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# LOCAL LEGAL RELATIONS IN THE CONTEXT OF ADMINISTRATIVE DECENTRALIZATION. PROSPECTS AND CHALLENGES

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**Abstract**

*Local legal relations have evolved steadily over the past twenty years, so now we are witnessing a redefinition of their concept, with the purpose of overcoming the traditional local autonomy in recognition of certain international legal capacity of local communities to participate in forms of decentralized cooperation.*

*The goal of our research is to identify new actors in the international relations, local communities, which under EU law and the Council of Europe acquire certain powers that would allow them, at least theoretically, employment among secondary actors on the stage of international law.*

*The study presents an examination of the documents governing international or local cooperation with the ultimate aim to highlight the consequences of these forms of cooperation, which they produce in the context of administrative decentralization.*

**Keywords***: local cooperation, international relations, local community.*

## Introduction

*The development of the role of local collectivity in the society and the requirements imposed by modernization has multiplied relations between communities both domestically and internationally. The legislative framework which puts such rights came quite late, as operational forms of intercommunity co-operation have developed since the 1960's in the European administrative space, and in the Romanian legislation, regulations are more recent, the years 2000.*

*Relations between local authorities are marked by a close co-operation, characterized by the initiative to show a more attractive image, especially from the perspective of investors. Co-operation between local authorities has become a necessity for strengthening local*

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*structures by joint exercise of powers in order to promote development projects that serve local interests.*

*Relationships that are established between local collectivities go beyond border limits, so international co-operation has become a reality carefully analyzed in theory.*

The European Charter of Local Self-Government[2] is a document that states some principles likely to govern the interaction between local and central authorities. The objective of this document is to compensate for the lack of common European rules likely to appreciate and protect the rights of local authorities, which are the closest to the citizens.

The principle of local autonomy, enshrined in the European Charter of Local Self-Government, forms the local authorities and their ability to organize themselves in cooperative structures. Therefore, co-operation materializes territorial and legal autonomy. However, autonomy can know serious limitations, depending on the legislation of the states.

The Charter merely regulates the sphere of interactions between central authorities and local community by establishing and sharing responsibilities and indication mechanisms to facilitate these relations.

Designation of responsibility to local collectivities consists in autonomy, legality, general competence clause, subsidiary and delegation of powers. The second category of principles could be regarded as tools that ensure the normal conduct of relations established in different spheres of activity, namely co-operation, information, financial independence and supervision. While the first category of principles is defining the status of the community and the skills domain, the second one governs relations between communities.

Local Autonomy acquires new acceptations, extended to understand what meaning it was given before. Overcoming traditional local autonomy represents the recognition of certain international legal capacity of local communities to participate in forms of decentralized co-operation.

In the European administrative space, we notice at least three forms of co-operation between regions: cross-border, transnational and interregional co-operation. The first form concerns regional development of adjacent local collectivities (located just across a border state), the second form concerns co-operation between groups of European local authorities for integrated and harmonious development of the territory of the European Union and the third form includes co-operation of EU with third countries.

In classical international law it is recognized that only states can be primary subjects that act in international relations, conclude treaties and bear the consequences of noncompliance. In the last 20 years significant changes have occurred on the stage of international relations, in the sense that the presence of certain actors is felt-actors that may not fall into the category of primary subjects, but acquire certain powers that would allow them, at least theoretically, employment among secondary actors on the stage of international law[3]. To be even more rigorous, we note that this phenomenon is particularly at European level in the range of the European Union and the Council of Europe, two regional organizations with regional vocation.

[2]Adopted in Strasbourg on 15 October 1985 and entered into force on 1 September 1988. Romania signed the Charter on October 4, 1994 and a ratified by Law no. 199 of 17 November 1997, published in the "Official Gazette of Romania", Part I, no. 331 of November 26, 1977, except art. 7, paragraph 2 of this European instrument.

[3] They have the quality of subjects - of international law states, international organizations and nations or nations fighting for independence. For details see Stelian Scăunaş, *International Public Law*, C.H. Beck Publishing House, Bucharest, 2007, p. 104.

In 1980, the European countries signed the *European Outline Convention on Cross-Border Co-operation between Territorial Communities or Authorities*[4], adopted at Madrid on 21 May 1980. This convention has greatly facilitated cooperation between regions.

Each Contracting Party undertakes to facilitate and promote cross-border co-operation between territorial communities or authorities of other States Parties to the Convention in accordance with the constitutional provisions of each State.

The Additional Protocol to the Convention - contains in the provisions of Article 1, paragraph 2, the following provision: *A cross-border co-operation agreement commits the sole responsibility of territorial communities or authorities* which have concluded it. Therefore, this regulation brings cross-border co-operation to a higher level, providing in Article 3 that cross-border co-operation agreements concluded by territorial communities or authorities can create a cross-border body with legal personality or not.

A second Protocol to the *European Outline Convention on Cross-Border Co-operation between Territorial Communities or Authorities*[5], states in its preamble that to fulfill their functions efficiently, territorial communities or authorities collaborate not only with neighboring communities in other states, but also foreign non-contiguous communities that have a community of interest (inter-territorial cooperation). For the purposes of this Protocol, *inter-territorial co-operation* means any consultation aimed at establishing relations between territorial communities or authorities of two or more Contracting Parties other than border co-operation reports of neighboring communities, including agreements with territorial communities or authorities in other states. Article 2, paragraph 2 of Protocol 2 of the Convention provides that an inter-territorial co-operation agreement commits the sole responsibility of territorial communities or authorities which have concluded it.

The situation remains somehow uncertain in terms of the legal commitment and the consequences of decisions these communities of work take. The Standing Conference of Local and Regional Authorities in Europe of the Council of Europe, in the name of trans-boundary communities, adopted in 1991 the Resolution 227 (1991) *"on the foreign relations of territorial communities" which requests the Committee of Ministers to develop an Additional Protocol to strengthen the influence of European Outline Convention on Cross-Border Co-operation between Territorial Communities or Authorities which recognize:*

- *The power of local collectivities to maintain cross-border relations;*
- *The legal person in internal law of cross-border co-operation bodies;*
- *The legal value of national acts performed by these bodies".*

In the specialty literature, the relation between such authorities or public bodies is also called low level relation, transnational or trans-border relation. The existence of intrastate agreements raises various issues related to their recognition by international law, as well as their impact on the unity of the state on the international stage given that the state is the only entity able to engage across borders. There are therefore two issues worth mentioning.

Therefore, we note that in order to preserve the coherence of the states international relations in trans-boundary relations, it is important for the State concerned to channel and focus the action of local collectivities in order to avoid any conflict between decentralized action taken to local and international commitments of the State.

Regarding the legal nature of interstate agreements, the doctrine stated that they are not Treaties, proposed qualifications being those of*: political agreements, agreements of international law, national agreements or agreements sui generis.*

[4]Government Ordinance no. 120/1998 for ratification by Romania of the European Outline Convention on Cross-Border Co-operation between Territorial Communities or Authorities adopted at Madrid on 21 May 1980, published in Official Gazette of Romania, Part I, no. 329 of 31 August 1998, approved with amendments by Law no. 78/1999.

[5] Concluded on 05 May 1998, in Strasbourg.

States began to conclude, as we noted above, framework treaties which detail the conditions under which local communities can act with the intent to co-operate. Through the conditions imposed, states try to reconcile interests in order to ensure stronger co-operation between local entities and coherent external action to preserve the state. States *wanted thereby to preserve the national law of such agreements.*

Most of these treaties provide that any co-operation bodies that constitute - shall apply national law of one of the parties to the treaty framework. The state remains an indispensable player for the efficiency of cross-border territorial communities or authorities.

Most of these framework treaties, aim to facilitate and promote cross-border co-operation, while the local communities that have the right to be part to such agreements are rigorously specified, depending on each state's internal constitutional architecture.

Local communities' competence, to conclude such co-operation agreements is consistent with the principle of parallelism-skills so that agreements can be signed only in areas where entities have the same kind of powers under their intern law. Some materials are of course excluded from the co-operation. These are the fields that involve the exercise of sovereignty.

The *European Outline Convention on Cross-Border Co-operation between Territorial Communities or Authorities* presents a series of models and outlines agreements, statutes and contracts in terms of cross-border co-operation of territorial communities or authorities. Thus, we distinguish two main categories:

- Models of intergovernmental agreements[6] concerning cross-border co-operation at regional and local levels;
- Outline agreements, contracts and statutes[7], which can serve as a basis for cross-border co-operation between authorities and local authorities.

Covered by national and state laws, schemes are likely to immediate use, or subordinated to the adoption of an interstate agreement, which regulates their use. The system of these agreements, intended for local communities, corresponds to the models of interstate agreements. The Government Emergency Ordinance (GEO) no. 120/1998 for ratification by Romania of the *European Outline Convention on Cross-Border Co-operation between Territorial Communities or Authorities* represents the legal frame of cross-border co-operation activities conducted by local authorities and communities in our country.

The principal provisions of Law no. 215/2001 are completed with the Government Ordinance no. 120/1998 for the ratification of the *European Outline Convention on Cross-Border Co-operation between Territorial Communities or Authorities* and the provisions of Law no. 315/2004 on regional development[8]. According these law, co-operation represents a component of the regional development policy which aims are to ensure balanced economic growth, social development and sustainable development of border regions.

Regarding the procedure for concluding agreements by local intrastate, the Romanian legislator has limited the exercise of these rights by amending the legislative act[9] which was

[6] Under intergovernmental agreements we distinguish the following models: the inter-state agreement on promoting cross-border cooperation model; the interstate agreement on cross-border regional consultation model; the interstate agreement on local border pooling model.

[7] Regarding schemes of agreements, contracts and statutes between local authorities we distinguish: the outline agreement on the creation of a consultation between local authorities; the scheme to coordinate the management of local public affairs cross-border agreement, the scheme for creating cross-border private law associations; the scheme of supply contract or a supply of services between local (non-private) and the scheme supply contract or a supply of services between local border's (public) agreement scheme creating inter-border cooperation bodies.

[8] Published in the Official Gazette of Romania, Part I, no. 577 from the 29th of June 2004, as corrected by Correction no. 315/2004, modified and completed by Government Emergency Ordinance no. 111/2004.

[9] Law no. 129/2003, published in the Official Gazette of Romania, Part I, no. 260 from April the 15th 2003, art. 2 from Government Emergency Ordinance no. 120/1998 have been modified.

originally ratified in the Framework Convention. So, the legislator has introduced in Art. 2 of Government Emergency Ordinance (GEO) no. 120/1998 the following provisions: „Cross-border co-operation is subordinated to the conclusion of intergovernmental agreements and the application of the provisions regarding cross-border co-operation is limited to the territory surrounding counties. Local communities, authorities or bodies exercising regional functions, under Romanian law are represented by county councils and local councils".

Provisions of art. 15 and following of Law 215/2001 on local public administration, regulates the procedure of exercising the right to co-operation and association of local communities with other communities in the country or abroad as follows:

- Local initiative to co-operate and associate with other communities abroad and to join an international association shall be notified to the Ministry of Foreign Affairs and the Ministry Administration and Internal Affairs.
- The projects of co-operation agreements that territorial administrative units intend to conclude with local authorities in other countries will be submitted for approval to the Ministry of Foreign Affairs, through mayors, or Presidents of County Councils, prior to submission for approval by Local Councils or Councils County, as appropriate.
- These notices must be issued within 30 days of receiving the request. Otherwise it will be considered that there are no objections and the project can be submitted for approval to the Local Council or County in case.
- The decisions regarding the participation in programs of county, regional, zonal development or border co-operation is adopted by a majority of local councilors in office. Responsibility for co-operation agreements concluded by local communities belongs exclusively with them.
- Through the border co-operation agreements, it can be created within the Romanian territory certain bodies endowed with legal personality. These bodies have, in the present law, administrative-territorial powers. Local authorities that have concluded agreements of border co-operation have the right to participate in other Member bodies created by those agreements, within their competence.

The procedure regarding the assent has been criticized. In the literature was estimated that this regulation is anachronistic[10] for the following reasons: establishing this task to the local community it prejudices the principle of local autonomy, so that the right to judge on whether initiating external co-operation belongs no longer to the local community, but to the state. In these circumstances the state can paralyzes the association, co-operation or accession to procedure by issuing a negative opinion regarding initiating external co-operation. In a different opinion it is supported that the control exercised by the Ministry over the activity of local or county councils, by issuing this opinion represents a classic exercised trusteeship administrative control.

As far as we are concerned, we believe that the requirement for obtaining the notice is likely to infringe local communities to express freely. The possibility to prejudice the unitary and indivisible character of the state through association or co-operation agreements does not exist; because unlawful[11] decisions that adopt these agreements may be censured by the administrative court, in the exercise of judicial review by the Prefect.

In conclusion, we consider that the provisions on international co-operation are intended to reinforce and to develop neighborly relations between territorial communities or authorities, which depend on two or more contracting parties, as well as on agreements and understandings necessary for this purpose.

[10] A. Trăilescu, *Administrative Law*, C.H. Beck Publishing House, Bucharest, 2010, p. 40.

[11] According to art. Article 16.3 of Law no. 215/2001 "The opinions provided in par. (2) must be issued within 30 days of receipt of the request. Otherwise it will be considered that there are no objections and the project can be submitted for approval to the local council or county concerned".

## Conclusions

1. Regarding local legal relations, we noticed that the local autonomy acquires new meanings, extended to the understanding that it was given before. Overcoming traditional local autonomy represents the recognition of certain international legal capacities of local communities to participate in forms of decentralized co-operation.

2. The nature of this phenomenon calls for reflection; can it be an irreversible process or will it disappear due to the lack of funds for various projects? Scenarios[12] foresee the emergence of certain transnational representatives, transnational budgets and, why not, a representation in the European institutions of forms for cross-border co-operation.

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[12] N. Fabian, *Models of regionalization in the context of European integration*, University of Bucharest, Faculty of Law, Doctoral School, Bucharest, 2009, Abstract, PhD Thesis, p. 70.

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# THE RIGHT TO A FAIR TRIAL IN PROCEEDINGS CHALLENGING THE MINUTES OF DISPUTING CONTRAVENTIONS

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**Abstract**

*The offenses field is assimilated to the criminal one from the perspective of the European Court of Human Rights, in the sense of article 6 of the Convention, the person accused of committing an act regarded in national law as an offense must benefit from the guarantees specific to criminal proceedings.*

**Keywords:** *the right to a fair trial, contravention, access to justice.*

## Introduction

*The legal regime of contraventions is regulated by Romanian Government Ordinance no. 2/2001. This regulation represents common law on the matter and is supplemented by various other regulations: of the public acquisitions field – Romanian Government Emergency Ordinance no. 34/2006, of traffic on public roads – Romanian Government Emergency Ordinance 195/2002, of accounting – Law no. 82/1991, of companies – Law no. 31/1990, of the fiscal field – The fiscal code and fiscal procedure, of labor contracts – Labor Code, of urban planning – Romanian Government Emergency Ordinance no. 7/2011 which modifies and supplements Law no. 350/2001 regarding land use and urban planning.*

An action may be identified as an offense only if the following conditions apply simultaneously: 1. there is an action; 2. there is a willful violation of the law; 3. the offense is set and punishable by legal rule; 4. the legal norm is enforced by a public authority empowered by law.

Common law procedure to challenge the minutes of the offense by contravention complaint is made under the provisions of art. 31 of the Romanian Government Ordinance.

*The deadline to introduce* the complaint is 15 days from the date of the minutes (if the offender is present at the time of drawing up the minutes and receives a copy) or from the date of its communication (if the offender was not present during the drawing up of the minutes or being present, the offender has not received a copy of the minutes). The term shall be calculated on days off, without taking into account the first and last day of the period.

The persons who can file complaints are: the offender, the victim and the owner of the seized goods, other than the offender.

The complaint of the plaintiff may relate to just the compensation, and the owner of the seized goods, other than the offender, may appeal only in respect of the seizure.

The constitutional provision that must be mentioned is article 15, paragraph (2), by which it is disposed that the law is not retroactive, except for the more favorable criminal or contravention law. The association of the two (criminal and contravention) serves as starting point for the circumscription of the contravention matter in the area protected by article 6 of

the European Convention of Human Rights regarding the right to a fair trial. The lawmaker must regulate the contravention material according to the guarantees provisioned by the Convention to be applicable in "criminal law", because the European Court does not interpret the provisions of the Conventions in abstract, but by relating them to a concrete situation[13]. Therefore, if the penalty provided in the new law is lighter, it will be one that applies. This would be a rather simple variant as the means to determine the more favorable criminal or contravention law is more complicated. "The criminal or contravention law may comprise of exclusively more favorable or unfavorable dispositions to the offender or may comprise some more favorable and some more unfavorable dispositions"[14]. In short, firstly, the distinction between "more favorable" and "more unfavorable" is made in relation to the offense, and secondly, in relation to the punishments[15], considering the particulars regarding the prescription and execution of the punishment and solving a possible conflict between the used criteria[16].

Art. 32 paragraph (1) of the Romanian Government Ordinance no. 2/2001 provisions that "the complaint accompanied by a copy of the minutes is submitted to the body to which the traffic officer belongs, the latter having the obligation to receive it and hand the depositor evidence in this regard". By Decision no. 953/2006[17] of the Romanian Constitutional Court, the constitutional challenge of dispositions of article 32 paragraph (1) of the Romanian Government Ordinance no. 2/2001 was admitted. In its motivation it was shown that by the provisions of article 21 paragraphs (1) and (2) of the Romanian Constitution, article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as article 10 of the Universal Declaration of Human Rights because, providing the deposition of the complaint to the body to which the traffic officer belongs, the latter is given the opportunity to not submit the complaint to the court. Also, such a conduct of the administrative authorities concerned would have been encouraged by the fact that the legal text under analysis provides no penalty for failure to fulfill said obligation under the law.

The Romanian Constitutional Court considered the plea of unconstitutionality and decided that the existence of any administrative obstacle which does not have any objective or rational justification and which could eventually deny said right of the person flagrantly infringes the provisions of article 21 paragraphs (1)-(3) of the Constitution, and implicitly the right to a fair trial, and thus the conventional provisions of article 6.

The Court also held that the text of law under scrutiny allows that abuses be committed by agents of the administrative bodies, which eventually, even if leading to their criminal or disciplinary liability, would impair or even deny the appellant's right to free access to justice.

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[13] Mircea Ursuța, *Can the Romanian contravention procedure be considered as belonging to the autonomous notion of "criminal matter" from the perspective of jurisprudence of the European Court of Human Rights?* Judicial Courtier, no. 2/2008, p. 82: "Thus, it is possible that the ruling of a fine in a certain amount to constitute for a person of low economic means a „criminal charge", whereas for a person of means, the Court to consider that the notion is exceeded.

[14] Dan Claudiu Dănișor, *The principle of retroactivity of the more favorable criminal or contravention law,* Caiete de Drept Penal, nr. 4/2009, p. 26.

[15] It should be noted that in relation to how to apply the sanction, a law is the more favorable as the one that can enforce it has a more prominent level of independence and impartiality. Also, the more favorable laws are the ones that give judges better opportunities to rule in favor of the person who bears the penalty, in contradiction with those that suppress or reduce the possibility of a more favorable arrangement of execution of the punishment.

[16] "The criteria for determining the milder nature of the punishment are usually the following: legal hierarchy of punishments, the accumulation of sentences, and the limitation of decision left to the judge and the means of accumulation of sentences". For details, please consult Dan Claudiu Dănișor, *op.cit.*, pp. 26-41.

[17] Published in the Official Gazette no. 53 from the 23rd of January 2007.

In conclusion, the obligation to submit the complaint to the body to which the agent belongs, as a condition of access to justice, cannot be objectively and reasonably justified not even in that the administrative bodies, in receipt of the complaint, would take cognizance of it and would not proceed to the execution of the applicable fine.

According to article 16 of the Ordinance, the minutes of finding of the offense must contain certain information and statements. If it fails to find any of these items, the minutes is annulled and the complaint, admitted. In some cases, the nullity of the minutes can be found on ground basis (art. 17 of the Ordinance).

The court ruling by which the contravention offense is solved is submitted to a 15-day appeal term from it communication, except for the one laid in the case of traffic offenses and that regarding the disturbance of public order. By Law no. 202/2010 regarding certain measures for the acceleration of case solving[18], also known as the "little reform" of justice, these categories of contravention complaints become final and irrevocable by the law court. Judging the appeal belongs to the department of administrative and fiscal contentious of the Court, during the trial the execution of the ruling being suspended.

Contravention complaints and appeals are exempt from stamp duty, as expressly disposed in article 36 of the Ordinance.

Under the provisions of article 13 of Romanian Government Ordinance 2/2001, the penalty with contravention fine is prescribed within 6 months from the date of the deed or from the date of its finding, for ongoing contraventions, or within 1 year from the above-mentioned dates if the deed was initially considered a crime and it was subsequently determined that it is a contravention, if no other terms are provisioned by special laws in force.

The painstaking issue represented by the suspension of fines and of contravention sanctions, under article 118 of the Romanian Government Emergency Ordinance 195/2002 on the circulation on public roads, until the ruling of a final and irrevocable court decision, considered to be a judicial artifice by which the offender obtains an "adjournment" of the sanction applied, led to the inadequate decision to deny the possibility to exercise the remedy of appeal in relation to traffic offenses.

Such a solution violates the principle of attending at least two levels of jurisdiction throughout the proceedings and finding the truth, because the offenses field is assimilated to the criminal one from the perspective of the European Court of Human Rights, in the sense of article 6 of the Convention. However, it clearly and consistently[19] holds that whatever distinctions are made in national law between offenses and crimes, the person accused of committing an act regarded in national law as an offense must benefit from the guarantees specific to criminal proceedings. Thus, the European Court of Human Rights could find the violation of article 2, paragraph 1 of Protocol no. 7 of the Convention regarding the right to two levels of jurisdiction in criminal law.

The Constitutional Court of Romania gave a similar ruling by its Decision no. 500 from the 15th of May 2012[20], when it admitted the constitutional challenge raised and found the dispositions of article 118 paragraph ($3^1$) of the Government Emergency Ordinance no. 195/2002 regarding traffic on public roads to be unconstitutional (the court ruling by which the court resolves the complaint is final and irrevocable).

The arguments of the Romanian Constitutional Court are extremely important and will be presented below, as will be detailed some gaps in its reasoning as well, but undoubtedly, the decision must be upheld and enforced by the ordinary courts. These tend to "forget" two decisive aspects of their activity. The first is that, under art. 20 of the Constitution, the

[18] Published in the Official Gazette no. 714 from the 26th of October 2010.
[19] Starting with the Ruling from the 21st of February 1984, given in the case *Oztürk against Germany*.
[20] Published in the Official Gazette no. 492 from the 18th of July 2012.

conventionality control is an "obligation, not a faculty of ordinary courts"[21], but involving more knowledge of procedural and substantive law, so an adequate legal training in human rights. The second aspect is related to the effects of the decisions of the Constitutional Court.

Three situations are identified[22]. Art. 147 of the Constitution requires that the provisions of laws and ordinances in effect found to be unconstitutional should be brought into line with the provisions of the Constitution within 45 days of the publication of the decision of the Court, otherwise ceasing its effects on expiry of said term. Therefore, the first situation is when the Parliament or the Government did not fulfill its obligation to harmonize any unconstitutional provisions with the Constitution within 45 days, in which case the ordinary courts are obliged to declare cessation of the effects of the unconstitutional law[23]. A second possible situation is one in which the said obligation is only mimed, not an actual compliance with the constitutional provisions, which reverts the decisive role in implementing the decisions of the Constitutional Court in order to produce effects *erga omnes* also to ordinary courts. The operation of the latter to verify the act of congruence of provisions is not a substitute of the Constitutional Court, rather, is a simple logical expression of finding the elimination, or lack of it thereof, of the grounds of unconstitutionality from the controlled provisions, already shown by the Constitutional Court in its decision. A third identified situation is the one referring to conducting the compliance of unconstitutional dispositions with the provisions of the Constitution after the expiry of the 45 days. In such a case the rule-making procedure is not dully followed, which equals to the invalidity of a legal act adopted under such conditions, i.e., extrinsically unconstitutional. In this situation also, the competence to find such invalidities lies on ordinary courts as well[24].

These specifications are intended to highlight the important role of ordinary courts to actually impose constitutional court decisions, a side effect being that of relieving the constitutional court by not notifying it regarding norms whose unconstitutionality has already been ruled. Moreover, the assumption by ordinary courts of the performance of each shown control, despite attacks against them from the political class and the media, would also be a method to combat the tendency to overuse the procedure of constitutional challenge.

Considering all the above, law courts must enforce the application of Decision no. 500/ 2012, especially considering that one of the argument to admit the constitutional challenge was that some law courts, in the absence of a way of attack against their rulings, generalize the presumption of legality and rationality of the minutes of the findings and sanctioning offences in traffic on public road.

These courts no longer exercise their active role in the management of all relevant, pertinent and conclusive evidence in question, thus rejecting complaints of offences, without researching the case.

The Constitutional Court of Romania held that such conduct may constitute the prerequisite of future convictions of the Romanian state by the European Court of Human Rights considering the jurisprudence of the European law court, the Ruling from the 4th of October 2007 respectively, given in the *Anghel against Romania* case.

Correctly, in view of the above, the Romanian Constitutional Court ruled that the lack of a means to appeal against the ruling of the first instance court in the matter of traffic on public roads is equivalent to the impossibility to exert an actual court control on main and complementary sanctions, as well as on technical and administrative measures, regulated in

[21] D.C. Dănișor, *Imposition of the Decisions of the Constitutional Court – a problem of ordinary courts,* The Judicial Courier, no. 6/2009, p. 3.
[22] *Ibidem*.
[23] The *lato sensu* understanding of the term "law" is considered in this situation.
[24] *Ibidem.*

art. 95-97 of the Romanian Government Emergency Ordinance no. 195/ 2002, the right of free access to justice thus becoming an illusory and theoretical right[25].

In conclusion, by eliminating judicial control over pronounced decisions of the court the "principle of free access to justice, the right to a fair trial, the right to defence, the uniqueness, fairness and equality of justice" are all affected, thus emptying of any content the principle of exerting the legal means of attack and the right to appeal (art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

Furthermore, eliminating the sole attack remedy in relation to offenses regarding traffic on the public roads would amount to also emptying of content the provisions of art. 129 of the Romanian Constitution, according to which "against law court rules, the interested parties and the Public Ministry may exercise remedies, under the law". *It is undisputed that the legislature may limit the number of appeals, however, by the criticized legal norm, the only possible remedy, which is the appeal, is eliminated altogether.*

Finally, through the arguments previously expressed, the Romanian Constitutional court has ruled that the provisions of article 53, paragraph (2) of the final form of the fundamental act are also infringed. What represents a lack of motivation of the Court is common practice, and by it the Court refuses to make a systematic analysis of the conditions under which the fundamental freedoms are restricted, limiting to pass rulings which are not thoroughly proven. In this case, even if the Court's decision is grounded, its contents does not make it apparent that until the "analysis" of the final thesis of paragraph (2) of the article that draws the coordinates of limiting the freedom to exert certain rights and liberties, a leveled control would have been carried out, a genuine proportional control of the limitations of the right to free access... Such control would have anyway revealed the failure to fulfill the first condition to operate a restriction, that the latter can only be made by law[26], thus making it unnecessary to analyze the subsequent conditions[27].

## Conclusions

Regardless of the nature of the offense, the procedure to challenge in court the minutes of the case is the same and is based on the provisions of Romanian Government Ordinance no. 2/2001, if the regulation on the offense does not imply special procedures. In case of such derogatory procedure, it will have priority under the principle "*specialia generalibus derogant'"*. By eliminating judicial control over pronounced decisions of the court in relation to offenses regarding traffic on the public roads is affected the principle of free access to justice from the right to a fair trial.

[25] Corneliu-Liviu Popescu, *Comments. Ruling from the 4th of October 2007, Case Anghel against Romania*, The Judicial Courier, no. 10/2007, p. 16, shows that "the Strasbourg jurisdiction found that, in the contravention judicial proceedings, unlike the criminal proceedings, the presumption of innocence is not met, this important guarantee of the right to a fair trial in "criminal" law being non-existent."

[26] Even though the European Court of Human Rights interprets the term "law" *lato sensu* regarding the limitation of exertion of certain rights provisioned by the Convention, this is due to the desire to protect the sovereignty of states, as well as the diversity of meanings this term bears in the states who have signed the Convention. Nonetheless, in our system an extensive interpretation is inappropriate, the objective of constitutional dispositions being that of limiting the power of the state in order not to abuse human rights and liberties. This objective can only be achieved by a *stricto sensu* understanding of the term "law", as an act issued by the Parliament in order to primarily regulate an activity area. A *lato sensu* understanding of the term would allow the executive that by documents with a legislative character restrictively intervene in the fundamental rights area, which is unacceptable from the perspective of the necessity to have a real protection of said rights.

[27] Restraining certain rights or liberties can only be done by law. At the same time, it can only be done for certain situations expressly detailed in the Constitution and only if necessary, in a democratic society.

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# MERGER AND DIVISION NULLITY IN THE ROMANIAN LEGAL SYSTEM

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**Abstract**

*As a consequence of the transposition of European Directives regarding the merger, division, and cross-border mergers, the Romanian legal system established a special legal framework with regard to the sanction of nullity for such juridical acts. The peculiarities of internal and cross-border reorganisation operations and the imperative of protecting the interests of third parties, associates, and the companies involved led to the creation of a derogatory legal system on the matter. An analysis of both theoretical and practical perspectives of the subject matter may result in a useful instrument for the application of incidental legal norms, or every time restructuring juridical acts contravene the legal norms.*

**Key terms**: *nullity, merger, division, judicial character, nullity remedy.*

## Introduction

*Generically, mergers and divisions are juridical acts concluded with the agreement of the participating legal persons and which, for their valid coming to being, need to fulfil conditions regarding the capacity, consent, object, cause and form regulated by legal norms.*

*Contrary to most juridical acts, mergers and divisions are concluded under particular form and substance conditions imposed by law, justified by the complexity and effects of such acts in relation to the very existence of the legal entities involved.*

*Given that the valid concluding of a juridical act requires more conditions to be accomplished, leading therefore to the existence of a bigger number of nullity causes, the importance of the respect for the rule of law in every moment and for every part of the merger or division procedure becomes obvious.*

## 1. The legal background

The merger and division nullity is regulated by the Law 31/1991 in article 251. As it results from the legal dispositions, the merger and division nullity sanction concerns the merger or division process producing effects, according to the law article 249. Therefore, the accuracy and legality of different specific acts and formalities undertaken during the merger or division procedure will be able to make the object of a legal action only after the merger or division juridical act begins to produce legal effects.

The merger and division legal regime derogates from the common law regime concerning the nullity of the juridical act, according to the stipulations of the European directives with regards to mergers and divisions. In the preliminaries of the joint-stock companies Merger Directive nº III, respectively of the Division Directive nº IV, it is shown that one of the objectives to be achieved by the Member States consists in the broadening of the guaranties provided to shareholders or third parties with regard to mergers and divisions. Thenceforth, in the justification part of the European legislative acts, it is mentioned that “in order to ensure the legal certainty in those reports between companies involved in mergers or

divisions, in those between the concerned companies and third parties, and in those legal relations involving the shareholders, the nullity causes has to be restricted by providing the possibility of rectifying an irregularity every time it is possible and by reducing the legal period of time for invoking the nullity"[28]. As a result of the transposition into national law of the european directives, the Romanian legislator limited the number of nullity causes and the period of time in which it can be invocated, protects the third parties against the retroactivity of the nullity effects concerning those, and prefers the solution of rectifying illegal situations to sanctioning mergers and divisions by nullity.

**2. The judicial character of the merger and division nullity**

The Law 31/1990 regulates through imperative norms the judicial character of the nullity specific to mergers and divisions. Therefore, according to article 251, paragraph 1, which transposes into national law the article 22, paragraph 1, letter a) of the Merger Directive nº III and of the article 19, paragraph 1, letter a) Division Directive nº IV regarding joint-stock companies, the nullity specific to mergers or divisions can be decided only by court order[29].

According to the interpretation of the law, it follows that this disposal is likely to forbid any other appreciation method of the null or voidable character of the merger or division juridical act. In presence of such a conclusion, the question arising is whether the merger or division nullity can be covered by expressed or tacit confirmation.

In our belief, contrary to common law, in mergers or divisions, explicit or tacit confirmation of absolute or relative nullity is unacceptable. In other words, people entitled to invoking the nullity of the merger or division juridical act, cannot renounce to this right, with the aim of covering the nullity, even though such a measure would suit their interests. To argue otherwise would mean to agree that every person interested to invoke the nullity can implicitly decide that the merger or division act is either null, or voidable, as appropriate[30]. Yet, only the courts of law are competent to rule.

The European merger and division Directives give member states the possibility to derogate from the juridical character of the merger or division nullity. In this respect, the legislation of a Member State can regulate the pronouncement of nullity with regards to mergers or divisions by the administrative authorities, provided that the decision could be contested in court. The administrative authorities, in the exercise of their competencies, will make a decision by applying the rules specifically stipulated with regards to the pronouncement of the merger or division nullity by the judicial authorities.

Moreover, the European legislator offers the possibility of the nullity pronouncement for mergers or divisions as a result of a monitoring process, other than the judicial or administrative preventive control, in those member states where the legislation in force provides for such a possibility.

The Romanian legislator opted for a regulatory framework insuring a rigorous application of the nullity sanction, as well as the legality certainty of the merger process.

[28] Preliminaries – The joint-stock companies Merger Directive nº III and Division Directive nº IV.

[29] According to European regulations, Member States can state in their national normative acts that the verification of the merger or division legality has to be made either by the judicial authorities, or the administrative authorities. In case if in any of the Member states, the regulations regarding the control of the merger or division legality are incomplete, the legal acts necessary to mergers or divisions have to be drawn up and certified in compliance with the adequate legal form.

[30] The confirmation of a null act doesn't have to be confused with the rectification of a null act. The rectification of the legal act for mergers and divisions is acceptable and produces effects from the date of its conclusion, contrary to the confirmation of a null act which produces effects retroactively.

### 3. The prescription term for the merger or division nullity action

The action for annulment or declaration of nullity with regards to mergers or divisions can be exercised within six months from the moment when the merger or the division process became effective, according to article 249.

Both the absolute nullity and the relative nullity with regards to mergers and divisions can be invoked within six months, starting with the moment when these juridical acts begin to produce effects, as follows:

- from the date of registration in the commercial registry of the new company, in case of merger whereby all participating companies cease to exist and a new one is formed;
- from the date established by the parties, by their agreement, as the moment from which the merger or the division will produce effects;
- from the date of registration in the commercial registry of the last company newly created, in case of division by transmission of the assets belonging to the company under division towards many companies taking such being;
- from the date when the decision of the most recent shareholders meeting approving the operation was registered in the case of merger by absorption and of division by transmission of the assets of the company under division towards many existing companies.

The six-month term is a special extinctive prescription term, liable for suspension, and interruption, and to which apply the provisions regarding the possibility of reinstatement.

Being a term expressed in months, the term will expire on the day corresponding to the day it started to run, of the sixth month[31]. Actions introduced once the 6-month term will have expired will be rejected as belated[32].

The question arising is whether the 6-month term in which the action for declaration of merger or division nullity can be introduced, applies only to relative nullity or, as an exception to the rule of imprescriptibility of absolute nullity, can be applied to this one as well. Two kinds of approaches and solutions to this issue are possible.

As a first hypothesis it can be argued that the term can apply only with regards to relative nullity given that the prescription term applies, from a simple juridical logic perspective, only to actions which are prescriptible. Given that only to relative nullity it is likely to be applied a prescription term, the conclusion would be that absolute nullity does not fall within the application field of this term.

According to a second position, with which we agree, we cannot make distinctions that are not provided by the legal norm, a rule consecrated by the Latin adagio *ubi lex non distinquit, nec nos distinquere debemus.* This means that there is only one solution to the legal issue we analysed, meaning that the 6-month term in which the action for declaration of merger or division nullity can be initiated applies, by exception, both to relative nullity and absolute nullity[33].

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[31] If the last month doesn't have a corresponding day, the term is considered as being expired in the last day of that month.

[32] In an action for annulment of a merger by creating a new company, the Court accepted the exception of late introduction of the action for annulment as founded because the merger begins to produce effects from the date when the last decision of the general shareholders' meeting approving the process was taken, and since then have passed more than 6 months, *The Court of Appeal Bucharest, The 4th Commercial Section, case nº 178, April 10 2009.*

[33] In the same way, the law 137 from the 28th of March 2002 concerning the measures to be taken for the acceleration of the privatization process published in the Official Journal of the 28th of March 2002, in chapter VI, and called *Special provisions concerning mergers, divisions, dissolutions and liquidations of joint-stock companies submitted to the privatization* process, article 32, paragraph 2, provides a special 5-day prescription term with regard to the merger and division nullity, without making any difference between absolute and relative nullity.

**4. The nullity remedy**

To ensure a better protection of the interests of the companies participating in mergers or divisions, the article 251, paragraph 3 of the Law 31/1990 regulates the remedy of those irregularities likely to give shape to an action for annulment or declaration of nullity.

The court of law in charge with an action for nullity has to provide to the involved companies a term in which the thereby invoked irregularities could be rectified, provided that, based on the adduced evidence, it appreciates the given situation as likely to be rectified. The accomplishment process of remediation determines the dismissal of the action as unfounded and illegal. In practice, the rectification of those rules conducive to a merger or division annulment can be achieved by the parties before addressing the Court, situation when such an action wouldn't be appropriate anymore and therefore will be rejected by the Court.

In our view, the article 251, paragraph 3 expressly regulates the rectification of the juridical act regarding mergers and divisions. The rectified juridical act represents a new juridical act producing affects from the moment of its conclusion. Because every rectification of acts concerning mergers and divisions determines a change of the merger or division juridical act, it will become effective in the moment of its registration, in compliance with the modifications it has known, as it is shown in article 249 of the law.

**5. The causes determining the merger or division**

The causes leading to the exercise of the action for annulment or declaration of nullity with regards to mergers or divisions are express prescribed by the law.

Therefore, according to article 251, paragraph 2, mergers and divisions can be declared null only for the next two reasons:

- because of breaking the legal disposals regarding the obligation of the merger or division judicial control, and
- because of the absolute or relative nullity of one of the decisions taken by the general assembly having voted for the merger or division project[34]

a) The first nullity case refers to the breaking of legal dispositions regarding the judicial control on mergers and divisions.

According to article 37, paragraph 1, the acts or facts that, in compliance with the law, are registered to the registry of commerce, are submitted to the legality control which is exercised by the institution of Justice through a delegated judge.

To apply this legal disposition, all the involved companies are obliged to submit the merger or division project, signed by their representatives, to the registry of commerce were they are registered. Together with this project, the company or the companies ceasing to exist have to submit a declaration regarding the way in which the passive doesn't exist anymore.

The delegated judge to the registry of commerce verifies if the project is prepared according to the legal conditions and approves it for the further publication in the Official Journal.

If the merger or division project is modified after its approval and publication, the project in its new form is going to be submitted to a new control of legality and respect of the advertising formalities[35].

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[34] According to article 22, letter b) of the joint-stock companies Merger Directive nº III and Division Directive nº IV, mergers and divisions can be declared null only if their legality was not submitted to a preventive juridical or administrative control, if they hadn't been concluded or certified in due legal form or if it is shown that the decision of the general assembly is null or likely to be cancelled according to national law.

[35] It was decided in a Court rule that the modification of the merger plan does not automatically imply the deletion of the stipulations made within the merger project. These stipulations are made so that those interested may gain knowledge of the merger intent and gain the ability to manifest their agreement or opposition to the merger project. By the subsequent approving or rejecting of the merger, or by approving of it with amendments, the initial stipulations made on the basis of the project cease to produce effects, the only remaining part to produce effects being the merger in itself. As a consequence, the action for annulment was rejected, motivated,

As a result of the modification known by the merger or division project, the date from which is calculated the term when the social creditors can bring forth an objection, respectively the date up to which they can call a general shareholders' meeting that will decide the approval of the merger or division process, will chance accordingly.

In practice, in our national legal system, the possibility to register mergers or divisions without a prior submission to a legal control is difficult to conceive of, particularly given the double control such acts are subjected to, and the registration of the acts enabling the effective existence of mergers and divisions is not possible without their prior verification. This kind of nullity is relevant within the European law systems where the juridical acts specific to companies are not submitted to a rigorously regulated control of the legal or administrative authorities. It concerns namely those legal systems which either don't require a judicial or administrative control of the merger or division legality, or, although such a control is regulated, it does not refer to each of the legal acts necessary to close the operation and, if the case, the merger or division contract is neither concluded, nor certified in a proper legal form[36].

b) The second case of merger or division nullity concerns the situation when the decision of one of the general assembly having voted the merger or the division project is null or prone to annulment. Therefore, the merger or division nullity is in this case the effect of the nullity of the general assemblies.

The merger or division nullity can be required not only because the validity general conditions that every decision of the general shareholders meeting were broken, but also because the special legality conditions required by law have not been respected.

Not adhering to the general rules regarding the call to assembly of the general shareholders meeting, of those rules concerning the shareholders' representation within the general assembly, of those norms specific to the general assembly taking place, as well as the taking decisions without respecting the general shareholders' meeting agenda by the general shareholders meeting are only some of the reasons able to determine the merger or division nullity.

As such, in one of the jurisprudence cases dealing with this kind of situations, it was decided that the decision of the general shareholders' meeting regarding the merger process has to accomplish the general validity conditions. Thus, the decision of the general shareholders' meeting is likely to be cancelled if the administrator having contrary interests participated to the decision making. Such a situation appears when the administrator is the main shareholder and holds the position of administrator with two societies holding the majority of shares both to the incorporating company and the incorporated one[37].

In another case, it was decided that the action submitted by the accuser for the declaration of absolute nullity of the decision taken by the general shareholders' meeting and of all the acts concluded for its convening and performance, as well as for the declaration of absolute nullity of the division project and the additional document made under it, is founded. To make such a decision, the instance ascertained that the mandate of the administrators' and the defendant's auditors mandate has expired, and the fact that by the moment of the general shareholders' meeting decision, the defendant didn't have statutory bodies represent a nullity

among others, by the failure to fulfil the formalities to annul the stipulations made on the basis of the initial merger project. *The Craiova Court of Appeal, the Commercial Section, case nº. 23 of 19 January 2005, op. cit., pp 568-569.*

[36] According to the E.U. Directives in the field, the notary or the competent authority to prepare and certify the merger or division documents in an adequate legal form, has to verify and testify the existence and the legality of the acts and formalities imposed to the company on whose behalf they exist, and of the merger or division project.

[37] The High Court of Cassation and Justice, the Commercial Section, decision no. 2287 of 1 April 2005 op. cit, pp. 579--580.

cause in what it is concerned. In the same case, the court stated that the evidence consisting of expert tests were wrongly rejected based on the administration of the evidence by the delegated judge to the registry of commerce. The court showed that the procedure taking place at the registry of commerce has a non-contencious nature, so that on the occurrence of a conflict, in contradictory conditions, the administration of the evidence consisting of a new expert test, the court has to approve it for a fair resolution of the case. Otherwise, it is not possible to examine the merits of the defendant's claims, namely as the evidence was carried out within a non-contencious procedure, at the request of the other party[38].

Finally, in another case, the court decided that the decision of the general shareholders' meeting having decided the division of the company was illegal, given that when invoking the complete text of the proposal regarding the modification of the constitutive act didn't appear, and the agenda didn't include all the aspects with regard to which the general shareholders' meeting adopted decisions[39].

On the other hand, infringing the special legal dispositions which regulate mergers or divisions can represent as many causes of nullity as there are dispositions. Therefore, the lack of, the illegality, or the groundlessness of any of the mandatory pieces of information in the merger or division project, the irregularities characteristic to the financial situations created to register mergers or divisions, the infringing of the rules concerning the quorum and the majority requirements provided by law to make decisions, the violation of the obligation regarding the making available of documents to shareholders, the violation of the procedural requirements regulating mergers or divisions, can be invoked within the action for annulment or the action of declaration of absolute nullity of the merger or division juridical acts.

The move to declare nullity with regard to mergers or divisions can be exercised by the shareholders or the associates of the joint-stock companies participating to the merger or division, in case of relative nullity, and by every interested physical or legal person, as well as by the state through its representatives, in case of absolute nullity.

If the action is accepted, the final decision of declaring the nullity of the merger or division will be transmitted ex officio by the court to the officials of the registry of commerce where the companies involved in the merger or division process have registered. The registry of commerce will order the registration of the decision and its transmission for publishing to the Official Journal.

It can make the object of an analysis whether, apart these specific nullity causes, the annulment of the merger or division process can be decided as well because of vices of consent, the breaking of legal dispositions concerning the legal capacity, the lack of validity either of the object or the cause of the juridical act.

Although the procedure formalism is desired to be a guarantee for the legality of the merger or division juridical act, it is generally known that the powerful partners abusively dominate, sometimes in an invisible way, their partners who ultimately depend on them, which raises questions regarding the latter's capacity to freely express their consent. From a similar perspective, it can be analysed whether mergers or divisions have a valid or invalid cause. Of course, the cause is a validity element of the convention that is very hard to prove, given its nature. Nevertheless, we have to admit that, beyond the merger or division stated objective, there is a high probability that the objective followed by the participants when they conclude the merger or division legal act be contrary to the law, good morals and of public order. The issue here seems to be more of a theoretical one, rather than practical, and its formulation might have a role of prevention of the shareholders or of associates regarding the

[38] The High Court of Cassation and Justice, the Commercial Section, decision no. 1942 of 21st of March 2005, op.cit., pp. 584—586.
[39] Ibidem.

appropriate approach to be used when analysing mergers or divisions, so that preventive measures leading to the protection of personal interests can be taken.

**6. The effects of the merger or division nullity**

In principle, similarly to the common law nullity, the merger or division nullity has retroactive effects, the joint-stock companies returning to the prior condition, while the acts subsequent to the null act are cancelled as a consequence of the initial act being cancelled.

By derogation from the common law principles, the merger or division nullity is not retroactive with regards to the obligations born from the juridical reports closed after the operation, but prior to its dissolution. Briefly, we can say that the nullity has no influence on those given obligations which are required to be honoured.

According to article 251, paragraph 6 of the Law 31/1990, the final decision declaring the merger or division nullity doesn't affect by itself the validity of the obligations in charge of or for the benefit of the absorbing companies or the beneficiary companies, assumed once the merger or the division have become effective, according to article 249, and before the nullity decision be published. These obligations are jointly assumed by the companies involved in the merger or division process.

If a merger nullity is decided, the participating companies to the merger are jointly responsible for the obligations of the absorbing company, resulting only once the merger became effective, but before the publication of the nullity decision.

By effect of the law, absorbed and merging companies engage their responsibility together with the absorbing and the newly created companies for obligations in charge of the last ones, even though they cease to exist in the moment when the new juridical relationships generating these obligations were concluded.

In case of a division nullity, the law establishes a limited responsibility for the reorganised company with regard to the obligations in charge of the beneficiary companies.

Therefore, as a result of a nullity decision in the case of a division, the responsibility is shared between the division companies and the beneficiary companies as follows:

- each beneficiary company holds responsibility for its own obligations, engaged after the division having become effective, but before the publication of the nullity decision,

  while

- the company under division holds responsibility for these obligations within the limits of the percentage of net shares that have been transferred to the beneficiary company on whose account were born the given obligations.

Mergers and divisions are complex processes that engage important resources of the companies. The question arising is who holds responsibility for the situation when, at the end of an important effort, it is decided that nullity is decided. *De lege lata*, the joint-stock company law contains some dispositions regarding the administrators' responsibility for the legality of the merger or division process. In our view, given that administrators act under the legitimacy of a mandate they were given by the initiators of the merger or division, *de lege ferenda*, the responsibility regulation applies to all the people involved in the merger or division process.

**7. The nullity of the cross-border merger**

The nullity of the cross-border merger is governed within the Romanian legal system by the provisions of the article $251^{19}$ of Law 31/1190 on trade companies. At a first view, we could consider that nullity of the cross-border merger is characterized, generally speaking, by a legal regime similar to that characterizing the national merger nullity, the only difference consisting of a more detailed regulation of the latter one. As in the case of the national merger nullity, the law consecrates the judicial character of the cross-border merger, the possibility to rectify the nullity and the obligation of the competent instance to transmit ex officio the final decision of the nullity to the officials from the register of commerce where the companies

involved in the merger process have their social office. We could say that, despite a more concise regulation, for those aspects which haven't been yet regulated by a special law, is applying the common law in the field.

Yet, the entire reasoning we built is invalidated by a careful reading of paragraph 2, of article $251^{19}$ stating that: "The merger nullity cannot apply after the date when the merger has begun to produce effects, the date being established according to article $251^{15}$paragraph 2". The law makes no distinction between absolute nullity and relative nullity.

Therefore we have a certainty that makes useless any attempt to analyse the institution of nullity for cross-border merger, simply because it doesn't exist. In a radical way, the Directive 2005/56/ECC and the Law 31/1990 exclude the nullity from the sanctions applicable to the cross-border merger. Those authors interested in the field of intra-community mergers brought arguments for this surprising deregulation, eventually qualifying its rigorous character as a safety measure necessary to all those involved, given the cross-border character of this process.

As to what we are concerned, every time a legislative measure appears to be adopted with certain restrictions, we believe that the competing protected interests have to be considered as well. In this case, the interests and the effects of an action for nullity have to be compared with the interests and the effects of the security of the process. We consider that a comparative quantitative analysis and a qualitative analysis of these ones, together with the regulation regarding the merger double control mechanism tip the balance for the solution of forbidding the nullity.

Contrary to the cross-border nullity interdiction, we consider that, in an erroneous way, the Romanian legislator adopted rules regarding the judicial character of nullity, the rectification of nullity, and the communication of the decision to accept the nullity. Yet, regulating legal aspects of an institution which doesn't exist is lacking any logic, namely the legal one. Therefore, *de lege ferenda*, the abrogation of paragraphs 1, 3, and 4 of article $251^{15}$ is mandatory as they don't have an object of regulation.

**Conclusions**

The need for a derogating legal regime with regard to the cross-border restructuring processes appeared as a result of the need to guarantee the juridical acts affected by these mechanisms. The control of the valid conclusion of merger and division legal acts is strictly regulated under the aspect of competency, of the prescription term, of the rectification, of the nullity causes and effects. Moreover, in what concerns the merger of companies in member states, the legal provisions are radical. Due to the cross-border character of the process, and because of the risks to which would be exposed the participating companies, associates, employees, and creditors by promoting of the action for nullity, the legislator preferred to deregulate it. Mergers, divisions, and cross-border divisions are complex processes, and the optimal solution for their promotion is to respect the legality in each and one of the moments of the process and regarding all the legal aspects.

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# REFLECTIONS WHILE CHOOSING AN ELECTORAL SYSTEM - THE CASE OF ALBANIA

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**Abstract**

*This paper aims to present some reflections and legal issues that are crucial and should be considered when choosing an electoral system. The paper will present current Albanian legislation and practices in the process of conferring, choosing and implementing the electoral systems in Albania as well as citizens rights and preferences with regards to these issues, as a fundamental pillar of democracy and rule of law.*

*Albania, as many other post communist countries is going through a long process of democratization of life and institutions and is also facing challenges on its road to EU integration, to tolerant and governments and open-minded society. Elections are very crucial political processes for electing citizens to run the country and take all major decisions on the behalf of the others. Choosing an electoral system according to which votes of citizens will be transformed into seats of Parliament or offices for elected officials is a very complex process that requires consideration from all actors such as political parties, citizens, group of interests, non governmental organizations etc. These actors, being political or non-political ones will need to come up with an elaborated decision for choosing the most appropriate electoral system for a country, since there are many of them implemented all around the world. Factors, elements, issues, citizen's interests, elections formulas and features to be considered when choosing an electoral system, as a matter of choice will be presented more deeply in this paper.*

**Key words**: *Electoral System, citizens' interest, elections' formulas, democracy, Majoritarian voting system & Corrected Majoritarian (Albanian case - Parliamentary Elections in Albania in 2001 & 2005), Proportional System, Regional Proportional System (Albanian case – Parliamentary elections held in Albania in 2009).*

## Introduction

## A. General Considerations

*Political parties have a preference of the electoral system that favors them and of course lead them to a victory of majority of seats in legislative institutions or elected officials they promote or the ones that are supported by them. In different countries, political parties would prefer proportional representation versus majoritarian one and that is related to the*

*size of a political party, the pre and post electoral agreement that parties carry out, the stability of government and the political tradition.*

*What should be represented in the process of elections? As James Madison stated at The Federalist Papers, No. 10, during the time they were theoretically discussing for the suitable draft of the US Constitution, " … elected representatives would refine and enlarge the public view … ". Pursuant to democratic theories, the elections allow citizens to appoint or authorize their "representatives" lawfully – "officially authorized representatives" to articulate, verbalize and act in their behalf. In that sense, the institution of electing and selecting a representative that derives from private law[1], has been transposed into public law.*

*The main feature of the democracy is plurality of opinions, ideas which are reflected in political organizations, named political parties. Based upon this statement, an electoral system that favors the existence of more and more political parties could be labeled as the most democratic one.*

*Nowadays, requirements to respect and implement democracy's principles are a certain and maybe the most important feature when an electoral system designed in a country. In this respect, what Madison called "public view" could essentially be interpreted as "public democratic view". Pursuing the argument, Proportional Representation could be ideally the best system to put into practice that democratic principle. This way, all public views will be represented in state institutions or at the parliaments or other legislative institutions[2] and the minorities views will also be represented; the political specter will be complete.*

*Another crucial element of democracy is the decision taking and decision making procedure by the majority, whether that is simple majority, absolute majority or qualified majority. In order to have what John Jay had insisted in The Federalists Papers, No. 64, "…the absolute necessity of the system …", every country, when considers the political structure should be aware of its priorities. Since the time after Second World War, almost all countries inspired amongst peace, security, human rights, political stability of the state's governments. The concern raised is whether Proportional Representation offers political stability. The most common system, used in Canada, India, the United Kingdom, and the United States, is* ***simple plurality****,* ***first past the post*** *or* ***winner-takes-all****. In this voting system the single winner is the person with the most votes; there is no requirement that the winner gain an absolute majority of votes.*

**B. Electoral occurrence in Albania**

As many post communist countries, after 1990-s Albania had tried hard to adopt and implement so far different electoral systems in order to ensure democratic principles of the MP-s elections. The electoral system that Albania inherited from communism was simple majoritarian; all Members of the Parliaments of that time were elected by people according to the system first past the post.

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[1] In the sense of personal mandate by which a person entrusts another person – implying the power of attorney, as institute of private law, when applied electing state officials or Member of Parliament, is being converted into a collective mandate that a nation assigns to the MP-s. These collective mandates, in the beginning were interpreted as "*imperative*" mandate and later on "*representative*" mandates.

At the end of nineteenth century, the intervention of Proportional Representation changed the meaning of the term "representation" from a legal to a factual relationship. Parliament came to be thought of as a portrait of the nation, as a small scale of reproduction of the collectivity of the voters. It represents the nation as a portrait represents its model and no longer as the trustee represents his mandatory. Parliament is a small scale reproduction of the whole country, a microcosm in the image of the macrocosm – for more information see *Arend LIJPHART & Bernard Grofman, "Choosing an Electoral System", Issues and Alternatives, American Political Parties and Elections, Co published with the Eagleton Institute of Politics, Rutgers University, PRAEGER, New York Westport. Connecticut, London, ISBN 0-275-91216-7.*

[2] Assemblies or Councils that have authority to take major legislative decisions for their countries.

From 1991 – 2001, the electoral system had been Mixed Members Representation – MMR, from which 100 MP-s had been elected directly by voters according to first past post system and 40 remaining MP-s by a proportional formula, that had changed in some elections.

On 2001 Parliamentary elections, the electoral system applied was a mixed one – Mixed Member Representation; of the 140 seats of Parliament[3], 100 should be elected according to formula first past the post and 40 other according to a formula defined at Constitution of Albania and Electoral Law; That system favored mostly the party coalitions and alliances for 40 seats of MP-s.

The same electoral system was applied on Parliamentary elections on 2005. Again, the partie's coalitions made possible that many of the votes for the biggest electoral parties[4], for the sake of the formula used for 40 remaining seats, were transported to the small parties with whom they had entered into pre electoral agreement[5]. The system used both times[6], offered stability for the country except few problems came about especially when qualified majority was necessary to elect the President of the Republic on July 2007[7] by Parliament.

On 2008, Albanian Parliament approved a new Electoral Code[8] based upon the amendments of the Albanian Constitution, Art. 64, where provided the changed electoral system; electoral system was provided only by the Electoral Code and not the Constitution any more. Therefore it changed from Mixed Member Representation to Regional Proportional Representation[9]. The agreement for changing the electoral system was reached mainly by two big political parties SP and DP and disputed by small political parties and non-parliamentary ones. This system favored big parties and of course parliamentary ones and somehow obliged small parties to enter into coalitions in order to win any mandate and other governmental offices as a reward for their contribution into the final elections result.

Due to political fractions that are being created nowadays[10] and pursuant also to the opinions and views of foreign organizations community, especially EU institutions[11], there is

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[3] See Art. 64 of the Albanian Constitution (*this article is now amended by removing the electoral system from the constitution's provisions. Therefore the electoral system ins provided by Electoral Law/Code – that means it is easier for political parties to change it every time there is elections*), "*…One-hundred deputies are elected directly in single-member electoral zones with an approximate number of voters. Forty deputies are elected from the multi-name lists of parties or party coalitions according to their respective order…*".

[4] Biggest parties in Albania are considered to be Socialist Party which originates from the existing Party of Labor of Albania / PLA during communism time (it was formed after the dissolution of the PLA on June 1991) and Democratic Party (founded on December 1990) which was created after communism regime collapsed; for more info see http://en/Socialist_Party_of_Albania and http://en /Democratic_Party_of_Albania .

[5] The so called "*Dushk phenomena*" and later on "*mega Dushk phenomena*".

[6] Mixed member Representation based on the Majoritarian System domination.

[7] For more info on presidential elections, see http://en.presidency.org.

[8] New Electoral Code was approved on December 29, 2008 by mutual accord of two main Albanian political parties and a very intense and serious objections by mid-size and small political parties.

[9] Art 64 of the Albanian Constitution provides that "*…Parliament will be composed by 140 MP-s, elected according to a proportional system*"; Also See part XII of the Electoral Code, Division of Mandates, Art. 163, where provided the formula according to which votes for political parties and coalitions was supposed to be transferred into seats of Parliament.

[10] There are initiatives from some leaders to create new political parties, as fractions of majority – I would like to mention "*Red & Black Alliance*", which nowadays represents a social movement focused on protecting human rights of Albanians of the region and all over the world. There are discussions that this social movements could be transformed soon to a political party and compete on 2013 parliamentary elections.
Also, as consequence of political fractions, there had been created the party of "*Social Movement for Integration - SMI*", as a fraction of Socialist Party of Albania and competed separately during the elections of 2005 and also during other parliamentary and local elections. It influenced into the results, since the SP electorate split into two parties SP and SMI.

[11] Please see Progress Report of EU for Albania, 2009 and Elections Observation Mission Final Elections Report of OSCE / ODIHR of Parliamentary Elections during 2009.

a substantial polarity of Albanian society and more of Albanian politics specter, that should be reduced in order to stabilize the situation in terms of political and social aspect aiming the fulfillment of requirements of Albania for EU integration.

The main issue for Albania is what elements, factors, components and aspects should be considered by political parties, civic society or professional organizations when designing an electoral system for Parliamentary Elections of 2013. When designing an electoral system it is recommended to consider a list of criteria which encapsulate what you want to accomplish, what you want to avoid and, in the very end, what you want your legislature and executive government to look like.

The legislature should be to some degree a '*mirror of the nation*[12]' which should look, feel, think and act in a way which reflects the people as a whole. An adequately descriptive legislature would include both men and women, the young and the old, the wealthy and the poor, and reflect the different religious affiliations, linguistic communities and ethnic groups within a society each region, be it a town or a city, a province or an electoral district, has members of the legislature whom it chooses and who are ultimately accountable to their area. The *ideological* divisions within society may be represented in the legislature, whether through representatives from political parties or independent representatives or a combination of both.

**C '*Building blocks*' recommended to be reflected over when designing an electoral system**

***I. The electoral system is recommended to Simple and Comprehensible***

Effective and sustainable electoral system designs are more likely to be easily understood by the voter and the politician. Too much complexity can lead to misunderstandings, unintended consequences, and voter mistrust of the results.

***II. The electoral system is recommended to facilitate Stable and Efficient Government***

The expectations for a stable and efficient government are not determined by the electoral system alone. The perception of whether results are fair or not varies widely from country to country[13]. The question whether the government of the day can enact legislation efficiently is partly linked to whether it can assemble a working majority in the legislature, and this in turn is linked to the electoral system. As a general rule, plurality/majority electoral systems are more likely to produce legislatures where one party can outvote the combined opposition, while PR systems are more likely to give rise to coalition governments. Sometimes, it might happen that PR systems can also produce single-party majorities[14] and plurality/majority systems can leave no one party with a working majority. Much depends on the structure of the party system, the nature of the society itself and the electoral tradition.

***III. The electoral system is recommended to increase Voter's Influence***

Voters should feel that elections provide them with a measure of influence over governments and government policy. Choice can be maximized in a number of different ways. Voters may be able to choose between parties, between candidates of different parties, and between candidates of the same party. They may also be able to vote under different

[12] Electoral System Design / The New International IDEA – Institute for Democracy and Electoral Assistance Handbook, Andrew Reynolds, Ben Reilly and Andrew Ellis, ISBN: 91-85391-18-2, pg. 9, concept of "*vivid representation*".

[13] I would like to mention here the case of Albania in last Parliamentary Elections, June 2009, where Regional Proportional system was applied; Two main political parties won majority of seats in Parliament but none of them was able to govern. The elections results were a bit contradictory because of the system effects – SP won 620586 votes which were equivalent (according to ***electoral formula*** and ***coalitions*** formed) to 65 mandates, while DP won 610463 votes equivalent to 68 mandates. For more info see http://www.cec.org.al

[14] Albanian case of Regional Proportional Representation that has similar effects as plurality one, Parliamentary Elections in 2009.

systems when it comes to presidential, upper house, lower house, regional and local government elections. They should also feel confident that their vote has a genuine impact on the formation of the government, not just on the composition of the legislature.

***IV. The electoral system is recommended to be Accountable***

***Accountability of electoral system at the individual level –*** Accountability at the individual level is the ability of the electorate to effectively test on those who, once elected, betray the promises they made during the campaign or demonstrate incompetence or idleness in office. Some systems emphasize the role of locally popular candidates, rather than on candidates nominated by a strong central party.

Plurality/majority systems have traditionally been seen as maximizing the ability of voters to throw out unsatisfactory individual representatives. Again, this sometimes remains valid. Sometimes the connection becomes vague where voters identify primarily with parties rather than candidates. Sometimes open and free list systems are designed to allow voters to exercise candidate choice in the framework of a proportional system.

***Accountability of the Government –*** Accountability is one crucial element of representative government. Its absence may lead to long-term instability. An accountable political system is one in which the government is responsible to the voters to the highest degree possible. Voters should be able to influence the shape of the government, either by altering the coalition of parties in power or by throwing out of office a single party which has failed to deliver. Suitably designed electoral systems could facilitate this objective.

***V. The electoral system is recommended to encourage participation of Political Parties***

In a democratic system of government, could that be established or new democracies suggests that longer-term democratic consolidation requires the growth and maintenance of strong and effective political parties, and thus the electoral system should encourage this rather than establish or promote party fragmentation.

Electoral systems can be framed specifically to exclude parties with a small or minimal level of support[15]. Most experts also agree that the electoral system should encourage the development of parties which are based on broad political values and ideologies as well as specific policy programs, rather than narrow ethnic, racial or regional concerns.

***VI. The electoral system is recommended to promote Legislative Opposition and Oversight***

Effective governance depends also on those who oppose and oversee them. An electoral system should help ensure the presence of a viable opposition which can critically assess legislation, question the performance of the executive, safeguard minority rights, and represent its constituents effectively. In this respect, it is recommended as much as possible that opposition groupings should have enough representatives to be effective and in a parliamentary system should be able to present a realistic alternative to the current government. Obviously the strength of the opposition depends on many other factors besides the choice of electoral system, but if the system itself makes the opposition impotent, democratic governance is inherently weakened.

**D. Sustainability of Electoral Process**

Elections do not take place in the academic books but in the real world, and for this reason the choice of any electoral system depends to some degree on the cost and administrative capacities of the country involved. Although donor countries often provide substantial financial support for the first, and even the second, election in a country in transition to democracy, this is unlikely to be available in the long term even if it were

[15] This is the case of electoral systems where the minimum threshold for entering the Parliament applied for parties or coalitions.

desirable[16]. A sustainable political framework should take into account the resources of a country both in terms of the availability of people with the skills to be election's administrators and in terms of the financial demands on the national budget.

**E. Application of 'International Standards' of elections**

Finally, the design of electoral systems today takes place in the context of a number of international conventions, treaties and other kinds of legal instruments affecting political issues. While there is no single complete set of universally agreed international standards for elections, there is consensus that such standards include the principles of free, fair and periodic elections that guarantee universal adult suffrage, the secrecy of the ballot and freedom from coercion, and a commitment to the principle of one person, one vote.

Moreover, while there is no legal stipulation that a particular kind of electoral system is preferable to another, there is an increasing recognition of the importance of issues that are affected by electoral systems, such as the fair representation of all citizens, the equality of women and men, the rights of minorities, special considerations for the disabled, and so on. These are formalized in international legal instruments such as the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights, and in the various conventions and commitments concerning democratic elections made by regional organizations such as the European Union (EU) and the Organization for Security and Co-operation in Europe (OSCE).

***And last but not least … do not assume that defects can easily be repaired later[17]***

Electoral systems are to be applied for more than two elections. The level of democracy an electoral system offers, the level of citizens 'participation, the level of transparency and also the level of elections administration, is to be evaluated after each electoral system appliance. It is better that electoral systems are designed as per the elements mentioned above; in democracy there is no time for '*fiasco*' elections.

All electoral systems create winners and losers, and therefore vested interests. When a system is already in place, these are part of the political environment. At a time of change, however, it may be unwise to assume that it will be easy to gain acceptance later to fix problems which arise. If a review of the system is intended, it may be sensible for it to be incorporated into the legal instruments containing the system change. Take the time needed to get it right the first time.

**Conclusions**

The Choice of Electoral System is one of the most important institutional decisions for any democracy. In almost all cases the choice of a particular electoral system has a profound effect on the future political life of the country concerned, and electoral systems, once chosen, often remain fairly constant as political interests solidify around and respond to the incentives presented by them[18].

Electoral system choice is a fundamentally political process, rather than a question to which independent technical experts can produce a single 'correct answer'. In fact, the consideration of political advantage is almost the main feature in the choice of electoral systems, while the menu of available electoral system choices is often, in reality, a relatively constrained one.

[16] Electoral System Design / The New International IDEA – Institute for Democracy and Electoral Assistance Handbook, Andrew Reynolds, Ben Reilly and Andrew Ellis, ISBN: 91-85391-18-2, pg. 13.
[17] http://aceproject.org/ace-en/topics/es/esg
[18] IDEA / International Institute for Democracy and Electoral Assistance / Handbook Electoral System Design 2005, ISBN: 91-85391-18-2, page 2. http://www.idea.int/publications/esd/upload/ESD_inlay.pdf

Political institutions shape the rules of the game under which democracy is practiced, and it is often argued that the easiest political institution to manipulate, for good or for bad, is the electoral system. In translating the votes cast in a general election into seats in the legislature, the choice of electoral system can effectively determine who is elected and which party gains power. While many aspects of a country's political framework are often specified in the constitution and can thus be difficult to amend, electoral system change often only involves new legislation.

Albania has traditionally applied electoral systems based upon majoritarian trends, except Parliamentary Elections of 2009 where Regional Proportional system was applied. Still, political parties are aiming to change again the electoral system for next Parliamentary Elections. Electoral systems are living documents that could be amended and changed according to political climate, interests and other circumstances. In that framework, it is recommended to take into account the criteria described above regarding designing process of electoral system. Reforms of the country such as obligations deriving from NATO accession as well as complete integration process to EU require political stability in Albania and region as well, so would be recommended that electoral system applied should offer that stability.

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# CERTAIN ASSESSMENTS RELATED TO THE RIGHT OF SUPERFICIES IN THE NEW ROMANIAN CIVIL CODE

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**Abstract**

*In this paper, we analyze the right of superficies as a significant new element of the actual Romanian Civil Code as compared to the provisions of the 1864 Romanian Civil Code, expressly regulated for the first time in Romanian legislation, in the first chapter of the 3rd Title of the 3rd Book, the articles from 693 to 702.*

**Key words:** the new Civil Code; the right of superficies.

## Introduction

*The right of superficies has been acknowledged ever since the Roman legal system, as the right of a constructor to indefinitely use a building that had been erected on someone else's land, in exchange for a yearly amount of money (solarium)[1]. Being taken over in the modern civil right, following various hesitations and doctrinarian disagreements regarding its very existence, ever since the inter-war period we have witnessed the appearance of the constantly reiterated opinion according to which the right of superficies is an indirect consequence of the provisions of the article number 492 in the prior Civil Code (at present art. number 577 of the Civil Code[2]), as an exception to the rule of the artificial realty accession.*

*Until the actual Civil Code became recently effective, its legal status has been established by doctrine and jurisprudence.*

## 1. Definition and legal characteristics of the right of superficies

Article no. 693 (1) of the Civil Code gives the following definition of the right of superficies: ''The right of superficies is the right to own or erect a building on someone else's land, above or below that land, over which the builder acquires a right to use". We can therefore notice that, according to current regulations, within the legal content of that particular part of the right of superficies representing parts of the ownership right over the

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[1] For further details regarding the right of superficies in the Roman legal system, see E. Molcuț, D. Oancea, *Drept roman*, "Șansa" S.R.L.Publishing House, Bucharest, 1993, p.131.

[2] Para. 1 in Art. no. 577 Civil Code side title "Work acquisition by the owner of the building" stipulates: "The constructions, plantations and any other works on a certain building thereafter called works, become the property of the building's owner, unless otherwise provisioned by law or legal documents".

land, only the attribute of use is regulated *expressis verbis*. In the case of the right of superficies, we find ourselves faced with two overlapping ownership rights, belonging to two different owners: the builder's right – ownership of the buildings, plantations, works – and the land owner's right to land ownership.[3]

In the silence of the old Civil Code, the resolutions regarding the nature and legal contents of the right of superficies have not been similar. The old Romanian doctrine (C. Hamangiu, I. Rosetti-Bălănescu and Al. Băicoianu) has supported the idea that the right of superficies could be a special form of ownership, limited to the constructions or plantations on a land fund[4]. Recently, an idea has been expressed according to which only the builder's use right over a land which is someone else's property represents the actual right of superficies, and the legal complex resulting from the ownership right over the constructions, plantations and other works and the use right represent a mere variation of the ownership right, property which only consists of the existing constructions or plantations[5]. According to another perspective, to which we tend to subscribe, the right of superficies is the main realty right which combines, within its legal contents, the ownership right of a construction or plantation, with a main real right over a land belonging to someone else other than the holder of the superficies right, reuniting, in a limited way, use, possession and disposal over the land or part of it[6].

What is new in the view of the Civil Code is that the right of superficies is temporary; it can be set over a period of 99 years maximum, and it can be renewed once the set period has ended (art. 694 of the Civil Code). Until the present code has become effective, specialized literature and practice have credited the opposite opinion, according to which the right of superficies is perpetual by nature and lasts, unless otherwise stipulated, as much as the construction or the work on someone else's land, without there being any possibility of cancellation by lack of use. Therefore, not using the construction does not lead to the loss of the right of superficies[7]. Due to its temporary character, the right of superficies only acts as a suspension of the artificial realty accession right, not as its definitive removal. Consequently, once the time limit has expired, unless otherwise stipulated, the mechanism of the artificial realty accession becomes effective and, according to art. 699 (1) of the Civil Code "the landowner acquires the ownership right over the construction", while obligated to pay to the builder the current value of the construction. The second paragraph of article 696 in the Civil Code uncompromisingly stipulates the fact that the right to the admittance of the right of superficies cannot be prescribed, the relevant argument used in favour of this solution being the fact that the perpetual character of the ownership right over the construction, plantations and autonomous, enduring works also extends over that part of the superficies right which is related to the right over the land.

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[3] See, as an example, C. Stătescu, *Drept civil. Persoana fizică. Persoana juridică. Drepturile reale,* Didactică şi Pedagogică Publishing House, 1970, p. 823.

[4] C. Hamangiu, I. Rosetti-Bălănescu, Al. Boicoianu, *Tratat de drept civil,* vol.2, C.H. Beck Publishing House, 2002, p.312.

[5] L. Pop, L.M. Harosa, *Drept civil. Drepturile reale principale,* UJ, 2006, p.257. In an opposite direction, legal practice has led to the conclusion that by acknowledging the right of superficies over the land and not the use right, the first instance was wrong regarding the complex contents of this right: besides the ownership right over the construction, it also always involves the use right over the land on which it is located (Brăila Courthouse, Civil section, Civil decision no. 180/2005)

[6] V. Stoica, *Drept civil. Drepturile reale principale,* Ed. C.H. Beck, 2009, p.238. Also see S. Cercel, "Dreptul de superficie", in *Noul Cod Civil.Comentariu pe articole,* coord. F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, ed. CH Beck, 2012, p.748 and M. Uliescu, A. Gherghe, *Drept civil. Drepturile reale principale,* Ed. U.J., 2011, p. 140. For a thorough analysis of the various solutions stipulated in the French legal doctrine and of the arguments in favour of each viewpoint, see J.L. Bergel, M. Bruschi, S. Cimamonti, *Les biens,* L.G.D.J., 2010, p. 331.

[7] See decision no. 649/1999 of the Appeal Court in Iaşi, Civil Section.

## 2. Means of instating the right of superficies

Most frequently, within the legal practice a problem has arisen regarding the ways in which the right of superficies can be instituted, the resulting ideas being inserted as a whole in the current Civil Code, which, in art. 693 (2) stipulates the fact that the right of superficies is acquired by a legal document, by usucaption and otherwise provisioned by law. This enumeration is limitative, since, as already shown, the mere fact of erecting a construction on someone else's land, however honest-minded that person might be, and under the circumstances of the builder being fully aware of the fact that the latter is the owner of the land on which the new construction is located, would not be enough to lead to the acknowledgement of the existence of a right of superficies in favour of the person who erects a construction on a land that is not their own, and since there is no possibility of applying either one of the instatement methods mentioned above, the holder of the ownership right over the constructions can only acquire a mere claim against the holder of the ownership right over the land[8]. Therefore, in the absence of any legal foundation, the right of superficies cannot be acquired by means of a court rule[9].

The right of superficies can be acquired by a legal act by onerous title or free of charge, authenticated under penalty of absolute invalidity (art. 1244 of the Civil Code). In the case of conventions, there are two possible situations: *i)* the landowner reserves their empty property and grants the right of superficies to the other contracting party, *ii)* the landowner keeps the right of superficies and grants the empty property. If the builder obtains an agreement from the holder of the ownership right over the land, he acquires a right of superficies, any lack of a building authorization being completely irrelevant.[10] In full agreement with the legal practice[11], the last paragraph of art. 693 in the Civil Code was inserted, stipulating the fact that the right of superficies can be turned in the builder's favour on account of the holder of the ownership right over the land resigning their right to claim accession, and in a third party's favour on account of the owner resigning the right to claim accession. It has also been decided that, within family relationships, when parents normally allow their children to have a building erected on the land which is their property, a certificate is morally impossible to draft[12]. The right of superficies can also be certified on account of a legal document, under the provisions of art. 693 (3), when the owner of the entire fund (both land and construction) sold either the construction alone, or the land and the construction as well, but to different people, in which case the right of superficies can be registered in the cadastral register even if there has been no express mention of the instatement of the right of superficies in the construction estrangement act. Furthermore, the legal practice has agreed to

[8] In this view, see the Civil Decision no. 1394/2010 of the Bârlad Courthouse, the Civil Decision no. 6529/2010 of the Bihor County Courthouse, the Decision no. 868/2011 of the Civil Section at the Appeal Court in Braşov, the Civil Sentence no. 8938/2009 of the Iaşi Court of Justice, all available at http://portal.just.ro, the Civil Decision no. 11057/1997 of the Argeş Courthouse, Culegere de practică judiciară 1998, ed. All Beck, 1999, the Civil Decision no. 457/2009 of the Appeal Court in Timişoara, and the www.jurindex.ro website, as viewed on the 4th of December 2012.

[9] Case law solution: the Civil Decision no. 1406/2009 of the Videle Courthouse, available at http://portal.just.ro, as viewed on the 4th of December 2012.

[10] See the Decision no. 4559/2005 of the Civil and copyright section at the Romanian High Court of Cassation and Justice.

[11] The Civil Decision no. 43/2007 of the Civil section at the Appeal Court in Bucharest, available at http://portal.just.ro. In this case, it has been decided that the landowner's inaction or acceptance equals their consent to erect the construction, thus enabling the instatement of a right of superficies in favour of the constructor. Also see the Romanian High Court of Cassation and Justice, Civil and copyright section, available at www.legalis.ro., as viewed on the 4th of December 2012.

[12] In this regard, see the Civil Decision no. 195/2011 of the Constanța Courthouse, and the Civil Decision no. 2510/2011 of the Caracal Courthouse, both available at http://portal.just.ro, as viewed on the 4th of December 2012.

this solution, by adopting a firm position in the sense that "even if there has been no convention between the landowner and the construction owner, by means of which the latter gives their consent to having their land encumbered, it can be admitted, on account of a rational interpretation of art. 492 of the Civil Code that, by acquiring an ownership right over the construction, a right of superficies is generated ope legis for its owner"[13]. The right of superficies can be acquired by legacy, when the testator assigns a person who, at the moment of the former's death, will acquire either empty property or the right of superficies, or when two different heirs are assigned, one of whom will acquire empty property and the other will acquire the right of superficies over a construction, plantation or any other durable works.

The current Civil Code also regulates the way to acquire the right of superficies by adverse possession, when the land holder acts as a person who has a right of superficies, not as the landowner; we will however not enlarge upon this topic, since it is seldom put into practice[14].

The right of superficies can also be acquired by "other means, as provisioned by law", for example, in the case of applying the legal or the conventional community system[15], by the particular spouse having a construction, a plantation or any other autonomous, durable work erected on the other spouse's land; the spouse who is not the landowner acquires a use right over their spouse's land and shared ownership right over the construction, plantation or work[16].

**3. Extension and exercise of the right of superficies**

According to article 695 of the Civil Code, the right of superficies is exercised within the limits and conditions of its constitution document. According to the case law[17], current regulations mention that, unless otherwise stipulated, the exercise of the right of superficies is limited by the surface of the land on which the construction is to be erected and by the surface which is necessary to the use of that construction or the corresponding land and the surface which is necessary to the use of that construction.

**4. Cessation of the right of superficies**

The new Civil Code minutely regulates all instances of cessation of the right of superficies and their specific effects. According to the provisions of article number 698 in the Civil Code, the right of superficies can cease in one of these ways: *a)* when the time period expires, *b)* by consolidation, *c)* when the construction is demolished, if specifically stipulated and *d)* in other cases, as provisioned by law. The fact that the holder of the ownership right over the land sells the land which has been the object of the right of superficies cannot lead to the cessation of this right[18]. It has to be said that the right of superficies only ceases once it has been erased from the land registry book (art. 885 of the Civil Code).

The right of superficies ceases once the time period in its constitution document has expired or, should the time period not be mentioned in that respective document, at the end of the 99-year period, should the right of superficies not be renewed thereafter. In the

[13] Decision no. 214/2010 of the Civil Section of the Appeal Court in Bucharest.

[14] See, as an example, the decision no. 379 of the 21st of January 2005 of the Civil and copyright section of the Romanian High Court of Cassation and Justice.

[15] According to the provisions of art. 339 Civil Code, "The assets that have been acquired during the legal communion by either one of the spouses become, from the date of their acquisition, shared assets of the spouses".

[16] In specialized works it has been rightfully shown that in this case the source of the right of superficies is the mere legal fact of the spouses having acquired a construction, a plantation or a work, placed on the land which belongs to one of them, in the course of their marriage, fact which legally generates this effect. For further details, see V. Stoica, cited work, p. 244.

[17] See the Civil Decision no. 219/2007 of the Appeal Court in Bucharest and the decision no. 1515/1973 of the Civil Section at the Supreme Court in the Romanian Decision Registry, no. 5/1973, p.73.

[18] In this sense, see the mercantile Decision no 496/2004 of the Mercantile Section of the Appeal Court in Iaşi.

constitution document of the right of superficies or at any time thereafter, the parties can establish what is going to happen to the construction, plantation or work at the end of this time period. If not, the mechanism of artificial realty accession becomes effective and the landowner acquires the ownership right over the constructions, plantations or works which have in time been erected by the builder, while obligated to pay their current value to the builder once the time period has expired (art. 699 para.1 of the Civil Code). An interesting, more nuanced solution mentioned at art. 699 (2) of the Civil Code is the one related to the case in which the construction was not erected at the time of the instatement of the right of superficies and its value equals or exceeds that of the land. In this case, the text stipulates the fact that the landowner has to choose between acquiring the ownership right over the construction, by means of the acquisition effect of the artificial realty accession, and determining the builder to purchase the land at the value at which it would have been estimated had the construction not been erected; in the latter case, the builder can refuse purchase if they erect the construction at their own expense and restore the land to its previous situation. Once the time period has expired, principal real rights agreed to by the holder of the right of superficies cease to be effective, should the owner not agree to their maintenance. As for the mortgages, we must *ab initio* distinguish between those related to the right of superficies and those related to the land itself. At the cessation of the right of superficies, the Civil Code presents three distinctive cases regarding those mortgages related to the right of superficies: *1)* the landowner also becomes the construction owner, in which case the mortgage is rightfully transferred to the amount of money the builder has received; *2)* the builder purchases the land, in which case the mortgage rightfully extends over the land and *3)* the builder refuses purchase and restores the land to its previous situation, and the mortgage is rightfully transferred to the material results of the construction demolition. As for the mortgages related to the land, once the time period has expired, in the three cases mentioned above, the Code establishes the following: in the first case, the mortgages are not extended to the entire building; in the second case, it is rightfully transferred to the amount of money the builder has received and, in the last case, it is rightfully extended to the entire land. The right of superficies ceases as a result of consolidation when the land and the construction become property of one and the same person. According to article number 700 of the Civil Code, unless otherwise stipulated, the main real rights agreed to by the holder of the right of superficies are maintained all throughout the time period over which they have been instated, but no later than the initial expiry date of the right of superficies, and the mortgages that have been taken on during the time the right of superficies was effective are all maintained according to the object of their constitution.

Art. 698 c) of the Civil Code determines the fact that the right of superficies ceases to exist if the construction is demolished, should there be any specific mention of this aspect. What is noticeable is that the text comes in contradiction with the jurisprudential and doctrinarian perspective according to which, should the work, plantation or construction have been demolished or totally annihilated by the builder, the building right ceases to exist[19]. The argument in favour of the current solution is that, in the legal contents of the right of superficies there still remains a main real right derived from the ownership of land. As an effect of the cessation of the right of superficies in this way, in the absence of a contrary legal provision, the real rights encumbering the right of superficies cease, and regarding the mortgages involving the empty ownership over the land until the expiry date of the right of superficies, the text of article 701 in the Civil Code stipulates that they are maintained and are related to the reinstated ownership over the land.

[19] See Chelaru, *Drept civil. Drepturile reale principale*, C.H. Beck Publishing House, 2009, p. 329, C. Bârsan, op. cit., p.300, the Decision no. 888/2008 of the Civil and copyright section of the Romanian High Court of Cassation and Justice.

**Conclusions**

1.The right of superficies has also been recently mentioned in the French Civil Code, which, at article number 2531, introduced by the Decree no. 2005-870 of the 28th of July 2005, mentions this right among those which can be placed under mortgage. The solution that the Romanian legislator has chosen is different from the French one, and preferable, because within our legal system there is a uniform, minute regulation of the right of superficies.

2. Mostly, in this matter, for the first time, it gives legislative consecration to long existing jurisprudential rules, which have been largely accepted by doctrine.

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# THE IMPUTABLE DEED / THE IMPUTABLE ACTION

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**Abstract**

*The criminal standards, meant to the protection of the social values, establish the objectives and subjective conditions that must be fulfilled as a behavior to be illicit. Therefore, finding the illicit/the unlawful character of the behavior does not means that this can be already considered infringement of law, for the existence of the offense needful to establish if the agent can be made responsible for that illicit behavior, in other words should be analyzed if the deed is imputable.*

**Keywords:** *Imputability, risk, behavior, legislator.*

## Introduction

*The objective imputable theory tries to resolve the doubtful assumptions of causality relation based on some conceptual paradigms subsequent to causal criterion and takes into account that being a real legal problem of causality the establishment if and in which conditions a causal connection is enough to justify the result imputability of a certain author.*

*This conception/view is in used in some states from the Western Europe (Germany, Austria) but knows many variants, interpretations, sometimes so various that makes practical impossible their reduction to a common denominator.*

*The present theory's presentation must have as starting point the influence exercised by the so-called theory of the final action formulated in the 1940's by Hans Welzel[1]. The author sustained that the final activity is distinguished by the common causal process due to the fact that the first is lead by setting of a purpose and the carrying out of a certain actions in order to achieve that objective, while the causality is seen only as an accidental resultant of the pre-existing various factors. From those stated result an essential stroke of the human action, those that can't be appreciated exclusively reference to the cropped up result but it is necessary to keep into account even by the meaning in which the agent has been transmitted.*

It is known and accepted the fact that the criminal standards that has as purpose the protection of the social values establish the objectives and subjective conditions that must be fulfilled as behavior even illicit. Therefore, the finding/the establishment of the illicit character of behavior does not means that this can be considered already infringement of the law, that must established that the agent could be made responsible for that illicit behavior, in other words, must be analyzed if the deed is imputable.

The objective imputable theory supposes an exam in several stages:

a) first of all it is checked if the action has created a relevant danger from the juridical point of view for the protected value.[2]

Thus, the behavior must be dangerous, to have created a certain probability of producing such wound or putting into dangers the protected social value. The probability is

decided having in view all the known circumstances by a careful human been in the moment of action, but even those that has been known in concrete the author. [1]

In the existence opinion of such condition is used the permitted risk concept and the unpermitted risk concept[1].

The concept of the permitted risk[2] is used to designate those situation in with the legislator tolerate a behavior with causal potential, that behave risk of some harmful results for the social values protected by the criminal standards, having in view the existence of other superior reasons, which the law must give priority.

Such situation it is found (again) within those human activities, useful and necessary from the social point of view to which the legislator restricted itself in establishing of certain due diligence rules thus that the risk to be kept under control and, **as far as** possible, to be avoided. The eventual negative results that occur despite the observance of these rules will not attract the penal responsibility /criminal liability (e.g. the possible/eventual deadly injury to a pedestrian might not offense the driver, to the extent that it has been respected the legal speed and other traffic rules).

A possibility/a modality of the permitted risk is the concept of the main life risk [3], situation that exclude the objective imputation on the grounds that the result appearance can be considered a hazard creation /an work of chance (e.g. the nephew who convinces the uncle to make a walk in the forest hopping that he will be surprised by the storm and will be struck by the lightning, that what is actually it happened).

Finally, a last case of removal of the objective imputable application is the increasing of the risk of the victim to the extent that the person agrees to be exposed to a known risk (e.g. If a person accepts consciously and unwillingly sexual relations with a person with AIDS).

The unpermitted risk concept occurred in all other cases than those previously exposed, in which, through its action, the agent created an increased risk, additional for the social value protected by the criminal law owing to which has been produced the harmful result (e.g. the author of such body injury is responsible for the death of the victim, even if this has been occurred due to an explosion intervened at the hospital to which the person has been subject to medical care).

b) Subsequently it is checked if the produced result is a consequence of the danger situation created through the perpetrator/culprit action.

To the extent in which the result produced does not constitutes any longer a materialization of the danger caused by the action, but is because of other circumstances, the imputation is excluded

To be able to justify the objective imputation is not enough to ascertain only the unpermitted risky character of the agent's action, but it is necessary as well to check the specificity, respective, if the result caused coincides with the one which the standard at least followed to prevent it

c) Therefore, it has been introduced a new imputation criterion/norm those of the norm/standard „the purpose of protection (warden)". For a better understanding of this concept we must refer to some concrete examples. First of all, in the situation previously exposed, the subject cannot, by applying this corrective/reserve, be made responsible for the accidental death of the victim. Another case under doctrine's discussion is those of the drugs seller responsibility towards the drug addict's death as a result of the powerful narcotic consumption, since it created a necessary condition of the result and, besides this, he could not known the risks, even deadly, linked to drug use.

The objective imputation of the result can be excluded in a such case, only under the criteria of the warden purpose of norm that obliged to observe that the reason that imposed the

[1] M. Guiu, Raportul de cauzalitate în dreptul penal, Bucharest, 2001, p. 59.
[2] F. Streteanu, op. cit., p. 420.

incrimination of drugs traffic already includes reference to the dangers of the consumer's health, and the possibility of the production of some lethal results were taken into account by the legislator at the penalty determination for this offence, whose maxim is comparable to that stipulated for the murder offence.

d) In addition has been imposed the introduction of a new criterion called the avoidable criterion with the application especially in the case of the infringement of law guilt. Thus it is considered that is not enough that the agent to create unpermitted risk, but is more necessary to prove that in the case of the behavior maintaining in the limits of the permitted risk, the results would not be produce. For example, in the German judicial practice1, has been established that the driver which engaged itself in going beyond a bicyclist to lateral distance of only one meter (instead of 1,5 m as law prescribes), and the bicyclist turn unexpectedly to the right and is deadly injured will not be responsible if, ex post is established that the bicyclist would have been anyway wounded/injured, even in the condition in which would have been complied the legal distance of 1.5 meter.

**Conclusions**

The objective imputable theory supposes an exam in several stages:

a) First of all it is checked if the action has created a relevant danger from the juridical point of view for the protected value

b) Subsequently it is checked if the produced result is a consequence of the danger situation created through the perpetrator/culprit action.

c) Therefore, it has been introduced a new imputation criterion/norm those of the norm/standard "the purpose of protection (warden)".

d) In addition has been imposed the introduction of a new criterion called the avoidable criterion with the application especially in the case of the infringement of law guilt.

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# PECULIARITIES IN INVESTIGATING THE CRIME SCENE IN CASE OF EXPLOSIONS

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Abstract

Explosions are a real threat for the life, the bodily integrity and the health of the people, as well as for the public and private property. The investigation of the crime scene is a high risk activity because of the complexity of the large scale damages, the large area involved due to the blast of the explosion and to the partial character of the imprints. According to the Romanian penal legislation, explosions are not considered to be independent infringements of the law; yet they are defined as means of producing other infringements as, for instance, the infringement of destruction in an aggravating stage, as stipulated by the Penal Code.

**Key words:** explosions, investigation of the crime scene, imprints, evidence/proofs, investigation

## Introduction

The explosion is a very quick and violent physical or chemical reaction accompanied by mechanic, sonorous, thermic, bright effects, etc. as the result of the decomposition of certain explosive elements a destruction device may contain[1]. A large quantity of gas with destructive effects over the persons and objects in the proximity of the detonation will be relieved.

At the same time, an explosion is a very complex technical phenomenon that can be done in a very large number of ways and has very unexpected consequences. Its characteristics raise problems in the investigations meant to demonstrate the causes and the culprits responsible for generating the explosion[2].

From the chemical point of view, an explosion is a series of oxidizing reaction phenomenon.

The most obvious difference between fire and explosion lies in the fact that, although the explosion is thought to be another type of burning, it acts with such a high speed that it can practically be considered instantaneous[3].

Explosions are followed by fire because, the moment an explosion is released, a very high temperature is given out which, consequently, sets fire to all the inflammable materials

[1] DEX – *Explanatory Dictionary of the Romanian Language*, Univers Enciclopedic Printing House, Bucharest, 1998, pp. 539.
[2] Matei, A.; Feraru D.L. – *Peculiarities in the Forensic Investigation of Terrorism Attacks Using Explosives*, in *The Contribution of Forensic Sciences in Investigating Terrorist Acts and of Seriously Other Dramatic Events*, Bucharest, 2007, pp. 146.
[3] Stoica, V. – *Investigating Special Events (fires, explosions), in Guidebook of the Forensic Prosecutor*, vol. II, Helicon Printing House, 1994, pp. 9.

in the area.

This violent generation and release of gas is one of the first criteria of an explosion that can define the other important types of explosions: mechanic, chemical and nuclear[4].

The explosion can also be generated by a spontaneous combustion/ ignition of certain substances, in case it accumulates the necessary agents.

A mechanical explosion is accompanied by very high temperatures, by a very quick release of gas and vapours, as well as by a very loud noise.

A chemical explosion is generated by a very quick conversion of a solid or liquid explosive into gas and, it is accompanied by very high temperatures and by an astounding noise.

The nuclear explosion can be generated by fission or fusion. The consequence is a huge quantity of energy, heat and gas, followed by fire. By the way the explosion grows after the release, it destroys the imprints because it burns all the inflammable or heavy inflammable materials or, because of the serious damage produced to the fireproof materials.

Aspects regarding the investigation of the crime scene

The lab probative procedure - defined in art 129 by the Romanian Penal Code of Procedure as an investigation of the crime scene - is the first measure to be taken in investigating extremely dangerous deeds. In conformity with the above mentioned article this procedure is applied then when it is necessary to reach conclusions concerning the state of the crime scene, to discover and establish the traces of the infringement, to fix the position and the state of the proofs and to settle the circumstances the deflagration took place.

In as far as an explosion is concerned the crime scene means the place where the explosion took place and the area between the center of the deflagration and the distance up to where the blast acted - both on a vertical and on a horizontal plane.

The experts take into account two distinctive stages in the investigation of the crime scene: the static and the dynamic one. In practice, this distinction is somehow conventional. In reality the two stages are rigorously intermingled, fact which does not appear to be very important if the integrity of the material proofs is preserved[5].

*The static stage* is the first contact with the crime scene, when the investigation is reduced to observation only - with no touching anything. Data regarding the general situation will be obtained and used in preventing or avoiding other explosions to happen, in giving the first aid to victims, as well as in obtaining other details about what had happened at the moment of the explosion or, in getting information about the changes which have been noticed and of what nature, in inquiring about the type of activity carried on at the moment of the explosion and in recording all witnesses' and victims' declarations.

*The dynamic stage* involves the removal and the attentive examination - with maximum precaution - of the objects. This is the most complex stage, as it involves the participation of all the members of the team. All transmitting stations, measuring and control devices will be sealed and the state and the position of the inflammable or under pressure equipments will be checked. The ground of aggression and the crater will be looked for and after, the investigation for the discovery, establishing, prevailing and analyzing the traces, as reported to the place and type of explosion will be seriously examined.

The investigation proper will take place in conformity with the following tactical rules[6]: the investigation of the crime scene shall be done immediately - but avoiding speed and superficiality -, shall be made systematically and shall be objective and complete. The team

[4] Lăpăduşi, V.; Popa, G. – *Forensic Investigation of the Crime Scene*, LUCEAFĂRUL Printing House, Bucharest, 2005, p. 133.

[5] Ionescu, L., *Forensic Science*, Bucharest, Pro Universitaria Printing House, 2007, p. 29.

[6] For more details see: Cârjan, L.; Chiper, M. – *Forensic Science. Tradition and Modernism*, Curtea Veche Printing House, Bucharest, 2009, p. 280 and next.

shall be led by chief: he has to coordinate all activities and guide them, to strictly respect the procedures, to correctly respect the relationship with the mass-media and, to analyze the results obtained.

Identifying the explosion scene

The explosion scene is marked by various sized craters depending on the amplitude of the explosion and on the quantity of explosive matter used. The constructions and the installations around are deformed or destroyed from the centre to the outside.

The search of the open places generally starts from the center to the periphery, concentrically or spirally, progressively enlarging the investigated area.

If the explosion took place inside a room or building, the deformation of the walls is oriented towards the interior; all traces of burns, smoke, distortions produced by the blast or by fire will be taking into account.

To identify the place where the explosive materials are stored and to find out the persons who are in their possession and use them, special means and methods are resorted to, as well as explosive detecting trained dogs.

After having removed all the devices and the potential dangers generated by the explosion the investigation team can enter the crime scene. Rescuing measures have priority in the looking for and picking up of proofs.

Proofs Drawing

Before removing the proofs from the explosion scene, the area is marked and minutely photographed or mentioned in the official report; scaled drafts and the position of the found marks and traces should be cautiously mentioned.

From the explosion scenes there are raised earth proofs, ceramics samples, plaster, ashes from the floor of the rooms and other burnt objects, textile fibers/ patches, inflammable liquids found in either the area or in the possession of suspects. There are also raised fragments of materials taken from the crater of the explosion (earth, concrete, wood, etc) as well as fragments of dubious materials coming from the improvised explosive device or from the initiation devices, wicks, containers and wrappers, ammunition, hand grenades, shell splinters, etc.

There can be also found rests from the unexploded explosive material, rests of wicks or of plastic explosives.

Proofs-gathering should be sufficient and carefully handled, wrapped in tight sealed glass vessels as to avoid casual impurities altering the tests or making the volatile substances evaporate. Wrapping the tests/ proofs is done in such a way as to prevent the loss of the evaporating substances and their contamination from other external sources, during the transport.

Explosive smell samples can be raised from the explosion scene only with special devices - absorbing materials, syringe or aspirator - and be tested with trained dogs, if the respective samples contain such traces and if they were raised after a period of time since the event.

The unexploded devices or the explosive materials are raised, handled, wrapped and transported by pyrotechnical technicians.

The problems that can be solved by investigating the consequences of an explosion[7] are the following: the nature of the trace; whether the trace was the consequence of the explosion; the nature and the causes of the explosion; the nature and the type of the explosive material; the type of the detonation device; resemblances between the traces of the explosive substances discovered at the explosion scene and the explosive substances used as a comparative model from a chemical point of view; the technical state of the apparatuses

[7] Ionescu, F. – *Forensic Science,* Universitară Printing House, Bucharest, 2008, p. 208.

recording the pressure and the temperature of the cisterns containing explosive-property substances.

**Conclusions**

The investigation of the explosion scene shall be very carefully and minutely done having in view the discovery of all the fragments of the explosive device in order to help the reconstitution.

Beside the already mentioned peculiarities, the evolution and materialization of the results of the investigation take place at the explosion scene in conformity with the general rules. In open places the activity of searching for proofs generally starts from the center of the explosion to the periphery, in concentric or spiral circles. In the case of explosions produced in an "explosive atmosphere" traces of burn and wall smoke will be looked for.

Because of the very specific character of the explosions, the cooperation between the legal organs and the experts who are present at the explosive scene is absolutely necessary; it is only in this way that the circumstances and the causes leading to such events should be established and solved.

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# TECHNICAL AND LEGISLATIVE EXTERNAL STRUCTURE OF THE LEGAL NORMS

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**Abstract**

*If the logical, trichotomic organization of the laws forms its stable internal structure, the technical and legislative body forms its external structure. It is correlated to the celerity requirements which are included in the legislative system, in different stages of its development, and also to the general principles of legal techniques.*

**Keywords**: *law, article, paragraph, external structure.*

## Introduction

*The technical and legal structure, unlike the logical structure refers to the external form of expression of laws, to its written form, which must be clear, concise and well-shaped. Therefore, the technical and legal structure takes into account the normative aspect, the way legal rules are expressed within written laws. The laws established by legislation are subjected to specific legal requirements aimed at modeling certain social relations through mechanisms that transform them into legal relations, while making tools that create, foster, alter or extinguish these relations, depending on the purpose of the legislator.*

The drafting of the final regulatory action is part of the process of law. In this process, the drafting operation follows the legal concepts and notions, especially the rules of law. At this stage it is necessary to find the words to express concepts and formula to enable the drafting of rules of law. The right combination of words is a tool for communicating concepts, rules and legal reasoning.[1]

Since the law is an abstract construction that very often emerges from the combination of several items that are in different places in the body of the law, it is important that the sequence of articles in laws is correct, logical, making it easy to detach the meaning intended by the legislator.

Arguments to support this idea have been made, for example, to resolve a dispute regarding the correct application of Decree 92/1950. In the first article of this decree, the conditions under which some property may be nationalized are shown. According to the stipulations of article II, certain categories of people are exempted from nationalization. In that dispute, on appeal, the defendant argued that the plaintiff could not be exempted from nationalization, since he owned, at the time of nationalization, two buildings, exceeding his housing needs, and some commercial spaces. The buildings were used for rental purposes and it was obvious that the owner had another residence.

[1] F. Geny, *Science and technique in positive private law*, Sirey, Paris, 1922, p. 51.

Even though the article II of Decree no. 92/1950 exempted from nationalization certain categories of people, article I, paragraph 2 was not changed and was applied so that the buildings were nationalized according to the Law no. 112/1995. The court did not share this point of view, stating that "The stipulations of article II of Decree no. 92/1950 should be considered as derogating from those of article I, with the result that even if the owner of the buildings belonged to one socio-professional categories listed in Article II, the buildings should be excluded from the measure of nationalization. This conclusion sends to the topographic argument. The stipulations of article II are consecutive - and so derogating those of article I".[2]

The language plays a very important role in the materialization of the rules of law.[3] The law promotes the "legal language", a special way to express legal thoughts and realities that deviates from everyday speech and borrows external elements, through which the laws and rules are expressed.[4] Since ancient times, Roman jurists showed that normative acts must use the lexical, colloquial language, but in a refined form, to achieve technical accuracy, without which there is no legal language in the scientific sense of the term.[5] The word, the language becomes, in ancient times, an element of legal formalism and therefore required in enforcing the law. The value of the word is underlined by Gaius, the jurist, who states that the slightest error in terminology can result in losing a lawsuit, since the lawyers used to *verbatim reproduction* sacred texts of the law.[6]

The overall technical words belonging to a particular field of activity forms its terminology. In law, for a harmonious expression of legal concepts, it is necessary that each concept is expressed through an appropriate word. Thus the legal terminology and the legal semantics arise. By virtue of legal terminology and legal semantics, a word used in law always has certain significance. Usually, the words used in legal terminology are taken from the common vocabulary and semantic undergoes conversion by charging them with a specific legal meaning. Thus, apart from having a common sense, the words become independent elements of legal terminology.[7]

The legal terminology is part of the legal vocabulary, which is the main corpus of the Romanian language used in the legal field.

The legal vocabulary responds to some legal requirements concerning the quality of the law and its dissemination.

For securing the quality of the law, for achieving its purpose in the most efficient way and applying it consistently, it must be characterized by unity, order, precision and clarity. In order to achieve this, the rule of law must first be expressed in clear and precise words, to remove the possibility that those who apply the law to confer it their own interpretation, making it irrelevant for the legislator's intention.

The external form of laws is characterized by legislative enactment or by normative style. The latter represents all the methods and artifices forming the drafting of normative acts. The former refers to a set of features that legislative texts take[8].

In our specialized literature, there is not a single legislative style, but a multitude of styles specific to certain fields of law[9]. In other words, it has been argued that the style is specific for a normative writ because the legislator rarely uses writs particular for a branch of

[2] Civil Decision no. 171/2001 Court of Appeal Cluj, unpublished.
[3] V. Hanga, *Technical and Legal Right. A Summary*, Lumina Lex Publishing House, Bucharest, 2000, p. 33.
[4] To see J. L. Bergel, *General Theory of Law*, 3e issue, Dalloz, Paris, 1999, p. 222.
[5] V. Hanga, *Work cited*, p. 33.
[6] Ibidem, p. 35-36.
[7] I. Vida, *Introduction to Formal Legislation*, Lumina Lex Publishing House, Bucharest, 2000, p. 110.
[8] J. Voyame, *Legal Methods and Procedures*, Institute of Advanced Studies in Public Administration, Lausanne, 1991, p. 87-88.
[9] V.D. Zlătescu, *Introduction to Formal Legislation-*, Rompit Publishing House, Bucharest, 1995, p. 66.

law.[10]

The issue concerning the style of writs is addressed in a separate chapter and also in Law of legislative techniques no. 24/2000, in which the legal norms ensuring intelligibility, the use of neologisms, the terms, the regionalisms and other tools needed for the drafting of such writs, allow easy understanding of their content.

The normative style has to render the permissive legal standards and the devices that should make clear whether the person is obliged to have a certain conduct in the circumstances described, because otherwise he/she will be subjected to a penalty, or to recommend a certain conduct a person may adopt.

For the laws to be understandable, the style in which it is written has to be concise, sober, clear and precise, to exclude any ambiguity, in strict compliance with the rules of grammar and spelling.

A concise style involves expressing ideas in a few words, avoiding redundant[11] statements and terms with a high degree of abstraction, to cover a wide range of phenomena due to abide future legal regulations.

However, one should avoid replacing a term used in the law along with another, even if it is synonymous with the first one. Thus, the cohesion of terminological texts will be ensured, removing confusion, ambiguity and the potential for uncertainty that would otherwise contradict the intended meaning of the law.

The moderate style of the law lies in eliminating tropes, using, as much as possible, the basic meaning of words, in the most common occurrences.

Clarity and precision of the style is achieved by proper use of words in their ordinary meaning. Even though it is generally used the common language, in the absence of adequate means to express as accurately as the law intended, legal terminology, neologisms or specialized terms will be used.

The legal terminology is useful because ensures the terminological cohesion of written laws, expressing legal concepts in an accurate form. Terms such as: the individual, legal entity, termination, revocation, will never be replaced by other terms, because it would cause a disruption in the interpretation and application of legal rules.

If the legislator is required to use concepts and terms that are not part of everyday speech, or to give them a different meaning, he is obliged to define and clarify the meaning of these terms as they are used in content of the law. Definition consists of a technical process that specifies the structural elements of the legal concepts and legal institutions, thereby facilitating legal rules[12]. As Jean Dabin stated, the first condition for practicality is just to define[13].

Defining legal concepts has a formal and a more practical meaning. In terms of practicality, the concept expresses substantial consistency and in terms of formality, it designs the shape and meaning of a concept.[14]

Modern law makes a distinction between scientific definitions developed in doctrine and law, and positive law, which represents the will of the legislator.

Legislative definitions are treated as such in the texts of the laws or are implied in the wording given by the legislator.

For example, the Criminal Code, at the end of the General Part in Title VIII certain terms or phrases of criminal law are defined as “public”, “relatives”, “family member”, “public official”, “serious consequences and effects”, “tools”, etc.

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[10] I. Vida, *Work cited* p.112.
[11] I. Mrejeru, *Legal Technique*, Academy Publishing House, Bucharest, 1979, p.102.
[12] V. Hanga, *Technical and Legal Right. A Summary, Work cited* p. 54.
[13] J. Dabin, *General Theory of Law*, Dalloz, Paris, *1969*, p. 268.
[14] J. L. Bergel, *General Theory of Law, 3rd edition*, Dalloz, Paris, 1999, p. 195.

The legislator uses many terms without giving a definition. Such terms are, for example: "national sovereignty", "people", "unitary state", "administrative and territorial unit". In these cases, it is the doctrine and judicial practice that will explain the meanings and in doing so, giving a full understanding of the law.

In order to define certain concepts, we can also use the enumeration process. It consists in the decomposition of an abstract idea - considered to be too vague to allow a consistent and efficient implementation - in practical applications[15]. Using the enumeration process enables us to completely understand a legal statement with a high degree of abstraction. The legal statement includes references to the concept, and then, by example, shows some features of the concept within the statement. For more abstract concepts we can substitute more practical ideas, more concrete elements[16].

The enumeration can be illustrative or exhaustive. The illustrative enumeration is characterized by the fact that the legislator allows the law enforcement officer to extend its application to other similar cases.

Thus, in article 16, paragraph 3 of the Decree no. 31/1954 it is stipulated: "Those who disappeared during war, in a railway accident, in a shipwreck or in other similar circumstances, are supposed dead, without any previous announcement of their disappearance...".

The exhaustive enumeration forces the law enforcement officer to confine to it. It is often used when setting exceptions to general rules of law.

For example, in article 31, letters a)-c), e)-f) of the Family Code are listed exhaustively each spouse's own assets, goods which are exempted from the general community of goods. The text of article 31 of the Family Code is just an example of how the two types of enumerations can be combined; at letter d) the enumeration is illustrative: "property acquired as a prize or reward, scientific or literary manuscripts, drawings and artistic projects, inventions and innovations projects, and other such goods".

Legal concepts can be defined via substitution, by assumption. Thus, instead of defining a difficult concept another one, more easily perceived is chosen. For example, instead of saying "failure of individual spiritual maturity", it was agreed to use numbers, to express the age. It is supposed that minor age is equivalent to insufficient development of mind.

As far as the formal aspect of the definition is concerned, it has been shown that there is a real distinction between definitions and terminology.

A real definition consists of a substantial determination of elements and attributes of the concept in question. In this way, concepts relating to individuals, legal documents, property, property rights and servitude were defined. The terminological definition explains the meaning of a word used in a legal text[17].

This kind of definition was regarded as defective and dangerous because the legal system constrains the perception and concepts on which it is based, the restrictive nature of the definition representing a limitation in the way that integrates the concepts into the law[18].

In our opinion, the use of terminology definitions is useful insofar as it is not abused.

In criminal law, the offense is labeled as crime only if it is under the criminal law, and the use of terminology definitions is needed to outline more precisely the crime range. Otherwise, greater flexibility is beneficial while enforcing the rules of law on rapidly changing social conditions. If the legislator is required to use concepts and terms that are not

[15] A. M. Naschitz, *Theory and Technique in the process of creating the Law*, Academic Publishing House, Bucharest, 1969, p. 263.
[16] J. Dabin, *op. cit.*, p. 289.
[17] G. Cornu, *Civil Right. Introduction. The people. The goods*, 7th edition, Montchrestien, Paris, 1994, p. 74.
[18] I. Vida, *Work cited*, p. 78.

part of everyday speech, or which give them a different meaning from that already established, he is obliged to define and clarify the meaning of these terms as they are used in the content of the laws.

The law concerning the technical standards is quite restrictive on the use of neologisms in order to provide a better understanding of the law to all people, regardless of their level of general knowledge. The law prohibits the use of neologisms if there is a synonym widespread in Romanian. If the case, the usage of words and phrases from foreign languages is accepted as long as their Romanian correspondent is used alongside.

Even if the use of neologisms is not desirable as a general rule, there are situations in which there is a corresponding term in Romanian. The legal situations which are new for our society should be regulated though. There are such cases, for example, with different types of contracts: *franchise* contract, *leasing* contract, *management* contract, *and know-how* contract. The legislator has regulated these types of contracts, without finding a counterpart in Romanian. They were practically regulated from the contract: objectives, parties, concluding and implementing ways.

Legal reality also has a quantitative dimension, related to length, size or extent of regulated phenomena. This dimension is expressed in laws using figures offering the legislator detailed procedures[19].

Using measurements, the legislator may use absolute numbers to introduce a rigid determination (such as the cash taxes and other contributions) or, if a flexible quantification is needed, he can use the minimum and maximum limits (such as criminal penalties).

To meet the requirements of legal text style, the arrangement of words in sentences and phrases should closely follow the grammatical rules. The simplest structure is given by subject - verb - complement[20].

The subject indicates the participant in the social relations whom the law is addressed. The precise determination of the subject is essential for the correct application of legal rules. For legal rules with maximum level of generality, the subject is the person.

By using this term, we understand all subjects seen as individuals, regardless of the position they occupy in society.

When a human being is regarded individually, it is referred to by the term “registered sole trader”, and when it is a collective subject, by the term “legal entity”. The two terms have been devoted to the branch of civil law but are now used interchangeably in all the branches of the law[21].

Preferably, the subject is expressed in singular, articulated form (minor, person, husband), thus eliminating any confusion regarding the identity of the person the law is addressing. The use of plural form is not excluded, especially in situations in which the legal action intended cannot be carried out but with the help of more subjects together (associations, wives, union members, etc.).

The subject can be expressed using demonstrative and indefinite pronouns: anyone, everyone, that, those. When the subject is expressed by personal pronouns (he, she, etc.) is recommended to avoid extended usage, in order to prevent confusion and uncertainty.

When the text of the law is a sequence of topics, proper use of conjunctions will determine whether the legal standard applies to a collective subject, made up of all those listed, or only to one of them. If the last element of the enumeration is linked to the last but one by the conjunction “and” that means the law applies to all. If they are connected by the conjunction “or”, on the contrary, that law applies only to one of them.

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[19] A. M. Naschity, *Work cited* p. 261.
[20] V. D. Zlătescu, *Work cited* p. 68.
[21] E. M. Fodor, *The Legal Norm, part and parcel of the social norms,* Argonaut Publishing House, Cluj-Napoca, 2003, p. 146.

The use the verbs in writing texts of law also follows some rules. Verbs are generally used in the active voice, reflexive or passive present tense or future. Using the present tense is preferable to other times, because the law is usually enforced in the present.

The prescriptive style specific to written laws is inextricably linked to the verb, the impersonal verbs or verbal expressions used: prohibited, is chosen, it is recommended, should undertake and so on.

Verbs can be used in affirmative or negative, expressing the prohibitive character of rules.

A well-defined language and accurate grammar structures are important for the correct application of laws, the more so as one of the methods used for the interpretation of legal texts; the grammar involves interpreting and analyzing the meaning of words, the morphological and syntactic analysis, taking into account both the position and agreement between words and different parts of the sentence, and also the linking words.

**Conclusions**

In terms of legal technique[22] a law ranges, usually between writs of certain legal value (law, decree, judgment, order...).

The normative law is a written document, the content of which includes legal rules developed by legislator.[23]

Viewed from the legal point of view, the normative law is its form of technical and legal existence. It can be divided into chapters, sections, articles, paragraphs.

The structural element of any basic law is the article that contains stipulations in its own right. It may include one or more phrases; if several phrases are used, each of them forms a paragraph. Therefore, in an article several rules of conduct might be included or on the contrary, an article may contain some or only one element of the law (hypothesis, disposal or penalty). There are situations in which multiple articles contain one legal standard.

To correctly determine the contents of a legal standard, one should corroborate texts from articles and even from different laws.

In conclusion, the technical and legal structure of a legal standard takes into consideration the way in which appears in the normative act, being its external "coat".

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# THE LEGISLATION OF THE NON- PATRIMONIAL CIVIL RIGHTS ACCORDING TO THE NEW CIVIL CODE - THE RIGHT TO LIFE

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**Abstract**

*The right to life is a supreme attribute of the human being, whose compliance is the very condition for exercising other rights. The right to life has two essential forms, a personal interest of the human being and the interest of the society, extremely dangerous.*

**Keywords:** *non-patrimonial civil rights, the right to life, lethal force*

## Introduction

*There are two different interests regarding the protection of the human being: the personal right to life and the detached right to life. The personal right is the one which has a real bound to the specific person, the one which is protected from the very moment of birth of that person and the moment of death. The detached right of life represents the right of the society to have members, to protect their life in order to evolve and at the same time to survive.*

Book I, Title II, Chapter II, and 2nd Section of the New Civil Code of Romania includes provisions on the right of life, the right of health and integrity of the human being.

According to art.61 (1) from the New Civil Code of Romania "Life, health, physical and mental integrity of any person are guaranteed and protected by law". Paragraph 2 of the same article provides that "the interest and the good of the human being should prevail over the sole interest of the society or of the science".

The provisions of the new civil code regarding the right to life, health and integrity of the human being have as related legislation:
- Art.22 paragraph (1) from the Romanian Constitution;
- Art.2-3 from the European Convention on Human Rights;
- Art.2-4 from the Charter of Fundamental Rights of the European Union;
- Art. 6 paragraph 1 from the International Covenant on Civil and Political Rights;
- Paragraph (2) resumes the provisions of the art.2 from the European Convention on Human Rights to the application of biology and medicine, the Convention of human rights and biomedicine signed at Oviedo on 1977, ratified by Law 17/2001;

The right to life is a supreme attribute of the human being, whose compliance is the real condition for exercising other rights.[1]

The right to life has two essential forms, a personal interest of the human being and the interest of the society, generally extremely powerful. Therefore, there are two different interests regarding the protection of the human life: the personal right to life and the detached right to life. The personal right is the one which has a direct relation to the person, the one which is protected from the very moment of birth of that person and the moment of death. The

[1] Noul Cod civil al Romaniei - *Comentarii, doctrina si jurisprudenta*, Hamangiu Publishing, Bucharest, 2012.

detached right of life represents the right of the society to have members, to protect their life in order to evolve and survive.[2]

This right has the protection from the moment of conception because the embryo cannot be seen as "a thing" but as "a possible person".[3]

On the right to life it is known that the states have both the negative and the positive duties. They have to take the necessary measures in order to offer the protection of life and they must refrain from causing death intentionally.[4]

The right to life is enshrined "expressis verbis" also by the International Covenant of civil and political rights. According to this document "The right to life is inherent to human life. This right has to be protected by law. No one shall be deprived of his life arbitrarily". It is to the guarantee of the right to life and the duty of the State to ensure the minimum conditions of existence and of decent life that is, the protection of the environment in which the individual lives.

According to a work[5] the right of life has complex consequences in the legislation, which are seen in the attitude which has to be adopted against the eugenics, conviction of genocide, abortion, the regulation of transplant of organs, euthanasia.

The right of life would have no concrete and effective effect if the duty of the state wouldn't be completed by a second condition: the protection of health and the protection of physical and moral integrity of the person.

The content of the legal text materialize the idea that both the protection of health and the protection of physical and moral integrity of the person are guaranteed not only against the harm of the authorities but also by against the other persons. In concrete, the state has not only the duty of not applying torture or bad treatments but also the duty to accuse those actions and to prosecute those who do them.

Taking into consideration that the right to life represents "above all an uncertainty"[6] the identification of the borders of this right implies many difficulties which are identified also when we ask ourselves if some parts of life, such as euthanasia, the legal situation of the fetus, cloning, transplant of organs and tissues are covered or not by the protection of right to life and of course if the states have duties regarding their protection.

The identification of the borders of the guaranteed right through the art.2 is not easy at all and the difficulties increase when we ask ourselves about the beginning, the end of life and the evolution of biomedicine.

According to the interpretation given by the European Court of Human Rights, regarding the protection of the right of life of the citizen there were mentioned more distinct obligations of the state. In one article recently published, an author enumerated the obligations of the state concerning people, in terms of respecting the right to life.[7] There were the following obligations identified with direct reference to the jurisprudence of ECHR.

**The obligation of not using lethal force excessively**

In the case of Nachova and others vs.Bulgaria, ECHR punished the Bulgarian law which provided the possibility of using lethal force by the state agencies against those who evaded arrest or escaped, without taking into consideration the particularities of each case.

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[2] Radu Chirita, *Conventia Europeana a Drepturilor Omului, Comentarii si explicatii*, 2nd edition, Bucharest 2008.
[3] ECHR, Evans v. Great Britan, Decision from 07.03.2006.
[4] B. Selejan-Gutan, *Protectia europeana a drepturilor omului*, C.H. Beck Publishing, Bucharest, 2008.
[5] G. M. Preduca, *Drepturile omului-valente juridice si canonice*, C.H. Beck Publishing, Bucharest, 2011.
[6] ECHR, Osman v. Great Britain, Decision from October 28, 1998.
[7] The Right of Life. Which are the obligations of the state to us from this point of view? www.avocatnet.ro 13.03.2012.

As long as those persons were unarmed or did not present a real danger to other citizens, using the gun only their simply avoidance was considered excessive.

By the interpretation of this decision the conclusion is that ECHR doesn't express a total refusal for using the guns, but it states a condition that of the real social danger, the fugitives represent for the other citizens.

**The obligation to make a concrete and effective investigation into homicide case**

It is mentioned the case of Ramsahai and others vs. Holland. A person was deadly shot after a fight with the Police. Because the life of the policemen was in danger the use of guns was considered as necessary and as a consequence it was appreciated that there was no violation of art. 2.

But from the procedural point of view, it was considered that the investigation didn't accomplish the unbiased and objective conditions because it was done by the colleagues of the involved officers. According to another decision of ECHR (De Cubber) it was mentioned that the justice shouldn't be only done but it should be also seen as done.

**The obligation of the state to prevent killing by lack of diligent**

This means that the dangerous offenders should receive imprisonment so that they are no longer a threat for the other citizens. [8]

**Conclusion**

The right of life has been recognized even before it was mentioned in the New Civil Code of Romania. For example, The Criminal Code of Romania incriminates the acts that affect the right of life, within the Title II, chapter I, section I, called "murder". The offenses against life are: murder (art.174) with the variants of qualified murder (art.175) and the degree murder (art.176), infanticide, involuntary manslaughter (art.178) and the causing or aiding suicide (art.179).

But, the criminal law defends the right of life as a social value and not the right of the quality of life.

The state is the one which has the instruments to assure the effective protection of the right of life and its obligations include not only the regulation in terms but also the need to take measures in order to protect the quality of life.

The legislation of the guarantee of the right of life included also through the Civil Code of Romania is of a great benefit and it seems to complete the existent regulation regarding the quality of life.

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# PROTECTION OF EXTRAPATRIMONIAL RIGHTS IN THE NEW CIVIL CODE

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**Abstract**

*The New Romanian Civil Code, entered into force on 1 October 200, adopted by Law No. 287/2009 and implemented by Law No. 71/2011 integrates the personality rights in to non-patrimonial rights. Considering that personality rights cannot be confused with personal rights and does not integrate the heritage of the person, shall be assessed better their naming extrapatrimonial rights.*

*The measures which may be ordered by the Court for the protection of these rights consists either in the prohibition of unlawful deed, whether it is imminent, or cessation of the infringement and the prohibition for the future if it lasts still or finding illicit character of the committed offence, if disturbing that produced it subsists. The exception to the rule is given in cases of infringement of the rights of non-patrimonial rights by exercising the right to free speech, according to which the Court cannot order banning of illicit acts.*

*In the first part of the article we present a brief analysis of personality rights, and in the second part we present the analysis of extrapatrimonial rights (non-patrimonial rights) defenses.*

**Keywords**: *extrapatrimonial rights (non-patrimonial rights), personality rights, freedom of expression, protection of extrapatrimonial rights (non-patrimonial rights).*

## Introduction

*In the New Romanian Civil Code[1], Chapter II – "Respect of the Person and of His/her Innate Rights", Title II „The Physical Person", Tome I – "Of Persons" (articles 58-81), the concept of "personality rights" appears in the marginal title of article 58, paragraph 1: "Any person has the right to protection of the values inherent to the human being such as life, health, physical and psychological integrity, dignity, intimacy of the private life, freedom of consciousness and scientific, artistic, literary or engineering creation", and article 252 Civil Code.*

*It has been estimated that the general personality right is rooted in the sixth paragraph of Article 30 of the Constitution: "Freedom of expression shall not be prejudicial to the dignity, honor, privacy of a person, and to the right to one's own image". Although the content is indeterminate and ambiguous, it brings the advantage of covering "various current*

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[1] New Civil Code – Law no. 287/2009 on the New Civil Code republished in the Official Journal no. 505/201, in effect as of October 1st, 2011.

*or future circumstances not having been distinctly regulated; it may also include other rights and proprietary interests in the future"*[2].

*Civil liability tends also to protect one's patrimony, not only one's person. Personality rights correspond to a set of innate prerogatives meant to protect the moral or psychological integrity as between individuals, which are often opposed to human rights aiming on their side to limit the powers of the State*[3]. *Such prerogatives are innate rights specific to any human being and may be qualified as subjective rights dowering with legal action. They are non-transferable rights extinguishing upon the holder's demise which cannot pass on inheritors.*

*Personality rights protect man's most cherished non-pecuniary values of a general moral nature such as life, dignity, honor and private life. It is impossible to make a constant and final inventory of such rights as these vary according to historical and social changes. The French literature even speaks of an "inflation of the personality rights"*[4].

*Such proprietary values profit by discretion and confidentiality, whether in respect to personal communications or phone calls or to one's private life or personal data. Personality rights are extrapatrimonial due to their non-monetary nature. Although the New Romanian Civil Code classify personality rights as non-patrimonial rights, the law, considering however that personality rights cannot be mistaken for personal rights or included in one's property, appreciates personality rights as being extrapatrimonial.*

*Our reference literature places extrapatrimonial rights under three categories: a) rights in respect to existence and integrity (one's physical and moral integrity, the right to life, the right to health, the right to bodily integrity, the right to honor, the right to reputation, the right to human dignity); b) rights in respect to natural person's and legal person's details (the right to a name, the right to a denomination, the right to domicile, etc.); and c) rights in respect to intellectual creation, i.e. the rights arising from the literary, artistic or scientific works and from inventions*[5].

*The new theory conveying the patrimonial nature of such rights is based on the interferences between the personality rights as extrapatrimonial rights and the patrimonial rights*[6] *following the acknowledged validity of certain conventions relating to personality rights such as the use of the image, name and even private life.*

*The new Chapter II "Respect of the Person and of His/Her Innate Rights", Section 3 of "Respect to Private Life and Dignity of the Person" of the Civil Code sets out and aims to protect the right to free expression*[7], *the right to private life*[8], *the right to dignity*[9] *and the*

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[2] Ovidiu Ungureanu, *Dreptul la onoare şi dreptul la demnitate,* "Acta Universitatis Lucian Blaga", Iurisprudentia Series, Supplement 2005, p. 20.

[3] Bernard Beignier, Bertrand de Lamy, Emmanuel Dreyer, *Traité de droit de la presse et des médias*, Litec, LexisNexis, Paris, 2009, p. 889.

[4] Xavier Pradel, *Le préjudice dans le droit civil de la responsabilité*, Paris, Librairie Générale de Droit et de Jurisprudence, 2004, p. 123.

[5] Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, sixth edition revised and enlarged by M. Nicolae and P. Truşcă, Şansa S.R.L. Publishing House, Bucharest, 2000, p. 90.

[6] Edith. Deleury, Dominique Goubau, *Les droits des personnes physiques*, Editions Yvon Blais, Montreal, 2002, p. 74.

[7] Article 70 of the Civil Code: The right to free expression: (1) Any person has the right to express freely. (2) The exercise of this right shall be confined under the circumstances and within the limits specified in Article 75.

[8] Article 71 of the Civil Code: The right to private life: (1) Any person has the right to respect of his/her privacy. (2) No one can be subject to invasions of his/her private, personal or family life at his/her domicile or residence or in his/her correspondence, without the consent of or the compliance with the limitations specified in article 75. (3) The use by any means of the correspondence, manuscripts or other personal documents and of one's private information without his/her consent or without the compliance with the limitations specified in Article 75 is also forbidden.

*right to one's own image*[10]*. We cannot but highlight the constitutional value the regulator bestows upon certain rights and freedoms classified as fundamental, probably in an attempt to overcome the normal constitutional rights and freedoms.*

*Defense of the extrapatrimonial ("non-patrimonial") rights,* the new institution introduced in the new Civil Code, Chapter VI "Cancellation of the legal person", Section 3 "Special Dispositions", articles 252-257, stating that the natural person may obtain in court the protection of his/her non-patrimonial rights whenever they are breached or in case of threatened breach. The defense of the non-patrimonial rights of the legal person is similar to the natural person.

Before the coming into effect of the Civil Code, adopted by Law no. 287/2009 and enforced by Law no. 71/2011, the protection of non-patrimonial rights was regulated by Decree no. 31/1954 regarding the natural and legal persons in Chapter III. In accordance with article 54 "the person suffering a prejudice in his/her right to a name or to a nickname, to honor, to reputation, in his/her personal non-patrimonial right of author of a scientific, artistic or literary work or of inventor or in any other personal non-patrimonial right, may address to the court to prevent the perpetration in the future of the act prejudicing all above-mentioned rights. Moreover, the person suffering such prejudice shall ask the court to bind the perpetrator to publish the rendered decision at his/her expense and in the conditions established by the court or to take other actions in order to reinstate the prejudiced right".

In principle, the personal non-patrimonial rights were also subject to protection after the holder's demise and the prejudice caused could be compensated by non-patrimonial means – exemplary damages and only exceptionally by material patrimonial means according to Article 998-999 of the former Civil Code. This Decree was cancelled on the effective date of the new Civil Code in accordance with Article 230, subsection n) of enforcing Law no. 71/2011.

Under the New Civil Code, actions that may be urged by the court to protect such rights resides either in:

a. *the interdiction to commit illegal acts, if such interdiction is threatening (art. 253 par. 1(a) of the Civil Code);*

This action can be entered before the start of the scene. The condition imposed for the exercise of this action, it is the existence of "imminence" in committing illicit acts.

b. *the cessation of the breach and the interdiction in the future, if such breach continues, or the acknowledgment of the illegal nature of the action if the discomfort caused still lingers (art. 253 par. 1 (b) of the Civil Code);*

"The cessation of the breach" is of a preventive nature, with the purpose of termination for the future already has reached to a governmental law. Ban for the future of non-patrimonial rights violations presupposes consumption violations, "but there is a serious and credible threat that another act of infringement will occur"[11].

c. *finding the illicit nature of the crime committed, if disturbing that produced it subsists (article 253 paragraph 1 letter c of the Civil Code);*

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[9] Article 72 of the Civil Code: The right to dignity: (1) Any person has the right to respect of his/her dignity. (2) Any prejudice to the honor and reputation of a person without his/her consent or without the compliance with the limitations specified in Article 75 is forbidden.

[10] Article 73 of the Civil Code: The right to one's own image: (1) Any person has the right to own image.(2) In exercising the right to own image, the person may forbid or prevent the reproduction by any means of its physical appearance or voice or, as appropriate, the use of such reproduction. The dispositions of Article 75 shall apply.

[11] Marilena Uliescu, *Noul Cod Civil. Studii şi comentarii, Vol. I Cartea I şi Cartea a II-a (art. 1-534),* Universul Juridic Publishing House, Bucharest, 2012, p. 571.

Conditions that relate to the nature of this action involve the determination of deed, in concrete and determined the circumstances of fact and products subsist. It is well known that the cessation of wrongful acts does not mean the immediate operation of restitution of the right violated or economic renovation, so disturbing produced pate still exist, possibly in different forms, in relation to the victim's personality or the nature of the deed.

*d. the obligation of the author to illicit acts, at its expense, to the publication of the judgment of conviction (art. 253 paragraph 3 (a) of the Civil Code);*

To restore governmental law violated, the Court may oblige the author, at its expense, to the judgment of condemner or any other necessary measures for the cessation of the infringing acts or to repair the damage caused. To be able to bring this action, it is necessary to the existence of a "judgment of conviction" so that this measure has a complementary character. Through the notion of publishing means any way to lead to the public. The main criterion, common to all the abuses of freedom of expression, in the case of media, is the publication of material constitutive element, essential for the existence of the media. This notion does not have a true definition, not even a clear and accurate pricing of or facts that constitute. Bear in mind the existence or absence of communities of interest, joining the recipients of the communication, whether it is a professional, friendly, associative array, if are a fact of publication.

*e. the obligation of the author to any unlawful acts, necessary measures counted Court to enjoin illegal deed or to compensation for damage caused (art. 253 paragraph 3 (a), (b) the Civil Code).*

The legislature does not give any indication to identify those specified or definable action that could be taken by the Court, so that the question arises whether or not violate the principle of availability, according to which the judge is bound to judge cause within the application with which it was endowed or can bind to other any other measures which it deems necessary having regard to the wording "any legislative measures considered necessary by the Court to reach the restoring the right reached".

The patrimonial remedy of the non-patrimonial prejudice is possible when the harm may be imputed to the author of the prejudicing act and the right of action is subject to the extinctive prescription.

As for defending the right to a name or to a nickname, the person may address the court to obtain either the recognition of the right to a name by the person whose name of challenged or the cessation of the illegitimate breach by the person prejudiced through the total or partial entrenchment of his/her name.

The person claiming to be prejudiced must produce credible proof that his/her non-patrimonial rights are subject to an illicit, current or threatening act and that such act is likely to cause a prejudice difficult to repair.

In case of prejudice caused by means specific to the written or audiovisual press, the court cannot dispose the temporary cessation of the prejudicial act if the prejudice is not serious, the action is not clearly justified (it is permitted under the law or the international conventions on human rights adopted by Romania) and the measure urged by the court is not disproportionate against the prejudice caused.

*Provisional actions* that may be taken by the court consist either in the temporary interdiction or cessation of such breach or in taking the required steps to ensure the preservation of evidence.

Provisional measures provided in article 255 Civil Code, provide for the exercise of emergency procedures, in order to ensure the protection of the rights of non-patrimonial rights more effective and faster, to special measures iterated above that can be used the way common law procedure.

The conditions necessary for the exercise of such provisional measures are: i) the making by the person who is adversely credible proof that his governmental notification necessary subject of illegal actions; ii) illicit action to be present or imminent and iii) the existence of the risk as the illicit action to cause damage difficult to repair.

After fulfilling these requirements, the person who is adversely affected may request the imposition of "especially" the following categories of provisional measures: banning non-patrimonial rights violations, termination of the infringement, take the necessary measures to ensure the conservation of samples. Thus, the Court is not held exclusively and only imperative in these categories of provisional measures, you can take any kind of provisional measures, in compliance with the conditions provided for in article 255 of the Civil Code.

In case of prejudice caused by means specific to the written or audiovisual press, the court cannot dispose the temporary cessation of the prejudicial act if the prejudice is not serious, the action is not clearly justified (it is permitted under the law or the international conventions on human rights adopted by Romania) and the measure urged by the court is not disproportionate against the prejudice caused.

These actions are settled according to the dispositions concerning the presidential ordinance. If the request is filed before the initiation of the action on the merits, the decision stipulating the temporary measure shall also set the deadline for the initiation of the action on the merits, subject to the legal cessation of such measure. Moreover, the claimant may be forced by the curt to pay a caution if measures taken are likely to prejudice the opposite party.

Measures disposed by presidential ordinance are binding from its pronouncement, although temporary, and may cease only after the action on the merits is filed within the deadline agreed by the court or if they are continued as a result of the action on the merits (if admitted). If the action on the merits is dismissed as ungrounded, the claimant must repair the prejudice caused at the request of the interested party through the temporary measures taken. However, if the claimant is not in breach or is guilty of a minor breach, the court, in the light of actual facts, may either refuse to bind him/her to cover the claims of the opponent or to ask for their reduction.

In demise of the holder of the non-patrimonial right, the action for reinstatement of the breached non-patrimonial right may be continued or initiated after the death of the prejudiced person by the surviving spouse, by any of direct relatives of the deceased and by any of the kindred up to the forth degree. The same may file the action to reinstate the integrity of the deceased's memory.

In France, legal seizure is by its seriousness an exceptional measure that the judge, whether or not on the merits of the case or under special proceedings, shall only dictate in case of emergency if the harm to one's private life appears to be "intolerable and causing a prejudice that the subsequent compensation granted by the trial judge cannot cover"[12].

The French Press Law of 1881 stipulated only the authority to seize four copies of the challenged publication in order to preserve the evidence, without considering such measure as a punishment (article 51), while the option for the civil liability under the common law, specified in Article 9, provides much more protection to privacy through prevention or stopping of the invasions of privacy and the large panel of measures available to the judge, such as the order of publication seizure or foreclosure, the order to remove or mask certain portions of the text, to insert corrections, to bind the parties to destroy books not rectified, to reverse numbers or to publish the decision at the respondent's expense.

As a measure established in the council chamber, in case of prejudice to one's honor or reputation, the person in question may address the courts either by following the

[12] TGI Paris, référé du 21.02.1970, JCP, 1970, II, 16293; TGI Paris, référé du 18 janvier 1996, „Affaire du Grand Secret", seizure of the book published by the personal physician of François Mitterrand, Légipresse no 128, 1996, III, 15.

proceedings specified in Articles 808 and 809 of the French Code of Civil Procedure regarding the temporary ordinance or on the grounds of the dispositions in Article 9 of the Civil Code.

Such provisional measures are consistent with the dispositions of the European convention for Human Rights as asserted in the very practice of the Strasbourg Court in Leander versus Sweden on March 26, 1997 whereby such limitations are authorized by law, as well as by legislative rules, with the view to protect the reputation or the rights of the other, provided such rules are available to the predictable person of interest.

**Conclusions**

The rules governing institution extrapatrimonial rights are not in majority norms of the substantial law, related to the specificities of the Civil Code, but also procedural norms characteristics to the Civil Procedure Code, as found in article 253-257, concerning the procedure to protect the extrapatrimonial rights.

On the other side, many of the legal provisions, such as article 252 Civil Code, relative to article 58 paragraph 1 of the Civil Code concerning the values of "intrinsic human being, such as life, health, physical and mental integrity, dignity (...)" seem rather normative constructions of constitutional law, through which I regulates the production of other rules.

Therefore, in consideration of all these new changes made in the extrapatrimonial rights protection without a history of judicial practice and doctrine, will lead the courts dealing with a terrible battle in the interpretation and proper application and probably, often fragmented as to any beginning, the proportionality principle, endorsed and required by the European Court for Human Rights in its large practice and guidance.

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# THE PROCEDURAL AND NORMATIVE OVERSIGHTS WHEN DOING A SURVEY REPORT. THE MEDICAL-LEGAL EXPERTISE VERSUS JUDICIAL SURVEY IN MEDICINE

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**Abstract**

*The study attempts to present an abnormality in the Romanian system of expertise.*

*I will pass in review the normative documents that regulate the medical-legal expert's activity and those that organize the activity of the judicial expert in medicine, ascertaining a different way of approaching the two kinds of expertise, especially the criminal one, by the bodies with judicial responsibilities. In the end, there are solutions advanced with a view to normalizing the situation.*

**Key words**: *expertise, medical-legal expert, medical judicial expert.*

## Introduction

*Presently, the medical-legal survey is relative to the judicial bodies' activity which, thus, draws on the knowledge acquired by certain specialists within the evidence process, the medical-legal expertise being an important means of probation.*

The activity of the medical-legal services in Romania, is regulated by Government Ordinance no. 1/2000 including all the subsequent amendments and additions, being bound to carry out the surveys in the terms of article no. 117 CPP (Criminal Procedure Code, that is in first degree murder, psychiatric expertise and when the necropsy had not been carried out although it was necessary. The activity of judicial technical expert in the specialties of pharmacology-medicine-dentistry is regulated by the provisions of Romaniain Government Ordinance no. 2/2000 including all the subsequent amendments and additions.

Regarding the legislative situation anterior to the Decision of the Romanian Constitutional Court no. 143 of 5$^{th}$ of October, 1999, we mention that according to article no. 120, paragraph (5) of the Criminal Procedure Code, the parties did not have the possibility to ask the designation of a recommended expert, who would participate in the development of expertise activities if the latter is carried out by a medical-legal institute, by a criminal expertise laboratory or any other specialty institute. Practically, in this situation, the criminal prosecution body or the court of law would address these institutions with a request for expertise, without giving the opportunity to the involved or regarded parties to designate in their turn another expert to participate to the expertise development. By the Decision no. 143 of 5$^{th}$ of October, 1999, the Romanian Constitutional Court actuated that "the provisions of the article no. 120, paragraph 5 of the Criminal Procedure Code contravene to the provisions of article no. 24, paragraph (1) of Constitution, which guarantees the right to defense". In the opinion of the Court, not giving to the parties involved in a criminal process the right to

request for an expert recommended by them to participate to the expertise development when this is about to be carried out by a specialized institution according to the law, unaccountably restricts their right to defense.

Hereinafter, the Romanian Constitutional Court has ascertained that if the expert recommended by the interested party does not participate to the expertise development, the nonparticipation cannot be corrected by its right to request ulterior explanations on the expertise report or filling in the incomplete expertise or carrying out new expertise when, due to the position taken by the party, the judicial body estimates that the expertise was not carried out professionally and correctly. The Court has determined that "the provisions of the article 120, paragraph 5 in the Criminal Procedure Code are unconstitutional because they specify that the provisions of the paragraphs 3 and 4, referring to the right of the parties to ask the appointment and an expert each recommended by them, who would participate to the expertise development, is not applicable in the situation of the expertise specified in article 119, paragraph 2, and the parties will have this right in all situations, disregarding the place where the expertise would be carried out".

In this context, we have to mention the fact that the article 119 of Criminal Procedure Code regulates the official experts' situation and have to view it in correlation with the whole "X Section – Expertise". It enumerates the surveys of expertise that, according to the law, are mandatory to be administered and who the official experts are, establishing within the article 120, paragraph 3 and 4 that the parties have the right to ask themselves the appointment of a recommended expert who would participate to the development of the expertise. If, by the time of the above mentioned decision of the Romanian Constitutional Court, these provisions were applicable to any other surveys of expertise except the medical-legal, criminal ones or those carried out by any specialized institute, after 1999, these provisions were applied disregarding the kind of expertise required in the criminal lawsuit.

To the same effect has the European Court of Human Rights advised, which in the case of Bonisch versus Austria, in the 6$^{th}$ of May, 1985, had highlighted the fact that the lack of balanced treatment within the lower Court is the result of the inequity between the view of the expert suggested by the party and the official expert's view.

As a result of the Romanian Constitutional Court decision, the legislator took all the necessary measures and, beside the abolition of the provisions of article no. 120, paragraph (5) in the Criminal Procedure Code declared as unconstitutional, adopted a series of specific detailed settlements by which he organized the way in which the state authorities applied the dispositions through the Constitutional Court decision.

As a consequence, the following normative documents were modified and completed:

1. those in the article 28, paragraph 1 of Government Ordinance no. 1/2000 regarding the organization of the activity and operation of the legal medicine institutions, by which it has been stipulated that "the legal medicine institutions, with the service of a legal medicine Superior Council, elaborate lists comprising experts on different levels of competence, out of whom the interested parties can request, with payment, coroners or other specialists that would attend the designated official experts, according to the law, for certain medical-legal activities;
2. those in article 18 of Government Ordinance no. 2/2000 regarding organizing the activity of the judicial and extrajudicial technique expertise, by which it has been specified that "the interested party has the right to request that, beside the person designated as expert, another expert or specialist should participate in the future to the expertise development, at their expense, designated by the party, out of the category of people specified in the article 11-14";
3. those in article 1, paragraph 2 of Government Ordinance no. 75 of 24$^{th}$ of August 2000 regarding the criminal experts' authorization, by which it has been specified that "(2) in the development of the criminal expertise by the official experts, experts appointed by the judicial

bodies can also participate, at the request of the parties and recommended by these, authorized in the terms of the present ordinance";

In this context, we stipulate the fact that the dispositions mentioned above were modified in such a way that, during the development of the criminal expertise by the official experts, experts designated by the judicial bodies can also participate, at the request of the parties and recommended by them. The problem is that, at the date of the Government Ordinance no. 2/2000 issuance, there were not judicial experts in medicine, for this reason the Romanian Constitutional Court decision should be updated because, after 2010 there were only 3 judicial experts in medicine, and presently there are 6 on the Ministry of Justice list.

There has to be mentioned that there are more inadvertences:

1. The expert in legal medicine is attested by the Ministry of Health Ordinance at the proposal of the Superior Council of legal medicine only out of the public sector (legal medicine services, legal medicine institutes, etc.), thus not existing any medical-legal expert independent of the state hierarchy;
2. The judicial expert in medicine sits an examination at the National Institute of Magistracy and is authorized by the Ministry of Justice in the whole medicine subject (the legal medicine is a subject that is studied in the sixth year at the University);
3. The legal medicine is not called Judicial Medicine anymore, but the judicial expert in medicine does not have in the criminal law any right in comparison to the medical-legal expert;
4. In the civil law, the judicial expert in medicine is recognized as official expert by the courts of justice;
5. According to the Government Ordinance no. 1/2000 regarding the organization and operation of legal medicine services with all the subsequent amendments and additions, the professors who teach legal medicine subject, who can be other than coroners in the higher education systems that are accredited and authorized, are rightful members in the Superior Council of legal medicine;

**The present situation of developing the expertise in Romania and the problems the judicial system confronts with.**

Out of the legislative framework applicable in civil matters, there can be observed that the Government Ordinances no. 1/2000 and no. 2/ 2000, with all the subsequent amendments and additions, create different conditions of operating the expertise in such a way that the medical-legal official experts would be visibly in a higher position compared to the ones recommended and requested by the parties or the judicial ones in medicine, in such a way that the situation in the expertise field in Romania has remained almost unchanged in the sense that developing the medical-legal expertise constitutes only the exclusive attribute of the legal medicine Services and the legal medicine Institutes, that are part of the public system, respectively the National Institute of Legal Medicine which is ancillary to the Ministry of Health.

This situation generated a series of critiques; some voices claimed that, in the field of the medical-legal expertise, with the exception of the cases provided by art. 117 of the criminal procedure code, there would be an exclusivity of the state, and this state of things would injure the defense right of the litigants who would lack the possibility to address to other entities (laboratories) in order to perform some independent judicial medical expertise.

Analyzing the above mentioned normative documents we consider that these findings are, in their ensemble, justified and pertinent, considering the fact that their related profile institutes and services function in Romania only in the public system. As a consequence, it can be observed that a change of the present situation can be accomplished only in a reform in the field of the medical legal expertise versus the medical juridical expertise that will take place at the level of the entire system, on the following coordinates:

a) the possibility of performing the juridical medical-medical legal expertise by the universities, institutes, private laboratories also, together with those from the public system;
b) the harmonization of the procedures applicable to the official medical legal experts, appointed by the juridical organizations, with those applicable to the juridical medical experts recommended by the parties;

The need of the reformation of the juridical expertise system in ensemble was underlined also in the project "The Consolidation of the Capacity of Juridical Expertise (MATO6/RM/8/2)" that took place in the period January – October 2007, under aegis of The Ministry of Justice from The Netherlands in partnership with The Ministry of Justice from Romania. The main recommendations formulated by the Dutch experts regarded:
- the fundamental reorganization of the system of juridical expertise and establishing it on new principles of organization and functioning;
- the unification and harmonizing of the procedures provided in the normative document regarding the juridical experts with normative documents that regularize the activity of the experts which can be recommended by the parties so that this last category could participate effectively in the technical activity of performing the medical legal expertise;
- the elimination of the state monopoly in performing the expertise, by establishing some mechanisms of evaluation and accreditation of some private medical legal/juridical institutes, that could perform their activity in this field this way, so exclusive up to the present;

Another problem observed in practice, whereby the juridical system is confronted, is the long period of time of the penal procedures. In this regard, it was observed that the large terms of performing the expertise could lead to the unjustified continuation of the penal trial period, with all the consequences that could come of this.

This aspect is valid also for the other categories of expertise. In conclusion, considering all the above mentioned aspects, we appreciate as being causes that lead to the delay of the trials the following:
1. the deficit of employees specialized on types of expertise from the public institutions and their related profile laboratories;
2. the lack of the harmonized procedures between the legislation applicable to the official medical legal experts and those recommended and chosen by the parties, aspects that stop the participation of the last professional category to the effective performing of the expertise, circumstance that could lead to many contestations, requests of clarification and performance of new expertise and counter expertise;
3. some litigants are interested directly of the delay of the juridical trial, intending the realization of the prescription terms, by repeated requests for the applications of the medical legal expertise to be admitted in the services of legal medicine, that have a period of solving relatively large, and the inducing, by repeated expertise and contrary points of view, of a state of confusion regarding the state of things inferred to the judgment. In the same time it can be observed that the acceptance of the opinion that the system doesn't have to be reformed, accepting the promoting of a simple policy of excessive supplementation of the number of experts for some specialties is not a solution due to the fact that;
4. some significant fluctuations could appear in the juridical system in the way that, depending on the economic and social criteria, some types of expertise can be directly influenced in the aspect of their dynamics and evolution;
5. from the technological point of view the medicine will register important progress each year and the implementation of some professional continuous training programs will be difficult to accomplish, on one side due to the fact that such programs will be expensive from the financial point of view and on the other side the experts will be excessively loaded with work, the terms of performing these works pressing them constantly, and they will not have

the necessary time to be informed about the new authorized methods or procedures for their field of expertise;

6. the interdisciplinary character of medicine and its affinity with other field creates numerous difficulties when the juridical organizations have to individualize the problems that need to be solved by technical expertise in the medicine or by the medical legal expertise, both activities being different types of the juridical expertise;

Their elimination in order to normalize the situation presupposes, on the basis of our appreciations, the adopting of some complex measures in the plans of recovery which are well structured, and which can be made by initiating some real reforms on the level of the entire system of expertise from Romania.

In the absence of the global reform, the measures with matchlessly and inconsistent character would only have a temporary effect, the essential causes that determine the presented disfunctionalities cannot be eliminated.

**The necessity and the objectives of the reform**

Creating an adequate background where the activity of expertise in the private system could be performed, a background that could assure the quality of the works and respecting the deontological principles agreed on the level of European structures of juridical expertise.

The main means of reforming the system is the modification of the present regulation in the field, in the way of defining the notion of deregulation of the condition of performing the expertise, allowing the authorized independent experts to perform also medical legal expertise in the penal trial.

Also, by giving up the exclusivity of performing the expertise by official experts, it aims to assure all procedural guarantees for the parties from the penal trial, in the way that the juridical reports of expertise will offer a higher degree of objectivity.

**Conclusions**

**Precise measures of reform**

In order to accomplish the reform of the present system of medical expertise, in ensemble, it is necessary to take the following measures:

1. the liberalization of the activity of medical legal expertise by modifying the provisions of the Government Ordinance no. 1/2000, with the further modifications and additions, which regulates this activity in the present;
2. the recognition of the juridical expert in medicine and in the penal trials, as the official expert, by modifying the Government Ordinance no. 2/2000 with the subsequent modifications and additions;
3. founding some private laboratories of juridical medical and medical legal expertise where the experts could develop their activity, either as authorized individuals in individual laboratories, or as associates in laboratories founded as professional civil company with limited liability and juridical person;
4. establishing some conditions of authorizing the private laboratories of medical juridical and medical legal expertise;
5. assuring the independence of the private laboratories functioning in relation to the authorities, in the conditions when they are certified that they meet the International standards of quality by an accreditation organization recognized in the member states of the European Union;
6. establishing some conditions of validity of the expertise reports performed in the private system;
7. establishing some criteria and conditions that the experts should meet in order to be authorized, which would assure a guarantee of their competence and integrity;

8. establishing a maximum limit of the taxes that would be perceived in the public system and in the private system so that the access of the citizens to this method of evidence would not be closed by prohibitive costs;
9. establishing some rights and obligations for the experts from the public system, that would assure their stability in this system avoiding their migration to the private system;
10. assuring a high level of professional training of the experts by including them in programs of continuous professional training and sanctioning those who do not participate to them.

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# THE SOCIAL DIMENSION OF CIVIL LIABILITY. FUNDAMENTAL BENCHMARKS

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**Abstract**

*This study examines the concept of liability, as seen from a social perspective, whether we relate to civil liability as an essential form of manifestation of essential legal liability. The civil liability is not a creation of the law, but it finds the values that it defends in the social normativity, as the law emerged along with the society.*

**Keywords:** *social liability, civil liability, social normativity, prejudice.*

## Introduction

*It is undeniable that the liability exceeds the law domain, it belongs and it claims intrinsically the social sphere, by its very nature, thus referring to the social liability. The scientific concerns to theorize and to deepen the concept of social liability are recorded at the level of various social sciences, which places the eternal "homo sapiens" in the center of theories. Whether we present from the perspective of the philosopher, sociologist researcher or politician, or we approach the issue from the ethical and moral, legal or economic point of view, the concept of social liability is circumscribed to human existence. And because the law appeared along with the society, the first attempts of human cohabitation have generated also the first manifestations loaded with legal substance. One of the forms of legal liability, the civil one, claims intrinsically the social origin, contributing by the nature of its principles to the protection of the subjective rights of the person.*

## The Social Liability and its Forms of Manifestation

The man, a social being, participates within the society with his whole mechanism of experiences and concerns, he relates permanently in a common language with the rest of his peers, in an open and reversible mechanism in which, the society, in turn, becomes "an educator of human reason."[1] Therefore, the human relations are established and implemented in accordance with certain rules (whatever their nature, seen as existential landmarks), established or predetermined[2] by the integrating collectivity, thus by the society.

The conduct of an individual, as Nicolae Popa mentioned, can be described as a "pragmatic sequence of attitudes, active or passive, as executions of certain operations or programs and as expectations or abstentions in other circumstances..."[3]. We conclude that, depending on the diversity of human activity, it widens also the scope of behavior rules

[1] Alain Supiot, *Homo Juridicus. Eseu despre funcția antropologică a dreptului*. Translated by Cătălina Teodora Burgă and Dorin Rață, "Rosetti Educațional" Publishing House, Bucharest, 2005, p. 11.
[2] *Ibidem.* The same author identifies in his work the sources of law by acceding to the "homo juridicus", namely: the law and the contract, justified by what we are obliged to respect and to what we oblige ourselves through a free agreement of will. Legally, these sources transpose within the principles "*pacta sunt servanda*" that is the principle of contractual freedom.
[3] Nicolae Popa, *Dimensiuni ale conduitei umane. Perspectivă praxiologică. In „Conduită, norme şi valori"*, Bucharest, "Politică" Publishing House, 1986, p. 19.

problematic, rules that differ, depending on the nature and their content: moral, ethical, religious, legal, economic, political rules, etc.[4] The scope of social liability covers therefore a wide range of manifestation such as: moral, ethical, legal, political, economic, religious liability, etc. With a wide range of manifestation, the social liability diversifies in relation to the nature and the content of the norms which governs it and obviously they can coexist. For example, different forms of social and moral liability can sometimes be merged into the legal one or vice versa. While the legal norm relates to the social individual, a member of a group, which can compel behavioral reactions, the norm of moral liability comes from within him, targeting the self-conscious individual.

Whether we are refer to humans as physical, biological, spiritual entity (all such rules are viewed cumulatively, they do not exclude themselves) or as *legal entity*[5], the man identifies in this global social horizon with a projection of a permanent mechanism of interaction at all levels, aiming at the satisfaction of some interests, within the social normativity[6] limits. This normative dimension requires a behavioral model to meet certain social values.

Our intention is not to exhaustively analyze the ratio problem of social normativity in relation to the individual and his behavior, which mainly is required to the philosophical, psychological, sociological domain[7]. However, the subject submitted to the research requires a substantive approach to the problem. So why do we need these limits of the social normativism?

Human behavior, in full compliance with the principle of freedom, can overcome by certain manifestation what the social norms have imposed, without finding a correspondent within these norms that balance the social order. Gh. Boboş states that, in case of violation or breach thereof, it shall trigger "certain social reactions" for rejecting the behavior of the person who has deflected from the norm. And thus, in the case of deviation or non-compliance, it intervenes as a remedy to social liability.[8] We can say therefore that the liability (social) becomes a compulsory reference to social order.

Defining and assessing the types of actions and behaviors in the society, the law and the legal normativity have mandatory features, establishing what must do the individuals engaged in specific social actions, what they can do or what it is prohibited. Any norm involves both its acceptance and compliance by the people.

The social norms also contain rules for the behavior of individuals, describing and detailing the ways in which the values should be embodied in legitimate and socially acceptable behaviors. The option of a person to choose to conduct an activity, assuming as an effect a particular conduct, involving the debut of making up his social responsibility. But the

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[4] Popescu, Adam, *Teoria dreptului*, Bucharest, "Editura Fundației România de Mâine" Publishing House, 1999, p. 173.

[5] Mircea Djuvara, *Teoria generală a dreptului. Drept rațional, izvoare și drept pozitiv*, All Publishing House, 1995, pp. 135-137. The author identifies only the human person as participant within the social relations: "it can only conceive a legal relationship among people".

[6] The specialized literature specific to the general theory of law domain ruled unanimously on the subordination of social activity normativity, i.e. a set of norms, principles, social rules. For a general overview of the issues, see Gheorghe Boboș, *Teoria generală a statului și dreptului*, "Editura Didactică și Pedagogică" Publishing House, Bucharest, 1983, pp. 260-262; Nicolae Popa, Mihail-Constantinescu Eremia, Simona Cristea, *Teoria generală a dreptului*, Ediția a 2-a, All Beck Publishing House, Bucharest, 2005, pp. 287-288; Andrei Sida, *Teoria generală a dreptului*, Vasile Goldiș University Press, Arad, 2004, pp. 190-191; Adam Popescu, *op. cit*., pp. 173-174.

[7] As samples of normative thinking, we may give some Socratic assertions as: "we must not do harm", and efforts to answer questions such as: "what is right, what is moral, what is required to do / not do?"

[8] "Social liability involves the social sanction of the attitude chosen by the individual in cases of discrepancy between its behavior and the stated social norms." See George Boboș, *op. cit.*, p. 261.

human activity presupposes a variety of dimensions, of manifestations that are not in their integrity, subsumed to the regulations of the social norms to which we referred earlier.

By an extension on this interpretative approach, the social normativism leaves sometimes at hand to individuals to procure their own conduct in the establishment of certain social relations[9], in which case there is no overlapping of the imperative will of the society of the individual. In this situation, the individual has at his disposal, along with those of legitimate behaviors, also a freedom space of the choice of their behavior.[10] But in this respect, their manifestation dictated by the principle of freedom is subordinated to social consciousness, so that the freedom and the liability become two complementary and inseparable concepts. The conclusion: man is not conscious and free unless he is responsible[11]; and vice-versa.

In many research papers in the field of law theory, the authors claim the same point of view: the liability is pointless if the individual does not have free will, the freedom of choosing from many variants of behavior. Freedom of choice is a real prerequisite for social liability, a liability which requires a conscious attitude, reflected by a private or public behavior that reflects the awareness of this attitude.[12]

But what would happen if freedom would not be controlled by the effect of the social norms? Some voices argue the occurrence of the social disasters, even anarchy, while other more pragmatic researchers analyzed the sources of guilt and penalty, when a pre-existent rule is violated, referring to all types of sanctions: moral, legal and civic. In contrast, a normal social attitude of the individual reinforces the belief in the available individual freedom. In this case, the role play between liability-liberty gives birth to an ethics of the human behavior.

We may retain the definition of social liability as being that special social relationship established between the individual and the society, the act or the conduct of the individual being surrounded by the society in the limits of some rights, freedoms, duties, prerogatives established by the rules, principles or values of that society and whose failure attracts one or other forms of social sanctions.[13]

**The Specifics of Civil Liability as Aspect of Social Liability**

The social liability in relation to other forms of liability forms translates through the relationship between gender and species. One of these derived forms is represented by the legal liability, "the cornerstone"[14] of all social liability.

The man was forced to think and act legally, a conduct symbolically represented in Latin *ubi societas, ibi jus*, creating the corpora of the legal norms[15] by which he organized his

[9] We refer to the legal relationships of private law governed by the norms, especially in the contractual domain.
[10] Andrei Sida, *op. cit.*, p. 233.
[11] Yvonne Lambert-Faivre, *L' Ethique de la responsabilite*, in RTDC no. 1/1998, p. 2 apud Constantin Teleagă, *Armonizarea legislativă cu dreptul comunitar în domeniul dreptului civil. Cazul răspunderii pentru produse defectuoase*, Rosetti Publishing House, Bucharest, 2004, p. 22.
[12] The same opinion is shared by the author Nicolae Popa, who believes that the social action is the direct liability framework and that freedom is a fundamental condition of liability. "The social liability occurs while the individual deliberately chooses a variant of social behavior, it implies autonomy regarding the choice of its social action". In this regard, see Nicolae Popa *op. cit.*, p. 198. Also see Dmitrii Baltaga, *Teoria răspunderii juridice: aspecte doctrinare, metodologice şi practice*. Teză de doctor habilitat în drept, Chişinău, 2008, p. 32.
[13] Andrei Sida, *op. cit.*, p. 234.
[14] Liviu Pop, *Drept civil român. Teoria generală a obligațiilor*, Lumina Lex Publishing House, Bucharest, 1998, p. 163. The metaphorical formulation of the author develops on a legal level an overwhelming reality: the social activity, at the size of the one which develops nowadays, requires optimal and legal coordination harmonization of rules of law with the individual's behavioral intentions, accompanied by the related restraints.
[15] The legal norm is defined as a rule of general, impersonal and mandatory, repeatable conduct, issued by the state power, accomplished, if necessary, by the coercive power of the state. See, Gheorghe Mihai, *Fundamentele dreptului*, I-II, All Beck Publishing House, Bucharest, 2003, pp. 290-291.

own needs. The social order is maintained by corroborating these principles, norms, rules[16], resulting in a complex legal normativity, the rule of law. In this context, it is natural the question what is specific to legal liability?

In one referential approach to the meaning of the *liability* term in the *Dicționarul explicativ al limbii române*/*Explanatory Dictionary of the Romanian Language*, the notion of liability[17] is defined as "*the fact of answering; the obligation to answer to the performance of an action, task, etc., liability, and in the legal sense – the resulting consequence from the failure of a legal obligation. To answer is to be accountable, to be responsible, to vouch for someone.*"[18]

The French dictionary *Le Robert* indicates the polysemy of which enjoys the term submitted to the discussion: "*1. The obligation of ministers to resign when the legal power grants the lack of confidence vote; 2. The obligation to repair the damage caused by his own fault or (in some cases) the one provided by law, 3. Intellectual or moral obligation to repair the prejudice by the execution of the duty, obligation, contract"*.[19]

Since the rules of judicial conduct have different natures, it also emerges the form of civil liability, which is represented by a fundamental category, a complex institution of civil law. In this sense, from the economy of past civil legislation, but also from the current one, which do not explicitly define this institution, we may specify that the civil liability represents a form of legal liability, which consists of a compulsory legal relation, according to which a person has a duty to repair the unjust prejudice suffered by another person.[20]

In addition to the civil liability qualification as a form of legal liability, we should mention that the civil liability also represents a legal institution that includes all the rules of law governing the obligation of persons to repair the damages caused by the breach of contractual provisions or by the extra-contractual facts.

Regarding the importance of civil liability as a form of social liability we retain the practical utility of civil liability which, having as aim the repairing of any prejudice caused to a person, there are grafted sometimes other forms of liability which accompanies or complements them in order to restore the order of law. Regardless of its nature, conflicting or contractual, the civil liability, through its functions, principles and conditions, aims at the restoration of the rule of law. This assertion is true even if the civil action, which has as finality the repairing of the prejudice, it is not started ex-officio, as in the case of criminal liability, but at the demand of the complainant. This aspect claimed to private law does not outline the idea that in the event of such prejudice (of civil nature), the society would not be interested in repairing it. The degree of guilt of the offender is submitted also to a social odium. The victim reports this injustice, addressing to those in the position to investigate. The arguments are supported also by the fact that the victim is not the one who sanctions the illicit act of the offender, but the society still, by the state bodies entrusted with this role. Also, the coercive force is still the prerogative of those state entities.[21] In this case we are analyzing the classical concept of a repairing liability.

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[16] All these current normative rules in a state unit form the positive law.

[17] Comes from the Latin word *respondere.*

[18] *** Dicționarul Explicativ al Limbii Române, ediție revăzută și adăugită, "Univers Enciclopedic Gold" Publishing House, Bucharest, 2009, p. 918.

[19] Robert, P., *Dictionnaire alphabétique française*, Paris, 1980, p. 880. In *Dicționarul explicativ Oxford* is stated: "1. Being responsible means doing something without being forced or without advising someone, 2. The fact for which a person is liable is called obligation".

[20] Sache Neculaescu, *Reflecții privind fundamentul răspunderii civile delictuale* In Dreptul nr. 11/2006, p. 41.

[21] For a comprehensive view of this issue, see Eugenia-Carmen Verdeș, *Răspunderea juridică. Relația dintre răspunderea civilă delictuală și răspunderea penală*, "Universul Juridic" Publishing House, Bucharest, 2011, pp. 75-78.

The evolution of society characterized by resizing the activities and relationships between individuals highlighted lately the superiority of the preventive function of the liability[22], comparing to the classical repairing function. The precautionary legal principle derives and it is based on social considerations and attitudes: it has as objective the prevention, reduction, or even avoiding potential risks to human life and health, and also for the environment.[23] Hence the contribution of civil legal liability in the prevention and discipline of contractual and extra-contractual civil legal relations, that is it permanently arises in human consciousness the idea to act with care, not disturbing or damaging the interests of others.

**Conclusions**

According to the above we deduce that every individual has a "debt" to the society by which it affirms as legal personality, increasingly dynamic by the chosen social conduct. It should be mentioned that it is excluded for each individual to meet its own system of rules that could be applied individually. Thus, we consider that a certain content prescribed by a rule applies to all individuals formed in defined communities, retaining the general feature[24] and the repeatability of social normative dimension. The civil liability through its functions and its finality accompanies and supports the development of social life, contributing to the protection of subjective rights of individuals.

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[22] This theory was developed and supported in our doctrine by several authors. We note the scientific contribution on the issue presented by the author Lacrima Rodica Boilă, *Răspunderea civilă delictuală obiectivă*, C.H. Beck Publishing House, Bucharest, 2008, pp. 73-79.

[23] Liviu Pop, *Tratat elementar de drept civil. Obligațiile,* "Universul Juridic" Publishing House, Bucharest, 2012, p. 402.

[24] Relating to the individual's personality, the rule of law, by the established conduct, it is characterized by generality and repeatability.

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# EVENTS PRECEDING THE ESTABLISHMENT OF THE NORTH ATLANTIC ALLIANCE PACT

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## Abstract

This paper presents the events preceding the establishment of the North Atlantic Alliance and the role played by every international power in its accomplishment. There is also presented a chronology of international facts and factors taht led and influenced this major world treaty.

**Key words***: alliance, doctrine, history, events*

### Introduction

*Certainly, the statements of the victorious powerful promising leaders met the hopes of the people for peace, security, cooperation and also proclaimed the United Nations Charter Preamble.*

*Paradoxically, the noble goals to crush the aggressors unified the great powers which made an alliance that was strong (in which western democracies had fought with great power with the Communist totalitarian regime).*

*Unfortunately, this unit could not have continuity, because, before the end of the antifascist war between the West and the Soviet Union serious differences and disagreements appeared.*

*The way in which the Russians have fulfilled their military obligations has made the West look with confidence to them, as true friends.*

### 1.1 End of World War II

End of the Second World War on 8 and 9 May 1945 (for some units and Romanian including Austria and Czechoslovakia until 12 May) meant the victory of the Great Coalition (the given name): U.S., USSR, England and United Nations against the Axis powers.

There should not be overlooked that the capitulation of the Third Reich also counted France among the winners of the signatories.

Also, in the Pacific and Asia regions, the great conflagration ended on September 2nd with the Japanese surrender to the U.S., China, England and the USSR.

Yalta myth has developed that, somehow or other, Roosevelt and Churchill gave Stalin Eastern Europe.

In the Yalta agreements, it was agreed that people in these countries should decide their own government through free elections.

Stalin, the Soviet political leader believed that the Red Army would be accepted as a liberating army.

Kremlin leaders have been very affected when they discovered that the red army was regarded by the Polish, Romanian and others as a new invasion force.

According to the Westerners, Stalin hoped to reach the Atlantic, this being one of the reasons for not having fulfilled the Yalta agreements.

One more reason which led the Soviets to believe in this, was the existence of the strong communist parties in France and Italy.

In these circumstances, the Communist leaders of these countries have reported to Moscow that they could take power, which is possible, if the U.S. had not helped to rebuild Western Europe.

General Marshall, Army Chief of Staff of the U.S., for example, in a telegram on September 9th 1944, acknowledges Harry Hopkins, the closest adviser and influential foreign policy of President Roosevelt that the relations with the Soviets, now when the end of the war could be seen, took a surprising obvious turn evident in the last two months.[1]

**1.2 Truman Doctrine**

There should also be shown the role of President Truman and the Republican senator in Michigan, Vandenberg, who was chairman of the Foreign Relations Committee.

Actions taken have included aid to Greece which was subjected to the communist attack, and Turkey that was threatened in that period.

The Foreign Minister and the Prime Minister of Belgium, the future NATO General Secretary, Paul Henri Speak, assessing the Soviet positions in the war, said that: "One great power is out of the war by conquering other territories, an this power is the Soviet Union".

During the Second World War, with its policy, Stalin had managed to annex Estonia, Latvia, Lithuania, parts of Finland, Romania, Poland, Czechoslovakia, a total of 500 000 km2 with a population of over 23 million inhabitants.

After the victory over the Third Reich, this expansion has been strengthened by the establishment of the zone of influence and control in Albania, Bulgaria, Romania, Poland, Czechoslovakia, Hungary, and East Germany, where, between 1945 - 1948 the pro-Soviet governments and Communist regimes were installed.

During the Yalta Conference, Churchill praised his that “Marshal Stalin's life is the most precious for the hopes and hearts of all”.

Also in the spring of 1945, in the House of Commons, the British Prime Minister and Tory leader gave a blank check to the USSR, declaring: “I know of no other government to better fulfill its obligations than the government of Soviet Russia”.

After the sudden death of President Roosevelt, the new U.S. chief executive, Harry S. Truman asked Harry Hopkins to go to Moscow to discuss with Stalin the new guidelines of the White House dweller and to clarify many rough seas appeared between allies.

Although health was very grave, he went to the Soviet capital, where he had several hours of talks with Stalin.

In the two weeks he exposed Stalin's new administration, the hopes and determination to go forward under the Yalta agreements, the so hard drawn new postwar policy towards

[1] NATO-Partnership and Cooperation Handbook, Office of the NATO Information and Press, Brussels, Nemira Publishing House, Bucharest, 1997, p. 7.

cooperation and trust, clearly indicating a series of U.S. grievances for Soviet actions and attitudes including what happened in Romania by Dr. Petru Groza's government imposed in March 1945. Stalin recalled that the U.S. attitude toward the Soviet Union has cooled long after Hitler's defeat, alluding to the huge Soviet human sacrifices.

By the politico-diplomatic solutions found and the established arrangements, Hopkins's visit to Moscow was assessed as a success, though, there immediately reappeared new grounds and sources of tension.

By the views expressed by Stalin and the Soviet delegation to the Conference of Heads of State and government of the three great powers at Potsdam in July-August 1945, just six months after the Yalta Conference, they let the Soviet Union see clearly what was intended.[2]

If the argument on its security interests in Poland, Romania, Czechoslovakia, Bulgaria and Germany were seen as explanations of Anglo-American postwar Soviet policy, its applications to include Communists in the Greek government, the Soviet interests in Tangier and Libya as the desire to annex the two provinces of Turkey and to control the Black Sea straits, have been taken as warning signals to the West.

It was clear that substantial changes had begun to disintegrate the alliance and the political atmosphere.

It must be remembered that the overall political climate in the West was very supportive and friendly with Stalin and the Soviet Union.

The Potsdam Conference, which will be in effect (although the few common decisions taken by Heads of Governments of the three great powers), was rather a meeting of the disagreements than one of the agreements.[3]

This confrontation will be considered as a first point in the early Cold War history.

The World War II -the influential diplomat, Deputy Secretary of State, a member of the circle of political analysis of the interwar years in Riga, Joseph Grew, wrote that there was a transfer from totalitarian dictatorship and the power of Germany and Japan to the Soviet Russia.

The awakening of the West was a gradual process, but, they were puzzled at first by what was happening around them.

America was certainly unprepared for a political war, lacking the experience and tools - a famous analyst, Walter Laqueur, writes. He pointed out that "the West was essentially in a defensive posture - it had few means to cope with the dynamic and aggressive Soviet policy and the communist parties.

Awakening the West, which was really the way to create the North Atlantic Alliance, included a number of challenges in the Soviet and early post-war Western countermeasures. It included, however, the major political events that have forged a conception and gave birth to a project.

Such events were: the one on 6 March 1945 in Romania, Churchill's speech in Fulton, George Marshall's proposals, the study by George F. Kenan, the famous American diplomat who served in Moscow as head of diplomacy.[4]

The Truman Doctrine, practically a political statement submitted on 12 March 1947 by the U.S. President, stated that any direct or indirect aggression which threatened U.S. peace also involved U.S. security.

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[2] Andre Fontaine - History of the Cold War, Military Publishing House, Bucharest, 1992, p. 29.
[3] NATO-Partnership and Cooperation Handbook, Office of the NATO Information and Press, Brussels, Nemira Publishing House, Bucharest, 1997, p. 10.
[4] NATO-Partnership and Cooperation Handbook, Office of the NATO Information and Press, Brussels, Nemira Publishing House, Bucharest, 1997, p. 14.

As for the above statement, it appears to be another important moment in which a large confrontation with the USSR began, a confrontation which appeared in the history for the next four decades as the Cold War.[5]

At the Potsdam Conference (July 17 to August 2, 1945) President Truman attacked in force, protesting that the Yalta agreements were not respected for Romania and Bulgaria.

Between 1945 - 1947, the Americans had already introduced in the European economy 14 billion U.S. dollars through international organizations or through bilateral agreements.

But instead of improving the economic situation of Europe - especially the agricultural and financial - it became worse.

### 1.3 The Marshall Plan

After the arrival of General George C. Marshall as the head of the State Department in January 1947, "impoundment policy" began to take shape.

On 5 June 1947, the Secretary of State officially launched the U.S. plan to help Europe. In that day at Harvard, he announced the European Recovery Programme (European Recovery Program - ERP). Their policy was not directed against a country and a doctrine but against hunger, desperation and chaos.

Its purpose had to be the revival in the world economy that would operate to allow the emergence of political and social conditions in which free institutions could exist. The aid came in the form of grants (85%) and long-term loans (15%).

For the European countries which could accept that, it was a huge incentive. Here is a statistic of the amounts - in dollars - which were received in April 1948 (when Congress passed a law) by June 1952: United Kingdom - 3.389 billion, France - 2.7 billion, Italy - 1.508 billion, Germany - 1.4 billion; Netherlands - 1.083 billion, Greece - 708 million, Austria - 677 million, Belgium and Luxembourg - 559 million, Denmark - 273 million, Norway - 255 million, Turkey - 225 million, Ireland - 147 million, Sweden - 107 million, Portugal - 51 million, Iceland - 29 million.

The Russian historian, Mikhail Narinski, based on his research in the Soviet archives, says that Moscow has reacted hastily and disorderly in announcing the Marshall Plan.

After the Paris Conference (June 29-July 2, 1947), the great wartime alliance ended and installed in its place a policy of confrontation.

On 11 July 1947, representatives of Austria, Belgium, Denmark, Switzerland, Greece, Iceland, Ireland, Italy, Luxembourg, Norway, Netherlands, Portugal, Sweden, Turkey, together with the originators, France and Britain, met in Paris.

The next day, the European Economic Cooperation Committee was created, whose role was to provide U.S. government information about resources and needs of the 16 participating countries, and to forecast for the next four years.

In September 1947, Stalin, who was on the offensive, created the Cominform, the new coordinating body of the communist parties.On this occasion, on 5 October 1947, Andrei Jalanov resumed from the point of view of Moscow Truman's idea stated on March 12: "in the world two camps have been formed, on one side the anti-democratic imperialist camp whose main role is to establish global dominance of the American imperialism, and on the other hand, the anti-imperialist and democratic camp, whose main goal is to dig imperialism, strengthen democracy and liquidate the remnants of fascism".[6]

However, a positive solution of the relations between the USSR and the great powers was tried.

### 1.4 First steps towards the emergence of the North Atlantic Pact

[5] Andre Fontaine - History of the Cold War, Military Publishing House, Bucharest, 1992, p. 42.
[6] The North Atlantic Treaty, Washington, 4th of April 1949, p. 12.

In December 1947, the U.S. Conference of the Foreign Ministers of Great Britain, France and the USSR in London, ended in failure in the collaboration of the four great powers.

A milestone occurred on March 12, when important discussions initiated on April 16, 1948 between George C. Marshall and the Secretary of State Robert M. Lovett, together with Senator Vandenberg and Connolly, about safety issues in the North Atlantic.

In agreement with the State Department, Senator Vandenberg had prepared a resolution that recommended U.S. association based on a constitutional process, with such regional arrangements based on collective and mutual help and continuous and effective self-help.

It also recommended that the U.S. government's goal should be to contribute to peacekeeping, clearly stating their determination to exercise the right of individual or collective self-defense, that Article 51 (in the United Nations Charter), where there would be an attack that would threaten national security.[7]

On 17 March 1948 in Brussels, representatives of Belgium, France, Luxembourg, the Netherlands and the United Kingdom of Great Britain signed a common defense treaty, pledging to strengthen economic and cultural ties, to resist the dangers of ideological, political and military, which could become a direct threat to the signatories.[8]

On 11 April 1948, General George C. Marshall and Secretary of State Robert M. Lovett initiated discussions with Senator Vandenberg and Connolly on security issues in the North Atlantic.

On 16 April 1948, representatives of 16 countries and military commanders of the Western occupation zones in Germany have initialed the document that gave birth to the Organisation for European Economic Cooperation (OECE).

U.S. Senate adopted on June 11, 1948 a resolution advocating the right of individual or collective self-defense, where an attack might occur that would threaten national security.

From a legal perspective, the way was open for the establishment of the alliance, which was continued by the meeting held on 6 July 1948 in Washington between the State Department representatives and the ambassadors of Canada and Western European countries which signed the Brussels Treaty.[9]

On 25 January 1949, in response, the Council for Mutual Economic Assistance (CMEA), with the participation of Bulgaria, Czechoslovakia, Poland, Romania, Hungary, led by the USSR was created.

In February 1950 Albania also joined, in September 1950, the GDR and in July 1961, Mongolia. A spectacular series of events occurred between 1947 and 1949 which rushed things. Among these there were direct threats against the sovereignty of Norway, Greece, Turkey and other allies in Western Europe, the state attack in June 1948 in Czechoslovakia, the illegal blockade of Berlin, which began in April of that year.

There followed negotiations between the signatories of the Treaty of Brussels, Belgium, France, Luxembourg, the Netherlands and Britain on the one hand, the United States, Canada and Denmark, Iceland, Italy, Norway, Portugal with the aim of creating a single North Atlantic

The Alliance[10] based on security guarantees and mutual commitments between Europe and North America.

[7] United Nations Charter, San Francisco, 26th of June 1945, p. 1.0
[8] Andre Fontaine - History of the Cold War, Military Publishing House, Bucharest, 1992, p. 51.
[9] Defense and security strategies of NATO and the EU at the Eastern Border, Carol I National Defense University Press, Bucharest, 2006, p. 94.
[10] Paul Robinson – Dictionary of International Security, CA Publishing House, Cluj-Napoca, 2010, p. 49.

On 4 April 1949, a ceremony has established the North Atlantic Organization, after signing the Washington Treaty, which established a common security system based on a partnership between the 12 signatory countries.[11]

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[11] The North Atlantic Treaty, Washington, 4th of April 1949, p. 34.

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# THE QUALITIES OF THE PUNISHMENT

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**Abstract**
*The punishment – measure of compulsion and mean of re-education for the convict – it has to meet certain qualities in order to achieve its goals in an actual and efficient way. Thus, the punishment has to be right, it has to be adaptable, inflictive and moralizing, it mustn't offend the good manners, it has to be equal for all persons and it has to be remissible and repairable.*

**Keywords**: *quality*; *right*; *adaptable*; *enforceable*; *remissible*.

**Introduction**

*The punishment's finality – the constraint, the reeducation and the prevention – it can be realised only if the punishment fulfills certain qualities; these qualities refer to the abstract punishment as it's provided within the law and they don't refer to the concrete punishment which is inflicted by the judge.*

*Consequently, the qualities which the punishment has to contain are as it follows: it has to be right; it has to be adaptable; it has to be inflictive and moralizing; it mustn't offend the good manners; it has to be equal for everyone; it has to be remissible and repairable.*

The punishment has to meet certain qualities in order to achieve its goals in an actual and efficient way[1]. These qualities are estimated by considering the abstract punishment as it is provided by law and not by considering the concrete punishment that the judge enforces, because in the last case, the efficiency of the punishment depends on the mode in which the judge enforces the legal punishment to the concrete situation and it does not depend on the punishment's qualities that are stipulated by law.

In order to realise its goal, the punishment: has to be right, adaptable, inflictive and moralizing; it mustn't offend the good manners; it has to be equal for all; it has to be remissible and repairable.

There are also other requirements which are usually added to those mentioned above as those that refer to the necessity that the punishment has to be certain; it has to be public and others. But, these conditions refer to the punishment's mode of enforcement and they do not refer to the punishment in itself, thus they are not submitted to the present analysis.

**A. The punishment has to be right**

1. One of the principal requirements of the punishment refers to the fact that it has to be right, that is to say the punishment has to correspond to the gravity of the committed

[1] V. Dongoroz, *Drept penal (Tratat)*, Institutul de Arte Grafice Publishing House, Bucharest, 1939, p. 586.

offence. “The justice, especially consists in the fact that the punishment has to be equal to the offence”, as Bodin said.

In the common language it is said that a punishment is unjust when the judges have punished an innocent person or when they have been too severe or too clement with the guilty person. But, the requirement we talk about, it takes into consideration the mode in which the legislator has provided it in the penal law and also the fact whether the punishment corresponds to the idea of justice[2]. The idea of justice has permanently evolved and is far from having an unaltered content. Thus, it was said with good reason that the entire history of the penal law is nothing else but the history of the punishment which has followed step by step the evolution of the idea of justice. In the old law and in the classical doctrine, it was promoted the idea that a punishment is right when it’s proportionate to the committed offence and consequently when it’s proportionate with the author’s guilt. This fact would mean the identification of the requirement that the punishment has to be right with the condition of proportionality. Actually, the justice is not only a simple requirement of the punishment, but it is the resultant of all qualities that a punishment has to contain.

2. In the modern conception, a punishment is right, first of all, when it is necessary, that is to say when the legislator is obliged to resort to it. The legislator does not incriminate by chance, but it incriminates only those deeds which reach a certain degree of social danger that justifies the intervention of the penal law and the infliction of a punishment. Consequently, the legislator’s will expressed in the legal frame of the incrimination norm justifies by the social dangerous character of the incriminated deed; if the concrete deed didn’t present the level of social danger that justifies the enforcement of a sanction, the punishment provided by the legislator it wouldn’t be necessary and it would be considered unjust.

In the Romanian penal legislation, the matter of the disproportion between the generic social danger and the concrete social danger it found its solution within the legal provisions of article $18^1$ combined with article 91 of the Penal Code. Thus, if the concrete deed doesn’t present the social danger of an offence, it doesn’t represent an offence and as a consequence it is not sanctionned with a punishment. In other legislations, the lack of concrete social danger of the deed it led to various regulations. Thus, the American Penal Code and the French new Penal Code contain provisions according to which in such cases, a punishment is not inflicted[3] (therefore, the lack of social danger is a cause of non-punishing and it’s not a cause of inexistence of the offence).

This means that when the legislator copes with an illicit fact and it has to react against it, it firstly has to examine if an extrapenal sanction isn’t enough and only in the case when the intervention of the penal sanction (any other sanction is inefficient) is necessary, the punishment provided by law would be just.

The unjustness of the punishment represents the negation of law; a law which distinguishes by the unjustness of its sanctions, not only it cannot serve for the public interest, but also it would be the strongest source of attacks against the respective order[4].

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[2] Tonissen, *Histoire du droit criminel*, p. I, Bruxelles, 1869, p. 11.

[3] The American Penal Code (article 2.12) provides that "the court can give up the trial if considers that taking into consideration the imputed conduct and the circumstances of the case, then the doer’s manifestation is placed within the limits of tolerance which are traditionally admitted and it doesn’t infringe the goal pursued by the legislator"; the French new Penal Code (articles 132-58, 132-59) states the court’s possibility to “dispense the defendant from any punishment if it results that his reeducation has been achieved”; in the same way, the German Penal Code (§ 60) provides the possibility that “the court has to give up the infliction of the punishment which doesn’t exceed one year of prison when the consequences of the committed deed affected the defendant in such a large extent so that the pronouncement of a sentence would seem as useless”.

[4] V. Dongoroz, *Tratat*, op. cit., p. 586.

3. The punishment mustn't be either too severe or too clement, but it has to represent the equivalent of the social danger of the committed offence. The study of the punishment's history points out many cases of omission of the requirements regarding the justness and the proportionality. Thus, for instance, the Egyptian law in the days of Pharaoh Menes (approximately 5000 years before Christ) stated the death penalty for any offence[5]; Manu – the ancient legislator in India, similarly established merciless punishments provided in Manava – Dharma – Sastra; "the Indian penal law is severe and the punishments are cruel enough", said Eschbach[6]. In the Hammurabi's ancient legislation, the punishments were too very severe and the death penalty was inflicted for the majority of the offences. Concerning the Greek people, the Dracon's laws are famous for their severity, as the same punishment (the death) was inflicted both to serious offences and to slight offences[7]. In Rome, according to the Law of the XII tables, *pater familias* had the power over life and death and the debtor who was bad payer could be sold and killed by his creditors; Emperor Nero made lamps from the convicts' bodies and he smeared them with black oil; the guilty slaves were given as food to "*murene"*. In the Middle Age and even in the modern time, the punishments continued to be very severe. In France, many of the committed offences were punished by the death penalty[8].

In the Romanian Countries, the severity of the punishments was as great as in the Occident. There are known the draconic punishments inflicted during the XV$^{th}$ century; Vlad the Impaler, the voivode of Wallachia punished with the death penalty even the slightest offences. In the Pravila of Matei Basarab and Vasile Lupu, there can be found too some punishments very severe[9].

After thousands of years of barbarian severity, in the new times the punishments gradually became ridiculous because of their indulgence, thus the society wasn't defended anymore against the evil-doers. In part, this change was explained by the influence of the ideas that belonged to Cesare Beccaria who fought against the cruelty excess and he sustained that the punishment should become more human. Some of the legislators have understood that this fact justifies the passing into the other extreme, which means that the provided punishments were much disproportionated in comparison with the abstract social danger of the committed offence. The punishment's indulgence is not less dangerous; an insufficient punishment is as harmful as the excess of rigour; it results no good from such a punishment neither for the members of the society that are in danger, nor for the defendants that won't become better persons[10].

Therefore, in order to get a right punishment, it's necessary that the legislator avoid the extreme points which are equally dangerous: neither excessive severity nor excessive indulgence. The modern legislations have to find a wise way in order to keep a fair balance between severity and tolerance, as it well said Carrara.

**B. The punishment has to be adaptable**

In order that the punishment should be well proportionated, the legislator has to choose those punishments which are adaptable to various levels of social danger of the deed and of the doer, from both quantitative and qualitative points of view.

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[5] Diodor de Sicilia, *Biblioteca Istorica*, Book I; Platon, *Legile*, Book II, du Boys, *Histoire du droit criminel des peuples anciens*, Joubert Publishing House, Paris, 1845, p. 19.

[6] A. Eschbach, *Introduction generale a l'etude du droit*, 3-eme edition, Cotillon Publishing House, Paris, 1856, p. 608; Tonnisen, *Histoire du droit criminel*, p. I, p. 11.

[7] Plutarh,*Viața lui Solon*, XVII.

[8] Jousse, *Justice Criminelle*, I.II, p. 267.

[9] In gloss 259, number 13, it is stated that "any slave or *naemit* or servant that abducts a woman, then he not only suffers the death penalty, but also he is thrown in the fire".

[10] Bentham, *Traite de lois*, I.II, p. 144 and *Theories des peines*, p. 25.

A punishment which is not susceptible of a qualitative differentiation that would allow a good proportioning and a perfect adequation of the sanction in its infliction, then it's a deficient and criticizable punishment because it has no elasticity. Such a punishment which isn't properly individualized by law, it makes impossible a proper judicial individualization.

Concerning the requirement of elasticity, the Romanian present Penal Code is criticizable because it establishes a restricted legal frame of principal punishments (actually, there are only two principal punishments because in fact the life imprisonment is a prison punishment which doesn't serve to the operation of individualization the penal repression. The narrowness of the system of sanctions isn't diminished not even in the cases of some substitutives of the punishments as the conditional suspension with its two forms or the execution of penalty at the working place which serve to the individualization of the prison sentence's execution.

From the quantitative point of view, the punishment has to be divisible in order to fulfill the requirements of proportionality and individualization.

In the juridical literature it has been stated with good reason that the adaptation of the punishments is made by the legislator in the very moment of drawing up the penal law by establishing the type and the limits of the punishment and also the extent in which they can be modified under the influence of the aggravating or of the attenuation causes[11].

An adaptable punishment is that punishment which can be proportioned depending on the concrete social danger of the offence and of the offender and also depending on the aggravating or on the attenuation circumstances that were present when the offence was committed (according to the principle of individualization of the punishment). On this reason, the legal punishment is relatively fixed, except for some cases; it has a minimum and a maximum limit, not only general, but also a special one. There are also provided alternative punishments for the same offence, each of them with its own special limits, in order that the punishment should be as corresponding as possible to the offence's concrete danger.

Regarding this aspect, the death penalty which is still provided in certain legislations, it's unadaptable from both elasticity and divisibility points of view; in contrast with the life imprisonment which is elastic because it can be adapted from the qualitative point of view, even if it is indivisible.

**C. The punishment has to be inflictive and moralizing**

1. The punishment is inflictive and moralizing when it represents a suffering for the convict. The punishment itself defines as an evil, as a suffering which is imposed to the convict against his will[12]. When it is said that a punishment has to be inflictive it means that it has to be able to create a feeling of constraint, of shame, of discontent from which it has to derive the feeling of suffering or at least, the feeling of pleasure has to be absent. The punishment has to generate this effect in all its moments: when is written in the incrimination norm, when it's inflicted and when the punishment is executed. The punishment that doesn't cause such feeling it won't have force of inhibition and the observance of law will be implicitly compromised. Also, a punishment regarded as inflictive, *in abstracto*, but by its mode of execution would remove any feeling of displeasure and it would be perfectly agreeable, then it would lose any intimidating force.

In the modern vision concerning the punishment, from the multitude of punishments, the legislator mustn't choose the one that is the most inflictive because this fact would mean

[11] V. Dongoroz, *Explicații teoretice ale Codului penal român, partea generală*, second volume, Academy Publishing House, Bucharest, 1970, p. 119; V. Dongoroz, *Tratat*, op. cit., p. 651; I. Oancea, *Drept penal. Partea generală*, Didactica and Pedagogica Publishing House, Bucharest, 1971, p. 421; M. Basarab, *Drept penal. Partea generală*, Lumina Lex Publishing House, Bucharest, 1997, p. 226.

[12] G. Antoniu, *Contribuții la studiul esenței, scopului și funcțiilor pedepsei*, Revista de drept penal number 2/1998, p. 10.

to turn back to the barbarous punishments. But, the legislator is obliged not to adopt the repressive measures which are the less inflictive. The legislator has to select the punishments which are able to satisfy the social group's moral conscience.

2. The punishment's inflictive character mustn't be confounded with the conviction's dishonouring character[13]. A conviction can be more or less inflictive in comparison with another conviction to a severer or to a less severe punishment. But, concerning other aspects, the modern conception over the punishment oposes to the punishment's dishonouring character. An offender can be convicted to a severe punishment, but he may not draw the public opprobrium upon him and vice-versa, an offender can be acquitted and the members of the society still refuse him any feeling of respect. Concerning the dishonour, the echo generated by the conviction in the public opinion it's enough because it's directly proportional to the punishment which is more or less inflictive. Any excess concerning this aspect, it perverts the person instead of reforming him. If the legislator doesn't have to establish punishments which would represent a pleasure for the convict by their treatment; it's also true that the legislator mustn't fall into the other extreme and he mustn't transform the punishment into an opportunity of torments which are far from moralize him but, on the contrary, they humiliate the convict, they discourage and enrage him.

In the old legislations, the punishments usually caused great sufferings but the punishments' cruelty, far from being an obstacle for the criminality, they have hardened the manners and they have developped the brutality[14].

As the society cannot oblige the offender to expiation, she also cannot constrain him to moralization but at the same time, the punishment mustn't be demoralizing. A similar idea was stated by Bettiol who pointed that by the punishment is not pursued the convict's moralization against his will, but its goal is to form certain minimal manners in order that the offender should not commit offences in the future[15].

The requirement that the punishment mustn't be demoralizing is acknowledged by all the modern legislations, including the Romanian one where it's provided that "the punishment's execution must not cause physical pains and it cannot humble the convict's person", according to the final part of article 52, paragraph 2. But, it's possible that a punishment regarded *in abstracto*, it may not be demoralizing when it's drawn up in the law but it may get this character when it's *concretely* inflicted.

**D. The punishment mustn't offend the good manners**

According to this requirement, the punishment has to be decently inflicted and it cannot be a mean of mockery for the offender. In the past times, there were utilized various forms of punishments that humbled the convict to the very depths of his soul and also they excited and they let go free the crowd's abject feeling. The convicts were often exposed in the public square, wearing mocking clothes and they were let in the public's power that spitted upon them and they threw stones at them. At other times, the convicts were carried in mocking postures on the streets and also, there is no need to mention the various torments that accompanied the execution, in everybody's sight and delight.

Ignominious punishments can be found in the old Romanian regulations; thus *Pravila* of Matei Basarab, Chapter 237, stipulated the mode in which the man married with 2 women or the woman married with 2 men were "scolded": "the one who has two women, you have to carry him naked on the lane, riding on a donkey and you must keep beating him with two

[13] R. Saleilles, *L'individualisation de la peine*, F. Alcan Publishing House, Paris, 1898, p. 225; E. Ferri, *La sociologie criminelle*, F. Alcan Publishing House, Paris, 1905, p. 448.
[14] V. Dongoroz, *Tratat*, op. cit., p. 187.
[15] G. Bettiol, *"Nuovo Difesa Sociale"* considerata da un punto de vista catolico (considerated by the catholic point of view) in Scritti Giuridici, Padova, 1966, p. 1009.

distaffs that the women utilize to spin; you have to do the same with the woman that take two men, you have to carry them naked, riding on a donkey and you must beat them with two *comanace* or with two *islice*"[16].

Such punishments existed in the states of Western Europe. The history states the mode in which widow Desbleds was punished on 4 August 1791. She was exposed in the square Palais Royal in Paris, riding on a donkey, with her face turned towards the donkey's tail and wearing a straw hat with the inscription "corrupter of young people"[17].

The drawback of these punishments was that they injuried not only the convict but also they injuried the society's members feelings of chastity. They were far from generating morality and they represented a permanent impulse to disorder.

Among the dishonourable punishments, a special place has been occupied, until nowadays, by the beating[18], although such a character has been denied for it[19]. Thanks to the works that belong to the great humanist thinkers, especially to Beccaria, the modern penal law has gradually removed these features of the punishment and it has promoted the principle according to which the punishments have to correspond to the good manners.

Respecting the human dignity became one of the points of support of the penal intervention; the punishment, in order to achieve its goal, it mustn't lead to the loss of honour, but it has to contribute to its retrieval, thus the dignity can take its place inside the conscience. The offender is deprived of liberty and not of dignity[20]. The protection of human dignity represents an imperative aspect which regards the whole criminal trial or the penitenciary; this fact doesn't mean that the offenders shouldn't be punished because of respecting the human dignity, but it obliges to a proper framing within norms and structures that can ensure this major desideratum, with the perspective that the dignity should hold a decisive place inside their own conscience.

**E. The punishment has to be equal for everyone**

1. This requirement gives expression to the principle of equality before the law; in other words, the same offence has to be punished within the same limits of punishment, without distinction among persons.

This principle was unknown to the old legislations, the judges could resort to arbitrary punishments, they punished in a certain mode when the offence was committed by persons that had a social position in the society and they punished in a different way when the deed was committed by ordinary people. In the ancient law of Manu, the inequity was so common that it represented a legislative principle[21]. The inequity before the law existed in the Romanian legislation too; for instance, "if the man killed the woman caught in the act, he was sentenced to life exile if he was an ordinary person and if he had a certain social condition; he was exiled for a limited period of time"[22]. *Pravila* of Matei Basarab abounded with such types of example: "neither the boyards, nor their sons are punished with the galley or with the salt work, but they are expelled from their landed property for a while; they are not hanged in

[16] Similar provisions can be found in the *Pravila* of Vasile Lupu, Chapter 15, Longinescu Publishing House, *Legi vechi românești*, Bucharest, 1912, p. 131.
[17] G. Mace, *Gibier de Saint Lazare*, second edition, G. Charpentier Publishing House, Paris, 1888, p. 305.
[18] In Romania the beating was abolished in 1864, in Austria in 1876, in Sweden in 1855, in Serbia in 1873.
[19] Thus, I. Tanoviceanu stated that "what dishonours the person, it cannot be the punishment that is other person's fact, but the offence which is his own fact", *Tratat de drept penal și procedură penală*, third volume, Curierul Judiciar Publishing House, Bucharest, 1924, p. 184.
[20] Theodore Papatheodoru, *De l'individualisation des peines et la personalisation des sanctions*, Revue Internationale de Criminologie et de police tehnique, number 1/1993, p. 109.
[21] As Manava- Dharma-Sastra said, "the king has to beware of killing a brahman even if he had committed all the possible murders" (Lois de Manon, VIII, 380); "For adultery, the brahman is submitted to the shameful hair-cutting while the individuals of other social classes are killed" (Tonnisen, op. cit., I, p. 62).
[22] *Pravila* of Vasile Lupu, chapter 64.

pitchforks as other evil-doers, they are not pricked, they are not carried on the lane or in the square as other evil-doers are carried"[23] or "the *Pravila* changes the bodily punishment with the money sanction when it's about a boyard" (chapter 234).

The punishment's inequity existed in Romania until the modern period. As a proof, we mention the *Condica criminaliceasca Ionita Sturdza* in 1826 (paragraph 253), *Condica criminaliceasca Bibescu* in 1841 (articles 25 and 33) and *Codicele penal* of prince Stirbey in 1850 that established "The noble by his family, rank or profession as are the boyards, the traders, the doctors, the lawyers and other with a distinct character, they aren't submitted to beating, although the beating is provided amongst the punishments of this code, but when the judge inflicts it, he always has to take into consideration the character and the social position for any convicted person".

In the XVI$^{th}$ century, Tiraqueau justified this solution "an easier punishment is given to the offenders owing to their birth's honour and to their ancestors' nobleness"[24]. The same inequity is mainteined in the XVIII$^{th}$ century; in this respect, Montesquieu showed that "in case of murders, the noble loses his honour, while a physical punishment is inflicted to the ordinary person who hasn't honour"[25]. The spirit of inequity went so far in punishing the offenders and sometimes degenerated into ridiculous[26].

The principle of equality of the punishments doesn't exclude the fact that the penal law may stipulate for a different way of sanctioning for the persons that had a certain quality when they committed the deed[27] (for instance, public officer, military man and others) or for the offender who is a minor person.

Also, the observance of this principle doesn't exclude the fact that the punishment may have unequal effects, depending on each convict's sensibility.

No matter the perfection of the criteria of proportioning and adequation of the punishment, they couldn't equalize the convicts' suffering because each of the individuals will endure the punishment in a different way; they cannot equalize either the suffering for those who indirectly feel the punishment's effects (the convict's family) or the satisfaction for those injuried by the committed deed; they cannot equalize the punishment's echo in the public opinion or the final result of the punishment.

**F. The punishment has to be remissible and repairable**

1. The act of justice as any other human act is not infallible and often a complex of coincidences can cause an unjust conviction sentence. For this reason, it's necessary for the society to have the proper mean in order to repair the evil suffered by an innocent person[28]. As Pastoret said, "the punishment mustn't be of such type thus it couldn't be repaired if the crowd was wrong"[29]. Carrara, going further on with this idea, stated that "to convict an innocent person is a real social misfortune by the scare caused to the citizens"[30].

Incontestably, an unjust sentence is a great evil but the evil is even greater if the mistake was recognized but the society wouldn't have the possibility to repair it. Therefore, the legislator always has to take into consideration the eventuality of such mistake and he must choose only those punishments that can be removed and repaired in case of error; in

[23] *Pravila* of Matei Basarab, chapter 367; similar dispositions can be found in the *Pravila* of Vasile Lupu, chapter 62.
[24] Tiraqueau, LI, number 45, p. 282.
[25] Montesquieu, *Esprit de lois*, Book VI, chapter X.
[26] Benjamin Disraeli Coningsby (Book IV, chapter IV), mentioned the case of lord Ferres in England. The lord was sentenced for murder in the time of George II. Despite all the lords' oppositions, he was finally hanged, but with a string of silk.
[27] V. Dongoroz, *Tratat*, op. cit., p. 672.
[28] V. Dongoroz, *Tratat*, op. cit., p. 588; I. Tanoviceanu, *op. cit.*, third volume, p. 146.
[29] Pastoret, *Lois penales*, I.I, p. 22.
[30] Carrara, *Programma...*, paragraph 651.

other words, in case of establishing that the convict was the victim of a miscarriage of justice (he was punished without being guilty) then it has to exist the possiblity to remove it (to remit it) and so the evil suffered by the convict can be repaired[31]. To repair a miscarriage of justice doesn't mean only to cease the conviction's effects, but also to annihilate as much as possible the suffering caused to the one who was unjustly sentenced.

In order that the punishments should be repairable, they have to be revokable and remissible by their nature and this means that they can be removed when their execution hasn't started or that the execution can be stopped if was started. The punishment is neither revokable nor remissible when its effects are definitive and it's impossible to repair them. Concerning this aspect, the death penalty and the punishments that are executed over the human body are mainly irreparable and irremissible. The death penalty is still inflicted in many states[32], while the other punishments were removed at the beginning of the modern age[33].

2. The legislations of many countries including Romania contain reparative provisions in case of an unjust conviction. Thus, articles 504-507 of the Romanian Code of Penal Procedure as it was altered by Law number 32/1990 and by Law number 104/1992, it states a special proceeding by which the person who was the victim of a miscarriage of justice can request the state to repair the suffered prejudice[34]. According to this proceeding, both material and moral prejudices that were suffered by the person who was unjustly convicted can be repaired.

But this fact doesn't mean that any unjust punishment is totally repairable[35]. Thus, concerning the prison sentence, the privation of liberty and the suffering caused for a certain period of time, it cannot be repaired anymore. Not even the punishment to fine isn't entirely repairable and as Laborde said "the fine is returned but the benefits, the opportunities that were lost in speculations and enterprises are they ever returned?"[36].

**Conclusions**

In front of an illicit fact, the legislator, firstly, has to examine if an extrapenal sanction isn't enough and only in the case when the intervention of the penal sanction (any other sanction is inefficient) is necessary, the punishment provided by law would be just.

The unjustness of the punishment, including the non-fulfillment of the necessary qualities, it only represents the negation of law; a law which distinguishes by the unjustness of its sanctions, not only it cannot serve for the public interest, but also it would be the strongest source of attacks against the rule of law.

The punishment must be neither too severe nor too tolerant, but it has to represent the equivalent of the social danger of the committed offence.

A punishment that doesn't fulfill the qualities mentioned above, it's as harmful as the excess of rigour; it results no good from it, neither for the members of the society that are endangered because of the offences, nor for the defendants that won't become better persons.

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[31] V. Dongoroz, *Tratat*, op. cit., p. 588.

[32] In Romania, the death penalty was abolished by the Decree-law number 6 on 10 January 1990 and it was replaced with the life imprisonment.

[33] In the Romanian Countries, the corporal punishments were prohibited by the Organic Regulations of Muntenia and Moldavia which established that "The punishments by cutting the hands and also the torments or the works are destroyed and they are abolished and they cannot be inflicted from now on" (articles 298 and 385).

[34] N. Volonciu, *Tratat de procedura penala*, second volume, Bucharest, p. 236; I. Neagu, *Tratat de procedura penală*, Pro Publishing house, Bucharest, 1997, p. 723; in the French legislation it was inserted a double reparation: a moral reparation and a pecuniary one.

[35] Bristol de Varville, *Le sang de l'innocent renge*, p. 56; *Theorie des lais criminelles*, Neuchatel Publishing House, Utrecht, 1791, p. 56.

[36] A. Laborde, *Cours de droit criminel*, Rousseau Publishing House, Paris, 1891, p. 79.

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# PARTICULARITIES REGARDING COMPUTER SEARCH AND FIELD RESEARCH FOR ONLINE CRIMES

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**Abstract**

*The criminal investigation of a computer, also known as computer forensic, presents certain specific aspects due on the one hand to the particularitiesof the computer and, on the other hand, to the volatile nature of the data that need to be preserved throughout the entire investigations.*

**Key words:** *computer forensic, digital evidence, data preservation*

## Introduction

*Informatic Cybercrimes represent the new challenge of criminal crime systems around the world. This new type of crime is shown more and more often in official statistics, most often associated with organised criminal group. This phenomena is included in the context of an unprecedented development of information technology, the proliferation of computers and a more widespread and easy access to internet.*

The search is a procedural act meant to find and collect objects that contain or present marks of a crime, corpus delicti, documents, known or unknown to the judicial body and that can serve to discovering the truth.[1]

As far as computer forensic is concerned, it is an evidence process consisting in searching through an informatics system or a data storage system by the criminal investigation authorities to discover and collect the evidences needed to solve the case. Computer forensic is usually ordered when reasonable suspicions exist that evidence regarding the crime for which the criminal investigation has been started can be found on the informatics system or the data storage system for which search has been ordered. [2]

Committing a crime attracts the obligation of competent judicial bodies to determine all the circumstances referring to the person who committed the crime and to the crime itself. To do so, criminal investigation bodies can decide to send to court or not, depending on the situation, the person who committed the crime. If the case is sent to trial, the judges need to establish the existence or inexistence of the crime. He can only do so based on the presented evidence.

In juridical literature, evidences have been defined as factual elements that have informative relevance on any aspect of the criminal case, or actions or circumstances that establish the existence of inexistence of factual elements that need to be taken into account. [3]

Referring to digital evidence, they could be defined as any sort of information or 'traces' of information stored, processed or transmitted in digital format using computerised

[1] Emilian Stancu, *Tratat de criminalistică*, 3rd edition, Universul juridic publishing, Bucharest, 2004, p. 449.
[2] Adrian Cristian Moise, *Metodologia investigării criminalistice a infracțiunilor informatice*, Universul juridic publishing, Bucharest, 2011, p. 205.
[3] Grigore Gr. Theodoru, *Drept procesual penal*, Cugetarea publishing, Iași, 1996, p. 287.

systems or communication networks and that can serve as evidence of a crime being committed or that helps identify the criminal.[4]

Most frequently, digital evidence are found on a computer's hard disk. These evidences are volatile and non-volatile data.

Volatile data is any kind of data that could be lost once the power supply has been interrupted.[5] Non-volatile data are data that are stored and preserved on the hard disk when the computer is turned off.

All the objects that are found at the crime scene are considered to be data and the investigator is obliged to analyse and interpret the objects to establish what information can be obtained and which of them are relevant for the investigation. The latter needs to be collected as evidence.

As a consequence, field research is one of the activities that essentially contribute to accomplishing the objective of a criminal trial.

Field research represents the evidence process that consists in the judicial body going to the scene of the crime, the place where the result of the crime was produced or where tracks have been left, in order to observe the situation at the scene of the crime, discover and establish the tracks or marks of the crime and establish the position and state of the material means of evidence, as well as the circumstances in which the crime has been committed.[6]

In the case of a cybercrime, a specialist or forensic expert in informatics must be part of the investigating team due to the particularity of the following steps that must be taken.

*Step 1: Removing the suspect from the computer*

It is of utmost importance for the investigators who are field searching for digital evidence to remove the suspect from the computer. It is very likely for him to try to completely destroy any evidence or at least to deteriorate it.

If, upon the arrival of the investigators at the scene of the crime, the targeted computer is turned on, there is a risk that the suspect uses one of the numerous existing softwares to codify his files, making the recovery of the evidence more difficult, if not impossible.

Computer users today are more and more knowledgeable in codifying or securing the computer. Henceforth, it is not at all unlikely for a suspect to install or download a security programme that deletes important evidence at the simple pressing of a key or a combination of keys.

It is possible that these actions do not make it impossible to fully recover digital evidence, but the formatting programme that rewrites over the hard-disk of a computer can make the process very long and expensive, due to the advanced equipment needed.

These deleting programmes are configured to allow the choice of a 'hot key' that launches formatting or a coding programme when pressed. [7]

A hot key, often also called a shortcut key due to its capacity to easily trigger an action, represents a combination of keys that launch an operating programme.

The suspect's advice are never taken in this matter as there is a high chance they are meant to lead to an opposite result then the one intended by the investigator. They can however be written down to check later on whether they were given with bad intentions.

Regardless of the method chosen by the investigators to remove the suspect from the computer (by use of force or by misleading), it is of utmost importance to forbid his access to

[4] Gheorghe-Iulian Ioniță, *Infracțiunile din sfera criminalității informatice*, Universul Juridic publishing, Bucharest, 2011, p. 290.
[5] Dave Kleiman, *The Official CHFI Study Guide (Exam 312-49) for Computer Hacking Forensics Investigations*, Syngress, Burlington publishing, Massachusetts, 2007, p. 139.
[6] Gheorghiță Mateuț, *Procedură penală, Partea generală*, vol. II, Chemarea publishing, Iași, 1996, p. 177.
[7] Robert Moore, *Cybercrime: investigating high-technology computer crime*, second edition, Elsevier inc., Oxford publishing, 2011, p. 206.

the computer at any later point as well. He needs to be informed that the computer will be properly handled by professional staff.

*Step two: Securing the scene of the crime*

After having removed the suspect from the computer, care needs to be put in securing the scene and starting the process of documenting it.

The goal of this process is finding all potential sources of digital evidence and taking well-grounded decisions regarding which digital evidence will be kept at the scene of the crime.

When investigators enter for the first time the scene of the crime, it is important for them not to be too restrictive in the initial inspecting process. Limiting themselves only to specific objects can lead to lost opportunities or evidences.

Digital evidence can be found in unexpected places, such as digital photography frames, watches or bracelets that are USB mass storage devices. It is also important to keep an eye out to find certain passwords, important phone numbers and any documents associated with computers and their use. Many suspects write down details and passwords of various accounts. This is also valid for those who illegally access other people's computers.[8]

A complete investigation of the scene of the crime must take into account instruction manuals for software and external drives. They can facilitate the work of investigators, offering them details about the hardware, software and backups, details that can save a lot of time.

At the same time, the presence of books dealing with coding, digital evidence or other technical subjects can help evaluate the technical abilities of the suspect and can determine what exactly to look for in his computer.

During this phase, it is mandatory to take photographs or film objects that present interest in their current state, including laptops, external drives, video cameras and in general, any electronic device that could have a link with the crime.

Both photo-cameras and video cameras can be used. It is however preferred for the investigating team to have a specific person video recording the operation. This can be particularly useful if the suspect pretends digital evidence have been placed on purpose by the investigators at the scene of the crime. The person who films the operation can also ensure a 360 degree image of the computer and the peripheral devices attached to it.

If the investigators choose to use a traditional photo-camera or a digital one, it is important to take pictures of the suspect's computer when the warrant is executed. This will allow investigators to come back on the later on and prove what programmes were operational when the confiscation took place. In some cases, these pictures can later be used to contradict the suspect if he denies having been involved in a particular kind of activity.[9]

The photograph of every object needs to clearly present the state in which the respective object was discovered. Particular attention needs to be given to all surrounding elements, immortalising in images objects that contain serial numbers, objects that are deteriorated and different existent connections.

Certainly not least, the cables of the informatics system are to be labelled so as to allow a later correct reconnection and reassembly.

*Step three: Disconnecting any external control possibility*

In this phase, all network connections in the respective building are observed and any possibility to connect the computer to internet must be eliminated.

These days, the investigator who confiscates a computer is very likely to discover a wireless network. This can be problematic as wireless network routers can be placed

[8] Eoghan Casey, *Digital evidence and computer crime: forensic science, computers and the internet*, third edition, Elsevier inc. publishing, San Diego, California, 2011, p. 241.
[9] R. Moore, op. cit., p. 208.

anywhere in the building which is why the investigating team needs to use a programme that detects networks. NetStubmbler is an example of such a programme. It offers detailed information on detected networks and the corresponding routers, as well as on access points. At the same time, currently, more and more cell-phones can detect the presence nearby wireless networks. If an investigator discovers a wireless network, he will have to disconnect the network's router, remove the network cable from the router and the router also has to be unplugged to guarantee that no files can be exchanged between the respective computer and another one.

Before a computer is disconnected from any network connection, the investigator can decide to photograph or video record the computer's screen and include notes regarding any files or programmes that are downloading at that moment or that have been recently downloaded. [10]

*Step four: Turning off the computer*

If the investigators decide that turning off the computer is necessary to conserve digital evidence, the method considered to be most efficient is disconnecting the power cord from the computer, rather than from the plug or by using the on/off button.

Removing the power cord from the back of the computer is usually recommended to avoid the possibility for an uninterruptible power supply to continue supplying electricity to the computer.[11]

As far as laptops are concerned however, one should not remove its supply cord. This would be insufficient as laptops operate on a double source of power. They use electricity from the plug, but most of the times, laptops are also equipped with a backup battery for when they are used far from an external power source. Removing the cord will not be as efficient as for computers, since this will only make the laptop switch to its alternative source of energy. Henceforth, removing the power cord needs to be mandatorily accompanied by removing the battery (attached to the lower part of the laptop).

What happens though when we are faced with a running computer? It should be mentioned that even if the screen is dark, the computer can actually be on and active. Moving the mouse can turn the monitor on, allowing investigators to visualise the display of the screen.

If a running computer had its power cord disconnected, volatile data would be deleted and thus lost if not collected previously.

At the same time, problems related to coding can appear. It is possible for the system or files not to be coded when the computer is running. Suddenly unplugging it can trigger the information's coding, thus risking to lose the respective evidence. [12]

Therefore, before turning off the system, the following steps need to be take:[13]

- The screen will be photographed to record the data displayed when the investigation was done;
- Volatile data will be conserved;
- An image copy of the confiscated hard-disk will be done;
- The integrity of the image copy will be checked to confirm it is an exact copy of it, by using a mathematical process called CRC (cyclic redundancy checker).

The copy of the hard-disk is also called a clone. The suspect's disk will be known as source-disk, while the disk on which it will be cloned will be called destination-disk. It goes

[10] R. Moore, op. cit., p. 210
[11] E. Casey, op. cit., p. 251
[12] John Sammons, *The basics of digital forensics*, Syngress, Waltham publishing, Massachusetts, 2012, p. 57
[13] D. Kleiman, op. cit., p. 146

without saying that the destination-disk needs to have a capacity at least equal to the one of the source-disk, if not bigger.

As hard-disks are rather fragile, it is recommended to make two such clones as a backup measure. One of the clones will be used to be investigated, whereas the other one will serve as backup. Ideally, all investigations are done on the clone copy and not on the original. As far as the court is concerned, a correctly obtained clone is as viable of an evidence as the original.[14]

In some situations, it is preferable to connect a different keyboard and a different mouse to the computer so as to conserve fingerprints and biologic evidence.[15]

*Step five: Disassembling the computer*

After disconnecting the computer from the power source, the next step for the investigator is to disassemble the computer and prepare it to be transported. Of course, when only one computer exists, this greatly simplifies the investigator's work. Occasionally, however, executing the warrant can lead to confiscating several computers. In these situations, it is necessary to disassemble the computers in such a way that enables the re-assembly of any computer in the laboratory.

It is recommended that every cable or device is labelled as soon as they are disconnected from the back of the computer. A label should be applied to the cable or respective device and another label should be stuck on the back of the computer on the connecting port from where the device had been removed. If the investigator found a computer with unused ports, these should be covered with cello tape and labelled as unused. [16]

*Step six: Obtaining extra evidence from the scene of the crime*

After disassembling the computer, the investigators can begin examinating the area, looking to find other evidence that can have a link to the confiscated computer. As it was previously mentioned, these evidences could be disks, CDs, USB sticks, external hard-drives, instruction manuals and other storage devices or documents related to using the computer.

Considering the small dimensions of memory cards, these could easily be hidden almost anywhere. For example, one such device could be hidden in a book, in a wallet, in the lining of clothes etc.

One will take into account as well the possibility to locate a potential list with passwords. This could be stuck on various surfaces around the location of the computer.

Once the digital data storage have been located (i.e. USB memory sticks), measures need to be taken to ensure files cannot be added or deleted from the device.

*Step seven: Preparing the evidence to be transported*

Once all the evidences have been collected, they need to be ready to be transported. If plastic bags are used, it is important to keep the hard-disks and the storage devices in a bag without static electricity to prevent deterioration of the content. If the evidences are put in boxes, wrapping materials is to be used to secure the computer and the other devices.

Regardless of the chosen wrapping method, the computer should not be placed in the trunk of the police car. It should be put on the back seat of the car and taken to a secure storage room. At least two arguments exist against the use of the trunk:

- The heat during warm months or extremely low temperatures can affect digital evidence;
- Electronic emissions – a lot of police car have equipment to control communication and it can deteriorate the evidences.

[14] J. Sammons, op. cit., p. 54
[15] E. Casey, op. cit., p. 250
[16] R. Moore, op. cit., p. 218-219

**Conclusions**

The presence of a computer expert is absolutely necessary and will ensure the right steps are followed in executing a warrant for digital evidence. Computer criminal forensic experts need to have sufficient knowledge in computer technology and understand how a hard-disk is structured, how the file system works and how data are recorded.

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# CRIMINAL MEDIATION IN THE ROMANIAN LAW SYSTEM

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**Abstract**

*Criminal mediation is a relatively new field in the Romanian legal system and is an alternative way of resolving conflicts amicably through a third party - the mediator - only for those offenses for which by law the withdrawal of prior criminal complaint or reconciliation parties removes criminal liability.*

**Keywords:** *criminal mediation, voluntary procedure.*

## Introduction

*Mediation is rooted in the American legal system, which is known for about a century. Over time, in The United States of America this alternative method of dispute resolution has proved its efficiency, reason for which mediation enjoys an extensive media promotion and support by judicial bodies and administrative institutions.*

*In criminal law, mediation is part of the broader concept of restorative justice, a process in which victim, offender and other persons or members of society, affected by a crime, participate together to solve the problems caused by crime, often with an impartial third party.*

The success of mediation in the U.S. legal system determined implement similar forms of conflict resolution in most legal systems of modern states. In Europe, the mediation process was implemented about 20 years and unlike the American model in which mediation is binding, the European model is optional[1]. Efforts at EU level to implement this system in member countries, have resulted in the adoption of regulations in this area. Thus, in matter of criminal law we mention Recommendation. R (99)19 on mediation in criminal matters[2], adopted by the Committee of Ministers of the Council of Europe on 15 September 1999. The aim of Recommendation is emphasizing effective participation of the victim and the offender in criminal proceedings, recognizing the legitimate interest of victims to express their position regarding the consequences of crime and communicate with the offender. A second purpose of the trial is as recommending, encouraging offenders to take responsibility sense, giving thus the opportunity and ability to reintegrate and rehabilitate.

[1] In England, initially tried to impose mandatory mediation as a form of conflict resolution but was not successful, although in this state parties often appeal to this procedure, considering it more efficient and cheaper than court proceedings.
[2] Council of Europe standards for Justice, Chisinau, 2010, p 373, www.csm.md / files / Information / Standarde_Justitie.pdf.

Another important law is the Council Framework Decision of the European Union of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JAI)[3] by which was established for the Member States of the European Union to promote mediation in criminal cases for offenses they deem appropriate for this type of measurement, each Member State will ensure that any agreement made between the victim and the offender will be taken into account during mediation in criminal cases.

Romanian legal system, following the directions of principle established in the European Union, has adopted legislation that enshrines the possibility and conditions of settlement in civil, commercial, and restricted category of criminal cases through mediation. In the Romanian legal system, criminal and not only, mediation is optional.

Therefore, criminal mediation is a relatively new field in the Romanian legal system, this prompting some interest much later than in other countries, finally in 2006 the Law no. 192 on mediation and the mediator profession[4] has been adopted, which were devoted several articles on mediation in criminal cases. Romanian legislator has chosen to regulate this alternative way of solving conflicts only for those offenses for which the law, withdrawal or prior criminal complaint reconciliation of the parties removes criminal liability.

According to art. 1, paragraph 1 of the above mentioned law, mediation is a way of resolving conflicts amicably through a third party as a mediator specializing in conditions of neutrality, impartiality, confidentiality and with free consent of the parties.

Being a voluntary way of resolving conflicts amicably, both victim and offender cannot be compelled to mediate, states the art. 6 of the law that judicial and arbitral bodies, and other authorities having jurisdiction shall inform the parties about the possibility and advantages of mediation procedure and can lead to resort to it to solve conflicts between them.

Although no specific terminology used by regulating possibility of mediation both before and after the onset of a trial, the first paragraph of art. 2 of law classify mediation procedure extrajudicial mediation and judicial mediation, classification is at least at this point agreed by most professional work.

This award is valid for mediation in criminal matters.

Delineation between the two modes of mediation proceedings, as shown in the literature[5], is necessarily because comparing mediation with justice, in criminal matters, involved criminal judicial mediation, as the only special form of mediation, corresponding to the specificity criminal litigation, thereby determining the extent to this type of criminal litigation articulates with judicial proceedings. In this context, says the same author, mediation appears as a judicial criminal procedure governing criminal proceedings, including and together with other procedural ways that enable conflict committed to a judicial litigation (through prosecution and civil action in criminal proceedings) are oriented towards consensus treatment under the aegis of a judge to seek a negotiated solution to process acceptable and accepted, likely to be agreed by the judge.

**Extrajudicial mediation**, called extra procedural, occurs before the victim to submit prior complaint. Conversely, judicial mediation would occur after making this complaint. However, criminal proceedings (judicial stage actually) does not begin at the time the criminal complaint, between now and the start of trial by the prosecution taking place preliminary investigation phase, the issues raised by the injured person is checked, so that phrase Judicial mediation is easy inaccurate.

[3] http://eur-lex.europa.eu
[4] Published in the Official Gazette of Romania, Part I, no. 441/22.05.2006.
[5] Mateuț Gh., *Medierea penală*, Revista Dreptul nr.7/2007, p. 150.

In agreement with other authors[6], we consider that the terms of the mediation process and extra procedural mediation would be more suitable.

Extrajudicial mediation takes place at the initiative of one or both parties.

The legislature is only concerned with the result of extrajudicial mediation - if the mediation procedure ends with reconciliation, the injured party can not refer to the same offense the prosecution or the court.

We should note at least two errors on the terms used by the legislature: first, reconciliation cannot take place until after the formulation of a prior complaint, in which we found in extrajudicial mediation, so that the terms of an agreement or understanding were most suitable. Second one, in terms of the hypothesis of referral to court by prior complaint, this last sentence was repealed by Law no. 356/2006 for the amendment of the Criminal Procedure Code, and other laws[7]. Although Law. 192/2006 on mediation and the mediator profession has been amended three times; there was a legislative proposal to reconcile this provision of the law with the new version of the Code of Criminal Procedure, which establishes in Art. 279 paragraph 2 of the complaint prior to addressing criminal investigation body or prosecutor under the law.

Successful completion of the mediation process acts as a cause of preventing entry into criminal action.

If mediation is not completed by agreement, the injured party may submit prior complaint. A useful provision is contained in Art. 69 paragraph 2 of the Law, which enshrines the only case to suspend the deadline for lodging the complaint prior. If the parties during the mediation period for bringing the complaint prior 2 months, this period is suspended during the procedure and thereafter be back and considering elapsed before mediation. The period of suspension will therefore be included between contract signature and date of concluding the mediation - mediation closing minutes.

**Judicial mediation** occurs after the notification of the criminal investigation with prior complaint. In this case the parties may request mediation or their solicitation or at the court or prosecuting body recommendation.

The consequence for judicial mediation is suspended prosecution or trial (if the parties have resorted to mediation by the prosecution), action taken under the mediation contract submitted by the parties.

The suspension lasts until the close of the mediation process, in any of the methods provided by law, but not less than three months from the date of signing the mediation.

Criminal proceedings are officially resumed immediately after receipt of the report stating that the parties have not reconciled or if it fails to notify the deadline of 3 months.

According to art. 67 paragraph 2 of law, *nor injured person or the perpetrator cannot be forced to accept the mediation procedure*. This provision comes to reaffirm the voluntary nature of mediation, specifics highlighting the importance of this trait in criminal mediation.

Initiation of mediation procedure between injured and the offender party depends, almost entirely, on the will of the first. In the pair victim - offender, the victim has the most sensitive position, he is affected by the criminal act and, in most cases, and willingness to communicate with the other party is a prerequisite for initiation of the procedure. Will also not be neglected the offender will to participate in the mediation, which, in his turn, must show his voluntary consent to its onset. Only sincere willingness of the offender to be a part in the process of reconciliation can give mediation a chance of success, otherwise there is the

[6] Păncescu F.G., *Mediation Law. Comments and explanations, second edition*, Publishing House CH Beck, Bucharest, 2008, p. 213.

[7] Published in the Official Gazette of Romania, Part I, nr.677/07.08.2006.

possibility that by the mediation agreement the offender could see only as mere means to avoid criminal liability, which would remove procedure mediation of its purpose[8].

The mediator cannot impose a solution on the parties to the dispute submitted to mediation as its role in this process is that of a facilitator of communication between the parties, helping them to identify key issues of their conflict and to identify possible solutions and ways to repair.

During mediation, the actual solution is determined solely on the wishes, needs and interests of the parties, without constraining the scope of procedural rules. The parties may choose the solution that satisfies the interests, giving mediation more practical nature in restoring the situation of the parties.

Through the new Code of Criminal Procedure[9], to meet the functioning of a modern justice and to transpose into national legislation the rules adopted at EU level were introduced several provisions that refer to mediation. Thus was established the possibility of a mediation agreement and was consecrated injured or accused person's right to seek mediator in certain cases provided by law, and the possibility of recovery of claims through mediation.

Also, until the entry into force of the mentioned Code, at the Criminal Procedure Code have been brought current changes and additions[10] regarding to the mediation agreement which may be terminated under the law of offenses for which a reconciliation withdrawal of the complaint or eliminate the liability on criminal or civil claims in criminal proceedings.

Unfortunately, experience shows that without proper information on this new alternative dispute resolution and the benefits of mediation practice is almost non-existent in this area, not far concluded any agreement in criminal matters.

**Conclusions**

Interest is that mediation (as an alternative dispute resolution) being often successfully used in criminal field because it is essentially an alternative to prosecution and trial phase which is preferably a long process which follows necessarily those steps.

By adopting laws governing mediation and by ensuring an appropriate framework for conducting and promoting mediation not only is a better management of justice but can simplify or eliminate judicial proceedings in cases of conflict.

Mediation, as currently regulated, has no practical use but, in the case of a constant, real and effective media sustains, combined of course with the active involvement of judicial authority, criminal mediation can acquire such a utility.

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# THE EUROPEAN ORDER FOR PAYMENT PROCEDURE

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**Abstract**

*In the spirit of the Treaty of institution of the European Community and considering the need to maintain and develop a space of freedom, security and justice in the purpose of the free circulation of individuals, of goods, services and commodities, the Community considered as opportune the adoption of certain measures in the field of judicial cooperation in civil and commercial field, which to have a cross-border incidence, therefore instituting, on European level, a new freedom, the one of free circulation of the legal decisions. Therefore, it was adopted the (EC) Regulation no. 1896/2006 of the European Parliament and Council as of 12.12.2006 regarding the institution of an European procedure of payment order, of which purpose is the one to simplify, to accelerate and reduce the procedure costs in the cross-border causes regarding non-challenged pecuniary receivables, also ensuring the free circulation of the European orders for payment within all the member states by establishing some minimum standards of which compliance removes any other intermediary procedure in the member state of execution before acknowledging the execution*[1].

**Keywords:** order for payment, payment ordinance, European procedure, non-challenged pecuniary receivable.

## Introduction

*The institution of the European order for payment is regulated on European level by the provisions of the (EC) Regulation no. 1896/2006 corroborated with the ones of the Regulation (CEE, Euratom) no. 1182/71 of the Council from 03.06.1971 regarding the set out of the rules applied to the terms*[2]*, of the Decision 1999/468/EC of the Council from 28.06.1999 for setting out the regulations on the exercise of the competences of execution granted to the Commission*[3]*, and also of the (EC) Regulation no. 44/2001 of the Council as of 22.12.2002 regarding the judicial competence, acknowledgment and execution of the decisions in civil and commercial field*[4].

*The extent of instituting an European procedure regarding the order for payment was adopted having in consideration the continuous flow of the legal relations with cross-border*

[1] See point (9) from the considerations of the (EC) Regulation no. 1896/2006 of instituting an European order for payment procedure;
[2] Published in the Official Journal of the European Union L 124 as of 08.06.1971, p.1;
[3] Published in the Official Journal of the European Union L 184 as of 17.07.1999, p. 23; This Decision was amended by the Decision 2006/512/EC (Official Journal of the European Union L 200 as of 22.07.2006, p. 11);
[4] Published in the Official Journal of the European Union L 12 as of 16.01.2001, p. 1; The Regulation was amended last by the (EC) Regulation no. 1791/2006 of the Commission ( Official Journal of the European Union L 363 as of 20.12.2006, p. 1);

*nature as also the fact that, in the current context of recovering the receivables, the procedure of execution is an additional procedure which the creditor should cross in order to recover its receivable given that the decision was pronounced by the court of a state other than the one where the execution itself takes place.*

The regulation to institute an European procedure for order for payment is applied in civil and commercial area in the *cross-border litigations*[5], irrespective of the nature of the court, except for the ones that take birth in fiscal, custom or administrative matter. Also, neither the responsibility of the state for actions or omissions committed in exerting public authority is under the incidence of this Regulation (*acta jure imperii*) (art. 2 par. (1) of the Regulation. Also, par. (2) of the same article specifies that there are excluded from enforcing this Regulation: "the matrimonial, testamentary regime, successions, bankruptcy, covenants and other similar procedures, social insurances, the receivables coming from non-contractual obligations, *except for the cases where* these were the object of an agreement between parties or there is a recognition of the debt, or if they refer to liquid debts coming from the common property over a good". The purpose of this procedure consists in simplifying, accelerating and reducing the costs regarding non-challenged pecuniary receivables. This Regulation shall apply in the above fields to all the member states except for Denmark[6].

In achieving the procedure provided by this Regulation, the competence shall be determined in accordance with the regulations of community right applicable in this field, mainly the (EC) Regulation no. 44/2001. Therefore, according to art. 2, "*subject to the provisions of this regulation, the individuals domiciled on the territory of a member state are summoned irrespective of their nationality, before the courts of the member state in question*" Also, "*the individuals who do not have the nationality of a member state on the territory of which they are established, are subject to the competence regulations applicable to the citizens of the state in question.*". The interpretation[7] of the provisions of this article leads to the idea according to which the competence belongs to the member state where the defendant has its domicile or main office, irrespective of its nationality. Therefore results that this procedure can be applied even if the applicant is resident or established on the territory of a third country, as long as the defendant is resident or established on the territory of a member state. In accordance with the provisions of Art. 3 of the Regulation, the individuals established on the territory of a member state can be summoned in court before the courts of another member state only based on the provisions from the sections 2-7 of the 2nd Chapter which regulates the competence. Besides the regulations of general competence, there are also included regulations regarding special competences. Therefore, a person resident in a member state can be summoned in other member state in contractual matter, before the courts from the place where they have the obligation in question, understanding on one side, in case of the sale of goods, the place from a member state where, on the grounds of the contract, have been or should have been delivered the goods, and on the other side, in case of delivery of services,

[5] By cross-border litigation in the sense of art. 3 par. (1) of the Regulation it is understood that litigation where at least one of the parties has its usual domicile or residence in a member state other than the member state of the notified court.

[6] In accordance with Art. 1 and 2 of the Protocol regarding the position of Denmark, attached to the Treaty regarding the European Union and to the Treaty for institution of the European Community, Denmark is not participating in adopting this Regulation, does not have obligations on its grounds and is not subject to it - item (32) from the considerations of the (EC) Regulation no. 1896/2006;

[7] See G. Răducanu, C. M. Niță, *the (EC) Regulation no. 44/2001 of the Council as of 22.12.2002 regarding the judicial competence, acknowledgment and execution of the decisions in civil and commercial field (Brussel I). Comentarii şi explicații privind aplicarea în dreptul intern şi în dreptul european (English: Comments and explanations regarding the enforcement in the domestic and European law),* Hamangiu Publishing House, Bucharest, 2011, p. 24-25;

the place from a state where, under the contract, have been or should have been delivered the services. In case that the receivable is born from a contract concluded by a person - the consumer - for a use which might be considered as not connected with its professional activity, and the consumer himself is the defendant, the competence will belong only to the courts from the member state where the defendant is established, as provided by the provisions of art. 59 of the Regulation. "*(1) In order to determine if a party is established on the territory of the member state of which courts are notified, they apply the domestic legislation* and *(2) In case that one party is not established on the territory of the member state of which courts are notified, the court, in order to determine if the part is resident on the territory of another member state, applies the law of the member state in question*". The notion of "*domicile - established*", as shown also in the specific privatistic-international dogma[8], does not have the same acceptation in the various law systems of the member states.

The procedure of the European order for payment is a written and fully formal procedure. The commencement of this procedure takes place by filling the application by the applicant, using in this purpose the type A form. The application should contain, in general lines, the same information as the[9] application introduced according to the procedure of domestic law:

- ✓ the name and address of the parties and, as applicable, of their representatives, and also of the notified court;
- ✓ value of the receivable and, if applicable, of the penalties, interests, etc.;
- ✓ the interest rate and the period for which this is requested, in case it is requested;
- ✓ the de facto and de justo reasons for which the application is grounded;
- ✓ description of the probation items in supporting the receivable;
- ✓ the grounds of competence
- ✓ the cross-border nature of the litigation in the sense of art. 3 of the Regulation.

The application can be introduced both on paper media as also by any means of communication accepted by the member state of origin and which can be used by the court of origin, including on electronic path[10]. The court, in the shortest time from receiving the application whereby it was notified, will analyze to see if the conditions mentioned in art. 2, 3, 4, 6 and 7 from the Regulation are met and if it appears to be grounded. If the court determines that the application was not appropriately filled in has available the possibility to ask to the applicant to fill it or rectify it, using in this sense the type B form. In this sense, the court will establish a term that it can also recess if will consider this useful.

In case the conditions from art. 8 of the Regulations are met for only one part of the application, the court will inform the applicant about this, using form C, inviting him to accept or reject the proposal of European order for payment for the about established by the court, and also notifying him about the consequences of his decision. Depending on the attitude of the applicant, the following possibilities appear:

1. *The applicant admits the proposal of the court***.** In this situation the court will issue an European order for payment for the part proposed and accepted by the applicant;
2. *The applicant does not send the answer requested by the court within the established term.* The court entirely rejects the application for European order for payment;

[8] See G. Răducanu, C. M. Niță, *op. cit.,* p.25-26 apud I. P. Filipescu, A. I. Filipescu, *Tratat de drept internațional privat (engl. Treaty of private international law),* Universul Juridic Publishing House, Bucharest, 2007, p. 82, 283 – 285;

[9] Art. 7 par. (1) of the (EC) Regulation no. 1896/2006;

[10] When the application is filed on electronic path, this will be signed in accordance with art. 2 par. (2) of the Directive 1999/93/EC of the European Parliament and Council, from the 13th of December 1999 regarding a community frame for electronic signatures, published in the Official Journal as of 19.01.2000, p. 12. This signature will be recognized in any member state of origin wihout being subject to any additional conditions.

3. *The applicant rejects the proposal of the court.* The court entirely rejects the application of order for payment.

The court will also reject the application if the application is obviously motiveless. In any case, the applicant will be informed with regard to the reasons of rejection by the D type form. The rejection of the application cannot be challenged with appeal but the applicant will have open the possibility to try to value his receivable by a new application of European order for payment or by any other procedural mean provided by the legislation of a member state.

If the application meets all the requirements provided by law, the court will issue the European order for payment in the shortest time, in principle within a term of 30 days from the date of introducing the application, using the E type form. In this term of 30 days is not included the term required for the applicant to fill in, rectify or amend the application.

By the European order for payment, the defendant will be informed with regard to the possibilities of action as regard to the application of the applicant:

1. To pay to the applicant the amount written in the order;
2. To oppose to the order for payment making counteraction with the court of origin, counteraction which must be sent within 30 days from the date when the order was communicated or notified to them.

The European order for payment will be communicated or notified to the defendant according to the national legislation of the state where the communication or notification should be made, existing the possibility of being accompanied by confirmation of receipt from the defendant, or not.

In case that the debtor does not counteract, the procedure will continue in accordance with the common law from the member state of origin, except for the case where the applicant demanded expressly, or by request, at the latest before the issuance of the European order for payment, that the procedure to be ended in such a case. The counteraction of the defendant will be made by using the F type form which will be transmitted by the court once with the European order for payment, the defendant being free of the obligation of specifying the reasons of his appeal. There are three cases where, even after the expiry of the 30-day terms established by art. 16 par. (2) of the Regulation, the defendant may demand the re-examination of the European order for payment before the competent court from the member state of origin:

1. The European order for payment was communicated or notified in accordance with one of the ways provided in art. 14 of the Regulation and this communication or notice did not occur in useful time in order to allow him to prepare his defense, without this being imputable to him;
2. The defendant was prevented in appealing the receivable of the applicant by causes of force majeure or because of some extraordinary circumstances, without this being imputable to him;
3. The order for payment was issued wrongfully.

It can be observed that in all these 3 cases, the intention of the legislator was to remove the fault of the defendant, exactly this being the consideration for which he receives another chance to challenge the application of the creditor by filing the application of reexamination of the European order for payment issued. Contrarily, we interpret that the request of reexamination filed by the defendant would not be acceptable. Of the request for reexamination of the defendant will be rejected, the European order for payment remains valid. In exchange, if the court will consider that the reexamination request of the defendant is justified, the European order for payment will be null and void.

The most important element introduced by this procedure of European order for payment remains *the removal of the procedure of exequatur*. Therefore, according to art. 19 of the Regulation, an European order for payment becoming enforceable in the member state

will be acknowledged and will be executed in all the other member states without being needed any statement to determine the enforceable force and without its acknowledgment to be challenged. The court of origin will immediately declares that the European order for payment is enforceable, using in this sense the G type form. The formal conditions required to acquire the enforceable force will be regulated by the legislation of the member state of origin. The European order for payment hence becoming enforceable will be forwarded by the court and to the defendant.

If the enforcement is to be made in a member state other than the state of origin, the applicant will make available for the competent enforcement body from that member state a copy of the European order for payment as it is declared enforceable by the court of origin and, if applicable, the translation of the European order for payment in the official language of the member state where the enforcement shall take place. The translation shall be certified by a person authorized in this respect in one of the member states.

The European order for payment can never make the object of a background reexamination in the member state of enforcement, but its enforcement can be rejected in the member state of enforcement at the request of the defendant, in the following cases:

1. The European order for payment is incompatible with a decision given or an order issues previously in any member state or in a third state, given that these will not cover the same parts in a litigation having the same object and, in the same time, the decision given or order issued previously to fulfill those conditions required to acknowledge it in the member state of enforcement, and the incompatibility could not have been invoked during the legal procedure in the member state of origin;
2. If the defendant paid to the applicant the amount established in the European order for payment.

In case that the defendant requested to the court of origin the reexamination of the European order for payment, the competent court from the member state of enforcement may, at the request of the defendant to limit the procedure of execution at insurance measures, to subordinate the execution of the constitution of a security which will determine or, under exceptional circumstances, to suspend the enforcement procedure.

**Conclusions** that can be drawn after the analysis of the European order for payment procedure are the ones that, as we were saying, by this regulation was followed to simplify, accelerate and reduce the procedural costs in cross-border causes regarding the non-challenged pecuniary receivables, the approval and enforcement of this regulation in member states being based on the mutual trust between the institutions of these states.

Nevertheless, in reality, we agree with the opinion according to which,[11] in reality, the numerous differences between the regulations of civil procedures from the member states, but also the ones of substantive law, are not fully solved by instituting some minimum applicable standards, being necessary an ample example of dogma as regard to the particularities that create major impediments of interpretation. Possibly, by enforcing the new Code of civil procedure starting with 01.09.2012 next to the new Civil Code already in force as of 01.10.2011, more of these differences to be mitigated, but the practice will be the one that will show us, along the way, which of them will be mitigated or not.

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[11] See S. Angheni, G. Răducan, *Aspecte privind procedura europeană a somațiilor de plată (English:Issues regarding the European order for payment)*, in Analele Universității Titu Maiorescu, Seria Drept, Bucharest 2007, p. 30.

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# WORKERS' REPRESENTATIVES

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**Abstract**

*This study deals with the institution representatives of the employees, the only possibility, regulated by the law, to defense and promotion the interests of employees, in the absence of a trade union representative at the level of the unit. Therefore, we are in the presence of alternative to trade union representation, whereas, in principle, coexistence between the two is out of the question.*

*Topics studied has known substantive changes with the entry into force of the Law No 40/2011, both in respect of the conditions of eligibility of representatives of the employees, as well as in respect of measures of legal protection for them. Therefore, we want to do a comparative overview of the old and new provisions equal in the matter.*

**Keywords:** *empoyee, representation, trade union, colective agreement, mandate, responsabilities.*

## Introduction

*Nowadays, the institution of the workers' representatives is regulated by Articles 221-226 Labor Code. Law no. 40/2011 has brought important changes regarding the old stipulations in matter. In principle, these changes refer to the eligibility requirements, conditions that must be met in order to elect the workers' representatives, and also to the protective measures instituted in their favor.*

As it had been shown by the special literature[1], the workers' representatives are an alternative to the trade unions, being elected, at the employer's level, only if there are no unions. Law no. 40/2011 has brought an important clarification in the terminology of labor relationships, because, initially, Article 224 paragraph (1) Labor Code required the appointment of workers' representatives in the units that had no union members. Therefore, this way of representing the employees may coexist with the classic one, the representation by a trade union, as long as that union is not representative. Related, and reported to Article 223 (e), the negotiation of the collective labor agreement is one of the special duties of the workers' representatives.

In this context, the wording of Article 221 Labor Code gave birth, with reason, to some contradictory opinions in the specialized legal literature. Thus, it has been enforced the idea that these provisions are mandatory[2], respectively: the appointment of the workers' representatives is compulsory for the employers that have more than 20 employees and where is no representative union. The opposite opinion[3], that cannot be ignored either, refers to the

[1] In this regard, Al. Țiclea, *Reprezentanții salariaților*, in *Revista Română de dreptul muncii*, nr. 1/2004, p. 24.
[2] R. G. Cristescu, C. Cristescu, *Codul muncii modificat şi republicat. Analize şi soluții*, Hamagiu Pubishing House, 2011, p. 324.
[3] I.T. Ștefanescu, *Tratat de dreptul muncii*, Wolters Kluwer Pubishing House, 2007, p. 109.

wording of the concerned article: "for the employers with more than 20 employees and where is no representative union organizations created according to the law, the employees' interests *may* be promoted and defended by their representatives…". According to this opinion, it is obvious that the existence of the workers' representatives is not obligatory. The law has set up a possibility and not an obligation for the employees to choose their representatives. Indeed, the legal regulation of the institution of the workers' representatives can be found only in the Labor Code. From the interpretation of this regulation it can result only one conclusion: we find ourselves in the presence of a suppletive norm.

Conversely, both the Labor Code4 and Law no. 62/2011, the social dialogue law5, impose the compulsory negotiation of the collective labor agreement at the unit level for employers with at least 21 employees. The social dialogue law states that the negotiation of the collective labor agreement can be made by the workers' representatives only in the units where either representative trade unions do not exist or there are unaffiliated trade unions to a federation trade union that is representative for the sector to which the unit belongs. Therefore, we ask ourselves how this legal obligation, to negotiate the collective labor agreement (in units with at least 21 employees), can be fulfilled, in default of a union representative and of the workers' representatives, better said, in the absence of a party. Thus, we believe that the wording of Article 221 Labor Code should be reconsidered, so that the two legal texts to correspond to each other. More specifically, to establish mandatory election of the workers' representatives in units with more than 20 employees, so that the obligation of negotiation of the collective labor agreement to be respected in the same units.

Returning, the role of the workers' representatives is to promote and defend the interests of the employees from the unit, having a similar role to that of the trade unions, even if the ways of action are not the same, since they are special mandated for this purpose. The length and limits of the mandate, according to Article 224 Labor Code, are established in the general assembly of the employees, the same assembly that elects these representatives. Thus, as noted before, in the legal doctrine[6], the relationships between the workers' representatives and the employees that chose them are based on the contract of civil mandate, the mandate of these representatives being a special one.

Specifically, according to Article 221 paragraph (1), the workers' representatives are elected during the general assembly of employees by vote of at least half of all employees regardless of the number of participants at the meeting. The number of employees includes all categories of employees, regardless of the type of the employment contract.

Also, Article 221 paragraph (2) stipulates that the number of elected representatives of the employees shall be established by mutual agreement with the employer, in proportion to the number of employees. This agreement is not demanded, for example, when nominating these representatives.

The conditions that must be fulfilled by an employee in order to be elected as representative have been modified once that Law no. 40/2011 entered in force. In the initial settlement of the Labor Code, only the employees aged at least 21 years old and that have worked for the employer for at least one year without breaks could have been chosen as workers' representatives[7]. Currently, the only condition that has to be fulfilled is that of full capacity of exercise, respectively the age of 18. Thus, it was removed the existent discrepancy

[4] Article 229 paragraph (2).
[5] Article 129 paragraph (1).
[6] I. T. Ştefănescu, *op. cit.*, p. 111.
[7] The establishment of some special age conditions for the exercise of certain functions or tasks is not an isolated fact. It is required by a number of normative acts that have a special character, for example, according to Law no. 22/1969, in order to fill the position of administrator, a person must be at least 21 years old, must have not been convicted for offenses against property and must have the necessary professional knowledge.

between the conditions to be met in order to be elected in the management bodies of the trade unions and the necessary conditions to be elected as workers' representative. On the contrary, Law no. 62/2011 stipulates that the persons that enjoy the full capacity of exercise and that do not execute the additional punishment for prohibition of the right to occupy a certain function may be elected in the management bodies of the trade unions. In the same context, it should be noted the fact that even minor workers, aged of 16 or over, may be members of a trade union.

In this context, two remarks are necessary. Firstly, according to stipulations of Law no. 319/2006 for work safety and health, the persons designated by the employees to represent them on issues related to safety and health at work cannot act as workers' representatives[8]. Secondly, the employees occupying managerial positions cannot be elected as workers' representatives, just as well as they cannot be union members[9].

The length of the mandate for the workers' representatives, as stipulated by Article 222 paragraph (3), may not exceed two years. This is a maximum length, so it can be less than 2 years. In fact, the general assembly of employees, once with the appointment of the workers' representatives intentionally mandated to defend and promote their interests, will also establish: the length and limits of mandate, the duties of the workers' representatives and the way of their fulfillment. Yet, the general assembly of employees cannot establish for their representatives tasks that are specific for the trade unions, as provided by law[10]. Because the law does not specify whether the workers' representatives may or may not obtain a second mandate, we consider that nothing prevent the same persons to be elected to represent the interests of employees for another, possibly, two years.

The legal stipulations on time spent by the workers' representatives to exercise their mandate have supported some changes in relation to the initial settlement of the Labor Code. Thus, according to Article 224 Labor Code (as amended by Law no. 40/2011) the facilities accorded to the workers' representatives regarding the time required to fulfill the mandate were eliminated. It was established that the number of hours within the normal working hours necessary for the fulfillment of the mandate they received is determined by the applicable collective labor agreement or, failing that, through direct negotiation with the unit's management.

Contrariwise, the situation of the elected members in the executive bodies of the trade union, who also work in the unit, is more severely regulated by Law no. 62/2011. On this basis, the trade union leaders are entitled to a monthly reduction of the working program by a number of days necessary for the development of the trade union activity, under the conditions negotiated by the collective labor agreement at the unit level. The employer has no obligation to support their salary rights during the time in question.

By the comparative analysis of the two legal texts, we conclude that the workers' representatives may be paid by the employer during the period of time that they perform their duties with which they were invested by the employees, if the parties determined so by negotiation, as the law does not expressly prohibit this possibility (such as for the case of the trade union leaders)[11].

The duties incumbent upon the workers' representatives cover a wide range of activities. In principle, they should guard to the observance of the employees' rights, in accordance with the law in force, the applicable collective labor agreement, the individual

[8] In this regard see R. G. Cristescu, C. Cristescu, *op. cit.*, p. 326.
[9] In this respect, I.T. Ştefănescu, *op. cit.*, p. 109.
[10] For instance, the workers' representatives cannot defend the employees' rights, they represent in courts, jurisdictional bodies, other institutions or state authorities, through their own or elected counsels for the defense.
[11] The same, R. G. Cristescu, C. Cristescu, *op. cit.*, p. 327.

employment contracts and the internal regulation. In the absence of some trade union organizations in the unit, the workers' representatives have the following specific powers:

- to be consulted by the employer when reducing the working program from 5 to 4 days per week, with the appropriate reduction of the wage, according to Article 52 paragraph (3) Labor Code;
- to be consulted and informed by the employer that intend to make collective redundancy, as provided by Articles 69-70 Labor Code;
- to be consulted by the employer to the development of the annual vocational training plan, annexe to the collective labor agreement concluded at the unit level, according to Article 195 Labor Code;
- to approve the employees' requests of removal from work in order to attend the training programs;
- to organize, every semester, in the units information concerning the rights of the pregnant female employees, confinement after birth or who are breastfeeding, according to G.E.O. no. 96/2003 on maternity protection at work;
- to take part to the drafting of the internal regulation, with an advisory opinion, as provided by Article 241 Labor Code;
- to promote the interests of the employees regarding the wage, working conditions, working time and rest period, job stability and any other professional, economic and social interests connected to the employment relationships. According to Article 163 paragraph (2) Labor Code, the confidentiality of the wages may not be opposed by the employer against the representatives of the trade union;
- to notify the labor inspectorate as regards the breach of the legal provisions and the provisions of the applicable collective labor agreement;
- to support the solving, at workplace, of complaints made by the employees who consider themselves discriminated on the grounds of sex, according to Law no. 202/2002 on equal opportunities between women and men;
- to negotiate the collective labor agreement, according to Article 223 (e) Labor Code. This last task was added by Law no. 40/2011, amending the Labor Code, corroborating, thus, the provisions of the general act with the stipulations of the special law in matter (Law no. 62/2011 on social dialogue).

Currently, the measures of legal protection provided for the workers' representatives were substantially reduced. If the old regulations specifically stated that such persons cannot be dismissed for reasons related to the person of the employee, for professional unfitness or for reasons related to the mandate received from the employees, Article 226 Labor Code, republished, stipulates that the workers' representatives cannot be dismissed only for reasons of fulfilling the mandate that they have received from the employees. In conclusion, during the entire term of office, the workers' representatives may be dismissed based on all grounds provided by the Labor Code, including the ground of dissolution the job position or for professional unfitness. Such a dismissal is illegal only if it is proved that the real reasons that led to the dismissal had direct and immediate relation to the fulfillment of the mandate given by the employees[12].

**Conclusions**

The need of special protection for the workers' representatives was set out as a general principle in the European Social Charter and it was provided by the Romanian legislation in a number of special laws.

Thus, based on Article 28 of the Revised European Social Charter, the workers'

[12] In this respect, R. G. Cristescu, C. Cristescu, *op. cit.*, p. 330.

representatives are entitled to enjoy effective protection against the acts that could bring them prejudice, including the dismissal, and which could be based on their status or activities as workers' representatives within the unit; to benefit from specific facilities to enable them to carry out their functions promptly and efficiently, account being taken of the professional relations system of the country, as well as the needs, importance and capabilities of the concerned unit.

Internally, Article 8 of Law no. 467/2006 establishing the general framework for informing and consulting the employees, states consequently: the workers' representatives enjoy protection and guarantees to enable them to perform properly the duties entrusted to them for the entire term of the office. The setting and meeting of these obligations must, however, take place within the limits prescribed by law.

Also, based on Article 48 of Law 217/2005 on the establishment, organization and functioning of the European Works Council, the members of the special negotiating body of the European Works Council and the workers' representatives in Romania enjoy, in the exercise of their duties, the rights provided by the law in force for workers' representatives and the persons elected to the trade union bodies. These rights especially refer to the attending to meetings of the special negotiating bodies or of European Works Council or any other meetings required by law, as well as the wage payment for the staff members who are part of the Community-scale undertaking or Community-scale group of undertakings, during the necessary absence for the performance of their duties. The members of the special negotiating body may not be subject to any discrimination, cannot be dismissed or subjected to other sanctions, as a result of their duties, according to Law no. 217/2005. And not on the final turn, the members of the special negotiating body of the European Works Council and the workers' representatives must be given the time and necessary means to inform the employees on the progress and results of the information and consultation process.

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# THE LINKS BETWEEN THE NEW ROMANIAN CIVIL CODE`S PROVISIONS AND THE ONES OF LAW NO. 25/2012

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**Abstract**

*The present paper aims at offering a brief view into the newly provisioned regulations regarding domestic violence in Romanian Law. With this purpose in mind, the author invokes past regulations and present realities, correlating them with the novelty of the New Civil Code and the last modifications of Law No. 25/2012. The result is a general study that points out the main characteristics and instruments employed by the new legal framework in combating domestic violence.*

**Keywords:** *domestic violence, New Civil Code, Law. No. 25/2012, Family Law.*

## Introduction

*The current year – 2012 – has brought on a series of legislation novelties, not necessarily innovations, especially imitations from other states' juridical systems. In the present study we will try to analyze the modality in which these Family Law provisions of the New Civil Code are structured and completed by the new juridical norms that regulate family violence. The last ones are condensed in Law No. 25/2012 which has significantly modified Law No. 217/2003 for combating and preventing family violence. The lawmaker has seriously tackled this problem, considering it to be one of national interest, this especially standing out within the legal text, the main reason for this being that unfortunately Romania is holding some negative records in that which regards family violence.*

## The History of the Problem

Without detailing what other authors have already pointed out, we observe that domestic violence not only was not regarded to be a problem for a long time but in certain historical eras it was considered to be even justified, from Antiquity to the Modern Age being if not encouraged, at least justified or explained. In the worst case, some minor reproof was applied to the one implicated, not without drawing the attention of the wounded party on its own culpability, all under the dome of the Church's Canonical Law.

The pre-1990 legislation has totally neglected and occulted the problems of the Romanian society, a patriarchal one by excellence. Only in 1990 the quality of being a family member was considered to be an aggravating circumstance in the penal provisions and a special law that would address domestic violence, Law. No. 217/2003[1] was much later

[1] For an analysis of Law No. 217/2003 see Mariana Narcisa Radu, Mihnea Radu, *Considerații privind legea pentru prevenirea şi combaterea violenței în familie* in *Studii şi cercetări din domeniul ştiințelor socio-umane*, Academia Română, Filiala Cluj-Napoca, vol. 12, Ed. Argonaut, Cluj-Napoca, 2004, p. 409-413.

adopted, even though at present times, the situation is especially grave, requiring normative adjustments[2].

As we have shown from a statistical point of view, Romania's situation is a challenged one regarding this issue. Of course, statistics have their limits but this certainly reveals real aspects relating to the ever more active concern of the public institutions to identify the phenomenon. The policy of the European Union follows the same direction in the conditions in which it was statistically proven that half of the women and children (the most abused categories) from Europe are victims of domestic violence[3]. The data made available by the Ministry of Labor, Family and Social Protection are more than worrisome from a statistical point of view, the figures from 2008 and 2009 indicating 11534 cases (137 deaths)[4], respectively 9868 cases (77 deaths) in the first 9 months of 2009[5]. The tendency is one of elevation of this phenomenon, the reports forwarded by the same ministry to the *„No Abuse"* Association indicating 11.000 cases for 2010, the centralized results not being publicly released yet[6].

There are multiple forms of violence and we will only mention them because we do not wish to insist on the forms of violence managed exclusively through the penal legislation. Even Law No. 217/2003, as it was modified by Law No. 25/2012 concretely defines in article 4 letters a) – g) the manifestations of domestic violence: verbal, psychological, physical, sexual, economic and social.

The concrete definition of the notion of „family member" is also important and it too has taken on new meanings as a result of the provisions of the new legislation[7].

**The Inter-Disciplinary character of The Domestic Violence Issue**

In these conditions, taking in account the figures presented and the fact that over 50% of Romanians considers that domestic violence is normal, it was only normal that ever more severe measure be taken[8].

Next to the juridical aspects that are evidently linked to the existence of a normative act, this law has a powerful inter-disciplinary character, its application requiring the instrumentality of an important number of public institutions.

Of course, The Ministry of Administration and Internal Matters and The Ministry of Justice have essential competencies in that which regards the application of this law. We must also underline its powerful social component, The Ministry of Labor, Family and Social Protection being expressly designated as one of the institutions directly implicated in managing the policies of social assistance and that it is also responsible with the financial dimension of the programs resulted from the application of this law.

Domestic violence is not only a juridical problem, it has numerous dimensions that link it with psychology, social assistance, social phenomena[9], all of these corroborated with theoretical issues, purely speculative but important to the matter at hand[10].

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[2] Maria Pescaru, *Preventing and Fighting against (intra)Family Violence* in *Agora International Journal of Juridical Sciences*, 2011, no. 2, p. 201-206.

[3] http://www.ziare.com/stiri/violenta/un-sfert-din-femeile-si-copiii-din-europa-victime-ale-violentei-1148779 - article and statistics from the 3rd of Feb. 2012 consulted on the 9th of Oct. 2012.

[4] http://www.mmuncii.ro/pub/imagemanager/images/file/Statistica/Buletin%20statistic/2009/familie1_65.pdf - consulted on the 9th of Oct. 2012.

[5] http://www.mmuncii.ro/pub/imagemanager/images/file/Statistica/Buletin%20statistic/2009/familie4_68.pdf - consulted on the 9th of Oct. 2012.

[6] http://www.ziare.com/stiri/violenta/romania-peste-11-000-de-cazuri-de-violenta-in-familie-in-2010-1136095 - consulted on the 9th of Oct. 2012.

[7] Mariana Narcisa Radu, Mihnea Radu, *The Concept of „Family Member" in the Romanian Penal Legislation* in *Valahia University Law Study*, vol. XVIII, no. 2, 2011, p. 48-52.

[8] http://www.ziare.com/stiri/violenta/jumatate-dintre-romani-considera-ca-violenta-fizica-in-familie-este-ceva-normal-1087884 - article featured on the 12th of Apr. 2011, consulted on the 8th of Oct. 2012.

A true campaign has started several years ago, its purpose being stopping or at least reducing the phenomenon, starting from a preventive function. Next to numerous NGOs that greatly contribute to the support of the victims of these abuses (ex. The „Artemis" Centre), The Institute of Prevention and Combating of Crime has started an ample program closely related with domestic violence[11].

**Correlations with other juridical norms**

Because of the magnitude of the phenomenon and its numerous implications, the desired solution would be the existence of conjoined legislations that would jointly function from within several Legal branches in order to assure resolution of the problems linked to domestic violence.

Firstly, one must observe certain provisions of the New Civil Code that have a strong tendency towards the linkage with penal norms in certain matters rather than the current approach that, up until now had preferred to remain within the specific framework of Civil Law.

Evidently, the most significant implications of this normative act – Law No. 217/2003, as it was modified by Law No. 25/2012 – are juridical linked to Penal Law, respectively to the Penal Code and Penal Procedural Code. At the same time, we are dealing with a Penal normative act that presumes a series of specific elements – the urgency of the measures, the participation of the Public Ministry in managing these situations and also the temporary „crisis" character of some of them, the solutions applied being always temporary.

Thusly, several types of institutions were developed, like centers of urgently receiving the victims, centers of combating violence and centers for aggressors and the last novelty brought on by the last modification of the law regarding the prevention and combating domestic violence is the possibility of obtaining a restraining order[12].

In order to support the efficiency of these norms or at least the fact that a timid start exists, several actions forwarded with the purpose of instituting this measure were noticed even at the date of the entering in effect[13] of the provisions at hand.

**The Correlation of the Legislation Regarding Domestic Violence with the Family Law Norms of The New Civil Code**

The big problem appears in the moment in which, after the disappearance of the urgent element determined by the imminence of the peril, even though the restraining order exists, more concrete and durable norms would have to be applied. This is because the situation of the victim cannot be solved exclusively by Penal Law special procedures, even though constraints on the liberty of the aggressor (which at the moment happens as a last resort situation at most) as long as these measures are not supported by social assistance, psychological counseling and patrimonial measures.

In this regard, coordination between the Penal Law norms, those regarding social assistance and civil norms would have to exist.

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[9]An interesting article on this subject, author Otilia Sava, on the 31st of March 2012 http://www.avocatnet.ro/content/articles/id_28240/De-ce-acceptam-violenta-domestica.html consulted on the 9th of Oct. 2012.

[10] Corina Buzdugan, *Teoria generală a dreptului*, Ed. Universul Juridic, Bucharest, 2011, *passim; eadem, Theories of the Right of the State to Impose the Legal Sanction in Criminal Matters* în *The Efficiency of Legal Norms*, Hamangiu Publishing House, Bucharest, 2012.

[11] http://www.politiaromana.ro/prevenire/ - consultat la data de 8 oct. 2012 (not adapted to the new legal provisions).

[12] Mirela Gorunescu, 13th of July 2012 http://www.juridice.ro/209698/ordinul-de-protectie-in-legislatia-romaneasca.html consulted on the 9th of Oct. 2012.

[13]http://www.telegrafonline.ro/1339448400/articol/201992/victimele_violentei_in_familie_cer_protectie_impotriva_agresorilor.html consulted on the 8th of Oct. 2012.

We do not know if the state realized the importance of such a correlation and if it intends to continue along these beneficial lines, beyond the small signs that stood out in this sense. However, it appears to be certitude that in the actual form of the Civil Code, some of the provisions relating to family rapports and beyond can become useful in these situations.

The whole Chapter II of The New Civil Code, respectively article 58 and the next one, refers to a problem that is directly linked to those already discussed – The respect owed to the human being and its inherent rights. It is evident that in the case of domestic violence, through the introduction of these new provisions the law is broken twofold, both from a Civil and Penal perspective. Both the doctrine (which has analyzed these rights before their express mentioning in the current Civil Code[14]) and the law recognize the *"right to life, health, physical and psychological integrity, dignity, to an own image, respect of private life as well as other similar rights recognized by law"* (according to art. 58) [15] as being non-transmissible, inherent. Inaccessible, un-patrimonial, in-sesizable and imprescriptible rights. *"Life, health and the physical and psychological integrity are rights guaranteed and equally upholded by the law"* (article. 61 as well as art. 64 referring to the inviolability of the human body) are primarily rights that refer to the welfare of society, according to the same article, second paragraph.

Of course, in the next articles the Code refers to the eugenic practices developed due to modern technology. Also, the new provisions make the intimation of the Court possible, in the conditions of articles 252-256, in order to dispose the reparation of the material and moral damages suffered as a result of breaching the aforementioned provisions, the legal civil delictual responsibility being invoked. Of course, at least for this part of the provisions, the procedure that can be initiated by the victim is easier, faster, advantageous and more beneficial if started within a Penal trial.

Aspects like infringement of the rights to private life, image, dignity (art. 71-73 with the definitions and examples of art 74) were linked to Civil Law (although not entirely or at least arguable).

For the protection of the minor and not only in this case, more concrete norms are provisioned a little different, especially regarding the procedure, the institution of Tutelage and Curatorship (art. 104 and the next one). In a certain measure, the old norms were kept, provisioned both by civil legislation and by especially applicable juridical norms, respectively Law No. 272/2004. These norms, on which we will not insist, also regulate the situation in which the institution of the Tutelage or Curatorship is imposed on the child, when the parents do not respect their obligations and more so when the children become victims of domestic violence, the statistics indicating them to be the perfect victims, next to the women and the old. All these measures are under the control and strict observation of the Tutelage Court, which will be the one to watch over the upholding of the rights of those under Tutelage. Of course, these institutions could make the subject of a distinct paper on their own, reason because of which we will not develop the subject further as it is only auxiliary to the present study.

There are some totally new consistent provisions which directly regard the family relations, now provisioned in the content of the Civil Code.

The correlative rights and obligations of the spouses are regulated in the IInd Book of the Code, Chapter V, art. 307 and the next one.

One of the obligations expressly provisioned is that of mutual respect, according to art. 309 paragraph 1, respect which the doctrine has indicated to be the respect of the person and personality of the other spouse, including his or her private life, without the censorship of

[14] Călina Jugastru, *Reflecții asupra noțiunii și evoluției drepturilor personalității*, An. Inst. de Ist. „G. Barițiu", Cluj-Napoca, Series Humanistica, vol. V, 2007, p. 325-340.
[15] *Noul Cod civil. Comentariu pe articole*, coord. Fl. A. Baias etc., C.H. Beck Publishing House, 2012, p. 58 sqq.

mail, social relations or professional choices, according to art. 310[16], which regulates the independence of the spouses at a personal level, through relating to the principle of co-decision within marriage. Evidently, if we try to corroborate all the possible types of violence applied within a family between the spouses, there are as many breaches of the general civilian provisions as there are of the special law.

Beyond the personal rights and obligations, the two spouses also have rights and obligations of a patrimonial nature. Within these types of rapports, certain types of violence can be observed, like psychological, economic, social and spiritual, without excluding the other forms. Frequently, the aggressive spouse abuses the lack of control of the other over the family goods or the poor material state with which the whole family is confronted in order to maintain his or her dominant position. In this regard, the case of wives that cannot or refuse to divorce because they fear especially expensive and endless trials that they do not afford is very frequent

The new provisions permit the possibility that in certain special situation, a special judiciary mandate or temporary tutelage can be instituted over one of the spouses when he or she puts the family at risk through his or her own acts, provisions which we can easily correlate with an abusive behavior caused by alcohol consumption or the consumption of other substances (art. 315, 316).

One of the great novelties is the provision of art. 318 of the New Civil Code, which regulates the right of information between the spouses and the obligation of spouses to inform the other relating to the goods, revenues and debts. In case of the contrary and lack of knowledge on behalf of third parties, a relative presumption is instituted according to which the plaintiff spouse tells the truth.

Inspired not only by the former legislation but also by situations of an abusive nature from the practice of the Courts, the possibility of recording immovable property as a family residence has been instituted even if the respective spouse is not the proprietor of the house, which assures an elevated protection of the family over the whole duration of the marriage. If these provisions are corroborated with the possibility of obtaining a restriction order or one of evacuating the abusive husband from the house these add up to especially useful norms in limiting the effects of abuse[17]. Furthermore, according to the provisions of art. 322 of the New Civil Code, even the juridical acts concluded regarding that immovable property have a special legal character according to which the consent of the other spouse is needed, even if the spouse that concludes the acts is sole proprietor. As a result, the act can be annulled (if the immovable property was properly noted in the Land Register) or damages can be requested (if there is no such inscription in the Land Register).[18]

There are similar provisions regarding tenancy (art. 323 of the New Civil Code).

The two spouses are obligated to award reciprocal material support and as a novelty, what the jurisprudence already established is now regulated, respectively the assessment of the work that each spouse has made within the household, adding a value to the work of the spouses (the law does not distinguish between the spouses but the work of women within the household is still predominant within the Romanian family, according to the aforementioned statistics and to the social realities)[19]. At the same time, the right of compensation for this spouse is instituted, if his or her help surpassed the normal limits (art. 328). These are normal provisions, extremely atypical for the Romanian society but which come to realize a certain equilibrium within the families. Without presenting polarized values, at a national level the

[16] *Idem*, p. 316-319.
[17] Mirela Gorunescu, art. cit.
[18] *Noul Cod civil. Comentariu pe articole*, coord. Fl. A. Baias etc.,C.H. Beck Publishing House, 2012, p. 334-340.
[19] *Idem*, p. 347.

reality is that the revenues of working women are lower than those of their male colleagues that hold the same positions or when this discrimination does not exist, there is a clear preference for male employees.

A true Pandora's box has been opened for both the parties of a marriage through the acceptance of the existence of several matrimonial regimes and the possibility of concluding some matrimonial conventions by the future spouses. We will not insist on these aspects, we will only mention them, taking in account that their link to the subject of the paper is indirect and they have already been the subject of some specialized studies[20].

Also, the partition of the patrimony becomes possible within marriage, without the disappearance of the legal community of goods (if this is chosen by the spouses), according to art. 358 of the New Civil Code, which is a welcomed provision, taking in account that the old regulations requested special conditions and justified situations in order to request this kind of partition. Presently, any spouse can request the administration of a part of the goods or the individualization of his or her quota, independently of the marriage.

Continuing on the same line of thought, the provisions regarding the separation of patrimonies which bears similar characteristics strengthen this approach, the only difference being that in the moment of choosing this option the regime of the community of goods ceases to exist for future goods. Also, the spouse that requests this separation must prove the culpability in administering the goods on behalf of the other spouse, condition that is not necessary in the situation of the partition of goods.

Finally, other significant aspects are those related to the decomposition of marriage that comes as auxiliary elements.

From the provisions of art. 373 paragraph B corroborated with art. 379, 384, and 390 of the New Civil Code, the decomposition of marriage because of the culpability of a spouse attracts, if the marriage in question took longer than 20 years, the possibility of obtaining a compensation charge in order to avoid a lack of equilibrium in the living conditions. This sum of money is established according to several factors (resources of spouses, health, effects of divorce etc.) and can take on the form of a global fixed sum or a monthly allowance, percentage quotas of the debtor's revenues or the beneficial interest of mobile or immovable goods (art. 391, 392 and the next of the New Civil Code).[21]

At the same time, adding to the possibility of requesting the compensation charge, in case of the divorce from the culpability of the spouse there is also a possibility to request the allowance of damages for the suffered prejudice, regardless if that is a physical, moral or material one (art. 388 of the New Civil Code).

The last aspect of the same category of payments is the one based on the right of allowance. This obligation also existed in the past, presently being independent of culpability (the culpable one can solely benefit from it but only for a year since the decomposition of the marriage). The allowance cannot coexist with the compensation but is distinct and can be awarded in parallel with the damages linked to the aforementioned prejudice[22] caused by the decomposition of marriage.

**Conclusions**

Such measures come to support the situation of the spouses that try to exit the vicious circle of an abusive marriage. It is evident that these norms are not perfect and can be improved upon, even though there are numerous aspects in question even in this phase of the

[20] Cristiana-Mihaela Crăciunescu, Mihaela-Gabriela Berindei, *Convenția matrimonială. Considerații critice* in *Noul Cod civil. Comentarii*, IIIrd edition, "Universul Juridic" Publishing House, 2011, p. 392-430.
[21] *Noul Cod civil. Comentariu pe articole*, coord. Fl. A. Baias etc., C.H. Beck Publishing House, 2012, p. 425-431.
[22] *Idem*, p. 421-424.

theoretical analysis. The practice will surely reveal new problems. It is evident that these norms must be perfected with more efficient prevention measures and with the application of the norms strictly regarding domestic violence.

These norms do not represent the perfect solution. However, they are very good premises for obtaining a real financial independence by those abused when this is the reason for their deterrence, contributing to the growth of the security of these persons. Also, these norms also assume the implementation of mid and long-term solutions that will assure the surpassing the difficult period of time for the abused person, after surpassing the critical moment of maximum urgency. In the lack of such certainties and of the convergence of all these factors, we all know that the "relapse" of the aggressor is very possible and especially the relapse of the victim, that enters in that spiral of dependency about which the psychologists talk about, the surpassing of the vicious circle being a complex process which must combine all these factors (psychological, economical, juridical, social).

The provisions at hand come to adequately complete the norms that regulate the prevention and sanctioning of the abuses. In the situation of a complete combination of social and psychological assistance (according to the legal provisions) with a juridical one, both of an optimal quality, there are real chances for stopping the abuses or at least minimalizing their effects on the victim and assuring at the same time a normal life for the future.

Compared to the old provisions, these novelties, both the Penal and Civil ones are absolutely innovating and welcomed.

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# OBSERVATIONS ON THE INTERVENTION OF NATO IN KOSOVO

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**Abstract**

*On the date of June 12th 1998, the North-Atlantic Council, gathered on the level of the ministers of defense, required the evaluation of the possible additional measures which NATO could take under the conditions of aggravation of the crisis from Kosovo. Consequently, on the date of October 13th 1998, pursuant to the aggravation of the situation, the North-Atlantic Council authorized orders of activation for the air attacks. This measure is meant to support the diplomatic efforts in order to determine the regime of Miloşevici to withdraw the forces from Kosovo, to cooperate for the end of violence and to facilitate the return of refugees to their homes. However, in the last moment, pursuant to other diplomatic initiatives of the officials of NATO and United States, the president Miloşevici accepted to collaborate, and the air attacks were cancelled*

**Keywords***: NATO, Kosovo, North-Atlantic Council, Security Council, Resolution 1203.*

## Introduction

*The Kosovo region enjoyed a high degree of autonomy within the former Yugoslavia until 1989, when the Serbian leader Slobodan Miloşevici changed the status of the region, withdrawing its autonomy and passing it under the direct control of Belgrade, the Serbian capital. The Albanian Kosovarians strongly opposed to this decision. During the year 1998, the open conflict between the military forces and the Serbian police forces and those of Albanian Kosovarians caused the death of over 1,500 of Albanian Kosovarians and chased away 400,000 persons from their home. The overcome of conflict, the humanitarian consequences and the risk of extension of it in other countries as well caused a deep worry within the international community. The ignorance by the president Miloşevici of the diplomatic efforts to amiable set the crisis and the destabilizing role of Albanian militant forces from Kosovo represented other reasons of worry*[1].

## I. Preliminary issues of the intervention of NATO

On the date of May 28th 1998, the North-Atlantic Council[2] gathered on the level of the ministers of foreign affairs, determined the two major objectives of NATO related to the Kosovo crisis, namely:

[1] http://www.msz.gov.pl/editor/files/docs/DPB/polityka_bezpieczenstwa/NATO_handbook.pdf.
[2] The North-Atlantic Council is formed of the permanent representatives of all member states, who are gathering at least once per week and represent the political authority with effective power of decision. The Council gathers as well on high level, in the presence of the ministers of foreign affairs, the ministers of defense or the heads of state and government, having the same authority and deciding power, and their decisions have the same status and the same validity, regardless the level of the meeting. The Council has an important public image and issues

• to contribute to the acquirement of an amiable settlement of crisis, by the contribution to the reaction of the international community; and

• to promote the stability and security in the neighboring countries, mainly in Albania and in the former Yugoslavia Republic of Macedonia[3].

On June 12th 1998, the North-Atlantic Council, gathered on the level of the ministers of defense, required the evaluation of the possible additional measures which NATO could take under the conditions of the aggravation of the crisis from Kosovo. Consequently, on the date of October 13th 1998, pursuant to the aggravation of the situation, the North-Atlantic Council authorized orders of activation for air attacks. This measure is meant to support the diplomatic efforts in order to determine the regime of Miloşevici to withdraw the forces from Kosovo, to collaborate for the termination of violence and to facilitate the return of refugees to their homes. However, on the last moment, pursuant to other diplomatic initiatives of the officials of NATO and of the United States, the president Miloşevici accepted to collaborate, and the air attacks were cancelled[4].

The Resolution 1199 of the Security Council of ONU expresses, among others, the deep concern related to the excessive use of force by the Serbian security troupes ant the Yugoslavian army and demanded the end of fire by both parties involved in the conflict[5]. In the spirit of the resolution, limits were established with respect to the number of Serbia forces in Kosovo and in the purpose of the operations performed by it, according to a separate agreement concluded with the Serbian government. In addition, it was agreed that OSCE institutes a Mission of verification in Kosovo (KVM) which shall deal with the observance of the conditions on field and that NATO determines a mission of air supervision. The determination of the two missions was approved by the Resolution 1203 of the Security Council of the United Nations. A few NATO non-member nations agreed to contribute to the mission of supervision. Coming in the support of OSCE, the Alliance constituted a special operative military force which could contribute to the emergency evacuation of KVM members, in case of a new conflict which would expose them to risk. This operative force was carried out in the former Yugoslavian Republic of Macedonia, under the general control of the Supreme Commandant of the Allied Forces in Europe[6].

Despite all these measures, the situation from Kosovo changed at the beginning of 1999s, pursuant to some actions of challenge came from both parties and to the excessive and disproportionate use of force by the army and special Serbian police. A part of these incidents were stopped by the mediation efforts of OSCE inspectors, but on the half of January, the situation got worse, pursuant to the escalade of the Serbian offensive against the Albanians from Kosovo. New international efforts were undertaken in order to quicken the search of a peaceful solution of conflict. The six nations of the Group of Contact, incorporated in 1992 at the Conference of London for the former Yugoslavia, France, Germany, Italy, United Kingdom, Russia and the United State, gathered on the date of January 29th. It was decided the emergency organization of negotiations between the parties involved in conflict, which were to be carried out by international mediation. NATO supported and reinforced the efforts of the Group of Contact, approving on the date of January 30th the use of air attacks on need

declarations and handouts, which explain to the wide public and the governments of the states which are not NATO members, the NATO orientations and decisions.

[3] http://www.nato.int/kosovo/history.htm.

[4] *Ibidem.*

[5] Anca Păiuşescu, Nicoleta-Elena Buzatu, *State's Recognition and Succesion Act as Contemporary Issues in International Relationships. Case Kosovo,* The 18th International Scientific Conference "THE KNOWLEDGE – BASED ORGANIZATION", Sibiu, România, 14-16 iunie 2012, KBO Conference Proceedings 2 – Economic, Social and Administrative Approaches to the Knowledge – Based Organisation, "Nicolae Bălcescu" Land Forces Academy Publishing House, pp. 748-753.

[6] *Ibidem.*

and transmitting a warning to both parties involved in conflict. These initiatives culminated with a first round of negotiations at Rambouillet, near Paris, between February 6th-23rd followed by a second round in Paris, between March 15th-18th. At the end of the second round of discussions, the delegation of Albanian Kosovarians signed the peace agreement proposed, and the discussions ended without a similar signature to be obtained from the Serbian delegation[7].

Immediately afterwards, the Serbian police and military forces intensified the operations against the Albanians ethnics from Kosovo, bringing troupes and additional tanks in the region, within a flagrant breach of the agreement from October. Before such systematic offensive, dozens of thousands of persons abandoned their homes[8].

**II. Air campaign of NATO in Kosovo – Allied Force Operation and its consequences**

On March 20th, the OSCE mission of verification from Kosovo was withdrawn from the region, due to the fact that the obstructions of Serbian forces restricted its activity. The ambassador of the United States, Richard Holbrooke, went to Belgrade, in a last attempt to convince the president Miloşevici to end the attacks over the Albanian Kosovarians, in order to avoid the imminent air attacks of NATO. Miloşevici refused to submit, thus, on March 23rd was provided the order to start the air attacks (Allied Force Operation).

The Allied Force Operation lasted 78 days, between March 24th and June 10th 1999, when the air forces of NATO performed 38,000 missions, out of which 10,484 bombardment raids (initially against the military objectives, then extended over the industrial installations and the Yugoslavian infrastructure), as well as 2,700 missions against Serbian anti-air defense. Undertaken without any decision of ONU Security Council, condemned by Russia and China, the operations in the air space of Yugoslavia represented the first military intervention in the history of NATO. If NATO forums acknowledged the loss of only two aircrafts, without claiming the disappearance of any military, the bombardments caused 545 deaths among the Yugoslavian army and 2,000 victims among the civil population. Also, the air campaign of NATO severely affected the economy of Yugoslavia, causing important destructions of goods, factories, refineries, bridges, implicitly the blockage of fluvial traffic on Danube[9].

The NATO objectives related to the conflict from Kosovo were set forth in the declaration of the extraordinary meeting of the North-Atlantic Council, organized at the seat of NATO on April 12th 1999, and they were acknowledged by the chiefs of state and by the government from Washington, on April 23rd 1999:

• controlled termination of all military actions and immediate termination of violent and repression actions;

• withdrawal from Kosovo of police, military and paramilitary forces;

• staying in Kosovo of an international military presence;

• safe and unconditional repatriation of all refugees and persons deported and the free access of the organizations of humanitarian aid with a view to assist them;

• determination of a political frame-commitment for Kosovo in terms of the agreements from Rambouillet, in compliance with the international laws and the Charta of United Nations[10].

When these conditions were agreed by the president Miloşevici, the North-Atlantic Council agreed on suspending the air campaign[11].

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[7] http://www.msz.gov.pl/editor/files/docs/DPB/polityka_bezpieczenstwa/NATO_handbook.pdf.
[8] *Ibidem.*
[9] http://www.jointophq.ro/cdmopi/teatreoperatii/kosovo/.
[10] http://www.nato.int/kosovo/repo2000/report-en.pdf.
[11] *Ibidem.*

Thus, on June 10th 1999, after the end of the air campaign, the General Secretary of NATO, Javier Solana, announced that he had given instructions to the general Wesley Clark, Supreme Commandant of Allied Forces in Europe, concerning the termination of the air operations undertaken by NATO. This decision was adopted after consulting the North-Atlantic Council and upon the confirmation by General Clark of the beginning of complete withdrawal of Yugoslavian forces from Kosovo. The withdrawal was performed in compliance with the technical-military agreement between NATO and the Federal Republic of Yugoslavia, in the evening of June 9th. The agreement was signed by the general lieutenant, Sir Michael Jackson, from NATO, and by the general colonel Svetozar Marjanovic, from the Yugoslavian army and by general lieutenant Obrad Stefanovic from the Ministers of Home Affairs, from the governments of Federal Republic Yugoslavia and Serbia Republic. The withdrawal was also performed in terms of the disposals of the agreement concluded on the date of June 3rd between Federal Republic Yugoslavia and the special representatives of the European Union and Russia[12].

On the same date of June 10th, the Security Council of the United Nations adopted the Resolution 1244, greeting the acceptance by the Federal Republic Yugoslavia of the principles for a political solution of the crisis from Kosovo, including the immediate termination of violence and the fast withdrawal of Yugoslavian military, police and paramilitary forces. The Resolution adopted with 14 favorable votes, none against, and one abstention (China), announced the decision of the Security Council to determine a civil and security presence in Kosovo, under the auspices of the United Nation. Acting under the Chapter VII of ONU Charta, the Security Council decided that the political solution of crisis was to be based on the general principles adopted on May 6th by the ministers of foreign affairs from the Group of the seven industrialized countries and Russian Federation – Group of the 8 – and on the principles included in the document presented in Belgrade by the special representatives of the Un European Union and Russia, which were accepted by the Federal Republic of Yugoslavia on June 3rd. Both documents were included as annexes to the Resolution[13].

The principles included, among others, the immediate and verifiable termination of violence and of repression in Kosovo; withdrawal of military Yugoslavian military, police and paramilitary forces; development of an effective civil and security international presence with the substantial participation of NATO thereof and under unique control and command; incorporation of an intermarry administration; safe and free repatriation of all refugees; a political transformation to provide a substantial self-governing of Kosovo province; demilitarization of the Army of Liberation from Kosovo; and a global approach of the economic development of the crisis region[14].

The Security Council authorized the member states and the main international organizations to determine the international presence of security and decided that its responsibilities include the discouragement of new hostilities, demilitarization of the Army of Liberation from Kosovo and insuring a safe environment for the return of refugees, and which may allow the international civil presence to carry out the activity. At the same time, the Security Council authorized the General Secretary of ONU to determine the international civil presence and demanded it to appoint a special representative in order to supervise the performance of such project in practice. Pursuant to adopting the Resolution 1244, the general Jackson, appointed as commandant of the new civil and security force and action on the

[12] http://www.msz.gov.pl/editor/files/docs/DPB/polityka_bezpieczenstwa/NATO_handbook.pdf.
[13] *Ibidem.*
[14] http://www.nato.int/kosovo/history.htm.

instructions of the North-Atlantic Council, began immediately the preparations for the fast development of Security Force, to operate under the mandate of ONU Security Council[15].

**III. Stabilizing force of NATO – KFOR**

The first KFOR troupes entered Kosovo on June 12th 1999. The development of KFOR troupes was synchronized upon the leaving of Serbian forces from Kosovo. On June 20th, the Serbian withdrawal ended, and KFOR had accomplished the initial mission of force development. The KFOR mission included: providing assistance with respect to the return of refugees and their protection; reconstruction and clearing the conflict areas; providing medical assistance; providing security and public order; providing security to minority ethnies; imposing interdiction armament traffic; protection of national patrimony; insuring the security of borders; armament destruction; supplying support to determine some civil institutions, protection of law and order, criminal and judicial system, electoral process and other issues of political, economic and social life of province[16].

The current missions of KFOR focus on constructing a safe space where all citizens, regardless the ethnie, cohabit peacefully, as well as providing support for the construction of a democratic civil society. Also, a special attention is still paid to minorities, this including patrol missions in the areas where these are determined, points of verification, providing escort to minority groups, protection of patrimony places and protection of the places where cloths and food are donated[17].

Initially, the KFOR mission was formed of 50,000 militaries, staff coming from the NATO member states, partner countries as well as NATO non-member countries, gathered under the Commandment of unified control. At the beginning of 2002, the KFOR contingent was reduced to 39,000 militaries. The improvements in the security environment allowed NATO to reduce the KFOR troupes to around 26,000 militaries, starting with June 2003, and, at the end of 2003, the number of troupes reached to 17,500. A step behind in the process of stabilization of the region was taken in March 2004, when new violence acts appeared between the Albanians and Serbians, and the KFOR forces were attacked. This determined NATO to increase the number of the existent troupes by another 2,500 militaries to consolidate KFOR. At the Summit from Istanbul in 2004, the NATO leaders and the governments of NATO member states condemned vehemently the ethnic violence from Kosovo from March 2004 and acknowledged the position of KFOR in the area, necessary to create a stable and multi-ethnic Kosovo. In August 2005, the North-Atlantic Council decided the reorganization of KFOR. Thus, the 4 multi-national divisions were turned into 5 military formations[18] much more flexible, which allowed the military operations register much more success and to exist a better cooperation with the police and the local population. In 2006, NATO committed solemnly to continue to assure the military presence in the area, as much as the year 2007 is the year when it was decided the future status of Kosovo province[19].

The situation from Kosovo is closely supervised by the North-Atlantic Council. During the ministerial meeting from 2000, the NATO member states reasserted their decision to fully contribute to the achievement of the objectives of international community, as provided in the Resolution 1244, to take all necessary measures to turn the Kosovo province in a peaceful, democratic, multi-ethnic and multi-cultural territory, where all inhabitants could enjoy the fundamental rights and liberties. The ministers of exterior of NATO expressed their firm support for the duty undertaken by UNMIK and by the Special Representative of the

[15] *Ibidem.*
[16] http://www.msz.gov.pl/editor/files/docs/DPB/polityka_bezpieczenstwa/NATO_handbook.pdf.
[17] http://www.nato.int/kfor/.
[18] Task Force – military term for a military formation which involves a combination of terrestrial, naval and air units.
[19] http://www.nato.int/kfor/.

General Secretary of ONU, as well as for the continuation of the collaboration on high level between UNMIK and KFOR. Also, they reasserted their decision to assure the maintenance of forces and capacities of KFOR on all levels required by the challenges which it should face.

**Conclusions**

On NATO Summit from Istanbul[20] dated June 2004, the heads of states and government of the state members condemned the ethnic violence from March 2004 and reasserted the commitment of the Alliance for a safe, stable and multi-ethnic Kosovo on the grounds of a complete implementation of the Resolution 1244, and on Riga, in November 2006, NATO expressed the decision to continue to assure a security climate in Kosovo and to contribute to the implementation of the security issues of the future solution concerning the status of such province, in collaboration with ONU, EU and OSCE[21].

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[20] The Summit from Istanbul was organised between June 28th -29th 2004 and gathered for the first time the heads of state and government of the member states of NATO under the form of the 26 member states. The decisions taken in Istanbul advanced the process of transformation launched at the Summit from Prague in 2002, reasserting the global increasing role of NATO and announcing a change in the priorities of the Alliance concerning some political fields. The allied leaders reasserted the long term importance of trans-Atlantic relation and of sharing the same trans-Atlantic values and tried to create means of cooperation with other regions.
Also, in Istanbul, the Alliance leaders launched the Initiative of Cooperation from Istanbul, which has as purpose the promotion of cooperation with the interested countries from the extended Middle Orient, starting with the countries of the Council of Cooperation of Gulf, in order to consolidate the security and stability through a new trans-Atlantic commitment in the same region. The main objectives of the initiative are: reform of defense; planning the defense; civil-military relations; fight against terrorism and illegal traffic, by exchange of information and maritime cooperation; „mil to mil" cooperation and non-proliferation of the weapons of mass destruction.

[21] http://www.nato.int/docu/nato_after_riga/nato_after_riga_en.pdf.

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# EUROPEAN UNION BETWEEN THE CENTRALIZATION AND DECENTRALIZATION RHETORIC. BRIEF CONSIDERATION UPON THE EVOLUTION AND PERSPECTIVE OF THE "GOVERNANCE" EUROPEAN MODEL[1]

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**Abstract:**
*The paper intend to achieve s brief incursion in the European model of the governance on several levels, seen as an instrument of national public administration Europeanization.*

**Keywords***: European Union, multilevel governance, decentralization, subnational authorities.*

## Introduction

*European Union represents today a laboratory to produce new legal instruments and governance techniques, created at the interlocking of the treaties. Innovations do not cover mainly the nature of the public issues, but the instruments chosen to solve them. The role of these concrete instruments of public action is to contribute to the improvement of the European political system functioning. Thus, we are witnessing in recent decades, to an evolution of the European political system toward a greater flexibility: more flexible coordination; emergence of numerous control mechanisms with alternate character; proliferation of new types of public instruments less restrictive for the Member States than the standard tools of the Community method (regulations, directives); is given a more and more important place to the consultations and deliberations; the institutional system become more and more complex, creating multiple independent structures; cross logic is constantly developing; it is given a central place to define the common objectives and the accent is rather on methods and forms of public action, instead on the content of the action.*

*Appealing to this type of instruments it is not only the exclusive privilege of the European Union. Similar mechanisms were developed in the majority of the Western states (even in areas where not directly related with the European integration), and the international right level. The flexibility is preferred to the traditional "dirigisme" approach, creating a "new public management",[2] characterized, among other things, by closer links*

[1] This work was supported by CNCSIS-UEFISCSU, project number PN II-RU, code 129, contract 28/2010.
[2] H. Christopher, *A Public Management for All Seasons?* in Public Administration, Vol. 69, 1991.

*between the private and the public sectors, openness toward the civil society and seeking solutions to technical rather than political solutions to contemporary issues*[3].

*In the context of this paradigm shift, the territorial factor becomes an essential one. The territories are not passive receptacles of the European Union anymore, but they become actors that provide legitimacy to the system, allowing the interests' conjunction at European level, committed to move close to its base. Is there a real just return? Do these new European governance instruments contribute to the empowerment of the territorial actors and to the increasing of their role in the decisional process? Here are some reflections paths that we are willing to approach, starting from the multilevel governance model, which is used today to describe the functioning of the European Union.*

**The need to overcome the "Community method" and the conceptualization of the "governance model" at EU level.**

The impossibility for the European institutions to administrate alone Europe and extraordinary diversity of the political administrative realities at the level of the Member States determined the Union to totally rethink the public action, overcoming the traditional Community method, based on the decisional triangle: Council - Commission - European Parliament and heading toward other actors – the subnational authorities of the Member States, civil society, private bodies, that tried to associate them to the European decisional process. Concerning the appeal to the local and regional actors, Europe and subnational structures constitute, as remarked in doctrines[4], "two separately designed worlds" and that have evolved separately till, being aware of their interests convergence, have developed bridges between supranational echelon and the local one. If the Community institutions discovered progressively the advantages of the dialogue with the subnational entities of the Member States and of an articulation of the Community policy on local realities, the regional and local authorities understood rapidly the earnings that can be obtained from an active presence in the European institutions and from an effective participation to define and achieve the Community policies, earnings found also in the strengthen of their position inside the Member States. Thus, the supranational and subnational institutions tried to mutually consolidate, and the Union furnished a political space where the territories can manifest and promote their interests.

Without favoring directly and with undeniable evidence, the spreading of the decentralization and local autonomy principles in the Member States, the European Union conceptualized progressively, under pre pressure determined by the increase of the territorial complexity, multiplication of the decision levels and transformations of the world economic system, a model of European "governance"[5] as a solution to coordinate different actors and

[3] L. Boussaguet, S. Jacquot, *Les nouveaux modes de gouvernance: quelle nouveauté pour quelle gouvernance?* in R. Dehousse, (coord.), *Les politiques européennes*, Presses de Sciences-politique, Paris, 2009, p. 410.

[4] I. Janin, J. Palard, *Les collectivités territoriales et l'Europe*, in Décentralisation, Etat et territoires, Cahiers français N° 318, La Documentation française, 2004, pp. 44-51.

[5] The term "governance" is used for the first time in a report of the World Bank from 1989, regarding the economic development of African States where, starting from the existence of a "government crises" is found the need of a new way of exercising of power, of a new governing system, based on new principles and relations between the national states and international bodies, civil societies, companies and multinational corporations that lead to a better management of the businesses - Adrian Liviu Ivan, *Perspective teoretice ale construcției europene*, Cluj-Napoca, Ed. Eikon, 2003, p. 266.

different decisional level[6]. Polysemantic[7] concept, the governance essentially assumes, opposing the traditional governance concept, hierarchical and centralized, the flexible way to govern through the coordination of a plurality of private and public actors, based on negotiation and consensus. Governance provides to the Union instruments updated to European construction, in order to guarantee the effectiveness of its action, but also new sources of legitimacy, through a more and more association of the local level to the European integration process[8].

**Partnership, subsidiarity, proximity – fundaments of the multilevel governance**

*The partnership principle*, introduced with the reform of the structural funds, operated in 1988, evolved toward the idea of a "strengthen cooperation" when modified in 2006[9], opened the path to a new way of action at Community level, that presume the subnational authorities association in every phase of implementation of these financial instruments, from programming till evaluation. This allowed the development of new echelons in decision making and the implementation of the funds, creating a new issue at Community level – that of *multilevel governance*[10], where the local entities participating in the implementation of the funds represents a third level of governance. Based on an active concertation of all categories of interests' existent at the Union level, the Commission activity usually falls in this logic of multilevel governance.

Searching the territorial coherence, the Commission developed a "*consultative administration*"[11], named *comitology*, in which groups of local and national experts, and also representatives of different categories of private interests participate in decision making. Also, due to the lack of own territorial administration, there are involved subnational authorities in the implementation of the European legislation and Union' policies, thus offering conventional instruments, focused on objectives, like the tripartite contracts between Union, state and local authorities[12]. Implementing various techniques of consultation, taking into account the expertise of various actors, the Commission encouraged the decentralization in the implementation and control of the Community rules, which allowed *the interconnection of the national and European echelon*.

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[6] This model start from the concept of corporate governance appeared in 1970 in the private sector, which designed a new way of company management, based on an articulation between the shareholders and the executive powers.

[7] To analyze the evolution of the governance concept and its various dimensions, see Jean Pierre Gaudin, *Pourquoi la gouvernance?* Presses de Sciences Po, 2002; Marcou Gérard, *La gouvernance: innovation conceptuelle ou artifice de présentation*?, *in* La gouvernance territoriale, Annuaire des collectivités locales, 2006.

[8] To argument the need of a "governance perspective" at the European Union level see H. Wallace, W. Wallace, A. Pollack, *Elaborarea politicilor in Uniunea Europeana*, Bucharest, European Institute of Romania, V[th] edition, 2006.

[9] According with the Council Regulation no. 1083/2006 from 11 July 2006, art. 11 §.1, "The objectives of the funds are followed in *close cooperation* (hereinafter "partnership") between the Commission and each Member State" (JO L 210, 31.7.2006, p. 25).

[10] The paternity of this expression is attributed to Gary Marks, that starts from the observation that regional policy is no longer based on traditional model of governance, to identify the new system of "continuous negotiations between govern and various territorial levels" - G. Marks, *Structural Policy in the European Community*, in Alberta Sbragia, ed., *Europolitics: Institutions and Policy Making in the 'New' European Community*, The Brookings Institution, Washington D.C., 1992, pp. 191-224. Regarding the scientific debate concerning this concept, see Ian Bache, *Multilevel Governance and European Union Regional Policy*, in I. Bache, M. V. Flinders, *Multilevel Governance*, Oxford University Press, Oxford, 2004, pp. 165-178.

[11] C. Blumann, *Comitologie et administration indirecte*, in J. D. de la Rochere (coord), *L'execution du droit de l'Union, entre mecanismes communautaires et droits nationaux*, Ed. Bruylant, 2009, p. 139.

[12] Commission Communication "*A framework for target-based tripartite contracts and agreements between the Community, Member States and regional and local authorities*", COM (2002) 709 from 11 December 2002.

Another illustration of the multilevel governance is represented by the "*open method of coordination* - OMC" established thorough Lisbon Strategy. This concerns the exercise of an European influence upon the Member States policies in the area of the competencies assigned by the Union through treaties, paving the way to common actions that are not limited by assigned competencies and allowing the exchange of good practice between national administrations located at different levels of decision making[13]. Concretely, the clerks on different echelon of the subnational authorities are invited by Union to make known their working methods, and also different programs they are developing on territorial level.

The development at Union level of the governance theory was, in a certain way, contradicted by the enrollment in the treaties of a mechanistic model for the regulation of the competencies, based on a vertical division of the powers – *the subsidiarity principle*[14]. Due to the evolution of the integration the Union began to cover more and more areas that interfered with the states' competencies or with the subnational entities, and appeared the need to define the relationships between the level of European authority, national and local, to rethink the territorial repartition of the competencies in Europe. The subsidiarity principle, with federal origin and old philosophical and political roots[15] was described in the Maastricht Treaty (art. 3-B) as general principle of exercising the divided competencies between the Union and the Member States[16], establishing the pertinent level for decision making: either at Community level, or at national level. Although, in essence, both the partnership principle and the subsidiarity one concern the same objective – the action efficiency, the subsidiarity was interpreted for a long time in an ascendant way, as a mean of intervention of the superior echelon when the inferior level is weak. In the treaty logic, that required the decisions to be taken as near as possible to the citizens (art. A par. 2 TUE), the subnational entities could also be concerned by the subsidiarity principle, as the nearest authorities to the citizens; this principle functioned exclusively in favor of states. Being afraid of a potential interference of the Union in the allocation of the competencies at internal level, the states did not accept such an interpretation of the principle, and the Union, obliged to respect the internal organization of the Member States, was forced to accept the state filter upon the pertinence of an action achieved locally. This leads, in practice, to not expand the subsidiarity principle at local levels, even after the supplementary clarifications brought by Nice and Amsterdam Treaties, that introduced like appreciation criteria of the pertinent level of decision the effectiveness and the added value of the action. The criteria introduced did not favor the interpretation in sense of the proximity of the subsidiarity principle, because the nearest level to the citizen is not necessarily the most appropriate, and that brings a greater effectiveness and added value. Finally, the subsidiarity contributed to ensure the relegitimation of the state inside the European Union.

More and more fervent arguments in favor of an interpretation of subsidiarity principle closer to the proximity principle written in the treaties has come amid deepening the debate on the democratic deficit suffered by the Union. Even if the subsidiarity is a principle that concerns the action effectiveness and not the democratic legitimacy, amid the claims of the federal states[17], on one hand and the Regions Committee, on the other hand, begins a new

[13] To analyze this method of governance see R. Dehousse (coord.), *L'Europe sans Bruxelles: une analyze de la méthode ouverte de coordination*, Paris, L'Harmattan, 2004.

[14] N. Levrat, *L'Europe et ses collectivités territoriales. Réflexions sur l'organisation et l'exercice du pouvoir dans un monde globalisé*, Bruxelles, PIE-Peter Lang, 2005, pp. 288-291.

[15] See Jean Louis Clergerie, *Le principe de subsidiarité*, Editions Ellipses, 1997; Frédéric Baudin Cuilliere, *Principe de subsidiarité et bonne administration*, LGDJ, Paris, 1995, p. 8.

[16] După o primă consacrare a acestuia in Actul Unic European, dar numai in ceea ce priveşte acţiunile in favoarea mediului.

[17] Acestea considerau că aplicarea strictă a principiului neagă specificitățile lor constituționale, determinând o recentralizare a competențelor.

valence of the subsidiarity principle, that of instrument in the service of the democratization of the European Union, bringing the decision closer to the citizen.

Starting from this democratized version of subsidiarity, of its conjugation with proximity, the Lisbon Treaty integrated explicitly the local and regional authorities from the Member States in the area of implementation of the subsidiarity principle, and to guarantee its effectiveness, provide new mechanisms thorough which the subnational entities (represented at the level of Region Committee) to supervise the process of nearness of the decision to the citizen, depending by the internal organization of the state, by the competencies they have in the national legislation and by the existent mechanisms to be taken into consideration in the process prior to decision adoption. They cannot pretend therefore an automatic right to be associated.

The institutionalization of the partnership, the joint interpretation of the subsidiarity and proximity beside the citizen and the more and more powerful involvement of the subnational actors in the European decisional process, through a permanent structural dialogue with European institutions had as a consequence a "de-verticalization" effect in the general organization of powers inside the European Union between the third level of public intervention: local, national and communitarian[18]. Thus it is proceedings from a hierarchical conception of the power relations to a unilateral and authoritarian logic, to a public action based on a network of public actors (both public and private), based on a continuous negotiation and on a partnership between actors at different levels. In other words, it is developing a model of pluralist governance, based on the interpenetration of different types and political units and loyalties. There isn't only one center of authority, but many, that are interpenetrating and operates on various territories, not necessarily very clear demarcated. The compliance, mainly voluntarily, it is obtained offering incentives[19]. This model, explained through the concept of multilevel governance presumes in fact to conciliate the general interest with the multitude of particular interests. It is credited, among other things, to undrawn a model of an European construction, to not orient the European integration toward a predetermined vision, intergovernmental of supranational[20].

Union itself is seen as a multilevel governance system. Through the *White Paper regarding the European Governance*[21], adopted by the European Commission in 2001, the multilevel governance receive, beyond its strictly analytic function, that allowed to describe a phenomenon of interaction between various decisional level, a normative dimension[22]. Adopted in a context marked by numerous debits concerning the necessity of reforming the operation framework of the European Union to reduce the democratic deficit and to bring the European citizen closer, the White Paper propose a model of public action where the development of the policies is done through the contribution of all social actors, in an interactive environment. The policies are not decided anymore at high level, but in "a virtual circle based on interaction, on networks and participation in all levels, from the policies

[18] P. Claret, *L'influence de l'integration européenne sur les institutions territoriales des Etats membres*, in I. Illessy (coord.), *Constitutional Consequences of the EU Membership*, University of Pécs, Faculty of Law, Pécs, 2005, p. 110.

[19] J. Zielonka, *Plurilateral Governance in the Enlarged European Union*, JCMS 2007, Volume 45, number 1, pp.187-209

[20] N. Levrat, *Une dynamique multi directionnelle de la gouvernance multi-niveaux*, in Les Cahiers du Comité des Régions, Vol. I, 2009, pp. 49-54.

[21] The White Paper of the European Commision regarding the European governance, COM (2001) 428, *JOCE* nr. C 87/2 from 12 October 2001.

[22] Fără ca acest termen să fie expres utilizat, principiile teoriei guvernanței multi-nivel reies din numeroasele texte care tratează problema asocierii puterilor regionale and locale la elaborarea and punerea in aplicare a politicilor comunitare - N. Levrat, *Une dynamique multi directionnelle de la gouvernance multi-niveaux, op. cit.*, p. 51.

definition to their implementation". The Commission defines the governance as representing "rules, processes and behaviors through which are articulated the interests, managed the resources and it is exercised the power in a society", or as "a set of principles and instruments for the decision making process in the context of existence of multiple layers of actors and decidents in EU: the European institutions at Community level, the governs and national parliaments at the Member States level (national), local and regional authorities at subnational level, as well as other actors, groups of private interests, social partners, civil society". The White Paper plot also the modalities through which, in light of this governance, could be improved the Community institutions' functioning. On one hand, it clarifies the notion of "*good governance"*, as representing the "transparent and responsible management of the human, natural, economic and financial resources, toward a fair and sustainable development", governance that is based on the principles of "participation, openness, responsibility, effectiveness, coherence, subsidiarity and proportionality". On the other hand, the Commission commits itself to take concrete measures, such as: improvement and clarification of the European legislation, guides publishing, development of standards and criteria, public debates and development of the code of conduct regarding the dialogue and consultations[23].

The frequent references to local and regional authorities across the White Paper, the place they are requested to occupy in the new model of action, the Commission commitment to open a systematically dialogue with the European and national associations of the local and regional collectivities to watch the taking into consideration of the regional and local realities and experiences, in the process of political proposals preparation are leading to the idea that the subnational authorities are targeted with priority by the Chart' provisions. Thus it is expected to increase the degree of legitimacy of the European action and the fight against de democratic deficit, but having a better effectiveness.

At a considerable distance in time (2009), the Region Committee adopt its own *White Paper concerning the multilevel governance*[24], where the multilevel governance is defined as representing "a coordinated Union action, of the Member States and of the local de regional authorities, based on partnership and aiming the development and implementation of the EU policies. This involves the common responsibility of the authorities in various levels of power and is based on all the legitimacy democratic sources and on the representativity of various involved actors". According with the Region Committee, various levels of power must act in virtue to a "trust agreement", so each part to put in practice common objectives, according with the institutional autonomy principle, and being necessary the orientation of the orientation of the European governance toward an integrated territorial approach, which shall follow an increased coordination of the objectives in developing European strategies, but however accompanied by a real flexibility regarding the means provided to fulfill them[25]. In its vision, the subsidiarity principle and that of the multilevel governance are inseparable: one concerns the various power levels competencies; the other is focused on their interaction.

The ambition of the Region Committee is the achievement of a real *culture of multilevel governance in Europe*[26], through the consolidation of the subdiacent fundaments

[23] M. Munteanu, *Guvernanța europeană şi dinamica formulării politicilor publice in România*, in Sfera politicii no. 125, 2006, http://www.sferapoliticii.ro/sfera/125/art06-munteanu.html

[24] The White Chart of the Region Committee regarding the multilevel governance, CdR 89/2009. Recourse to such an instrument, reserved till then to the European Commission, represents the reflection of the Region Committee ambition to begin an institution on the same level with the Commission - A. Noureau, *op. cit.*, p. 598.

[25] Consulting Report regarding the White Chart of the Regions regarding the multilevel governance, CdR 25/2010, at: http://www.cor.europa.eu/governance.

[26] See the Regions Committee Resolution regarding the political priorities for 2011 (CdR 361/2010 fin), where is written that "it has the intention to continue to develop an European culture of the multilevel governance (GMN)

and principles inside the European and national political and institutional framework. Its political project includes the adoption of a *European Union Chart regarding multilevel governance,* which shall help the inclusion among the European values of a common perception of the European governance[27].

**Conclusions**

Although some critics subsist mainly related to the ambiguity of the governance concept, of the strong fragmentation of the European public action resulted from the multiplication of the governance levels, that makes each echelon to have a bigger and bigger part in a diluted global power[28], the multilevel governance represents the model on which is presently based the political system of the European Union[29]. This shows, according to the doctrine, an evolution of the European integration toward a "new type of federalism"[30], intersecting and overlapping jurisdictions, or a new "neo-federalism", or "federalism without dividing competencies"[31], based on multilevel governance.

For the local and regional actors, the multilevel governance model allows a better consideration of their autonomy, either into the European area, thorough their emergency in the decisional process and in the process of the implementation of the Community norms and rules, and internally, associating the subnational authorities to adopt national positions in European affairs. If at European level the local and regional powers are more instrumentalized in the benefit of a better operation of the Community legal order, that presumes their minimal involvement, through procedures often informal, the essential contribution of the principles on which is based the multilevel governance is to allow a closer situation for the subnational entities[32].

The governance model developed at European level has definitely an exciting effect. It proposes methods, institutions, ideas, good practices that the actors of the process must apply in various national contexts. It is a massive transfer of "forms" that, in time, through adaptative measures, shall create also the necessary "fund", that means a radically decentralized society, where the govern is only one of its numerous actors[33]. Beyond its Community size, multilevel governance assumption as a way of organizing public powers at national level depends, in a certain way, by the existence of domestic pre-conditions[34]: to reach a certain degree of administrative decentralization and the opening of the national government toward the ideas of partnership, dialogue, collaboration with various social actors; the existence of a powerful civil society, involved politics; the level of transparency of the decisional process.

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and that it shal take as reference the White Paper to evaluate its implementation and to monitor it inside the European Union".

[27] The Regions Committee, The 9th session of the CIVEX Commission, 6 June 2011, *Orientation* d*ocument regarding the creation of an European culture of multilevel governance: initiatives following the White Paper of the Regions Committee*, Rapporteur: Luc Van Den Brande (CdR 147/2011).

[28] See O. Borraz, V. Guiraudon, *Introduction/Comprendre les évolutions de l'action publique*, in O. Borraz, V. Guiraudon (coord.), *Politiques publiques 1, La France dans la gouvernance européenne*, Presses de Sciences Po, Paris, 2008.

[29] L. Malo, *Autonomie locale et Union europeenne*, Ed. Bruylant, Bruxelles, 2010, p. 180.

[30] L. Hooghe, G. Marks, *Unraveling the Central State, But How*? Political Science Serie no. 87, Instutut für Höheres Studien, Wien, 2003.

[31] N. Levrat, *Esquisse d'un néo-fédéralisme européen*, in P. Grigoriou, *L'Europe Unie et sa Fédéralisation*, Athènes – Bruxelles, Sakkoulas & Bruylant, 2009, pp. 31-44.

[32] L. Malo, *op. cit.*, p. 198.

[33] M. Munteanu, *op. cit.*

[34] C. Chiriac, *Emergența modelului guvernanței multilevel in România*, Transilvanian Review of Administrative Sciences 1 (23)/2009, p. 10.

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# MATRIMONIAL REGIMES IN THE NEW ROMANIAN CIVIL CODE

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**Abstract**

*The matrimonial regime represents the entirety of the legal provisions concerning the property relations between spouses during marriage, as well as the legal documents they conclude with other people, governing a (measurable) patrimonial asset.*

*In addition to the legal community regime, with the adoption of the new Romanian Civil Code two new matrimonial regimes were introduced, namely the regime of property separation and the regime of the conventional community.*

*Where the two spouses opt for one of the other two regimes, instead of the legal community regime, it is necessary that they should sign a marital agreement.*

**Key words:** *Matrimonial regime, property relations, legal community, marital agreement.*

## Introduction

*The matrimonial regimes regulated by the Romanian Civil Code.*

*In the Civil Code there are regulated three matrimonial regimes: spouses or future spouses may choose one of these, which is applicable to their marriage.*

- *the legal community regime;*
- *the separation of property regime (with the possibility of joint acquisitions);*
- *the conventional community regime.*

*By law, spouses cannot combine rules that are specific to these different regimes in order to create their own regime, and may only choose one of those prescribed by law.*

*However, the Civil Code also introduced in Romanian law the principle of the mutability of matrimonial property regimes, entitling the spouses to change, during their marriage, the matrimonial regime applicable to them.*

## Choosing the matrimonial regime

The freedom of the spouses to decide through contract provisos on the legal nature of their property and the manner of managing these assets is greater or lesser depending on the conception underlying this institution in every legal system.

According to the new regulations of the Civil Code, the spouses may choose the matrimonial regime that is applicable to their marriage from amongst those provided for by law. This will take the form of concluding a marital agreement.

## The marital agreement

*Notion*: A marital agreement designates the legal document whereby the future spouses, making use of the freedom conferred to them by the legislator, establish, by mutual agreement, their own matrimonial regime, or change, during their marriage, the matrimonial

regime under which they were married.[1] In the recent Romanian doctrine, it has also been defined as: *the agreement whereby the future spouses establish the matrimonial regime they shall abide by*.

*The juridical nature of the marital agreement*

In the Romanian law, before the entry into force of the Family Law Code, marital agreement, which was also present in older enactment, namely in the Civil Code of 1864,[2] was equated with the notions of marital contract, dowry establishment, dowry sheet, marriage contract, and was defined as the "convention whereby the future spouses regulate their matrimonial regime, in other words, the condition of their present and future property in the pecuniary relations that marriage entails."

Given its special importance for the family that comes into being through marriage, the marital agreement was considered a genuine *family pact*.

This is a contract that has a specific juridical cause, a qualification that we may find both in the classical doctrine from before the adoption of the Family Code and in the current doctrine.

*The legal characteristics of the marriage agreement*

- it is a bilateral legal instrument;
- it is a complex contract, which may encompass several legal instruments, each retaining its legal identity and characteristics;
- it is a solemn act;
- it is an synallagmatic document (Article 1171 first thesis of the Civil Code);
- it is an instrument that is an accessory to marriage;
- it is a public act;
- it is not compatible with the common law modalities (terms, conditions). However, the provisions of Article 330 from the Civil Code, paragraph 3, shall be taken into account. According to them, the "agreement concluded during marriage shall take effect from the date specified by the parties or, in its absence, from the date of its conclusion".

*The validity prerequisites for the marriage agreement*

*Substantive conditions* - refer to: the competence of the contracting parties, the consent thereof, the legal object and cause.

- the competence of the parties to enter into a matrimonial agreement is assessed according to the principle *habilis ad nuptias, habilis ad pacta nuptialia*, which means that any person who can marry validly also has the capacity to enter into a matrimonial agreement.[3]
- the consent of those who wish to enter into a matrimonial agreement will be subject to the general rules of validity necessary for the conclusion of legal acts, governed by Article 1204 of the Civil Code.
- the cause of the marriage agreement is special, which entails that the parties intend to marry and to form a family together, or, if already married, to continue family life, changing the matrimonial regime applicable to their marriage so as to create the best framework for the prosperity of the future ménage. In the absence of such a legal will, concluding a matrimonial agreement would not have a legitimate cause.

*Formal conditions*. The matrimonial agreement is concluded through an instrument authenticated by a notary public and is a solemn legal document. At the conclusion of the marriage agreement, according to Article 330 of the Civil Code, the consent of both spouses must be given before a notary public, either personally or by an authentic, special proxy having a predetermined content. The breach of the provisions is sanctionable by the absolute nullity of the act.

[1] C. M. Crăciunescu, *Regimuri matrimoniale*, Bucharest: All. Beck Publishing House, 2000, p. 11
[2] Article 1224 from the Civil Code of 1864, or Article 932 bearing the name of marital convention.
[3] M. Avram, C. Nicolescu, *Regimuri matrimoniale*, Bucharest: Hamangiu Publishing House, 2010, p. 81.

*The date of concluding the marriage agreement*

According to the provisions of Article 330 paragraph 2 of the Civil Code, the date of concluding the marriage agreement may be either before or during the marriage, but it will produce effects only during the marriage.

The validity of matrimonial agreements concluded long before the marriage subsists as long as they represent the will of the spouses: the law does not specify a deadline in this sense.

*The lapse of the matrimonial agreement*

The matrimonial agreement will become null and void if the idea of concluding the marriage is abandoned.

The matrimonial agreement will become null and void in the following cases:

- there is a manifestation of the will of the parties to relinquish the marriage;
- there is an ascertainment of the nullity or annulment of the marriage (except in the case of the putative marriage);
- when the guardianship court decides on the legal change of the matrimonial community regime, in this case ruling in favor of the separation of property regime.

*The publicity of the matrimonial agreement*

Under Article 334 of the Civil Code:

- the statement on the marriage certificate;
- the inclusion in the national notarial register of matrimonial property regimes;
- depending on the nature of the goods, the agreement will be included in the real estate register, written down in the trade register and other publicity records as provided by the law.

*The simulation of the matrimonial agreement*

It is regulated by Article 331 of the Civil Code, which provides for the secret document whereby a different matrimonial regime is chosen or changed, for which the publicity conditions provided by law are met; this takes effect only between the spouses and cannot be opposed to *bona fide* third parties.

*Amendments to the matrimonial agreement*

A change entails certain differences depending on whether it occurs before or after the conclusion of the marriage.

Before the marriage, the matrimonial agreement may be amended at any time, in whole or in part, under the conditions stipulated by the law regarding its form and publicity.

After the conclusion of the marriage, the spouses may modify the matrimonial regime applicable to them only after at least one year after the marriage date, by concluding a matrimonial agreement (Article 369 of the Civil Code.)

*The nullity of the marriage agreement*

The matrimonial agreement is void when it is concluded by disrespecting the substantive and formal conditions provided by law.

**The preciput clause**

This is regulated by Article 333 of the Civil Code, reference to it being also made in Article 367 letter d of the Civil Code.

The preciput clause is agreement of will between the spouses, or where appropriate, of the intending spouses, made under the law, contained in the matrimonial agreement, under which the surviving spouse is entitled to take, free of charge, before the division of inheritance, one or more common property assets, held in common or in joint ownership.

This clause may be stipulated for the benefit of either spouse or for the benefit of only one of them.[4]

[4] In the initial form of Article 333 of the Romanian Civil Code.

The preciput may also constitute the exclusive object of a matrimonial agreement.

The preciput clause creates a right to preciput, which is born for the benefit of the surviving spouse, at the time of the other spouse's death.

For each of the spouses (when the cause is stipulated for the benefit of either of them), or for the spouse to the benefit of whom the clause was provided, the preciput is a possible right to which he or she may be entitled under the suspensive condition of survival.

**Changing the matrimonial regime**

Article 319 paragraph 2 of the Civil Code provides the possibility to change the matrimonial regime adopted by the spouses, consecrating thus the principle of the mutability of matrimonial regimes.

The law does not provide the concrete ways of matrimonial regime change, but according to the principle of the symmetry of legal documents, they coincide with those whereby it was adopted.

Upon the termination or change of the matrimonial regime, Article 320 of the Civil Code provides that it shall be liquidated through the mutual agreement of the spouses (an authentic document being drawn up) or in court (in this case, the judicial ruling constitutes the liquidation act).

The **application of the matrimonial regime** chosen through the marriage agreement concluded according to the legal requirements takes place at a different time, depending on when it was concluded, before or during marriage. The date when the legal matrimonial regime or the agreement comes into force is:

- if a conventional matrimonial regime is chosen through an agreement, this will take effect from the date when the marriage is concluded (Article 313, paragraph 1, of the Civil Code);
- if the future spouses have not agreed to a conventional matrimonial regime, the legal regime shall apply to them from the date when the marriage is concluded;
- in the event of concluding a matrimonial agreement during the marriage, whereby a conventional matrimonial regime is chosen or whereby a conventional matrimonial regime is changed in favor of a legal regime or the matrimonial regime applicable to their marriage is modified, this will take effect from the date specified by the parties or, is that is absent, from the date of its conclusion, but not before the lapse of at least one year since the conclusion of the marriage (Article 369 of the Civil Code).

The application of the matrimonial regime adopted by marriage agreement or, in its absence, the application of the legal matrimonial regime should be subject to the following principles:

- the principle of equality between the spouses;
- the principle of the free choice of a matrimonial regime;
- the principle of the mutability of the matrimonial regime;
- the principle of the accessoriality of the matrimonial regime to the institution of marriage;
- the principle of the uniqueness of the applicable matrimonial regime.

The matrimonial regime is always applied together with the primary regime.

**The termination of the matrimonial regime**

It is applied in principle applies throughout the marriage. If the marriage is terminated, the matrimonial regime ceases on the date the request for a divorce is filed.

According to the principle of the mutability of matrimonial regimes adopted by the Romanian Civil Code, the spouses may agree to amend or change it during the marriage.

The matrimonial regime may be changed by the guardianship court, establishing the judicial separation of property, under the law.

**The liquidation of the matrimonial regime**

This is the legal operation whereby the spouses or former spouses separate their assets. This implies, in principle, the following:

- each of the spouses taking possession of their own property;
- the division of the joint assets (if any);
- debt adjustment.

**The matrimonial regimes regulated in the Civil Code**

**The legal community matrimonial regime**

This is applicable whenever the spouses do not express, through the conclusion of a marital agreement, their option for the adoption of a conventional matrimonial regime.

The legal community matrimonial regime is a matrimonial community regime capable of ensuring the effective protection of the spouses' common interests, ensuring, at the same time, sufficient flexibility and freedom of decision to each of them.

**The spouses' assets in the legal community matrimonial regime:**

- the mass of joint assets;
- the mass of the husband's own assets;
- the mass of the wife's own assets.

**The termination and liquidation of the legal community matrimonial regime**

The termination of legal community matrimonial regime occurs in the following cases:

- at its conventional or legal change;
- at the termination of marriage through the death of one of the spouses;
- at the declaration of nullity or the annulment of the marriage;
- at the dissolution of the marriage.

The liquidation of the legal community matrimonial regime occurs on the cessation of the community, according to Article 355 of the Civil Code. The liquidation of the legal community matrimonial regime is a complex operation, defined by law in Article 357 of the Civil Code, regulating each spouse's taking possession of their own assets, the division of the joint assets and the settlement of any liabilities. The presumption of the spouses' equal contribution to the acquisition of joint property becomes applicable, unless a different contribution is ascertained.

**The conventional matrimonial regimes**

The conventional matrimonial regimes regulated under the Civil Code are the following:

- the separation of property regime (with the option of joint acquisitions);
- the conventional community regime.

*The separation of property matrimonial regime.*

This is a typical separatist regime, offering the spouses a wide patrimonial independence, limited only to the application of the provisions of the primary regime.

**The spouses' assets under the separation of property matrimonial regime**

In this regime there exist only the personal assets of one or the other of the spouses. We do not find here the mass of joint property, characteristic only of the community matrimonial regimes.

Each spouse retains exclusive ownership of all the assets in their possession at the time of concluding the marriage, but also those they acquire during the marriage, for a consideration or free of charge.

Any property acquired is the exclusive property of the spouse in whose name the property was bought, even if it is paid for with money of the other spouse.

**The spouses' debts in the separation of property matrimonial regime.**

In this system there is only the personal debt of each of the spouses, except for the debts incurred by the household expenses.

The fundamental principle governing the spouses' debts under this matrimonial regime is provided for in Article 364 paragraph 1 of the Civil Code, which states that 'Neither

of the spouses shall be held liable for the obligations arising from the acts committed by the other spouse".

**The termination and liquidation of the separation of property matrimonial regime.**

*The termination of the separation of property matrimonial regime takes place:*

- at its conventional change;
- at the termination of the marriage through the death of a spouse;
- on ascertaining the nullity or annulment of the marriage;
- on the dissolution of the marriage.

*The liquidation of the separation of property matrimonial regime* involves mainly the following operations:

- the identification of each spouse's own assets;
- the division of the property acquired in co-ownership, or the transformation thereof into a full and exclusive ownership right for each of the spouses;
- the mutual payment of any possible claims arising between the spouses during the marriage;
- the payment of the spouses' common creditors.

**The matrimonial regime of joint acquisitions**

Under Law no. 71/2011 regarding the implementation of Law 287/2009 of the Civil Code, Article 360 of the Civil Code was supplemented with a new paragraph, which introduces the possibility of changing the separation of property matrimonial regime, which, in fact, amounts to a regulation of the new matrimonial regime, namely the regime of joint acquisitions.

In all the systems of law from which the legislature drew inspiration for enacting the Civil Code, the matrimonial regime of joint acquisitions represents a distinct matrimonial regime, not a manner of liquidating the separation of property regime.

**Changing the matrimonial regimes**

**The conventional change**

The matrimonial regime may be amended under the agreement of the spouses, whenever they want, under the following conditions:

- at least one year since the conclusion of the marriage must have passed;
- the legal requirements for concluding marriage agreements are complied with. Changing a matrimonial regime will be achieved by concluding a new marriage agreement in the form of an authentic instrument, before a notary public.
- the fulfillment of all the forms of publicity provided by law for the enforceability of the marital agreement.

**The judicial modification**

Changing the matrimonial regime applicable to a family may also be achieved in court, at the request of one of the spouses, where:

- the matrimonial regime applicable to the spouses is that of the legal or conventional community;
- the other spouse concludes acts that endanger the property interests of the family.

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# SUGGESTIBILITY IN INTERVIEW AND INTERROGATION – THE SMILE

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**Abstract**

*The author develops a discourse on suggestibility, on how smile can be used to guide the behaviour of people investigated, about how the presence of smile, jokes and laughter in the conduct of the person interrogated can be interpreted.*

**Key words**: *criminal investigation, interview and interrogation, smile, jokes, laughter*

## Introduction

*Suggestibility in judicial hearings/interrogation, why did we consider necessary an approach to such a subject?*

*Because the topic is considered taboo and is treated superficially in the specialized doctrine and practitioners do what they can about it. In principle, they sway, from case to case, from being persuasive with an amazing haste, impatience and ignorance, to being fearful, hesitant, awkward in formulating and delivering questions to the person they are hearing, while eagerly avoiding any non-verbal signs that might betray their beliefs, position or the strategy they intend to use in the development of the investigation they are conducting.*

*The written instructions seem clear enough – the investigator should avoid, the investigator is prohibited from resorting, within the hearings, to suggestive questions that might distort the statement of the person examined.*

In judicial hearings, suggestibility is explained as being given by the extent[1] to which a person having come into the hearing room, during the hearing, accepts messages conveyed by the investigator and appropriates them – possibly even enriches them – with a consequent damage to all subsequent statements given during the investigation.

Well, inter-human communication involves the exchange of messages and, consequently, their acceptance or rejection. It is normal, in the first instance, to agree with the content of certain messages, to take them on, to internalize and accept to promote them as representing us, individually, as well. In the second case, that of rejection of the content of certain messages, theoretically things become clear in the sense that we do not accept, we repudiate that content, but... we may develop an interest, which we consider important and which might cause us to... make concessions and, as such, to accept, to internalize and promote something that does not represent us, with a content that we disagree with, but which can help us achieve our interest, and what could possibly be more important than our personal interest?

[1]Gudjonsson, G.H. and Clark, N.K. (1986). Suggestibility in police interrogation: a social psychological model. *Soc. Behav.*, 1, pp. 83–104.

Of course, “higher” interests may come up in the first case too and, in such a situation, the person in question will try to refrain, to abstain from commenting, saying he does not know, he has no idea, was not concerned, did not realize that, etc.

Returning to inter-human communication, it should be accepted that it is absolutely normal to exchange messages, to influence each other, to accept or reject the suggestions that are conveyed to us and that we perceive. In fact, isn’t suggestibility a component of human communication? Of course IT IS.

In these circumstances, a serious problem arises: how to neutralize the negative effects of suggestibility on the investigation?

First of all, let's see what the positive and negative effects are, how suggestibility can influence in a positive or negative way the results of judicial hearings and, why not, of the entire investigation.

We have already shown that, by communicating, we exchange messages. In the hearing room, the person interrogated states something, therefore it is natural, normal for any communication, that the investigator should have a position, express his acceptance or rejection of the message content, show that he is interested or not, require details about one or another of the related aspects.

How can he do this?

Through verbal expression, through non-verbal manifestations or, exceptionally, in writing. Should we consider as erroneous the assertion that the person making the statement will continue his/her exposition, being obviously conditioned by the message – verbal, non-verbal or written – passed on by the investigator? The answer is definitely negative; there is no error in the statement. The suggestion is obvious, the level at which it acts, the suggestibility potential of a message, the degree of suggestibility of a person can be variable, but this does not change the conclusion, namely that suggestion operates in the context of an undeniable normality.

The problem of whether this is right or wrong is false! Human behaviour is suggestive the messages we send are suggestive – they are quite objective findings and if something is right or wrong, then “this is it”, we cannot influence anything.

So, where does the danger lie, what can bring about the failure of a hearing and of the entire investigation, if suggestibility is normal?

In my opinion, it lies in the way we, as investigators, convey suggestion and the object of suggestion.

The way we convey suggestion becomes dangerous when it becomes imperative (you must...), when it includes a credible threat (if you don’t..., we’ll...), when it conditions the good (if you want...).

The object of suggestion is a danger when dealing with false, unrealistic versions, arising from the investigator’s vanity, based on an ignorant interpretation of past experiences or, worse, as a result of interests having to do with corruption, with finding the guiltless as guilty, with the erroneous resolution of the case.

What are the means by which we can send suggestive messages, suggestions? We have made an overall reference to verbal, non-verbal and written communication. Given the limited space of this article, I will only further refer to smile, as a means of transmitting suggestion.

What is a smile? An expression of the face, which can be supplemented by various gestures and postures, which is interpreted as a positive response of the person – even more than a positive response, as it includes a component related to satisfaction – in relation to a state, situation or person.

With regard to its origin and development, we can say that it emerged as an adequate response of children from an early age to the expectations of their parents or, perhaps, as an

adaptive response of the prehistoric man to difficult situations, when dealing with animals possessing qualities superior to his own.

With regard to the way a smile emerges, what a natural smile, a fake smile looks like, etc., a lot has been written and things are clear[2].

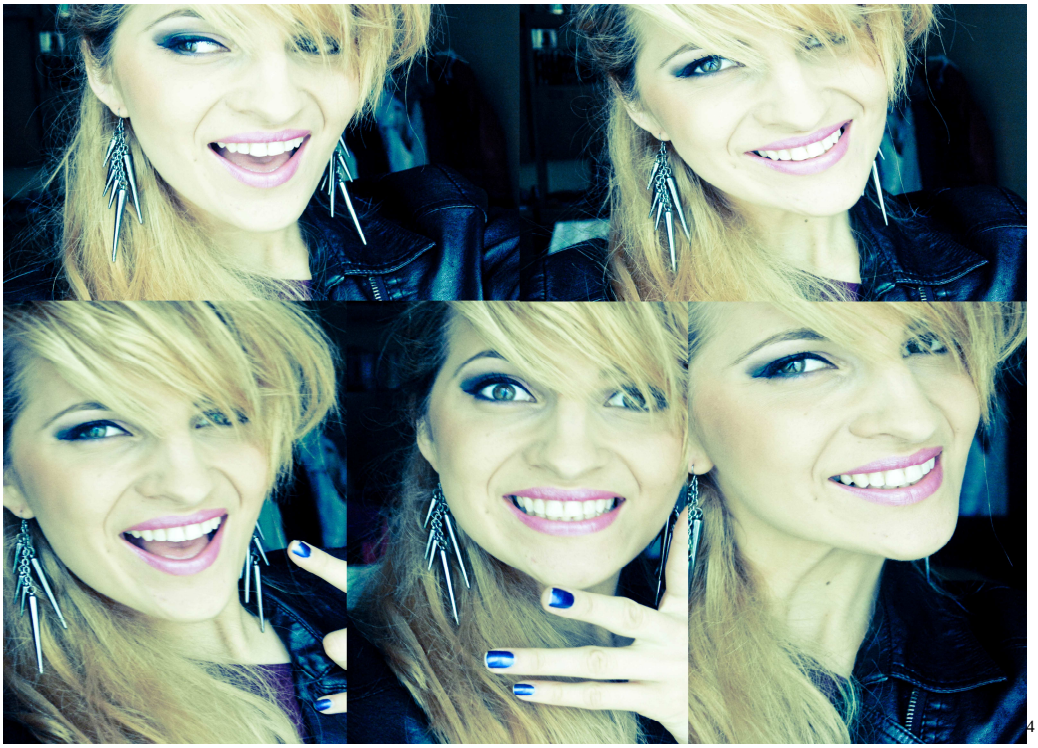
I decided on the topic of smile because I was amazed by the suggestion ability of this means. It all started from a conference held in Rome, Italy, in which I participated as a guest. I didn't know Italian very well then, nor do I now. I presented my ideas by reading a text in Italian from a sheet I had carefully prepared. My accent was not great but I was assured that the scientific message I had tried to transmit had been understood. At the dinner that followed, on the terrace of a fancy restaurant in Rome, as normally expected, each participant attempted to socialize, meet people with similar scientific concerns, make themselves agreeable. Everyone was smiling. "Large" smiles, "dry" smiles, "believable" smiles, "unreliable" smiles, "quick" smiles, "long" smiles, etc. What I found interesting, beyond the diversity of smiles displayed, was that the smiles evolved.

In terms of the scale of smile, it seems we are provided with a sort of "potentiometer" that allows us to increase or diminish our smile depending on whether the presence of the person or people around us and what they say or do corresponds or not to our expectations. Our smile may enlarge when the person we consider necessary is next to us, and if they leave or only give signs that they want to leave, our smile will lose intensity or simply suddenly disappear. The same happens when the smile evolves according to what the person or people around us say or/and do.

In an investigation, if the person we are hearing offers plausible information that corroborates with what we have gathered as evidentiary material, our smile is wide, we ourselves become complacent. Each deviation generates automatically, at an instinctual level, more abrupt or slower changes of the smile, in the sense of diminishing it, with the possibility of returning to a positive appearance, of course, if the person in front of us starts to provide information valuable for the course of the investigation.

 [3]

[2] See, for example, the Romanian edition of Paul Ekman's work, "Telling lies...", translated as "Mincinile adulților...", Trei Publishing House, 2009, pp. 178 and following.
[3] pshiholy.blogspot.com

 [4]

All these changes from "bad" to "good" and vice versa offer suggestions strong enough for the person interrogated to realize when what he/she says is "right" or "wrong". What is "wrong" for the investigation is everyone's tendency to "comply". Most of us accept that if there is no question of immediate loss, of some imminent danger, it is preferable not to contradict the expectations of the person we have in front of us, especially if he/she has a position of superiority.

Now and here is the place to admit that both in daily communication and in an inquiry, we can use our smile to guide the behaviour of the person we are communicating with. In the hearing room, all we need to do is check how the person we are hearing shapes his/her conduct in response to the changes in our smile and the "game" may begin. If h/she wants to comply or, on the contrary, to defy us, the verbal and nonverbal behaviour of the person examined will go through evolutionary processes based on how our smile evolves. It is important for the investigator to make sense of the way the person inquired reacts, and the rest may become a formality.

Analyzing investigative practice, we have found that there are situations when using smile to direct the behaviour of the person interrogated towards compliance is easier. Such situations are:

1. In the case of young people – they are inexperienced, keener on social interaction; tend to approach many social situations they come in contact with in a conflicting manner. They should not be treated as miniature adults, their inner processes and emotions are different from those of an adult. Often, they do not realize all the consequences of their statements – and many of their statements are poorly substantiated – they may consider themselves mature enough to use certain gestures, words or phrases without being aware of all the interpretations they can be given.

There is a real possibility for a skilled investigator to deceive them, not to mention that they can very easily give in under conditions of confrontation with an adult displaying

[4] hypeupyourday.wordpress.com

minimal persuasiveness. They come to seek help, to ask, to beg for help from the adults present who seem approachable.

Children are experts at reading non-verbal language when it comes to understanding what the expected response is, the answer the adult asking the question wants to hear. Things might get serious in the conditions in which children are particularly suggestive, being tempted, almost instinctively, to conform to the behaviour expected by the people around. If, in addition, the investigator proposes, with an appropriate smile, a response to the question he asks, the child will give an answer biased by the investigator's intention, an answer that he/she might assimilate and believe to be true, possibly enhancing its credibility through behavioural manifestations, especially if it contains less ordinary issues.

Regardless of whether the child makes a statement voluntarily or under an adult's pressure, his/her statement undergoes an evolution in volume depending on the investigator's insistence and how he uses his smile.

For example: Malicious father requests his daughter: "be careful what you tell the police... you must say that he waited for you on your way back from school and raped you in the forest grove near the well without a bucket".

Investigator: Last night, when you came back from school, did a man approach you and rape you in the woods?

M: Yes, he waited for me on my way back from school and raped me in the forest grove near the well without a bucket.

Investigator: Did he pull his pants down?

M: Yes, and then he had me do him a blow job.

Investigator: Well... he didn't need to pull his pants down for oral intercourse, unless there was a vaginal or anal intercourse, too.

M: Well... yes.

Investigator: Did he penetrate your anus, too?

M: Yes.

Investigator: More than once?

M: Yes.

Investigator: During the anal intercourse, did he keep his eyes open?

M: Yes...

Investigator: Yes... where is your anus located?

M: What do you mean? Between my legs, but you should know that I'm a virgin...

This is just an example, not necessarily a theoretical one. In practice, things may take other turns, sometimes can accept references to bizarre aspects, horrible crimes, group sex, satanic rituals, etc.

What is the mechanism by which smile can control children's statements?

Children's statements are obviously conditioned by the pressure of adults, children are particularly interested in the adults' expectations, knowing that often the answers considered as wrong generate nuisance, prompt verbal punishment. Investigators should be aware that when interviewing minors, they have an obvious position of superiority; they can dominate children both physically and mentally. Considering the matter of the credibility of minors' statements under these circumstances, we find that we have no fixed reference point – as it always happens when trying to assess and predict human behaviour, the approach enters the realm of relativity, because we can't reach certainty through some laboratory experiments, since real life cannot be reproduced in artificial conditions. Some studies[5] have concluded that the suggestibility of the smile displayed by investigators, as well as other mistakes they make may result in false statements in an alarming proportion – between 50% and 80% – the

[5] Underwager, R, Wakefield, H. (1990) – The Real World of Child Interrogations, Springfield, Illinois: Charles C. Thomas, p. 29.

amount of false information obtained thus becomes amazing, even for experienced investigators.

2. In the case of people with reduced memory and intelligence levels – it is estimated in practice that these people are prone to be influenced and give false information. Without any question of chance equality or discrimination of any kind, it is recognized that people who use drugs, alcohol, neuro-stimulating drugs, coffee, and tea excessively have problems with their memory, concentration, and intelligence level[6].

The difficulty stems from the fact that these people don't have a memory independent of the action of the neuro-stimulating substances consumed. They can accept that they have done what they haven't if the interviewer says so and convinces them, including through his smile, that there is evidence in this regard. Everything is based on an instinctual approach to delicate situations that can be best seen in people with mental disabilities or children up to 6 years. To them, smile and compliance are the cornerstone of survival. This is how they gain acceptance from their peers. In such circumstances, the answers to questions that are important for the investigation (sometimes they may not understand the meaning of all the words in the question or perhaps not even the question) are guided by the investigator's smile responding to the smile that accompanies the inquired person's answer.

The evolution of the smile – smile relation has consequences on the answer of any person inquired; in the case of vulnerable people, that I have made reference to, the consequences are more pronounced. Also, it can be seen that vulnerable people and/or those who feel and develop a specific vulnerability during the hearing will try to disguise a lack of understanding of the question or of words or phrases contained in the question by artificially increasing the confidence they seem to have in the answers they give.

Compliance has its roots in the socialization process at an early age. Whenever the child's behaviour was in compliance with the parent's expectation reward occurred, when, on the contrary, it was not as expected the penalty occurred which was sometimes corporal and violent. Compliance was strengthened over time – every time the child said or did something wrong, the adult's facial expression (there was always someone who had a position of superiority towards us) hardened[7], goodwill and understanding were diminished until we "came back to our senses" and said and did what was expected.

What may be interesting and paradoxical at the same time is how fast we accept that what we do or say is not right and, consequently, our promptitude to take the blame on us. It is possible that some of us may have made more mistakes in the process of socialization or, rather, that the adult may have been more attentive and prompter in sanctioning non-compliant behaviour. Well, whoever made more mistakes, or, in fact, whoever was punished more – and the punishment came quickly and certainly – is prompter and more willing to conform to expectations. In fact, admission of guilt in a criminal investigation may result from the desire to conform to the investigator's expectations, not from a feeling of guilt or from any hidden agenda of hiding something or getting some material benefit from the process.

Memory problems accompany any diagnosis regarding a lesion in the brain. Individuals with normal intelligence are far from having lesions in the brain. As for children[8], who, just as it happens with many people with disabilities, it is the manner of asking questions, the gestures, facial expressions (smile is all-important here) and the overall state of the person who asks the questions that matter in order to shape the answer. Not only do

[6] A/N – the human capacity to understand easily and quickly the changes in the surrounding reality and to adequately react to those changes.

[7] A/N – see also approaches specific to transactional analysis.

[8] **Dent, H.R.** (1982) The effects of interviewing strategies on the result of interviews with child witnesses. In A. T. Trankell (Ed.), *Reconstructing the Past*. Deventer, The Netherlands: Kluwer, 279–298.

children listen carefully but they are also tempted to copy words and/or gestures of the one asking the question out of their desire to give the "right" answer. If the investigator uses questions – and we know very well that the questions without being accompanied by smiles and other non-verbal signs are just mere strings of words – to guide the person interviewed, he will shape the statement of the latter so as to obtain the version he wanted.

There is the possibility that the person interviewed might accept the investigator's position just to "keep it simple" – meaning that once the investigator has explained his point of view on how things are, the person inquired accepts it simply because he/she has no arguments against it and because he/she feels the investigator's position of superiority.

In terms of behaviour, memory problems hide behind benevolent smiles which usually mask helplessness and beg for acceptance. Such a smile can only be false as it is the usual smile behind which such a person hides during every second of their public appearance.

3. Persons who are unable to understand abstract thinking – Having evolved for thousands of years, mankind has reached a level of abstraction in human communication that socialized individuals are hardly aware of – we communicate effectively and quickly because we were taught so and because these are the expectations of our social environment, of the people we meet or with whom we have to deal at work or in our personal life. To realize how complex human communication is at present, you should think of the many shades of meaning of a word or phrase, the different meaning they can take depending on the tone of voice, emphasis, a certain type of look, certain gestures, etc.

People with low intelligence, lacking minimal (relevant) experience on the characteristics and habits of the socio-professional environment in which the communication takes place find it very difficult to decipher the message, the investigator's smile being the only tool that could help them. Periods of "silence" may occur, accompanying the effort to decipher the communication, the blinking rate might increase, their gaze wander to the ceiling or the floor. If the interview takes place at an alert pace and there is no time to evaluate the investigator's smile and adapt the answer to it, the person will display a serious attitude and will provide determinate answers, being ready to substantiate them, if necessary, based only on the literal interpretation of the investigator's question. For example:

Investigator: Are you in school?

The person interrogated: No, I'm here with you!

or:

Investigator: Yo', you know you're screwed?

The person interrogated: No, I'm not! There's no screws here!

Suggestibility and compliance are clearly likely to affect the truth of the facts stated. It is still a matter of thought to determine the extent to which human communication, the interaction between the investigator and the person interrogated, by its very nature, is able to produce, to generate reciprocal influences, with the direct consequence of influencing the performance of both during the hearing. We have to accept that things can get another turn in circumstances where there is a potential for suggestibility that varies from person to person – any of us can influence one or more people depending on several factors, one of the most important being personal potential.

In the investigation, it becomes important in this context for the investigators not to confuse lies with false information provided as a result of the assimilation of information, ideas, opinions, etc., suggested by the investigator. It is possible that the person interviewed might simply want to cooperate, for the good of the investigation, to achieve the purpose of justice and, in these circumstances, assimilate the suggestion, without realizing it, or believe it is normal to admit a lie in order to stay out of trouble, accepting the course that the investigator wants to give to the research.

Suggestibility appears and develops also depending on the interview and interrogation strategies the investigator uses when there is not enough information or no information at all about an issue considered as important to the investigation. There is a possibility that the person interrogated might not know the correct answer to one or another of the questions asked by the investigator or only know the answer partially, in which case he looks for any clue that would allow him to give an answer that would not put him in a difficult situation – knowing that, under certain circumstances, it is hard to accept that someone doesn't know an answer that, in the general opinion, he ought to know.

The suggestibility level of a person also depends on the level of confidence that the person has in the investigator. If the investigator manages to gain the trust of the person interrogated, the latter will be willing to do almost anything, convinced that the investigator will help him escape, get out of trouble. If, on the contrary, the person interrogated "feels" that something is wrong, that the investigator supports the interests of others, is lying or manifests violently, communication will decrease in volume, increasing the resistance and persistence in promoting refusals to cooperate in finding the truth. It is known that interrogating those who have had criminal convictions is more difficult than interrogating a person who has never had to deal with the presence of an investigator because of the suspicion of a person already sentenced with regard to anything having to do with the judiciary.

The result of suggestive behaviour from the investigator's part is that the person interrogated adapts his/her conduct to meet the investigator's expectations – somebody accepts to do something and will do it without believing in what he/she does. The risk is that the investigator might "influence" the memory of the person interrogated by "introducing" information, perhaps even prejudices, which will affect the outcome – the statement that will ultimately matter in the judge's forming an opinion. Certainty in such a situation is also given by the tendency of many people – after all we are all taught to avoid conflict, to appear agreeable in society, to please those around us – to conform to different situations, accepting, for this, personal losses and, in the investigation, such "losses" turn into recognition of acts that were not committed, lies about the involvement of other people in the illegal activity, about its preparation, and so on

The investigator's smile may encourage smile, laughter and jokes from the part of the person interrogated. Under certain conditions, laughter may be a manifestation of stress specific to a lying behaviour. The following considerations may help an investigator to interpret laughter or jokes told by the person heard, to interpret their meaning in relation to the person's conduct in the investigation.

Use of jokes - When a suspect who is telling the truth is asked about the illegal activity carried out, most times he/she is very serious and concerned. There are cases – when the suspect heard is dominated by fear – when such a person deals lightly, with a certain lack of seriousness, "jokingly", with important issues, things that are not to joke about, in an attempt to defuse, to get rid of the nervous tension specific to the situation. For example, at the beginning of a hearing, a person who agreed to tell the truth, when asked "How do people close to you call you?", answers, laughing or with a visible note of amusement, "Most call me Jan, except my wife who, when she's angry at me, only calls me *bastard, son of a bitch, stinky*…". Throughout the hearing it is possible that the person interrogated should not make any effort to diminish the good mood displayed. The fact that the person interrogated treats "jokingly", with a certain detachment, his/her own statement, must be accepted as an attempt to escape the pressure of the moment, to free himself/herself from the fear generated by the possible consequences that may occur, rather than a specific manifestation of a symptom of lying.

There is also the possibility of the appearance of humor in the behaviour of the person interrogated later in the course of the hearing. For example, at about 40 minutes after the start of the hearing, the interviewer might ask: "If you have to undergo the lie detector test, what do you think the result will be?" The interrogated suspect might answer, "Sir, I am so upset that I am a suspect in this that it is needless to say that all the sensors will disrupt and that machine, smart as it may be, will break down!" – everything accompanied and continued by roars of laughter. The moment humor occurs in the performance of the person interrogated, together with the assumption that he will make the lie detector break down, may lead to the conclusion that the person heard is lying.

Another way to use humour during the hearing is through laughter or sarcastic jokes. Sarcasm often expresses a hidden truth. For example, if a man is asked, "Have you ever thought of raping a woman?" and he replies with a laugh, "Yeah, sure, I think all the time about raping a woman, about how she would laugh or cry satisfying my cravings...", the answer involves, of course, a denial, but..., the unprovoked complementing most often contains a dose of truth.

Smile evaluation – A forced or insincere smile is often used to disguise a dislike or worry. Imagine the meeting of two lawyers who meet to resolve the dispute between their clients – they adopt a posture with their hands in view, after which both shake hands with their counterpart uttering the familiar words, "Glad to meet you...", "It's a pleasure/honour to meet you...", "I am sure we'll solve the problem...", "I hope we'll find a reasonable solution...", all accompanied by an artificial smile. Such a smile appears only for 1-2 seconds and does not imply a complex and compelling mimicry, as in the case of a natural smile, it is rather vague, unconvincing.

On the other hand, a natural, genuine smile reflects acceptance and appreciation. A sincere smile will involve a complete separation of the lips and will last long enough to provide satisfaction to the person smiling and at the same time to be noticed by the person to which it is addressed. An important element in assessing the sincerity of a smile is the context in which it manifests itself. For example, once a professor at the university has delivered a remarkable lecture in terms of information, effective communication, relationship with students, has received feedback and has adapted his scientific discourse accordingly, has finished by thanking for their attention, and so on, a student's smile will reflect admiration and high appreciation.

However, smiling in the course of judicial hearings is something special. Some time ago, after preparatory activities, I found that it was time to go to the hearing room to interview a person against whom there was evidence demonstrating her involvement in the activities of a group dealing with drug trafficking. Studying the file, I found I was to interrogate a woman who had been my fellow at the summer courses of a university three or four years before. How she had come to be related to drug trafficking and how I had come to investigate her case God only knew. I wondered how she would react after I got into the hearing room and I prepared several variants of action. As I entered the hearing room, she stood up and, with a bold smile, offered me her hand decidedly and after shaking hands as a greeting, she addressed me in a special way: "It is a great pleasure for me, sir... to meet you again. You have an interesting job and, although it may seem out of place, I want to tell you that you look great".

I instantly realized I was dealing with a woman who had a liar's behaviour. No person (guilty or innocent) has any reason to be glad to meet with an investigator in the hearing room. Her smile and tone of addressing me were likely to draw my attention to the fact that what I was presented with was false, I had a feeling comparable to that of someone meeting a second hand car dealer who, although he knows that he is trying to sell a wreck, talks and gestures as if he was selling the best car in the world.

In another order of ideas, we must not forget the grin that any investigator with some experience must have had the opportunity to see. It is a "partial" smile, lips are usually closed, with their edges oriented upwards. Most often when a suspect grins, the investigator considers this as a form of defiance, a "declaration of war" against the investigation, being tempted to react decidedly. In fact, the suspect thinks he is displaying a slight smile, whose significance is, rather, one of acceptance of the accusation, of guilt. He is close to the moment of admitting his involvement in the illegal activity investigated – and this should be known by the investigator and exploited as such.

Laughter evaluation – Psychologically speaking, laughter relieves restlessness, concern, anxiety, much more than a simple smile and transmits much more powerful social signals. Studies show that laughter lowers the level of blood pressure and stress hormones that mutual laughter builds stronger interpersonal relationships and that people who laugh easily are believed to be more accessible and reliable than people who rarely laugh. With regard to the issue of identifying lies during a hearing, an investigator should consider three important reasons that may cause a suspect to laugh.

The first cause is related to the natural pressure of the activity, the unrest caused by the investigators' suspicions. The nervous suspect, whether guilty or not, will look for any reason to laugh, thinking that this will get him rid of this unpleasant state. For example, when the investigator asks the person interrogated to present his ID, because of his emotional state, he might drop the wallet and, when picking it up, say in a special tone, laughing, "I'm sorry, I'm a little nervous, sorry...". Laughter in the circumstances allows for ambiguous interpretations and can be associated with the behaviour both of a sincere person and an insincere one.

A second issue that may cause laughter during a hearing is associated with natural humour. For example, the interrogator asks the suspect: "What do you think will happen to the man who robbed young S.E.?" and the suspect answers laughingly: "If only I got my hands on him first..."; then he continues: "I think prison is the best place for him". Laughter appears here as a manifestation of the unusual situation where the person heard had the opportunity to apply a penalty based on their own perception about the serious crime committed. At least in principle, the laughter that occurs under these conditions is not related to a liar's behaviour.

The last cause, the most important in terms of association with lying behaviour, is unnatural association, inadequate to the moment it manifests itself. On a psychological level, it is considered that this behaviour can be useful to change the meaning of a statement. To become positive about it, it is good to watch carefully the non-verbal behaviour of the person heard – when realizing they have begun to say what must not be said, they blink or "wink" or bring their hand to the mouth, as though trying to stop the words they said unvoluntarily.

Just as with all behavioural manifestations, when assessing laughter as a means to change the meaning of the facts stated, the investigator should evaluate when laughter occurs. Take for example the following dialogues:

A. – Who do you think stole the 1,000 euros?
S. – I do not know. I did not know they stole 1,000 euros (suspect laughs).
A. – When I complete the investigation, what do you think will happen to you?
S. – Nothing. I have nothing to do with what you say (laughs suspect).
A. – Did you ever think of having sex with a girl of 10-11 years old?
S. – No, such a thought would make me sick (suspect laughs).

That is the case when laughter occurs before or during an endorsement is made without any special significance. In such a case the investigator should avoid making any connection with a possible change of meaning of the claim. For example:

A. – How do you feel being investigated for the theft of 1,000 euros?
S. – (laughs) A little scared, I think. I've never experienced anything like this before.

A. – Have you ever been suspected of stealing any money?
S. – Never. That's why I find this whole thing (laughs) so embarrassing.

It is very important that the investigator, when finding that the person interrogated has an unnatural laugh during the hearing, should wonder about the cause of the laughter. Whenever laughter occurs after or even before a claim relevant for the investigation, the person leading the hearing should bear it in mind that he might have to do with a lying behaviour.

In another order of ideas, laughter during a hearing should almost always be considered inappropriate. Investigators should note that by accepting such manifestations, the importance of the issues to be clarified and the seriousness of the professional approach could be called into question. From a tactical point of view, even in the case of innocent suspects, it is not good to accept the possibility of releasing tension through laughter – it is preferable, on the contrary, that the suspect who is really innocent should be determined to release tension by expressing vehement anger and frustration.

In conclusion, because laughter and humour helps to lower emotional tension, it is expected to occur both in the case of guilty persons and innocent ones. The simple display of laughter and humour should not be accepted as a manifestation of false behaviour. However, considering the time and context in which such behaviour occurs, laughter or attempted humour can be a significant symptom of lying. In the context of an interrogation, laughter or lack of seriousness are inadequate and must be associated with lying behaviour.

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# THE COURTS COMPETENT TO DEAL WITH INDIVIDUAL LABOR DISPUTES. PROPOSALS TO REFORM THE SYSTEM

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**Abstract:**

*The paper proposes that following the doctrinal analysis of judicial practice, the comparative law in terms of a specific study performed using sociological methods of investigation, to formulate proposals for amendments to the Romanian legislation regarding the courts that are empowered to resolve individual labor conflicts.*

*These proposals aim on the one hand the need to establish labor and social security tribunals and on the other hand panels up to resolve individual labor disputes involving legal assistance at both hierarchical levels, which express a deliberative vote.*

**Keywords:** *courts, labor and social security tribunals, legal aid, deliberative vote.*

## Introduction

*The doctrine and jurisprudence analysis shows that justice which solves the principle of individual labor disputes has specific characteristics in a position to outline specific labor jurisdiction of the Romanian legal system. This particularity lies in the existence of a distinct system of judicial bodies which resolves labor disputes, the material and territorial competence of the courts in matters of labor disputes presenting features, some of them presenting departures from the rules of the common law, a party in a labor dispute and, especially, specifies the duration of time that the person is standing interest, requested by the legislator to bring proceedings which are expressly governed by special rules; the conduct of the trial and judgment in matters of labor disputes, is governed by rules which derogate from the common law, aiming mainly two objectives, namely: ensuring that the principle of celerity in resolving labor disputes, and the employee protection, considered to be the disadvantaged party for a labor dispute.*

*In certain situations, due to the manifest conditions in which some aspects of the social life are carried out, certain waivers from the normal procedure are imposed by establishing special procedures[1], means rules that make general rules and regulations if they do not contravene the imperative rules[2].*

*On the courts competent to resolve individual labor disputes in the Romanian legal system, the provisions of art. 208 of Law. 62/2011 of the Social Dialogue expressly provides that general jurisdiction belong to courts. Thus, following the amendment of the Code of Civil Procedure, the court was given "unlimited jurisdiction" in terms of resolution of conflicts of rights, individual labor disputes, from this point, the court resolving only by exception a*

[1] L. R. Popoviciu, Minor's criminal liability, ProUniversitaria Publishing House, Bucharest, 2012, pg. 196.
[2] R. Gh. Florian, L. R. Popoviciu, The obligation to refund of employees, in A.I.J.J.S no. 2/2010, www.juridicaljournal.univagora.ro.

*number of lawsuits and claims*[3] *what expressly were assigned by law. In the complete tribunals and specialized wards for labor disputes and social security, which are formed with the participation of a judge and two judicial assistants, as representatives of the parties to the employment relations?*[4]

*Appeals against the decisions of the Court of first instance are assigned to the jurisdiction of the Courts of Appeal. And in these instances work also specialized sections or panels in labor disputes and social security panel of three judges, without the participation of legal aid in the law.*[5]

Based on existing legal reality and briefly reiterated previously in full compliance with relevant aspects of legal practice in the field of conflict resolution work both nationally and in the Bihor County, the opinions expressed by the doctrine of comparative law regulations subject of our research, we believe that the legislature, in consultation with the social partners should consider further in his lawmaking the following:

A. To introduce a legal provision expressly providing for establishment of special courts for labor and social security, with general jurisdiction and the settlement of labor disputes, or individual labor conflicts and work through special legislation to establish concrete way of putting into place

In fact, on this proposal, we rally an opinion based doctrine that believes that the idea of establishing specialized courts work and social security[6], which was dropped after the change, in 2005, *of Law no. 304/2004 on judicial organization*, which would have been "very positive" because it effectively ensured the greater specialization of judges in the areas of labor law and respective social security by maintaining their stability courts mentioned.

We support the idea of bringing other arguments above, considered essential to support them. Thus, a simple foray into the history of labor legislation in the Romanian legal system provides viable examples on the organization and operation by specialized courts, labor courts, which operated the next room working, competent to settle labor disputes pursuant to *Law for the establishment and organization of labor jurisdiction* in 1933.

Also, the comparative law provides many examples in this regard. Thus, we recall briefly the existence of three major systems work in practice jurisdiction of different countries: *specialized courts*, which are modern forms of employment litigation and have become in recent years an increasingly large audience, which can be in turn the two types: *autonomous organ of labor jurisdiction*, common law system in Germany and England, and *each tribunal specific work included in the system of courts of common law*, common law systems of France, Italy, Poland, *systems of labor jurisdiction by conventional organs*, an important means of resolving labor disputes, specifically America and the Swedish law, *recourse to ordinary courts*.

The necessity for the establishment of specialized labor courts was expressly emphasized in a study prepared and implemented for this purpose.[7] Thus, using a sociological investigation methods, namely focus group we aim to fill legislative and judicial practice perspective, the subject of our analysis, the specific opinions collected through sociological

[3] Țiclea, Al., *Labor Law. University Course*, Legal Universe Publishing House București, 2007, pp.431-432.
[4] Art.55 from Law no. *304/2004 regarding judicial organization*, republished, was modified in this sense, through Law no. 202/2010.
[5] Art.54 paragraph. 2 the second thesis from *Law no. 304/2004 regarding judicial organization*, republished.
[6] Belingrădeanu, S., *General Considerations and Critical Observations Regarding the Specialized Labor and Social Security Courts and the Judicial Assistants in the Light of Law no. 304/2004 Regarding Judicial Organization* in Law I nr. 9/2004, p.13.
[7] Onica Chipea, L., *Is legislative intervention required in the jurisdiction of the Romanian legal labor system?*, in Agora International Journal of Juridical Sciences - The consequences of European integration on the legal system in Romania, vol.V, No.I, 2010.

methods, from those who actually work in practice with this procedure, namely lawyers, legal advisors, judges, members of the panel to resolve labor disputes.

Thus there were recorded from concrete experience of the respondents, proposed amending legislation reviewed for the purposes of establishing specialized courts in labor disputes, composed of representatives of employers and trade unions, involving exceptional cases only divergence or remedies career judges, namely the creation of specialized courts in labor disputes in line with historical experience of the Romanian legal system.

We believe that the arguments supporting, entitled, such a legislative proposal are:

- It is necessary that the trend shown shy, of specialization of labor jurisdiction in the Romanian legal system, built on the specifics of the legal work, born after concluding an employment contract to be finalized by establishing specialized courts, or employment tribunals;

- Judges who make up these specialized courts prove a sufficient job in that field; knowing labor issues, thereby enjoying a full independence and autonomy;

- A specialized court can give judgment leaner, faster and less expensive;

- Ordinary courts, or courts and courts of appeal, in which currently operates full employment and social security will be relieved by the large number of cases of this kind, particularly social security and thus effectively channeling human and material resources, to resolve other causes, consider that argument because relevant and that recent legislative changes included labor disputes of jurisdiction, civil servants work, reality will help increase the number of cases subject to this jurisdiction;

- On hierarchical levels that would require the establishment of specialized courts consider that the first step would be sufficient, and material reasons, to establish labor courts with unlimited jurisdiction in resolving individual labor conflicts, following that the review against the decisions of the first instance court, courts of common law, that the Court of Appeal, however, would require that, for completing reform of labor jurisdiction panels to resolve individual labor disputes the Court of Appeal is constituted with the participation of judicial assistants, people with experience in labor relations, which have deliberative role within this structure, something to which we will return below.

B. We also believe that for completing reform of labor jurisdiction regulating the composition of panels required to settle at first instance and on appeal to labor disputes and social security with the participation of legal aid and grant them a deliberative vote

The starting point in formulating this legislative proposal is the current laws governing that institution, namely Article 55 of Law no. *304/2004 on judicial organization*, republished, modified by Law nr.202/2010, article 54 par. 2 second sentence of Law. *304/2004 on judicial organization, republished.*

Thus, we believe that invoking arguments consist of all doctrine and judicial practice ideas considered for continuation or completion of the process of specialization of labor jurisdiction of the Romanian legal system is necessary to:

- Appeal panels for settling labor disputes and social security be formed both career judges (3 under current legislation) and in two judicial assistants, court-like configuration which solves cases background (right panels tribunal common, which according to previous legislative proposal will be replaced by specialized courts work)

- Judicial assistants that make up the panel of judges to express a deliberative vote.

a. Regarding the establishment of a court of appeal panels with the participation of judicial assistants, we consider appropriate to support the argument that judicial assistants, in their capacity as representatives of the parties to the employment relationship, the employee and employer that participates in resolving individual labor conflicts, completing deliberative structure and that their legal knowledge with absolutely necessary, they have “the vocation of

reality,"[8] i.e. knowledge production labor in various sectors. Moreover, their presence in panels work is supported by the spirit of labor jurisdiction in the Romanian legal system, designed jurisdiction to intervene in conflicts settlement with tools specific to, arising from the particular nature of the employment relationship. Participation panels, legal aid work are one of the principles on labor jurisdiction of the Romanian legal system.

It also provides numerous examples comparative law, among which the German system, the jurisdiction courts to hear labor disputes, that courts held three hierarchical levels (Labor Courts of First Instance, Courts of Appeal for labor issues, the Federal Court Labor), are composed of professional judges, career and legal aid doctrine and judges appointed honorary or assessors, who have the same privileges as professional judges.[9]

b. Regarding the need of awarding the judicial assistants the deliberative vote, noting that arguments the following ideas expressed in doctrine and practice review, which we rally and offered many examples of comparative law:

- The advisory vote, granted legal aid under current Romanian legislation is "the most blatant and serious regulatory failure Law. 304/2004" because the European Court of Human Rights and regulations issued by the Council of Europe and Romanian fundamental act itself after review, creates the possibility of participation in specialized instances of people outside the judiciary, which can "do and they do, in equally, with judges the act of justice."[10] Also it was appreciated rightly in the doctrine[11], "that there is a contradiction *in terminis* between membership of the panel and for some deliberative and consultative vote for others, since the judgment is delivered to all members, who make part of a deliberative structure, as the jury can not only have a consultative vote on the other hand everyone is entitled by law to be part of a panel of judges of a court", even if not judge career must "speak right" and "not to express a simple opinion, which basically anyone can do."[12] It is proposed to give up the legal aid panels participation to resolve individual labor disputes, keeping them still being considered as "clearly critical" and "both unnecessary, harmful and unnatural" and their presence seems that judges are actually "pseudo-magistrates" must necessarily consult judicial assistants in order to fulfill their mission.

- One of the conclusions of their study, cited above is that it is absolutely necessary assigning roles deliberative full legal aid work to justify their presence. Otherwise, as actually existing governing laws, judicial assistants have only an advisory role and can even be absent from court.[13] Some of the experts interviewed supported the idea that would require the establishment of specialized courts in labor disputes, composed only of representatives of employers and trade unions that judicial assistants, involving exceptional only in cases of dispute or appeal, career judges, idea according to existing regulation in comparative law, specifically the French legal system, which, as we have developed throughout the paper, Prud'homme Councils are composed only of representatives of the parties to the employment relationship, courts career can be called only in case of a tie, that third parties separates votes.

**Conclusions**

Assuming that the Romanian legislator would accept legislative proposals previously held the picture of labor law would have the following appearance:

[8] Ştefănescu, I.,T., *Theoretical and Practical Treaty of Labor Law*, Legal Universe Publishing House, Bucureşti, 2011, p.881.
[9] Weiss, M., *The System of Labor Courts in Germany*, in Romanian Journal of Labor Law, nr. 3/2004, p.99.
[10] Ţiclea, Al., *Treaty of Labor Law*, Legal Universe Publishing House, Bucureşti, 2007, p. 959.
[11] Belingrădeanu S., *cit. work*, in Law I nr. 9/2004, p.17.
[12] Corsiuc, O., M., *Consideration referring of the institution of judicial asistants in the light of the new Regulations of Law no. 304/20004*, in Romanian Journal of Labor Law, nr.4/2004, p. 82;
[11]Onica Chipea, L., *cit.work*, p.10.

A. Throughout the Law no. 304/2004 on judicial organization to insert a mandatory legal provision stipulating the establishment of special courts for labor law. Specialized courts are courts without legal personality, operating in the counties and in Bucharest and usually office in the county capital. Specialized courts will take jurisdiction of the court in cases where established;

B. The social dialogue and other specific sources of labor law (collective agreements, internal regulations) contain provisions regarding:

1. Implementation of the Law no. 304/2004 on judicial organization on the establishment of special courts for labor;

2. Including legal provision which states that judicial assistants participate in panels to resolve individual labor disputes both in substance and in appeal and expresses a deliberative vote.

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# DEVELOPMENTS IN LEGAL CHEMISTRY. SIBUTRAMINE EFFECTS THE BOUNDARY BETWEEN LEGAL AND ILLEGAL CONSUMPTION

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**Abstract**

*In the present paper we determined the presence of sibutramine in urine using the GC-MS/MS system. The determination of sibutramine was studied in relation to slimming health foods[1]. Prolonged or excessive consumption of unauthorized pharmaceuticals may cause serious adverse consequences on health. In this study, samples were extracted with the help of methanol and acetonitryl and the sibutramine concentrations were found in the range of 0,5 g/l.*

**Keywords:** *sibutramine, GC-MS/MS, methanol and acetonitryl, HPLC-MS*

## Introduction

*Amphetamines are psychostimulant drugs that produce increased wakefulness, decreased fatigue and appetite.*

*The pressor effect of amphetamine was first described by Piness and associates (1933). In 1933, it was noted that it is a bronchodilator, a respiratory stimulant with analeptic action and was compared to epinephrine. Amphetamines described as methamphetamine and dextroamphetamine belongs to the group of drugs that potentially increase the levels of norepinephrine, serotonin and dopamine, euphoria-inducing drugs absorbed at cellular level.*

*From a medical perspective, amphetamines are sympathomimetic substances, related to derivatives of adrenaline (epinephrine) in which central excitatory effects prevail. Amphetamine is a stimulant of the nervous system due to its weak and long-term pressor action (approximately ten times longer than that of adrenaline).*

*Amphetamine was first synthesized in 1887 by the Romanian Lazar Edeleanu in Berlin, Germany. The name derives from phenylisopropylamine. It was one of a series of compounds obtained from plants ephedrine was derived from, that had been isolated by Ma Huang together with Nagayoshi Nagai.*

*Adrenaline and noradrenaline are hormones secreted by the adrenal glands, located in the upper pole of the kidney, and more specifically, the renal medulla. Both hormones exert similar effects of sympathetic stimulation, but while norepinephrine has more intense vascular actions, adrenaline activates especially the energy metabolism.*

*Amphetamine activity at the brain level is specific; certain receptors that respond to amphetamine in several brain regions do not conduct the impulse to other regions, although they exert effects on behaviour by carrying neurotransmitters in the brain, including*

[11] Yamamoto S-Shokuhin Eiseigaku Zasshi, 369, 2011.

*dopamine, serotonin and norepinephrine. So dopamine $D_2$ receptors in the hippocampus – the brain region associated with memory formation – appear not to be affected by the presence of amphetamines.*

**I.1. CHEMICHAL STRUCTURE**

In terms of illicit production, alongside amphetamine, the following are obtained:

- Specific chemical (the chemical used as green material, precursor, reagent or solvent in illegal processes or substance control).

- Precursor (chemicals which in clandestine processes are incorporated, in full or in part, in the final production of the molecule of the substance under international control).

-Reagent (chemical that reacts or participates in the reaction, but does not become part of the final product).

- Solvent (is the liquid substance that dissolves another solid substance without changing the chemical composition, and does not become part of the final product).

- Impurities (natural constituents originating from plant materials or from materials obtained through the processing of those remaining in the final product after complete process conversion).

- Adulterants (pharmacologically active substances remaining or added after the conversion of the final product).

- Diluent (pharmacologically inactive substance added to the final product to increase volume).

Amphetamines belong to the class of phenylalkylamines and classify into:

Amphetamines (found under the following names: 1-phenylpropan-2-amine,

□ methyl-benzeneethanamine

□ methylphenethylamine)

Methamphetamine (found under the following names:

2-(methylamino)-1-phenyl-1-propanone

N,□dimethylaminobenzene

N,□ dimethylphenethyl-benzene

N-methyl-amphethamine

Phenylisopropylmethylamine)

Sibutramine (found under the following names: Meridia, Ectiva, Reductil,

1-[1-(4-chlorophenyl) cyclo-butyl]-NH,3-trimethyl-butane-1-amine)

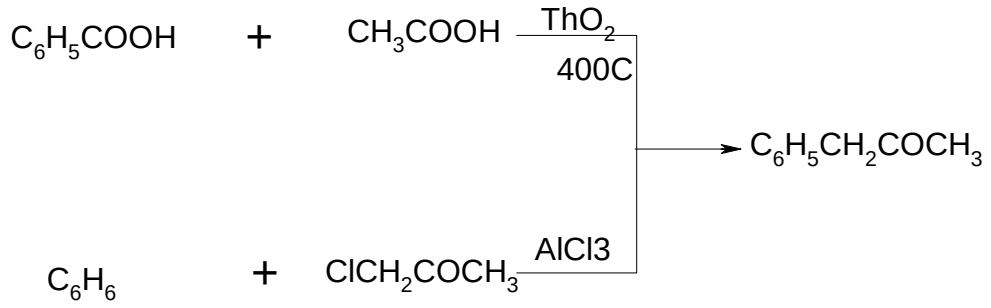
Methylphenidate (found under the following names: centedrin, ritalin)

Amfepramone (found under the name: Diethylpropion amphetamine)

Fenfluramine (found under the name: fenfluramine)

**I.2. SYNTHESIS**

Amphetamine is prepared from benzyl-methyl-ketone, by using several methods commonly used to convert the carbonyl group into the group – $CH_2NH_2$ (reduction of the nitrogen functional derivatives of carbonyl compounds). Benzyl-methyl-ketone is obtained by heating a mixture of phenylacetic acid and acetic acid at 400 C, in the presence of thorium dioxide or through the Friedel – Crafts reaction between benzene and chloroacetone, in the presence of aluminum chloride.




**I.3. FORMULATION**

Amphetamine-products generally come in the form of sulfates or phosphates. They are available on the international market in the form of tablets, capsules, syrups and elixirs. The vast majority of amphetamines appear as hydrochlorides or sulfates.

In terms of solubility, amphetamines are insoluble in water. As free bases they are soluble in organic solvents such as ethanol, diethyl ether, and chloroform. Hydrochlorides are soluble in water and ethanol, slightly soluble in chloroform and insoluble in diethyl ether. Sulphates and phosphates are soluble in water, slightly soluble in ethanol and insoluble in diethyl ether and chloroform. Trimethylamphetamine have boiling points ranging between 118 C - 220 C.

Amphetamine has two optical isomers:

- Dextroamphetamine – dextrorotatory stereoisomer
- Levoamphetamine – levorotary stereoisomer

Dexamphetamine is 2-4 times more active than the racemic compound as a psychomotor stimulant and less active as sympathomimetic. Also the dextrorotatory isomer is 24 times more active than its levorotary enantiomer.

Methamphetamine has amphetamine-like properties but its sympathomimetic effects are weak in normal doses.

Methylphenidate is a chemical related to amphetamines, having weaker psychomotor stimulant properties and weak peripheral actions. The effect is fast and relatively short in duration, corresponding to a half-life of 1-2 hours, which is an advantage over amphetamine.

Fenfluramine is a halogenated amphetamine derivative. Amphetamines may react with $H_3PO_4$ and $H_2SO_4$ forming amphetamine sulphate and phosphate. Amphetamine derivatives are:

A. Dimethoxy-amphetamines -2.5-dimethoxy-amphetamine (DMA)
-4bromo-2.5- dimethoxy-amphetamine (DOB)
- 2.5-dimethoxy-4-methylamphetamine (STP, DOM)
- 3.4 - methylenedioxyamphetamine
- 1-methoxy-4-amphetamine
- dimethoxy-2, 5-ethyl-4-amphetamine
- methoxy-3-methylenedioxy-4,5-amphetamine

B. Trimethoxy-amphetamines - 3,4,5-trimethoxyamphetamine (TMA 1)
- 2,4,5-trimethoxyamphetamine (TMA 2)
- 2,3,4-trimethoxyamphetamine (TMA 3)
- 2,3,5-trimethoxyamphetamine (TMA 4)
- 2,3,4-trimethoxyphenyl-propan-2-amine
- 2,3,6-trimethoxyamphetamine (TMA 5)
- 2,4,6- trimethoxyphenyl-propane (TMA 6)

**I.4 CHEMICHAL DETERMINATION**

The most common methods for the determination of amphetamines in biological products are spectrophotometric, immunologic fluorescence - FPIA (Fluorescence Polarisation Imunoassay), immunochromatographic, gas or liquid chromatography. These include:

I.5.1. *The spectrophotometric method* – in this case, amphetamine engage, in alkaline medium, with diazotized p-nitroaniline resulting in a calorimetric red azo-derivative.

I.5.2. *The immunofluorescence method* – is used in screening tests for testing a group of subjects suspected of amphetamine or methamphetamine consumption, using urine as a bioassay. For an amount of urine of 150 µl/ determination, results are obtained in a period of 12 to 14 minutes. Results are given as present or absent, because of the methods implemented using a six point-calibration curve, rather than a 1-point calibration for the FPIA assay system – the cut-off value being used for the determination of xenobiotic substances in the urine by reading the light polarization vector in polarization milliunits. A positive result will be necessarily confirmed by the GC-MS method.

I.5.3. *Immunochromatographic method* – is the appearance of a coloured band on a solid support (one to check, another to validate the presence or absence of amphetamines or methamphetamines in the urine, saliva or sweat, the type of biological fluids depending on the manufacturer of the immunochromatographic test). It also uses urine to detect: opiates, cocaine, phencyclidine, cannabis, barbiturates, benzodiazepines, tricyclic antidepressants. A positive result will be necessarily confirmed by the GC-MS method.

I.5.4. *The gas-chromatographic method coupled with the GC-MS mass spectrophotometer*

I.5.5. The HPLC-MS – DAD method

**II. EXPERIMENTAL**

**II.1 Materials**

To determine the amphetamines- sibutramine in this case the following materials were used:

- Spectrophotometer Cary 5 - Varian
- FPIA AXSYM - Abbot system
- GC-MS/MS Saturn 2000 - Varian system
- HPLC-MS/MS-DAD system - Varian
- Eppendorf centrifuge 5616
- Analytical balance - Precisa 40SM-200A
- Magnetic stirrer - HP 240
- Ultrasonic bath - Branson 2210
- Thermostat - Memmert
- Accessories and reagents specific to an analytical toxicology laboratory
- Sibutramine (10 mg amphetamine - Zentiva)

Sibutramine (trade name Meridia in the U.S. and Canada, Ectiva in South Africa, Reductil in Europe and most other countries), is an orally administered agent for the treatment of obesity as an appetite suppressant. It has virtually no potential for abuse because of the lack of dopaminergic effects. It is used as an anorexic, which is the only reason for its classification as a controlled drug, as in the mid-20th century it resulted in a number of cases of abuse or addiction.

## II.2. METHODS

### II.2.1. Gas chromatography method coupled with the GC-MS mass spectrometer

It consists of three submethods for each device that is part of the GC-MS system. Thus there will be a method for autosampler 8200, one for gas chromatograph 3800 and one for mass spectrometer Saturn 2000.

*Autosampler 8200*

Number of containers – 48; Volume injection syringe – 10 μl

Number of liquids for washing injection syringe – 2

Time for washing injection syringe with a washer fluid – 20 s

Time of taking over the injection matrix – between air plugs

Injection volume – 1 μl; Depth of penetration of the needle into the bottle – 80%

Fluid intake speed – 1 μl/ s; Heating time for the needle in the injector– 6 s

Injection speed – 10 μl / s; Time of the needle remaining in the injector after injection– 6 s

*Gas chromatography 3800*

Injector type 1079; Injection temperature – $300^0$C

Split rate 5% constant for the duration of the analysis; Constant flow – 1.2 ml/min

Oven temperature program, $T_0$ – $180^0$C waiting time 1.1 min

Growth in T1 - $290^0$C with $5^0$C/min speed; T1 – $290^0$C waiting time – 13.9 min

*Saturn 2000*

Filament off – 0 – 3min, AGC field "full scan" – 50 – 400 amu; Time 3 – 35 min

Scan duration – 1s/scan; Filament current – 10 μA; Maximum number of ions 25,000 Ionization maximum duration 25 ms; Prescan duration 100 μs

Mass to lower fund – 45 amu

## III. RESULTS

In the conditions mentioned, sibutramine extracted by two methods from a capsule of 10 mg Amphetamine – Zentiva was highlighted.

The extraction was performed from 7.5 mg excipient in methanol and acetonytril 1: 1 and 7.5 mg excipient in dichloroethane, dichloromethane and chloroform 1: 1: 1. The solutions were ultrasonated for one hour and centrifuged for 10 minutes. The supernatant was the injection matrix for both the gas chromatographic and the HPLC methods. Fig. 1 shows the resulting total ion chromatogram following the injection of sibutramine solution with a concentration of 0.5 mg/l.

Chromatogram Plot

File: \\saturn2000\hdd saturn2\saturn\data\prb24664.ms
Sample: URINA 6/16/09 1:19 PM
Sample Notes: SIBUTRAMINE (EXTRACTIE IN TEI SOLVENTI)
Operator: MIHAI Scan Range: 1 - 3000 Time Range: 0.01 - 50.00 min.

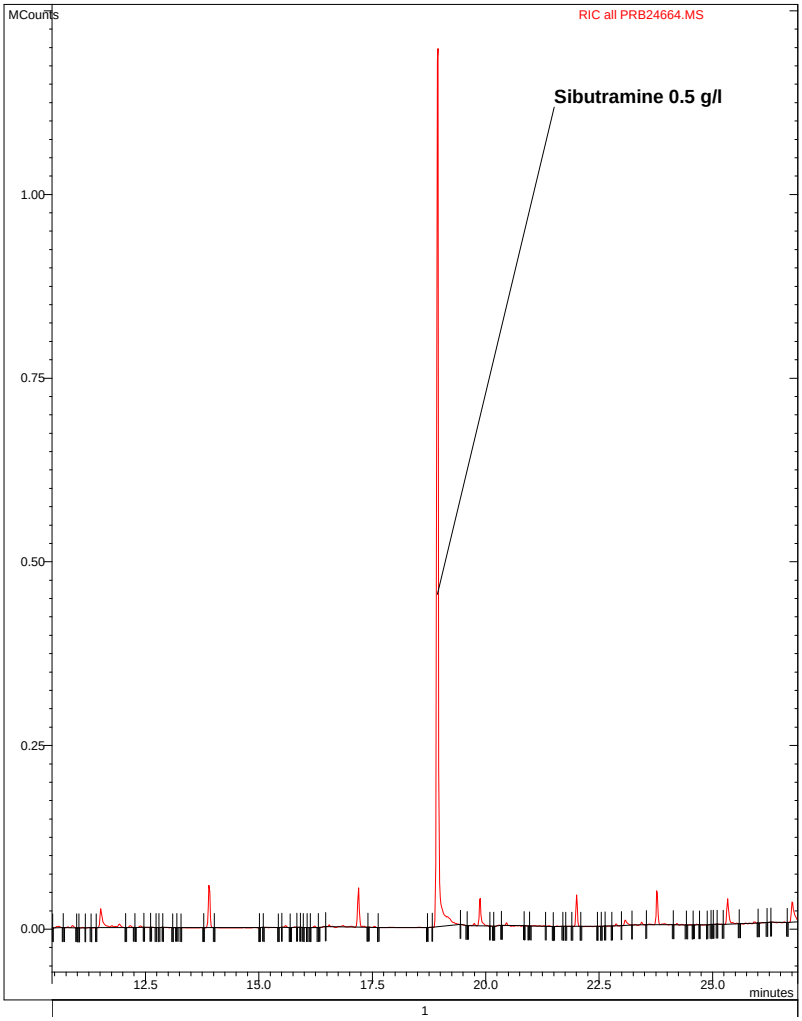



**Fig. 1. Total ion chromatogram of sibutramine at a concentration of 0.5 g/l.**

## Saturn Purity Search Hit List

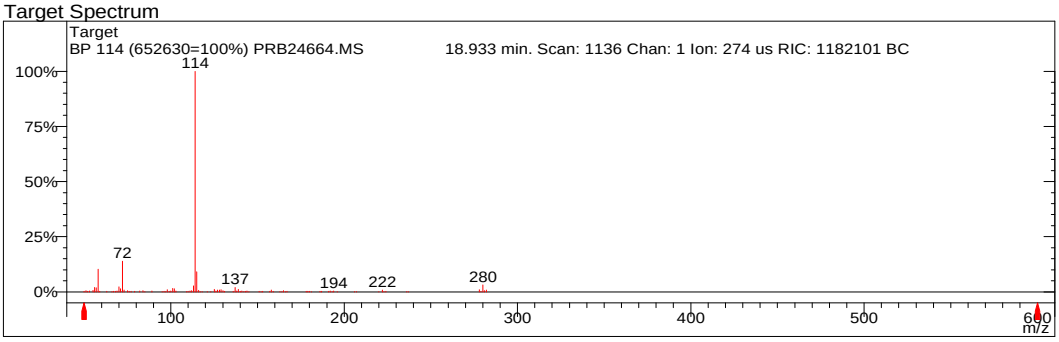
Saturn Purity Search Results

| | |
|---|---|
| Hits Found: | 25 |
| Pre-Search Hits Found: | 765 |

Saturn Purity Search Parameters

| | |
|---|---|
| Threshold: | 100 |
| Target Ion Range: | 50 - 600 |
| Library MW Range: | 50 - 600 |
| Library Ion Range: | All of Library Entry |
| Local Normalization: | Off |
| Requested Pre-Search: | 250 |
| Requested Final Search: | 25 |
| Search 7 Libraries: | A. c:\saturnws\satlib\nist98m.lbr<br>B. c:\saturnws\satlib\nist98r.lbr<br>C. c:\saturnws\satlib\pmw.lbr<br>D. c:\saturnws\satlib\libr_tr.lbr<br>E. c:\saturnws\satlib\libr_tx.lbr<br>F. c:\saturnws\satlib\libr_gp.lbr<br>G. c:\program files\wiley\wiley6.lbr |

Target Spectrum

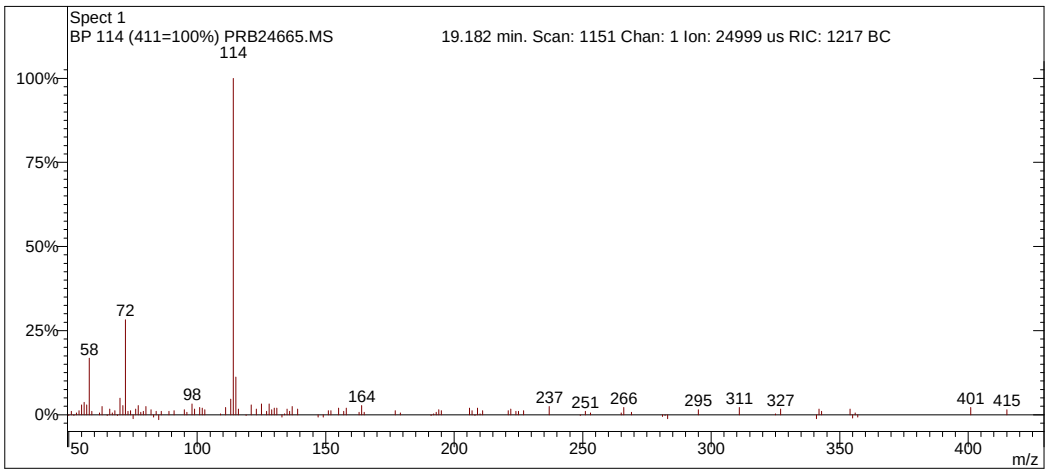



Spectrum from \\Saturn2000\hdd saturn2\Saturn\DATA\PRB24664.MS
Scan No: 1136, Time: 18.933 minutes
No averaging. Background corrected.
Comment: 18.933 min. Scan: 1136 Chan: 1 Ion: 274 us RIC: 1182101 BC
Pair Count: 99 MW: 0 Formula: None CAS No: None Acquired Range: 50 - 282

| | Purity | Fit | RFit | Entry # | MW. | Formula, CAS No., Name |
|---|---|---|---|---|---|---|
| 1 | 925 | 965 | 938 | 8741 C | 280 | C17H26ClN, 106650-56-0, Sibutramine |
| 2. | 698 | 890 | 754 | 51423 A | 380 | C18H40N2S3, None, Ethane, 1-[(2-diisopropylamino)ethyl |
| 3 | 663 | 850 | 763 | 51413 A | 517 | C27H30Cl3N3O, None, 1-[[2-[Butylamino]butyl]imino]-7-chl |
| 4. | 632 | 844 | 702 | 51422 A | 114 | C4H6N2S, 60-56-0, Methimazole |
| 5. | 631 | 829 | 701 | 9084 G | 114 | C4H6N2S, 60-56-0, 2H-Imidazole-2-thione, 1,3-dihydro-1 |
| 6. | 629 | 761 | 766 | 2305 C | 375 | None, None, |
| 7. | 628 | 855 | 665 | 34872 G | 159 | C8H17NO2, None, N,N-dimethyl leucine $$ |
| 8 | 625 | 734 | 744 | 51559 A | 295 | C21H29N, 5966-41-6, Benzenepropanamine, N,N-bis(1-methyl |
| 9 | 611 | 793 | 708 | 51416 A | 157 | C10H23N, 4458-33-7, Ethyl di-N-butylamine |
| 10 | 611 | 758 | 673 | 12442 B | 129 | C7H15NO, 13444-24-1, 3-Piperidinol, 1-ethyl- |
| 11. | 603 | 841 | 659 | 51369 A | 143 | C8H17NO, None, Oxazolidine, 2,2-diethyl-3-methyl- |
| 12 | 602 | 850 | 631 | 121870 G | 267 | C11H26NO2PS, 71840-25-0, Phosphonothioic acid, methyl-, |
| 13 | 601 | 849 | 630 | 12428 B | 267 | C11H26NO2PS, 71840-25-0, Phosphonothioic acid, methyl-, |
| 14. | 598 | 800 | 660 | 51419 A | 233 | C11H27NSSi, None, 2-Diisopropylaminoethanethiol, TMS d |
| 15 | 580 | 776 | 600 | 12432 B | 129 | C8H19N, 7087-68-5, Diisopropylethylamine |
| 16 | 580 | 775 | 692 | 51365 A | 129 | C8H19N, 16486-74-1, N-Butyl-tert-butylamine |
| 17. | 579 | 798 | 666 | 9085 G | 114 | C4H6N2S, 60-56-0, 2H-Imidazole-2-thione, 1,3-dihydro-1 |
| 18. | 577 | 717 | 779 | 2304 C | 375 | None, None, |
| 19 | 576 | 751 | 703 | 51409 A | 129 | C7H15NO, 57817-78-4, Oxazolidine, 3-ethyl-2,2-dimethyl- |
| 20. | 573 | 770 | 697 | 51404 A | 228 | C14H32N2, None, 1,2-Bis-(2-diisopropylaminoethyl) et |
| 21 | 572 | 713 | 631 | 18936 A | 204 | C10H24N2O2, 26549-21-3, 1,4-Butanediamine, 2,3-dimethoxy |
| 22 | 569 | 740 | 663 | 51428 A | 267 | C11H26NO2PS, 50782-69-9, VX |
| 23 | 563 | 732 | 751 | 51414 A | 533 | C28H31ClF3N3O2, None, 1-[[2-[Butylamino]butyl]imino]-7-c |

**Fig. 2. Sibutramine mass spectrum and the result of search in the mass spectra libraries.**

Scan 1151 from \\Saturn2000\hdd saturn2\Saturn\DATA\PRB24665.MS




Spectrum from \\Saturn2000\hdd saturn2\Saturn\DATA\PRB24665.MS
Scan No: 1151, Time: 19.182 minutes
No averaging. Background corrected.
Comment: 19.182 min. Scan: 1151 Chan: 1 Ion: 24999 us RIC: 1217 BC
Pair Count: 114 MW: 0 Formula: None CAS No: None Acquired Range: 50 - 429

| Ion | Int | %BP | Ion | Int | %BP | Ion | Int | %BP | Ion | Int | %BP |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 51 | 4 | 1 | 84 | 4 | 1 | 131 | 8 | 2 | 210 | 1 | 0 |
| 53 | 2 | 0 | 86 | 4 | 1 | 134 | 1 | 0 | 211 | 5 | 1 |
| 54 | 5 | 1 | 89 | 4 | 1 | 135 | 7 | 2 | 221 | 5 | 1 |
| 55 | 12 | 3 | 91 | 5 | 1 | 136 | 4 | 1 | 222 | 7 | 2 |
| 56 | 15 | 4 | 95 | 6 | 1 | 137 | 10 | 2 | 224 | 4 | 1 |
| 57 | 12 | 3 | 96 | 3 | 1 | 139 | 7 | 2 | 225 | 4 | 1 |
| 58 | 69 | 17 | 98 | 13 | 3 | 151 | 5 | 1 | 227 | 5 | 1 |
| 59 | 4 | 1 | 99 | 7 | 2 | 152 | 5 | 1 | 237 | 10 | 2 |
| 62 | 2 | 0 | 101 | 9 | 2 | 155 | 8 | 2 | 251 | 4 | 1 |
| 63 | 10 | 2 | 102 | 8 | 2 | 157 | 4 | 1 | 253 | 2 | 0 |
| 66 | 7 | 2 | 103 | 6 | 1 | 158 | 8 | 2 | 265 | 2 | 0 |
| 67 | 2 | 0 | 109 | 1 | 0 | 163 | 3 | 1 | 266 | 9 | 2 |
| 68 | 5 | 1 | 111 | 9 | 2 | 164 | 11 | 3 | 269 | 3 | 1 |
| 70 | 20 | 5 | 113 | 19 | 5 | 165 | 3 | 1 | 295 | 6 | 1 |
| 71 | 11 | 3 | 114 | 411 | 100 | 177 | 5 | 1 | 311 | 9 | 2 |
| 72 | 116 | 28 | 115 | 46 | 11 | 179 | 2 | 0 | 325 | 1 | 0 |
| 73 | 4 | 1 | 116 | 7 | 2 | 192 | 1 | 0 | 327 | 7 | 2 |
| 74 | 5 | 1 | 121 | 12 | 3 | 193 | 3 | 1 | 342 | 7 | 2 |
| 76 | 7 | 2 | 123 | 7 | 2 | 194 | 6 | 1 | 343 | 4 | 1 |
| 77 | 11 | 3 | 125 | 13 | 3 | 195 | 5 | 1 | 354 | 7 | 2 |
| 78 | 3 | 1 | 127 | 4 | 1 | 206 | 8 | 2 | 356 | 2 | 0 |
| 79 | 4 | 1 | 128 | 13 | 3 | 207 | 5 | 1 | 401 | 9 | 2 |
| 80 | 10 | 2 | 129 | 6 | 1 | 209 | 8 | 2 | 415 | 6 | 1 |
| 82 | 6 | 1 | 130 | 8 | 2 | | | | | | |

**Fig. 3. Sibutramine mass spectrum at a concentration of 5 mg/l.**

### II.2.2 HPLC-DAD-MS Methods

#### II.2.2.1 HPLC-MS Method

It is presented as a method for determining sibutramine in the injection matrices whose obtaining was described in paragraph 5.2.4.

Program duration: 30 min.

*ProStar solvent pumps*

Constant flow 500 µl/min of solvent B

*ProStar 410 Autosampler*

Number of containers – 84 of 2 ml; 3 of 10 ml

Injection syringe volume – 250 µl

Injection loop volume – 100 µl

Volume hose connecting the needle for collecting the sample – 15 µl
Syringe speed – 1µl/ s
Flush volume – 30 µl
Temperature of carousel with samples $40^0$C
Use of sample bottle pressure
*ProStar 500 column oven*
Number of columns – four
Work Column 1 (C8-3)
Column temperature – $35^0$C
Stabilization time 0.1 min
Delays after transition 0.1 min
*1200L mass spectrometer*
ESI ionization type
Ionization type - positive
Scan speed 1 scan/s
Detector voltage – 1480 V
Peak width of the first quadrupole – 0.7 amu
Peak width of the third quadrupole – 0.9 amu
Scan range 50 – 350 amu
*Detector ProStar with diode area 335*
Acquisition range – 200 to 400 nm
Slit width – 2 nm
Minimum purity level – 220 nm
Maximum purity level – 360 nm
Absorption spectrum acquisition: for each nm from the acquisition field
Display of absorption variation by two wavelenghts: 254 and 280 nm
Noise monitoring by 26 points.

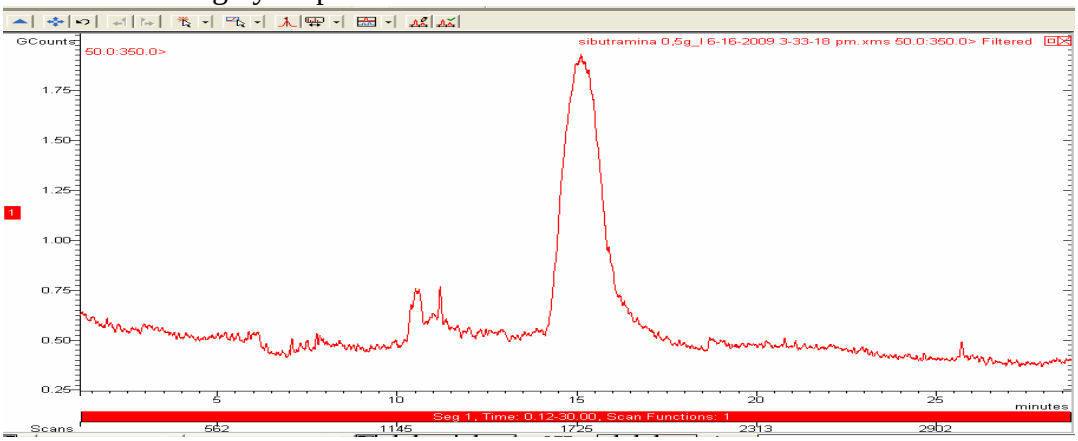



**Fig. 4, Total ion chromatogram of sibutramine at 0.5 g/l.**

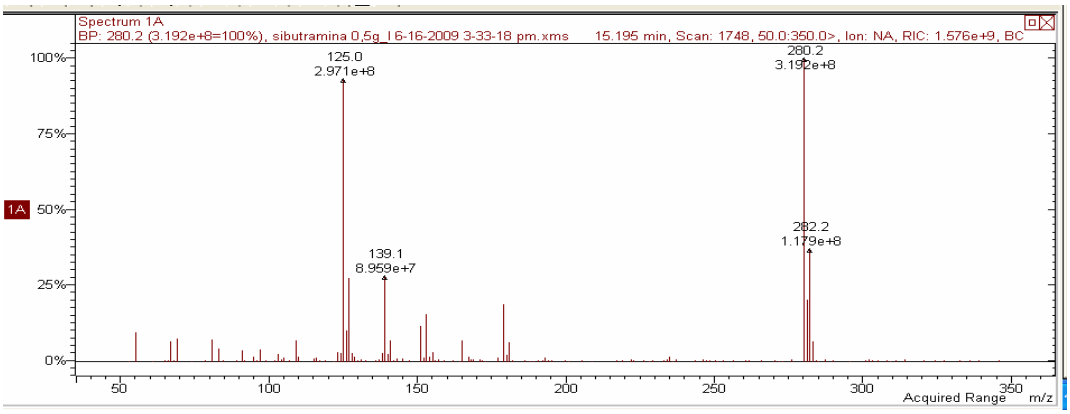



**Fig. 5. Sibutramine mass spectrum at 0.5 g/l.**


**Fig. 6. Mass sibutramine spectrum at 0.5 g/l as compared with that found in the MI spectra library of the HPLC-MS system.**

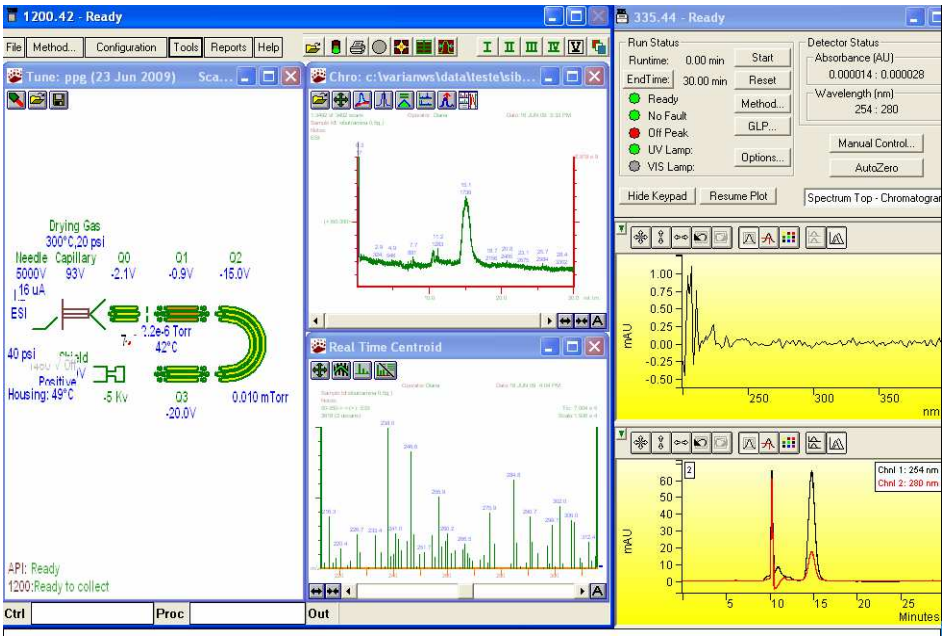


**Fig. 7. Total ion chromatogram of sibutramine in a matrix of three solvents compared to a liquid chromatogram obtained at 254 nm (black) and 280 nm (red).**

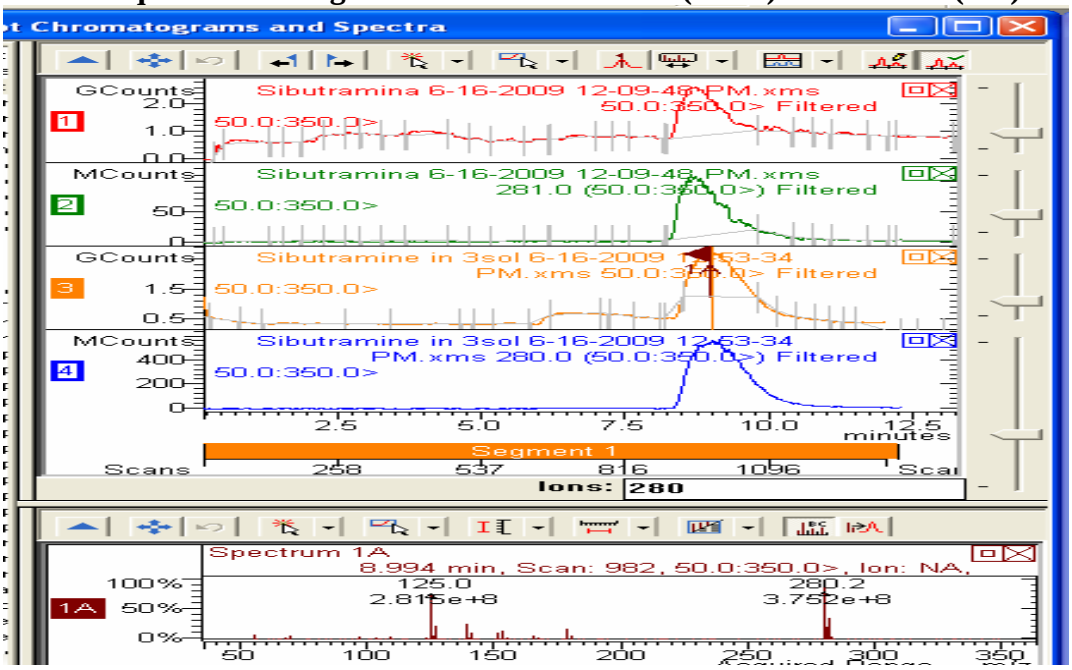



**Fig. 8. Total ion chromatograms (tracks 1 and 3) and ion chromatograms 281 (routes 2 and 4) of sibutramine at 0.5 g/l in methanol + acetonitrile matrix (tracks 1 and 2) and three solvent matrix (tracks 3 and 4).**

**II, 2.2. HPLC MS/MS Method**

It is presented as a method for determining sibutramine through the MS/MS technique.

Program duration: 30 min.
*ProStar solvent pumps*
Constant flow 500 µl/min of solvent B
*ProStar 410 Autosampler*
Number of containers – 84 of 2 ml; 3 of 10 ml
Injection syringe volume – 250 µl
Injection loop volume – 100 µl
Volume hose connecting the needle for collecting the sample – 15 µl
Syringe speed – 1µl/ s
Flush volume – 30 µl
Temperature of carousel with samples $40^0$C
Use of sample bottle pressure
*ProStar 500 column oven*
Number of columns – four
Work Column 1 (C8-3)
Column temperature – $35^0$C
Stabilization time 0.1 min
Delays after transition 0.1 min
*1200L mass spectrometer*
ESI ionization type
Ionization type - positive

Scan speed 1 scan/s
Detector voltage – 1480 V
Peak width of the first quadrupole – given by calibration
Peak width of the third quadrupole – given by calibration
Step 1 $Q_1$ -280 amu; $Q_3$ – 97 amu; with collision voltage: – 10.0 V
Step 2 $Q_1$ -280 amu; $Q_3$ – 139 amu; with collision voltage: – 11.5 V
Step 3 $Q_1$ -280 amu; $Q_3$ – 153 amu; with collision voltage: – 11.0 V.
*Detector ProStar with diode area 335*
Acquisition range – 200 to 400 nm
Slit width – 2 nm
Minimum purity level – 220 nm
Maximum purity level – 360 nm
Absorption spectrum acquisition: every 2 nm
Display of absorption variation by two wavelenghts: 254 and 280 nm
Noise monitoring by 27 points.

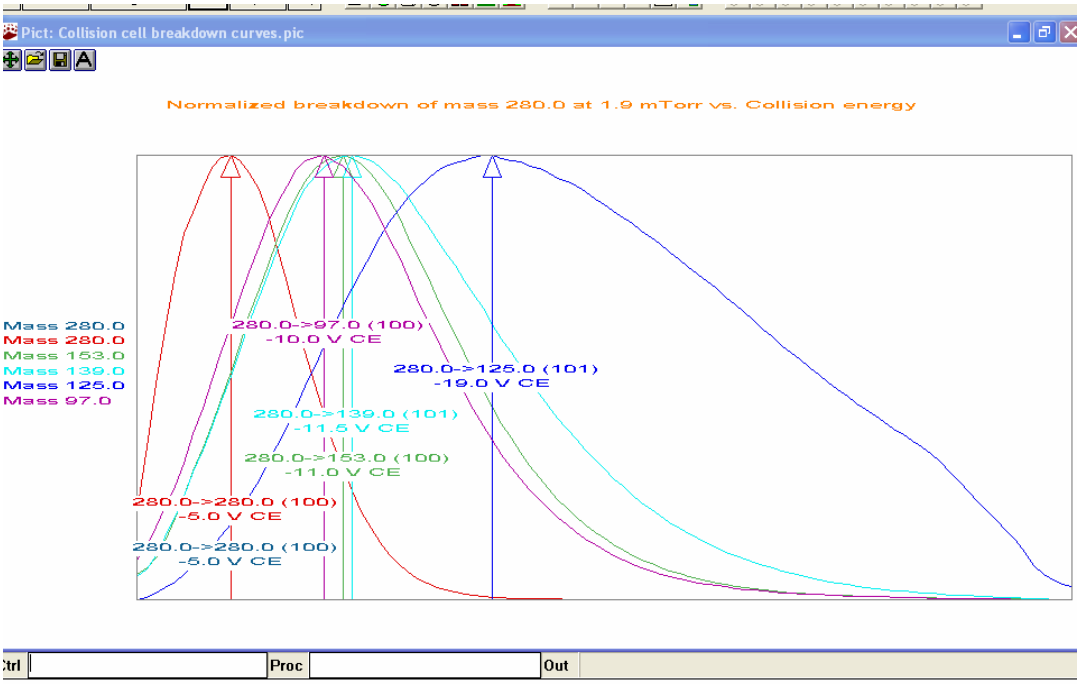



**Fig. 9. Result of ion 280 dissociation selected from the mass spectrum of sibutramine.**

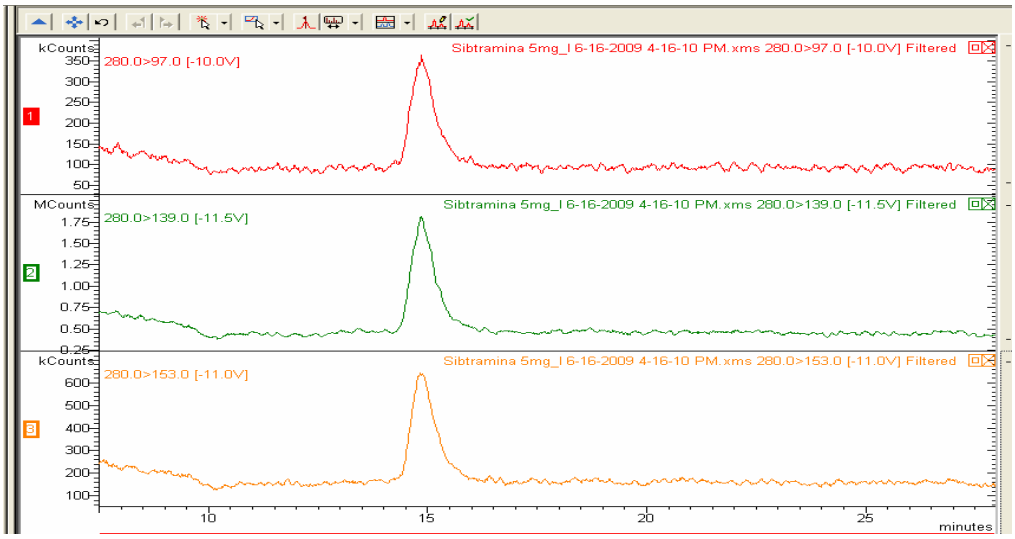



**Fig. 10. The MS/MS spectrum of sibutramine in a concentration of 5 mg/l.**

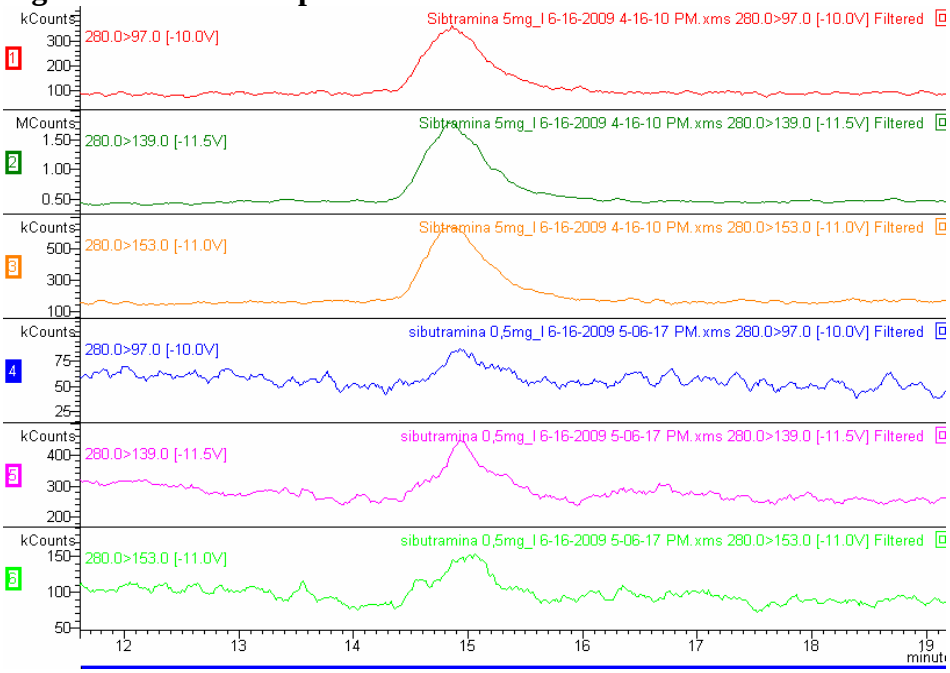



**Fig. 11. Comparison between the MS/MS spectrum of sibutramine in concentration of 5 mg/l (tracks 1-3) and that obtained at a concentration of 0.5 mg/l.**

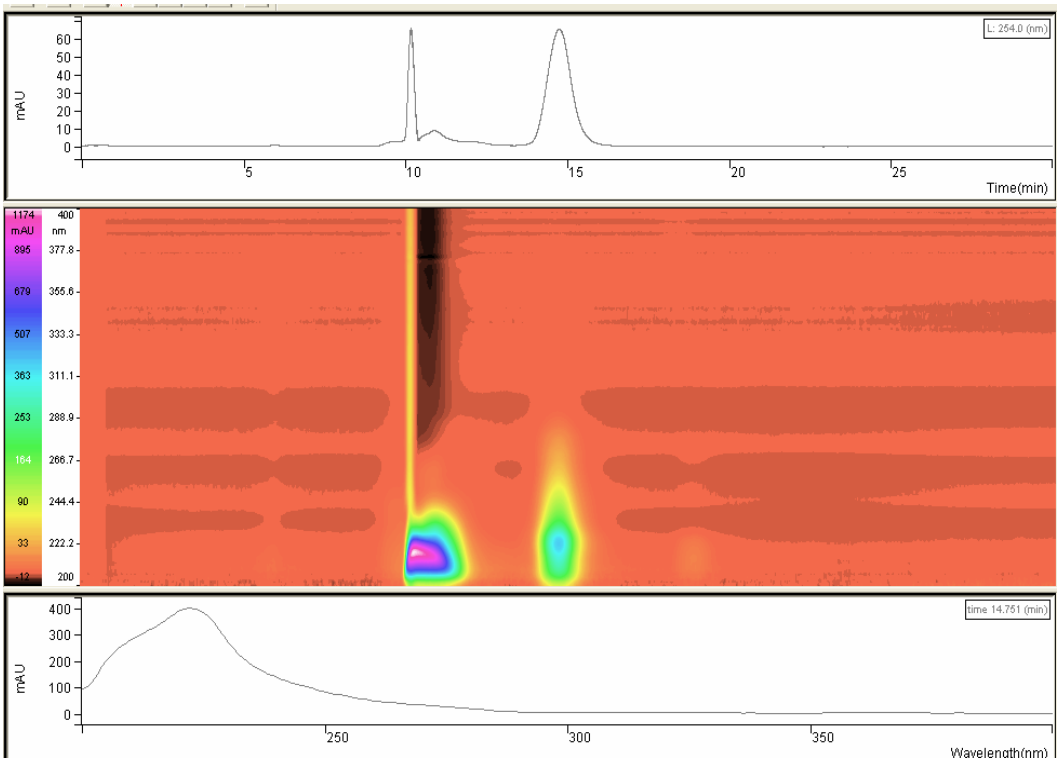



**Fig. 12. Liquid chromatocartogram of sibutramine in concentration of 0.5 g/l.**

## IV. DISCUSSION

### IV.1. Pharmacology

IV.1.1. Pharmacological effects

Another characteristic effect of sibutramine is its anorexigenic nature. Amphetamine decreases appetite and facilitates compliance with hypocaloric diet by the obese, helping weight loss.

The effects on the central nervous system are due to their interference at the level of catecholaminergic synapses. Amphetamine releases catecholamines from presynaptic terminals, reduces their uptake in these endings and inhibits their intraneuronal inactivation by monoamine oxidase. Psychomotor stimulation corresponds to an increase in the activity of the ascending reticular activating system, favouring the attentiveness process. Thus, wakeness reactions are amplified and there is a state of alertness in connection with the elective action on noradrenergic neurons, with the release of noradrenaline, with certain central synapses. The anorexigenic effect is due to the hypothalamic feeding center and corresponds to a local release of noradrenaline and dopamine. Stimulation of motility and motor stereotypes, arising from high doses, are assigned to dopamine release in the striated muscle. Psychotic phenomena produced by toxic doses are due to the release of dopamine in the mesolimbic system and to the release of serotonin.

Sibutramine also has sympathomimetic effects, i.e. there is an increase in blood pressure, weak bronchodilation, sphincter contraction and relaxation of the bladder fundus, increase of fatty acid concentration in the plasma.

In patients with narcolepsy sibutramine allows sleep seizure control without changing the state of catalepsy. Its therapeutic benefit lies in delaying in the development of fast sleep.

In the case of hyperkinetic syndrome in children (ADHD), sibutramine is effective especially in school children. The drug produces a decrease in the state of anxiety, motor agitation. The capacity for attention also increases without diminishing the learning process and mitigatess at least in part impulsiveness and behavioural disturbances.

In Parkinson's, the therapeutic benefits consist in reducing rigidity, oculogyric crisis prevention, improved mood and better sleep.

In epilepsy, it has a certain special efficacy regarding Petit Mall crises and antagonizes central depressant unwanted effects.

Amphetamine is readily absorbed in the intestine, being effective if taken orally. It has a half-life of 7-14 hours. It is eliminated through urine, and its metabolism is via the liver. In acidic urine a large quantity of amphetamine is released, as the pH decrease – increases the proportion of the dissociated form.

IV.1.2. Dose administration

Amphetamine use is limited due to its aggressive neuro-central effects. Its psychomotor stimulant effect recommands it for use only in special circumstances that require mandatory increased psychomotor performance and the removal of the feeling of fatigue.

Its dosage is in amounts of 3-6 mg/day 2-3 times a day, the last dose being administered before 4 p.m., to avoid insomnia at night. The usual dose in humans causes mental excitation phenomena with feelings of freshness, fun, initiative, increased concentration, the need to talk, the appearance of fatigue being delayed.

Thus, this “state of well-being” leads to developing tolerance, to phenomena of chronic intoxication, psychiatric disorders and a state of addiction, involving a change from the condition of taking a medicine to that of drug consumer, a background that favours the consumption of other substances with high toxicity as well.

**IV.2 Toxicology**

Tolerance initially concerns peripheral, sympathomimetic effects, which quickly become progressively weaker and which include a number of effects on nerves + psychomotor stimulation, euphoria, anorexia – and the lethal effect (a person may survive doses of 500 mg to 1 gram, when exitus occurs). Development of tolerance requires progressively higher doses that produce chronic neurotoxic and psychotoxic phenomena - hyperactivity, irritability, tremors, motor stereotypes, mental disorder with delusions and hallucinations similar to those in paranoid schizophrenia.

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# RECENT TRENDS REGARDING GOOD FAITH IN CONTRACT LAW

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**Abstract**

*The purpose of this article is to highlight the newly convergences between the Romanian legal system and that of other Member States of the European Union in the field of good faith.*

*In the first part of the article, we try to establish the core values of good faith in general and subsequently in the field of contract law, as perceived by the national scholars and researchers. While good faith had merely the role of a general rule which was rather simplistically associated with fairness and morale, in light of the recent developments brought upon by the enactment of the new Civil Code, good faith has become a focal point in several institutions in the field of contract law.*

*The second part of the article aims to identify the origin of the rules set out in the Romanian legislation, by investigating the motifs behind the adhering to the line of thought as set out by the Principles of European Contract Law.*

*In the last part we will illustrate the recent trends and goals of the European Union in the field of contract law and also try to correlate how these actions will translate to the Romanian national legal system in theory and in practice in the years to come.*

**Keywords:** *good faith, contract law, Principles of European Contract Law, Romanian Civil Code, European private law.*

## Introduction

*The notion of good faith has been perceived as a principle of law, but one that too often has been used in practice as a vague norm by which judges were enabled to rule in just. However, the recent enactment of the Romanian Civil Code has placed it as a centerpiece in several institutions in the field of contract law. Given the recent trends in the academic field and practices in different member states of the European Union, Romania has adapted from a legislation standpoint in order to accept good faith as a fundamental concept of contract law by regulating good faith prominently in the new Civil Code.*

## 1. Good faith in the former and current Romanian Civil Code

Originally, the previous Romanian Civil Code, as enacted in 1864, contained several applications of the notion of good faith, however most were applicable in the field of property law or were perceived as a broad behavior rule which would allow for a dispute to be judged in just or fairness. The reasoning behind this statement is that although good faith was present in legislation, it did not benefit from an express regulation or provision which would back up the existence and importance of good faith. Thus, the only express norm which regulated good faith was article 970 Romanian Civil Code, which pointed out that agreements between parties must be executed with good faith. Given that law makers at the time chose not to define this notion, its components or how it relates with other institutions, it remained the task

of legal doctrine and case law to fill in the aforementioned theoretical law gaps in order for good faith to become a practical and efficient institution.

Over the course of time, scholars have put effort in differentiating[1] good faith, as a practical institution, from other vague philosophical and justice related principles, which served little purpose in solving disputes related to civil contracts, even more so to complex commercial and economic related cases which require more certainty and practicality if they would up to be decided based on good faith.

**2. The components of good faith**

From a theoretical stand point we deem important to highlight the common ground between good faith, morale and honesty.

We support the opinion[2] that good faith, at its core and from a practical standpoint, is composed of the duty of loyalty and cooperation. These obligations reflect social and moral values which serve as the groundwork to any relations which guide individuals in their interactions in society. Law and morale are similar in that both dictate how one should behave[3], but while morale does not impose its ideas the law enforces them by means of legislation. Good faith provides strong ties with both the law and morale, which leads to the discussion whether good faith is a moral or legal notion. The generally accepted theory[4] is that good faith is a legal notion which combines morale elements or values which generate legal effects by means of legal provisions.

Until the recent change of legislation, the application of the aforementioned hypothesis was less present in contractual matters, but proved a proficient application in the field of (i) property law as a requirement in the case of usucaption of movable and immovable assets; (ii) family law as a limitation to the effects of the putative marriage; (iii) inheritance law as the basis for the theory of the apparent inheritor. All of these applications require that an individual has to have a given mental approach to the factual situation at hand and in order for his behavior or state of mind to produce positive legal effects in his favor, it is necessary that no legal, and to a lesser degree moral, provisions have been breached[5].

As a conclusion, good faith has a generating role in areas of law where social relations require them, and in order for good faith to operate in compliance with ethic and morale values[6].

From a psychological standpoint, honesty is composed of the following attributes[7]: loyalty, prudence, order and temperament. Over the course of time 'loyalty' has gained support and became a standalone value accepted by scholars[8] as a requirement in contract dealings. Prudence represents a factor which guides the behavior of the individual in the sense that he will not act in a harmful manner to those around him. Order represents the awareness and obedience to the social and legal norms. Temperament represents the restriction and downing of desire. Temperament correlated with prudence form an ideal mind frame for a

[1] Gherasim, D., *Buna credinta in raporturile juridice civile*, published by "Editura Academiei Republicii Socialiste România", Bucharest, 1978; Oprisan, C., *Elementul de morala in conceptul de buna-credinta*, in Romanian Law Studies Review no. 1/1970; Anca, P.; Eremia, M., *Efectele juridce ale bunei-credinte in dreptul civil*, Justitia Noua no. 12/1965.

[2] Musy, A., *The good faith principle in contract law and the precontractual duty to disclose: comparative analysis of new differences in legal cultures.* Global Jurist Advances. Volume 1, Issue 1 February 2001 p.2.

[3] Gherasim, D., op. cit. p.12.

[4] Oprisan, C., op. cit p 50.

[5] Cotea, F., *Buna-credinta. Implicatii privind dreptul de proprietate*, Hamangiu Pubishing House, Bucharest 2007, p.27.

[6] Oprisan, C., op. cit P.62.

[7] Gherasim, D., op cit p.9.

[8] Uliescu M., *Buna credinta in noul Cod civil, Justitie, stat de drept si cultura juridica*, p 365, Bucharest 2011; Gherasim D., op. cit. p. 23.

person to act in legal dealings with others by not harming other people's rights or via malfeasance.

All of the above represent psychological concepts, which do not have a standalone impact from a legal standpoint; however these concepts manifest themselves in different forms in order to be viewed as legal concepts. Thus, prudence manifests itself in the form of diligence, which in legal terms represents the minimum floor of attention and interest in all the actions to be performed by a normal individual with an average level knowledge (bonus pater familias). Order takes form of licit, in the sense of abiding the law. Whereas, temperament does not necessarily have a direct legal correlation, basically it's a requirement not to harm others which is necessary in all social interactions.

**3. The origin of the rules set out in the Romanian legislation**

The recent additions to the new Romanian Civil Code relating to contract law refer to confidentiality, behavior in regard to contract negotiations and change of circumstances. We found that these new provisions are similar to the ones of the Principles of European Contract Law ("PECL"), which proves to be the origin for the way of thought chose for the new Civil Code.

For example article 1:201 of the PECL states that "each party must act in accordance with good faith and fair dealing" and that "the parties may not exclude or limit this duty". The Romanian Civil Code provides the same rules at article 1170, with the addition that this obligation is applicable during the negotiations and concluding of the contract and also during the execution of the contract.

In regard to contract confidentiality, article 2:302 of the PECL provides that "if confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for its own purposes whether or not a contract is subsequently concluded". The Romanian legislation provides the same rules at article 1184 Civil Code.

In the case of negotiating contrary to good faith the Romanian provisions are identical to those of article 2:301 PECL:

1. a party is free to negotiate and is not liable for failure to reach an agreement[9].
2. a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party[10].
3. it is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party[11].

After taking a look at applications of good faith in the same fields of contract law, in the other legal systems[12], we can conclude that there are several key differences among them, however they all have in common the fact that in all systems good faith grants the legal practitioners a way out from the harshness of the strict application of the contract interpretation rules, by way of judicial discretion in the name of fairness[13]. Thus, good faith represents an example of existence of common points in approach among the national legal system.

**4. Recent trends and goals in the field of European law**

The harmonization of private law among the Member States has been an old goal for the European Union, dating back to 1989[14] when The European Parliament requested the

[9] Refer to art 1183 (1) Romanian Civil Code.
[10] Refer to art 1183 (4) Romanian Civil Code.
[11] Refer to art 1183 (3) Romanian Civil Code
[12] Musy, A., op.cit, p.2-5
[13] Musy, A., op cit p.7
[14] Official Journal of the European Communities, 1989, N. C 158/400.

creation of a European civil code. This initiative paved the way for the Communication from the Commission to the Council and the European Parliament on European contract law[15] which presented the Principles of European Contract Law as set out by the Lando Commission.

As recently as 2010, the European Commission presented its green paper on policy options for progress towards a European Contract Law for consumers and businesses[16] ("Green Paper"). The scope of the Green Paper was not to raise a debate regarding the content of European private law, instead it marked the beginning of the process to further harmonize and unify legislation in the EU zone by presenting the main options available in order for individuals and legal practitioners across the EU to best make use of the provisions of the future legal instrument. Options under consideration included: model contract rules; a 'toolbox' for EU lawmakers; - a Contract Law Recommendation (in the style of the US Uniform Commercial Code); - an optional instrument for European Contract Law ('28th regime'); - harmonization of national contract laws by means of a Directive; - full harmonization of national contract laws by means of a regulation; and - a full-fledged European Civil Code[17]. Opinions have been expressed that "Europe must be harmonized, not homogenized"[18]. Thus we firmly believe that the role of the PECL is to set up a set of general rules which would provide great flexibility in order to facilitate the future development of the legal thinking in the field of contract law.[19]

We are of the opinion that the Principles of European Contract Law promote the concept of the good faith and tend to promote its role in contract matters, mainly because good faith is not just an interpretation instrument, but a fully functional legal institution[20] capable of (i) completing contract provisions with the additional obligations[21] necessary for a proper execution of the contract, and (ii) limiting the rights which arise from the contract to a proper dimension or length in order to not give way to contractual imbalances which may occur.

Furthermore, we support the idea that a norm with a high occurrence in practice would be best served as being broad, and not excessively strict, in order to facilitate a bonding of legal institutions which would later lead to a smooth harmonization of European legal cultures.

Given that civil codes are very difficult to modify and implement, from a duration standpoint, we find it difficult to believe that a full-fledged European Civil Code will be in place in the ensuring decades. However it is expected that future directives and regulations to be enacted will further back up the PECL mechanisms which over the course of time will familiarize the law makers and individuals with this set of legal rules.

In regard to the Green Paper presented by the Commission, until January 31 2011 there was a consultation period during which any individual, organization or national authority, was able to submit its opinion and arguments regarding the options set forth by the Green Paper. The political opinions regarding the end result of the Green Paper - mainly

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[15] Official Journal of the European Communities, 2001, C 255, COM(2001) 398.
[16] Official Journal of the European Communities, 2010, COM(2010) 348.
[17] For further understanding of the contents and envisioned effects each option might have, please refer to http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:EN:PDF.
[18] Storme M., *Good Faith and the Contents of Contracts in European Private Law*, vol. 7.1 Electronic Journal of Comparative Law, March 2003, p. 11.
[19] Lando Ole/Beale Hugh: Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law, 2000, p. XXVII.
[20] Storme M., op cit. p. 9.
[21] Hesselink, M., *Principles of European Contract law*, Kluwer, Dwenter, 2001, p.51; the author manages to distinguish additional duties in four main categories: duties of care, duties of loyalty, duties to cooperate and duties to inform.

supported by EU and member state officials - were optimistic, whereas legal scholars were more reserved in this regard mainly based on the effects a relatively sudden forced harmonization may have on national legal cultures.

Strictly related to the scope of the consultation regarding the Green Paper several of the submitted opinions have been published[22]. After analyzing the submissions, we found that from a practice standpoint some of the leading law firms which are present across several European jurisdictions, such as Linkletters, Allen Overy, Clifford Chance, have presented a reserved approach regarding the positive outcome and implementation of this initiative. While seemingly understandable that setting a strongly regulated common core of contract law may lead to a sense of short sightedness in relation to legal heritage and habits, it would also prove to be a real challenge for lawyers to adapt their understanding of how civil law should be applied. We find it very likely that in the near future such a harmonization would be negatively received. However, the reticence regarding harmonization is somewhat unfounded, mainly because the Green Paper offers solutions such as optional instrument contract law, publication of conclusions by the EU experts and the toolbox option. All of these are not binding and do not impose restrictions on the national law makers.

On this matter the Romanian authorities have submitted their opinion, through the Romanian Senate[23], and manifested their support for the solution of adopting a regulation establishing a European contract law. Even though this way seems to be among the least likely solutions among those proposed by the Green Paper, after studying the reasoning behind the Senates' opinion, we can safely conclude that the Romanian law makers are aiming for a legal thinking very close to that of the PECL. The reasoning being mainly to assure an easy transition, to what the Romanian authorities believe to be, the future in the field of civil legislation, one that is harmonized either by means of obligatory EU legislation or even a European Civil Code. In support of this assessment we allude to the new Romanian Civil Code provisions in the field of contract law, especially to the concepts of good faith, contract performance, hardship, and tort, which are similar or inspired form the PECL provisions.

**Conclusions**

Looking at the direction in which European legislation at a national level is heading we find the recent enactment of the Romanian Civil Code as being a step in a direction which converges with that of other EU member states. Strictly related to good faith, we deem that the newly added provisions in our legislation have enhanced the role of an institution which is able to facilitate and resolve more and more complex contractual legal matters which legislation cannot always cover.

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[22] http://ec.europa.eu/justice/news/consulting_public/news_consulting_0052_en.htm.

[23] Decision no. 40 dated December 17, 2010 published in the Official Gazette no.890, dated December 30, 2010.

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# PSYCHOLOGICAL APPROACH OF WITNESS AND JUDICIAL TESTIMONY

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**Abstract**

*Testimony is one of the most important evidence, but in terms of doctrine and case, it appears a controversial approach to interpretation. This study aims to be an interdisciplinary approach, to highlight the psycho-legal elements, both of witness and testimony, elements of criminal procedural law. The method used in developing this approach is especially observation and managed by highlight, to connect the legal, criminal and psychological field in a delicate way.*

**Keywords:** *testimony, memory, error, false evidence*

## Introduction

*Often, was proved that taking skeptical position faced to this testimonial element, the evidence, from many authors and practitioners, becomes a natural attitude. In support thereof, may occurs the existence of witnesses or persons aggrieved by bad faith, but also the existence of subjective data coming from sincere people who have the desire to testify accurate. Person obedience is rather complex to be analyzed very carefully in order to establish the truth. Although it is regarded as one of the most important evidence in doctrine and practice there is a skeptical position about this sample. A doubtful position against this evidence is based on the existence of witnesses or persons aggrieved by bad faith, but also the existence of subjective data coming from sincere people who have the desire to testify accurate. Thus, we are in an area where we must delimit between errors vs.* ***lie,*** *fidelity vs. honestly, because any mistake will have repercussions on who will be the subject of criminal liability. From this point of view there are differences between witnesses of good faith, even if perceived information in a different way.*

## Psycho-Legal Aspects

Evaluation of sample testimonials from supposed psychological result of interaction between physical characteristics of a person communicating information and facts perceived psychological peculiarities resulting in the truth. Thus, it should be reconstituted the process of testimony construction with all its stages, and the objective and subjective factors must be analyzed carefully because they influence the fidelity of testimony.

Defining testimony in judicial psychology perspective, we can say that is the result of observation and involuntary memory of a judicial fact, followed by its resumption in oral or

written form, in front of prosecuting authorities and the courts[1]. Witness testimony must be investigated separately in all the aspects involved, implicit in psychological perspective, it is a logical research.

Thus, Enrico Altavilla in his work, "*Psichologia giudiziaria"* insists on the *phenomenon of psychological testimony has a double aspect, subjective and objective: the individual's psychological capacity to testify, the possibility of an object or event to be the subject of testimony"* [2].

Thus, it must to take into account the following aspects:

a. **Testimony** is a characteristic of an judicial event to form the object of evidence, taking into account that some issues are excepted by testimonial evidence;
b. **Memory** means the object ability to be stored;
c. **Fidelity** means the individual capacity to remember judicial event and to submit a testimony;
d. **Sincerity** means the subjective available to say the truth.

**Criminological aspects**

Vidal and Magnol criminology studies revealed certain deficiencies fidelity of judicial testimony, namely fully faithful witness is an exception, a witness may be in error honest, extent and fidelity of judicial evidence diminishes proportionally with age reveals facts[3]; value is proportional to the number of depositions of witnesses and a minority may be right against a strong majority, a large number of anomalous, unknown as such are heard as witnesses and distort the truth due to disturbances and personal handicaps[4].

**Doctrine**

As regards *the probative value of the testimony,* in theory there were many opinions. Thus, the testimony with witness being easiest way of administer and evaluate was sometimes viewed with distrust, skepticism, so the credibility of this evidence was diminished.

A similar opinion[5] said that the sample testimonial is apparently fragile, sometimes misleading and a rather random.

In literature, there is the conclusion that the witness is a passage of reality through the filter of witnesses subjectivity, but also that of the judicial body that considers the probative value of the witness statements, given that there are certain causes of relativity testimony[6] among which the most important are: imperfect senses, mental processes distorted, quasi-general conviction (that witness statements should be a faithful reproduction of reality).

**Relationship witness–judge of psychological view**

In the testimony process is created a trial relationship, the *witness - judge,* although it is a legal relationship, it is also a psychological relationship between the witness and judge, a cerebral communication with procedural compliance. Legal relationship, *witness-judge,* is fundamental for judiciary underlying procedural activities to identify, manage, appreciation and use of the evidence in order to solve judicial cases, regardless of their nature. Prerequisite of brain intercommunication between witness and judge is the witness to be in good faith, to overcome fear, interest or indifference, and the judge to help him to gain courage and responsibility necessary to establish the truth.

**Psychological approach of judicial testimony of good faith**

Judicial psychology provides methods and criteria for justice to detect some false or misleading testimony, of good faith, but also the false witness, of bad faith.

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[1] Stancu, E. (2002). *"Tratat de Criminalistică"*, Bucharest, "Universul Juridic" Publishing House;
[2] Mitrofan, N; Zdrenghea, V.; Butoi, T., (2000), *Psihologie Judiciară*, Bucharest, "Şansa" Publishing House;
[3] Sutherland, H.E.; Cressey. (1996 ), *Principii de criminology*, R.D.Paris;
[4] *Revue de Droit Penal et de Criminologie, no.6.*, 1976;
[5] Bogdan, T. (1973). *"Probleme de psihologie judiciară"*. Bucharest, "Stiințifică" Publishing House;
[6] Stancu, E. (2002). *"Tratat de Criminalistică"*. Bucharest, "Universul Juridic" Publishing House.

Good faith is the testimony of witnesses who made oath, is not false it not comes from dishonesty of witness and thus not covered by criminal law. Some of the testimonials of good faith can have the same consequences as testimony of bad faith, namely the false testimony. Analyzing this testimony from psychological view is most important for practitioners of the judiciary.

**General aspects of psychological approach of testimony of good faith**

In a criminal trial witnesses can testify to various inconsistent with reality namely the false confessions that are detrimental to justice. With judicial psychology support, can detect false confessions, but of good faith and false witness who violates the principle of good faith, of honesty. False testimony is regulated by Art 260 Criminal code both with offenses against carrying out justice.

Usually, withdrawal of false testimony is challenged and, rarely, it is the result of self-denunciation who has made false, so a voluntary initiative[7]. In practice judicial authorities in this matter, arise that promote withdrawal of false testimony is result of procedural activities of analysis and evaluation of the testimony complained that emphasize logical conclusions about that testimony cannot be given credibility, being suspected of untruth.

**Witness conduct**

According to its nature, it is considered that the witness has a relatively constant expression. Therefore, it is good to know witness orientations to sincerity, honesty, fairness, humility, generosity or by selfishness, cowardice etc. Knowledge of witness in terms of its features is a necessary but insufficient condition because witness testimony may be untrue even if they come from people with strong morals. Another credibility element is the affiliation to one of psychological types fidelity testimony is psychologically dependent on this type belonging to witness.

**Conclusions**

1. Testimonial evidence shows a growing interest burden of proof. On a comparison with other evidences, we could even say that it is the most comprehensive in the sense that the statement of a witness, the court may issue a final judgment of conviction, while a statement of any other participant, does not cause such a decision.

2. Equally, we believe that is a complex approach in terms of prospects. Thus, due to the development and presentation of the study, it was observed that the role of the witness in a criminal trial is both *probes* (private elements that transmit findings provide private) and *deductive* (general to offer items that can extract individual elements).

3. The most important proposals resulting from browsing this study are the following:

- establishment of an applied Psychology inside of courts and its including in the forerunner measures of trial;
- decrease of witness trust, based on complex structure of psychological testimony.

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# COMPLIANCE WITH THE PRINCIPLE OF ENFORCEMENT FROM OFFICE OF THE ADMINISTRATIVE ACT ACCORDING TO THE DISPOSITIONS OF THE FUTURE CODE OF ADMINISTRATIVE PROCEDURE

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**Abstract**

*Lately, the national juridical order of every country has been influenced by the supranational juridical systems due to the globalization phenomena, without it being possible to deny the interdependence of internal legislations, since the state, as contracting party of various international conventions, has several obligations to comply with, including obligations to adopt various laws subsequent to the agreements it signed.*

*Due to the transformations that occurred in all areas of activity of human society, we can note that we are assisting a process of convergence between the administrative law of EU Member States and the European administrative law, process that is in a continuous development.*

*As Romania assumed the EU acquis, it has the obligation to implement in its national legislation the general administrative procedure principles shaped at this level, principles among which one can also find the principle of enforcement from office of the administrative act.*

**Keywords:** *codification,* administrative act, enforceable act, administrative procedure

## Introduction

From a reserved attitude of most authors in the interwar period, mostly due to the diversity, but also the dynamics of the legislation in this field, the postwar period was characterized by a position favorable to codifying the administrative procedures, although the law-making process did not comply.

As far as the efficiency and the utility of adopting an Administrative Code is concerned, even before 1989 it was considered that such a normative act would contribute to clarifying the administrative juridical system, allowing a systematization of the legislation in the field of state administration; these considerations still stand today, as long as we replace the concept of state administration with that of public administration. After 1990, the theory of the necessity of codifying administrative law rules reappeared, starting from the premises that *a modern, civilized public administration, in a democratic and social state of law must be a transparent one,* characterized by *clear rules* that are as much as possible, *uniform and accessible to all.*[1]

The administrative codification is, alongside the other codifications, the quintessence of the systematization of law, imposing itself in the process of reforming the public

[1] Dana Apostol Tofan, Domnica Focsaneanu, Catalina Suta, *Proiectul Codului adminsitrativ al Romaniei,* Curierul Judiciar no. 2/21.07.2001.

administration, of overcoming the obstacles it currently faces. The administrative codification would bring multiple advantages that would consist, among others, in simplifying and correlating the legislation in the field, reducing the immense number of existing regulations, creating a general reference legal framework that would, in link with the code, eliminate parallelisms, contradictions and incoherencies in the legislation and also certain deficiencies stemming from not motivated acts, parties not being subpoenaed etc.[2]

Moreover, the future Code of Administrative Procedure should ensure full harmony between the internal legislation and the EU one. A compared study of the level of integration of EU legislation in Member States would be truly useful for the future code, so that it includes unequivocal administrative procedural norms that determine a uniform application according to the existing EU legislation.

Also, alongside the three different juridical orders (norms from the national legislation, the EU legislation and the European Convention of Human Rights), one can note a real normative competition, on the creator appanage of the jurisprudence, in shaping and developing administrative procedural norms.

Precisely because of that, as a consequence of signing the treaty to become member of the European Union, Romania is being confronted with the problem of integrating the European structures, and to accomplish this objective, it has to put sustained effort into improving its constitutional, legislative and institutional systems; the role of the Romanian legislator is to unify the norms by codifying and consolidating them, as well as to harmonize the legal regulations.

If the first step in preparing the constitutional mechanisms for the implementation of the EU law has been made by revising the fundamental law, another step that needs to be taken is codifying the administrative procedure; this is bound to start from a thorough knowledge of social needs and a deep understanding of the link between procedure and substantial law.

In our opinion, an improvement in the judicial protection of citizens and a good administration could be achieved this way, giving any person the possibility to benefit from an impartial, equal treatment from public institutions.

The illustration of these arguments consists in the fact that at present, frequently, during the same law suit, the judge is called to apply rules of the EU law, of the national law as well as regulations of independent administrative authorities, situation that can lead to conflicts between them, but mostly to an practice lacking uniformity.

One cannot ignore or minimize the fact that the ambiguity and incoherence of the legislation leaves a great freedom of manoeuvre to the public administration in adopting administrative acts, but also to the judge in administrative cases when analyzing the legality of the act.

We consider that the codifying activity would be a remedy both against inflation and legislative disorder, problem that should represent a constant preoccupation of all political factors and of public authorities with attributions on the field.

A place of its own in the future Code for Administrative Procedure will have, alongside other principles, the *principle of enforcement from office of the administrative act,* starting from the reality that currently, its existence is unanimously acknowledged in Romanian doctrine and that it is included in most legislations of EU states.

The decisive arguments leading to keeping the idea that *the unilateral administrative act is a writ of execution* as a priority of the future Administrative Procedure Code, consist of the fact that it is a constant principle in the Romanian administrative law doctrine, as well as

[2] Ioan Alexandru, *Un punct de vedere în conturarea unei concepții privind elaborarea Codului Administrativ,* Revista română de drept no. 9/1976.

in that of other EU states, but also because the administrative procedure laws in the latter explicitly mention it.

It is highly important that the *regulation of the forced execution of administrative acts* can be found in a separate section of the future Administrative Procedure Code (in the project for a Code, one could find the respective dispositions at art. 128 – 136), eliminating the possibility of regulating and adopting a separate special law. This is way the following essential aspects should be taken into account:

- the listing of the *principle of proportionate execution in the future Administrative Procedure Code* should consider that the measures taken by public authorities that affect the rights or reasonable interests of individuals should be necessary and proportionate to the goal that is followed;
- the forced execution action should be defined and the delay by which it can be done should be established;
- the fact that the forced execution can be done at the request of the administrative authority that issued the act that constitutes writ of execution or at that of the creditor of the obligation to execute should be specified;
- the conditions that need to be accomplished for the forced execution should be mentioned, as follows:
    a) the existence of the writ of execution in writing;
    b) the proof of having communicated the interested person on the administrative act that constitutes the writ of execution;
    c) the administrative authority competent to note the rejection to proceed to voluntary execution of the debtor, as well as the lack of an objective justification in this regard;
    d) there should be no exception from the rule of immediate execution of the administrative act;
- the administrative sanctions that could be applied by administrative authorities should be established (the principle of legitimacy of the administrative sanction);
- the principle of non-retroactivity of sanctions should be included.

One shouldn't forget that the procedure of applying administrative sanctions needs to comply with the guarantees assured by art. 6 of the European Convention of Human Rights. We are thus considering that the following need to be specified, according to the framework established by the Convention:

- the principle of necessity, as well as the principle of proportionality between the administrative sanction applied and the offense committed by the debtor of the obligation to execute;
- the adversarial principle that includes the right to defense, the possibility of hearing the party, his right to present the reasons for which he didn't voluntarily execute the administrative act, the motivation of the corresponding administrative sanction applied, the right of the party to challenge the legality of the administrative sanction applied and to demand it's suspension until the appeal is solved;
- the possibility of engaging the material responsibility of the administrative authority that is guilty of having illegally forcedly executed the administrative act.

From another point of view, we believe that mentioning in the project for an Administrative Procedure Code the procedure for appealing against the execution of an administrative act directly done at the public authority or the hierarchically superior one is assimilated to the administrative appeal before going to the administrative court.

In order to ensure a uniform and easy implementation by public authorities of the legal solutions aimed to remedy the malfunctions of the legal framework, it is necessary to foresee the possibility, for the party obliged to execute an administrative act, to appeal the execution and to be aware of all procedural aspects so as to not leave room for interpretation.

**Conclusions**

- As the Romanian doctrine in the field of administration constantly emphasized, the enforcement from office of administrative acts, it is more than necessary to stipulate this juridical reality as a general principle in a future Administrative Procedure Code. Moreover, this essential rule is present in certain normative acts with a departmental character, just like the disposition that the administrative act is a writ of execution. Emphasizing the fact that the administrative act does no longer need to be invested with enforcement formula in a future law that regulates the non-contentious administrative procedure seems obvious.
- As it was underlined, the presumption of legality of an administrative act is the basis of the principle of its writ of execution. As a logical consequence, the legislator can take into account this presumption so as to regulate it accordingly.
- As far as Romania is concerned, there is a lot of effort that still needs to be put in the normative, administrative and jurisprudential field as far as the implementation of the rules imposed by the European Convention of Human Rights is concerned or EU laws. Of course, the existing national non-contentious procedure is also delayed compared to European standards. One thing is certain: the juridical effects of administrative acts and the procedure of their execution needs to be submitted to strict rules from the moment they enter into force till its effects cease.

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# DISCIPLINARY RESPONSABILITY OF TEACHERS IN HIGHER EDUCATION[1]

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**Abstract**

*The regulations contained in Law no.1/2011, complete the common regulations that can be found the Labor Code. This way, the teachers in university education are going to be penalized disciplinarily, as much for the infringement of the common law directives (Labor Code), as for the behavior rules violation that prejudice the Education System interest and the institution's name, directives contained in the University Charta. Analyzing the regulations from Law 1/2011, I observed some deficiencies of regulations[2] concerning the disciplinary responsibility of teachers in higher education.*

**Keywords**: *teachers, high education, disciplinary responsibility.*

## Introduction

*The demand of respecting a certain order, of some rules, that can manage with the individuals' behavior, to achieve the common purpose, it is obviously necessary for the group activities[3].*

*The "sine qua non" requirement of the work discipline is represented by the subordination relation existing between employer and employee, relation that is defining for the working relations.*

*Although the labor legislation[4] doesn't offer a definition of the disciplinary responsibility, the doctrine is very rich in this direction. It is unanimously accepted that this type of responsibility interferes when a disciplinary irregularity it's done with guilt by an employee.*

## 1. The disciplinary irregularity and the sanctions applied to the higher education teachers

Regarding the disciplinary irregularity' definition for the Higher educational system employees, the regulations from art.312, paragraph 1 from the Educational Law no.1/2011, it shows that it is about the action made with guilt of violating the duties that those persons

[1] National education law 1/2011 published in O.M no. 18/2011, modified by Law 166/2011 published in O.M. no. 709/2011 and by OUG no. 21/2012 published in O.M. no. 372/2012, Title IV „Statutul personalului didactic", Chapter II „Statutul personalului didactic şi de cercetare din învățământul superior", Section 7 „Sancțiuni disciplinare".

[2] For more details regarding the regulations of Law 1/2011 see also Andreea Tabacu, Andreea Drăghici, Daniela Iancu „Legea 1/2011-implicații asupra învățământului superior", in the volume of International Conference The European Union-Establishment and reforms, University of Pitești, 2011, p. 560-564.

[3] Alexandru Țiclea, *Tratat de dreptul muncii*, Vth Edition, rewied, Ed. Universul Juridic, București 2011, p. 767; Sanda Ghimpu, Alexandru Țiclea, *Dreptul muncii*, Iind Edition, Ed. All Beck, București, 2001, p.359 and next

[4] In accordance with Union law. For more details see Elise Nicoleta Vâlcu, *Drept comunitar instituțional*, IIIth Edition, rewied and completed Sitech Publishing House, Craiova, 2012, pp. 13 and next.

have, according to the individual labor contract and the breaking of behavior rules, that can be found in the University Charta. The legal rules contained in art. 312 paragraph 1 are established without breaking the right to an opinion, freedom of speech and academic freedom.

Analyzing the regulations of art.318, from the Education Law, it results that the object of disciplinary violation is formed also from the relations concerning the university ethics and the just conduct in the scientific research. Also, art. 324 of the same regulatory document shows that breaking the just conduct in the research-development process it's seen as a violation, but as subject of this violation can be the research-development personnel, which is not necessarily a teacher too. The divergence from the just conduct in the scientific research and the university activity are provided by the art. 210 of the same law, in this manner: the plagiarism of other authors' results and publications; making results or replacing the results with fictional data; introducing false information for the financial or grants demanding.

Also in what concerns the sanctions, the law we discuss about deals with the three types of violation separately, although the citation of the first two is identical. The disciplinary violation, as they are set by art. 312 paragraph 2, are:

a.) written warning;

b.) the decrease of the base pay, together with, when it's the case, the board allowances of: boarding, guidance, and control;

c.) the temporary suspension of the right to enter any competition in order to occupy a higher educational function or a leading, guidance and control position, as a doctorate, master degree or licence comission member;

d.) the removal from the leading function in the education system;

e.) the disciplinary removal of the labor contract.

The sanctions for breaking the university ethics and that of the just conduct in the research are controlled by the art. 318 from Section 8 and, as I previously showed, they are identical with the disciplinary ones. In this matter, we can assert that the law is questionable and ambiguous. If the disciplinary penalties are settled in a separate section apart from that of the penalties that concern the violation of the university ethics and the just conduct in research, then all these latter ones, aren't of a disciplinary kind?

We consider that the legislator complicated the law text useless, settling the same sanctions twice for facts that, ultimately, represent disciplinary irregularities, either by violating the labor contract and the behavior rules, or by violating the university ethics and the just conduct in the research field.

The sanctions considering the irregularities at the just conduct in the research-development field are different from the sanctions for the other two forms of irregularity appointed by Chapter II of the current law. The subject of these sanctions is generally different from that of the previous mentioned sanctions, the discussion being about the research-development personnel from the higher education. Indeed, there is the situation in which the teaching staff it's also research-development personnel, but in this situation, two different work relations are established. The sanctions appointed for these irregularities are:

a.) written warning;

b.) the revocation and/or the correction of all the published writings by violating the just conduct rules;

c.) the revocation of the quality of PhD supervisor or the ability certificate leader;

d.) the revocation of the PhD title;

e.) the revocation of the university educational title or of the research degree or the degradation;

f.) the removal from the mastership of the high education institution;

g.) the disciplinary removal of the labor contract;

h.) the prohibition, for a determined period, of the access to a financing from public founds intended for the research-development field.

In comparison with the settlements for the preuniversitary education, as with the settlements from the Labor Code concerning the disciplinary sanctions, it is ascertained an ambiguity and a deficiency of the Education Law regarding the decrease of the basic cumulated salary, when it is the case with the leadership, the guiding and the control allowances, the suspension sanction for the right to participate to a competition, in order to occupy a high education function or a leading function, of guidance and of control, as a member of a doctoral, masters or license board and the sanction of prohibiting the access to a finance from public funds meant for the research-development field.

The art. 312 paragraph 2 letter b), and the art. 318 letter b) settlement, doesn't provide how much will the base pay be diminished, when it is the case with the leading, guidance and control allowance, and for how long.

The same goes with the penalty situation of suspending the right to participate to a competition, in order to occupy a high education position or a leading, guidance, control position, as a doctoral, masters or license board, and with the sanction of prohibiting the access to public funds financing intended for the research-development field, the suspension and also the interdiction, for which it is not estimated the period of time, but it is used the "determined period of time" saying. This is a pretty wide concept, by a "determined period of time", one could understand any time measurable period.

The terms and the quantities of applying these three sanctions shouldn't be let to those that apply the sanctions, even if in the high education system it is applied the university independence principle. We consider that, when applying these sanctions, it should be taken into consideration the Labor Code, as a common law in this matter.

*De lege ferenda*, we consider that the above analyzes directives should be filled in, even if the sanction periods and the decrease quantity of the salary would be derogatory from the common law, as it is the case of these sanctions for the preuniversitary education system.

**2. The institutions qualified to perform the disciplinary investigation**

As regards the disciplinary investigation, in the case of violating the duties of the high education teacher, according to the labor contract, as for breaking the behavior rules that damage the educational system interest and the institution's name, the law[5] provides the formation of analysis boards.

These boards are formed of 3-5 members, teachers that have at least the same position as that of the person who committed the irregularity, as also a syndicate member.

We can notice again a law deficiency considering the participation to the disciplinary research of a syndicate representative. The law omits to say if the syndicate representative belongs to the same syndicate organization with the person who is investigated or to another syndicate organization. Also, there is the question of, as in the case of the Labor Code settlements regarding this aspect, whether the investigated person doesn't belong to a syndicate organization.

The assignment of the analysis boards it is made by the rector with the university senate approval.

The research of the irregularities considering the breach of the university ethics and of the just conduct in research it is made by the university ethics commission which works in every university.

The art. 306, paragraph 2 from the Education Law establishes that " the structure and the commission members of university ethics it is proposed by the council board, prepared by the university senate and approved by the rector. The board members are high professional

[5] Art. 314 paragraph 2 from Educational Law no. 1/2011.

and moral persons. The persons that occupy positions as: rector, vice-chancellor, dean, vice-dean, director of administration, department director or director of research-development unity, projection, microproduction".

For the research of irregularities regarding the violation of the just conduct rules in the research-development field, the institution that needs to do the enquiry it's different from the two mentioned above. Art. 323 paragraph1 establishes this capacity for the Ethics National Council of Scientific Research, Technological Development and Innovation. The analyzed legal actions don't refer to the arrangement of this institution.

The foundation of the Ethics National Council of Scientific Research, Technological Development and Innovation has been made through Law 206/2004[6] to coordinate and monitor the implementation of the moral and professional conduct during the research-development activities.

Law 206/2004 by art.5 paragraph 3 establishes that the Ethics National Council' members must be persons with a well-known activity in the area: academicians, university teachers, level I scientists, public workers, research-development representatives and of other main sequencers that have in their command research-development unities.

The state authority for research-development is the Ministry of Education, Research, Youth and Sport.

Considering its performance, the Ethics National Council develops its activity in plenum and by ethics boards that deal with science and technology domains. The boards can be of a permanent or temporary state. The permanent boards can be formed for socio-humanist science, science of the living and for technical and exact science.

**3. The disciplinary research procedure**

The introduction of the corresponding institutions in order for them to start a disciplinary investigation and, if it is the case, to apply disciplinary sanctions, can be made by any person who is aware of an action that represents such a disciplinary violation. This notice can be done in written and it is registered at the respective institution' office clerk or in the respective educational institution. The analyzing boards can make a self-approach if it is the case of a directly discovered violation.

The notice for the University Ethics board can be made by any person, outside the university, as regards some irregularities made by members of the university community. Referring to this notice, the Board must respond to its owner in 30 days from its receiving and to communicate that person the result of the investigation procedures.

These directives show that the entire disciplinary research procedure, as the communication of the results must not exceed maximum 30 days.

The Ethics National Board analyses the cases that deal with irregularities following up the notice or their own initiative.

In all the noticing cases the person's identity that made the notice it will be kept confidential.

Considering the proper research of the disciplinary violation, the law does not clearly establish the procedures. It is only specified that "the disciplinary sanction it is applied only after the research of the noticed action is being done, after the hearing of the blamed person and the checking of his defensive affirmations". By these actions, one can understand the obligation of doing the disciplinary research procedure and the warranty of the questioned person's right to defend himself.

In case of the Ethics University Board introduction, the law provides that will be started the procedures established by the Ethics and Deontology University Code and also by the Law 2006/2004.

[6] Published in O.M. 505/4.06.2004.

According to art.11 from the Law 206/2004, the research stages are:
a) the written informal of the accused person/persons regarding the beginning of the investigation, its reasons and the existent argument;
b) making testimonials to the institution's manager.

As in the case of the Labor Code regulations, these ones do not establish a time limit for the information of the investigated person about the beginning of the enquiry. The proceeding period of the investigation must not go beyond 30 days. This period starts with the beginning of the investigation.

**4. The sanction proposal and establishment**

The disciplinary sanction proposal, when we talk about irregularities concerning the labor contract and the behavior rules, it is done by more subjects. In this way, the proposal can be done by the chief department or by the chief unit research, projection, microproduction, by the dean, by the rector or at least 2/3 from the total number of the department members, of the university board or the university senate, by case.

Establishing the disciplinary sanctions it is done peculiarly by the university boards for the written warning sanctions and the decrease of the base pay, when it is the case, with the leading allowance, the guidance one, and the control one, and by the university senates for the other worse three sanctions.

Applying these disciplinary sanctions, in this case, it is done by the dean or the rector, as they were established by the university board or by the university senate. The communication of the sanctions is done by writing, by the human resources service.

According to the Labor Code changes, Education Law also establishes the possibility to remove and to cancel the disciplinary sanction. If the person who is sanctioned has not committed disciplinary violations during a year from the received sanction, the authority that applied the respective sanction can proceed as such. For the situations when it is about irregularities of just conduct in the scientific research and of the Ethics code and professional deontology, the sanctions' application it is done by the Ethics university board. The board can establish one or more sanction, by waiver from the Labor code[7] rules that assign the principle according to which for the same disciplinary irregularity there can be only one sanction.

As regards this plurality of sanctions, we consider that the worst sanction, the disciplinary cancellation of the labor contract, cannot be added to any other sanction established by the analyzed rules.

The Ethics university board advances a decision that is approved by the law adviser of the university.

The application of the established sanctions by the Ethics university board it is done by the dean or the rector. In this case, the law also establishes a period of application. In this way, the sanctions are applied within 30 days from the date established for them.

The Ethics National Council of Scientific Research, Technological Development and Innovation establish the sanctions when it is the case of the teacher's guilt probation for which he has been approached. The document through which the sanctions are established is the decision. These decisions are going to be approved by the law direction of the Ministry of Education, Research, Youth and Sport.

The application of these established sanctions is done, if necessary, by the Ministry of Education, Research, Youth and Sport, by the National Authority for Scientific Research, by the National Council for the Titles Certification, Diplomas and University Certificate, by the authority leaders that ensure the public funds for the research-development are, by the high education institutions' leaders or by the leaders of the research-development units. The time limit to apply these sanctions is within 30 day and starts with the decision date.

[7] Art. 249 paragraph 2 from Labor Code.

An important effect of the disciplinary sanction is the forbiddance of occupying a teacher position and the research ones by people who have been proved to have committed serious irregularities of just conduct in the scientific research and in the university activity, established by the law. Also, the competition from which it were obtained a teacher position or a research one, is cancelled, and the labor contract with the university ends automatically, not taking into consideration the moment when it has been proved that a person has done serious violations to the just conduct in the scientific research and in the university activity.

**5. The contestation of the sanction act**

The contestation of the disciplinary sanctions approved by the analyzing boards is done differently, considering who emitted the decision.

So, the regulations from art. 314 paragraph 3 are referring to the assignment of some boards of analyze by the Ministry of Education, Research, Youth and Sport, in order to solve the appeals regarding the university senates' decisions.

It is appears that, in this way, the sanctioned people with penalties from art. 312 paragraph 2, letters c)-e), can contest the sanction' decisions to these boards.

Concerning the decisions given by the university councils, the law does not provide someone from the inside to whom to go to and make a contestation, but provides the general right of the sanctioned person to go to court.

The authority where the Ethics board decisions can be contested is established by the Law 206/2004. This authority is the The Ethics National Council of Scientific Research, Technological Development and Innovation. It has within 30 days to check the contestation, to have a result and to send suggestions and recommendations to the institution or the organization leader.

Although neither the Education Law, nor the Law 206/2004 do not provide which is the authority in question to solve the contestations against the sanction' decisions given by the The Ethics National Council of Scientific Research, Technological Development and Innovation, we consider that the sanctioned people have every right to complain to court of justice.

**Conclusions**

In the case of the higher education teacher, the object of the disciplinary violation has many categories of social relations regulated by the individual labor contract, by the behavior rules established by the university Charta, by the university ethics and just conduct, as by the just conduct in the research-development area. The disciplinary sanctions are different for each category of damaged relations, and the investigation boards are established for each one of them.

After the analysis of the settlements that deal with the disciplinary responsibility contained in the Education Law, we consider that these have deficiencies in some ways, opinion expressed and demonstrated within the present study.

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# PROFIT AND LOSS SHARING IN THE PARTNERSHIP AGREEMENT UNDER THE NEW ROMANIAN CIVIL CODE

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**Abstract**

*The new Romanian Civil Code regulations have reconfirmed the rule of proportionality when speaking about profit and loss in a partnership agreement. Basically, the law does not require that the participation of partners in profit and loss be necessarily proportional to their contribution to the society's capital and the associates can even determine their share of benefits and losses. In case the associates establish by contract only their share of benefits, then their contribution to losses will become proportional to their profit share. If the share of profit is not proportionally equal with the contribution, then the contribution to debts will be proportional with the profit share and not with the contribution brought to the capital.*

*One must keep in mind as compulsory the condition that each partner should participate both in profit and loss sharing. On the one hand, a partner cannot reserve all the benefit for himself only, while on the other hand the partners cannot decide that one or several of them are exempted from participating in loss sharing. Also, they cannot set a provision by which a partner is excluded wither from profit sharing or from participation in loss, as this provision would be void ab initio.*

**Key-words:** *profit sharing, loss sharing, essential condition, rule of proportionality*

## Introduction

*By adopting the current Civil Code[1], the Romanian legislator has considered appropriate to review the rules of civil society which have become obsolete and to replace them with flexible regulations which, by reconsidering the civil society, could provide those interested with an effective legal framework for profit association, instead of the classical trade association. In the light of the new Civil Code, by means of a partnership agreement, two or more people mutually engage to cooperate in an activity and to bring contributions in cash, assets, specific knowledge or services, in order to share the profit or to make use of the resulting savings (article 1881, paragraph 1, the Civil Code); this right has a correlative obligation to take the company's losses.*

*Thus, profit and loss sharing, whatever its value, represents an essential condition for the existence of the company and also a distinctive feature of the partnership agreement in comparison with other types of private legal entities[2].*

[1] Law no. 287/2009 concerning the Civil Code was published in the Romanian Official Monitor no. 511/24 July 2009, part I. The law was adopted on June 25 2009, based on the provisions of article 114 paragraph 3 from the republished Constitution, following the Government's engagement in front of the Senate and Deputy Chamber, reunited in common session on June 22 2009.
[2] Alexis Constantin, *Droit des sociétés*, 4-e édition, Mementos Dalloz, 2010, p. 33.

This distinctive feature, although not necessarily specified, represents the expression of two Roman law principles, according to which "any contract/agreement involves loss sharing" (*Cum societas contrahitur tam lucri, quam damni communio inizur*)[3] and „it is right for those who participated in gaining to be also part in losing" (*Aequum est cujus participavit lucrum, participet et damnum*)[4]. While applying this concept, the jurisprudence considered that „the essence of a partnership agreement is to make all contracting parties share both profit and losses resulted from the activity which represents the object of the contract"[5].

The mere stipulation of a fixed amount of money for price and also of a share of the eventual profit obtained by the buyer after selling any purchased goods is not enough to change the nature of the sales contract[6] or to turn it into a partnership agreement, because the element of loss risk for the seller is missing.

Profit and loss sharing can be done both when the partnership agreement is terminated and while it is still functioning. This is also provided in article 721 from the German Civil Code – the partners can ask for the conclusion of calculations and for the profit and loss sharing only at the dissolution of the partnership, according to paragraph 1, or, if the company has invested on long term, calculations and profit sharing must be done at the end of the financial year, according to paragraph 2. Profit or loss is calculated by making the difference between patrimony on the one hand, and liabilities and capital on the other hand. By profit/benefit we understand the excess of common patrimony in terms of debts and equity. A compensation for loss can be required only during partner confrontation, because there is no such thing as anticipated additional payment obligation for partners.[7]

In the Romanian 1864 Civil Code, in the absence of a special provision in the partnership agreement, each partner's share of profit and loss (including its share of company costs – article 1517 from the Civil Code) was established using the rule of proportionality stipulated in article 1511 paragraph 1 from the Civil Code, according to which "that share will be proportional to each partner's contribution to the common patrimony". The provisions of article 1511, paragraph 1 from the Civil Code, proposing the criterion of proportionality, has a suppletive value, therefore the partners could agree on sharing profits and losses based on their own criteria. The French Civil Code has similar provisions, stipulating that profit and loss sharing is, in principle, proportional to the value of the contribution to the capital. Still, the agreement's regulations can stipulate otherwise, within the limits of interdiction of leonine provisions.

The need to ensure that all partners enjoy a real equal treatment, both in terms of their partnership's functioning, and in terms of profit and loss sharing, has led to the amendment of all conventions violating this principle.

The current Civil Code gives a greater importance to regulations concerning the participation in benefits and losses, while reuniting and completing the provisions of article 1511 and article 1513 from the 1864 Civil Code within the six paragraphs of article 1902, which is actually called "Profit and loss sharing".

The provisions of article 1902 paragraph 1 state the validity condition that is the very essence of the partnership agreement, that is the right of every partner to take part in the obtained profit is correlated to the obligation to bear the eventual losses. As in the previous Civil Code, article 1902 paragraph 2 reaffirms the rule of proportionality for the situations

[3] Pr. Digeste, *Pro Socio,* 17,2 in D.Iancu, C.Gălățanu, *Drept privat roman*, University's Publishing House, Pitesti, 2009.
[4] *Ibidem.*
[5] *Jurisprudența Română*, 1930, p. 23.
[6] Cas. III, dec. nr. 1522/06.11.1929, in *Buletinul de decizii*, Bucharest, 1929, p. 579.
[7] Peter Kindler, *Grundkurs Handels- und Gesellschaftrecht*, University of Augsberg, C.H. Beck Publishing House, Munchen, 2011, p. 262.

where the parties involved have not decided otherwise: every partner will have a share of profit and loss proportional to his contribution to the capital. Following the same paragraph 2 of article 1902, in order to understand correctly its provisions, we must highlight the fact that there is a spelling error, in the sense that the term "rapport" is used instead of „contribution"; therefore, the correct sentence is "Profit and loss share of the partner whose contribution is...". Thus, in the situation where the contribution of a partner to the capital consists of expertise/knowledge or services, his profit and loss share is equal to the share of the partner with the smallest material contribution, unless the partners have already decided otherwise.

Basically, the law does not impose that partner participation in benefits and losses are compulsorily proportional to their contribution to the capital, as the partners can establish by themselves their share of profit and loss. In case they establish only their profit share in the contract, their loss share will be proportional to their profit share. If the profit sharing is not proportional to the contribution, the loss sharing will become proportional to the profit sharing instead the contribution to the capital[8].

Note that it is compulsory for each partner to participate in both profit and loss sharing. On the one hand, a partner is not allowed to keep all the profit for himself, while on the other hand, the partners cannot decide that one or several of them should be exempted from loss sharing. Also, the partners cannot introduce a provision excluding one of them either from profit or loss sharing, as this type of provision is void ab initio. These are known in the specialized literature as "leonine provisions"[9]; they contradict the very essence of the partnership agreement and are absolutely void.

To this end, article 1513 from the Civil Code deems void the contract containing a leonine provision, by which a partner either keeps the whole profit to himself or is exempted from loss sharing[10]; this is also mentioned by article 1902 paragraph 5, which stipulates that *"any provision by which a partner is excluded from profit or loss sharing is considered unwritten/inexistent"*.

The Civil Code terms explain the general character of the rule according to which any type of stipulation mentioned above is void, without making a distinction whether it is included in the articles of association or in a separate document related to the partnership agreement, whether the provision is temporary or spins over an undetermined period of time.

Such a provision (*societas leonina*) was deemed ever since the Roman law as being *contra naturam societatis.*

Some authors have considered that, in the case of a leonine provision, the whole contract is void[11], since "in a partnership agreement, all the provisions introduced by the partners are closely related and if one of them cannot produce effects, then all the legal arrangement collapses (…)".

According to most opinions in the legal literature and practice, the leonine provision does not entail the nullity of the entire partnership agreement; instead it is sanctioned only by partial nullity[12]. Consequently, the provision is considered unwritten, as it is contrary to *jus*

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[8] New Civil Code, Fl.A. Baias and the collective authors - *Comentarii, doctrină şi jurisprudenţă,* vol. III, Hamangiu Publishing House, Bucharest, 2012, p. 290.

[9] T. Prescure, A. Ciurea, *Contracte civile*, Hamangiu Publishing House, Bucureşti, 2007, p. 419.

[10] See D.C.C. nr. 744/24 iunie 2008, in the Official Monitor no. 570/29 July 2008 in V.Terzea, *Coduri adnotate – Codul civil,* vol. III, C.H.Beck Publishing House, Bucureşti, 2009, p. 77 – the provisions of the indicated article cannot distinguish and do not impose a certain way of dealing with a leonine provision, therefore the court can appreciate if the formulation of the contract's terms really results from such a provision, even if it is not explicitly stated; also see S. Deleanu, *Clauza leonină în contractele de societate*, in „Law" magazine no. 2/1992, p. 38.

[11] C. Prieto, *Conventions extra-statutaires entre associes,* p. 387.

[12] See also Daniel Mihai Şandru, *Pacte societare. Clauze, pacte, înţelegeri între asociaţii societăţilor comerciale*, Universitarian Publishing House, Bucharest, 2010, p. 55.

*fraternitatis*, which is common to all agreements. This opinion is also supported by the provisions of article 1844-1 from the French Civil Code, according to which any stipulation (and not the entire contract) reserving all the profit to one partner or totally exempting him from loss sharing is invalid, as well as the provisions which totally exclude a partner from profit sharing or make him bear all the losses on his own. The legal assessment of the interdiction has in view the assessment of the critical, uncertain threshold pertaining to the sovereign power of judges at first instance. The interdiction does not apply to the case when partners give up their dividends they are entitled to at the end of the financial year, nor to cases when engagements to purchase social rights (even those established by the partners) are being made, by which the buyer can set a fix price for the seller.[13]

The interdiction of leonine provisions does not exclude the right of the partners to establish a disproportionate share of profit and loss (that is disproportionate as compared to the contribution to the capital), on condition that the agreement stays within the law in force[14]. One can also stipulate that a partner who has contributed with certain services can be exempted from loss sharing in terms of patrimony, his participation to losses being reduced to the benefits of the service he has provided.

Without being considered leonine, any other provision can be abusive if it is susceptible of violating the equity principles between the partners. As a general rule, an abusive provision represents „any condition or conjunction of terms and conditions which generates an obvious imbalance between the rights and the obligations of the parties", thus allowing a right to be exerted to an end which contradicts its legal purpose. Such a provision, which is similar to a leonine provision, will become void without affecting the validity of the partnership agreement.

In agricultural partnership agreements established under article 5 from the Law no. 36/1991, any inequitable provision granting "special rights to certain partners" is prohibited (article 13); in case of prohibition breaching, the agreement will become partially void, in order to sanction the respective provision.

**Conclusions**

1. Profit and loss sharing, whatever its value, represents an essential condition for the existence of the company and also a distinctive feature of the partnership agreement in comparison with other types of private legal entities.
2. The Current Civil Code reaffirms the rule of proportionality for the situations where the parties involved have not decided otherwise.
3. Profit and loss sharing can be done both when the partnership agreement is terminated and while it is still functioning.
4. Any provision by which a partner is excluded from profit or loss sharing is considered unwritten/inexistent. The interdiction of leonine provisions does not exclude the right of the partners to establish a disproportionate share of profit and loss (that is disproportionate as compared to the contribution to the capital), on condition that the agreement stays within the law in force.

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# THEORETICAL ASPECTS OF THE EMPLOYEES' RIGHT TO UNPAID LEAVE

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**Abstract**

*The right to unpaid leave is a benefit for the employee, a time during which he/she can solve certain personal problems, during an established period of time, without losing the position of employee, but also as a disadvantage for the employer, as he/she is obliged to pursue the same activity, for a certain period of time, with fewer employee.*

**Keywords:** *unpaid leave, employee, employer, agreement, employment contract.*

## Introduction

*During the unpaid leave the employment contract is suspended, and if through the applicable collective agreement or through other special laws more favorable rights are not provided, the employees will not receive subscription for employment.*

*About the unpaid leave, the rule is that it does not represent job seniority, since for this term the employer has no social security contribution. As an exception, unpaid leave for professional training represents job seniority but does not generate a contribution period.*

Of all the rights enjoyed by a person, naturally, only in the virtue of being a human being, only the right to work seems to be the most complex and controversial. More complex, because on its existence depend other rights, such as: the right to remuneration for the work performed, the right to daily and weekly rest, the right to equal opportunities and treatment, the right to paid annual vacation, to dignity at work, the right to safety and health at work, the right of access to training, the right to information and consultation, the right to participate in collective actions, etc. and it is controversial because although framed as a real right in Article 41 of the Constitution, it must be perceived as an obligation, for example, the Fundamental Law, in Article 56 "Financial Contributions" stipulates that citizens have the obligation to contribute through taxes and duties to public expenditure. And this obligation can be satisfied only by the right (or obligation) to work.

As shown, the right to work under numerous other rights provided by the Labor Code, other regulations or applicable collective agreements. The right to unpaid leave is a benefit to the employee, in that it can solve personal problems in a period of time without losing an employee, but also as a disadvantage of the employer, as it is obliged to conduct the same activity, for a certain period of time, with fewer employees.

The employee's right to unpaid leave is covered very briefly by the Labor Code. Thus, a slight reference to this form of leave is found for the first time in Article 54, in the chapter on individual labor contract suspension, the leave without pay for education or personal interests appeared as a cause for suspension of contract work by the parties.

As defined, the suspension of the individual labor contract has the effect of rendering the suspension of work by the employee and salary payment default by the employer, but

during the suspension other rights and obligations of the parties may continue to exist, provided by other regulations, the applicable collective bargaining agreement, individual employment contracts or internal regulations[1].

So, during the leave without pay the individual labor contract is suspended, and if through the applicable collective labor contract or special laws other favorable rights are not provided, the employees will receive training for employment[2].

We consider that a shortcoming of this law article would be stipulating a maximum period of leave without pay that an employee could benefit form, but this lack is compensated for later on, in Article 148 of the Labor Code which stipulates that in order to solve personal situations the employees are entitled to time off without pay. The duration of leave without pay is set by the applicable collective labor contract or the by Internal Rules.

In practice questions are often asked about the maximum duration of leave without pay, the conditions in which they may be granted, and whether or not this period is work experience. Social Dialogue Law no. 62/2011, published in the Official Gazette no. 322 of May 10, 2011, a bill that repeals the Law Express. 130/1996, stipulates that collective agreements can be negotiated at the level of units, groups of units or sectors. Therefore, the provisions on leave without pay may differ from one professional category to another.

For instance, Law no. 1/2011 of the National Education provides the teachers holding a teaching position in education, which on their own initiative seek to specialize or participate in scientific research in the country or abroad, are entitled to unpaid leave. Their duration cannot exceed 3 years in a period of seven years. Approvals in these situations are handled by the management institution of higher education or, according to each case, by the Board, if that activity[3] is proved.

The same bill also provides that full-time teaching staff holding a position in the education system may receive unpaid leave for one academic year, once every 10 years, with the approval of higher education institution, with the reservation of the position during that period. As it is natural, the whole period of reservation is considered job seniority or work experience in education and implicitly at work.

We appreciate that this initiative of Law no. 1/2011 is welcome, and even constitutes an incentive for the teachers who want to conduct scientific research in the country or abroad, because they can benefit from professional training and at the same time their teaching position are retained, also benefiting from job seniority. This benefit of the law should help to stimulate scientific research among teachers.

But the permissive nature of this rule has generated in practice situations in which teachers apply for unpaid leave for a period of one year for going abroad in order to conduct other activities unrelated to their profession. In these cases, the ones who have to lose are the students who will have to be prepared by substitute teachers. We believe that it would be necessary to have a legislation to hinder the right of teachers to have unpaid leave for reasons unrelated to their profession.

Also, the internal regulations of public institutions may provide a certain number of days of leave without pay in full compliance with applicable labor contracts.

Although it is a great right of interest of the employee, most institutions insert through their Internal Regulations terse provisions concerning the employee's right to unpaid leave, such as: the staff is entitled to unpaid leave under the law. Records of leave without pay will be held by the department of human resources that will pursue their implications on length of service. Most often, however, by internal regulations employers provide a total of 30 days of

[1]http://e-juridic.manager.ro/articole/concediu-fara-plata-drepturile-si-obligatiile-salariatilor--5757.html
[2]http://legislatiamuncii.manager.ro/a/2645/concediu-fara-plata-drepturile-si-obligatiile-salariatilor.html
[3]Article 304 paragraph 10 of Law no. 1/2011 of the National Education published in the Official Gazette Part I no. 18 of 10 January 2011.

unpaid leave per year that the employee is entitled to, without mentioning whether or not these days are considered job seniority, a fact which gave rise in practice to many abuses by employers, especially under the old legislation.

Another bill that inserts in its content the employee's right to unpaid leave is the Government Decision no. 250/1992 updated. It provides in Article 25 paragraph (1) that the employees from public administration, from the autonomous bodies and from the budgetary units are entitled to time off without pay whose total duration may not exceed 90 days annually, to solve the following personal situations.

The enactment also provides what these personal situations are, as follows[4]:

a) passing the school-leaving exam, the examination for admission to institutions of higher education or extramural evening classes, examinations of the academic year, as well as graduation exams for employees who attend a form of higher education, evening classes or without attendance;

b) passing the exam for admission to doctoral examinations or doctoral thesis, for employees who do not receive doctoral grants;

c) presentation in the contest to fill a position in another unit.

It is also stipulated in the same normative act that this professional category is entitled to unpaid leave without the limit of 90 days in the cases above-mentioned in the following situations:

a) caring for a sick child older than 3 years, in the period indicated in the medical certificate, both the mother and the father employed can benefit from this right, if the mother of the child does not benefit, for the same reasons, from leave without pay;

b) medical treatment abroad performed during the period prescribed by the doctor, if the person in question is not entitled by law to compensation for temporary disability, as well as for accompanying the spouse or a close relative - child, brother, sister, parent, during treatment abroad - in both cases with the approval of the Ministry of Health[5].

Therefore, the employee is entitled to unpaid leave which can exceed the limit of the 90 days given that the leave is necessary to care for sick children aged 3 years or to carry out treatment abroad.

Also, Government Decision no. 250/1992 also provides that the conditions for the leave without pay may also be granted for personal interests, other than those mentioned above, for duration determined by the parties' agreement, and during these holidays, the people involved are maintained as employees.

Indeed, in the absence of a uniform legal provision, in practice some employers have granted long-term unpaid leave (one year or even for an indefinite period, but determinable) in the case of certain employees with a particular family situation or with a very good professional training.

In the same bill[6], the legislator provides that in case the leave without pay is granted for a period of 90 days, respectively in the situations in which the employee requires unpaid leave for the baccalaureate exam, the examination for admission to institutions of education, evening classes or extramural, academic year examinations, graduation, the employee's length of service is not affected, making it clear that in the case of leave longer than 90 days, the length of service will be affected.

This law article seems discriminatory: if an employee in the education system has his/her length of service acknowledged for unpaid leave for a period of one year, it would be

[4]G.O. no. 250/1992 on annual leave and other leave of employees of public administration, particularly in specific autonomous units and the budget published in the Official Gazette of no. 118 of June 13, 1995, Article 25 paragraph (2).

[5]Ibidem

[6]Ibidem, Article 25 paragraph (1) a.

normal to be the same for the employee in the public or from other fields, the length of service should be acknowledged for the same period, and not just for 90 days. We appreciate that a uniform legislation is necessary in this field, which does not create differentiated situations for each professional group separately.

Most collective labor agreements at units' group level provide that the employees are entitled to 30 calendar days of paid or unpaid leave, to support a one-time diploma examination in higher education and the foremen and 60 calendar days leave without pay to pass higher education exam sessions, with or without attendance. Some collective agreements at units' group level provide that this leave may be granted and divided. Through the collective work agreements one may grant other types of leave without pay, whose duration cannot exceed 90 working days.

There are, nevertheless, collective work agreements at branch level that provide a number of days of unpaid leave of up to 60 days with the approval, as it should be, of the management unit. In these cases there is no mention either if during this form of leave the employee benefits form job seniority or the situations in which such a leave may be approved. We appreciate the need for such clarification in order to avoid individual work conflicts between employee and employer.

If the period of leave without pay is not stipulated by the applicable collective labor contract or the internal regulation the person who will decide on this issue for each case will be the employer[7].

And for the professional training, the Labor Code provides that the employee is entitled to request leave with or without pay.

In the case of the leave without pay for professional training, it is given only at the request of the employee, during the vocational training period that is attended on his/her own initiative. The employer may refuse the request of the employee only if the employee's absence would seriously damage the activity.

And this provision of the law could create harm to the employee who - being unable to prove that his/her absence from work may be substituted by another employee and cannot cause serious harm to the employer - could be deprived of the benefit of unpaid leave when it is necessary to pass the graduation exam or other examinations.

On the other hand, in order to avoid abuse of rights by the employee who may request unpaid leave unduly, the employer is entitled to appraise the merits of the employee's request, through the analysis of the personal situation, the analysis of the consequences that could yield a refusal on his part, including the taking into consideration of the unit's interests[8].

Article 151 of the Labor Code provides that the request for unpaid leave for professional training must be submitted to the employer at least one month before its performance and it shall specify the start date of the internship training, its duration as well as the name of the training institution. The logic of this approach is that it enables the employer to find another person to replace someone that left on unpaid leave.

Taking the leave without pay for professional training can also be divided through division during a calendar year for the final exams of some forms of higher education or to pass some promotion examinations in the next academic year in the higher education institutions[9].

About the training of the employee, the Labor Code provides that if the employer has not complied with the obligation to ensure on his/her expense the participation of an

[7]Ioan Ciochina-Barbu-Law. University course, Hamangiu Publishing House, 2012, page 236.
[8]Daniela Moțiu individual labor-law, CHBeck Publishing House, Bucharest, 2011, page 321.
[9]Cristina Radu Roxana- Labor Law. Theoretical and practical considerations. Vol II, Alma Publishing House, Craiova, 2006, page 40.

employee in the professional training as provided by law, the employee is entitled to leave for professional training, paid by the employer, up to 10 working days or up to 80 hours.

The duration of the leave for the professional training cannot be deducted from the duration of the annual leave and it is associated to a period of actual work in terms of entitlements of the employee, other than the salary[10]. We understand from the text of the law that the leave without pay for professional training represents job seniority.

As shown above, the leave without pay is one of the causes of suspension of the individual labor contract at the initiative of both parties. The initiative of the leave without pay must belong to the employee, but it is absolutely necessary, according to the principle of mutual consent in the work legal relationships, to have the employer's consent. Therefore, at least in theory, the leave without pay at the employer's initiative cannot exist, just because the purpose of such a leave is for the employee to solve some personal problems. In practice, under the old legislation, there have been situations in which the employers sent all or part of employees on leave without pay, for a certain period of time, in case he/she did not have the opportunity to ensure they work.

To prevent recurrence of such situations, but also to help employers, the Labor Code modified in 2011 expressly regulates such cases in Article 52 paragraph (3) as follows: "in case of temporary reduction of activity, for economic, technological, structural or similar reasons, on periods exceeding 30 working days, the employer will be able to reduce the working hours from 5 to 4 days per week, with the corresponding reduction in salary, to remedy the situation that caused the reduction of the program, after the previous consultation of the representative union of the unit or of representative employee, as appropriate".

In practice, the question often arises if the leave without pay is similar to the permission. The answer is that, the leave without pay is not the same with the permission[11].

Although there is no legal provision to regulate it expressly, the permission is the situation in which the employee is absent from work, with the written consent of employer and with payment of salary. Permission does not affect length of service and it can last a period of hours, up to one working day.

There are situations in which the employer has the obligation to give permission to the employee, such as when the employee is called as a witness in criminal or civil lawsuits, or in the case of pregnant female employees who have to go to the doctor[12].

According to art. 175 paragraph (1) of the Criminal Procedure Code, as amended and supplemented subsequently, the calling of a person before a criminal investigation body or the court shall be made by written summons. The summoning can also be done by telephone or telegraph note. In this case, the employer cannot oppose the permission and the salary during the absence from work for such situations is stipulated by the Code of Criminal Procedure.

Also, according to Government Ordinance no. 111/2010 on parental leave and monthly parental allowance, Article 6 paragraph (1), after the child reaches the age of one year, except for children with disabilities, the people who have opted for parental leave and monthly allowance of 600 lei are entitled to unpaid parental leave for raising the child until he/she turns 2 years old.

During the time the female employee is on this type of leave, it will not be possible to terminate her individual employment contract and other people shall not be employed on her position, except with fixed-term work contract[13].

[10]Article 153 of Labor Code.
[11]http://legislatiamuncii.manager.ro/a/1891/concediul-fara-plata-constituie-sau-nu-vechime-in-munca.html.
[12]http://www.itmconsulting.ro/articole/2010/09/06/concediul-fara-plata-vs-invoirea/
[13]Cristina Radu Roxana Law. Theoretical and practical considerations. Vol II, Alma Publishing House, Craiova, 2006, page 39.

The leave granted under these conditions represents a right of the employee, which makes the granting of the leave be an obligation for the employer[14].

The request for granting leave without pay for child allowance shall be filed and recorded in the employer based on family book or birth certificate of the child.

People that in the last year before the child's birth were on sick leave also benefit from these rights, or who attended full-time university courses or who have received unemployment.

As a summary, the parents who chose the one-year leave for raising the child, are given the possibility by this this bill to monitor child raising by being on parental leave without pay until the child reaches the age of 2.

**Conclusions**

In terms of leave without pay, the rule is that it is not length of service, this time because during this period the employer does not contribute to the social security system. By exception, the leave without pay for professional training represents job seniority, but does not generate contribution period.

Also, another exception is the situation in which the law provides that in determining the 12 months to achieve the last year taxable income also include the period of the leave without pay for professional training at the employer's initiative or with his/her consent[15], and if parental leave without compensation.

Situations of unpaid leave in the private sector are left by the legislator on the account of agreement between the parties, so they can be provided in the applicable collective labor contract or in the internal regulation, cases and conditions for granting them[16].

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[15]GEO no. 148/2005 on family support in child raising, updated text modifying the legal acts published in the Official Gazette, Part I, to December 31, 2008 Article 1, paragraph (2).

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# COUNCIL OF EUROPE AND THE PROTECTION OF NATIONAL MINORITIES

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**Abstract**

*European protection of national minorities and the rights of persons belonging to their identity is part of human rights protection system developed at the universal level under the United Nation respectively regionally in the Council of Europe and other European institutions. Examined the international legal framework (adopted in the Council of Europe), as in the field and others with official regulations (universal or regional) that concern protection of minorities, "does not authorize any activity that is contrary to fundamental principles of international law, especially that of sovereignty, territorial integrity and political independence of states".*

**Keywords***: minority protection, minimum standards, universal rules, regional regulations, ethnic autonomy criterion, identity rights.*

## Introduction

The great diversity of concrete situations and the political interests of countries of the world in the protection of minorities has made so far can not adopt an international convention at the U.N. in this field.

We note in this context that not all regional human rights documents do not contain provisions aimed at minorities. Illustrating this are examples, such as the American Convention on Human Rights of 1969, the African Charter on Human and Peoples of 1981 - which refers only to the prohibition of mass expulsion in the case of national groups, racial, ethnic or religious European Convention Human Rights in 1950, a document that stipulates only the association with a "national minority" as a reason for any discrimination.

Although the issue of minorities has its global dimension, it has particular significance for Europe. Consequently, it has been the concerns of European institutions, among which detaches the Council of Europe.

Thus, in 1949 in a report by the Administrative Committee on Legal Affairs and the Parliamentary Assembly, it recognized "the importance of the wider protection of minority rights".

However, the European Convention of Human Rights[1] adopted after the Council of Europe, contains general provisions on the rights of persons belonging to minorities, merely provide in article 14 that "the exercise of rights and freedoms set forth in this Convention shall be ensured without any discrimination, especially based on sex, race, color, language,

[1] Passed at Rome on 4 November 1950. It entered into force on 3 September 1953. Romania ratified the Convention and its additional protocols by Law no.30 of 18 May 1994, Official Gazette no. 135/1994. Protocol 11 July 1995 was ratified by Law no. 179.

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

If this text is clearly a case of non-discrimination clause concerning, among other reasons, and that of belonging to a national minority. The provisions of this article can not be invoked unless the infringement of one of the rights mentioned in previous articles in the document (right to life, liberty and personal security, due process, privacy, and so on…) and is not therefore a independent regulation of minority rights[2].

In article 14th of the Convention implementation plan, the European Court of Human Rights has developed an interesting case law which has surpassed the limited nature of that provision.

Evolution of European minority rights was due to a greater extent the relations between Central European and Eastern European states, as well as those between them and Western Europe. Also drive the efficient solution of the problem of minorities on the continent was driven by the idea of building a multicultural Europe, sentence has been observed since the early 1960[3]. Finally, we note increasing interest in minorities in the context of the Berlin Wall fell, and the bloody disintegration of Yugoslavia and the USSR.

The result of these trends and developments in the field of minority issues has resulted in the adoption of two conventions within the European Community, which have direct tangency with the protection of persons belonging to minorities, namely the European Charter for Regional or Minority Languages and the Convention - Framework protection of minorities, documents that we will continue this.

*Documents regarding minorities adopted by Council of Europe - Presentation*

*European Charter for Regional or Minority Languages*

The purpose of this document is to promote and use regional and minority languages, as "an expression of cultural wealth" and to contribute to a Europe founded on principles of democracy and cultural diversity within the national sovereignty and territorial integrity.

Charter defines the phrase "regional and minority languages" as traditionally used languages in a given territory of a State of its citizens who form a group numerically lower than the general population that differs from the state and the official state language, without include dialects and languages of migrants (article 1).

Charter structured in five parts (general provisions, purposes and principles of the use of measures to promote regional and minority languages in public life, implementation and final provisions), setting characteristics to promote goals of this document, a "set" of measures which State Parties can choose what they will be implemented internally[4].

In addition to this flexibility, the book provides in article 19 paragraph 1 number only five ratifications to enter into force. The intention of the authors of the document written in such a way as to produce effects in the shortest time is obvious. The merit is that the originators of the document in a time when the trend in favor of resuscitation at the European level of protection of minorities was not quite clear yet, were able to rule in an international convention of rights of minorities. On the other hand Charter allows states to opt for measures on the set of measures provided by Part III of the Charter, that adequate protection of the language, education (article 8), justice (article 9), administration and public services (article

[2] See Introducere în Convenția Europeană a Drepturilor Omului Gomieu Donna, All Publishing House, Bucharest, 1993, p.127 and following.

[3] The Lannung Report, United Nations, Doc.1299, 26 April 1961. Scandinavian origin having an effective practice American concept of multicultural society finds its explanation in the economic interests of states.

[4] Article 2, paragraph 2 requires that States commit themselves to a minimum of 35 paragraphs, however, stipulating that at least three must be selected from Articles 8 (on education) and 12 (cultural activities and facilities) and one of articolele.9 (justice), 10 (administrative authorities and public services), 11 (media) and 13 (economic and social life). A wide choice of both is, on the one hand, it reflects the mosaic of positive European language and negative on the other, leaving much to be political will of governments.

10), media (11), cultural life (article 12), economic and social (13). Note that, for culture, the Charter emphasizes the importance of hiring a staff to be very well acquainted with minority or regional traditions, facilitating the direct participation of minority groups in the planning of cultural activities, the development and promotion of economic language, administrative, commercial, technical, legal, and so on… appropriate minority languages.

Power conferred by the Charter Member of choice of different alternatives, in more limited areas or their problems, certainly lead to different types of commitments by States Parties, to a certain lack of uniformity in the application of the act. This fact, however generous answer a real need for flexibility, resulting in different situation of the Council member countries, regional and minority languages spoken and minorities living on their territories.

Positive side of the document and is the defining instruments are intended to support the practical application of the provisions contained therein. Thus, parties are required to submit periodically a report on measures taken in this area, and a committee of independent experts established the effect of the Charter, will be able to examine these reports.

*Framework Convention on National Minorities*

It was adopted on 10 November 1994 and opened for signature on 1 February 1995. Romania signed the Framework Convention on 1 February 1995 in Paris and in the same year he made the ratification document[5]. The Framework Convention was adopted in place of an Additional Protocol to the European Convention on Human Rights, proposed by the Council of Europe Recommendation 1201.

The Framework Convention is the first multilateral treaty governing the exclusive protection of minorities. For this reason the provisions of this document have been made with great rigor and caution. In this context, states have imposed the policy in contrast to their pragmatic purposes, without stipulating a right that virtually no minorities might prevail as such (direct)[6].

Also, the Framework Convention, as in other international documents, does not contain a definition of "national minority" and not in any way recognize the existence of collective rights for persons belonging to minorities.

But there are situations in which use terms such as "where possible", "within the national legal systems", "if there is sufficient demand", and so on..., highlights the flexibility provisions of the Convention to taking the reported solutions to the peculiarities of States Parties.

Title I of the Framework Convention (articles 1 to 3) contains general provisions, and enshrines the protection of national minorities and the rights of persons belonging to them as part of the international protection of human rights (article 1), application of the Convention in good faith in a spirit of understanding, tolerance and respect for good neighborly, friendly relations and cooperation between states (article 2), the right of persons belonging to minorities to freely choose whether or not to be treated as such without any disadvantage to result from this choice (article 3, paragraph 1), and possibility for them to exercise their rights under the Framework Convention, individually or jointly with others (article 3, paragraph 2).

[5] Romania has ratified the Framework Convention by Law No.33 of 29 April 1995, published in the Official Gazette, Part I, no.82 of May 4, 1995.

[6] See R. Hofman, Die Rolle des beim Europarates Minderheitenschutz in Manfred Mohr, Friedenssichernde Minderheitenschutz in der Aspekt des Arc des Vereinten Nationen und des Volkerbundes in Europe, Springer Verlag, Berlin, Heidelberg, 1996, p. 131. To see a critical position and Christoph Pan Recommendation 1201/1993 and the Framework Convention, the Altera No.1 (1995), p.121-122 Valentin Stan, Convenția-cadru reprezintă rezultatul unui compromis, the Altera No.1 (1995), p. 122-124.

The first two articles repeat rules established long ago in public international law. With regard to article 3, it brings a new element[7], the right of option.

The second title (article 4-19) contains provisions which stipulate a set of principles: equality and prohibition of discrimination (article 4), the right to own culture and identity (article 5), the obligation to foster a spirit of tolerance (article 6), freedom of assembly, freedom of thought, conscience, religion (article 7), the right to manifest one's religion and the establishment of religious associations (article 8), freedom of expression (article 9), right to use their own language in private and in public, orally and writing (article 10), the right to use its full name in the language (11), the obligation to take steps to encourage education knowledge culture, history, language and religion, as both minority and majority (article 12), the right to establish and manage private educational institutions (13), the right to learn the minority language (article 14), right to participate in economic, social and cultural life and public affairs (article 15), refraining from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities, are directed against the rights and freedoms flowing from the principles enshrined Framework Convention (article 16) States refraining from interference with the right of persons belonging to minorities to establish and maintain contacts across frontiers (article 17), the parties will endeavor to conclude bilateral and multilateral agreements with other states especially with neighboring countries to ensure that persons belonging to minorities (article 18), committing themselves to respect the principles enshrined in the Convention, bringing them only those changes or limitations, restrictions and exceptions set out in international instruments, in particular the Convention for rights and fundamental freedoms (ECHR), to the extent they are relevant to the rights and freedoms flowing from the principles specified (19).

Part of the Framework Convention (those relating to equality, nondiscrimination, freedom of religion, religious cult) do nothing than to reiterate in a slightly modified form, provision of universal or regional international documents, to protect human rights. New elements are recorded on the right to use the name in their language or if rights-border contacts with persons of the same language, ethnicity or religion. Noteworthy that the provisions of article 19 on limitations made pursuant to the principles of the Framework Convention has a certain generality, so that will pose problems of interpretation.

Title III (article 20-23) contains provisions relating to the application and interpretation of the Convention. Thus, article 20 stipulates that persons belonging to national minorities to respect national laws and rights of the majority or other minorities, to interpret article 21 of the Convention prohibits in any manner that would involve an infringement of sovereign equality, territorial integrity or independence political states, and article 22 prohibits the interpretations that might affect human rights and freedoms. Article 23 provides a priority of the Convention on Human Rights and Fundamental Freedoms in the interpretation of the Framework Convention with the same object[8].

The fourth title (article 24-26) deals with the supervision and control over the implementation of the Convention by States Parties on this subject, tasks in mind the Council of Europe Committee of Ministers (article 24) General Secretariat of the Council of Europe (article 25) and providing for the establishment of an Advisory Committee to assist the Committee of Ministers to assess the system of protection of national minorities (article 26).

Title V contains the final provisions, based on model clauses for conventions and agreements concluded within the Council of Europe. The Convention shall remain open and those that are not members of the Council of Europe.

[7] Option right of members of minorities is enshrined in the UN Declaration in 1992, but it has the effect of creating obligations for states.

[8] View Niciu I. Martian, Drept International public, Ed Servosat, Arad, 2004, p. 173; Tudor Tanasescu, Drept International public, undergraduate course, Ed Sitech, 2009, p. 100.

In addition to legal documents submitted which concerns exclusively the rights of persons belonging to minorities, and thus their protection system, in 2003 the same body of the Council of Europe adopted Resolution 13349 on the positive experiences of autonomous arrangements as inspiration for conflict resolution in Europe, an act which has the recommendation for villages States and has a certain relevance to the case of categories of persons and entities referred to in which they take part (in limited circumstances and conditions stipulated in the document - in other ways unable to ensure the framework required to exercise language rights and preservation of cultural identity and circumscribed entity to which they belong, and the lack of mechanisms to prevent or extinguish certain conflict, involving people national minorities).

In the first six points provisions of the document refers to political tensions and crises in Europe (point 1) the origin of these events - the territorial changes and the birth of new states, more frequent applications of rights of minority groups to preserve their identity and conflicting issues manifested in terms of interpretation between the principle of indivisibility of states and the identity of persons belonging to minorities (points 2 and 4) and certain recommendations which are states in anticipation avoid tension within the meaning of democracy and adapt requirements the interpretation of international law concept of sovereign nation-state, and to develop a flexible framework to meet the demands of preserving the national identity of minorities (points 3 and 6).

The provisions of paragraphs 7 and 8 refer to the fact that the positive experience of autonomous regions (nn geographic regions, not ethnic) can be a source of inspiration for some way to resolve internal conflicts, given the experience of some European countries mitigate such tensions by introducing territorial or cultural autonomy.

In paragraph 9 states but the negative connotation of the concept of autonomy for the territorial integrity of states. Further, it expressly states that autonomy should be seen as an "arrangement between sub-state entities" that allow a minority group within a state to exercise its rights and to preserve cultural identity while ensuring the integrity and unity but with the state (10).

Paragraph 11 of document develops the period of territorial autonomy "howing that it involves an arrangement, usually adopted by sovereign states, where citizens of a given area are granted rights that reflect their specific geographical situation and protect and / or promote their cultural traditions and religious". The concept involves the exercise of linguistic and cultural rights.

The following provisions specifying that the indivisibility of the state is compatible with autonomy, regionalization and federalization (point 12), the autonomy that can be applied to various political systems based on decentralization in unitary states to a genuine power-sharing in regional states or federal (point 13).

The provisions of point 14 refers to the steps and sources of autonomy introduction.

Importance are attractive and some restrictive provisions stipulated in the resolution, namely that: autonomy is not a panacea and the solutions they offer are not universally relevant and applicable (point 15), this status must never give the impression that the community self-government is applicable only to local community concerned (point 16), autonomy must respect the principle of equality and discrimination along with integrity and sovereignty of states (point 17), interpretation and management autonomy should be the object of state authority and determined by the national parliament and its institutions (point 19).

[9] It was adopted by the Council of Europe Parliamentary Assembly on 24 June 2003 following the report entitled "Positive experiences of autonomous regions as a source of inspiration for conflict resolution in Europe" presented by Swiss parliamentarian Andreas Gross.

Autonomy requires special measures to protect "minorities and other minorities to ensure that the majority and other minorities do not feel threatened by the rights conferred autonomous entities" (21).

Endpoint (22) contains basic principles that need to be respected by governments of member states where the autonomy is recognized.

The contents of the resolution shows that *this document is to promote the issue by Member States on grounds of autonomy and ethnic minorities in general grant thereof, but evidence of the beneficial role of some form of autonomy (territorial or cultural) in solving the conflict resolution or prevent strain relations between the majority population and a certain national minority in a state*[10].

Also, the same document states that *autonomy can not be considered a pertinent solution applicable in all situations, so provisions of the resolution are not binding, but constitute an alternative* recommended for certain circumstances. *Under the uniform application document for the member raised the autonomous status of the resolution is through decentralization*, and in case of regional or federal states with real power-sharing procedures circumscribed to the principles of decentralization, local autonomy, and deconcentration of public services and not territorial autonomy on ethnic criteria.

In the context of the restrictions stipulated by resolution entered the national minorities and outlined its provisions from point 16 and 17. They provide the autonomous status that the application is not an exclusive deal to empower minorities and that involves the development of balanced relations between majority and minority rule, and also among all minorities. Also, those provisions show that any autonomy status should respect the principles of equality and discrimination and be based on territorial integrity and sovereignty of states.

The analysis procedure for the adoption of the document, or text and category to which it belongs reveals unequivocally that *Resolution 1334 is worth a recommendation to Member States, it features political nature and, therefore, is not binding on countries that are members of the Council of Europe* on whose territory national minorities living.

**Conclusions**

Documents analysis shows that European protection of minorities and the rights of persons belonging to their identity is part of human rights protection system developed at the universal level under the United Nation respectively regionally in the Council of Europe and other European institutions. Examined the international legal framework (Council of Europe adopted on level), as in the field and others with official regulations (universal or regional) that concern protection of minorities, does not authorize any activity that is contrary to fundamental principles of international law, especially that of sovereignty, Territorial integrity and political independence of States".

Regulatory provisions for the protection are given to minorities and their rights as such and person's freedoms belonging to such minorities. This distinction and difference forms indicate clearly, that has no recognition of collective rights to minorities (art. 1, Framework Convention for the Protection of National Minorities). Parties recognize, however, that protection of national minorities can be achieved by protecting the rights of persons belonging to such minorities.

Translation in the lives of various provisions related to minority protection is, par excellence, an issue of the jurisdiction of sovereign states. Obviously, there is no challenge to the international community right to know and to assess how international standards on minority rights are respected. International community action is performed but the complementary action of the internal organs of states and it shall be conducted only in

[10] View Tudor Tanasescu, Minoritatile. Repere institutionale si legislative, Ed Sitech, Craiova, 2006, p. 58-59.

accordance with the rules and principles of law that establish international organizations and treaties that define the mechanisms of cooperation of States in respect of human rights.

Documents submitted to the Council of Europe adopted, except for Resolution 1334 which has the recommendation to Member States, together with other previous regulations which are part of the universal international legal instruments or regional level have contributed to a minimum standard regarding outlining rights of persons part of minorities, a general conception about their rights in the overall identity of human rights.

Such standards will be to ensure preservation of individuality of persons belonging to such minorities and ensure their full rights but also harmonize with this issue general obligations incumbent minority in their capacity as citizens and the general principles of international law relating to sovereignty and territorial integrity of all European states.

Addressing the issues of rights protection system as part of national minorities can not be done through measures separatist or autonomist ethnic assimilation or forced to assume that because they would either destroy the unity of the State or the disappearance of the minority.

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# CHANGES MADE IN THE NEW ROMANIAN CIVIL CODE REGARDING THE REGLEMENTATION OF FAMILY RELATIONSHIPS

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**Abstract**

*The introduction of the Romanian Civil Code in 2011 represented for the entire socio-economic reality in Romania a major change of the landmarks the Romanian legal system was built upon, was consolidated on and developed from. Changes in family relationships were substantial, new concepts being introduced, the existing ones adapting to the new dynamics of personal lives. A series of specific notions were introduced aiming at changing certain institutions (in the field of the matrimonial regime) or several factual situations that had not previously been acknowledged legally found now legislative recognition (the engagement). It should be noted that there were considered the international conventions to which Romania is part, and the European standards in the field, as well. The labor force migration towards the foreign markets, the insecurity of work place in the European countries have 'elasticized' the traditional Romanian family, have led to a gap in the formerly constant physical connection between the family members, have made the authorities face the problems of responsibility for the children left in the country by the parents who had gone abroad. To bring up the children left by their parents has thus become a 'duty' of grandparents, aunts, uncles, and friends of the family or neighbors. If the psychical traumas of these children cannot yet be quantified, the legislative problems they raised have now started to be regulated by the authorities.*

**Key words**: *change, Civil Code, family relations, minors.*

## Introduction

*The changes developed in the field of family relationships in the new Romanian Civil Code are various, some being substantive changes, while others are just tinting the objectives pursued by the legislator.*

*Family was defined over time both by lawyers and by philosophers, sociologists, psychologists, theologians, etc., each customizing it or, on the contrary, integrating it into macro concepts, according to their own notions of analysis, values, scientific instruments and the audience addressed to.*

*In terms of law, we shall meet several definitions of the notion of family, this being considered "the group of people between whom there are rights and obligations arising from marriage, relation (including adoption) and other links assimilated to family relationships".*[1] *It was also said that"the family is a form of social relationships between people bound*

[1] Ion Albu, *Dreptul familiei* (Family Law), "Editura Didactică şi pedagocică" Publishing House, Bucharest, 1975, p. 9.

*together by marriage or kinship. Spouses alone, without children - form a family".*[2] *Underlying the concept of family is that of marriage.*[3]

A first novelty brought by the Romanian Civil Code is the ***regulation of engagement***. According to art. 266 "Engagement is a mutual promise to go through marriage".

Although traditionally there is the institution of engagement as a preamble of marriage, after WWII it wasn't regulated any longer.

In feudalism we meet the institution under the name of "promise"or"commitment"and it was a formality required. "Engagement means swearing and presenting a future promise - and involved – the consent of those who were to marry and also the parental consent, and when disagreements arose between parents, father's opinion was the overriding one. Sons and daughters could resist the engagement when parents choose fiancées or fiancés that prove dishonest and unworthy by their conduct".[4]

In the legislative acts of the nineteenth century, we can find engagement regulations both in Caragea Law Code and in Calimach Code.

Caragea Law Code was adopted in the Romanian Country in 1817 and had as sources: the Basilica (Byzantine laws), the law of the land, several laws in the Romanian Country and, to a lesser extent, the French Civil Code of 1804.

Calimach Code was adopted in Moldova also in 1817 and had as sources: primarily the Austrian Civil Code of 1811, the law of the land and the Byzantine laws.

According to Caragea Law Code, the engagement was a"word of deciding the wedding"[5] being of two types: perfect (valuable) and imperfect and then not followed by"any lawful duty to necessarily committing to wedding, but binding to reparation for the damages caused by its dissolution". [6]

Regarding the age it was established that perfect engagement could not be fulfilled before the age of 14 for boys and 12 for girls, and the imperfect one before the 7$^{th}$ year.

Returning to the current regulation, it clearly stipulates that in case of breaking the engagement, "the gifts that fiancés received in consideration of the engagement, or during it, with a view to marriage, are subject to refund, excluding normal gifts" (art. 269 Civil Code). It is not specified in the code if this refers to gifts received by any of the two from other people, or gifts that they give to each other; in the silence of the law, it is assumed that any such gifts are subject to reimbursement. However, the process of law will have to establish the criteria under which it will be appreciated, in a unified way, which of these gifts can be considered "normal" as thus excluded from the obligation of restitution by virtue of the law.

In terms of **marriage** there can be seen an approach to apply the contractualist theory of marriage, introducing the possibility of concluding a matrimonial convention, in which the future spouses - or the husband and wife, if it is concluded after marriage - may choose matrimonial regime that shall govern their marriage and may introduce a preciput clause, not being any longer forced, through marriage, to comply with mandatory and unique legal rules that would dictate all aspects of their family life.

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[2] Ion P. Filipescu, Andrei I. Filipescu, *Tratat de Dreptul Familiei* (Study on Family Law), All Back Publishing House, Bucharest, 2001, p. 1.

[3] T. Ionascu, I. Christian, M. Eliescu, V. Economu, Y. Eminescu, M. I. Eremia, V. Georgescu, I. Rucareanu, *Căsătoria în dreptul R.P.R.(Marriage in Romanian Law)*, "Editura Academiei" Publishing House, Bucharest, 1964, p.9-*Intrucat casatoria sta la baza familiei, ocrotirea ei este prima conditie a ocrotirtii familiei, in intregul ei.(As marriage underlies the institution of family, its protection is the primary condition for protection of family as a whole).*

[4] D. Firoiu, *Istoria statului si dreptului românesc* (History of the Romanian state and law), "Editura Fundatiei Chemarea" Publishing House, Iasi, 1992, p. 121.

[5] Legiuirea Caragea (Caragea Law Code), III, 14 # 1.

[6] D. Firoiu, work cited p. 168.

The doctrine of "freedom of contract" has been defined as"the possibility that individuals and companies have, by law, to create contracts and determine their content, reflecting the role of the will in the contracts".[7]

Seen in its "plenitude", the freedom of contract "consists in the legal possibility to conclude contracts, to establish their content and effects, to modify and terminate them".[8] This contractual freedom has limits, regardless of the matrimonial regime the two spouses have chosen:

- the regime of legal community;
- the regime of conventional community;
- the regime of separation of patrimonies.

The limits actually represent a set of basic rules that apply to all marriages. In the legislations "with pluralist matrimonial regimes, these rules of a mandatory nature were set up into a basic matrimonial status", called by some authors"primary imperative regime".[9]

The primary imperative regime provides the regulatory framework both for periods of family harmony, and for those of crisis in the couple.

The rules of the primary regime refer to: payment of household expenses, fulfillment of mutual material support between spouses, distribution of spouses' rights in administration and management of their property and common heritage, protection of conjugal home, but can also refer to the income from a profession, the possible mandate between spouses, business management, termination and liquidation of the matrimonial regime, general rules on matrimonial conventions: conditions of validity, termination, modification, disclosure, enforceability of matrimonial agreements, preciput clause or prohibitions on censorship:

- correspondence
- social relations
- partner's choice of profession

The legal community regime has been known and used exclusively under the old legal regulation.

The conventional community regime, regulated by art. 366-368 Civil Code, applies when, under the conditions and limitations of law, there are derogations, under matrimonial convention, from the provisions concerning legal community regime. Unless otherwise stipulated by the matrimonial convention otherwise, the legal regime of conventional community is completed by the legal provisions concerning the legal community regime. Between the formation of the amount of own and common property characteristic to the legal community regime and that belonging to the conventional community regime, the difference lies only in the extent of the mass of goods that spouses affect to marriage through matrimonial convention.

The Civil Code provides, in terms of patrimonies separation regime, that each spouse owns exclusively property acquired before marriage and things they acquired in their own behalf thereafter.

Paragraph (2) states that "by the matrimonial convention, the parties may stipulate clauses to eliminate this regime considering the amount of goods acquired by each spouse during the marriage, which is to constitute the base for the calculation of the claims of participation. If the parties have not agreed to the contrary, the claims of participation are half of the difference in value between the two amounts of net purchases and will be due by the spouse whose net purchase amount is larger, and can be paid in cash or in nature".

[7] I. Albu, *Liberatatea contractuală* (Contractual liberty), "Dreptul" Review, no.3/1993, p. 29.
[8] A.A. Banciu, *Raporturile patrimoniale dintre soti* (Spouses' patrimonial relations), Hamangiu Publishing House, Bucharest, 2011, p. 13.
[9] B. Vareille, Le *regime primaire, Droit patrimonial de la famille,* Dalloz, Paris, 1998, p. 7.

The regime of separation of patrimonies grants the holder ownership, use and management of own assets. It also includes the corresponding obligation, to contribute to the duties of marriage.

Among the advantages offered by the regime of separation of patrimonies the following can be mentioned: matrimonial independent, rapidity and efficiency of regime liquidation, protection offered to spouses if the other spouse incurs debts, amounts that have not been used for joint expenses of the marriage.

The disadvantages of this matrimonial regime are given by the mismatch between the purpose of marriage and the practicality of the material side of marriage.

The doctrine showed that the regime of separation of patrimonies "is the regime of distrust and selfishness, each spouse aiming to increase their own property without the other spouse to be able to touch it, distinguishing from the community type regime".[10]

Besides modifications brought by the matrimonial regime, we can also mention those that regard:

- spouses' name,
- the family home,
- the housing rights over the house rented,
- income received from the profession,
- the institution of the conventional mandate between spouses both in the legal community regime, in the conventional community regime and in the regime of separation of patrimonies,
- the spouses' right to information
- the matrimonial convention
- the preciput clause
- the right to compensation for the spouse that cannot be blamed for the divorce
- the damage reparation etc.

The higher flexibility met in the regulation of the patrimonial relations (especially) between spouse has removed the rigidity with which the system of family law code used to operate, an obsolete normative system regulating family relationships but that no longer met the economic, social or moral needs of nature. Thus, the Romanian legislation in the field has come to concord with the European one.

**Conclusions**

The new regulation brings, to the Romanian civil law regarding regulations of family relations, a very necessary adaptation to the evolution of social life, to the current conditions in which families live together, and a flexibility that can only be beneficial in the context of the contemporary Romanian and European society. The legislator does not impose rules any longer, but sets a framework, sometimes more permissive, sometimes more rigid, with respect to the fluidization of the matrimonial relations. However, abuses affecting marital stability are sanctioned and, above all, the best interest of children is set as the top value of the pyramid of values resorted to.

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***Legiuirea Caragea (Caragea Law Code), III, 14 # 1, 1817.

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# DEVIANCE IN THE ECONOMIC BEHAVIOUR AT THE AGE OF ADOLESCENCE

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**Keywords:** *behaviour, deviance, economic, adolescence, delinquency*

**Abstract**

*The main cause of poverty is the extended economic crisis, among others due to the irrational closing down of hundreds of companies, plants and its emergenet consequence, namely unemployment. Although poverty cannot be considered a direct cause of juvenile delinquency, it strongly influences the way in which families educate their children and the use of illegitimate methods as "solutions". ". Poverty favours the phenomenon "children of the street", and in turn this „supplies" the statistics of juvenile delinquency. Delinquency, thefts, prostitution and drugs economically add up to the desire of ignorant youngsters to "handle" and find "solutions" in the current society's incipient state of anomie.*

**Perpetual poverty - favouring condition of juvenile delinquency**

The crisis in Romania is moral, psychological, and economic, also showing the incipience of the anomie phenomenon. Anomie (*a nomos Gr*.) is a concept that translates by "lack of norms". This is typical of socially deficient societies, in which revolutions and social crises occur, after which social deviance accentuates and social models become ambiguous. Some teenagers psychologically feel the anomic state as a conflict between their developing personality and legislative landmarks that constrain their conduct, as a denial of the values of education that comes from the adult generation and any kind of norm that disregards their needs for creativity and social assertion. The anomic concept was used by R.K. Merton as well, the famous American sociologist who gives it new meanings. In his opinion, social order is restored when there is a balance between goals to be achieved and the legitimate means to accomplish them. Deviance is precisely the individual's reaction to the discrepancy between circulating and society-valorised goals and the possibility to achieve them (Rădulescu 2002)[1]. Because he develops an interior conflict between the image of aspirations and the limited possibilities, the individual, in order to achieve his goal, also turns to illegal actions, going beyond the normative system. Thus, teenagers and adolescents belonging to under-privileged groups are exposed to the road to delinquency and crime. Starting with 1989, along with the onset of economic life restructuring, Romania experimentally tried a series of reforms that attained social expectations only to a small extent and only for a privileged category. Market economy developed really slow, private investments are far from covering the desperate request for jobs, and the quality of life continuously diminished. The national

[1] Banciu Dan., Rădulescu M. Sorin *Evoluții ale delincvenței juvenile în România. Cercetare şi prevenire socială.* Lumina Lex Publishing House, Bucharest, 2002.

average wage is barely above 150 euro and, as a measure for economic balance it is diminished by 25%. In this situation, poverty became perpetual for most people. The most dangerously affected by the effects of poverty are children, adolescents and teenagers that tend to react pulsionally to these conditions. After the research performed by the Research Institute for the Quality of Life, 40% of children under 7 years old and 50% of those aged between 7 and 15 confront with low levels of subsistence. Social categories such as unemployed 60%, peasants 57%, wage earners 30% and pensioners 25% are brought to the poverty situation and in some cases even to vital endangering. From an ethnical point of view, the most vulnerable population to poverty is that of the Romani people 32%, followed by Romanians 32%, Hungarians 30% and other nationalities 36%. According to the same evaluations, 50% of the children aged between 7 and 15 live in poor families. (Rădulescu, Grecu according to Zamfir).[2] The main cause of poverty is the prolonged economic crisis in part because of the irrational liquidation of hundreds of enterprises and plants and because of the consequent unemployment. Although poverty cannot be considered a direct cause of juvenile delinquency, it majorly influences the way families raise their children and the use of illegitimate methods as "solutions". Poverty favours the "children of the street" phenomenon, and it nurtures the statistics of juvenile delinquency. Delinquency, theft, prostitution and drugs come to compensate the desire of ignorant teenagers to "manage" to find "solutions" in society's incipient state of anomie. M. Cussen (source-Internet.)[3] suggests a relative list divided into seven categories that unfortunately is frequent not only in the case of adults, but also in that of children or adolescents: a) crime and misdemeanours: murder, theft, rape, juvenile delinquency b) suicide c) drug use with psycho-social implications d) deviant sexual conducts include: prostitution, homosexuality, lesbianism, pornography e) religious deviances f) mental illnesses have also been labelled from the point of view of deviation from social norms g) political extremism h).physical handicaps.

The volume of deviance participation between 2005 and 2010.

| Categories of participants | **2005** | **2006** | **2007** | **2008** | **2009** | **2010** |
|---|---|---|---|---|---|---|
| Minors: total | 15253 | 14783 | 14947 | 13831 | 13134 | 12363 |
| a. younger than 14 years | 616 | 491 | 637 | 634 | 660 | 631 |
| b. 14-17 years | 14637 | 14292 | 14310 | 13197 | 12474 | 11732 |
| Youngsters (18-30 years) | 62831 | 67238 | 80727 | 82054 | 84129 | 93506 |
| No occupation | 79456 | 86727 | 102100 | 100714 | 107174 | 116857 |
| Unemployed | 726 | 683 | 571 | 442 | 950 | 1230 |
| Detained or arrested | 12838 | 11850 | 11562 | 8221 | 8070 | 8551 |

Source: General Inspectorate of Romanian Police within the Ministry of Administration and Interior (Statistic Directory 2011)[4]

[2] Grecu Florentina.,Rădulescu S., *Delincvența juvenilă în societatea contemporană*, Lumina Lex Publishing House, Bucharest, 2003, p. 145, 146.
[3] http://www.scribd.com/doc/78435148/Deviant-A consultat la 18.02.2012.
[4] http://www.politiaromana.ro/date_statistice_anul_2009.htm consultat la 16.02.2012

**Psycho-social factors of juvenile delinquency**

**Juvenile delinquency**

Deviant behaviour is a type of individual or group action that deflects from the norms and rules of social system getting in conflict with the social-cultural values and social expectations. The term "*juvenile delinquency*" comes from the French term "*deliquance juvenile*" which in turn comes from the Latin construction "*delinquere juvenis*" that designated the ensemble of deflections and violation of social norms, legally sanctioned and committed by minors. The explanation for juvenile delinquency should start from the concept of social maturing. V. Preda[5] states that social maturing can be defined as "the individual's capacity to maintain a dynamic balance between his interests and those of society, the delinquent seemingly being an individual insufficiently matured from a social point of view and to present social integration difficulties that get in conflict with the requirements of a certain value-normative system, including with legal norms". The delinquent doesn't manage to harmonize his conduct actively and dynamically with the requirements of interpersonal relations, because of a socializing deficit determined by the disturbance or insufficiency of processes of assimilation of requirements and social-cultural environment and of processes of accommodating to it by acts of conduct acceptable from a social-legal point of view. Thus, delinquency appears as a disorder of social relationships structure of the individual because of the insufficiency of social maturing. The concept "juvenile delinquency" is approached within the larger spectrum of deviance. The concept of deviance is defined as the ensemble of dysfunctional behaviours that threaten the balance of the social system. The deviances are various, relating to misfit phenomena or social disadaptation. Adrian Neculau (Dictionary of psychology, 1997)[6] defines deviant behaviour as a situation of deflection from the norms of a group, to which the deviant person breaks the belonging group's system of rules and instructions and contradicts with the opinions, attitudes, goals, aspirations, behaviours, even clothing of the group or collective.

Annual tendency of minors indicted between 1989 and 2000[7]

| Year | Number of minors incriminated. | Percentage of those convicted. % |
|---|---|---|
| 1989 | 3810 | 73,2 |
| 1990 | 4554 | 43,5 |
| 1991 | 8520 | 44,4 |
| 1992 | 9210 | 49,8 |
| 1993 | 10141 | 68,4 |
| 1994 | 11658 | 78,2 |
| 1995 | 12611 | 77,6 |
| 1996 | 12439 | 83,4 |
| 1997 | 13674 | 92,9 |
| 1998 | 10918 | 80,8 |
| 1999 | 8231 | 70,5 |
| 2000 | 7322 | 75,0 |

[5] Preda Vasile, *Delincvența Juvenilă. O abordare multidisciplinară*, "Presa Universitară Clujeană" Publishing House, Cluj-Napoca, 1998, p. 23, 33-34.
[6] Neculau, A., *Dicționar de Psihologie*, Babel Publishing House, Bucharest, 1997.
[7] http://www.politiaromana.ro/date_statistice_anul_2009.htm consultat la 16.02.2012.

Deviant behaviour can be manifested or hidden, latent, can evolve within certain tolerable limits or can exceed these limits of tolerance; it can be accepted by members of the group if it doesn't endanger their existence, or it can be rejected and sanctioned if it encroaches on the life and activity of group members; it presents various degrees and forms of manifestation, from tolerable to criminal ones. Deviant behaviour, as form of social disadaptation, presents various forms of manifestation.

**Crimes against property**

*Theft.* Children and adolescents of different age can be tempted to steal from various reasons: some of them understand that theft is socially sanctioned and they proceed on doing it out of a desire of adventure, others may steal as a reaction to draw attention to physical or emotional abuse they are subject to within the family, but most of them do it because they do not have the necessary social means to obtain the objects legally or by working. **The children and teenagers' natural tendency towards brands acknowledged on the market has long become a habit of orientation to objects possessing these indisputable attributes of quality.** Thus, objects that are common to middle-class, such as balls, tennis rackets, electronic consoles, perfumes, T-shirts, etc. prove to be inaccessible to under-privileged children. They can but desire these objects, accumulating frustrations that subsequently turn into anger and open violence, as they do not have access to these goods under no circumstances, for a long period of time. Even under the age of 18 two categories of thieves can be distinguished: amateur or occasional thieves that steal an object tempting them at an infantile level, money to buy food or movie tickets and professional thieves that are part of networks specialized in various types of crimes such as breaking an entry or fraud, car theft, arsons, etc.

The new information technologies are also used by children and adolescents with an IQ of 120 and above, that are tempted to commit crimes on the Internet from various reasons. As general profile, these children come from the middle-class, are aged between 14 and 19, are usually introverted and have poor social contact. They mostly relate to those that show the same preoccupation in fields such as informatics, cybernetics, and electronics. Thus the illegal access to various secured networks, serious crimes like industrial espionage, copying and counterfeiting informatics programs can occur (Andreea Fabian, 2007).[8] The psycho-social causes of this type of behaviour must be sought especially within primary and secondary groups that do not manage to rightfully accomplish socialization of children and adolescents, in conformity with the norms and values of global society. Among family factors implied in the aetiology of juvenile delinquency, we mention: the "cold – indifferent" attitude of the parents, the parents' "tyrannical" attitude, the conflicting atmosphere within the family, disturbances within the family's moral climate and family disorganization. Of course, the influence of family criminogenic factors must be regarded in relation to their multiple inter-conditionings with extra-family and psycho-individual factors of children and teenagers.

**Prostitution**

Etymologically the Latin verb "*prostituo*" meant the act of public exposure for and before the sale. Above all, these etymological explanations show the mercantile sense and the despicable moral of trafficking human beings. The wherewithal of prostitution is amazing: declaratively, nobody wants to practice the occupation out of pleasure, it's just that money need to be earned for daily subsistence, clearly state in bad faith those involved. However, in time, researchers have statistically shown that the following factors are invoked when it comes to prostitution: a) unemployment, b) low level of wages and difficult working

[8] Fabian, Andreea, *Aspecte teoretice şi statistice ale devianţei şi delincvenţei juvenile*, Echinox Publishing House, Cluj Napoca, 2007.

conditions, c) adverse educational climate, d) recruitment in the grid through pimps. (Radulescu 1996)[9]. Several studies performed on delinquent children involved in prostitution have proved the following: most of them came from families where alcohol was consumed, delinquent girls and prostitutes came from families with moral deficiency mainly due to the immoral behaviour of parents who tolerated a promiscuous environment. So, the immorality of the family environment immorality first led girls to alcoholism, prostitution and consequently the various serious crimes. Juvenile prostitution is also widespread in Romania, children of the street children providing a real attraction pole for both Romanian paedophiles and foreign ones. V. Preda states that, in terms of socio-affective and moral, the family climate is more predisposing to deviance when the family has cases of alcoholism, immorality and criminal history, favouring children and adolescents to glide down the slope of crime and promiscuity. Given the above-mentioned aspects it can be said that the family – through the behaviour of its members - is a reference framework and serves as an example, a "model" for adolescents and youngsters. Children coming from such families with side-slips of the moral, socio- affective climate and with a conflictual background can easily associate with criminogenic groups.

**Addictions**

As it was noticed in social inquiries performed by authorities regarding drug use and drug traffic, it is not just the user that is affected by this behaviour but the family, close friends, community and consequently the entire society as well, by the huge costs it has to pay. Stelian Turlea, the author of the paper “Drug bomb”, points out that: “The family also suffers, being deprived of harmony and anguished to witness the destruction of the one they love”. The economic factors must also be mentioned: production loss, increased number of accidents, greater absence from work and higher costs for healthcare. The buyer will eventually pay the price, as he will have to purchase inferior goods at higher costs. The tax-payer will pay the price, as his money is necessary for the government’s efforts, for public order troops and for treatment and rehabilitation centres, for drug control. To this the financial support that the drug user offers criminal organizations must be mentioned, which benefit from drugs and criminal activities the user often gives himself up to in order to sustain his vice” (Rădulescu according to Stelian Turlea)[10]. Alcohol use in teenagers and adolescents is an everyday reality that reaches mass proportions, in private or in public places, even if merchandising it to people under 18 years old is forbidden. Unfortunately for many adolescents this behaviour leads to addiction and symptoms of chronic alcoholism that occurs along with the series of specific illnesses, job loss, abandoning school, spending personal resources but those of the family on alcohol and later on the hospital or clinical needs. V. Preda states that the social-affective, moral and also the economic climate of the family is more disturbed when in the family there are cases of alcoholism, immorality, and criminal records, favouring the children and adolescents’ slide on the slope of delinquency due to the very familiar negative example. Research shows that alcoholism in families of which delinquents come from manifests approximately three times more frequent than in the families of non-delinquents. The immorality of the family environment in which alcohol was used eventually lead to a permissive atmosphere that favoured alcoholism in the case of young females, as well as prostitution and later to other serious crimes in which they get involved.

*Video games* have been generating a very attractive activity to millions of children, for at least 30 years, an aspect that determined scientific research regarding their effects on their

[9] Rădulescu M. Sorin, *Sociologia comportamentului sexual deviant*, Nemira Pubishing House, Bucharest, 1996.
[10] Rădulescu M. Sorin, *Deviantă criminalitate şi patologie socială*, Lumina Lex Publishing House, Bucharest, 1999, p. 250.

developing personality. The results of these studies proved both their positive effects and the negative ones. When approaching the computer interaction phenomenon, researcher Ana Maria Marhan showed in the paper *Psychology of the use of new technologies*[11] that from the beginning the computer user is facing a pressing of motivational paradox: accomplishing a common task – writing a text, sending a message, taking a picture – competes with the objective of understanding the used system and thus the user will self-limit learning the system's possibilities. It is thus noticed that from a behavioural point of view, the "gamer" adolescent also wastes time to score or win games detrimental to understanding the complex functions of the computer that brings real benefits and possible professional qualifications.

In his turn, Alexandru Tarasov highlights in his paper *The psychology of Video Games*[12] the dynamics of relationship psychic mechanisms that are initiated during the games, as well as the effects on conduct. Quoting Donglas Gentile and Craig Anderson, the author states that video games have a greater social influence than media on the aggression phenomenon because of the following factors: a) games are more attractive and interactive. b) games consolidate aggressive behaviours. c) children imitate these behaviours with every game they play.

Table of definitive or alternative sentences, minors 2005-2010

| Years | **2005** | **2006** | **2007** | **2008** | **2009** | **2010** |
|---|---|---|---|---|---|---|
| Total number of minors convicted: | 6796 | 6145 | 5019 | 3624 | 3035 | 3263 |
| Fine | 237 | 269 | 192 | 117 | 61 | 88 |
| Execution of punishment at work | 83 | - | - | - | - | - |
| Jail | 1860 | 1638 | 1369 | 921 | 783 | 821 |
| Imprisonment with conditional suspension of execution of punishment. | 2610 | 2429 | 2071 | 1676 | 1474 | 1582 |
| Suspension of the sentence execution under supervision | 511 | 462 | 472 | 289 | 257 | 362 |
| Educative measures | 1495 | 1347 | 915 | 621 | 460 | 410 |
| Reprimand | 491 | 436 | 310 | 196 | 145 | 139 |
| On parole. | 702 | 557 | 349 | 205 | 157 | 140 |
| Internment in an re-educative centre | 298 | 344 | 252 | 217 | 154 | 128 |
| Internment in an educative medical centre | 4 | 10 | 4 | 3 | 4 | 3 |

Source: Romania's statistic directory 2011[13]

As far back as 1993, video games classification was imposed as follows: "E (everyone) T (teen) young (Y) and M –mature, this aspect leading to the limitation of the access of children to games inappropriate to their age. Thus in 2003 *Entertainment Software*

[11] Marhan, Ana-Maria, *Psihologia Utilizării Noilor Tehnologii,* Institutul European Publishing House, Iaşi, 2007.
[12] Tarasov, A., *Psihologia jocurilor video,* Lumen Publishing House, Iaşi, 2007.
[13] *Anuarul Statistic al României 2011*

*Rating Board* presented a significantly improved classification starting with the age of three up to adults over 18 years old.

Although research in the scope of this phenomenon is few, one can still state that the policies quickly applied in the EU as a consequence of scientific proofs, significantly reduced the rate of aggressive behaviour triggered by video games.

**Conclusion**

Deviance is a complex and multidimensional phenomenon that has always existed in our country as well because of dysfunctions in approaching the reality of social life. Structural-organizational mistakes of the past generation are also passed down and implemented to "adaptive" behaviours learnt by the young generation, in a developing pressing. Adolescents already notice educational slips and cannot easily break from perished value and concept traditions, triangulated in the family, received or adopted at psychological level. Moreover, the formal-educational component of the current social system no longer has the ability to motivate the new generation to build a professional career, not to mention satisfaction of a job fairly paid. This is how the main negative justification of juvenile delinquents is initiated, who firstly presents itself as being an economic issue. Paradoxically the answer of our society regarding the integration of teenagers is also negative, of limitative-selective refusal, and that proves above all the economic incapacity to sustain, socialize with and integrate the under-privileged groups. Economic and organizational incapacity of vulnerable groups is mirrored at the level of common sense in negative statistics of deviance and delinquency in progress. We can also say that deviance of teenagers represents the sum of yesterday's educational mistakes associated with today's anomic incipience.

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# BRIEF CONSIDERATIONS ON THE INFLUENCES OF THE UNION'S PROVISIONS IN THE NEW ROMANIAN CIVIL CODE

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**Abstract**

*Considering that on 1 October 2011 took place a real reform of the international private law with the entrance into force of the new Romanian Civil Code, the provisions of the international private law were gathered in Book VII "International Private Law Provisions", aiming to integrate the revised Law No 105/1992 to synchronize its provisions with the new conception on family law stated in the code and with the European and international instruments in the area of international private law. Specifically, the provisions of the new Civil Code on contractual and extra-contractual obligations are in accordance with the European law found in Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), as well as in Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).*

**Keywords**: *the principle of autonomy of will, objective criteria, habitual residence, characteristic performace, regulation*

## Introduction

Law No 71/2001 is the law applying Law No 277/2009 on the Romanian Civil Code, published in the Official Gazette No 409/10 June 2011 and entered into force on 1 October 2011, except for 8 articles expressly stated which entered into force on 13 June 2011 (according to Art 221). In turn, Law No 71/2001 was modified by Government Emergency Injunction No 79/2011[1] published in the Official Gazette No 696/30 September 2011. The new Civil Code repealed several important legislative norms, of which we mention the Civil Code of 1865, Commercial Code of 1887, as well as Law No 105/1992 on the regulation of the private international law rapports.

[1] Also, Government Emergency Injunction No 80/2011published in the Official Gazette No 694/30 September 2011 modifies the Law No 119/1996 on marital status documents, for compatibility with the new Civil Code. In the Official Gazette No 666/19 September 2011 was published the Order from the Minister of Justice No 1786/2011 approving the Methodological Norms on the organization and function of the National Register of the matrimonial regimes, the registering and consultation procedure.

## I. Theoretical aspects on the influence of Union's norms in the new Civil Code regarding the issue of the law applicable to contractual obligations

Chapter 7 of Book VIII states the "Obligations", specifically the "*law applicable to contractual obligations*"[2] and the "*law applicable to non-contractual obligations*"[3].

Art 2640 of the NCC on the "law applicable to contractual obligations"[4] states that "the law applicable to contractual obligations is determined according to the EU regulations" is in line with Regulation (EC) No 593/2008[5].

Specifically, the Regulation (EC) No 593/2008 mentions the issue of the conflict-of-law rule, stating that the contract is governed by the law chosen by the parties. This choice must be express or to result, with a reasonable degree of certainty, from the circumstances of the cause or from the statement in the contract of the *pactum de lege utenda* clause. By their choice, the parties may state a law applicable for the entire contract or for just one part.

Art 2640, like the Union's provisions, states the principle of autonomy of will as main rule in determining the law applicable, according to which the parties choose the law applicable for their contract, but equally it offers the possibility to reconsider their initial choice.

According to Art 3 Para 2 of the Regulation the parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity or adversely affect the rights of third parties. Art 4 states the *objective criterion* in determining the law applicable to the contract in the absence of a choice. Considering this criterion we mention Art 4 Para 1 which refers to the concept of *habitual residence*.

The new Civil Code has the merit of assimilating the concept used by the Union, namely "*habitual residence*" instead of "*domicile*". In this regard, Art 19 of the Regulation (EC) No 593/2008 the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

If the applicable law was not chosen by both parties, it shall be determined by the objective criterion of the habitual residence, the Regulation stating in this regard:

a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

[2] Art 2640 of the New Romanian Civil Code.
[3] Art 2641 of the New Romanian Civil Code.
[4] Art 2640 of the New Romanian Civil Code.
[5] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 (Rome I)`.

f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

h) a contract concluded within a multilateral system which brings together or facilitates the bringing together or multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

The Union's Regulation offers a subsidiary solution in Art 4 Para 2 namely, "*the habitual residence of the party required to effect the characteristic performance of the contract*". The text is not foreign to us to the idea that the Law No 105/1992 referred to the concept of "*characteristic performance*", a much commented concept by the Romanian legal literature.

Thus, if the contract is not governed by one of the above situations, it shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

Moreover, Art 4 Para 3 states that where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country, the law of that other country shall apply. If the law applicable is not determined by the above mentioned provisions, the contract shall be governed by the law of the country to which it is more closely connected.

## II. The specificity of the provisions inserted in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June on the law applicable to contractual obligations (Rome I)

On 30 November 2000, the Council adopted a common program of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters[6] as base of judicial cooperation in civil matters. The program establishes measures to harmonize the regulations if a conflict of laws occurs, as well as measures easing the mutual recognition of court decisions.

Regarding the material area of application, the Regulation shall apply for all contractual obligations in civil and commercial matters, if there is a conflict of laws.

The following shall be excluded from the scope of this Regulation:

a) questions involving the status or legal capacity of natural persons;

b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;

c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

e) arbitration agreements and agreements on the choice of court;

f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organization or winding-up of companies and other bodies, corporate or unincorporated, and

[6] OJ C 12, 15.01.2001, p. 1.

the personal liability of officers and members as such for the obligations of the company or body;

g) insurance contracts arising out of operations carried out by organizations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance[7] the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work[8].

The law applicable to a contract by virtue of this Regulation shall govern in particular:

a) interpretation;

b) performance;

c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

d) the various ways of extinguishing obligations, and prescription and limitation of actions;

e) the consequences of nullity of the contract.

In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

*1. Contracts of carriage*

To the extent that the law applicable to a contract for the carriage of goods has not been chosen by the parties, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to a contract for the carriage of passengers only the law of the country where:

a) the passenger has his habitual residence;

b) the carrier has his habitual residence;

c) the carrier has his place of central administration;

d) the place of departure is situated;

e) the place of destination is situated.

*2.* The present Regulation defines *consumer contracts*[9] as being a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (*the consumer*) with another person acting in the exercise of his trade or profession (*the professional*) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional[10]:

[7] OJ L 345, 19.12.2002, p.1 amended by Directive 2008/19/EC (OJ L 76, 19.03.2008, p. 44).

[8] The Regulation does not apply for proofs and procedural aspects in fiscal, customs and administrative areas.

[9] Art. 6 of the Regulation.

[10] The provisions are not applicable for: a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence; b) a

a) pursues his commercial or professional activities in the country where the consumer has his habitual residence;

b) by any means, directs such activities to that country or to several countries including that country.

*3. Voluntary assignment and contractual subrogation*[11]

The concept of assignment in this Regulation includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

The relationship between assignor and assignee or subrogated under a voluntary assignment or contractual subrogation of a claim against another person (*the debtor*) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

*4. Legal subrogation*[12]

Where a person (*the creditor*) has a contractual claim against another (*the debtor*) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

*5. Multiple liability*[13]

If a creditor has a claim against several debtors who are liable for the same claim and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defenses they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

*6. Set-off*[14]

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

*7. Burden of proof*[15]

The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum, provided that such mode of proof can be administered by the forum.

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contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours; c) a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC; d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service.

[11] Art. 10 of the Regulation.

[12] Art. 15 of the Regulation.

[13] Art. 16 of the Regulation.

[14] Art. 17 of the Regulation.

[15] Art. 18 of the Regulation.

**Conclusions**

We consider that probably after the Romania's adhesion to the European Union, the application of the principle of supremacy of the communitarian law was strongly felt in the national law.

It is indisputable the influence of the Union's legislation, the creation, approach and interpretation of the new Civil Code. Moreover, the Union's legislative influences are arisen from the will of the authors of the novelty version of the Code, which often expressly refers to the European law, an example being Art. 2640 commented in the paper.

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# CONSIDERATIONS REGARDING THE PROCEDURE FOR THE ACCESS TO PUBLIC INTEREST INFORMATION IN ROMANIA AND BULGARIA

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**Abstract**

*By means of this article, we undertake to perform an analysis of the procedure regarding the citizens' access to public interest information in Romania and in Bulgaria, thus attempting to illustrate the common points and the interaction elements occurring between them, as both states joined the European Union in the same period.*

**Keywords:** *access to information of public interest, human rights, democracy.*

## Introduction

*Free and unrestricted access to any public interest information, thus defined through the Romanian Law no. 544/2001, constitutes one of the main fundamental principles of the relationships between persons and public authorities, according to the Romanian Constitution and to the international documents ratified by the Romanian Parliament.*[1]

*The fundamental law of Romania receives the right to information from the international legal instruments in the field*[2]*, it being considered a truly fundamental right because man's material and spiritual development, the exercise of the freedoms established through the Constitution and especially of those through which are expressed the thoughts, opinions, beliefs of any kind, also involve the possibility to receive data and information regarding the social, political, economic, scientific and cultural life.*[3]*Thus, the content of the right to information, as defined in article 31 of the Romanian Constitution, comprises: the person's right to by informed promptly, correctly and clearly with respect to the measures envisaged and especially taken by the public authorities; free access to the sources of public information, scientific and technical, social, cultural, sportive; the person's possibility to directly and normally receive the radio and television broadcasts; the governmental authorities' obligation to create the material and legal conditions for the free and ample broadcasting of information of any kind.*[4]

[1] E. Bălan, *Procedura administrativă*, Universitara Publishing House, Bucharest, 2005, p. 164.
[2] For example, recommendation (2002)2 of the Committee of Ministers to member states on access to official documents, adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies.
[3] Elena-Simina Tănăsescu in Constantinescu, M. & all, (2004), *The Constitution of Romania Reviewed – Commentaries and Explanations*, All Beck Publishing House, Bucharest, 2004, p. 64.
[4] I. Muraru in Muraru, I., Tănăsescu, E.S., (coord.), *The Constitution of Romania commented article by article*, C.H. Beck Publishing House, Bucharest, 2008, p. 300.

**The access to public interest information in Bulgaria**

In Bulgaria, by free access to public interest information is understood any information regarding social life in the Republic of Bulgaria, as well as the offering of the citizens' possibility to have their own opinion regarding the activities of the persons having the obligations deriving from the law.[5]

The Bulgarian Access to Public Information Act regarding free access to the public interest information applies for the access to the public interest information which is created and maintained by the state bodies, with regional and local offices. The law does not apply to information of a personal nature. The institutions in the public sector must supply public interest information.

According to the law, any citizen of the Republic of Bulgaria has the right to access public interest information; at the same time, the legal persons and the foreign citizens, as well as the persons without citizenship, also enjoy this right, but with some restrictions. Thus, the right to public interest information and the right to re-use the information in the public sector cannot be exercised against the rights and reputation of others, as well as against national security, public, national order, health and moral standards.

The basic principles that govern this law are the following: openness, correctness and the exhaustiveness of information, the assurance of the legal conditions for accessing public interest information, the assurance of conformity with the legislation, the process of searching and receiving public interest information, the protection of access to information, personal character data protection and the guarantee of security of society and state.

The citizens' access to public interest information may be partial or total.

According to Bulgarian law, public information created and kept by their bodies and administrative structures is divided into official and administrative information. Thus, official information is considered as being the information contained in the self-government state or local documents in the course of exercising their duties."[6] Next article states that the administrative information will be considered information that is collected, created and maintained in connection to the official information, as well as within the activity of their bodies and administrative structures.

Access to the official information contained in normative acts will be accessed by means of promulgating them. According to the Bulgarian law, access to the administrative information must be unlimited. It cannot be unlimited in the following cases: when it pertains to the activity of preparing a document of the bodies and has no legal significance in itself (approvals and recommendations prepared by or for a body, reports and consultations) or when it contains opinions and statements regarding the ongoing or prospective negotiations.

The petition to grant access to interest public information can be made in the form of a written or oral request, the petition being considered written when sent in electronic format.

In case the petitioner does not receive an answer to the verbal request, he/she may draft a written petition, which must contain the following information (art. 25): the petitioner's full name, or, respectively, name and headquarters; description of the information requested; preferred form of access to the information requested; the petitioner's correspondence address.

The access to public interest information is granted in the following forms: Examination of the information - original or copy; Verbal – explanation; Paper copy; Copied on a technical media. The persons with disabilities of sight, hearing or speech have the right to request the information in a form that corresponds to their ability to communicate.

[5] Access to Public Information Act, promulgated in State Gazette No. 55/7 July 2000, with amendments.

[6] Article 10 of the Access to Public Information Act, promulgated in State Gazette No. 55/7 July 2000, with amendments.

The requests regarding public interest information will be solved in the shortest possible time, but no later than 14 days since the date of registration; the term may be exceeded by 10 days when the information is substantial in volume and requires more time to prepare.

Access to public interest information must be free of charge. A decision of refusal to grant access to public interest information must indicate the legal and factual reasons for the refusal, on the grounds of the act, decision date and the appeal procedure.

The public interest information must be published on the institution's website, in the mass-media, but also at the institution headquarters. In case of refusal to supply the information requested by the citizens, for reasons not pertaining to the legislation in effect, for reasons of discrimination, fines are charged.

**Comparative analysis**

In Bulgaria, as well as in Romania, free access to public interest information applied for the activities, or derives from the activities, of a public authority or public institution. In exchange, in Romania is also offered access to personal character information, as long as it pertains to an identified or identifiable individual[7] while in Bulgaria the law does not apply to the personal character information.

Both in Romania, and in Bulgaria, any person is entitled to request and obtain public interest information from the public authorities and institutions. Also, the public authorities and institutions must ensure for persons the public interest information requested in writing or verbally.

In Romania, for the information requested verbally, the information may be supplied on the spot. In case the information requested is not available at the time, the person is instructed to request in writing the public interest information. In what concerns Bulgaria, in case of the verbal request, the information may be supplied on the spot. In case the petitioner considers that the information divulged is not sufficient, or he/she is not offered an answer, he/she may submit a written request.

The necessary information for the access request are the same in both countries, except for the preferred form of access to the information requested, which is requested only in Bulgaria.

Unlike Bulgaria, where the answer to the petition requesting information is given within maximum 14 days since the registration date, in Romania the term is of 10 days, respectively 30 days since the registration date, depending on the difficulty, complexity, volume of documentary works and the urgency of the request.

The law regarding free access to public interest information in Bulgaria indicated the fact that the persons with disabilities of sight, hearing or speech have the right to request the information in a form that corresponds to their ability to communicate, while the law in Romania does not establish such an advantage for the persons with disabilities. In what concerns the sanctions granted for the refusal to offer the information requested, in Romania disciplinary measures are taken, while in Bulgaria the respective public servant will have to pay a certain fine, depending on the gravity of the situation.

**Conclusions**

Informing the public with respect to their rights and promoting a culture of governmental transparency are essential for reaching the goals of the regulation regarding the

[7] Article 2 of the Law no. 544/2001, regarding free access to public interest information, published in the Official Gazette no. 663/23 October 2001.

freedom of information. Indeed, the experience of both countries[8] proves that a body of stubborn public servants may undermine even the most progressive legislation. The law should establish the granting of special attention and adequate resources to promote the goals of legislation in force. Freedom of information represents an essential right for each person, allowing individuals and groups to protect their rights, and, at the same time being a useful instrument against defective administration. The legislation in effect, both in Romania and Bulgaria, sets the obligations correlative to the right of information, which are the tasks of the public authorities.

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[8] For Romania see E. Bălan & all, *The Right to a Good Administration and its Impact on Public Administration's Procedures*, comunicare.ro Publishing House, Bucharest, 2010 and for Bulgaria the Repports on the State of Access to Information published by the Acces to Information Programme Foundation.