will last 10-15 years, we believe that the new generations should be prepared for what is to come. We think that we have the moral duty to prepare them for the situations in which they will be put and for the conscious exposure to new technologies, such as AI.

We cannot go back to what it was, nor can we stand still, technologically speaking, because of fear, or of the strong social impact that society will feel. It is basically impossible. But it is necessary to find legal solutions that respect all the moral and legal principles learned so far to protect human society in its interaction with AI.

From the data analysis done by the McKinsey Global Institute, supplemented by interviews and research by specialists, nearly 600 AI uses were highlighted in all major industries. [16]. Between 400 and 800 million employees will be replaced by AI until 2030, shows a new study by the consulting firm McKinsey.

Google CEO Sunder Pichai, says that AI is the most important discovery, deeper than electricity and fire. And just as we learned to use the two, we will also learn to work with AI.

Electricity, fire, atomic energy can kill people; all discoveries are risky and can lead to loss of human life, if misused, to the detriment of people and the principles that govern life. But also, when used wisely, electricity, fire, atomic energy and other major discoveries that humanity has made, have saved lives, helped humanity, greatly improving the quality of life, leading even to the prolongation of life and even to an evolution of it. In this way, we should also think about the new AI creations.

Conclusions

Technology is advancing at an exponential rate. Genetic engineering, lasers, space settlements, telecommunications, computers, robotics all bring social, economic and political changes as it has never happened before in the history of mankind. Unfortunately, it is difficult for people and institutions to keep up with such changes. One day the robots will be in our houses, as play partners for children, servants for adults.

They will be in court as judges, they will be in hospitals as caretakers, they will perform dangerous military tasks in our place, they will clean up pollution and save us from numerous accidents.

Therefore, AI can be the path to a substantial increase in the living standard of mankind throughout the planet, finding solutions to use it, increasing the quality of life of all people on the planet, helping us to considerably extend life. Changing the consciousness of mankind, changing the way of thinking and acting, can lead to the improvement of the life of every human being and thus of the whole society.

It is necessary for mankind to be able to learn from past mistakes and to act early in order to avoid major social tensions and even wars. The need to train and educate new generations in this regard is a responsibility that we should take on to ensure a future in which children and young people will understand that life can be also lived in a different way than what they are seeing today around them. [17]

Education based on knowledge, kindness, understanding, balance, on highlighting one's qualities and not on competition and envy, is a necessity.

We need to explain to children and young people why it is necessary to learn and have knowledge, we must explain to them that not only AI may be a threat, but there is also a danger of self-destruction. They must also know that AI may be a threat not only to jobs, but it may be a real threat to the extinction of humanity if we do not learn to go beyond the values of humanity. To do this, we must educate and teach children and young people which are the true values of humanity, so that they have a clear system of values to which they can relate permanently. Then, we need to educate the children and young people to be as united as possible, to motivate them to learn, to have knowledge and also to teach them how to work as a team, not to be divided, envious, but to find permanent support among them. Team spirit, knowledge, kindness and balance are the future, and not competition, envy and evil.

If we start doing this, we will work very well with AI, and the future of humanity will be as we cannot imagine it at this moment.

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TRANSFERS OF PERSONAL DATA TO THIRD COUNTRIES OR INTERNATIONAL ORGANISATIONS. AN OVERVIEW OF THE EUROPEAN LEGAL REGIME

Lecturer Dana VOLOSEVICI, PhD.

Petroleum-Gas University Ploiesti

dana.volosevici@vplaw.ro

Abstract

The protection of personal data is a strategic issue at European level and state of art legal tools are provided for data transfers and international data protection instruments. The paper aims to be an overview of the European legal regime applicable to the transfers of personal data to third countries or international organisations.

Keywords: *Data protection, European Union, transfer*

The protection of personal data is a strategic issue at European level and is enshrined in Article 8 of the EU Charter of Fundamental Rights. The Regulation 679/2016 [1] applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not. As an important number of personal data is transferred outside the EU, from its inception data protection legislation has provided several mechanisms enabling international data transfers aiming to ensure that when the personal data of Europeans are transferred abroad, the legal protection follows with the data.

Thus, any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if the conditions laid down the Regulation 679/2016 are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation.

The aim of the regulation is that to ensure that the level of protection of natural persons guaranteed by the Regulation 679/2016 is not undermined. Hence, data exporter transferring personal data to third countries or international organizations must meet both the conditions stated for the transfer, but also of the other provisions of the GDPR. Each processing activity must comply with the relevant data protection provisions, in particular with Articles 5 and 6.

Transfers of personal data to third countries or international organisations may take place in three main cases: (1) where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection (2) in the absence of a decision of the Commission, where a controller or processor has provided appropriate safeguards and (3) if the transfers fall inside the scope of a derogation.

Transfers outside the EU with adequate protection. A transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation (Art. 45 (1)). The Commission "adequacy decision" establishes that a non-EU country provides a level of data protection that is "essentially equivalent" to that in the EU. As is was pointed out by the case law, "in order for the Commission to adopt a decision [...], it must find, duly stating reasons, that the third country concerned in fact ensures, by reason of its domestic law or its international commitments, a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order" [2].

The adoption of an adequacy decision involves a number of steps: a proposal from the European Commission; an opinion of the European Data Protection Board; an approval from representatives of EU countries; the adoption of the decision by the European Commission. As confirmed in 2015 by the Court of Justice in the Schrems ruling, the adequacy standard does not require a point-to-point replication of EU rules[3].

The Commission, after assessing the adequacy of the level of protection, may decide, by means of implementing act, that a third country, a territory or one or more specified sectors within a third country, or an international organisation ensures an

adequate level of protection. The implementing act shall provide for a mechanism for a periodic review, at least every four years, which shall take into account all relevant developments in the third country or international organisation.

The list of the third countries, territories and specified sectors within a third country and international organisations for which the Commission has decided that an adequate level of protection is or is no longer ensured shall be published in the Official Journal of the European Union.

As per December 1st, 2019, The European Commission has so far recognised Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, Uruguay and the United States of America (limited to the Privacy Shield framework) as providing adequate protection.

Appropriate safeguards. Where the Commission has not decide that a certain country ensured an adequate level of protection, the transfer of data to a third country or an international organisation may be performed if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

The Regulation 679/2019 provides five types of appropriate safeguards which can be provided without requiring any specific authorisation from a supervisory authority: legally binding and enforceable instrument between public authorities or bodies; binding corporate rules; standard data protection clauses; approved code of conducts; approved certification mechanisms.

Subject to the authorisation from the competent supervisory authority, the appropriate safeguards may also be provided for contractual clauses or provisions to be inserted into administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights.

Legally binding and enforceable instrument between public authorities or bodies. Data exporter may assure the legality of a transfer using a legal instrument between two public authorities or bodies provided that the legal instrument provides 'appropriate safeguards' for the rights of the individuals whose personal data is being transferred and it is legally binding and enforceable. The 'appropriate safeguards' must include

enforceable rights and effective remedies for the individuals whose personal data is transferred.

Binding corporate rules (BCRs). BCRs are an internal code of conduct operating within a multinational group, which applies to restricted transfers of personal data from the group's EEA entities to non-EEA group entities. The BCRs are to be approved by the competent supervisory authority provided that they meet the conditions set forth in the Article 47 (2). Thus, the BCRs should be legally binding and apply to and be enforced by every member concerned of the group of undertakings, or group of enterprises engaged in a joint economic activity, including their employees. Data subjects should enjoy expressly provided enforceable rights with regard to the processing of their personal data. Moreover, the Regulation and the documents of Article 29 WP [4] provide the elements and principles to be found in Binding Corporate Rules.

BCRs can be used both for arrangements among entities of the same corporate group, and by a group of enterprises engaged in a joint economic activity, but not necessarily forming part of the same corporate group.

Standard contractual clauses (SCCs). Models of standard contractual clauses are laid down by the Commission, in order to ensure adequate safeguards for the transfer of data to third countries. By the Decision of 15 June 2001 [5] and Decision of 27 December 2004 [6] the Commission issued two sets of standard contractual clauses for data transfers from data controllers in the EU to data controllers established outside the EU or European Economic Area. The Decision of 5 February 2010 [7] established one set of contractual clauses for data transfers from controllers in the EU to processors established outside the EU or EEA.

Moreover, standard data protection clauses may be adopted by a supervisory authority and approved by the Commission pursuant to an examination procedure.

Approved codes of conduct. The codes of conduct are defined as „voluntary accountability tools which set out specific data protection rules for categories of controllers and processors” [8]. The codes are prepared, amended or extended by associations and other bodies representing categories of controllers or processors. As provided by the non-exhaustive list stated by the Article 40(2), codes of conduct may cover topics such as fair and transparent processing; legitimate interests pursued by

controllers in specific contexts; the collection of personal data; the pseudonymisation of personal data; the information provided to individuals and the exercise of individuals' rights; the information provided to and the protection of children (including mechanisms for obtaining parental consent); technical and organisational measures, including data protection by design and by default and security measures; breach notification; data transfers outside the EU; or dispute resolution procedures. A code is approved, registered and published by the supervisory authority.

Approved certification mechanisms. Certification mechanisms may be used as an element to demonstrate compliance with specific obligations of the controllers and processors concerning the implementation and demonstration of appropriate technical and organisational measures and the sufficient guarantees. Regulation 679/2016 does not define "certification", but the European Data Protection Board cites the definition of International Standards Organisation (ISO): "the provision by an independent body of written assurance (a certificate) that the product, service or system in question meets specific requirements"[9].

Article 42(5) provides that certification shall be issued by an accredited certification body or by a competent supervisory authority. The certification bodies issue, review, renew, and withdraw certifications (Article 42(5), (7)) on the basis of a certification mechanism and approved criteria (Article 43(1)).

The EDPB considers that when assessing a processing operation, the following three core components must be considered, where applicable: 1. personal data (material scope of the GDPR); 2. technical systems- the infrastructure, such as hardware and software, used to process the personal data; and 3. processes and procedures related to the processing operation(s)[10].

Derogations. Article 49 (1) states that in the absence of an adequacy decision or of appropriate safeguards, a transfer or a set of transfers of personal data to a third country or an international organization shall take place only under certain conditions. This article shall be interpreted in line with the provisions of the Article 44, which requires all provisions governing the transfer to be applied in such a way as to ensure that the level of protection of natural persons guaranteed by the GDPR is not undermined.

Therefore, the Article 49 shall be strictissimae interpretationis et applications and should never lead to a situation where fundamental rights might be breached [11].

The consent of the of the data subject is the first case stated by the Article 49. As regards the consent a two-step test must be applied: first, the consent shall meet all the conditions stated in the Article 7, as it has been interpreted by the WP 29 [12]; and as a second step, the provisions of Chapter V must be complied with.

Article 49 (1) (a) states that a transfer of personal data to a third country or an international organization may be made in the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46, including binding corporate rules, on the condition that 'the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards'.

According to Article 4(11) of the GDPR, 'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

The consent shall be "explicit", which means that that the data subject must give an express statement of consent [13]. Even if a written and signed statement is a unequivocal way to prove that the consent is explicit, it is not the only way to obtain explicit consent. Filling in an electronic form, sending an email, uploading a scanned document carrying the signature of the data subject, using an electronic signature are considered valid and sufficient ways to obtain explicit consent [14].

The data subject must have been informed before the transfer. As regards the information, we are again in a case of a two-layer obligation. The general obligation of information, stated by the Articles 13 and 14, of the specific circumstances of the transfer, such as the data controller's identity, the purpose of the transfer, the type of data, the existence of the right to withdraw consent, the identity or the categories of recipients etc, completed by the obligation to be also informed of the specific risks resulting from the fact that their data will be transferred to a country that does not provide adequate protection

and that no adequate safeguards aimed at providing protection for the data are being implemented.

After having been informed, the data subject must provide a consent specific for the particular data transfer or set of transfers. Therefore, a consent expressed in general terms cannot meet the conditions provided by the Regulation. As general rules regarding consent apply, the consent provided by a data subject can be withdrawn at any time and with no cause.

Another derogation refers to a transfer necessary for the performance of a contract between the data subject and the controller or for the implementation of precontractual measures taken at the data subject's request. In accordance with the recital (111) data the transfer shall be occasional and necessary in relation to a contract".

The occasional character of a transfer shall be established on a case by case basis.

Since the "necessity" requirement is also stipulated in the derogations set forth in Article 49 (1) (c) to (f), it may be relevant to point out some aspects regarding the necessity test. (Does this processing actually help to further that interest? Is it a reasonable way to go about it? Is there another less intrusive way to achieve the same result?). In all case, necessity shall be justified on the basis of objective evidence. Moreover, the case law envisaged that necessity is a concept which has its own independent meaning in European law and which must be interpreted in a manner which fully reflects the objective of the relevant law provisions [15].

It is important to point out that the performance of a contract cannot be used when a corporate group has, for business purposes, centralized its payment and human resources management functions for all its staff in a third country as there is no direct and objective link between the performance of the employment contract and such transfer, which constitutes a common practice for multinational corporations [16]. For this specific case, it is advisable to use other grounds provided by the Regulation, such as standard contractual clauses or binding corporate rules.

When a transfer is occasional and necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person, it falls under the provisions of the Article 49 (1) c). The above-

mentioned considerations regarding the necessity test and the occasional character of the transfer shall be applicable.

Another derogation, known as “important public interest derogation provides that a transfer shall take place only where it is necessary or legally required on important public interest grounds. The recital 112 clarify the scope of this derogation, through an enumeration which covers both public and private entities: “in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health”. No matter the public or private nature of the entity, the requirement for the applicability of this derogation is the existence of an important public interest.

The establishment, exercise or defence of legal claims constitutes another legitimate ground for a transfer, if the transfer is occasional and necessary. This derogation can apply to activities carried out by public authorities in the exercise of their public powers.

Since the transfer is related to “legal claims”, the procedure shall have legal grounds, but it is not limited to a procedure in front of a court of justice.

Another derogation refers to a transfer necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent. To exemplify, this derogation is applicable when data is transferred in the event of a medical emergency and where it is considered that such transfer is directly necessary in order to give the medical care required. As it has been pointed out by the European Data Protection Board, this derogation cannot be used to justify transferring personal medical data outside the EU if the purpose of the transfer is not to treat the particular case of the data subject or that of another person’s but, for example, to carry out general medical research that will not yield results until sometime in the future [17]. The data subject must physically or legally incapable of giving consent and the proof of the incapacity may be done by reference to legal provisions or by producing relevant official documents.

Article 49 (1) (g) and Article 49 (2) allow the transfer of personal data from registers, if the conditions stated by the two articles are met. Thus, the register should, according to Union or Member State law, be intended to provide information to the public,

therefore, the registers kept for private entities are outside of the scope of the derogation. Moreover, the registers should be open to consultation either by the public in general or by any person who can demonstrate a legitimate interest. Transfers from these registers may only take place if and to the extent that, in each specific case, the conditions for consultation that are set forth by Union or Member State law are fulfilled.

The transfer shall be limited to relevant data and it cannot involve the entirety of the personal data or entire categories of the personal data contained in the register. Where the register is intended for consultation by persons having a legitimate interest, the transfer shall be made only at the request of those persons or if they are to be the recipients. This derogation can also apply to activities carried out by public authorities in the exercise of their public powers.

Finally, Article 49 (1) § 2 introduces a new derogation which allows the transfer under a number of specific conditions and if it is necessary for the purposes of compelling legitimate interests pursued by the data exporter. This derogation applies only if a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations for a specific situation is applicable. Therefore, the data exporter must be able to prove it was impossible to frame the transfer by appropriate safeguards or to apply one of the derogations provided by the Article 49 (1) § 1.

As regards the conditions expressly enumerated by the Article 49 (1) § 2, they refer to transfer and to the data exporter. The transfer shall be non-repetitive, shall concern only a limited number of data subjects and shall be necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject. In order to reach this objective, the recital 113 provides that “the controller should give particular consideration to the nature of the personal data, the purpose and duration of the proposed processing operation or operations, as well as the situation in the country of origin, the third country and the country of final destination, and should provide suitable safeguards to protect fundamental rights and freedoms of natural persons with regard to the processing of their personal data”.

As regards the data export, it should have assessed all the circumstances surrounding the data transfer and provided suitable safeguards with regard to the protection of personal data. Moreover, the data export shall inform the supervisory authority of the transfer and provide a complete information to the data subject.

The protection of personal data has been central to EU law for more than 20 years, from the Data Protection Directive in 1995 ("the 1995 Directive") to the adoption of the General Data Protection Regulation (GDPR) and the Police Directive in 2016. As the demand for protection of personal data is not limited to Europe, countries and regional organisations outside the EU are adopting new or updating existing data protection legislation to respond to the growing demand for stronger data security and privacy protection. The European legal provisions regulating the transfers of personal data to third countries or international organisations take into account the compatibility with different data protection systems that facilitate international flows of personal data and adapt constantly its legal mechanism in order to ensure flexible and commercial wise instruments.

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EFFECTIVE TECHNIQUES FOR APPROACHING COMMUNICATION IN MEDIATION

Lecturer Claudiu IGNAT, PhD.

Spiru Haret University of Bucharest (ROMANIA)
claudiu@lexignat.ro

Abstract

Communication is a decisive element in restoring and restoring human relations, as well as the bridge that the mediator creates between the parties, so that, finally, the conflict resolution becomes a formality administered with mastery and art. Used wisely and patiently, communication becomes a negotiation technique within the reach of any professional in the conflict, allowing the parties to reach a unanimously accepted understanding.

Keywords: *mediation, cultural approach, value system, strategy, administration, communication.*

1. Introduction

„Mediation is an elaborate process in which the conflicting parties have the opportunity to express their wishes, needs, aspirations, expectations and interests, while also helping the reflection of the individual and the group, in order to make the decision most satisfactory to themselves." [1]

Mediation is primarily an alternative way of resolving conflicts, this procedure not excluding the parties to the conflict the possibility that they may be involved in another procedure, contentious or non-contentious, formal or informal, to resolve the conflict, either on its own friendly or imposing.

The mediation procedure is an eminently non-contentious, extrajudicial, voluntary procedure, whereby the parties are helped to negotiate a unanimously accepted agreement, under conditions of neutrality and impartiality, provided by a conflicting professional, in this case the mediator. [2]

Volunteering or the voluntary character of mediation presupposes and guarantees the parties to the conflict, that they have the freedom to choose their own way of resolving the conflict, the mediator, the communication or negotiation techniques that can be used

in mediation, as well as the ways of resolving the conflict. of the conflict, based on interests and needs, using objective criteria and accepted by the parties. [3]

The main technique used by the mediator during the mediation procedure is communication. The communication techniques can be found in all stages of mediation, from the moment the mediation begins, when the mediator establishes the first contact with the parties in conflict, until the effective resolution of the conflict through assisted negotiation, which is based on the selection of offers and which can lead implicitly to a lasting commitment to mediated conflict.

2. Communication techniques

Mediation communication techniques are most often used to find out as much as possible about the parties involved in the conflict, what is their role in the conflict, whether or not they are decision-makers in the mediated dispute, the history of the conflict and the value system and beliefs of participants in mediation.

All these aspects can form an x-ray of the conflict, thus giving the mediator the opportunity to choose a strategy for managing and resolving the conflict, by communication, based on criteria as objective as possible and in full accordance with the objectives and the support that the parties in the mediated conflict argue.

3. Communication through a cultural approach

Generally, parties in conflict do not always share the same cultural or axiological system, as they may belong to different cultures, giving birth to differences regarding the psychological ending of the conflict. Also, the parties may approach differently the degree to which they find it necessary to initiate a settlement, amicable or not, as well as the way in which this settlement can be reached. [4]

There are cultural paradigms unanimously accepted by community members, whereby conflicts may need a more or less psychological approach, with a greater emphasis on a legal approach, focusing more on a procedural approach and fairness. is based on the individual agreements that are mutually agreed upon.

It should be borne in mind that sometimes cultural approaches, even if at first glance seem a more affordable way to resolve the dispute, may prove to be a stagnation

factor in conflict management and a flawed or simply uninspired communication management strategy may become a factor generating conflict, amplifying the state of emotional instability of the participants in the mediation procedure. [5]

The communication must first be based on the common cultural elements, even if the value system is different or apparently different, establishing together evaluation criteria unanimously accepted by the participants in the dispute, even if their way of approaching the conflict is different.

When the culture of those who are involved in the conflict is primarily oriented towards collectivity, rather than individuality, the mediator must identify the individual or personal elements of the conflict, make the parties aware, that in fact they as individuals and not collectives are the ones responsible for the conflict and that in the end, they are the ones who have to reach an understanding, even if the conflict started from a collective consciousness but applied by the individual.

The mediator must find and identify whether the group's harmony and interpersonal relationships are more important than their individual interests and whether forgiveness or reconciliation are basic principles of the disputed parties.

4. Communication through and within separate meetings

Separate meetings are in fact a communication technique that has over time become a mediation technique that is used by the mediator when communication is at a standstill or needs further clarification of important issues in the economy. communication and mediation procedure. Separate meetings are also a form of attempt to re-establish communication by separating the emotional element from the communication, which is accomplished through confidential and relaxed discussions with each party involved in the conflict, separately.

This technique of communication reduces the psychological pressure, allowing the parties to reconnect and focus on real ways of resolving the conflict, by focusing on real options based on their stated and assumed wants and needs.

During these separate sessions, the mediator verifies realities, or checks the soundness or objectivity of the arguments used by the parties, controls the communication between the parties in dispute, so that they focus more on the objective

criteria, trying to eliminate the emotional elements that do not. other than stagnating the meditative dialogue initiated by the mediator with the help of all the people involved in the communication and mediation process.

Also in the separate meetings, by developing the communication and increasing the confidence of the parties both in the mediator and in the mediation procedure, they can accurately identify options to resolve the dispute, generating based on them concrete offers for a future mediation agreement.

At the same time, these separate meetings are very often used as a way of communicating the offers during the negotiation during the mediation, when the communication has been restarted and the offers are a natural consequence of this.

5. Communication through and during joint meetings

The mediation procedure is a long and elaborate process that requires first and foremost to re-establish the links between the parties, be they emotional or relational, so naturally, with the restorative progress of communication, other communication techniques that normally occur naturally, it no longer implies a strict control of the mediator regarding the behavior and communication between the parties in dispute. As a result, joint meetings appear as a form of communication that is secure, fast, and more efficient than other communication techniques.

In this case, the emotional factor, the stress, was overcome and the mediator leads the parties to the negotiation stage of the mediation procedure, but without losing sight of the arguments of the parties that even if they are different can at any time return to an argumentation based on subjective criteria.

Communication through joint meetings allows both the mediator and the parties to be connected at any time to the arguments used, to the way of supporting them, allowing direct and non-intermediary dialogue, ensuring real-time synchronous feedback, as well as accepting or combating the arguments that are present. on the communication table.

It is necessary that during the mediation procedure, both in separate meetings and in joint meetings, the mediator must guide the parties to an open, positive language without negative emotional burden, as toxic language, full of negative emotions in the form of abuse verbal which compromises, in most cases, the established relationships

and implicitly the performance of efficient communication and conducive to the resolution of the dispute. [6]

6. Non-verbal communication and verbal communication

Interpretation of nonverbal communication in mediation is one of the most demanding but also one of the most valuable sources of information on the parties' behavior, assimilation and acceptance of arguments, combating them as well as the emotional impact they produce on the disputed parties. mediated. [7]

Non-verbal communication is in fact an extension of verbal communication, by accentuating it, completing it, and when they are in harmony, they represent a clear indication that the statements of the parties are supported and are in accordance with their intentions and that they are true. When, deliberately, nonverbal communication contradicts certain aspects of verbal communication, there is a risk of making the communication unbelievable and may introduce elements of confusion that may even lead to an unexpected amplification of the dispute.

As such, the mediator must attach greater importance to nonverbal communication and the antenna must implicitly correct by referring to verbal communication so that it can avoid tense situations that could lead to escalation of the dispute or simply lead to unjustified dilatation of the mediation procedure. Moreover, nonverbal communication helps the mediator to understand that the parties may be receptive to a certain way of resolving the conflict even if their verbal language is at odds with nonverbal language.

The gestural support of the speech is also part of the nonverbal language category, and assumes that the speaker or the part involved in the communication process, displays a certain facial expression, moves, shakes hands, shakes his head, or changes his position.

The gestures used during the speech can represent more than punctuation when we read a text, and these allow the synchronization of the speakers by harmonizing the verbal with the nonverbal and of course paraverbal. [8]

Another important aspect that becomes an essential component of communication during the mediation process, and which has an interpretative character, is the way in which the context influences the communication. Therefore, the analysis of

communication should not be limited only to understanding the interaction mechanisms and the way in which the protagonists are involved, but also implies an interpretation of the context in which the communication takes place. The positioning of the parties in space and time, as well as the history of their behavior can create interpretative patterns, but not always the parties react in the same way in similar situations if they do not have a motivation. [9]

7. Elements of proxemics or the language of inter-human distances

"People behave as if they were carrying concentric, invisible, open-eyed body wraps, the invasion of which is not permitted at any time, however, and any intruder perceived as unwanted or dangerous." [10]

Parties as individuals, more or less consciously, feel the need for an individual territory, as a kind of maneuvering space within which they feel they are at large feeling safe. The language of proximity denotes strong and sometimes even contradictory meanings. The agreed and assumed proximity can be represented by mutual attraction, cooperation, friendship, love, intimacy, generally positive emotions and feelings, and the forced closeness can hide aggression and hostility being dominated by negative feelings and feelings in a latent state that can whenever it takes the manifest form, inevitably leading to the amplification of the conflict and implicitly to a communication barrier. [11]

As a rule, the affective and psychological distances are translated completely and completely spontaneously into physical distances. As such, when dealing with good news, positive intentions and feelings, strong emotions, the involuntary and spontaneous interlocutor will approach and when the news is bad or the feelings are negative, it will take a step back or a gesture of withdrawal. [12]

In other words, the higher the level of trust, the more the trust in the interlocutor increases directly in proportion to rebuilding the relationship of the parties, and in the end, the dispute is resolved.

8. Conclusions

The communication techniques used by the mediator in the mediation process, in certain circumstances, usually become mediation techniques and negotiation techniques,

allowing the mediator to try to re-establish the real relations between the parties, to temper the emotions of the parties as well as the generation and development of understanding options, based on criteria as objective and as close as possible to the wishes and needs of participants in the mediation procedure.

The communication helps the parties to identify with accuracy which are the true needs versus desires, and which are the objective or subjective elements that underlie these priorities.

Accepting differences as well as the fact that we can think differently is not necessarily bad and does not exclude the possibility that both parties may be right but the social norms imposed as a paradigm require the settlement of the dispute for the general good of the community or even for the good of the parties in conflict.

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FACTORING CONTRACT. FINANCING PERSPECTIVE IN THE INSOLVENCY PROCEDURE

Diana Maria ILIE, PhD. Student

Faculty of Law, Titu Maiorescu University, Bucharest
dianamaria.ilie@yahoo.com

Abstract

How insolvency law “invades” and suppresses common law governing principles, as well the contractual freedom, obligatory character and irrevocability of contracts concluded by the insolvent debtor before the opening of the procedure, shows once again the specificity of the insolvency matter and its prioritization in the system of national law. The area of interference between insolvency law and common law relates to an economic philosophy that assigns to the contract a role that exceeds the individual interests of the parties, namely granting the second chance to the debtor in difficulty, prioritizing the reorganization and concretization of a rescue culture at the level of the market economy, which becomes a reason, a purpose and a finality in the matter of insolvency. Unlike other contracts, such as transferring property contract, transaction contracts, commission and consignment contracts, which enjoy a legal regime expressly regulated by the Insolvency Code, the factoring, which is a creation of the Anglo-Saxon system of law and which functions in our system of Roman-German law through the institutions of assignment of claims, subrogation and mandate, do not benefit from special clauses, which means that it is subject to the general rules of art.123 of Law no. 85/2014. In this respect, such a contract which collides with the insolvency procedure may be maintained, modified or terminated by the insolvency practitioner. However, we will observe that this contract is a complex one, and the incidence of insolvency implies a multidimensional and customized analysis from case to case.

Keywords: *insolvency, factoring contract, compatibilities, the right of option of the insolvency practitioner, financing perspective.*

Some reflections on compatibility between insolvency law and civil law. Current contracts - objective of convergence between the common law principles and the insolvency principles

What is the place of insolvency law in the Romanian law system? This question can be a starting point in the analysis of the compatibility problem, considering the coercive character of the legal conduct imposed in the matter of insolvency, a character that is required to be conserved regardless of the supplement of the other norms of law in the matter. We agree with the doctrinal opinion [1] that insolvency matter determines “a necessary causality” that allows the application of the rules of common law only in this

context. In this respect, we also invoke the general theory of law [2] which identified in the structure of the order of law two categories of rules, respectively “rules constituting legal value” and “rules that shape the law”, considering that the rules constituting legal value must be distinguished from the rules by which the modelling of the law is evaluated. In other ideas, from the perspective of the compatibility analysis, the legal rules in the field of insolvency which impose certain restrictions and sanctions, or which confer certain rights and protections by virtue of some fundamental principles that governed the final legal construction of the insolvency, cannot be affected by the common law, the application of compatible rules of interference being allowed only on condition that it does not affect the reason of the special insolvency law. Therefore, the rules that “shapes” the legal relation specific to the insolvency procedure is a complementary rule, related to the common law, while the “shaped” rule, with “intrinsic legal value” is the specific rule of the insolvency procedure, which corresponds to a special, autonomous law. [3] Starting from the logical unity of the order of law, the affectation of some principles that ensure the intrinsic justification of the specific legal rule regulated by the insolvency matter leads to the loss of its finality, becoming vulnerable in the legitimacy and effectiveness of its application: [4] “However, the knowledge of the law, like any knowledge, seeks to understand its object as a whole with meaning and to describe it in non-contradictory sentences, it starts from the premise that the conflicts of rules within the material of norms that it is given to him, more precisely it is given to him, they can be solved by interpretation and they must be solved in this way”. Beyond doubt, the way of addressing this interference becomes a very delicate one, in relation to the need for corroboration, conciliation and convergence of the law specific to the insolvency procedure and the branches of common law. An interesting situation is also the one of the executory contracts at the date of the opening of the procedure, “a situation which also becomes governed by specific assets, such as the maximum increase of the value of the debtor’s assets or the criterion of profitability for the debtor”. [5]

In relation to these aspects, we consider that the interaction of insolvency with the common law and its latter modelling in an almost unique way at the normative level, can only represent a justified “alteration” of the established guiding principles, this won vocation of the insolvency law towards by the common law by virtue of clear reasoning

and specificities it can be defined as “rights won by insolvency” [6]. In other words, the insolvency-specific rule of law will attract other norms of law within its sphere of regulation, which through interconnection with the insolvency procedure can be neutralized and adapted to its specificity. More specifically, a common law rule is considered compatible with insolvency law as long as it does not go beyond the scope and limits allowed by the latter.

By violating the principle of contractual freedom governed by common law, the insolvency law sanctions with nullity the contractual clauses meant to either terminate the contract, or shall not be entitled to the benefit of the payment term or to declare the early exigibility for the cause of opening the procedure and limit the impact of the *intuitu personae* character. As a result, the contractual relationship is protected and strengthened by a special law, applicable with priority, in the form of the insolvency practitioner’s option right within the limits and conditions required by law, as recognized by virtue of the character and purpose of public order of the insolvency. Thus, the clauses that provide for the cancellation of the contract due to the opening of the insolvency procedure, but also the aggravation of the contractual situation of the debtor by not being entitled to the benefit of the payment term or by declaring the anticipated exigibility, lose their effectiveness when opening the procedure, the invalidity of these clauses could not be covered by a clause contained in the contract or by agreement of the parties concluded after the opening of the procedure.

The very reason of the insolvency and the legal regime, we could say original, of the executory contracts after the opening of the insolvency procedure have as purpose the creation of opportunities for economic recovery and revitalization of a debtor in insolvency and of maximizing his assets, principle established expressly by the special law. The right of option of the insolvency practitioner concerning maintenance, modification or cancellation of contracts ensures a social function [7], of general interest, which triggers a paradox of the regime of contracts, following that the way of corroboration, conciliation and convergence of the specific law of the insolvency procedure with the branches of common law becomes extremely delicate and interpretable.

Without strictly referring to the regime of contracts in the insolvency procedure and to emphasize its extravagance in the system of law, the doctrine, otherwise, called it the “rebellious daughter of civil law”, [8] why not admit it that despite what the traditionalist authors assert regarding the “sacrosanct” character [9] of the principle *pacta sunt servanda*, free will remained only an illusion, a misleading appearance, knowing at present a “visible and constant erosion” [10]. Contractual freedom does not (so much) exist in the economic reality [11], where professionals and consumers, on the other hand, no longer have unrestricted freedom to contract or refrain from contracting, a reality in which business needs and personal needs determine people to sign contracts, which we can call adherent contracts or forced contracts.

In the insolvency procedure, the contract becomes an added value in a reorganization procedure, the right of option of the insolvency practitioner regarding the maintenance or cancellation of the current contract at the date of the insolvency procedure triggering a general interest, higher than the particular interest of the contractors, justified by saving the debtor, maintaining the activity and the employees, as well as the collective coverage of the liabilities.

Therefore, the object of the option right is “the executory contract”, the Romanian legislator transposing the concept of “current contract” from French law, which is defined by the fact that the respective contract exists at the date of opening the procedure, in the sense that it was concluded prior to this date and is in the process of execution, therefore it has not ceased to date. The new EU Directive 2019/1023 on preventive restructuring frameworks on discharge of debt and disqualifications and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt defines similarly the “executory contract”, respectively the contract between a debtor and one or more creditors under which the parties still have obligations to be fulfilled at the date of granting or applying the suspension of individual forced executions”.

The doctrine also raised the question of extending the analysis over the contracts in course of creation [12], in the sense of analyzing the intermediate phases underlying the agreement of the parties. We consider that we cannot refer to this type of contracts, as the legislator has not considered them, especially since they can encourage fraudulent purposes, which may favour certain creditors in the insolvency procedure.

Factoring contract - short considerations regarding the current role in the national and international economic system

Without having to claim a comprehensive analysis of the factoring contract and the effects it implies, our intention being first of all to analyze the effects triggered by the insolvency procedure on the clauses of such a contract, but also the possibility of approaching as a financing and capitalization mechanism by an insolvent debtor from the perspective of success of a reorganization plan, however, we consider it appropriate to make some clarifications regarding the factoring operations in relation to their size and their current role in the national and international economic system. [13]

Regarding the international regulation of factoring, we mention that it benefits from the adoption of international instruments that define the regulation of the activities specific to this operation, as well as the rights, obligations and conduct of the parties. Thus, the International Institute for the Unification of Private Law - UNIDROIT [14] expressed a special concern for the legal and economic regulation of modern payment instruments such as leasing or factoring, organizing in 1988 the Convention on International Factoring in Ottawa - Canada, [15] within which the term of international factoring was defined. Subsequently, in 2001 it was signed The United Nations Convention on the Assignment of Receivables in International Trade, which is also one of the greatest efforts to unify the legislation on debt financing, which comes in addition to the UNIDROIT Convention by dealing with the omitted issues regarding the validity of the assignment of debts made abroad and the vital issue of priorities in case of insolvency of the debtor. However, it had as the main purpose of encouraging and practicing international debt financing as a method of facilitating international trade, by reducing the costs of transactions such as factoring, financing projects and insurance, the major problem in this area being given by the national divergences regarding the regulation of the institution, primarily due to the complexity of factoring operations. [16]

We should mention that Romania is a member of UNIDROIT and the UN, but so far it has not signed and ratified neither the 1988 UNIDROIT Convention nor the UNCITRAL Convention in New York in 2001, our system of national law having no normative document of general applicability expressly regulating the factoring institution.

The parties to the contract may decide in the sense of submitting the factoring in part or in full to the international conventions, expressly specifying this by the contractual clauses, or they may adhere to the terms proposed by the big professional associations of international factors in the field, such as Factors Chain International. [17]

The literature defines the factoring operation through mechanisms such as conventional subrogation in the rights of the creditor [18], assignment of debt [19] or mandate [20]. At the same time, referring to the provisions of art.18 of GEO no. 99/2006 regarding credit institutions and capital adequacy [21], which mentions among the specific lending activities carried out by the credit institutions and the lending through the factoring contract, with or without regress, we find that it would be a lending operation specific to the credit institutions. However, a similar provision is found in Law no. 93/2009 regarding non-banking financial institutions, which mentions in art. 14 paragraph (1), in addition to the main object of activity regarding credit granting activities, also the factoring operations. In the secondary legislative plan, we can consider the Order of the National Bank of Romania no. 27/2010 for approving the Accounting Regulations according to the international financial reporting standards applicable to credit institutions, which defines factoring [22] as that, “transaction whereby the client, named adherent, transfers the property of the receivables, more precisely of its commercial invoices, to the credit institution, named factor, the latter having the obligation, according to the contract concluded, to ensure the collection of the debts of the adherent”.

By accessing the website of the Romanian factoring association, [23] a major reference in the field, as well as the websites of the credit institutions that offer the possibility of financing through the conclusion of a factoring contract, we can understand in concrete terms what factoring is, how it can be defined internally, what are its advantages and what are the regulations, the normative documents to which we refer. In a rather simplistic but easily to assimilate definition, some credit institutions have defined factoring as “a quick financing solution to which a company that has a liquidity deficit can appeal to, as a result of a process by which the Factor (in this case the bank) acquires from the Adherent (the client of the factor) the certain, liquid and exigible debts, respectively the invoices resulting from the delivery of goods or the provision of services. The claims must be accepted and confirmed by the client of the Adherent”. [24]

Thus, conceived as a complex package of services, [25] which is based on the process of acquiring the claims resulting from the delivery of goods or the provision of services, the factoring operation involves flexible financing, which increases with the level of the business and is structured on its specificity, access to specialized services for claims management and collection, access to specialized services for evaluating, verifying and monitoring the Assigned Debtors and the claims held on them, covering the risk of non-payment of the Assigned Debtors, consulting and specialized commercial assistance, real-time reports and information, without constituting material guarantees.

We can appeal to the common law in order to draw up the legal regime applicable to factoring, respectively the provisions of art. 1.566-1592 of the new Civil Code regarding the "assignment of claims", supplemented by special laws applicable in certain particular situations, such as the provisions of Law no. 125/2011 regarding the approval of the Government Emergency Ordinance no. 121/2010 for amending and supplementing the Government Emergency Ordinance no. 146/2002 regarding the creation and use of resources developed through the State treasury and for the modification of art.52 of Law no.500/2002 on public finances. [26] However, these additions do not validate the equivalence between the factoring institution and the one regarding the assignment of claims, factoring involving certain particularities, in the sense that this is a contract essentially with an onerous title that implies the financing of the adherent, while the assignment of claims can also be free of charge. At the same time, the assignor guarantees only the existence of the claims, not the solvency of the assigned debtor, while in the case of factoring with regress or with recourse, the adherent also guarantees the solvency of the assigned debtor, in the sense that, if the latter does not pay, the factor is directed against the adherent. Moreover, the parties to the factoring contract are specialized, the factor being a banking company, a non-banking financial institution or a specialized factoring company, and the adherent is, in most cases, a trader, a natural or legal person, while the mechanism of the assignment of the debt is accessible to any natural or legal person without imposing a certain quality. As a consequence, we invoke the provisions of art. 1168 of the Civil Code according to which, "the contracts not regulated by law are applied the general provisions of the code regarding contracts, and if they are not sufficient, the special rules regarding the contract with which they are most

similar". Part of the doctrine thus defines the factoring contract as being that "financing contract which contains intrinsically specific elements, especially the assignment of debt, as security or payment, but, in practice, according to the object and purpose agreed by the parties, it may also have the characteristics of a mandate contract". [27]

It is very important to specify and clarify the aspect regarding the classification of factoring, existing factoring with regress and factoring without regress. Regarding the factoring with regress, this option implies that, in the event of non-payment, the factor will recover its sums not collected from the adherent by exercising the right of regress, respectively by debiting the current account of the adherent, or by using the guarantee, depending on the applicable situation. On the other hand, in the case of the factoring without regress, the factor pays to the adherent the accepted value of the invoice or invoices, one part immediately after the issuance and the rest within a certain term from the maturity of the invoice, even in the event that it does not receive in whole or in part one or more invoices. Subsequently, the factor will try to recover the amounts from the assigned debtor or, possibly, from the insurance-reinsurance company to which it was insured against the risk of default. [28] In the case of factoring with regress it can be considered that the adherent, assignor of the claims bought by the factor, assumes towards it, in capacity of assignee, not only the legal obligation specific to the assignment of the claims, to guarantee the valid existence of the assigned claims, but also the conventional obligation to guarantee the assignee with respect to the insolvency of the assigned debtor, an obligation that extends to the nominal value of the claims ceded in the ownership of the factor and not to the amount established between the adherent and the factor as the price of the assignment.

In other words, while in the case of factoring with regress or with recourse, the risk of the insolvency or refusal to pay the debts by the assigned debtor is borne by the adherent, in the case of factoring without regress, the factor takes over the debts assigned with the risk of non-payment or of the insolvency of the assigned debtor, in the sense that the factor can not be directed against the adherent for recovering the amounts paid by way of price of the invoices at the moment when the assigned debtor refuses to pay the debts due.

Factoring contract - financing perspective in the insolvency procedure

Analyzing the factoring contract from the perspective of insolvency, we refer to the following hypotheses. Thus, in the hypothesis factoring with the right of regress of the factor against the adherent, the latter being in the insolvency procedure at the time of the conclusion of the contract, the assignment of the claims is certainly done as collateral, the right of the factor on the claims being one similar to the guaranteed creditor. Therefore, in relation to the regulation of art.1.389 of the Civil Code regarding the chattel mortgage, insofar as the debt is transferred as a guarantee, there is also a right of regress of the factor, meaning that, in the absence of the respective debt being collected at the due date, it will be able to request from the adherent the unpaid amount.

In the hypothesis of the factoring contract without regress, but with the guarantee of the solvency of the assigned debtor, which represents an application of the provisions of art.1.585 par.(3) of the Civil Code and a possibility of aggravation of liability by the parties' agreement [29], the crediting factor may be entered with the price of the assignment as a unsecured creditor in the claims table on the insolvent debtor adherent, under the effect of guaranteeing solvency, to which the expenses of the assignment may be added.

In a third hypothesis, that of the factoring contract without regress, without any other stipulation regarding the guarantee of the solvency of the assigned debtor, in which the assignment of the claims has the meaning of definitive and irrevocable transfer of the claims [30], the factor can no longer be entered with any claims in the table of claims on the insolvent debtor, in this case the adherent, since the former has no right over the assets of the debtor. The doctrine invokes a single possibility of these creditors to join the creditors' list, respectively if the adherent assigner knew the insolvency status of the assigned debtor on the date of assignment, by virtue of the similarity of the provisions regarding the hidden defects in bad faith [31].

As a result, insolvency may be one of the main risk factors for the factors, as parts of factoring contracts, the abrupt deterioration of the financial situation of the adhering company, often annihilating, paralyzing the possibility of continuing financing and guaranteeing liquidity. [32]

In most cases, the insolvency appears during the development of such a factoring contract, as it is difficult for us to admit to taking such risk by the banking or non-banking

institutions, knowing that the adherent is in the insolvency procedure. However, a factoring contract could be an essential element of a preventive agreement, in the insolvency prevention phase, or even in a judicial reorganization plan, in the insolvency procedure phase, all the more so, as such of claims would enjoy the preferential legal regime of the guaranteed ones, through similarities with the financing granted to the debtor during the observation period. A substantial and truly revolutionary change in the safeguarding of the debtor in financial difficulty and the resuscitation of the businesses in order to reintegrate them into the economic circuit is even the possibility of financing the current activity, correlating with offering a “super-priority” of these financing by Law no. 85/2014, as well as their guarantee. Therefore, such a “financing” could be stimulated by ensuring the preferential indebtedness regime, the debts born by lending to the insolvent companies having priority to the repayment.

In relation to the special provisions of the insolvency, if during the development of the factoring contract the adherent enters the insolvency procedure, the insolvency administrator has the right to choose to maintain or unilaterally terminate the respective contract, according to art.123 of the Insolvency Code. Also, the insolvency law gives the factor the right to sue against the adherent with an action for damages for the damage caused by a temporary termination, represented mainly by the unachieved commission. However, we believe that maintaining such a contract, even with the possibility of modifying the clauses by the insolvency practitioner in the sense of an advantageous refinancing, can ensure the capitalization necessary for the reorganization of the insolvent debtor.

On the other hand, if we open the analysis on a factoring contract concluded after the date of the opening of the insolvency procedure, it may take on the legal nature of a “credit for current activities” [33] in the sense of financing the current activities [34] the factor being considered a secured creditor, who benefits from a guarantee represented by the claims held by the adherent against the assigned debtors, being able to request to be entered in the consolidated table of the creditors with a secured debt, as mentioned above.

In interpreting the doctrine [35], credit contracts expressly regulated by Law no. 85/2014 in art. 123 paragraph (5) can also be maintained without the need to obtain the

agreement of the co-contractors, following the analysis of the benefit of the credit by the insolvency practitioner, and, at the same time, they can be modified during the observation period, either with the bank's agreement or invoking the hardship, so that the reorganized contracts may ensure the equivalence of future benefits. Thus, we consider an additional reason to assimilate the factoring contract for these financing, the more so as it can enjoy a special legal regime favourable to both parties involved, especially if the debtor will follow the direction of the reorganization and not the bankruptcy. As a result, the factor will enjoy the continuation of a contract in the current debt regime, the debts born prior to the opening of the procedure being entered in the table of creditors as privileged secured debts, and the adherent debtor will apply the principle of maximizing its assets through capitalization and financing.

All these measures should be taken into account in the light of developments in this area and the opportunity offered to companies to have access to thorough analysis and prudent management of the client portfolio, especially by outsourcing these processes to a Factor, Bank or IFN, as well as the latest predictions about the possibility of triggering a new economic crisis, as noted by the specialists of the Romanian Factoring Association, according to which "the economic environment we are in does not seem very favourable for the private sector in the short term, whether we are talking about large companies or SMEs, which is why concrete measures would be welcomed regarding attracting new European funds and increasing investments, which would lead, in a short time, to the creation of new jobs and, implicitly, to the increase of the volume of taxes and duties brought to the budget. Even in the international context, different scenarios for slowing down the economic growth in the Euro area are considered, which will have a chain effect in Romania as well. For this reason, Romanian companies, which for the most part are not very well capitalized, will be very vulnerable to falling sales and increasing the level of not collected claims, respectively. [36]

Conclusions

By virtue of the latest insolvency regulations, at European Union level, respectively (EU) Directive 2019/1023 and in relation to the situation of ongoing contracts concluded by the debtor entered into the insolvency procedure, we consider it appropriate to

conclude by evoking some issues established at the level European, as discussed in the previous sections. Thus, we consider point (20) of the preamble of the Directive, according to which, (...) Member States should also be able to limit the access to preventive restructuring frameworks to legal persons, since the financial difficulties of entrepreneurs may be efficiently addressed not only by means of preventive restructuring procedures but also by means of procedures which lead to a discharge of debt or by means of informal restructurings based on contractual agreements". At the same time, the Directive provides in art. 7 paragraph (4) the following: "Essential executory contracts shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill (...) Member States may provide that this paragraph also applies to non-essential executory contracts". The latter provision also reflects the intention of the internal legislator by regulating the option right of the insolvent practitioner to maintain or not an executory contract, as is the case with a factoring contract, which demonstrates the rallying of the domestic law with the European one, still existing many aspects transposed internally to harmonize and modernize insolvency legislation. Violation of the principle of contractual freedom is temporary, however, since the insolvency law enshrines by art.123 paragraph (3) the return to the principle of contractual freedom in the situation in which the fault in execution occurs after the maintenance of the contract. Therefore, the contracts, once assumed, re-enter under the common legal regime of the contracts, being able to be terminated, all the more so, as executory contracts will give rise to current claims, which enjoy a priority regime.

At the legislative and jurisprudential level we encounter a primary concern in trying to find and identify the best balance between the requirements and principles of each branch of law and the imperative of the insolvency law, but in the confrontation of the common law of the contracts with the insolvency law, the common law is avoided by the expansionism that characterizes this revolutionary matter in evolution and regulation. In this sense very suggestive becomes the doctrinal assertion that, "the opening of the insolvency procedure is only the beginning of a procedure constructed from paradoxes and weaved with challenges of the principles of law that seemed to last forever. Contracts with a force

equal to the law break down with incredible ease or become malleable in the interest of the debtor”.

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PROTECTION OF YOUTH WITHIN THE EUROPEAN UNION

Associate Profesor Eufemia VIERIU, PhD.

Petroleum-Gas University of Ploiesti
eufemiavieriu@yahoo.com

Abstract

The protection of young people's work is ensured by a unitary set of imperative legal norms that have as their object the regulation of the social relations that are formed regarding the organization and conduct of the control of their work process, in order to ensure the specific conditions of safety and health at work, for the defense. the life, bodily integrity, and health of workers.

The content of this material briefly presents general aspects regarding the rights of the young employees as well as the obligations of the employers, elements integrated into the European and internal legislative concerns in the field of the protection of the youth work.

Keywords: *protection of young people's work, general obligations of employers, activities of specific risks.*

Introductive aspects

Labor security and health are some of the main concerns of the European Union and a more and more important issue on a national level.

The improvement of labor security and health is a matter of great importance in the EU ever since the '80s. By introducing legislation throughout Europe, minimal standards for protecting workers have been established, at the same time allowing member states to maintain or adopt stricter rules. After the Treaty of Lisbon had come into force, The Charter of Fundamental Rights of the European Union became compulsory making the politics regarding labor health and security within the EU even more important.

Labor conditions and keeping the rights of workers are some of the most important objectives of the Union, the goal being for the development of the market not to be followed by the dropping of labor standards and other distortions. The Community prioritizes the definition of the minimum labor requirements through national legislation. Contributing to the protection of employees are the adopted directives referring to:

- collective personnel leave (Directive no. 98/59/CEE);
- the transfer of enterprizes (Directive no.2001/23/CEE);
- the protection of pregnant women (Directive no. 98/85/CEE);
- the protection of young employees (Directive no. 94/33/CEE) etc.

The Council of the European Union has adopted Directive 94/33/CEE concerning the protection of young employees, which regulates the legal aspects for defining terms such as young, child, adolescent, light labors, working and resting time, interdiction of child labor and possible derogations of this interdiction, general obligations of the employer regarding the employment of youth, especially in what concerns labor security and health, working time, night shift, legal resting time, activities that imply the exposure of youth to harming chemical, biological and physical factors. [1, 629]

The legal reaction regarding the protection of youth

1.1. Within the EU

Legal concerns about labor security and health have been a priority within the European Union, provisions on this subject are found both in the constitutive treaties of the European Community and in a broad series of directives based on them.

Directives are judicial acts that have a general meaning which only establishes the objective, the choice for the necessary means for achieving it being in the hands of the authorities of every state. Emerging from the community decision, the directive that is correctly published or communicated binds the intended member state to take the necessary measures for effectively applying it by transposing or implementing it. [2, 15_16]

Regarding the protection of youth, the European Union adopted Directive 94/33/CE concerning the protection of youth at the workplace which regulates the main aspects of youth protection and the keeping of their rights within the labor relations in which they are allowed to take part.

This Directive refers to youth under 18 years of age and includes legal provisions concerning the legal obligations of the employer, such as:

- the protection of the health and security of the youth;
- evaluating the risks associated with the labor of the youth;
- evaluating and supervising the youth's health;
- informing the youth and their legal representatives of the possible dangers of their health and security;
- the work schedule;

- night shifts;
- resting time;
- Annual leaves and breaks.

Oftentimes the physiological risks are the same for both adults and the young. There are however some fields where the young workers need more protection than the adults because of the physiological differences:

- work where the rhythm is determined by hand;
- work within a highly pressurized environment;
- ionized radiations;
- the vibration of the whole body;
- exposure to dangerous substances;
- Among the specific biological factors that must be taken into consideration there are:
- the existence of the individual protection equipment adapted for the young;
- the dimensions of the body and the arm strength about the ability to operate commands;
- The dimensions of the youth's body concerning the stability distances to present access to dangerous areas. [1, 630]

The risks to which the youth can be exposed are high and must be prevented by regulations regarding the insurance of labor health and security. Their lack of experience, training, and awareness must be taken into consideration while evaluating the risks of accidents or professional diseases.

The young need good counseling, good training and adequate, safe and healthy workplaces. There are special measures, which provide restrictions regarding the exposure to danger during working hours of youth under 18 years of age who are under professional training as well as for youth working occasionally during training.

Every workplace must have a management system of labor health and security to protect all employees but special attention must be given to young or new employees.

Improvement of labor conditions and keeping employee's rights are some of the most important objectives of the Union through which it aims for the development of the market not to be followed by a drop in labor standards or other distortions. The priorities

of the European Community regarding labor legislation are directed to the definition of minimal labor requirements through national legislation.

According to European statistics, the risk of labor accidents is much higher for young workers than in the case of older ones. Professional or other diseases (physical, biological) can also occur during the first experience at the workplace. On one hand, young workers are immature and lack experience and thus they need extra protection. They often work within heightened risk circumstances and areas such as constructions, agriculture, hotels, catering and hairstyling having temporary labor agreements or only working weekends.

The report of the European Agency for labor security and health notices that constant attention must be given to labor health and security of youth and to the development and enforcement of innovative strategies for preventing accidents. [3, 135]

According to the Directive, children and adolescents are groups of specific risk which require special measures regarding their labor health and security including their minimum resting periods.

The general interdiction of labor for children is provided in the specialized European legislation. [4, Art. 4 par. (1)] This interdiction does not apply in the following cases:

- children who take part in cultural or similar activities;
- children of at least 14 years of age who work during a training period or an internship at an enterprise;
- children of at least 14 years of age who perform light labor, other than cultural or similar activities;
- Children of 13 years of age can also perform light labor for a limited period per week and within the labor fields established by the national legislation.

Children can only perform cultural, artistic, athletic or advertising activities if they have authorization from the competent authority. These labors must not harm the security, health or development of the child and at the same time must not harm school activity, participation in orientation or training program or the child's chance to benefit from the given training. By derogation from the authorization procedure, the member states

can establish by law or regulation the possibility of children of no less than 13 years old to take part in artistic, cultural, athletic or advertising activities.

It is also provided that its dispositions do not apply to occasional or limited labors that regard: housework performed within a private household or labors that are not considered to be harmful, dangerous or prejudicial for children within their household. [4, Art. 2 par. (2)] Article 3 of the same Directive defines labor time as being the length of time when the young person is at the workplace, at the service of his employer and performing his duties according to the national laws and practices resting time at any period that is not labor time.

The employer has to take the necessary measures to ensure and protect the health and safety of the young especially taking into account the specific risks provided by the Directive regarding the night shift. [4, Art. 9], [2, 432]

1.2. Within the internal legislation

In our country, the necessity and compulsory character of the existence of the regulations regarding the protection of youth at the workplace is a priority, considering the labor conditions for this sector of the population under the aspect of protecting the youth from every labor that can harm their security, health physical, psychological, moral or social development or their education.

As a consequence of synchronizing the national law to the European one, the Romanian state has not remained indifferent to the issue of protecting children at the workplace and enforces all the regulations in this regard that are compulsory to employers. Thus, Law 53/2003 – Labor Code, GD no. 600/2007 regarding youth protection at the workplace and GD no. 867/2009 regarding the interdiction of dangerous labors for children represents the frame legislation that protects people under the age of 18 who are working on the grounds of an individual labor agreement. For the child's health and morality not to be harmed by performing inadequate labors for the physical and psychological training of the young, the internal legislation has forbidden children to perform dangerous and intolerable labor for this category of employees, the criteria defining dangerous or intolerable labor being concretely established by GD no. 867/2009 and no. 600/2007.

The old Labor Code stated that every person who is apt for work can perform labor to gain the existence and spiritual development means starting with the age of 16. Likewise, there was a difference between temporary and industrial labor. For temporary labor, the age of 14 was the minimum allowed and 15 for industrial but the employer could only be done with the agreement of the parent or legal guardian and referred to labor that was adequate for the physical development and knowledge of the child.

Other important provisions referred to the fact that the employee had the right to continue his studies to graduate the compulsory education and the units that employed minors had the obligation to support them in this regard.

According to Recommendation no. 146/1973 and the Convention of the International Labor Organization no. 138/1973 regarding the minimum age required for employment this cannot be inferior to the age when compulsory education stops or the age of 15. By adopting this convention there was concluded that the dispositions of the Constitution of Romania regarding employment must be changed. What the Convention aims is to abolish child labor and to raise the minimum age of employment to allow children to fully develop both mentally and physically.

The minimum working age is established by synchronizing the constitutional provisions with the international regulations regarding the minimum employment age. Thus, the Constitution of Romania provides the following regarding the protection of youth and children:

- children and the young benefit from a special protection and assistance regime to help them achieve their rights;
- the exploitation of minors, their usage for activities that could harm their health, morality or that could endanger their lives or normal development are forbidden;
- Minors under the age of 15 cannot be employed. [5, 49]

The decision regarding the protection of youth at the workplace [6] is the normative act by which the legal provisions are adapted to the European regulations. It ensures the protection of youth against economical exploitation, any kind of labor that could harm their health, safety or their moral, physical, psychological or social development or that could harm their education.

The provisions also apply to people under 18 years of age who have signed an individual labor agreement according to the legislation in force.

According to the normative act, child employment is forbidden. A child is a person under 15 years of age or any young person between 15 or 18 years old who is the object of compulsory education based on a full-time schedule established by law.

By derogation children of at least 16 years old can sign an individual labor agreement as an employee for performing light labor. Light labor is any activity that through the nature of its duties and its conditions cannot endanger the security, health or development of the child or youth and cannot prejudice school attendance, participation in orientation or professional training programs or their ability to benefit from their training.[1, 631]

The child who is the object of compulsory education can sign an individual labor agreement from the age of 15 with the agreement of their parent or legal guardian for performing activities that are fit for their physical aptitudes, their skills, and knowledge, if their health, development and professional training are not harmed by doing so.

The decision states that the employer has to take the necessary measures to ensure the protection of the youth's health and security especially taking into account the specific risks of the lack of experience, insufficient acknowledgment of the potential or existent risks or of the fact that the young are still developing.

The employer has to inform the youth in writing of the possible risks and all the measures taken for their security and health. Likewise, he has to inform their parents or legal guardians in writing about these measures.

According to the new normative act the employment of youth is forbidden for activities that:

- exceed their physical or psychological capacities;
- imply a dangerous exposure to toxic or cancerous agents that can cause hereditary genetic mutations, having adverse effects on a pregnant woman or having any other chronic dangerous effect on the human being;
- imply dangerous exposure to radiation;

- implies risks of accidents that are assumed unable to be identified or prevented by the young because of their insufficient attention on labor security, of their lack of experience or training;
- Endanger their health because of extreme cold or heat or because of the noise or vibration.

According to the normative act, among the activities and procedures that can have specific risks for the young, there are, especially, activities that imply dangerous exposure to physical, biologic and chemical factors.

The decision states that in the case of youth the maximum working time is of 6 hours per day and 30 hours a week. [6, art.10, alin (1)] If the young gathers more jobs based on individual labor agreements, the total working time is added and its total cannot exceed that limit. Likewise, the young cannot perform overtime or night shifts and the employed children cannot perform labor between the hours 20.00 and 6.00.

The young benefit from a meal break of at least 30 consecutive minutes if the total working time per day exceeds 4 and a half hours. Between two working days, the young benefit from a minimum resting pause of 12 consecutive hours. Between two working days, employed children benefit from a minimum resting time of 14 working hours. The young benefit from a weekly break of two consecutive days, usually Saturday and Sunday. They also benefit from an additional leave of at least 3 working days.

The decision transposes the provisions of Directive 94/33/CEE regarding the labor protection of youth, directive that ensures the youth's protection against economic exploitation and any other labor that can damage their health, security or their physical, psychological, moral or social development or that can compromise their education.

The employer must take the necessary measures to ensure security and protect the health of the young, especially from the specific risks mentioned above.

The employer must put the necessary measures into practice to ensure security and protect the health based on the evaluation of the potential risks for youth and regarding their labor.

This risk evaluation must be made before the young are employed and any significant modification of the labor conditions must mainly take into account the following elements: [6, Art.6 alin. (3)]

- labor equipment and the organization of the workplace and the job;
- the nature, level, and duration of exposure to physical, biologic and chemical factors;
- the organization, category, and utilization of labor equipment, especially of physical, biological and chemical factors, of machines and devices as well as their handling;
- establishing labor procedures and development as well as their interaction, namely the organization of labor;
- The level of professional training of the young and their training.

If the evaluation finds risk for the security, physical or mental health or development of the young, the employer must ensure the evaluation and supervision of the youth's health regularly, adequately and free of charge, according to the regulation in force.

The employer must protect the young against specific risks for their health, security, and development, risks resulted from their lack of experience, from the insufficient acknowledgment of the potential or existent risks or from the fact that the young are still developing. [6, Art.9 alin. (1)]

Not keeping the obligation to design the workplace by taking into account the presence of the young is a contravention and is punished by a fine. [8, Art.39 alin. (8) lit. a)]

Although, as opposed to the European legislation, the national legislation does not differentiate among children, adolescents and young, the Romanian Constitution and Labor Code establish the age when a minor can perform activities based on an individual labor agreement, the special legislation emphasizing the type of allowed work as well as the working and resting times a derogation from the general rule abided by employed adults. For a good physical and psychological development as well as for keeping all needs related to the age of this employees' category, meal breaks, weekly rest as well as leaves are regulated by special norms and last longer than the ones that are considered to be sufficient for adult employees. [2, 431]

Among the activities that can present specific risks for the young there are especially:

- A. Work that implies dangerous exposure to physical, biologic and chemical factors
 1. Physical agents

- ionized radiations;
 - Labor in a highly pressurized environment, for example in under pressure instances, underwater diving.
2. Biologic agents:
- the biologic agent that can cause severe human diseases and can be a grave peril for workers; can be contagious but can usually be prevented or have efficient treatment;
 - The biologic agent that causes severe human diseases and represents a grave peril for workers: can be highly contagious and cannot usually be prevented or treated.
3. Chemical agents:
- substances and concoctions that are classified as toxic, highly toxic, corrosive or explosive; [9], [10]
 - dangerous substances and concoctions that have one or more of the following risks: very grave irreversible effects, the possibility of irreversible symptoms, irritation through inhalation or touch, can cause cancer, can cause hereditary genetic mutations, grave effects on health in case of prolonged exposure, can modify fertility, can have dangerous effects for the baby during pregnancy;
 - substances and concoctions that are classified as the irritating ad has one or more of the following risks: highly flammable, can irritate by inhalation or touch;
 - substances and concoctions mentioned by the Directive 90/349/CEE of 28 June 1990 regarding the protection of employees at the workplace against the risk of exposure to cancerous factors;
 - lead and its compounds if those agents can be absorbed by the human body;
 - Asbestos.
- B. Procedures and types of work
- making and handling devices, fireworks or various objects that contain explosives;
 - working with ferocious or venomous animals;
 - industrially sacrificing animals;
 - handling production machines, storing or using compressed, liquid or dissolved gas;
 - using tubs, basins, tanks, containers or canisters that contain chemical agents;
 - work that implies the risk of falling;
 - work that has a high risk of electrocution;

- work that has its rhythm commanded by machines and is paid according to the result; [11]

- The procedures and types of work provided within Annex 1 of Directive regarding protection at the workplace against the risk of exposure to cancerous agents. [12]

For the cases when a cancerous or mutagen factor is used, the employer must take the following measures:

- limiting the quantity of the cancerous or mutagen factor at the workplace;
- reducing the number of workers that are exposed or have the risk of being exposed;
- designing a labor process and technical measures of control to avoid or reduce the release of cancerous or mutagen substances at the workplace;
- evacuating the cancerous or mutagen factors through proper ventilation, local or general, compatible with the need to protect human health and the surrounding environment;
- using the proper measuring methods for the cancerous or mutagen factors, especially for timely detection of abnormal exposure resulted from an accident or an unforeseen event;
- applying adequate labor procedures and methods;
- insures collective and/or individual protection measures if the exposure cannot be avoided by other means;
- applying some hygiene measures, especially the regular cleaning of floors, walls, and other surfaces;
- informing the workers;
- separating the risk zones and using adequate security markers, including the “No smoking” sign within the areas where workers are or can be exposed to cancerous or mutagen factors;
- developing some measure plans for emergencies when there might be abnormally high exposure;
- insuring some means that allow storage, manipulation, and transport of cancerous and mutagen factors without risk, especially by using airtight containers visibly and labels;

- Insuring means that allow the safe collection, storage, and evacuation of waste by workers, including the use of airtight containers that are clearly and visibly labeled. [11, Art. 12 alin. (4)]

Likewise, it is to be remembered the fact that the Dispositions of the Charter are addressed to the institutions and organs of the European Union while keeping the principle of subsidiarity. Therefore, Romania does not directly have to assimilate the norms of the European Union Charter in its internal law. However, as a member state of the European Union, according to the dispositions of the Association Agreement, Romania must synchronize its legislation (include the labor law) with the community, primary and derivative law. In other words, those norms must be present in the internal law of Romania.

Economical exploitation of minors is a violation of the equal chances and education right and if it is tolerated it will cause misery and the deepening of economic inequity.

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- [7] Law no. 53/2003 regarding the Labor Code;
- [8] Law no. 319/2006 regarding labor security and health;
- [9] Directive 67/548/CEE regarding the approach of legal provisions of regulation and administration concerning the classification, storage and label of dangerous substances;
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- [12] Directive 90/349/CEE regarding the protection of workers at the work place against risks related to the exposure to cancerous agents.

ASPECTS REGARDING THE INCRIMINATION AND INVESTIGATION OF THE DECEIT OFFENCES IN ROMANIAN LEGISLATION

Associate Professor Adrian Cristian MOISE, PhD.
Spiru Haret University of Bucharest (ROMANIA)
adriancristian.moise.@gmail.com.

Abstract

Starting from the incrimination of the deceit offences in the Romanian legislation, the article aims to present and analyze the main issues that need to be clarified by investigating the deceit offences, as well as carrying out probative procedures often disposed by the judicial bodies in the forensic investigation process.

Keywords: *offences; deceit; forensic investigation; criminal prosecution.*

Introduction

The deceit is incriminated in the content of Article 244 of the Romanian Criminal Code in a variant type and an aggravating variant. According to Article 244 para.1 of the Romanian Criminal Code, the type variant consists in "misleading a person by presenting as true a false fact or as a liar a true fact, in order to obtain for himself or another a patrimonial use and if a loss has been caused ". The aggravated variant is provided in Article 244 paragraph 2 of the Romanian Criminal Code and is retained when "the deception is committed by the use of false names or qualities or other fraudulent means" [1].

Unlike the other crimes against the patrimony, in the case of the crime of fraud, the damage is caused by misleading the person by the perpetrator who wishes through various fraudulent manoeuvres, obtaining an unjust patrimonial benefit for himself or for another [2].

The notification of the criminal investigation bodies, regarding the committing of the fraudulent offences is carried out according to the provisions of Article 288 paragraph

1 of the Romanian Criminal Procedure Code, by complaint or denunciation, by the documents concluded by other bodies established by law or ex officio.

The criminal prosecution in the case of fraudulent offenses is carried out by the local prosecutor's offices, and the jurisdiction in the first instance belongs to the courts. The economic and financial crime fighting service of Direction of Investigation of Organized Crime and Terrorism Offenses –DIOCTO- within the Prosecutor's Office attached to the High Court of Cassation and Justice, investigates the crimes of deception, in the event that their perpetration came within the scope of an organized criminal group, within the meaning provided by Article 367 paragraph 6 of the Romanian Criminal Code and if these offences have produced particularly serious consequences, within the meaning of Article 183 of the Romanian Criminal Code.

When the criminal prosecution is carried out by DIOCTO in the case of deceit offenses, in accordance with the provisions of Article 36 (1) (c) of the Romanian Criminal Procedure Code, the jurisdiction in first instance of these offences belongs to the tribunals.

1. The main issues that need to be clarified by investigating the deceit offences

The main issues that need to be clarified through the investigation of the deceit offences refer to: determining the special legal object and the material object of the crime, establishing the elements of the objective side and the subjective side, identifying the subjects of the crime, establishing the causes and conditions that favoured the crime.

1.1. Determining the special legal object and the material object of the crime

The special legal object of the crime of deception consists of the social relations of patrimonial type that involve good faith and the mutual trust of the subjects of these relationships.

The material object of the deceit offence can be represented by a movable or immovable property, as well as by the documents that have a patrimonial value (any goods, rights, obligations, actions of patrimonial character, etc.). Also, it may be a material object of the deceit offense a document that incorporates a patrimonial value (pass book, bonds, proof of winning a lottery prize, etc.) [3].

1.2. Establishing the elements of the objective side and the subjective side

In relation to establishing the component elements of the objective side, we are interested in the ways in which the deceit offence was committed. Thus the material element in the case of the crime of deception in the type variant consists in a misleading action, by presenting as true a false fact or as a lie a true fact.

The presentation of a false fact as true means to believe, to pass as a real, existing, fact or circumstance that does not exist, that was made up. To present a true deed as a lie means to believe that there is a fact or circumstance that does not exist in reality [4].

This fraudulent, distorted or altered presentation of reality must be capable of inspiring the victim's confidence, good faith and misleading, deceiving or keep it in the error previously produced.

The offence of deceit in the aggravating variant consists of the fraud committed by the use of false names or qualities or other fraudulent means.

The use of false names refers to the use of names that do not actually belong to the offender. Thus, these false names are "borrowed" from other people instead of which the perpetrators are recommended and claim that they are those people, or the false names are made up, they are imagined so that in this way they hide their true identity.

The use of lying qualities refers to the use of titles, functions that the offender does not have in reality, such as, for example, the offender presents himself as a prosecutor, a police officer, or he can attribute his unreal quality of a family member's friend, messenger of a knowledge, and so on [5].

By fraudulent means is meant the means that is true and inspires confidence, removes any suspicion, but which in reality is a liar (for example, the presentation of recommendations by personalities in a field, which have been obtained through false or other illegal procedures, pledge of objects belonging to another person, use of false documents, etc.) [6].

During the last years, the most common modes of operation found in committing deceit offences are the following [7]: substitution of official qualities; the promise of purchasing some goods; intermediation of the sale-purchase of real estate with fake documents; the promise of obtaining work contracts at home and abroad; practicing self-help and gambling games; sale and registration of foreign cars with false documents of

provenance; the sale of jewellery of common metals as of precious metals; conclusion of false insurance contracts; payment of insurance contracts based on false documents.

According to the speciality literature [8] and practice in the field of the investigation of deceit offences, the places most frequented by the perpetrators, from where their victims are gathered are the following: commercial banks, foreign exchange houses, pawnshops, gambling agencies, markets, insurance companies, hotels, travel agencies, Romanian Auto Registry, Western countries embassies and consulates, commercial complexes and companies, tourist resorts, and so on..

The offence of deceit is committed only with the form of guilt, of the direct intention. The offender foresees the results of his actions, carrying out an activity of misleading and thereby producing a loss, aiming to produce that result by committing the deception, the text referring to the purpose of obtaining an unfair material use, the intention being qualified by purpose.

The immediate consequence is the production of material damage to the person who was deceived. We highlight the fact that, in the absence of an action aimed at causing harm, the act does not constitute the offence of deceit.

For the existence of the deceit offence there must be a causality link between the misleading action and the damage caused or the immediate consequence.

The preparatory acts are possible, but they are not criminalised and thus they are not punishable.

The attempt is possible and is punished according to the Article 248 of the Romanian Criminal Code.

The consumption of the offence of deceit takes place at the moment when the immediate consequence occurred, that is, the actual damage occurred in the property of the one who was deceived.

We emphasize that the deceit crime is consumed only at the date of the damage, and not at the date of the victim's misleading.

1.3. Identifying the subjects of the crime

The active subject or the perpetrator of the deceit offence can be any person, who commits the crime by misleading the victim to whom a damage occurs, the criminal law

does not condition on the existence of the deed of a certain quality that the criminal must fulfill. In most forms of deception, the offenders act verbally, by convincing the data subjects, the future victims. They are intelligent criminals, well aware of the psychology of the people and have a high level of general training. Also, the perpetrators of the crime of deceit have a high elasticity of thought, quickly discovering the weaknesses of the victims and finding spontaneous solutions, which remove them from any confusion. Therefore, in order to make it more difficult or difficult to identify them, the offenders act under a false identity, so that they make every effort to gain possession of the identity documents of other persons, which are obtained by theft or by the various promises they make [9]. The offenders, after obtaining the identity papers, will apply on them their photographs and present themselves under the respective identities, which they change from one period to another.

Also, the criminals falsify the documents used by various procedures, from the simple deletion of letters or words and the writing of others by adding text, until the forms are completely completed [10].

The passive subject or the injured person may be the natural or legal person, whose heritage was affected as a result of committing the deceit offence.

1.4. Establishing the causes and conditions that favoured the crime

In order to establish the most important measures for preventing and combating deceit offences, it is important to know the causes that led to their committing and the conditions that favour the commission of these crimes.

The main conditions, causes and circumstances that favour the committing of deceit offences are the following [11]: the negligence or the ease manifested in the verification of the false documents presented by the perpetrators; diminishing the attention of the officials of the banks, the customs offices, the notaries, by requesting to perform some operations in the busy hours, due to the rush and the increased workload; the negligence of some persons or officials in keeping credit cards, documents of study and identity, documents of property, which allows their use for fraudulent purposes; the desire of some people to get rich quickly and easily.

2. Performing the acts of criminal prosecution

2.1. The hearing of the injured person

The identification and hearing of the injured person in the case of the crime of deception is a problem for the investigating bodies, since there are situations when the victims do not immediately notice the commission of the crime.

From the statement of the injured person, the criminal prosecution body must identify the following aspects: the circumstances in which the injured party met the offender; the identification data of the offender, in case the injured party knows the offender or his traits, these being very necessary for the judicial bodies to identify him; the goods that the injured party has alienated to the offender; if the injured party constitutes a civil part in the criminal case and the amount of money with which a civil party constitutes in the criminal case; the existence of eyewitnesses when committing the crime of deception; the possibility of recognizing the offender.

2.2. The hearing of the suspect or defendant

In carrying out this act of criminal prosecution, the judicial bodies must take into account both the concrete circumstances in which the defendants acted and their psycho-behavioural traits.

The main issues to be clarified when performing this procedural act are the following [12]: the circumstances in which the suspect or the defendant met the victim; the qualities that the suspects or the accused assigned to them and the documents used by them to mislead or keep the victim in error; the amounts of money and other objects received from the victim as a result of his deception; the way in which the suspects or the defendants obtained the documents they used to commit the crime.

2.3. The hearing the witnesses

The witnesses can be identified from persons who have witnessed the perfect understanding between victim and offender or who were present at the time of handing over the unfair patrimonial use or from persons who have seen various documents from the offender.

The purpose of hearing the witnesses is to establish the following aspects: how the witnesses became aware of the deed; the circumstances in which the victim met the offender; if the witnesses were acquainted with the offender; if the witnesses also know other persons deceived by the criminals; the amounts of money or other benefits obtained

by the offenders as a result of the victim's deception; the qualities assigned by the criminals and the documents which they presented to the injured persons in order to commit the crime of deception.

2.4. Conducting searches and forensic expertises

In the case of the crime of deceit, the home search carried out by the judicial bodies aims to discover the goods (money, values, objects, documents) that have constituted the unjust patrimonial use received by the offender as a result of the illegal activity carried out.

The forensic expertise contributes to establishing the truth in question, by clarifying the circumstances regarding the conditions in which the crime was committed.

3. Conclusions

The deceit offences are a category of crimes frequently committed in Romania. Because of this, we believe that law enforcement agencies should continually improve their techniques and methods of forensic investigation, taking into account that criminals in the field of deceit offences are constantly improving their modes of operation.

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BETTER THAN WE CAN IMAGINE: THE ROMANIAN RIGHT BETWEEN A PRESENT UTILITY AND A DEMONSTRATED INEFFICIENCY

Valentin- Stelian BĂDESCU, PhD.

Associate scientific researcher of the Institute of Legal Research of the Romanian Academy.

valentinbadescu@yahoo.com

Abstract

The surprise and revealing of the Romanian legal creations, the surprise of the Romanity and the originality of our law - as defining elements of a Romanian legal identity - and its continuity in the spaces inhabited by the Romanians are closely related to the being of the nation. In this sense, the return to the scientific debates of the polar categories: continuity and discontinuity in the field of law was determined, not long ago, by two historical processes: the one of the post-totalitarian transition of the Central and East-European countries and the one of their European integration, leading to effective interdisciplinary efforts.

Keywords: *Romania, Romanian law, romanity, continuity, European Union law*

1. Argument - warning

I'm worried, I love my country. What do I do? If a Romanian, that is, I declare that I love the Czech Republic, that he admires the Czechs, that he feels excited whenever he hears the Czech language, nobody is surprised and disapproves. But I do not want to write about the Czechs and their homeland, but about the fact that if a Romanian states that he loves Romania, that he admires the Romanians, that he feels emotional whenever he hears the Romanian language, it is almost certain that he will be accused of nationalism and blamed. It ended up in an absurd situation. A Romanian who loves his country can only love it in secret, with the feeling of secrecy. The American flag, with its fifty stars, is spontaneously flown by Americans, in many situations, on the facades of their houses. The Romanian tricolor flag has almost no courage to carry it under any circumstances, so as not to be considered ridiculous. The paradox works and vice versa. If a Romanian speaks with contempt of any other people than the Romanian people, he risks hurting her, being accused of xenophobia. But if a Romanian speaks with disdain about the Romanian people, everyone around him approves of it with enthusiasm or silence. Let me not be told that it is about manifesting the critical spirit, lucidity, etc. I do

not refer to these situations. I consider shameless denigrations of what is Romanian, disgraceful acts, which should happen in the privacy of the home or in a psychiatric office, not in public. "Every day we play the game of birds, of love and of the sea" and especially of our own country, with a lack of love and respect which we mistakenly believe is fashionable in the West, but which in reality, dismay the westerners. And those of us who love our country must be careful not to find out that we love her, because we may not be stigmatized. If you ask someone capable of explaining why they always throw the objection on the people to whom it belongs, you can see that the arguments are irrelevant.

Everyone has the right to love any country he wants, including his own country. If nationalism becomes legislation or political action, yes, we must be worried and opposed. The feelings that make the splendor of literature are dangerous when it becomes a political program. From feelings, led to delirium or hysteria, monstrous and fascism, and communism developed. In politics, only reason can be admitted. But an intellectual does not have to confuse the plans. Eminescu is punished post mortem because he loved his country. Blaga has been punished since life for the same guilt. Our writers today have learned the lesson, they carefully avoid stepping on the mine that might blow them. But from this precaution even their literature has lost, losing the greatness. The following text is not for those who are angry when they hear the Bible, nor for those who believe only in the seen and much less for those who believe that the destiny of a countries, whether it is Romania or any other, are decided exclusively by the power of some people, whether they are "ourselves" or "others", or they are people in the eyes of all or covered by who knows what is in our eyes. Therefore, I recommend them to avoid the following lines and to enjoy as they know better than what the "angel of Romania" offers.

You will perhaps raise your eyebrows - what does the "angel of Romania" mean? What is this? I will remind you that in the biblical tradition, it is said that God gave to each one of us an angel. It is the interpretation that many scholars have given to a Deuteronomy text that has reached us with different shades in different variants of the Hebrew, Greek and Latin texts. In support of the reading of this fragment in the sense that God gave to each nation an angel, we mention the evocations of the "angels of the nations" from other canonical books in which it is said that with the kings, the angels corresponding to the acts of the nations will be judged. There is, therefore, a solidarity

between the angel of a nation and the nation that is guarded against him, so that the angel can become the "prisoner" of his nation, because he is "condemned" to follow him in any way. The relationship between the angel of a nation and its object of activity is complex because God gives people and free will. Moreover, the tradition of the angel's solidarity with those given in his guard is solid and old: in one of the most famous Essenian manuscripts, the final battle between the Sons of Light and the Sons of Darkness is described, and in the description of the colossal battle it is shown as in the two armies, with the people of the two "empires" magnifying glass, side by side with them, the angels guarding them.

In his admirable book "About the angels", Andrei Pleșu talks about the relationship between angels and Gentiles, wondering what is the cause of interethnic wars and hatred since each people is guarded by an angel and all the angels come from God? We have, says Andrei Pleșu, three possible answers. First, that there are fallen angels who can subtly take control of the hands of the angels of God and can remove the people of God by lying to them. The Essenian myth, described above, seems to support this hypothesis; second, that people are given not only with protective angels but also with freedom. There is, from this perspective, a perfect similarity between the individual and the collective case - just as every man has an angel of his own, but that angel cannot manipulate his will nor can he infinitely protect himself from the nonsense he alone does, the nation has an angel who, however, cannot determine its path step by step. Stubbornness, delirium, or other forms of spiritual blindness can make an entire nation immune to angel urging. Finally, the third answer to the question how the Gentiles do to others or do themselves harm even though they are guarded by angels, seems to Andrei Pleșu the most convincing: Gentiles "can fail not only by turning the angel's back, but on the contrary, by idolizing him „by giving him obedience and worship, which is normally only granted to God.”

Absolutizing one's own angel is a terrible mistake that a nation cannot make, and history has proven us endless and plentiful, with waves of blood and immense suffering how severe the mistake of taking the angel of your nation as God can be. "For some people today, talking about angels sounds like walnuts on the wall. But ultimately not all of us need to become political analysts, reform professionals. It is good for our mental horizon to appear, from time to time at least, and things less understood, less current.

Reflection on angels can be a good therapeutic for combating intellectual mediocrity, the threat of which no one escapes.” As for his presence, I do not think we can have doubts - the angel of Romania is relatively easily detectable. It is very close to us; he is always here, and he still has the force to take us out of the troubles we are entering. The last time was felt by all Romanians on December 1, 1918, when the Great Union was performed in a way that cannot be explained outside the angel's action. I know that this observation will annoy those who have argued that our National Day is a day of mourning for them, but the angel of Romania does not work for their own good, but for the good of Romania. In Romania, minorities must live the same way as Romanians. Any minority, wherever she comes from, if she wants to stay in Romania, she has to work and eat like Romanians, she has to speak Romanian and respect the Romanian laws. Romania needs minorities just as minorities need Romania, and we should not grant those special privileges, as we do not have to change our laws to satisfy their desires, no matter how hard they are being discriminated against.

The lack of respect for the Romanian culture should not be tolerated. We would do well to learn about how America, England, the Netherlands and France have committed suicide if we are to survive as a nation. Minorities are currently conquering those countries, but they will not be able to conquer Romania. When our legislative body will consider adopting new laws, keep in mind that Romanian national interests take precedence, and remember that Romanians are at home, and the others only guests, lusts or guests. Otherwise, when he said that, as luck is, Romania no longer needs politicians, I think that Petre P. Carp brought the most beautiful praise to the angel of this country. The fact that we exist and that we are as we are can in no case be explained by the performance of those who lead us or have led us or by our way of being, by our national features. On the contrary, if it were for the destiny of the country to be the direct consequence of who we are, I think we would have long since disappeared. We live and above all, we live incredibly well in this world because from there, from the sky of history, our angel works whirlwind for us. And to be good, we often have to work against our decisions, only the homeland remains eternal.

It is obvious that we are living in difficult times, which some of us make ourselves more difficult. Against the background of general disorientation, there are quite a few who

fish in murky waters and exaggerate provincialisms, local entities. Why am I talking about our need for identity? Not because I'm a nationalist, but because I'm talking empty. Please go out and ask some Romanians why they feel Romanians. You will see and hear the biggest bumps! And if you go to Brussels, Madrid or Rome, between serious people, the question that invariably comes is: how is Romania and who are the Romanians? Naturally, we autoflagellate and present ourselves as a kind of nothing! More recently, some have found the solution: something else is given and no Romanians are recognized anymore. This lightness in dealing with serious things may have saved us from time to time, in the past, but it may not always be a way of life for a decent, conscious people. But, I want to talk about our language and tell you my conviction about it: our language has saved us from being sprayed with history!

Our language is a permissive one and opens with generosity to neologisms, but to a point. If we force the note, we fall into ridicule and this is how we do it now, not only under the influence of English, but also digitization in English clothing. That is why the Romanian Academy would also have a weighting role here, but who cares! Romanians are now not only inventive, but also independent and free. We believe that this short trip to history would be incomplete if we did not even remember the Communist period, because the problem is very complicated. The communist regime, for more than four decades, had three major stages: one proletarian, of proletarian internationalism and of atrocious Stalinist dictatorship, when nothing of what was Romanian was good, but "rotten", "bourgeois", "decadent"; another more balanced one, in which it returned to most of our authentic values (minus the modern monarchy, Bessarabia, the diaspora, etc.); the last, nationalist-communist, in which the "genius of the Carpathians" was leading us and in which the past, present and future were hailed with glory, while dying of hunger, cold, darkness. All this is intentionally merged today, so there is no room for nuances. I got rid of the unique truth under communism and I gave in to the truths controlled today! I still believe in the reason of this people, who must wake up in these times when the "boyars of the mind", the subtle philosophers of the salon accuse us of xenophobia, nationalism and even chauvinism, we are stubborn to love strangers, even and those who hurt us! Of course, these vigilantes on the march of the nation - seen by them as a mournful gregarious, patibular mass - do not discover any danger anywhere, neither over the Prut

and the Dniester, from where we are directly threatened, without bypasses, nor towards the west, from where our carriers come from. forests and the new owners of the estates, not even over the Ocean, from which comes the news that NATO does not make any more names and that the US closes itself, no closer, where autonomous feasts are prepared. In other words, Romania has only enemies in our imagination! It is clear that this situation facilitates the work of the agents of influence in the political and public life of Romania. In any case, Romanians do not hate or hate foreigners well, but they will love their homeland and their right to sovereignty even in the context of so many European continuities and discontinuities. And Romanian law can be one of the keys to the inaction.

2. Romanity and originality of Romanians' law

The surprise and revealing of the Romanian legal creations, the surprise of the Romanity and the originality of our law - as defining elements of a Romanian legal identity - and its continuity in the spaces inhabited by the Romanians are closely related to the being of the nation. In this sense, the return to the scientific debates of the polar categories: continuity and discontinuity in the field of law was determined by two historical processes: the one of the post-totalitarian transition of the central and east-European countries and the one of their European integration, entailing effective interdisciplinary efforts. We will refer, in the following, to those from the sphere of the history of law and from the sphere of comparative legal sociology, dedicated especially to legal cultures. Regarding the first mentioned process, the comparison was made between a previous, post-war transition and the transition that followed, in the European space, in 1989. In this context it was emphasized that while the defeat of Nazi Germany in World War II had as an effect the imposition of legal discontinuity by the occupation authorities, empowered by their own legal regulation and which have transplanted legal solutions, ready prepared, from outside, the change in the central and eastern part of Europe is characterized by an uninterrupted legal continuity, by a guaranteed framework of the rule of law and by the prestige of the democratic constitutional order, these being the result of the action of the internal factors.

In the same vein, the emphasis is integrated that, from the common history of European countries, their systems of law and their legal cultures, elements of continuity

result. These have played an important role in the process of European integration in the field of law. In continental Europe, there is the tradition of Roman law (*jus commune*), humanism, enlightenment and modern codifications. In a paper devoted to the transnational future of Europe, it is shown that, in general, it is regarded as a community of cultural values and the system of cultural values forms the backbone of European consciousness. Despite many cultural differences, Europe is rooted in Christianity, the tradition of Roman law and the Greek perception of beauty, a fact evident for Central and Western Europe. But as far as Russia and South-East Europe are concerned, the presence of religious, cultural and political connections with the Eastern Roman Empire and the Byzantine version of Roman law cannot be denied. It is supported by the idea that, although the countries of central and Eastern Europe have entered, after the Second World War in the field of Soviet domination, it cannot be said that the mentioned historical process meant their break from the common European history. It can be shown that, there are common constants, in all successive stages of the legal history of Europe.

The complex issue of continuity and discontinuity in law is related to the dynamics of legal cultures because the very definition of legal culture implies references to continuity. Thus, Lawrence M. Friedman, the initiator of the concept of legal culture, attributes to it a sense related to the sustainable elements of a coherent and relatively permanent legal system, as if, for example, we consider, for example, the Japanese or Dutch legal culture, viewed as a complex of attitudes and behaviors that form a model, which we can recognize. Viewed from the perspective of European integration, the relationship between innovation and tradition, the perennial values of the national legal culture, the rightful reflection of national particularities, the continuity characteristic of the behavior of the individuals that make up a people are very important aspects. Legal institutions, as well as cultural ones, reflect the specific, common features of the members of an ethnic community and make them different from those of other communities. These features ensure durability, stability that does not equate to immobility. In connection with the idea of continuity, manifested in European legal science, it is worth mentioning that the methods of interpreting the law are common to EU Member States, being recognized and experienced over the centuries. At the same time, it is interesting that the distinctive features of the Common Law system are mainly explained by the absence of the defining

characteristics of the Roman-German law systems, and the specific differences that the Scottish law presents which - geographically it is framed in the Anglo-Saxon family, they are explained as the result of the influence of Roman law. Elements of continuity were also noticed in the sphere of the legal professions, as a result of extensive research carried out in four European countries: France, England, Germany and Italy on the forms of organization, the legal regulations in this matter, the professional practices and the professionals themselves.

One of these elements was that of maintaining a significant share of national traditions, despite the process of internationalization of legal professions. Another element of continuity found in England, regarding the relations between the legal professions, and the state, the degree of autonomy of the former was the still strong maintenance of national customs, of the self-government of the legal profession. The fact was explained by the history of this profession and by the liberal tradition that had neither suffered in the ninth century nor in the twentieth century because of an authoritarian regime, while, the other countries did not have the same historical chance, the state on the contrary, trying, at different times in their history, to subordinate the judiciary, the legal professions, to keep them under control, limiting the independence of the legal professional structures. It was concluded with regard to Italy and Germany that the situation of the legal professions still bore, at the time of the sociological-legal investigation, the imprint of state control, long and pressing control, during the Nazi and fascist regimes. Finally, it was found as an element of continuity, the maintenance in the countries included in the field of research, the recruitment of professionals, with a predilection among the middle and upper social layers.

Throughout history, Europe has encountered difficulties of alternation continuity, discontinuity. Moving on to some discontinuities, we recall that after the fall of the Western Roman Empire, the superior classical culture of Roman law, as well as the revived one in the Eastern Roman Empire, meant a regress of the European legal culture. However, the Roman heritage survived. The notions of official power, official jurisdiction, law, conceived as a command of the state power, which was the basis of legalism, specific to the European legal culture and legal positivism, were maintained. The notion of "jus commune" of Europe has been maintained throughout the European legal thinking and

has proved itself capable of being reborn as happened with the classical Roman law, starting with the 12th century. Thanks to the Romanian jurists and their European successors, the ground was prepared for the great codifications of the modern era. Another element of discontinuity in European legal history was the emergence of modern law, which, by its specificity, represented a break with medieval law. Then, totalitarian regimes marked a period of discontinuity in Europe, in the evolution of its modern law, affecting, for a period, more or less prolonged, the legal culture of the countries in which they were established. The concept of the rule of law, which was formed and affirmed in Europe on the basis of Enlightenment, in the spirit of the American Declaration of Independence and the philosophy of the French Revolution, was deformed and became powerless, inoperative, under the conditions of the totalitarian regime of the 20th century. The law has lost its relative autonomy and authority, stemming from its role of control over the state. The state has gained control over the law which has become a mere instrument of state domination. The totalitarian regimes, however, could not be dispensed with by law and legal institutions.

A disruption of the evolution of modern European law, significant from the point of view of discontinuity, was provoked by postmodernism, which inevitably influenced the law. Postmodernity is presented, in sociology, as a time of social transition, dominated by the process of globalization and the search, sometimes the sharp affirmation of new forms of organization and management of new institutions and ways of life. Peter Murphy notes that postmodernism is a reflection of the modern condition, claiming that we live in a differentiated society in which different spheres coexist. Each of the spheres is made up of distinct norms, goals, procedures, processes, values, transformations and balances. Each of the spheres emphasizes one element or another, on its own perspective about a good society, about a fair or impartial treatment. As a result, in society there is not a single justice, but a multitude of justices that coexist, either in friendly or conflictual relationships. But, precisely, the advantage of postmodernism, which recognizes a plurality of rationalities and a multitude of justices, demands greater prudence on the part of the one who makes judgments about justice or norms, forcing him to judge not only by one criterion, but by more many. Postmodernism demands finding ways to reconcile different conceptions of justice and law, to adapt competing claims and conceptions. Colin

Summer pointed out that, in the post-modern period, some specific trends of modern law evolution are mitigated, while the practical purposes of the law are on the foreground. If, in the modern period, the classical liberal model of the rule of law was based on the general and abstract character of the law, the concept as a premise of formal equality, the universality of individual rights, the postmodern orientation consists in the particularization of legal regulations and in the specialization of human rights. In conclusion, the law was transformed into a system directed to profit, advantage, opportunism and instrumentalization.

Boaventura de Sousa Santos wrote in 1989 that, starting with the 19th century, modern state law represented a unique, autonomous, autocratic and endowed power with modeling and social innovation, planning for the future. In the last decade of the twentieth century, however, the aging of state law and the emergence of fluid, ephemeral, negotiable and renegotiable forms of law, some regulation of relations between corporations, a community regulation, a postmodern legality, in accordance with the interests of moment of the parties involved. The reduction of the role of the law, the desacralization and trivialization of the law, especially the state law, the end of the legal fetishism, the monopoly of the state in the area of the elaboration and even the application of the law, as well as the emergence of the legal minimalism were observed. He pointed out that, legal minimalism means that, legal relations are increasingly subject to power relations, it means the disarmament of powerless social groups, which are signs of a deep crisis of democracy. He proposed as a solution the renewal of participatory democracy, in order to strengthen the representative one, assuming a concept of law, based on legal pluralism, combining state law, with non-state forms of law. Very interesting was, in the same order of concern, the detection of paradoxes that accompany, inevitably the radical renewal that represents the transition from modernism to postmodernism.

A first paradox is that of the universal and the private. When modern law systems were formed, they were conceived on a universalistic, individualistic basis, which allowed the elaboration of the notion of human rights which, however, were over-developed, which led to their over-ideology, with negative effects. Subsequently felt. A second paradox is that of deregulation and regulation. Although the jurists have endeavored to demonstrate the benefits of legal deregulation, in fact, there has been a growing demand for the

regulation of some areas of great danger, such as the field of bioethics. The next paradox is that the emergence of alternatives to state law risks producing perverse effects, meaning that, instead of ensuring the relaxation of relations within civil society, alternative solutions sometimes cause a reinforcement of state control. The fourth paradox reported is the paradox of equality in rights of the subjects of law, under the conditions of a differentiated society. At the same time, more justice, more equality and more citizen participation are required in social life, and on the other hand, there are some regulatory systems that represent alternatives to legal regulation or judicial settlement of disputes, under the conditions of a differentiated society. , consisting of subsystems generating their own regulations. However, it is good to have a certain dose of pluralism and a certain kind of pluralism that allows the fight against state law. But, it is not necessary to accept any pluralism that introduces differentiations that, the right of sole origin, could alter in the continuity of national law.

3. Continuity and discontinuity in the history of Romanian law

We dealt first with the continuity and discontinuity in the field of law, in Europe because we considered it necessary to precede this analysis to the one dedicated to the subject, at national level, as Romania remains in perpetuity a continental-European country, which became 2007 and EU member state. In order to highlight the particularities presented by the continuity-discontinuity alternation in Romania, it was absolutely necessary to consult reference works on the history of Romanian law. From the inevitably incomplete research, few and significant conclusions regarding the Daco-Roman legal system, the Roman-Byzantine law, the old Romanian law, the medieval law stage, the modern law stage, the codifications made, especially conclusive for the belonging of the national law system to the sea, have resulted. German Romance family. Regarding the origins of the old Romanian law, it is noted that the opinions they support, either the Daco-Roman origin or the exclusively Roman origin, prevail and belong to predecessor illustrators, such as Miron Costin, Dimitrie Cantemir, Nicolae Iorga, Andrei Rădulescu, as well as prestigious law historians who followed. Attention was drawn to the fact - which could be interpreted as an interruption of continuity - that, in the absence of an autonomous organized state body and a strong own governing blanket, during the

barbarian population outbreak, the non-application of Roman law to pilgrims from Roman Dacia and the partial use by the colonized Romanians of the provincial Roman law determined that, the persistence of the Romanian legal system acquires particular aspects. To the question whether for long or short periods, one would not find, from one legal system, to another, apart from the fundamental elements of differentiation, elements of continuity, if it could not be found, at different legal systems points common we find the answer according to which the formation of the modern Romanian law represented the break with the feudal law.

During the disintegration of the medieval structures and the emergence, as well as the development of new social relations, codes were developed, with inherent limits. For example, the Calimach Code was developed (1817), inspired not only by the Roman-Byzantine legions and by the custom of the land, but also by the Napoleonic civil code of 1804. The transformations that marked the beginning of the modern era in the Romanian Countries had direct effects on the of the state and the law, acquiring a greater character after the creation of the Romanian national state, in 1859. In the second half of the nineteenth century, the Parliament occupies a central place in the system of state organs, having a representative character and carrying out a remarkable activity destined to the preparation and elaboration. Modern European legislation. As noted by Valentin Al. Georgescu, in the process of accelerating the modernization of Romanian law, was increasingly felt in the three Romanian countries, the need for codification, the process of knowing the three phases: the first, a synthesis phase, in which, the selective and adapted transformation took place. of the Byzantine praviles, in the internal law of the kingdom, the valorization of the customs of the earth; the second phase initiated in Moldova by the Calimach Code in which, in a necessary synthesis, a western and jusnaturalist type right is introduced and the third phase, the one inaugurated by the Organic Regulations through the provisional translation of the French Commercial Code of 1818 and by the requirement of elaboration to modern codes to which it was only partially answered, until 1859.

Regarding the formation of modern Romanian law, it is necessary to remember that, by the Paris Convention, the Romanian Principalities were required to revise their entire legislation, in order to agree with the modern requirements. A special mention must

be made of the fact that, at the disposal of Alexandru Ioan Cuza, the codes that were the foundation of the system of modern Romanian law were adopted. The legislative work of Alexandru Ioan Cuza, located Romania, among the countries with the most advanced legislation. The temptation to capitalize, even in some matters, the national legal tradition antetotalitate, to renew the thread of history, where it was broken, by the establishment of totalitarian regimes was also present in Romania, especially regarding the constitutional law. The temptation was so strong, in some cases, that the obvious fact was ignored that, in the concern of realignment to Western standards, changes in more than half a century had to be taken into account, in the countries of origin themselves standards. We consider the Constitution of Romania of 1923, inspired by the Belgian model and very advanced for the time when it was adopted and for the area in which it was to be applied.

4. About contemporary national legal science

In relation to contemporary national legal science, we can affirm the existence of a Romanian legal science and culture as a single and indivisible one. Indeed, the assertion of such a postulate becomes all the more necessary and important under the conditions of European integration, including in the plane of law and reality of a globalization, including legal, increasingly accentuated and aggressive, which also implies the preservation and strengthening of the juridical identity-cultural, as an imperative of the manifestation of unity through diversity. The grounds for a unam scientum juridical are becoming more and more evident and more provocative and start only from Bucharest, not from Brussels, since in the world there are a significant number of national states based on a nation, whose name is a gate, usually. In Europe, the absolute majority of states are national. Thus, the main objective of our research cannot be other than the Romanian legal science understood as a science of Romanian law, and the purpose of this approach is not difficult to identify either: the crystallization of the doctrinal expression of Romanian law as a unitary law of the whole Romanian people, therefore, a unitary legal expression that serves as a theoretical-conceptual reference for both the laws of the Romanian state.

"Like the language, the law lives in the conscience of the people" and develops organically "through internal forces that work in silence, and not through the arbitrary will of a legislator" to impose by political decision the result of rational speculations on human nature and natural rights inalienable of the individual considered in the abstract: here is the starting point for the well-known historical doctrine of law in the formulation of Friedrich Carl von Savigny, the founder of modern legal science in the true and true sense of this term. Not first of all the politicians gathered in legislative assemblies, but the lawyers are the true representatives of the people in everything that belongs to the latter's right, and they can be either the medical practitioners in the courts, or the theorists trained in universities". Two centuries ago, Savigny was the winner, and the German legal science formed from his ideas and developed for half a century under conditions of political fragmentation reached a level that has remained imposing even for today's jurists. . On the contrary, where the accent fell not on the law of the people, but on the laws of the state, the legal science could only overcome by far the consequences of long political separation, as can be seen after the First World War in a Romanian state whose territory it covered. the Romanian historical space, but which could only solve with great difficulty the problem of legislative unification and when the times when the historical conception of the law was explicitly used by Simion Bărnuțiu in the Blaj Proclamation, or by Mihail Kogălniceanu in carrying out the major reforms societies of modernity in the Old Kingdom seemed long forgotten. As if not learning too many of these historical experiences, today Romanian legal science seems to be satisfied with the task of accompanying by exegesis and commentary an activity of legislation whose only benchmarks seem to consist, on the one hand, in punctual requirements especially of the invoice. Economic and ideological, and on the other hand, to ignore any tradition or perspective of systematic crystallization.

In addition, at the level of positive law, the codifications of the last decades have followed divergent orientations, in Bucharest taking into account the Romanian model, and in Bruxelles the union model. In the approach we allow ourselves to propose, we must start from the fact that beyond the political correctness raised by the EU on the ruins of the old glosses and comments of a Roman law accepted after a millennium of absence as a law of a long-lost society, Romanian jurists they must understand themselves as lawyers of a space in which Roman law also continued as usual and as a Byzantine law

to be alive throughout the Eastern Roman Empire, as a right of a Byzantine Commonwealth and then of a Byzantium after Byzantium. , without its popular, customary, uninterrupted base having altered its substance. In this context, we need a unitary, comprehensive vision from which to start. More clearly, the nomos of the Romanian space as an unmistakable and perpetual seal of Rome always: here is the historical right of the nation invoked by a Declaration of Independence and whose full restoration is called to contribute from now on the Romanian legal scientific community, we all concerned about the Romanian legal identity, in a Europe of integration and a World of globalization.

This approach to EU law should start from the fact that only in case of lack of local laws will the Union law and especially the EU Treaties be applied. The question is: what is meant by lack, by the so-called insufficiency of local laws? Whenever the Romanian judges do not find in the local laws the text that will resolve the dispute, be willing to count deficiency and to apply the Union law. With this system, EU law was introduced as little as possible in the area recognized by local law and it is understood that the latter would have had very little application. In fact, the judges made only a good interpretation in the situation of the insufficiency of the text of the law; and in any case it should not have been given a purely literary, abstract, tight interpretation, without assuming the consequences and without disregarding equity. The scientific method of interpretation has established certain rules and, among others, requires that the sources of the texts be taken into account. For local law in Romania, we must necessarily resort to Roman and Greco-Roman law. Even if the texts do not include the solution of the question, the arguments of logic, the general principles of law and the purpose pursued by the drafters of the rules must be used. Only when these means do not lead to the solution of the problem can it be argued that in local law there is a lack, that there is an insufficiency and - as such - to resort to EU law. However, the local law is not protected by the interpretation in favor of the union because the judges did not know very well, or at times, the European one. But there would be another cause that would make EU law less and less used: the language of this situation. We consider that the unionists do not use the Romanian language in the drafting of the normative acts, nor in the CJUE or the ECHR, our mother tongue is weakened, nothing worse for the performance of justice as this situation and older for the

justices. And our argument would continue, but we stop here, not because we might be considered Eurosceptics, but simply because of the technical-editorial constraints. However, we will talk further about the romanity and originality of Romanians' law in the context of a new legal typology, the law of the European Union: between a presumed utility and a demonstrated inefficiency.

5. A new legal typology. Stranger than European Union law can imagine: between a presumed utility and a demonstrated inefficiency

The European Union is a major global player, representing a great commercial power. Sometimes described as civil or normative power, this "reflects the fact that the means at its disposal are - by necessity, given the lack of its military capacity - economic, diplomatic and political in nature, rather than coercive. In other words, worldwide, the EU relies mainly on soft power. Also interesting is the proposal of States that are not permanent members of the UN Security Council for the EU to be represented in the Security Council. As the idea has already been launched, all we have to do is wait. And "comparative history teaches us that political forms are never fixed and minority models sometimes end up being imposed." The future of the EU is closely linked to the ability to operate under the Lisbon Treaty, the possibility of attracting and co-opting new Member States, as well as eliminating discrepancies between them. Although considered a unique institutional and functional model in the world, the European Union represents "a necessity and an ideal to be attained in which we will find our philosophical and cultural roots" and through which "we will participate in a collective adventure, which unites people for the good. , and not the evil ". "In order to succeed on this unique path of the European Union, we must give up nationalist ideas, in order to approach the regional vision. There is no room for "wondering by what singular aberration an adult people could thus alienate their concern to create their own right in the hands of people who are strangers and whose first mission is not the common good of French society."

Right is a struggle, as Rudolf von Ihering states. We must not forget to fight, because, "all the great achievements that the history of law has registered: the abolition of slavery, slavery, freedom of land ownership, industry, freedom of belief, etc. they were conquered at the price of fierce fighting, sometimes continued for centuries; not many

times, in order for the right to cross this road, he left behind the rivers of blood and trampled rights. Everything is in full swing, in a dynamic, we must not stop. However, we remain at the conglomerate stage, although there are steps backwards, for example the failure of the Constitutional Treaty. Unfortunately, not all the consequences were drawn from the recognition of the legal personality of the European Union by the Treaty of Lisbon. Thinking about the future of the Union, many questions arise in our minds, the answers of which are very difficult to find theoretically. As none of the Member States alone would be able to face today's challenges, would the Union break down or stall a solution in the future? How effective could a single state fight against organized crime, trafficking in human beings or drugs? What would be the influence of a state in trying to advocate for the protection of the environment or to fight against climate change? How could a state alone fight for anti-competition regulation or play a major role in international trade negotiations? We do not believe that these results can be the result of singular efforts, so that Europeans must be more innovative and powerful, either in strengthening the functioning of the European Union or by imagining a new original structure to organize Europe's future.

In this regard, we consider that the EU, since it was not founded by a nation or a people, could not be assimilated to a nation state or a constitutional structure. It is an international organization, *sui generis*, created on the basis of treaties concluded between sovereign states that have decided to exercise joint competences for an indefinite period of time. We find it interesting also the classification of the European Union in the category *Staatenverbund* (union of states), following the Maastricht Decision of October 1993, pronounced by the Federal Constitutional Court of Germany. In the Maastricht Decision, it is emphasized that the objective behind the Union was to create a "union of states as a union as close as possible to the peoples of Europe (organized as states), and not as a state founded on the people of a single European nation". However, the Federal Constitutional Court of Germany does not use an established term, its meaning being unclear, there is no equivalent in other languages, but it certainly refers to a form of confederation (*Staatenbund*). By this neologism, the Germans mean multi-level governance in which states cooperate more closely than in a confederation, but which, unlike a federal state, retain their own sovereignty. A more appropriate translation for the

German term Staatenverbund would be "union of sovereign national states". This meaning also brings us closer to the descriptions proposed by Great Britain "partnership of nations" or "constitutional order of sovereign states", which would have a similar meaning. It should be emphasized, however, that the United Kingdom opposing the idea of the rule of law of the EU has, by referendum, described abandoning the union, perhaps because of the specific typology of Union law. The British, in their conservatism, interpreted in another key the new EU legal order.

6. Instead of conclusions, the typology of Union law in another interpretation key

In order to be able to investigate the European legal phenomenon, it is necessary to observe the important legal typologies, but also to analyze the history and specificities of European Union law, with an emphasis on the features that support the idea of a new legal typology, since without such analysis, we cannot separate the features of European Union law. Which betrays the idea of a new legal typology. In this sense, it is necessary first of all to have an autonomous will that commands the legal decision-making process, different from a simple arithmetic sum of the individual wills of the states. The legal will of the Union is the essence of Union law, which is normal, because we are talking about a Union, so the question of typical features is raised, even if there are particularities. In addition to this autonomous will that commands the legal creation, the new typology also implies the existence of general principles that command the essential directions of the construction and development of the legal order of the Union. Within the complex process of developing and applying European law norms, general principles of law occupy a very important place. Most of the general principles of law are enshrined in the legal order of the Union, but in some cases we also find references to treaties. Reference to these principles can be made only when Union law is deficient, because if there are provisions in this respect, their application is mandatory. The role of European doctrine and CJEU jurisprudence in shaping the principles of law should also be emphasized here.

As emphasized in the doctrine, "the judge cannot be indifferent to doctrine and practice, when applying the law; the legislator, in his turn, cannot ignore the doctrine and the judicial practice, which leads to the conclusion that the different sources of the law expert on one another, an inevitable influence". If, in the settlement of a case, the Court

of Justice has to refer to or apply general principles of law derived from the national legal order of the Member States or from the international legal order, the referral or application can be made only if those principles "are compatible with the Community principles and with the specific legal order enshrined in the Community texts". Also, the general principles of law gain authority in Union law through the practice of jurisprudence, "but they are always based on their consecration in a legal system organized either at the level of the Member States, or common to the Member States or resulting from the nature of the European Union". The attitude of the Court of Justice on the general principles of law has evolved greatly over the last 60 years. If at first the Court was hesitant, since 1960 it can be seen that the European court referred to principles in many areas. Of course, since the 1970s their importance, suppleness and dynamism have been realized by European judges, who have recognized them as rules of Union law. Therefore, over the years, the general principles have become very important, today, they are an indisputable part of EU law, alongside primary or secondary law. The role of the principles is to guarantee the cohesion of the law of the Union and its adaptation to the changes of the European realities. Interestingly, although the EU legal order is governed by the general principles of law, the CJEU has not always defined or applied them in the same way, but they are very broadly designed. Thus, we can see that depending on the situation of the cases, the principles play different roles in the EU legal system. Despite these differences, there is still a balance - the desire to ensure uniformity of Union law and to guarantee the achievement of the objectives assumed by treaties. It is obvious that the necessity of resorting to the general principles of law as legal sources derives mainly from the "novelty of Community law that is still in its consolidation phase, as opposed to the internal order of each state that has known for a long time in which it has its own settled".

Although the origin of the general principles of European Union law remains the national law of the Member States, the CJEU has some freedom in their choice. The principles of the European Union are binding on its institutions, and the acts or measures adopted, whether they are of an administrative or legislative nature, which would violate any of the above principles are illegal, and can be annulled by the Court of Justice. It should be noted that these principles are applied in order to avoid denial of justice, to fill the gaps in European Union law and to strengthen the coherence of this right. Of course,

in the hierarchy of sources of Union law, the general principles play an extremely important role "as well as the constitutive treaties, especially the fundamental principles which are expressly recognized by Article 2 TEU and which must be respected by the EU and its institutions. The CJEU recognizes other general principles as they are compatible with the constitutive treaties and fundamental human rights "as sources of rights and obligations, especially since there is no Union domain that is alien to these principles. They acquire an independent normative value, ultimately representing fundamental democratic values deeply embedded in the common political and cultural heritage of the Member States. The general principles of law are closely linked. The fusion between them is not surprising because they are based on those values and pursue the same goals. As more and more domestic disputes raise questions of Union law, national courts are increasingly relying on European jurisprudence, so it is imperative for the CJEU to argue its decisions in detail.

Also related to the typology of the Union legal order would be to point out the multilingualism characteristic of the Union order. Contrary to the ECSC provisions that provided that French is the only authentic language, the EU is based on the principle that at least one official language of each Member State becomes an official language of the Union. If originally it was only six Member States and four official languages (French, German, Italian and Dutch), we are currently discussing twenty-eight Member States and twenty-four official languages (almost each Member State having its own language official). Thus, any of the Member States has its own legal system, which can be classified according to René David's typology as belonging to the family of Roman-German or Anglo-Saxon law. Therefore, summarizing the ones discussed above, we emphasize that the various forms of expression of the law have the common purpose of creating a legal order and due to the fact that they are addressed to a region of the world that includes several states and international organizations, the problem of knowing European law is a problem. Serious from a double perspective: the accessibility of European legal norms and multilingualism. Moreover, even a lawyer has trouble understanding European law, especially being a young, constantly evolving law, he did not have time to settle, so there are two major problems at this stage: the originality and the superiority of the law. European. And in European law the question of proving the legal norm is raised. Law will

always be a topic in the center of attention, analyzed intensely and admired by some, challenged by others. And as for the European Union, the opinions on the future of this political and legal construction are divided: we meet fervent supporters of the European Union, on the one hand, but also its challengers, on the other. In this context, we can say that the relation between the law of the Union and the national law of the Member States is dialectical. On the one hand, Union law borrows elements of national law to fill the gaps in the Treaties, and on the other hand, Union law nourishes national systems in particular through national courts. This interaction of the two plans is overshadowed by the uncertainty that is an inevitable consequence of the fragmentary development of the law inherent in such a process of judicial harmonization.

In view of all the above, we emphasize that EU law is a new legal typology from the perspective of the theory of law and can be defined as the specific legal order, having an autonomous and unitary character, integrated into the legal system of the Member States, grouping all the legal norms included. in the EU treaties, as well as in the acts of the own institutions that were adopted in application of the treaties and issued on the basis of a specific procedure.

The recognition of its own legal order means that the legal norms of the European Union form a complex structure of norms that have a well-established set of sources of law, while the Union institutions have well-established procedures for notifying and sanctioning violations and skids. Similarly, the legal order of the Union is its own, being autonomous in relation to the international legal order and relatively autonomous to the national law of the Member States, but it is integrated into the legal system of the Member States and is required to their jurisdictions due to the direct, immediate and priority applicability of EU law. Thus, by reference to the legal order of the Member States, EU law is an autonomous and original legal order, which is characterized by a triple autonomy: the autonomy of its sources, the autonomy of the notions of law that do not depend on the qualifications of the Member States and the autonomy of the legal norms of the Union. Europeans that cannot be lacking in legal efficiency through the national law of the Member States. But, in relation to the international legal order, the specificity of the EU is that it was born following the treaties concluded by the Member States and the normative acts that were issued by the institutions of the Union, based on and in

application of the treaties. Although challenged on the fact that it is an "incomplete law by nature", unable to "pass neither as national law nor international law", it is precisely this "incompleteness" that has led to the finding of original solutions and methods that allow the rules and principles of the Union to interact with the national and international environment. Some authors appreciated that "domestic law, European law and international law mix, overlap, complement, consolidate, compete with each other or cancel each other". "The permanent tension between the three major legal levels - national, regional and international - shows in any case today that the quasi-absolute autonomy of European law is a myth and that its dependence on international and national law has increased considerably during construction. European ". Moreover, in order to be able to apply European law, you must integrate its specificity into the broader set created by international law and national law.

The Treaty of Lisbon has made progress in the constitutionalization of the Union, "in particular by granting legal force to the Charter of Fundamental Rights, but without making a revolutionary leap that would transform the Union into a federal State". However, this treaty has been challenged by some authors, on the grounds that "it is anything but a treaty", calling it "the Lisbon European arrangement" because "it is more than another example of a hidden bureaucratic revolution, provided by the unelected bureaucracy in Brussels to a largely ignored public, avoiding democratic consultation and information, ie the process of democracy itself and, therefore, the unpleasant experience of the former European Constitution, rejected by the French and Dutch in 2005. The EU is in fact an "institutional, intermediary model" between the nation-state, confederation and federation, which has no equivalent in the world". It is necessary to "overcome the political divide, within a larger, real and necessary union between the peoples of Europe", having as its basis "what we can call the" European tradition ". In the US in particular, European Union law has often been accused of being devoid of culture because it cannot associate patterns of thought and action of a community, does not have its own language or education system, because each Member State has its own legal/political culture, but also because it is a relatively new system. The existence of a right is also appreciated in terms of its ability to be applied, not only with regard to its definition or its sources. Through its application, EU law also approximates the systems of law, observing an

approximation of the common law system to the Romanian-German system. However, at present, we are witnessing a process of "Europeanization of legal systems - jus commune - and in particular, public law". However, the functioning of the institutions of the Union must be ensured, the institutional balance must not be abandoned, and the separation of powers must still be guaranteed as we have been inoculated with the idea, which seems to be common sense in the opinion of the decision-makers in Brussels that national law must fall within certain limits. Of Union law.

The question is how and what you do to achieve this. Because the national legislators prescribe the "treatments" that they consider beneficial for the sick national state, without knowing that the state or the union has or does not have resources and to ensure this consumption for "treatments". Whose obligation is the state or the union? To achieve this objective, it is normal for the national state to introduce a control barrier so that we do not wake up that we have "consumed" more rights than we can afford. Until the accession of 2007 this control was carried out in a simplified way, the control of the constitutionality of the international treaties to which Romania acceded. The result was that I still had a national right. Now after modifying the Constitution and joining the Euro-Atlantic structures, sometimes we succeed sometimes, with the consequence of the alteration, until the disappearance of the Romanian law and, together with it and the national state, by setting up a Union of the United States of Europe.

From this perspective, the legal knowledge cannot be avoided, from the connections with the human network of knowledge, as the legal phenomenon cannot be avoided to the connections and interferences with other socio-human phenomena. This interactivity does not pay attention to the specificity of legal entities or specializations, such as branches of law, concepts, principles or legal theories. The knowledge of the law implies the use of legal concepts and categories, without which the law would be nothing more than an amalgam of heterogeneous rules, lacking any coherence and unable to regulate the realities of social life. Any conceptual system involves distinctions and relationships between the notions he uses and the realities or phenomena he encounters. Jurists are thus led to establish legal categories, that is, ensembles of rights, things, persons, deeds or acts, which have common characteristic features and are subject to a common regime. The right, thus understood, as a network of concepts and legal

categories, proceeds to classify facts, circumstances, notions, according to their similarities and their relation to certain models. The evolution of social life and the world determines the emergence of new concepts, including in the field of law, which are derived and which allow to unite around them sets of rules that must be applied to the phenomena arising from this evolution. Law is an investment made by those who have the sensitivity and power to understand what the process of forming and supporting a nation entails. You don't do the right thing to make a profit!

With modest intentions, I tried to deliver a new scientific contribution that aims to make the topic discussed become a plausible topic for the contemporary reader who is quite skeptical of the essence of law. Personally, I believe that this work does not constitute in the canons specific to the texts of the legal doctrine, but it renders the current Romanian legal phenomenon, the dignity and the existential relief that I think it deserves. I would say that this approach which is sometimes lacking in academic pedantry is the remedy for the intellectual curiosity and honesty of a reader who wants to read something else. Even though it is a work about law and justice and these should have been the main characters, the study has as its core the human being, respectively its identity by reference to the community having as legal scenography, in this case, regulating our movement between good and evil because, in the end, we are human beings. And we are - or, in any case, we should be - in a permanent dialogue with God. He tirelessly conjures, as an option, the flow of our lives, just as we would if we were in his condition.

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CHANGES IN THE ETHNIC STRUCTURE OF THE POPULATION OF ROMANIA

Professor Cornel LAZĂR, PhD.

Petroleum - Gas University of Ploiești (Romania)
clazar@upg-ploiesti.ro

Associate professor Mirela LAZĂR, PhD.

Petroleum - Gas University of Ploiești (Romania)
lazar_mce@yahoo.com

Abstract

The evolution of the number and structure of the population according to its ethnicity, is an important problem for any state, with profound political and social implications, especially in substantiating the measures to protect the rights of national minorities. Taking into account the multiple acceptances of the term of ethnicity, in the first part of the paper we tried to clarify this concept starting from the definitions of specialists in the field. The paper presents the main changes in the ethnic structure of the population of Romania based on the statistical data from the last three censuses of the population. The study highlights the fact that during the period 1992-2011 the majority population of Romanian ethnicity registered a slight decrease tendency, from 89.5% to 88.9%, while the minority ethnic groups registered an increase from 10.5% to 11.1% in the same period, mainly as a result of the accelerated dynamics of the Roma population. Also, the paper makes a brief presentation of the main instruments of protection of the rights of national minorities at European level but also in the case of Romania.

Keywords: *ethnic structure, national minorities, ethnic group, minority protection*

Introduction

National minorities have always been a topic of interest in European states, not only because of the complexity of the problems associated with them, but also because of their economic, political and social importance in the overall development of the states in which they live. The term of minority, although it has no universally accepted legal definition, include a number of common elements. In the first part of the paper we tried to clarify the concepts of ethnicity and national minority, starting from the definitions of some specialists in the field.

Based on the statistical data obtained during the last three censuses of the population, we have highlighted the main changes in the ethnic structure of the population of Romania. Knowing the ethnic structure of the population, the territorial distribution of ethnic groups are important aspects in substantiating the policies for the rights of national minorities.

The concept of ethnicity

Before presenting the evolution and changes in the ethnic structure of the population of Romania, we consider it necessary to clarify the concept of ethnicity, a concept that presents different meanings from one country to another or depending on the legal, social, political or demographic perspective. However varied and complex the acceptations of the term "ethnicity" may be, it is useful to try to systematize them.

Etymologically, the notion comes from Greek from "ethnos", indicating a community of people of the same origin and ancestry. A renowned researcher on the problem of ethnicity (Max Weber) considers, "ethnic groups are those human groups that entertain a subjective belief in their common descent because of similarities of physical type or of customs or both, or because of memories of colonization or migration; this belief must be important for the propagation of group formation; conversely, it does not matter whether or not an objective blood relationship exists" [1].

In the same way, Fearon and Laitin consider ethnic group is "a group larger than a family for which membership is reckoned primarily by descent, is conceptually autonomous, and has a conventionally recognized "natural history" as a group [2].

According to Anthony Smith, an ethnic group is, "a named human population with myths of common ancestry, shared historical memories, one or more elements of a common culture, a link with a homeland and a sense of solidarity" [1].

Elements of this definition are taken from researcher Kanchan Chandra, who believes that ethnic identities "have a subset of identity categories in which membership is determined by attributes associated with, or believed to be associated with, descent (described in the article simply as" descent -based attributes "[3].

In the definition of ethnic groups some authors [4] use the term of ethnic (cultural) nation, which means all ethnicities linked by cultural belonging, regardless of the state in which they live.

Other researchers have explained the term ethnicity as a result of a way of life, based on one's own language and culture, coupled with spatial determination, which results in solidarity between people.

Thus, according to Richard Molard, "ethnicity" is a community of language, habits, beliefs and values, based on the spatial criterion. For the Meyer Fortes researcher, "ethnicity" represented a spatially determined group, within which there are close social links [4]. In some cases, the term of ethnicity is used in conjunction with the terms "ethnic minority" and "ethnic group". The ethnic minority designates a social entity, "a distinct group" of the population within the society, whose culture is different from that of the majority of the population [5].

In the European tradition, "ethnicity" is not perceived as a synonym for the phrase "ethnic minority", but as a determining element of the nation. According to this approach, society as a whole, not just ethnic minorities, belongs to a certain "ethnic group" [6].

Regarding the statistical surveys realized in Romania on the structure of population by individual groups (the censuses mainly), were used the term of nationality (the 1977 and 1992 censuses) and the term of ethnicity (the 2002 and 2011 censuses) but with the same meaning.

It should be noted that the term of nationality taking into account in the calculation of the number and structure of the population at the censuses was used in the sense of ethnic origin and not of citizenship.

Thus, the following definition appears in the Census Staff Manual: "Ethnicity is defined as the choice of a person to belong to a human group with common features of civilization and culture, through one or more of the characteristics related to language, religion, common traditions and customs, lifestyle etc." [7]. In contrast to this approach, the European Convention on Nationality of 6 November 1997 defines nationality as the legal link between a person and a state and does not refer to the ethnic origin of the person [8].

The Evolution of the number and structure of the ethnic population in Romania

Knowing the number and ethnic structure of the population, the dynamics and changes involved in its evolution represent an important objective of the official statistics of any state taking into account its social but also political implications. On the other hand, the protection of the rights of the ethnic minorities would not be possible without knowing of their size and of the territorial distribution. In the statistical research of the number,

structure and evolution of the population by ethnic groups the most important sources of information are the population censuses.

To analyse the changes in the ethnic structure of the population of Romania, we used the statistical data obtained during the last three censuses of the population (Table 1). According to the data presented in table 1 but also in figure 1, the ethnic structure of the population of Romania experienced some changes, between 1992 and 2011, especially in the case of minority ethnic groups.

At the last census, from January 1992 census, the population's structure by ethnicity was as follows: Romanians (89.5%), Hungarians (7.1%), Roma (1.8%), Germans (0.5%), Ukrainians (0.3%), Russians-Lipovens (0.2%), Turks (0.1%) and Tatars (0.1%).

The evolution of Romania's population, by nationalities, in Romania, at census, between 1992 and 2011

Table 1

Ethnicity	1992		2002		2011	
	persons	%	persons	%	persons	%
Total	22810035	100.0	21680974	100.0	20121641	100.0
Romanians	20408542	89.5	19399597	89.5	16792868	88.9
Hungarians	1624959	7.1	1431807	6.6	1227623	6.5
Roma	401087	1.8	535140	2.5	621573	3.3
Ukrainians	65764	0.3	61098	0.3	50920	0.3
Germans	119462	0.5	59764	0.3	36042	0.2
Turks	29832	0.1	32098	0.1	27698	0.1
Russians -Lipovens	38606	0.2	35791	0.2	23487	0.1
Tatars	24596	0.1	23935	0.1	20282	0.1

Data sources: <http://colectaredate.insse.ro/phc/public.do?siteLang=ro>, NIS Bucharest, [9].

Analysing the data from table 1 we can find that, excepting the Roma population, which, during the period 1992-2011 registered an increase of 55.0% (+ 220486 persons), all the other ethnic groups experienced decreases in the population, in some cases significant.

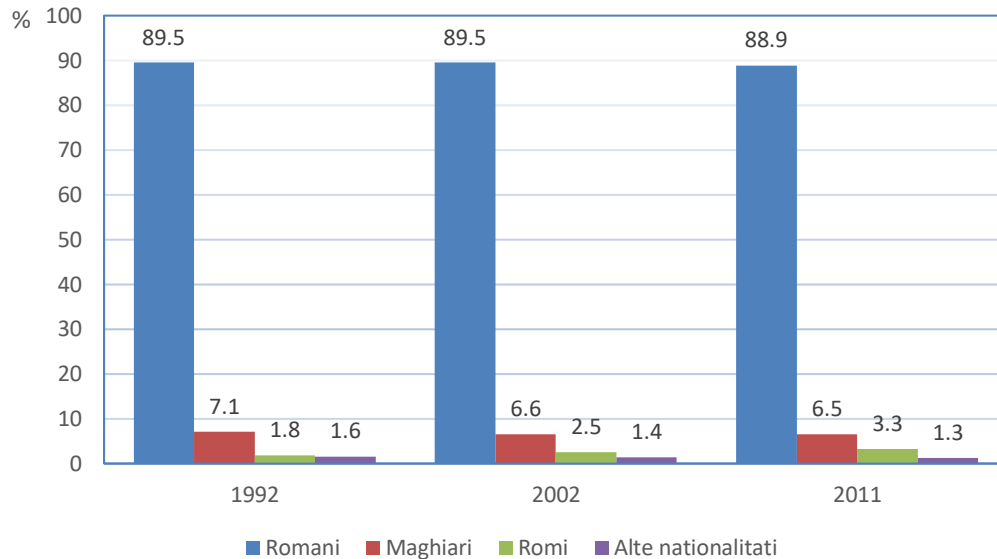
These different evolutions have led to changes in ethnic structure, more important being:

- The decrease of the share of the Romanian ethnic population from 89.5% in 1992 to 88.9% in 2011, mainly as a result of the sharp decrease of the population number (-17.7% respectively 3615674 persons) due to the decrease of birth and growth of external migration;
- The increase of the share of the Roma population from 1.8% in 1992 to 3.3% in 2011, an increase determined both by the higher birth rate in this case compared to the other ethnic groups but also because to the census from 1992, many Roma people declared themselves to be Romanian;
- The decrease of the share of the German ethnic population from 0.5% in 1992 to 0.3% in 2011, mainly as a result of the migration of a large number of German ethnic groups; during the analysed period, the population of German ethnicity decreased by 83420 persons, which means a reduction of about 70.0%;

We also note that in the period 1992-2011, the majority population of Romanian ethnicity, holds a share of approximately 89% and the most important (numerically) minority ethnic groups are the Hungarian and the Roma, that together hold about 10% of the total population (Figure 1).

The evolution of the share of the main ethnic groups, in Romania, at census, between 1992 and 2011

Figure 1



Data sources: <http://colectaredate.insse.ro/phc/public.do?siteLang=ro>, NIS Bucharest [9].

The analysis of the structure of the population by ethnic groups is important from the perspective of minority ethnic groups or national minorities as defined in many cases. Among the multiple definitions given to national minorities, we consider that it deserves to be retained the definition given by Recommendation 1201/1993 of the Parliamentary Assembly of the Council of Europe: "national minority" refers to a group of persons from a state, which [10]:

- a) They live in the territory of that state and are its citizens;
- b) Maintain long-term, lasting and permanent links with that state;
- c) It has distinct ethnic, cultural, religious or linguistic characteristics;
- d) They are sufficiently representative, even if they are smaller in number than the rest of the population of a state or a region of that state;
- e) They are motivated by the concern to keep together what constitutes their common identity, including their culture, traditions, religion or language. ”

A definition of national minorities is also found in Romanian law, more precisely in art.56 paragraph 3 of Law no. 208/2015 regarding the election of the Senate and the Chamber of Deputies as well as for the organization and functioning of the Permanent Electoral Authority, according to which, by national minority is understood that ethnicity represented in the Council of National Minorities.

As we mentioned earlier, in the case of Romania, national minorities hold just over 10% of the total population, which is close to the European average level [11].

The evolution of the share of Romanian population and the other ethnic groups, at census, between 1930 and 2011

Table 2

Years	Total population (persons)	from which: Romanian	Romanian share in total population (%)
1930	18057028	12981324	71.9
1948	15872624	13597513	85.7
1956	17489450	14996114	85.7
1966	19403163	16746510	87.7
1977	21559910	18999565	88.1
1992	22810035	20408542	89.5
2002	21680974	19399597	89.5
2011	20121641	16792868	88.9

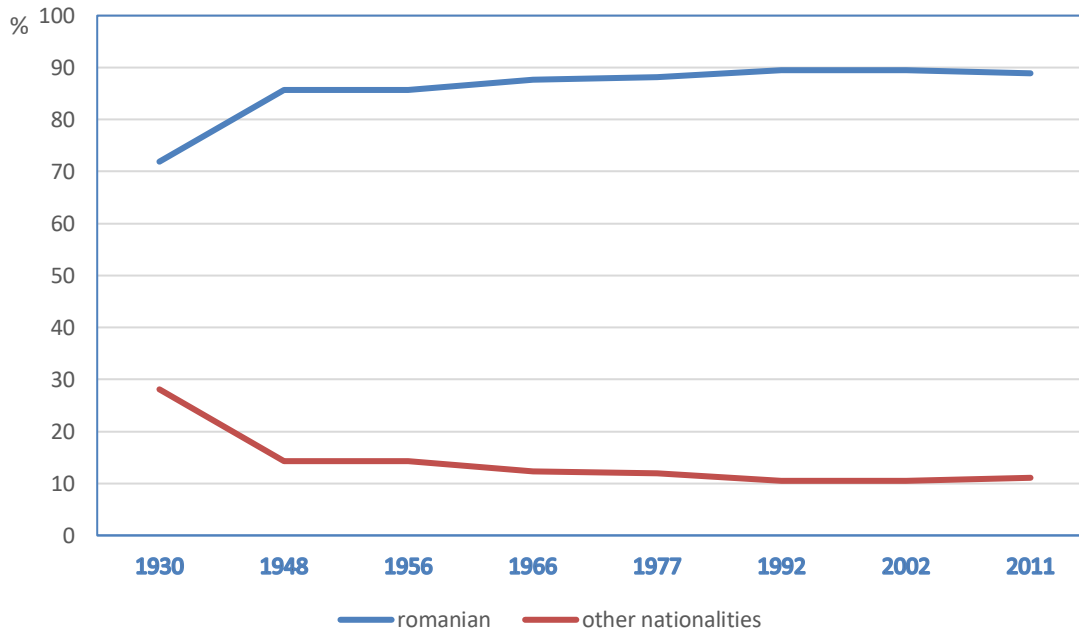
Data sources: <http://colectaredate.insse.ro/phc/aggregatedData.htm>, NIS Bucharest [13].

The share of Romanians in the total population in Romania has now decreased to 88.9% compared to 1992 when it was almost 90%.

The lowest percentage of Romanians was registered in the census of 1930, respectively 71.9%, the rest of the ethnic groups owning then almost 30% of the total population of Romania (Figure 2).

The evolution of the share of Romanian population and the other ethnic groups, at census, between 1930 and 2011

Figure 2



Data sources: <http://colectaredate.insse.ro/phc/aggregatedData.htm>, NIS Bucharest [13].

Starting with the 2011 census, the share of the population of other ethnicities begins to increase, at the expense of the Romanian ethnic population, a process favoured by the intensification of migration at European level.

The protection of the rights of ethnic minorities at European level

Minorities are a major concern of the European Union, determined firstly by the extension to the former communist space, and secondly by the problem of immigrants in the territory of the Union. However, there are large differences among the Member States in terms of their availability to recognize minorities, protect their rights and guarantee their political participation [13].

The Council of Europe as a comprehensive association of all European states based on the ECHR, has created two principals and important international conventions aimed at accommodating the minority question. These are the European Charter for

Regional and Minority Languages (ECRML), adopted in 1992, and the Framework Convention on the Protection of National Minorities (FCNM), adopted in 1995.

The European Charter for Regional or Minority Languages (in short ECRML) has been adopted as a Convention by the Committee of Ministers in its meeting of 25 June 1992, with the principal object “the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe’s cultural wealth and traditions” (preamble). The ECRML tries to ensure the use of these languages in the private and public sphere, such as in education and the mass media, allowing their use also in administrative, judicial, economic and social fields. The Charter does not establish individual or collective rights for the speakers of regional or minority languages, but sets out the obligations of states for their legal systems and political undertaking [10]. The ECRML does not seek to protect minorities or minority members as such, but the languages. It does not create any rights for minority language speakers, even if it refers in the preamble to the inalienable right to use a regional or minority language in private and public life. If a state decides to establish rights for the speakers of the minority languages, they will be rights just under national law.

Another important instrument for minority protection is *Framework Convention for the Protection of National Minorities (FCNM)*. The origin of the FCNM can be found in Recommendation 1134 (1990) of the Assembly of the Council of Europe. The FCNM define some principles that should be applied to the protection of national minorities, and in the “Vienna Declaration” of the OSCE summit of 9 October 1993, which expressed the wish that the Council of Europe should comprehensively transform the OSCE’s political commitment to minority protection in legal provisions. The Convention was adopted in 1995 by the Committee of Ministers and ratified in 1998 by 12 member states. The FCNM seeks to promote the full and effective equality of national minorities by obliging the states to create appropriate conditions enabling persons belonging to national minorities to preserve and develop their culture and to retain their identity.

The Convention define and promote the principles relating to persons belonging to national minorities in the sphere of public life, such as freedom of peaceful assembly, association, expression and thought conscience and religion and access to media, as

well as in the sphere of freedoms relating to language, education and cross-border co-operation [10].

The FCNM does not, however, directly impose rights for persons belonging to minorities in the signatory states because, in all cases where such references are made, the Framework Convention states that "the States Parties shall endeavour, as far as possible", to assure the respective rights "in the areas traditionally inhabited or in a substantial number of persons belonging to national minorities, if these persons request this and where this request corresponds to a real need" (art. 10).

Also in the case of Romania, the introduction of legislative measures regarding the protection of minorities was also one of the permanent concerns and one of the preconditions of accession to the European Union. Internally, Romania has taken important steps in maintaining and developing a climate of tolerance and multicultural understanding, as well as in creating a legislative and institutional framework that responds to the needs of protection and development of the rights of the national minorities existing here. The persons belonging to the national minorities enjoy, besides the universal human rights, the Constitution of Romania and special rights, in order to maintain the identity of the minority group, at least at the cultural, linguistic and religious level. The Romanian legislation focused mainly on the development of criteria in the field of non-discrimination, the use of the mother tongue in the public sphere and in education, political representation of minorities both at central and local level. The legislation provides important guarantees for the participation of national minorities in the political sphere (Law of local public administration, no. 2001/2001).

Romania's Constitution guarantees a seat in Parliament for a representative of each national minority, in case they failed to reach the electoral threshold in elections. The right to education in the mother tongue is also guaranteed by the Law of national education, no.1 / 2011. According to the revised Constitution, persons belonging to national minorities have the right to use their mother tongue in courts and this possibility is no longer restricted only to criminal courts.

Conclusions

The analysis based on the data provided by the last three censuses of the population emphasizes the idea that the ethnic structure of the population of Romania has not registered major changes, which shows that the Romanian state has maintained the ethnic diversity of the population.

In the period 1992-2011 we can notice a slight decrease of the share of Romanian majority population from 89.5% to 88.9% and an increase of the share of minority groups from 10.5% to 11.1%. However, this increase was determined exclusively by the increase of the number and share of the Roma population (from 1.8% in 1992 to 3.3% in 2011), the other minorities maintaining their share or recording slight reductions.

Romania has taken important steps in maintaining and developing a climate of tolerance and multicultural understanding, as well as in creating a legislative and institutional framework that responds to the needs of protection and development of the rights of the national minorities existing here.

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