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Evolution of the Penal Legislation in Romania and Hungary, in the Post-Communist Era

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FOREWORD

THERE IS ALWAYS A START

Journal of Eastern-European Criminal Law could stand out as a unique publication, at least in this part of the world, as an outcome of the partnership between specialists in criminal law and criminal procedure law from the law faculties of the West University in Timisoara and the University in Pecs, who aimed at presenting, in a different language from their own, the serious amendments of criminal legislation that occurred in their countries in the post-communist era, an essential requirement for the rule of law.

We envisage this journal, published semesterly, to be open to all researchers in the academic environment from the former communist countries, to professors, PhD students, but also, to magistrates and other professionals interested in the evolution of criminal legislation and in the more and more firm response to be given to the criminal phenomenon, while observing the fundamental HUMAN rights.

Crime is no longer a purely national issue, it is no longer a feature of one country, and the Penal Codes conceived by following the pattern of sovereign jurisdiction of national states are not, by themselves, the only available instruments for an effective opposition to the new forms of crime.

The creation of a common area of freedom, security and justice, based on the principles of transparence and democratic control needs an open dialogue between doctrinaires and practitioners of law in general, and those of criminal law and criminal procedure, first and foremost.

Knowledge of the inherent features of national legislations can facilitate the mutual recognition of court decisions, as well as the police and judicial cooperation in criminal matters at cross-border level.

Globalization of law is able to lead to a stability of relationships between humans, including of those between the magistrates belonging to different national judicial systems, the professional exchanges thus amounting to the establishment of a broad judicial network, at global level, animated by common spirit, culture and even projects.

In this context, the comparative study of certain legal institutions, the quotation of some decisions passed by the courts of law abroad offers to judges a source of ideas in their quest for logical reasoning or solutions.

Globalization is an argument in favor of "another way of learning law" in which the references to comparative law become a must which, if not confronted by universities, "there will emerge a real risk of *provincialization* of the law faculties within their own country".[1]

That is why the current edition of the journal is mainly an invitation to join our team for all those interested in the evolution of criminal law and criminal procedure law and criminal sciences, in general.

The board of editors

[1] J. Allard, A. Garapon, *Les juges dans la mondialisation. La nouvelle revolution du droit*, 2005

Romania's New Penal Code and the Saga of its Adoption

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Abstract:

The decision to proceed to the drafting of a new Penal Code was not a mere manifestation of the political will, but equally represented a corollary of the economic and social evolution - and also of the doctrine and case-law - and was based on a series of shortcomings in the regulation of the 1968 Penal Code.

A very important role in the harmonization of the legislation with the constitutional provisions has been played by the Constitutional Court, both through its a priori and a posteriori judicial review, the latter taking the form of the settlement of the constitutional challenges raised before the courts.

The harmonization of the provisions of the Penal Code with the new constitutional order was performed in this manner, followed, but not always, by appropriate legislative changes.

Following the overturn of the communist regime, the 1968 Penal Code was amended or supplemented 54 times, out of which 23 times by means of Government Emergency Ordinances, in order to put in line with the new constitutional regulations and the requirements of Romania's European integration process.

Keywords: *new Penal Code; enforcement of the Romanian criminal law in time; enforcement of the Romanian criminal law in space; plurality of offences; criminal liability of legal persons.*

Responding to the monitoring requirements of the European Commission, the new Penal Code has, as a starting point, the necessity to take over elements which could be maintained from the previous Penal Code, as it had been modified along the way, and their integration, based upon a unitary concept, next to elements taken from other systems of reference, but also from the rules adopted at EU level in order to achieve the area of freedom, security and justice.

In the drafting of the code, one has intended, on the one hand, to accentuate the tradition of the Romanian criminal legislation and, on the other hand, to connect with the current regulatory trends from the landmark legal systems of the European criminal law.

Following a failed Penal Code, repealed before even coming into force,[1] the current Penal Code was adopted through Law no. 286/2009.

Published in the Official Journal, Part I no. 510 of 24/07/2009, the new Penal Code, immediately after birth, has been submitted to modifications by means of two laws, passed within an interval of less than one month, an utter example of lack of consistency and perspective in a criminal policy which sees itself as reformatory, although the distinguished members of the Cabinet had forgotten the fact that they had committed, within 12 months from the date of the Penal Code's publication in Romania's Official

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[1] Penal Code from 2004 (Law no. 301/2004, Official Journal of Romania no. 575/29.06.2004).

Journal, to submit to the Parliament a draft law for the implementation of the Penal Code, a good opportunity to make the desired amendments.

The absurdity of the legislative process and the lack of legislative strategy have caused the Parliament to adopt, within one month, two laws identically defined: the Law for the modification and completion of the Penal Code of Romania and Law no. 286/2009 regarding the Penal Code, thus modifying both the previous and the current Penal Codes.

The first one, Law no. 27/2012,[2] through which both Penal Codes are amended, refers to the imprescriptibility of criminal liability for those deliberate offenses which resulted in the death of a person.

The second one,[3] Law no. 63/2012, regulates, among the safety measures, distinct from the special confiscation, the extended confiscation, but also the doubling of the special limitation period for criminal liability.

It took almost five years since the publication of the current Penal Code for it to enter into force on February 1st, 2014 as a result of Law no. 187/2012[4] which, in turn, has brought some changes to the original shape of the Penal Code.

The entry into force was preceded by disputes and politicking attempts to amend the notions of civil servant and conflict of interests.

The amendments to the Penal Code adopted by the Chamber of Deputies on December 10th, 2013 have caused the biggest scandal in the field of justice from last year. Through one of the amendments, the president and the members of Parliament have been removed from the category of civil servants provided under the Penal Code.

The same day, the Chamber of Deputies approved another bill of amendment of the Penal Code, rejected by the Senate in October 2012, which changes the content of the article regarding the conflict of interests by removing the category of civil servants. The bill was introduced on the supplementary agenda of the Chamber and was voted without a prior publication of the committee's report and without a debate in plenary.

The proposed amendments were rejected by the Constitutional Court[5] after an enormous media scandal, known as "the Black Tuesday", from December 10th, 2013 in Parliament[6].

The new Penal Code contains, following the established structure, two parts, general and special.

The general part gathers the rules applicable to all the offenses covered by the criminal legislation, regardless of their nature, demarcates the general scope of the criminal law, defines the offense, establishes its general characteristics and constituents, and regulates the general conditions of criminal liability, the penalties and their application.

The special part includes the main offenses, grouped according to the social values whose protection is achieved through their incrimination. The legislator envisaged to include in the special part of the code those categories of offenses with which the legal practice gets confronted more frequently.

The general part of the code gives the due importance to the principle of the legality of incrimination (Article 1) and the principle of the legality of punishment (Article 2), turned into constitutional principles following the adoption of the 1991 Constitution.

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[2] Published in the Official Journal of Romania, Part I, no. 180 from 20/03/2012.

[3] Published in the Official Journal of Romania, Part I, no. 258 from April 19th 2012.

[4] Published in the Official Journal of Romania, Part I, no. 757 from November 12th 2012.

[5] Constitutional Court, Decision no. 2/15.01.2014; Official Journal no. 71/29.01.2014.

[6] www.hotnews.ro/stiri-politic.

As to the **enforcement of criminal law in time**, it was necessary to supplement the provisions regarding the enforcement of the most favourable criminal law in the course of the trial with the provision regarding the situation of the unconstitutional normative acts, namely of the emergency ordinances which have been rejected or approved with amendments, given the fact that such acts, although they cease - in whole or in part, as the case may be – to produce effects, continue to be applied to the legal situations found, at some point, within their scope of application, inasmuch as they are more favourable.

In the regulation of the mandatory enforcement of the more favourable criminal law, the legislator envisaged the situation of the cases on trial, as well as of the cases having received a definitive judgment, but in the latter case only if the penalty imposed is greater than the legal maximum of the penalty provided by the new law, the constitutional principle of the legality of punishment, a limitation of the *res judicata* inasmuch as the penalty imposed is greater than the special maximum of the penalty provided by the new law.

As to the **enforcement of the Romanian criminal law in space**, the introduction of the requirement of the double incrimination, provided by the majority of European legislations, imposed itself on the basis of the personality principle. In order to avoid the unnecessary loading of the Romanian judicial authorities with cases that might never be solved due to the impossibility of their instrumentation, the legislator provided in such cases, as a condition for the initiation of the criminal proceedings, the authorization of the attorney general from the Public Prosecution's office next to the Court of Appeal.

As for the enforcement of the Romanian criminal law under the reality principle of the Romanian criminal law, it was decided to bring in its sphere of incidence all the offenses committed abroad against the Romanian state by a Romanian citizen or legal person.

The enforcement of the Romanian criminal law under the universality principle circumscribes even more precisely its sphere of incidence, by limiting it to those situations where the intervention of the Romanian criminal law imposes itself by reason of international commitments, as is the case of those offenses which Romania undertook to suppress under an international agreement or in those situations in which the extradition was denied, when the principle *aut dedere aut judicare* requires that the case be investigated by the solicited state.

The new Penal Code, just like the Penal Code, contains the definition of the offense, although neither the Romanian Penal Codes of 1864 and 1936 nor the majority of legislations provide such a definition, since it is considered to fall within the competence of the doctrine.

The offense is defined as the deed provided by criminal law, committed with guilt, unjustified and imputable to the person who committed it. The elements of the offense, as drawn from the above mentioned definition, are: the legal element (its provision by criminal law), the moral or subjective element (the guilt), antijuridicity (an unjustified deed), and imputability.

The legislator defines the legal forms of guilt: direct intent, indirect intent, recklessness and negligence, as well as the exceeded intention (praeterintention).

We are in the presence of intention when the perpetrator foresees the result of his/her deed and aims at achieving it through committing the respective deed (direct intent), or when he/she foresees the result of his/her deed and, although he/she does not pursue it, he/she accepts the possibility of its occurrence (indirect intent).

The deed is committed with recklessness when the perpetrator foresees the results of his/her deed, but does not accept it, groundlessly believing that it would not occur (recklessness, foolhardiness), or he/she does not foresee the result of his/her deed, although he/she should have and could have foreseen it (negligence).

We are in the presence of exceeded intent when the deed, consisting of a deliberate action or inaction, produces a more serious result, due to the fault of the perpetrator.

The deed consisting of an action or inaction constitutes an offense when committed with intent. The deed committed with negligence constitutes an offense only when expressly provided by law.

As regards the offense committed by omission, recognized as such by the Romanian doctrine and legal practice as well as by the majority of European legislations, the Romanian legislator has provided two main hypotheses in which the inaction can be assimilated to the action, namely: the existence of a legal or contractual obligation to act or the existence of a previous action of the perpetrator, which had created a state of danger for the protected and wronged value.

The legislator has regulated as justifying causes those circumstances which remove the unjustified nature of the deed: self-defence, state of necessity, the exercise of a right and the fulfilment of an obligation (order or authorization of the law and command of the legitimate authority) and the consent of the victim, if the latter was allowed to legally dispose of the harmed or endangered social value.

The justifying causes operate *in rem*, their effects being extended over the participants as well.

It is considered to act in self-defence the person who commits a deed in order to block a material, direct, immediate and unjust attack which threatens his/her own person or another one, their rights or a general interest, provided the defence is proportionate to the seriousness of the attack.

It is presumed (relative presumption) to act in self-defence the person who commits the deed in order to prevent the entry of a person into a house, room, outbuildings or enclosed spaces belonging to the former, without right, by means of violence, deception, burglary or other such illegal means or during the night.

The causes of non-imputability are personal ones, which do not accrue to the rest of the participants, and they will only benefit the person who acted under their influence, with the exception of the hazardous, unforeseeable event *(cas fortuit)*. They remove the third essential feature of the offense - imputability.

The causes of non-imputability are: physical or moral coercion; the justified excess of defence (exceeding the limits of self-defence due to unrest or fear); the perpetrator is a minor (the minor under 14 years of age or, being 14-16 years old, does not possess discernment), irresponsibility; complete involuntary intoxication with alcohol or other psychoactive substances; the error of fact or concerning an extra-criminal statutory provision or because of an erroneous understanding of its unlawful nature and the hazardous event.

A new regulation was given to **the plurality of offences**; unlike the previous Penal Code, the new Penal Code regulates three forms of the plurality of offenses retained in the criminal doctrine and confirmed by judicial practice, namely: concurrent offenses, relapse into crime and intermediate plurality of offenses.

In the case of concurrent offenses, when a person commits two or more offenses before being convicted for any of them, the legislator opted for the system of absorption in the hypothesis in which for one of the concurrent offenses was applied the penalty

consisting in life imprisonment and, respectively, the cumulative sentencing system with mandatory penalty increase, if the concurrent offenses were punishable only by fine or punishable one with imprisonment and the other one with a fine, and applying the heaviest penalty, increased by one third of the others' total.

Last but not least, in the matter of sanctioning concurrent offenses, the legislator introduced an exceptional provision which allows that, in the situation of committing several very serious offenses, of which at least one imposes a sentence of 20 years or more, and, by adding the increase of one third of the others' total, the penalty resulted would exceed the general maximum of imprisonment - which is of 30 years - the court may apply life imprisonment, even if this penalty had not been established for any of the committed offenses.

The temporary nature of relapse into crime is highlighted in the very definition of this form of plurality of offenses. The terms of relapse have been changed - their limits have increased; at the first term, the imposition of a penalty of one year or more, and at the second term, for committing an intentional offense for which the law provides a penalty of more than one year.

In the matter of the sanctioning regime, the regulation was simplified by recourse to an arithmetic accumulation in the case of the post-conviction relapse into crime and, respectively, to a legal increase of the special limits of the penalty with a half, in the case of the post-release relapse into crime.

The legislator has consecrated, in the matter of the post-conviction relapse into crime as well, by way of exception, the possibility to apply life imprisonment - even if the penalties established consist in imprisonment - in those cases in which the accumulation of penalties would exceed the general maximum of the prison sentence, which is of 30 years.

As far as the plurality of offenders is concerned, the code defines the activity of the author and the co-author as people who directly execute the deed provided by the criminal law, and the instigators and accomplices are those who commit the deed indirectly, by means of the author.

The new Penal Code retains the institution of improper participation, which has become a tradition in Romanian criminal law and which has functioned smoothly and with no difficulties in practice, to the detriment of the theory of the mediate (indirect) author. The regulation of the improper participation was, however, completed with the provisions regarding co-authorship.

Regarding the categories of penalties, the new regulation starts with the principal penalties, continues with the accessory penalties and ends with the complementary penalties and, as elements of novelty, in the category of the complementary penalties, the content of the penalty regarding the ban of certain rights was diversified and a new penalty was introduced, consisting in the posting or publication of the definitive judgment of conviction.

The principal penalties are life imprisonment, imprisonment and fine.

Life imprisonment consists in the deprivation of freedom for an indefinite period of time, but does not apply to those who, upon the date of the pronouncement of the conviction, had already reached the age of 65; instead of life imprisonment, they will receive the penalty of imprisonment for 30 years and the penalty of the prohibition of exercising certain rights throughout its maximum duration. If the convict who executes life imprisonment reaches the age of 65 whilst executing his/her punishment, the penalty of life imprisonment may be replaced by imprisonment for 30 years and the

penalty of the prohibition of exercising certain rights throughout its maximum duration, if the respective convict had a good conduct throughout the carrying out of the sentence and has fully fulfilled all the civil obligations established by means of the sentence, unless he/she can prove that he/she had not been given the opportunity to fulfil them, and has made steady and manifest progress with a view to his/her social reintegration.

Imprisonment consists in the deprivation of freedom for a determined period of time, ranging between 15 days and 30 years, the custodial regime being established according to the law regarding the execution of penalties in relation to the length of the penalty.

The court may suspend the execution of the prison sentence on probation if this is up to 3 years, including in the case of concurrent offenses, when the court considers that, taking into account the person of the offender and his/her behaviour before and after the offense, the application of the penalty is sufficient, even without its enforcement, but the offender's behaviour still need to be monitored for a determined period of time.

The probation period in the case of suspension is a variable one, ranging from 2 to 4 years, but not less than the length of penalty imposed, and the probation system should have a flexible and varied content, allowing both the verification of the offender's behaviour (the offender can be forced not to go to certain places, sporting or cultural events, or to other public meetings, established by the court, not to communicate with the victim or with members of the victim's family, with the people together with whom they committed the offense or with other people, determined by the court, or to stay away from them etc.) and the support offered to the offenders in order to realize the risks to which they expose themselves by committing offenses or to facilitate their social integration (the offender may be required to attend a training school or vocational qualifications, to perform unpaid community service work for a period between 30 and 60 days under the conditions established by the court, to attend one or several programs of social reintegration, to undergo control measures, medical treatment or care etc.).

The system of obligations throughout the probation period is also very flexible, allowing the court to adjust it in relation to the behaviour of the person on probation either by imposing new obligations, increasing or decreasing the conditions provided for the enforcement of the existing ones, or even by ceasing the execution of some of the obligations which it had initially imposed, in order to ensure increased chances of reformation.

The exercise of probation was entrusted to the probation services which operate next to the courts of justice, the probation counselors being people specialized in this kind of activities, in order to be able to contribute in a qualified manner to the process of social reintegration.

The fine penalty now has a new regulations, and also a significantly expanded scope as opposed to the Penal Code in force, by increasing the number of offenses or variations thereof for which a fine may be imposed as a unique penalty, but, especially, as an alternative penalty to the prison sentence.

The setting of the fine is done through the day-fine system, which, by means of the mechanism which determines the amount of the fine, provides a better individualization of the penalty, concretely applied both in terms of proportionality, expressed in the number of days-fine, and of effectiveness, through the establishment of the value of a day-a fine taking into account the patrimonial situation of the convict.

The general limits of the number of days-fine are between 15 and 400 days, and those of the value of a day-fine, between 10 and 500 lei. Regarding the special limits, only the limits of the number of days-fine are progressively variable, since they are determined in relation to how the incrimination rule provides the fine to be either a unique penalty, or an alternative to the prison sentence of certain duration. The court can either increase the special limits of the fine penalty or apply the fine cumulatively to the prison sentence, in those cases when the offense was committed in order to obtain a patrimonial gain.

In the hypothesis in which the convict acts in good faith, but is unable to carry out, in all or in part, the fine penalty and cannot be foreclosed for non-accountable reasons, the court, with the prior consent of the convict, replaces the days-fine with a corresponding number of days of community service. Regulated in this manner, community service appears, in terms of its legal nature, as a substitute form of execution of the fine penalty in the case of those persons who act in good faith, but are insolvent, and consent to the execution of the fine penalty in this way. Until the full performance of the community service obligation, this obligation may cease if the convicted person pays the amount of money corresponding to the days-fine still unexecuted or may be converted into deprivation of freedom by replacing the unexecuted days-fine into days in prison, in those cases in which the person convicted does not perform the community service under the conditions set by the court or commits a new offense.

The accessory penalty consists in the ban, during the period of execution of the custodial sentences, of the rights whose exercise was prohibited by the court as complementary penalty. The accessory penalty of the prohibition of the exercise of certain rights is executed from the moment when the conviction becomes final and definitive and until the principal custodial sentence has been served or deemed as served.

Complementary penalties are the prohibition of certain rights and military degradation.

The complementary penalty consisting in the prohibition of exercising certain rights means the ban to exercise, for a period of one to 5 years, of one or more of the following rights: the right to be elected in public authorities or any other public offices, the right to hold an office involving the exercise of state authority; the right of a stranger to be on Romanian territory; the right to vote; parental rights, the right to be a guardian or trustee; the right to hold the office, to practice the profession or craft or to engage in the activity which was used for committing the offense; the right to own, carry and use any type of weapon; the right to drive certain types of vehicles determined by the court; the right to leave the territory of Romania; the right to occupy an executive position within a public law legal person; the right to be in certain localities determined by the court; the right to be in certain places or at certain sporting, cultural or other public meeting events, established by the court; the right to communicate with the victim or the members of his/her family, with the people with whom the offense had been committed or with other people, established by the court, or to approach them; the right to approach the home, workplace, school or other places where the victim carries on social activities, under the conditions established by the court of justice.

The new Penal Code provides two new ways of individualisation of criminal penalties under non-custodial regimes.

For the offenses of reduced gravity, the court may order to waive the application of the penalty if the committed offense is of reduced gravity, taking into account the nature

and extent of the consequences, the means used, the manner and circumstances in which it was committed, the reason and the purpose aimed; the penalty provided by law for the committed offense is imprisonment not exceeding 5 years, and the offender does not have a prior conviction, with the exception of the offenses committed with negligence or those offenses which have been decriminalized or for which rehabilitation intervened or the term of rehabilitation had passed. In this case, it is sufficient to apply a warning, since the establishment, application or enforcement of a penalty would be likely to cause more harm than help in the recovery of the defendant.

One cannot order to waive the application of penalty if, for the same offender, one has already ordered the waiver of the application of penalty in the last 2 years preceding the committing of the offense for which the offender is being put on trial or if the offender had evaded trial or prosecution or had tried to block the establishment of the truth or of the identification and prosecution of the author or participants.

If, within 2 years from the final decision ordering the waiver of the application of penalty, it is found that the person against whom such measure was taken had committed, prior to the final and definitive judgment, another offense, for which a penalty was established just after the expiry of this term, the waiver of the application of penalty is annulled and one established the penalty for the offense which initially attracted the waiver of the application of the penalty, and then applying, as appropriate, the provisions regarding concurrent offenses, relapse into crime or intermediary plurality.

Another way of individualization of penalty in a non-custodial regime is the postponement of the application of the penalty.

The court may order the postponement of the application of penalty (conditional sentence), establishing a surveillance term, if the established penalty, including in the event of concurrent offenses, is the fine or imprisonment not exceeding 2 years; the offender has not previously been convicted to imprisonment, with the exception of the offenses committed with negligence or those offenses which have been decriminalized or for which rehabilitation intervened or the term of rehabilitation had passed; the offender has expressed his/her agreement to provide nonpaid community service work; in relation to the person of the offender, the behaviour demonstrated before committing the offense, the efforts made by the offender to remove or mitigate the consequences of the offense, as well as his/her possibilities of self-correction, the court may consider that the immediate application of a penalty is not necessary, but that the offender's behaviour must be supervised for a specified period of time.

One cannot order the postponement of the application of penalty if the penalty provided by law for the committed offense is of 7 years or more or if the offender evaded trial or prosecution or had tried to block the establishment of the truth or of the identification and prosecution of the author or participants.

The surveillance period is of 2 years and is calculated from the date the judgment ordering the postponement of the application of penalty becomes final and definitive.

Throughout the surveillance period, the person which was granted the postponement of the application of penalty must follow the surveillance measures and must carry out his/her incumbent obligations, under the conditions established by the court.

The surveillance of the execution of the obligations established by the court is performed by the probation service, which must notify the court in case there intervene reasons which justify either the modification of the obligations imposed by the court, or

the cessation of the performance of some of them; the supervised person does not comply with the surveillance measures or does not perform, under the established conditions, his/her incumbent obligations or the supervised person did not fulfill his/her civil obligations established by means of the judgment, no later than 3 months before the expiry of the surveillance term.

If, throughout the surveillance term, the supervised person, with bad faith, does not comply with the surveillance measures or does not perform the obligations imposed, the court will revoke the postponement and will order the application and enforcement of the penalty.

In the case in which, until the expiry of the surveillance term, the supervised person does not fully meet the civil obligations established by way of the judgment, the court will revoke the postponement and will order the application and enforcement of the penalty, unless the person proves that he/she was given absolutely no opportunity to fulfill them.

If, after the conditional sentence, the supervised person committed a new offense, with intent or with exceeded intent, discovered during the surveillance term, for which a conviction was adjourned, even after the expiry of this term, the court will revoke the conditional sentence – aka the postponement – and will order the application and enforcement of the penalty. The sentence penalty applied as a result of the revocation of the postponement and the penalty for the new offense are calculated according to the provisions regarding concurrent offenses.

If the subsequent offense is committed with negligence, the court may maintain or revoke the conditional sentence.

If, throughout the surveillance term, it is discovered that the supervised person had committed an offense until the adjudication of the final and definitive judgment deciding the conditional sentence, for which the court applied a prison sentence, even after the expiry of this term, the conditional sentence is annulled and the court will apply, according to circumstance, the provisions regarding concurrent offenses, relapse into crime or intermediary plurality.

The person who received a conditional sentence will no longer have to execute the penalty as well and is not subject to any disqualification, prohibition or incapacity which could result from the committed offense, provided he/she does not commit a new offense until the expiry of the surveillance term, the postponement of the application of penalty was not revoked and no cancellation cause has been discovered.

The postponement of the application of penalty – the conditional sentence – has no effects upon the execution of the safety measures and of the civil obligations set out in the judgment.

Another category of criminal sanctions regulated distinctly from penalties are the safety measures.

Through the proposed regulation, the legislator aimed to strengthen the mainly preventive character of these criminal law sanctions which may be applied only if an offender committed an offense provided by the criminal law and unjustified, an offense which reveals the existence of a state of danger. It is however not necessary that this deed be also imputable, which means that the safety measures can be applied also in the presence of a cause of non-imputability (*e.g.* irresponsibility), but not in the presence of a justifying cause.

The safety measures can have a medical nature (the obligation to undergo medical treatment and hospital care), deprivation of certain rights (prohibition to exercise

certain functions or professions) and safety measures with a patrimonial nature (special confiscation and extended confiscation).

The safety measure of the prohibition to exercise certain functions or professions differs from the complimentary penalty with the same content in that the former is determined by certain inability, lack of preparation or other circumstances which make the offender unfit to occupy a certain position, to exercise a certain profession or trade or to carry out another activity and one can take the measure of prohibiting the exercise of the right to occupy that function or to exercise that profession, trade or activity, whilst the complementary penalty is determined by the fact that the respective function or profession was used by the offender in committing the respective offense.

The special confiscation regards the goods by committing the deed provided by the criminal law; the goods which were used, in any way, or intended to be used to commit an offense under the criminal law, if they belong to the offender or if, belonging to another person, the latter was aware of the purpose of their use; the goods used, immediately after committing the offense, to ensure the escape of the perpetrator or the keeping of the gain or of the product obtained, if they belong to the offender or if, belonging to another person, the latter was aware of the purpose of their use; the goods which were offered to determine the perpetration of an offense provided by the criminal law or to reward the perpetrator; the goods acquired through the perpetration of the deed provided by criminal law, if they are not returned to the injured person and to the extent to which they do not serve for his/her compensation and the goods whose possession is prohibited by criminal law.

By means of the transposition of the Framework Decision no. 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, the measure of extended confiscation has been regulated for the first time in our legislation.

The legislator decided to submit to the extended confiscation goods, other than those subject to the special confiscation, in case the person is convicted for committing serious offenses, expressly provided by the law (organized crime, corruption, drug or human trafficking etc.), if the deed is likely to procure for him/her a material gain and the penalty provided by law is imprisonment of 4 years or more.

The extended confiscation is ordered if the value of the goods acquired by the convicted person, within a period of 5 years before and, if appropriate, after the time of the offense, until the date of issuing the document instituting the proceedings, clearly exceeds the his/her revenues, lawfully obtained, and the court is convinced that the respective goods derive from criminal activities having the nature of those provided by law. The confiscation may not exceed the value of the goods thus acquired, which exceeds the level of the lawful revenues of the convicted person.

Title V of the General Part is reserved for regulations regarding the minors.

In the Romanian criminal law, the minor under the age of 14 is not criminally liable, the minor who is aged between 14 and 16 is criminally liable only if it is proved that he/she had committed the act with discernment, and the minor who has attained the age of 16 is criminally liable according to the law.

The major change brought by the new Criminal Code in this respect is the complete renunciation of the penalties applicable to the minors who are criminally liable, in favour of the educational measures, similarly to other European legislations.

The Criminal Code sets out, as a rule, the application, in the case of minors, of non-custodial, educational measures; the custodial measures represent the exception

and are reserved for those hypotheses of serious offenses or for minors who have committed multiple offenses.

The non-custodial educational measures are, in ascending order of their gravity: civic training, surveillance, weekend confinement and daily assistance.

The custodial educational measures are: confinement in an educational center for a period of one to 3 years and, respectively, confinement in a detention center for a period of 2 to 5 years or, in exceptional cases, from 5 to 15 years. The measure of confinement in a detention center is ordered for a period of 5 to 15 years only in the event of committing a very serious offense, for which the law provides life imprisonment or imprisonment for at least 20 years.

Title VI of the General Part is devoted to the criminal liability of legal persons.

In regulating the criminal liability of the legal person, the legislator maintained the direct liability model of the legal person. Accordingly, the criminal liability of the legal person can be brought about by any natural person acting in achieving the object of activity or in the interest or on behalf of the legal person.

The state and public authorities, as well as public institutions, are not criminally liable, with the remark that the latter are not criminally liable only in the case of the offenses committed in the exercise of an activity which cannot be the object of the private domain.

The criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed to the perpetration of the same deed.

The principal penalty applicable to the legal person is the fine, and the complementary penalties are as follows: the dissolution of the legal person, the suspension of the activity or of one of the activities of the legal person for a period from 3 months to 3 years, the closure of some work sites of the legal person for a period from 3 months to 3 years, the prohibition to participate in public procurement procedures for a period of one to 3 years, the placement under judicial supervision and the posting or publication of the conviction.

The amount of the fine is determined through the day-fine system. The amount corresponding to a day-fine, ranging between 100 and 5.000 lei, is multiplied by the number of days-fine, ranging between 30 and 600 days.

Since the complementary penalties consist of the dissolution of the legal person or the suspension of the activity or of one of the activities of the legal person for a period from 3 months to 3 years, these penalties cannot be applied to public institutions, political parties, trade unions, employers' organizations and religious or national minorities organizations, constituted according to the law.

The causes which eliminate criminal liability are: pre-conviction amnesty, prescription of criminal liability, lack of prior criminal complaint and the withdrawal of the prior criminal complaint, in the case of the offenses for which the exercise of the criminal action is conditioned by such a complaint, and the reconciliation of the parties in the case of the offenses for which the law expressly provides it.

The causes which eliminate or modify the execution of penalty are: post-conviction amnesty, pardon and prescription of the execution of penalty.

Prescription does not exclude criminal liability or the execution of the penalty for the offenses of genocide, crimes against humanity and war crimes, regardless of the moment when they were committed, as well as for the offenses of homicide and other intentional crimes followed by the death of the victim.

Rehabilitation ceases the disqualifications and prohibitions, as well as the incapacities arising from conviction. Rehabilitation does not result in the obligation of reintegration in the position from which the convict was removed following the conviction or of restoring the lost military rank. Rehabilitation has no effects on the safety measures.

The Special Part of the Penal Code is structured into twelve titles, as follows: Offenses against the person, Offenses against property, Offenses regarding state authority and borders, Offenses against justice, Offenses of corruption and offenses committed on the job, Offenses against public security, Offenses which affect relationships regarding social life, Electoral offenses, Offenses against national security, Offenses against the fighting capacity of the armed forces and Crimes of genocide, crimes against humanity and war crimes.

As concerns the systematization of the Special Part of the code, the legislator has abandoned the structure of the previous Penal Codes, regulating first of all the offenses affecting the person and their rights, and only afterwards those offenses which affect the state's attributes, an outlook which reflects the importance paid to the values related to the person and their rights and freedoms in the hierarchy of the values which enjoy protection, including through criminal means, hierarchy which can be found in other European Penal Codes as well.

As regards the offenses against life, the legislator expressly regulated the offense of *murder at the request of the victim*, as a mitigating form of homicide, thus not only returning to the tradition of our law from the interwar period, but also to the tradition of most European codes.

A separate chapter has been devoted to those offenses meant to protects the foetus against all aggressions, by incriminating, along the offense of illegal abortion, provoked outside health units or by non-specialized personnel, also the offense of injury against the foetus, meant to ensure the protection of future life, for the period between the moment of the start of the birth process, at which point one can no longer talk about abortion, and the moment of the conclusion of this process, when we already are in the presence of a person, which can be a passive subject to the offenses of bodily injury or murder.

The legislator systematized, within the offenses against the person, the offenses of trafficking and exploitation of vulnerable persons, which were, up until now, incriminated in a special law. Therefore, in addition to human trafficking, child and migrants trafficking, following the ratification by Romania of the Council of Europe's Convention on Action against Trafficking in Human Beings, a new incrimination has been introduced: the use of the services covered by the exploitation of trafficked persons.

The regime sanctioning family violence was aggravated, and, amongst the offenses against sexual freedom and integrity, the legislator introduced the sexual harassment committed by repeated acts and which creates, for the victim, an intimidating or humiliating situation.

The rules incriminating the deed against property were grouped in four chapters, given the factual situations in which the goods might find themselves as patrimonial entities, as well as the character or nature of the illegal actions through which these factual situations might be changed. Thus, in addition to the offenses of theft and robbery, the legislator chose to incriminate also the deeds against property which are committed with infringement of trust, category in which there have been included, apart

from the breach of trust, fraudulent management, appropriation of the found good and fraud, which had existed in the previous codes as well, new deeds have been added, whose illicit actions are based on an infringement of trust, such as the breach of trust by defrauding creditors, fraud on insurance, misappropriation of public tenders and patrimonial exploitation of a vulnerable person.

The regulation of the offenses perverting the course of justice knows some major changes, which aim to ensure the legality, independence, impartiality and firmness of the achievement of justice, by criminally punishing those offenses liable to seriously affect, ignore or undermine the authority of justice.

The legislator has incriminated, as new deeds of obstructing the course of justice: the revenge for the help offered to justice, pressures on justice, compromise of the interests of justice, contempt of court, judicial outrage, unfair assistance and representation, and the offense of money laundering, incriminated by means of a special law, was included in this category.

The offenses of corruption and the offenses committed on the job are structured into three chapters: the first chapter contains the corruption offenses, the second chapter, the offenses committed on the job, and the third chapter is devoted to those offenses which affect the financial interests of the European Communities.

The code provides that the provisions contained in the chapter "corruption offenses" are applied, correspondingly, to the acts of corruption committed by foreign officials or in connection with their work, and, following the ratification by Romania of the Additional Protocol to the Criminal Law Convention of the Council Europe regarding corruption, the above mentioned provisions were completed and extended to also include the acts of giving and taking bribery committed by persons involved in the settlement of disputes by means of national or international arbitration.

Within the offenses committed on the job, the legislator incriminated the act of misuse of one's position for the purpose of sex, a new indictment, having as starting point the offense of sexual harassment in the current regulation, and contains the so-called vertical harassment, by abuse of power, as well as new hypotheses of incrimination.

In the category of the offenses against public order, the legislator has redefined the content of the offense of organized criminal group, incriminated until now by Law no. 39/2003 regarding the prevention and fight against organized crime.

Article 2 letter (a) of the United Nations Convention against Transnational Organized Crime defines the organized criminal group as "a structured group of three or more persons, existing for a certain period and act in concert with the aim of committing one or more serious crimes or offenses under this Convention, to obtain, directly or indirectly, a financial or other material benefit".

The organized criminal group was identically defined by Article 2 para. (1) of Law no. 39/2003 which, in addition, added the following: "the group formed occasionally to the purpose of immediately committing one or several offenses and which has no continuity or definite structure or pre-established roles for its members inside the group does not constitute an organized criminal group".

The current Penal Code defines the organized criminal group as "a structured group of three or more persons, constituted for a certain period of time and for acting in a coordinated manner with the aim of committing one or more offenses".

As one may notice, in the Romanian criminal law, the definition of the organized criminal groups has passed from the forms of transnational organized crime to the

forms of domestic, national crime in order to replace criminal associations, which has been criticized by some authors because it would mean, in fact, a distortion of the meanings and purposes of the incrimination of the serious forms of organized crime, through the trivialisation of evil.

The crimes of genocide, crimes against humanity and war crimes were redefined in accordance with the Statute of the International Criminal Court Statute, following its ratification by Romania by means of Law no. 111/2002.

Regarding the sanctioning regime of offenses, the new legislation has started from the need for readjustment within normal limits of the punitive treatment; the practice of the last decade has shown that an exaggerate increase in the limits of penalties is not an efficient solution in the fight against crime, and therefore, in general, the special limits of the penalties provided in the new Code are usually lower than in the previous code, the new Penal Code constituting, thus, a more favourable law.

The correlation of the provisions of the Penal Code with many of the European Penal Codes helps to enhance the international cooperation with the EU countries.

Although some provisions from the new Penal Code aroused contradictory discussions within the legal literature, it constitutes a modern code, connected to European.

Economic Bribery as a Part of Economic Criminal Law and a Concomitant of Political Corruption

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Abstract:

Corruption is a term used by criminology, but the new Hungarian Criminal Code included it as a concept of substantial criminal law since it bribery and the related criminal acts are discussed under the title of crimes of corruption.

In case of bribery two actions are required and confronted, meaning that it has at least two subjects: an active and a passive briber. The active briber is the one for whom a decision is important. The passive briber is the one who has the right to pass the decision. The active briber gives or promises a kind of advantage or price and in exchange therefore this person expects the passive briber to pass a decision as it was required by the active briber. The bribed person accepts this advantage and usually decides according to the expectations of the active briber. This process is like a business agreement, and unfortunately is almost as usual in the everyday life of Hungary, Europe and China as well.

Keywords: *economic bribery; administrative corruption; the new Hungarian Criminal Code; high rate of invisibility.*

Crimes under the Chapter on Purity of Public Life have a common legal object, namely the lawful, unbiased and un-influenced operation of state, social bodies and official and other relevant persons with public tasks. „In Hungary the political and economic change was accompanied by a widespread corruption. The indicators of corruption are still the shortage or wrong distribution of resources, the overly bureaucrat legal and administrative system, and the network of mutual favors. The society went through significant changes that undermined the generally accepted norms of conduct (loosening of morals) and strengthened the tendency of corruption. Besides, the structure of corruptive acts was changed in certain sectors by transfer from controlled economy to liberal market economy. In the shortage economy of socialism, the path of corruption led from the buyer to the seller in order to obtain limitedly available goods and services (quality foods and imported goods). Following the change of regime, corruption was directed from the seller (contractor) to the buyer (client) in certain sectors of life (business life, public procurement etc.).

In Hungary the most common forms of corruption are of an administrative nature, and they derive from the interweave of political and economic interests.[1] Policemen, tax and customs inspectors are often accused with fraud, or caught in such criminal acts thanks to the strengthening of monitoring of internal affairs.[2] In the health system

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[1] László Kőhalmi: A gazdasági növekedés gátlótényezője: a korrupció [An obstacle of economic growth: corruption]. JURA 2013/2. pages 100-101.

[2] Balázs Elek: A bíró büntetéskiszabási szemléletének jogalkotói alakítása. Kriminológiai Közlemények 70. Válogatás a Magyar Kriminológiai Társaság 2011. évben tartott tudományos rendezvényein elhangzott előadásokból. 2012. Budapest, pages. 20-33.

several doctors use the apparatus of public hospitals for their own benefit in order to get an income. 77% of the respondents of the enquiry thought that it is a «generally accepted» custom to give gratitude-money or tip to the doctor of charge for a supply that they are entitled for free. This is regarded as an unlawful practice neither by the patients nor by the doctors themselves in most of the cases. According to the public opinion, policemen – especially those who carry out public road control, inspections of tax fraud and drugs and customs and revenue officers – are connected mostly to corruption.

The 39% of the respondents thinks it is a generally accepted custom to pay in order to avoid a fine for a traffic misdemeanor, and 28 % thinks that bribery for importing and exporting goods is «typical». It is a generally accepted custom to pay for a fast registration and incorporation at the registry of title deeds or licenser authorities, especially in traffic-related areas".[3]

A typical unfortunate characteristic of corruption natured crimes is the high rate of invisibility. The crimes that came to the cognizance of the authorities vary between about 300-1000.

The new Criminal Code simplified the structure of the criminal offences, so it regulates crimes against the purity of public life and international public life in once chapter, since the criminal act and sanctions were the same regarding these crimes. Therefore, the new Criminal Code at the end of each criminal offence, where it is necessary for the protection of international public life and the legal acts of the European Union, gives a separate paragraph for the case when the crime is committed in connection with international officials. The new Criminal Code introduces active bribery as „bribery" and passive briber as „accepting bribery" under a separate Title. A significant change in comparison to the past Criminal Code of Act IV of 1978 is that instead of the suspending the criminal liability the new Criminal Code only makes it possible to unrestrictedly mitigate or omit the sentencing of a person who co-operates with the authorities in investigating crimes of bribery.[4]

The new Criminal Code regulates he following crimes und this Chapter:
- bribery
- accepting bribery,
- bribery of officials,
- accepting bribery as public official,
- bribery in court proceedings and administrative proceedings,
- accepting bribery in court proceedings and administrative proceedings,
- failing to report bribery,
- buying of influence,
- influence peddling.

In this study we only examine economic corruption and the criminal equivalents thereof, bribery and accepting bribery. The Hungarian economy is infiltrated deeply by corruption, but it is not true to attribute this to the change of regime and reintroduction of capitalism. The problem lies in the fact that we are witnessing the spreading of corruption in the past 25 years irrespective of the governing political party.[5] Certain

[3] http://www.transparency.hu/KORRUPCIOROL_ALTALABAN (15th March 2013).

[4] According to the Reasoning of Act C of 2012.

[5] László Kőhalmi: Let's talk about the political corruption in Hungary honestly. Analele Universitatii de Vest Din Timişoara. Drept 1/2010. pages 72-73.corruption.

economic crimes are hardly shown by the official criminal statistics, but they have a standard name. For example, money laundering is called „the transactions need some paperwork", the money paid in political and economic corruption is often referred to as „constitutional expenses" during discussions of contractors, but sometimes they say „we take some albany grease" to the administrator at the self-government.

1. The term and forms of economic corruption

Economic corruption is defined differently by many.[6] The term created by Iván Münnich is maybe the most accurate one, which says that economic corruption is decision competence offered for sale.

Basically it arises in three areas:

- corrupt practices related to privatization. The privatization of companies and state farms was accompanied by the suspicion of corruption, but only a few cases ended up at court. It is a fact that sometimes certain syndicates and politics related groups got non-losing productive and supplying plants for a strikingly cheap price, and at other times crediting related to privatization gave opportunity to form corruptive connections.

- public procurement, which placed corruption to a higher level: now not the employee brings an invoice of a higher value of a purchased computer, but for example the financial executive of the public institution gets some hoops of cash in a briefcase from the company delivering the computers, as a gratitude… Mariann Kránitz differentiates between two types of corruption regarding public procurement. On the one hand the negligent management of legal provisions and on the other hand their evasion. It is quite common method that there is only one competitor in an invitation-based public procurement, who makes an actual offer and arranges for other competitors whose participation is only pretense.[7]

- the business segment. Small and middle businesses of moderate capital are usually involved in sustenance corruption, for example black market employment, tax fraud, pro forma invoices, refunding after orders, cartel agreements. In case of larger companies the aim of corruption is usually the increasing of profits of the company or individual profiting of an employee of the company. The risk of corruption lies in the individual actions and cartel agreements among large companies. The first one includes the case where the buyer gives preference to the supplier who promises some kind of excess-supply. In the latter case, greatly acquainted companies agree who bring what to the purchase.[8]

Mariann Kránitz during analyzing each forms of economic corruption highlights the contamination of building industry, public health, agriculture and food industry.

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[6] László Kőhalmi: New trends in Hungarian economic crime. In: Criminalitatea Economică În Contextul Crizei (Coordonatori: Viroel Paşca – Flaviu Ciopec – Magdalena Roibu). Universul Juridic S.R.L. Bucureşti. 2013. pages. 38-40.

[7] Mariann Kránitz: A korrupció utolsó 25 éve Magyarországon [The last 25 years of corruption in Hungary] Ügyészek Lapja 2006. 5. szám pages 38-39.

[8] Zoltán Mirgay Dr.: A gazdasági korrupció közelmúltja és jelene hazánkban, nemzetközi kitekintéssel [The recent past and present of economic corruption in Hungary with and international outlook]2008., kézirat page 28.

However, we meet corruptive situations along the everyday life as well, for example the bribery of public supervisors, tax inspectors and purchase of language certificates.[9]

2. The outline of the regulation on bribery

Bribery
Section 290

(1) Any person who gives or promises unlawful advantage to a person acting for or in the interest of an economic organization, or to another person on account of such a person, to induce him or her to breach his or her duties is guilty of a felony punishable by up to three years of imprisonment.

(2) The punishment shall be one to five years of imprisonment if the crime defined in (1) is committed regarding a person acting for or in the interest of an economic organization with the power to take measures independently.

(3) The punishment shall be
a) one to five years of imprisonment in case of (1); and
b) two to eight years of imprisonment in case of (2)
if the bribery is committed as a criminal conspiracy or in the manner of a business operation.

(4) Any person who commits bribery regarding a person acting for or in the interest of a foreign economic organization shall be punishable in accordance with (1)-(3).

(5) The punishment may be reduced without limitation – or dismissed altogether in cases deserving special consideration – if the offender of the crime defined in (1) reports the act to the authorities before the authorities are informed of it from any other source, and reveals the circumstances of the criminal act.

The protected legal object of this crime is the purity of public life (and international public life) and the purity of economic and social relations.

The object of the committed crime is the unlawful advantage, which can be financial, personal or even moral. The most typical is financial gain, and within this the most liquid is cash. Other very typical forms of financial gain:

- money deposited to a bank account (for example transfer from an offshore account to another offshore account),
- trust, loan[10] (in case of a free loan a money grant, and in case of a loan on interest the fact of granting credit can be regarded as an advantage. It is important – from the point of view of confiscation – that it is a real or false loan - BJD 3923.),
- cancelling a debt.

[9] Mariann Kránitz: A korrupció utolsó 25 éve Magyarországon [The last 25 years of corruption in Hungary] Ügyészek Lapja 2006. 5. szám pages 38-39.

[10] Granting a loan is also financial advantage. (BH 1989/431.).

Personal advantage can be:

legal transaction subject to certain liabilities a (for example a buying and selling with better conditions than at the market. A legal transaction subject to certain liabilities – *e.g.* contract of sale – can be in certain cases a financial or maybe personal advantage. - BH 1981/268., BH 1983/186., BH 1994/62.),

securing a possibility for an income (Typically a passive briber for one of his family member or relative. Personal advantage can be a kind of employment possibility with an income, *e.g.* promise of a part-time job - BJD 3911, 6222, 8013.),

entering into sexual relations (typically between a policeman and a prostitute).

It is necessary to introduce a problematic question that was challenged by the practice of the courts: the problems of „commercial gifts". We think that the value of the received advantage must always be evaluated in any aspects of bribery, and so should the motivation of the bribed person be examined whether the advantage is suitable for directing his motivation. The practice of the courts cannot go in the opposite direction than the social reality that there are „commercial gifts" and „customary quantity" of gifts in our everyday life.[11]

The advantage in these cases does not count as illegal due to the lack of danger to society and if two conditions met at the same time:

it has a very little value that is incapable of motivating the recipient (an example is the formerly mentioned commercial gift),

the gift is not given upon the request of the recipient and the recipient does not give anything in exchange.

An action can constitute a crime if it poses a danger to the society; it is a condition element of a crime. It is an objective and social category.[12] „The behaviour itself cannot be considered, consideration can only be taken due to the caused or aimed effect. We regard an act as useful or harmful depending on the caused or foreseeable effects. An act is dangerous, if the situation it causes is more disadvantageous than the actual. An act is dangerous to the society if the caused or foreseeable situation is more disadvantageous for the society".[13]

The danger to society is important for the legislator since only those acts should be considered as crimes which mean a danger to the society to a degree that the tools of other fields of law are not enough.[14]

„However, the danger to the society is a meaningful category for the law enforcement institutes as well – according to the point of the unified legal literature. The object of the legal dispute is and always has been whether the legislator is entitled to establish, if an act violating the law lacks the danger to society – without having any reason for exclusion of criminal liability stands-, that is, the only result of such establishment would mean that the act does not constitute a crime. In this regard the

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[11] See: the case of Csaba Molnár at the Metropolitan Court of Appeal (=JeMa 2010. 1. szám pages 33-38.).

[12] Objective, since this is the only concept of a crime that does not depend on the decision of the legislator. This is not created by the legislator; it is only recognised and reacted to. It is a matter of content as well, cause it answers the question why the legislator rendered the given behaviour to be criminally punished.

[13] József Földvári: Magyar büntetőjog Általános rész [Hungarian Criminal Law General Part] Osiris Kiadó Budapest, 2002. 81. oldal.

[14] This can be deducted from the principle of the basic principle of subsidiarity, as it was referred to Miklós Holán.

legal practice is uniform and published many cases where the court established the judgment on acquittal on the lack of an element of a crime."[15]

Another question must be settled with regard to unlawful advantage, being the problem of confiscation of property. We agree that when the bribed person gets the advantage during a corruption crime from the active briber the property originating from the crime, gained during or in connection to the commitment of the crime should be subject to confiscation according to section 74. § para. (1) point a). Confiscation cannot be ordered against the passive briber, if he did not get a financial gain during or in connection with the committed crime. However, if the financial gain is already not in the possession of the active briber, confiscation should be ordered against him on the property that was the subject of the given financial gain. A property that was only promised to be given cannot be confiscated on the legal basis, since it was not gotten by anyone during a crime or in connection thereto and it did not leave the possession of the active briber and so confiscation of property cannot be ordered."[16]

The subject of the crime can be anybody. The crime is intentional (the intention being the breach of duty), therefore it can only be committed intentionally and only with direct purpose.

The crime has two acts of commitment:

- giving advantage,
- promising advantage.

The advantage means a positive change to the situation before the crime was committed, and it is unlawful, if it is capable of motivating or influencing the concerned person. The advantage shall be given or promised to a person acting for or in the interest of an economic organization, or to another person on account of such a person. According to section 459. § para. (1) point 8. economic organization shall mean **an economic organization listed in the Civil Code, as well as organizations which, according to the Civil Code, are subject to the provisions on economic organizations concerning the civil relations of such organizations in connection with their economic activities**

According to the Civil Code economic organizations are: state-owned enterprise, other state-owned economic organizations, co-operative, building society, European co-operative society, economic company, European company, union, enterprises of certain legal entities, affiliated company, water management society, forest management society, executive office, one-person firm, and personal contractor. Provisions on economic organizations prevail to financial managing activities of local governments, publicly financed institution, association, public body and foundation, unless the law says otherwise.

The new term „a person acting for or in the interest of an economic organization" includes a wider range of people and at the same time it is exact and easily interpreted in light of legal security.

The crime can be committed in national and international relations according to paragraph (4).

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[15] Ervin Belovics: A jogellenesség és a társadalomra veszélyesség konfliktusa [Conflict of illegality and danger to society] (=Iustum Aequum Salutare III. 2007/3. szám 36. oldal).

[16] Belovics-Molnár-Sinku: Büntetőjog II. a 2012. évi C törvény alapján [Criminal law II according to Act C of 2012] HVG ORAC Kiadó Budapest, 2012. 428. oldal.

The following aggravated cases are provided by the Criminal Code, partly in conformity[17] with the past Criminal Code: It is an aggravated case when bribery is committed by a person acting for or in the interest of an economic organization with the power to take measures independently. Such person is someone who has the right to decide on important questions on the rights and obligations of the firm and persons related to the firm. For example, the manager of the economic organization commits the felony of bribery of a person acting for or in the interest of an economic organization, if he gives possession of a car to the manager of the financial institution – in order to get a large sum of loan (BH 2004/6.).

It is another aggravated case, if bribery is committed as a criminal conspiracy or in a business-like manner (See explanatory provisions of 459. § para. (1) points 2. and 28. of the Criminal Code.)

The counts of bribery follow the number of persons to whom the unlawful advantage is given or promised (BH 2006/178.).

The punishment can unlimitedly mitigated - or altogether in cases deserving special consideration – if the offender of the crime defined in (1) reports the act to the authorities before the authorities are informed of it from any other source, and reveals the circumstances of the criminal act. With this regulation the legislator gives the possibility and responsibility of decision making to the judge, so he can decide on finding the perpetrator criminally liable and impose a punishment after examining the specific circumstances of the case.[18]

3. Accepting a Bribe

Section 291

(1) Any person who requests an unlawful advantage in connection with his or her activities carried out for or in the interest of an economic organization or

[17] The new Criminal Code establishes as aggravates cases if the bribery according to paragraph (1) or (2) is committed in a criminal conspiracy or in a business-like manner. This way the legislator meets the requirements of the practice to impose heavier sanctions to such crimes. (According to the Reasoning of Act C. of 2012).

[18] One of the most important change of the new Criminal Code is that the punishment can unlimitedly mitigated - or altogether in cases deserving special consideration – if the offender of the crime defined in (1) reports the act to the authorities before the authorities are informed of it from any other source, and reveals the circumstances of the criminal act. GRECO Hungary in its third national assessment – according to the standards formed by its practice – proposed the following: „evaluating, and revising the automatic, obligatory and full exemption from criminal liability that is granted for the active and passive briber who committed the act in national private and public sector in case of voluntary restitution. GRECO considered the following as problems in the Hungarian regulation:

- There is no time limit for reporting the crime, it is enough, if it happens just before the authorities get knowledge thereof;
- voluntary restitution means an automatic and total immunity, so there is no possibility to evaluate the individual circumstances of the case; for example why the perpetrator reported it to the authorities;
- there is no possibility for the court to revise this, this means that not the judge decides whether this favour is applicable or not.

Therefore the new Criminal Code changed the old rules, so it is not automatic and the court can decide to what extent it can be taken into consideration taking into account the specific circumstances of the case. There is still no exact time limit to report the crime, since this favour can always be reasoned by a successful investigation of bribery until the authority did not get knowledge from any other source about the crime. (According to the Reasoning of Act C. of 2012.).

accepts such advantage or a promise thereof, or agrees with a party requesting or accepting the advantage on his or her behalf, is guilty of a felony punishable by up to three years of imprisonment.

(2) The punishment shall be:

a) one to five years of imprisonment if the offender breaches his or her obligation in return for the illegal advantage;

b) two to eight years of imprisonment if the crime defined in (1) is committed as a criminal conspiracy or in the manner of a business operation.

(3) If the offender is a person acting for or in the interest of an economic organization with the power to take measures independently, the punishment shall be

a) one to five years of imprisonment in the case defined in (1);

b) two to eight years of imprisonment in case defined in (2) a); and

c) five to ten years of imprisonment in the case defined in (2) b).

(4) Any person who commits the crime defined in (1)-(3) as a person acting for or in the interest of a foreign economic organization shall be punishable in accordance with (1)-(3).

(5) The punishment may be reduced without limitation – or dismissed altogether in cases deserving special consideration – if the offender of the crime defined in (1) reports the act to the authorities before the authorities are informed of it from any other source, hands over the unlawful advantage received or its value to the authorities and reveals the circumstances of the criminal act.

4. Explanatory Provision

Section 292

For the purposes of Sections 290-291, 'foreign economic organization' shall mean an organization vested with legal personality according to the laws of its home country, which is entitled to perform economic activities in its existing organizational form.

The protected legal object of this crime is the purity of public life (and international public life) and the purity of economic and social relations. The object of the committed crime is the unlawful advantage (For the explanation thereof see above.).

The subject of the crime is a person acting for or in the interest of an economic organization, or to another person on account of such a person. So the subject of the crime is quite specific but still wider than in the former Criminal Code.

„It must be noted that the procedure and obligations of the person acting for or in the interest of an economic organization are based on the rule of law, internal regulations based thereof, activity descriptions, agreements. Only those kind of obligation can establish the crime which are provided by law, enforceable upon law, and there is a public interest to fulfill them legitimately. Therefore, the obligations derived from social, institutional and union memberships that are based only ground rules are irrelevant from the point of view of law, and cannot lead to establish bribery."[19]

[19] Belovics-Molnár-Sinku: Büntetőjog II. a 2012. évi C törvény alapján [Criminal law II according to Act C of 2012] HVGORAC Kiadó Budapest, 2012, page 431.

This crime can be committed only intentionally, like other corruption-related crimes.

The crime has three acts of commitment:

- asking for unlawful advantage,
- accepting the unlawful advantage or the promise thereof,
- agreeing with a party requesting or accepting the advantage.

In case of asking for the advantage the passive briber is the one who initiates the bribery and the crime is committed thereby. In case of accepting the advantage the advantage goes from the possession of the active briber to the passive briber. Accepting the promise of the advantage means accepting a foreseeable future advantage. Agreeing with a person who accepts bribery is only punishable, if the advantage is given or promised to a person acting for or in the interest of an economic organization, or to another person on account of such a person, and the person agrees with this. This means that no one can be found guilty in economic life for agreeing with the corruption of his colleague.

It must be noted that corruption-related crimes can be committed usually verbally, and in most cases it is not necessary that the advantage exchange owners actually.

Due to paragraph (4) a person acting for or in the interest of a foreign economic organization can punished in the same way as the crime was committed nationally.

It is punishable more severely, if accepting bribery is committed in the following manner:

the offender breaches his or her obligation in return for the illegal advantage,

the crime is committed as a criminal conspiracy or in a business-like manner,

the offender is a person acting for or in the interest of an economic organization with the power to take measures independently

Regarding the aggravating cases and the counts of criminal acts we would like to refer to the explanations given above regarding bribery.

There are three problems that arose regarding accepting bribery in the Hungarian judicial practice[20]: commission of the sales clerk, bribery in relation to crediting and gratitude money paid to the doctors.

A sales clerk is a person who is employed by a firm or requested as an outside contractor and who can get a certain amount of commission for his or hers tasks. The suspicion of a crime can arise when the commission is disproportionate to the tasks carried out, but it is really difficult to prove.

Crediting is a quite infected area from the point of view of corruption. In reality a loan under favorable conditions can be granted even for the lack of legal conditions, if 7-10% corruption money is paid to the adequate person or persons.

The criminal liability of a doctor can be established, if during his practice he or she asks for or accepts illegal advantage. The viewpoint of the former Criminal Code was the following:

Point II. 15. of Medical Code of Ethics of the Hungarian Medical Chamber gives the definition of gratitude money as of 1st January 2012: „Gratitude money or service is any kind of advantage or profit which is given to the doctor by the patient or his or her relative after the treatment subsequently without a request and only if it does not influence even indirectly the quality of treatment. Money or other advantages requested,

[20] Belovics-Molnár-Sinku: Büntetőjog II. a 2012. évi C törvény alapján [Criminal law II according to Act C of 2012] HVGORAC Kiadó Budapest, 2012. pages 432-433.

expected, offered or accepted shall be separated from gratitude money, since those acts are illegal and constitute a very serious ethical offence."

A doctors do not count as a person acting for or in the interest of an economic organization with the power to take measures independently, so they can only commit the basic case of accepting bribery, and only if they request beforehand or they breach their obligation. If the doctor accepts the voluntarily offered gratitude money subsequently, he can only commit disciplinary offence, not a crime.

Since the new Criminal Code, doctors cannot ask for and cannot accept gratitude money since it constitutes bribery to ask for illegal advantage, or accepting beforehand or subsequently such advantage. The only reason in a doctor's defense who subsequently accepted gratitude money is that gratitude money – if it is given subsequently - fulfills the terms of the Medical Code of Ethics, so it does not count as illegal advantage.

5. Conclusions

I would like to close with some comprehensive remarks. Economic bribery, as piece of economic criminal law in a wider sense raises one question: Has criminal law any ground in economics? I think there is. I say this despite the fact that I can imagine an efficiently operating economy without the intervention of criminal law. I think besides criminal law, administrative sanctions should be convenient to protect economy, if the following two conditions are met:

- business culture amongst normal conditions with a high moral level,
- the upper limit of the foreseeable financial sanctions are determined in a way that they are multiple amount of the obtained or intended illegal profit.

Under such conditions there would be no need for economic criminal law.[21] In Hungary unfortunately none of these conditions are met and only the change of the second one might be expected in the close future. So economic criminal law is and will be necessary for quite a long time.

Economic criminal law is suitable to direct the acts of economic operators in a direction that is expected by the society. However, this role can only be realized, if the majority obey voluntarily or for the fear of the sanctions the rules. Economic criminal law would lose its role of adjusting behaviors, if the majority violates its economic rules (for example they constantly commit tax fraud). We almost hardly can reprove a caught perpetrator when they ask why a criminal procedure was initiated against them from among those thousand or ten thousand who do the same. The situation can be worse when people see that leading politicians and members of the economic élite do not regard the rules of economic criminal law obligatory regarding themselves. In such case economic criminal law rather gives the impression of another risk for the persons in the market[22]. This is a dangerous process, if there are too many side effects; it questions the existence of the use of the medicine after a while.

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[21] László Kőhalmi: The never-ending fight: economic and political corruption in Hungary. DANUBE: Law and Economics Review 4 (1) 2013, pages 81-82.

[22] Barbara Herceg – László Kőhalmi: The fight against corruption in Hungary and Croatia. In: Contemporary Legal Challenges: EU – Hungary – Croatia. Tímea Drinóczi, Mirela Župan, Zsombor Ercsey, Mario Vinković (eds.). Faculty of Law, University of Pécs and Faculty of Law, J.J. Strossmayer University of Osijek. Pécs – Osijek. 2012. -9) pages. 388-389.

The New Romanian Code of Criminal Procedure

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Abstract:

Starting with February 2014, Romania has the latest code of criminal procedure of Europe. A historical opportunity to overtake, adapt and elaborate a legislative work which would enjoy the latest solutions in a huge stake matter. The criminal justice represents to Romania a touchstone, often used in order to verify the progress we have been achieving as a state in the eyes of Europe. The present study aims at identifying the measure in which novelty at a formal level can be associated with efficient innovation in substance, i.e. the measure in which the new code is a professional benchmark as well. Our attempt goes beyond the borders of descriptive and analytical, being critical as well, regarding those provisions of the new code which do not provide the best solutions. We have concluded with a diagnosis of the performances of the new code, supporting the idea that such assessments, although risky, are necessary however in this early stage.

Keywords: *Code of Criminal Procedure; Romania; innovation; mimetism; critics.*

I. Introductory considerations

By entering into force, on 1st February 2014, the new criminal procedure code of Romania has marked the end of the exit of communism. As it has been considered, "more than the criminal code, the code of criminal procedure is <the test paper> of democracy".[1] In the area of the ex communist states, Romania was the only one without a new code of criminal procedure, able to terminate the basis of the old authoritarian legislation. Thus, amongst Romania's neighbours, Bulgaria adopted a new procedural law in 2006, Moldavia in 2003, Serbia and Ukraine in 2012; only Hungary has had an older code (1998). The other states of the former communist influence area have all taken steps in this direction. Poland has had a new code since 1997, Slovakia since 2005, Slovenia since 2006, Croatia since 2009, Macedonia since 2005, Bosnia since 2003, Latvia since 2009, Estonia since 2004, Lithuania since 2002, Russia since 2002, even Albania since 1995, only the Czech republic keeps an old code adopted in 1961.

The appearance of the new code closes an important legislative stage, opportunity which allows formulating a series of remarks.

Firstly, from a diachronic perspective, the code is the fourth in the juridical order of the modern Romanian state. The first code goes back to 1864[2] and it was inspired by the French criminal instruction code of 1808. It had the biggest longevity, staying in force

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[1] Viorel Paşca, *Romanian Criminal Lawsuit between Authoritarianism and liberalism, vol. International Biennial Conferences 2008, Faculty of Law and Administrative Sciences*, Publishing House Wolters Kluwer, Bucharest, 2010, p. 193.

[2] Published in the Official Monitor no. 0 of 2 December 1864.

for over 70 years, till the adoption of the code in 1936,[3] a code with a French and Italian pedigree. This code started producing effects on 1st January 1937 and only had a short life cycle, due to the radical change of the political regime, subsequent to the end of the World War II and the shift of power to the communist forces. Amongst the first measures taken by the new regime, the living proof of the quote mentioned above, were the dramatic modification of the 1936 code; in February 1948 was published the code of the Romanian Popular Republic, which was reflecting the new ratio of state political relationships. Thus a different model of criminal process: the socialist model,[4] which gives up the French model in order to overtake the soviet one. On the same basis, in 1968 a new criminal procedure code[5] was elaborated and entered into force on January 1st 1969 and it will survive, however undergoing numerous "cosmetic" operations for 45 years, till its being abrogated on 1st of February 2014. Since that date, Romania should be thrilled about having the newest code in Europe, at least from a formal point of view.

Secondly, from the perspective of current realities of the judicial life, has been revealed the lack of celerity in the development of criminal lawsuits in general, the significant human and social costs, translated into high consumption of time and financial resources, as well as into the presence of an atmosphere of distrust concerning the efficiency of the act of criminal justice. Several flaws of the criminal lawsuit, such as the measure of preventive arrest, the duration of the procedures, the place of competences and evidence in the criminal matter represented the object of some causes at the European Court of Human Rights,[6] thus the Romanian judicial system receiving numerous and important organizational cues. The old procedural system did not succeeded in balancing, in accordance with the principles of the European family, despite frequent legislative interventions over various institutions. Thus, since 1990 to its abrogation, the criminal procedure code has been modified 35 times, 9 times by Emergency Ordinances, not always fully justified from a constitutional point of view under the aspect of the realities of the emergency situations, and in the last 15 years, the modifications were annual. The maximum of modifications was reached in 2004, when 6 modifications were operated by various normative acts. Quantitatively, the greatest number of modifications operated by one single normative act took place in 1993 (97 amendments), 1996 (74 amendments), 2003 (221 amendments), 2006 (228 amendments), 2010 (65 amendments). This abundance of modifications undermined the stability of the code and led to a non unitary interpretation and application of the criminal procedure law. Consequently, starting with the year 2004, the High Court of Cassation and Justice has been very active performing the role of harmonizing the criminal jurisprudence, through appeals in the interest of law (20 decisions were pronounced in 2006, 37 decisions in 2007, 31 decisions in 2008, 21 decisions in 2009 etc.).

Thirdly, reported to the gestation period of the new code, the way was long and full of gaps. By Government Order no. 829/2007,[7] the Preliminary Theses of the project of

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[3] Published in the Official Monitor no. 66 of 19 March 1936.

[4] Diana Ionescu, *About the Procedural Conception and the New Criminal Procedure Law, A Few Simple Matters*, Criminal Law Notebooks, no. 1/2011, Universul Juridic Publishing House, Bucharest, pp. 77-86.

[5] Published in the Official Monitor no. 145 of 12 November 1968.

[6] Romania ratified the European Convention of Human Rights by Law no. 30/1994, Published in the Official Monitor no 135 of 31 May 1994, date on which this year marks 20 years.

[7] Published in the Official Monitor no. 556 of 14 August 2007.

the Criminal Procedure Code were approved. As it is specified in this document which represented the foundation of the project, it was not intended that the new Criminal procedure Code contain original solutions by all means, compared to the existent legal solutions which proved to be viable in practice or whose use represents a habit to practice, but the new Code was intended to accordingly modify all those solutions which had become obsolete or had revealed a series of anomalies in practice and to introduce new solutions, based on positive comparative experiences or oriented towards the expected favourable outcomes.

The project of the Criminal Procedure Law became Law no. 135/2010,[8] law which needed over 3 years in order to become effective. The entry into force of the new regulation was delayed, since the implementing law was adopted only in 2013.[9] Even at that moment, there had been quite a number of voices[10] claiming the necessity to postpone the new code, from various reasons.

According to the exposal of reasons,[11] the new Code of Criminal Procedure has as essential goal to create a legislative modern framework for criminal procedure matter, able to completely meet the imperatives of the functioning of modern justice, adapted to social expectations and to the necessity of a higher quality of this public service. The objectives of the new Code of Criminal Procedure were the following:

1. provide the legislative framework in which the criminal lawsuit should be faster and more efficient and less costly;
2. unitary protection of human rights and liberties guaranteed by the Constitution and international juridical instruments;
3. conceptual harmonization with the provisions of the new Criminal Code, special attention being paid to the definition of the deed which represents a felony;
4. harmonization of the solutions derived from the Code of Criminal Procedure with the provisions of special laws with criminal procedure dispositions;
5. appropriate regulation of the international obligations assumed by our country regarding the normative acts of the criminal procedure law;
6. settle the adequate balance between requirements for an efficient criminal procedure, protection of the elementary procedure rights, as well as the fundamental human rights, for all the participants to the criminal lawsuit and unitary compliance with the principles regarding the equitable deployment of the criminal lawsuit.

In what follows, we are going to present the main modifications introduced into the new Code of Criminal Procedure, which contribute to the achievement of the general objectives mentioned above.

To what extent the proposed goals have actually turned into results remains to be assessed at the end of the study, though one thing is certain: the construction of the new code seems to be not solid enough, since immediately after its having entered into force,

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[8] Published in the Official Monitor no. 486 of 15 July 2010.

[9] Published in the Official Monitor no. 515 of 14 August 2013.

[10] APADOR-CH, 31 January 2014, *Reasons why the entering into force of criminal land criminal procedure codes should be deferred*, available on www.juridice.ro or Monica Macovei, 29 January 2014, speech available on http://www.revista22.ro/monica-macovei-victor-ponta-sa-amane-intrarea-n-vigoare-a-noilor-coduri-sa-nu-arunce-justitia-penala-n-aer-37242.html.

[11] http://www.just.ro/Portals/0/Coduri/coduri_60309/Expunere%20de%20motive%20Proiectul%20Legii %20privindCodul%20de%20procedura%20penala-forma%20transmisaParlamentului.doc.

the government felt the need to modify it, by means of an Emergency Ordinance.[12] According to one author's statement, the reform of justice is nothing more than the modification of modification.[13]

II. Regarding the fundamental principles of the criminal lawsuit

The major premise taken into consideration in the process of edifying the new code was that an equitable criminal lawsuit, deployed within reasonable time limits, cannot be provided without being supported by new principles, which together with the classical ones, should force the juridical bodies to perform an independent and impartial criminal justice, capable of inducing to the public opinion respect and trust into the act of justice.

This is why, besides the classical principles (finding the truth, the benefit of the doubt, the right to defence, the right to freedom and safety, the respect for the human dignity) new principles were introduced into the new code, such as the right to an equitable lawsuit deployed within reasonable time limits, separation of the judicial functions within the criminal lawsuit, mandatory criminal action tightly related to that of the subsidiary opportunity, *„ne bis in idem,* and as far as evidence is concerned, the principle of loyalty in getting the evidence.

From the category of these new principles, the one referring to the separation of judicial functions within the criminal lawsuit is expected to considerably improve the quality of the act of justice. This principles states and guarantees that there are four judicial functions performing within the lawsuit: criminal prosecution (by the criminal investigation bodies and prosecutor), disposition of fundamental rights and liberties during the criminal prosecution (by the judge of rights and liberties), verification of the legality of referring or not to the court (by procedure of preliminary chamber) and trial by the court of law). Though the idea of regulating such a principle is correct, the new code seems to have missed the opportunity to formulate a clear option able to solve an ancient unsolved issue inherited from the socialist model: which is the procedural function exercised by the prosecutor?[14] Criminal prosecution is not a function nut a stage of the criminal lawsuit. Within this stage prosecution is performed and it traditionally entitles the prosecutor. Furthermore, there is no function of disposition over the rights and liberties or the function of verification of the legality of referring to the court. It might possibly exist the function of instruction, in its contemporary sense, of course.

In order to avoid criminal lawsuits in minor causes, where there is no public interest, the mandatory character of exercising criminal prosecution has been attenuated by introducing the subsidiary principle of opportunity, based on which, in

[12] O.U.G. no. 3/2014, published in the Official Monitor no. 98 of 7 February 2014.

[13] Viorel Paşca, *Reform of Justice: Modification's Modification Reforma justiției: modificarea modificării*, Romanian Pandects, supplement, Publishing House Wolters Kluwer, Bucharest, 2007, pag. 309.

[14] Diana Ionescu, *Quoted Works*, p. 88.

causes of the kind, the prosecutor will be able to give up criminal prosecution, within the legal provisions.

In the chapter dealing with the institution of judicial fine, we have approached the need, felt by most judicial bodies, of regulating and sanctioning the legal abuse in criminal procedural matter.

Analyzed in terms of its general rules, the new code maintains the predominantly continental European character, but it also implies a number of elements whose origins are traced back in the Anglo-Saxon procedure of adversarial type, overtaken in a way which should properly adapt them to our own legislative concept.[15] Such an approach has represented the tendency in modern law and nowadays, the most traditional European countries, such as Germany, Italy or France, have criminal procedures which combine solutions of both systems.

Beyond the positive appreciation which can be brought to the manner in which the new code understood to regulate the principles of criminal procedure, fact which obviously represents some progress, it remains to bring into discussion the criteria according to which the principles of the new procedure emerged. Nothing makes explicit the internal logic of such an operation, given that some of the principles existing already in the previous code have not been materialized into the new regulation (for example, the principle of the active role al judicial bodies) and on the other hand, some notorious principles have not passed yet the threshold of positive law (for instance, the double degree of jurisdiction in criminal matter, equality of arms, protection of the victim's rights, trial according to the same rules of persons in similar contexts- procedural non-discrimination[16]).

Starting from art. 1 of the code which stipulates that "criminal procedure norms seek to ensure the efficient performance of the judicial bodies' attributions....., we cannot lose of sight that above all these principles there seems to be one- the principle of efficiency- which crosses like a red thread the statement of grounds of the new code. Quantitatively, the term "efficient" appears 14 times in the statement of grounds, which legitimately raises the question: what does efficient means in terms of criminal procedure?[17] A high percentage of convictions or a high percentage of acquittals? Or a faster justice?

III. Regarding the competence of courts of law in criminal matter

It was redesigned the division of the material competence of first instance court between courts and tribunals, with the specification that judges will have general

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[15] Viorel Paşca, Flaviu Ciopec, *The Adversarial or Inquisitorial Approach to Romanian Criminal Procedural Law and Practice*, in E. Balogh, A. Hegedüs, P. Mezei, Z. Szomora, J. S. Traser (eds.) *Legal Transitions. Development of Law in Formerly Socialist States and the Challenges of the European Union*, Pólay Elemér Alapítvány, Szeged, 2007, pp. 221-230.

[16] Flaviu Ciopec, *Repetitio Principiis. A Commentary on the Principles of the New Code of Criminal Procedure*, in L. Bercea (ed.) *20 years of juridical education in Timisoara In honorem Radu I. Motica*, Publishing House Universul Juridic,Bucharest, 2012, p. 315.

[17] Diana Ionescu, *Quoted Works.*, p. 87.

competence, while tribunal will have a limited competence. Consequently, courts of law will judge in first instance all crimes, except for those expressly destined to the competence of the tribunal. Courts of Appeal will judge all appeals, while the High Court of Cassation and Justice will judge the appeal in cassation - an extraordinary means of appeal. In exceptional cases, both Courts of Appeal and the

High Court of Cassation and Justice will judge merits of criminal cases having as object crimes committed by certain categories of persons (competence according to the person's quality).

It was redesigned the competence of Military Courts by regulating the competence of military tribunal and military court of appeal and eliminating the intermediary institution of the military territorial tribunal. Thus, the military tribunal will judge in first instance all crimes committed by militaries, up to the rank of colonel included, except for those attributed by the laws to the competence of other courts. The military court of appeal will judge in first instance certain crimes stipulated by the Criminal Code, committed by militaries (higher in rank than colonel), crimes related to the national security of Romania committed by militaries and stipulated by special laws, crimes committed by judges of the military tribunal and military prosecutors of Military Prosecutor's Office, as well as other crimes attributed to its competence by the law. As court of appeal, it will judge appeals against criminal sentences pronounced by the military tribunal.

Amongst the judicial bodies, besides the courts of law and criminal prosecution bodies there were introduced: the judge of rights and liberties and the judge of preliminary chamber. The judge of rights and liberties will solve requests, propositions, complaints, contestations or any other intimations referring to preventive measures, precautionary measures, temporary safety measures, authorisation of searches, special surveillance or investigation techniques or other evidentiary procedures, anticipated administration of evidence and any other cases stipulated by the law. In the procedure of preliminary chamber, the judge of preliminary chamber will verify the legality of the administration of evidence in the stage of criminal prosecution and reference to court and will settle the complaints against the solutions of non-reference to the court, as well as any other cases stipulated by the law.

IV. Regarding the participants to the criminal lawsuit

The parties in the criminal lawsuit have been defined (defendant, civil party and civilly responsible party) with their rights and obligations. The parties are those procedural subjects who exercise or against whom it is exercised a judicial action (civil or criminal). The universal successors of a prejudiced person by the performance of a felony have the quality of civil party, provided that they would exercise civil action within the criminal lawsuit.

The prosecutor, as specialized judicial body of the state, is participant to the criminal lawsuit, not having the quality of procedural party.

Besides the parties, amongst the participants to the criminal lawsuit, there are also the main procedural subjects (the suspect and the harmed person), as well as other

procedural subjects (witness, expert, translator, procedural agent, special finding bodies etc.). The definition of the category of procedural subjects was determined by the need to distinctly present the rights of the suspect and the harmed person, who, even if they are not parties in the criminal lawsuit, must be granted appropriate procedural guarantees, in compliance with the jurisprudence of the European Court of Human Rights and the European regulations regarding the victims' rights.

The suspect is the person who, from the existing data and evidence in the case, raises the reasonable suspicion of having committed an act stipulated by the criminal law, having all the legal rights of the defendant. The injured person is the person who suffered a physical, material or moral injury through the criminal act, his rights being expressly stipulated by the code, amongst which the most important ones are the right to propose administration of evidence by the judicial bodies, the right to be informed, within a reasonable term, about the stage of criminal prosecution, on his express request, the right to see the file, the right to be heard, the right to ask questions to the defendant and the right to formulate exceptions and draw conclusions.

V. Regarding the judicial assistance in criminal matters

The attorney is a participant to the criminal lawsuit, his role, position and attributions according to the law being clearly defined. He assists or represents the parties or the main procedural subjects in the criminal lawsuit. It was expressly regulated the right of the person in custody or arrested to get in touch with his attorney and the confidentiality of the discussions, conversations and mail.

In compliance with the principle of the right to defence, it was regulated the general right of the suspect or defendant's defender to request seeing the file during the entire duration of the criminal lawsuit, as well as the content of this right, which includes the right to study the documents of the file and write down containing notes or information. Furthermore, there were settled the circumstances in which the exercise of this right can be restricted by the prosecutor.

Regarding the right of the attorney to assist in carryout out the prosecution documents, there were expressly stipulated the exceptions from the exercise of this right, respectively the matter of special surveillance techniques or investigation and the search of IT devices or vehicles in case of flagrant crimes.

As far as the right of the attorney to formulate complaint, it was given the opportunity to appeal, at the judge of rights and liberties, the solution of the hierarchically superior prosecutor, if the attorney contested the way in which his rights had been respected.

VI. Regarding evidence, evidence means and evidentiary procedures

a) General considerations

The new code eliminates the limitative enumeration of evidence means, provisioning that any evidence means which are not prohibited by the law, can be used in the criminal lawsuit.

In order to provide an equitable procedure in the stage of administration of evidence, an improvement has been made to the provisions consistent with the right to request administration of evidence, expressly regulating the cases in which the judicial bodies can reject a request referring to the administration of some evidence: when the evidence is not relevant for the object of the evidence in the case; when it is considered that in order to prove the fact which constitutes the object of evidence, sufficient evidence means were administrated; when the evidence is not necessary, since the act is notorious; when the evidence is impossible to get; when the request was formulated by a person who had no right to or it is against the law.

The new code has expressly regulated for the first time the principle of loyalty of procedures in the administration of evidence, in order to avoid the use of any means which might aim at the administration in bad faith of certain evidence or which might lead to the performance of a crime, in view of protecting the person's dignity and his right to an equitable lawsuit and to personal life.

The institution of illegal exclusion or disloyal administration of evidence has known a more detailed regulation. Evidence obtained under torture, inhuman or degrading treatments cannot be used in the criminal lawsuit. Another institution newly introduces is the exclusion of derived evidence (the doctrine of the "distance effect" or "fruit of poisonous tree") whose object is eliminating means of evidence legally administrated but which are derived from evidence illegally obtained. The exclusion of the derived evidence has applicability only when between the illegally administrated evidence and its derived evidence subsequently administrated there is a connection of necessary causality, and the judicial bodies mainly and directly made use of data and information resulted from the illegal evidence, in the absence of any other alternative source and without the definite possibility to be found in the future, in order to legally administrate the derived means of evidence.

b) Hearing of persons

The new code regulates minute regulations for hearing the suspect, the defendant, the injured person, the civil party, the civilly responsible person, the witnesses and the experts.

The main elements of novelty introduced refer to:

- guaranteeing the dignity of the person and the protection of his health during the hearing.
- written communication, previously to the first hearing of the suspect or defendant, of their rights, in order to ensure the right to an equitable lawsuit.
- audio or audio-video recording, during the criminal prosecution, of the hearing of the suspect or defendant;
- informing the injured person, on the first hearing, on the following rights and obligations: the right to be assisted by an attorney, the right to present evidence; the right to be informed about the deployment of the procedure; the obligation to be present at every citation formulated by the judicial bodies; the obligation to communicate any change of address; the obligation to tell the truth.

- the express regulation, in compliance with the jurisprudence of the European Court of Human Rights, the privilege against self-incrimination and hearing of the witness.

- related to the protection of the witnesses, a distinction is made between threatened witnesses and those vulnerable, providing special protection measures.

c) Identification of persons or objects

The new code proposes a detailed regulation of this evidentiary procedure, by capitalizing forensic techniques currently used in practice. It was also regulated the photo taking and fingerprinting of the suspect, defendant or other persons and the conditions in which it is possible to admit making public the photography of the person.

d) Special surveillance and investigation techniques

In order to respect the right to personal life and mail, the new code has introduced procedural rules regarding special surveillance and investigation techniques, able to meet the accessibility, predictability and proportionality requests

There are the following qualified and defined as special surveillance or investigation techniques:

- interception of conversations and communications
- surveillance by video, audio or photo shooting in private spaces;
- GPS surveillance or localization or by other surveillance techniques;
- getting the list of phone calls;
- retain, deliver or search postal packages;
- monitor financial transactions and reveal financial data;
- the use of under-cover investigators
- finding of a corruption felony or of concluding a convention;
- supervised delivery
- identification of the subscriber, owner or user of a telecommunication system or of a computer access spot.
- fast preservation of computer data, data referring to digital traffic or of those provided by telecommunication systems, in compliance with the Convention of the European Council regarding computer crime.[18]

It has been established the principle according to which the surveillance techniques are ordered by the judge of rights and liberties, and investigation techniques are ordered by the prosecutor. In all cases of authorization of such measures, the new code imposes the need of an existent reasonable suspicion about the performance of a crime, the compliance with the principle of subsidiarity, being underlined the character of exception of interference with the right to personal life and the principle of the proportionality of the measure by limiting the right to private life, relative to the peculiarities of the case, the importance of the information or evidence to be acquired or the gravity of the crime.

[18] Ratified by Law no. 64/2004, published in the Official Monitor no. 343 of 20 April 2004.

In order to ensure the right provisioned by art. 8 of the European Convention regarding the protection of human rights and fundamental liberties, it is established as a principle, the prosecutor's obligation, once the technical surveillance measure ended, to inform in writing, in the shortest time, each subject of a warrant about the technical surveillance measure that was used in the subject's case.

Though introducing all procedures defined as surveillance or investigation techniques in one body of norms seems to be something positive, we must reflect on the general outcome of such an operation, from the perspective of the following question: what is lost when something is gained? Apparently, we have gained on the level of formal rigour and operation but haven't we reached a harmful level of what we might call the trivialization of interferences onto the fundamental rights? All techniques mentioned above have been extracted from the special procedural legislation (applicable only to *certain* crimes) and concentrated into the new code, under the name of special techniques. As far as these techniques preserve their special character, wouldn't it have been more legitimate to keep them in the origin legislations, also qualified as special? Transferring them to the common law, only makes them more visible, more frequentable and obviously, more easily acceptable. That this is the case follows from the fact that special techniques are available to investigate all crimes sanctioned by the law with a 5-year prison sentence or longer (art. 139). The exception has turned into rule.

There are also special techniques which can be defined from the very beginning as "poisonous fruit".[19] Simulating corruption acts (procedure which allows the judicial police officer, the undercover investigator or a collaborator of justice to offer bribe - art. 138, art. 150) or the investigator's right to install recording devices in private spaces - art. 140 (including a person's bedroom?!)

e) The search

The new code introduces detailed regulations regarding the evidentiary procedure of the search, depending on its nature: house search, body search, computer search or the search of a vehicle.

- *House search.* Besides the need to find or collect evidence existing in a house, when there is a reasonable suspicion about a crime having been committed, it is provisioned the possibility to perform the house search in order to preserve traces of the crime or to capture the suspect or the defendant.

- *Body search.* The new code establishes the possibility to perform body search in order to find traces of the crime, material evidence or other objects which are important for finding out the truth in question. The body search implies external bodily examination of a person, which might also include examination of the oral cavity, the nose, ears, hair, clothing, and personal objects on the person or under his control at the moment of the search. The distinction is made between the institution of body search

[19] *Viorel Paşca, Romanian Criminal Lawsuit between Authoritarianism and liberalism, vol. International Biennial Conferences 2008, Faculty of Law and Administrative Sciences, Publishing House Wolters Kluwer, Bucharest, 2010*, p. 201.

and physical examination, the latter implying the external and internal examination of the person's body, collection of biological samples, being a more invasive evidentiary procedure which necessitates a stricter control on the way it is performed.

- *Search of a vehicle.* The new code makes distinction between the protection provided to the house and the one provided to the vehicle, regulating the conditions in which the search of the exterior or interior of a vehicle or another means of transport and their components can be performed

Thus, it has been expressly provisioned that the judicial bodies have the possibility to inspect a vehicle or some of its accessible parts either by visual inspection or by dismantling the vehicle's components.

- *Computer search and access to a computer system.* The new code established a joint provision for the two evidentiary procedures in view of respecting the right to private life. The computer search implies the investigation of a computer system or of a storage device of the computer data, in order to find and gather evidence necessary to solve the case. The access to a computer system means to access in a conspired war a computer system or some part of it, or to a storage device of computer data in order to gather evidence, either on the location of the system or the support accessed or remotely, by using special software.

f) Expertise

According to the new regulation, the expertise can be performed by official experts or independent experts nationally or internationally authorized. It was provisioned the possibility of hearing the expert in compliance with the provisions related to the hearing of witnesses, by the criminal pursuit authority or by the court, on the request of the parties or appointed, when the judicial body considers the hearing necessary for clarifying the expert's findings or conclusions. Thus, the additional expertise can be ordered only if it has been established that the expertise in not complete and this flaw cannot be substituted by the hearing of the expert. Furthermore, the performance of a new expertise can be ordered only if the conclusions of the expertise report are unclear or contradictory, or there is contradiction between the content and the conclusions of the expertise report, and these flaws cannot be eliminated by the hearing of the experts.

The new code contains a detailed regulation of the ways to performs:

- psychiatric forensic expertise and hospital admission of the suspect or the defendant into a specialized medical institution for this expertise to be carried out;
- forensic autopsy, exhumation and the forensic autopsy of the foetus or a newly-born child;
- toxicological expertise;
- forensic examination of the person;
- physical examination;
- DNA expertise;

VII. Preventive measures and other procedural measures

In compliance with the jurisprudence of the European Court of Human Rights, it was provisioned the explicit regulation of the principle of proportionality of every preventive measure with the gravity of the accusation brought to a person, and the principle of necessity of such a preventive measure in order to achieve its legitimate goal.

As far as the preventive arrest is concerned, on the level of principle, its exceptional character and the subsidiary character of it related to the other non-custodial preventive measures. Consequently, the preventive arrest can be order only if by taking a different preventive measure is not sufficient for reaching the legitimate goal.

To enhance the efficiency of the above mentioned principles, it is admitted the competence of the prosecutor is or, as applicable, of the judge of rights and liberties to order the measure of judicial control or judicial control on bail, institutions regulated as distinct preventive measures. The proposed regulation changes the previous outlook on the procedural institutions of the judicial control and respectively, the bail, which presently are applicable only in case of a defendant who has been previously placed under preventive arrest.

There have been reformulated the cases where preventive arrest of a person can be ordered in compliance with the jurisprudence of the European Court of Human Rights and the model of the criminal procedure codes of the EU states. Thus, situations when deprivation of liberty can be ordered have been recognised as general cases: when there is a risk to avoidance, the risk of influencing the criminal investigation and the risk for a new crime to be committed. In case of serious crimes, (such as those against life or those with a prison sentence longer than five years), the new code introduced a special case of preventive arrest, respectively the case of the existence of a real threat to public order. Despite the previous regulation, the new code establishes the legal criteria used to assess the mentioned threat and it also provisions, by the German model, a new legal feature of it, respectively its current nature, which implies its being proved at the moment the deprivation of liberty is ordered.

In order to ensure that the eminently preventive character of the arrest ordered during a criminal lawsuit is complied with, the new code, finding inspiration in the model of the Italian Criminal Procedure Code, stipulated the establishment of maximum terms for the preventive arrest and for the trial stage.

As an absolute novelty for the Romanian criminal law, a new preventive measure was introduced, respectively house arrest by the model of the Italian Criminal Procedure Code, aiming at enlarging the individualization possibilities of the preventive measures, related to the previously mentioned principles.

Regarding the minors, it was stipulated as a general rule, the possibility of preventive deprivation of liberty of the minor only if the effects of such a measure on the personality and development of the minor are not disproportioned compared to the legitimate objective aimed at by having taken the above mentioned measure.

VIII. Criminal prosecution

In order to ensure the celerity of the criminal lawsuit, the stage of criminal prosecution was simplified by establishing a fast verification procedure of the intimation addressed to the criminal prosecution authorities, which allows, if the content of the intimation leads to the conclusion that a criminal act was committed and it is not about one of the cases in which the criminal prosecution authority is prohibited to exercise the beginning of the criminal prosecution of the criminal act, to start the investigation stage of the criminal act, being thus drawn-up the general framework of the criminal lawsuit. Thus, it was eliminated the stage of preliminary acts which would prolong the stage previous to the start of the criminal prosecution and it would imply activities similar to the administration of evidence during the criminal lawsuit, without ensuring all its specific guarantees.

Consequently, all activities carried out by the police forces will be deployed during the criminal prosecution, which ensures that the rights and guarantees granted to the investigated person would be respected during the whole duration of the criminal lawsuit and it also ensures that practical inconveniences, generated by the unjustified extension of the categories of investigation acts allowed in this stage, would be eliminated.

Redesigning the stage of criminal prosecution brings as a novelty the fact that the criminal prosecution is carried out in two distinctive phases: the investigation of the criminal act and the investigation of the person. If the phase investigating the act starts, as it was shown above, by notifying the competent judicial bodies, the investigation of the person phase is marked by the act of starting the criminal proceedings.

It was also expressly regulated the interdiction to hear as a witness a person reasonably suspected of having committed a felony. There were thus answered this issues existing in the current practice when it had been allowed that a person reasonably suspected of having committed a felony to be heard as a witness, in the preliminary proceedings.

The start of the criminal proceeding was approached in a new concept. Thus, the start of the criminal proceeding takes place when the administered evidence offers reasonable motifs to believe that the suspect has committed the criminal act. He acquires the quality of a suspect, which provides him the rights specific to this part of the criminal lawsuit and it is eliminated the possibility that the indictment could be ordered by public prosecutor's charge, thus being ensured the full exercise of the right to defence.

As an element of novelty within the deployment of the criminal prosecution, the new code also contains the regulation regarding the procedure of anticipated administration of evidence. This procedure is carried out when there is the danger that certain evidence could be no longer administrate in front of the court and it is subject to the competence of the judge of rights and liberties.

Another element of novelty is represented by the categories of settlements of no ground for criminal prosecution. The new code only stipulates two ways of non

reference to the court; the prosecutor settles the case by closing it or by waiver of prosecution.

First of all, it is aimed at, as a consequence of the principle of opportunity, regulating the settlement alternative to criminal prosecution, assigned to the prosecutor's competence, respectively the waiver of prosecution. Thus, in case of crimes for which the law provisions sanctioning by fine or sentence to prison up to 7 years, the prosecutor can withdraw the defendant's criminal prosecution when, depending on the person of the defendant, his conduct previous to the crime, the content of the crime, means of committing it, purpose of the crime and the real circumstances in which the crime has been committed, the effort made by the defendant to remove or diminish the consequence of the crime, the prosecutor finds that there is no public interest in his prosecution. The criminal prosecution can be withdrawn only after the criminal proceedings started and when the prosecutor finds that the evidence administrated in the case sufficiently proves that the defendant had committed the crime he was charged with. The cessation of the criminal prosecution can be ordered previously to the notification of the preliminary chamber and implies the optimal selection of some of the obligations established in the defendant's charge, so that it would be ensured the efficiency of this alternative way. Furthermore, the failure to fulfill the obligations within the established term induces the penalty of revocation of the measure and the interdiction to subsequently order a new withdrawal of criminal prosecution in the same case.

Secondly, the dismissal unites all solutions of no ground for criminal prosecution which in the previous regulation were provisioned under the name of no ground for criminal prosecution, release from criminal prosecution or cessation of criminal prosecution.

The new code eliminates the procedure of presenting the criminal prosecution material, since it is ensured the actual defence of the defendant in the criminal prosecution stage, by having regulated the right of the defendant's attorney to assist at the carrying out of the criminal procedure documents and the detailed provision of the right to consult the file during the whole duration of the criminal lawsuit.

The introduction of the agreement of recognition of the guilt, even limited to crimes which are sanctioned by the law with a fine or up to 7 years in prison, brings about a dramatic change in the Romanian criminal lawsuit. The procedure of the agreement of recognition of the guilt not only reduces the duration of the criminal lawsuit of the case, but it also simplifies the activity of criminal prosecution. One of the most frequent arguments in favour of this procedure is the economic advantage, which more or less favours nearly all parties of a lawsuit, but mostly the state, which has the possibility to save essential financial and human resources. Today, several European countries (Germany, France, Belgium and Greece) have adopted in their legislations procedures similar to the institution of the agreement of the guilt recognition. The new code overtook elements from the French and German criminal law and adapted them to the characteristics of the Romanian judiciary system.

Without neglecting the rights of the injured person, the defendant has the opportunity to negotiate with the prosecutor the terms of his agreement and thus to participate to the procedure of decision making in establishing the sentence. This type of

participation promotes human dignity. Like the trial carried out on basis of evidence administered in the phase of criminal prosecution, the trial on basis of agreement of guilt recognition is an abbreviated form of the trial for certain crimes, meant to enhance the responsibility of the parties in the lawsuit and relieve the courts. The agreement can be concluded only for crimes sanctioned by the law with a fine or maximum 7 years in prison and only in the case when the evidence administered provides sufficient data regarding the existence of the crime for which the criminal proceedings were started and regarding the defendant's guilt. The agreement is subject to the control of the court regarding its object and the terms of the agreement and if the agreement is admitted, the court will order a sentence for the defendant which cannot be bigger than the sentence requested by the prosecutor by means of the agreement. If the agreement is rejected by the court, the prosecutor will continue the criminal prosecution according to the common law procedure.

IX. Procedure of the preliminary chamber

By regulating the procedure of the preliminary chamber is aimed at solving issues related to the legality of the reference to the court and the legality of the administration of evidence, ensuring the premises to solve with celerity the substance of the case. In this context, the procedure of the preliminary chamber contains rules which eliminate the possibility to subsequently return, in the trial phase, the file to the prosecutor's office, because the legality of the evidence and the reference to the court are settled in this phase.

The new code establishes the competence of the preliminary chamber judge in verifying the conformity of the evidence administered during the criminal prosecution. If the judge finds that the means of evidence should be removed since it essentially damaged the rights of one of the parties in the lawsuit, he will eliminate that means of evidence.

The new institution has focused the specialists' interest within the waiting period for the new code to enter into force. Some appreciated it as being innovative[20] while others placed themselves definitely against the institution.[21] Among the weak points, there have been mentioned: the object of the preliminary chamber lacks of verification of the degree of suspicion of the accusation, starting from the role of the institution to protect the citizens against arbitrary accusations, but mainly the lack of publicity and the contradictory nature of the procedure. How was it possible that a criminal procedure, overtaken from the adverse system, with a protective role, should be regulated in the most genuine inquisition style? And how could such an institution meet the equity requirements of the criminal lawsuit? Questions to which we need to find an answer.

X. First instance trial

The trial in substance was conceived as a complex of specific proceedings and procedures, having as goal the adjudication of a legal and sound solution, equally founded on law and truth.

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[20] Laviu Florin Uşvat, *Is the preliminary chamber a distinct phase of the criminal lawsuit? Law Magazine* no. 3/2014, Publishing House. Universul Juridic, Bucharest, p. 91-104.

[21] Diana Ionescu, *Quoted Works* p. 92-93.

The prosecutor, as the holder of the criminal proceeding will have to prove the charge by administration of evidence. Consequentially it is redesigned the role of the judge, who will make sure that the procedures carried out in front of him should have an equitable nature, the principle of the active role not being established *per se.*[22] To this purpose, if the judge considers it necessary, will order the administration of other evidence than those indicated by the prosecution or the defence.

The introduction of new institutions in the stage of first instance trial, as it is the "trial based on evidence administered during the criminal prosecution" does not have the role to answer merely formally a need of reforming this stage of the criminal lawsuit. This institution, which implies the admission by the defendant of the facts mentioned in the notification document of the court, is consistent with the need of an efficient trial by eliminating some cumbersome procedures often unnecessary to establish the judicial truth.

It has been eliminated the possibility to extend the criminal proceedings or the criminal lawsuit, institutions which contribute to the delay solving the case for which the court was notified.

Regarding the new facts found during the trial, it is regulated the carrying out of distinct criminal prosecution procedures in order to avoid the delay or the dilution of the initial case. It is equally eliminated the institution of returning the file to the prosecutor in order to remake prosecution. The elimination of the return is procedurally prepared by regulating the competence and the regime of nullities and also by introducing the procedure of the preliminary chamber.

According to the principle already existing in the civil procedure, the non final court orders will be integrally communicated to those, who, according to the law, can exercise remedy.

The text of art. 357 line (2) of the new code provisions that "During the trial, the president, after having consulted the other members of the panel of judges, can reject the questions formulated by the parties, the injured person and the prosecutor, if they are not conclusive and useful for the settlement of the case." The text seems reasonable, since it is acknowledged to the panel of judges the competence to filter the questions asked by the parties. The text was necessary in relation to the new regulation concerning the possibility that the examinations could be conducted by the parties or by their attorneys (art. 378, art. 380, art. 381). Thus, the new code made an important step towards an institution originated from the Anglo-Saxon law *cross-examination,* considered to be of capital importance for the criminal lawsuit.[23]

Regarding the cases of incompatibility of magistrates, the procedures of abstention and objection so that the celerity of the criminal lawsuit could not be affected by

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[22] Flaviu Ciopec, *Remarks on Trial in Substance of the Criminal Case from the Perspective of the New Code of Criminal Procedure*, *Annals of the Timisoara West University, series Law, no.* 1/2014, Publishing House. Universul juridic, Bucharest.

[23] In John Henry Wigmore's terms „cross-examination is the greatest legal engine ever invented for the discovery of truth", *Evidence in Trials at Common Law*, Little Brown, 1974, § 1367, 32.

repeated abstentions and objections, including by refusing all the judges of the court or the prosecutors of the prosecutor's office, fact which would lead to the delay of solving the criminal case, at the expense of the operational character of the act of justice.

XI. Trial in appeal

In order to ensure the celerity of the criminal lawsuit and the reduction of the duration of settling the criminal case, under the circumstances of higher guarantees for the criminal prosecution stage and the first instance trial, regarding the remedy, the new code provisions an ordinary remedy to the appeal, totally devolutive. Thus, only one ordinary remedy is maintained, increasing thus the efficiency of the principle of double degree of jurisdiction, stipulated by art. 2 paragraph 1 of Protocol 7 of the European Convention for the defence of human rights and fundamental liberties.

The court of appeal can readminister the evidence administered in first instance and can administrate new evidence, having the obligation, besides the reasons invoked and the request formulated by the plaintiff in appeal, to examine the case and verify the decision of the first instance in all factual and legal aspects. The new code eliminates the institution of appeal over term, taking into consideration the detailed regulation of the opportunity to reopen the criminal lawsuit in case of trial in the absence of the defendant.

XII. Trial in extraordinary remedies

The new code of criminal procedure proposes substance modifications to the matter of extraordinary remedies:

a) The appeal in cassation (petition) will be a remedy, exercised only in exceptional cases, only for reasons of illegality and it will provide nationally wide unitary practice. By this remedy, whose settlement lies only in the competence of the High Court of Cassation and Justice[24] the conformity of final decisions attacked with legal rules is analysed in relation to the cassation cases, expressly and restrictively provisioned by the law. There are expressly stipulated the decisions which can be remedied by appeal in cassation (petition) and those which do not undergo this extraordinary remedy.

The general term for submitting the appeal in cassation is 30 days from the date the decision of the court of appeal was communicated. Regarding the specifics of this extraordinary remedy, strict conditions were imposed in relation to the content of the cassation appeal application, in order to ensure the discipline and the rigour of the lawsuit and avoid the abusive submission of appeals which do not respect the motifs stipulated by the law. The cases in which the appeal in cassation can be exercised aim exclusively the legality of the decision and not factual matters. They can constitute ground for cassation of the decision only if there were not pleaded by appeal or during the appeal trial or, despite having been pleaded, they were rejected or the court omitted to pronounce itself on them.

[24] On this occasion, the Supreme Court will finally have competences consistent with its title The High Court of Cassation, title adopted in 2004, but lacking real correspondence till today.

The submission of the application for the appeal in cassation does not have a suspensory nature, but after admission in principle, the execution of the decision can be justifiably suspended, totally or partially, with the possibility to enforce the defendant to comply with certain obligations.

b) As far as revision is concerned, a new case has been regulated, when the decision was based on a legal provision which was pronounced unconstitutional after it had been pronounced final, in the event that the consequences of violating the constitutional provision continue to be produced and cannot be remedied but by revision of the pronounced decision. It has been thus regulated a procedural remedy, in order to eliminate the possibility to suspend criminal cases during the development of the settlement procedure for exceptions of unconstitutionality.

c) In the original version of the project of the new code, it was eliminated the extraordinary remedy of contestation for annulment, a traditional remedy of the Romanian law system, which aimed at eliminating procedural errors incurred in front of courts of final instance.

The reason of this elimination is the fact that the role was overtaken by the appeal in cassation. After having been consulted the magistrate judges, it resulted that the extension of cases where appeal in cassation can be exercised would have led to a substantial increase of competence and overcharged load of work for the Criminal Section of the High Court of Cassation and Justice. Consequently, the procedural grounds have been eliminated from the appeal in cassation and turned into grounds for contestation in annulment, according to the judicial nature of this remedy.

d) The new code establishes a new extraordinary remedy for withdrawal, reopening of the criminal lawsuit in case of trial in the absence of the convicted person, in order to ensure the compatibility of the Romanian legislation with the standards imposed by the jurisprudence of the European Court of Human Rights. The lawsuit is usually judged in the presence of the defendant. In all cases where it does not result that the absence of the defendant at the trial is the result of a deliberate and unequivocal act on the behalf of the defendant by giving up his right to be heard by the court and defend himself in the trial, this subsequent procedure is regulated, by which after hearing the absent person, judgement would be given on the validity of the allegations brought to him.

In this respect, it is provisioned the opportunity for the person convicted with a final sentence, who had been judged in absence, to request the reopening of the criminal lawsuit in term of 6 months from the date he acknowledged that a criminal lawsuit had been taken place against him, on the condition that the term for prescription of the criminal liability had not turned. It is defined as a person judged in absence the defendant who, on the trial, had no knowledge about the lawsuit, or despite having known about it by any means, was absent from the trial of the case on valid grounds

XIII. Providing a unitary judicial practice

In order to ensure a unitary judicial practice the new code proposes the modification of the appeal on points of law, which, presently, is regulated by the extraordinary remedies and the introduction of a new mechanism, the referral to the

High Court of Cassation and Justice in order to pronounce a preliminary decision to solve some law issues. [25] Thus, this last procedure implies:

- the request for principle settlement of a law issue on which depends the settlement of a case, a law issue which was not unitarily solved in the practice of the courts;
- The referral of the High Court of Cassation and Justice is made of its own motion or on the request of the parties, after contradictory debates, by conclusion, which is not submitted to any remedy.
- In order to ensure the efficiency of this new mechanism, the decision of the High Court of Cassation and Justice, published in the Official Monitor, will be mandatory both for the court that made the request for solving the law issue and for all the other courts.

XIV. Execution of criminal decisions

The regulations contained under this title targeted the correlation with the provisions of the general part of the new Criminal Code. On one hand, it was aimed at introducing the newly regulated institutions into the criminal code – for instance, the complementary sentence of making public or publishing the conviction decision, delay of execution of the sentence, replacing the sentence with fine by work for the community and on the other hand, it was aimed at eliminating the institutions which do not have a correspondant in the new criminal code or are no longer functional – for example, the provisions referring to execution of sentence at the work place or those referring to the execution of sentences by militaries or the replacement of criminal liability.

In the matter of safety measures of medical nature, there were taken into consideration the comments made by the representatives of the National Institute for Forensic Medicine. The proposed regulation does not contain any more those provisions which were not compatible with the valid legislation or the jurisprudence of the Court of Strasbourg in the matter and which represented un unjustified intrusion of the court in the prescription of a medical treatment by specialists.

In order to find those solutions which could increase the degree of celerity of the trial, judges delegated for monitoring the deprivation of liberty have been consulted and the majoritary opinion was that their role is to ensure that the prisoners' rights in the detention places would be respected, the more so since publicity cannot be ensured in the detention places or the contradictoriality of the court hearing. From this point of view, the conclusion was drawn that the court is the solely able to ensure the conditions necessary to settle the circumstances occured during the execution of the sentence, in compliance with the principles and the right to an equitable lawsuit.

Provisions no longer consistent with the practical realities, such as the one regarding the delay or interruption of the execution of the sentence on family grounds, institution which is not justified by solutions pronounced in practice, mostly all of them

[25] At the time this study has been ellaborated, the High Court already pronounced, on la 14.04.2014, the first two decisions in compliance with the procedure in question. Further details on http://www.mpublic.ro/recurs_penal.htm.

had been of rejection, were eliminated and it was taken into the consideration as well the multiple changes in the organization of the activity of the national Administration of Prisons, which allow the prisoners to carry out activities in prison or their circulation outside the detention place, by a simple administrative disposition, under special circumstances.

XV. Conclusions

All the matters presented above appear to signify the presence of a very strong will of change. One thing remains certain - this project attempts to solve a series of issues found in the practice of courts. Nevertheless, the major issue is represented, as mostly, by the attempts to search for the ideal solutions.

Though in many cases, the introduction of new procedures and institutions of European origin proves to be pertinent and functional, there are also cases when overtaking mimetically[26] some European structures turns into a true legislative truism (new names, identical procedures).

[26] Flaviu Ciopec, Magdalena Roibu, *The New Code of Criminal Procedure: Mimetism or Innovation?* Annals of West University, series Law no. 2/2007, p. 170.

Confrontation in the Mirror of International Documents and the European Court of Human Rights

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Abstract:

In the past few years I surveyed under my research the criminal procedure legal institution of justice, the confrontation (confrontatio), the international and human rights documents that concern in any forms, and the connected court practice of the European Court of Human Rights special decisions, interpretations, guidance. This study tries to present the confrontation's newest international research results as a procedure as an evidentiary procedure action.

Keywords: *confrontation; ECHR case-law; right to a fair trial; international criminal courts case-law; Hungarian domestic legislation; evidentiary rules.*

I. Universal and international basic treaties, framework decisions

The considerable and be of account list of documents, following the Hungarian proclaim, are the next:

International Covenant on Civil and Political Rights, proclaimed in Hungary by the Law decree 8 in 1976.

The „Behavior Codex" for the civil servants of the UN Forces accepted by the general assembly of the United Nations, 17 December 1979.

The Law Decree 3 in 1988 of the proclaiming of international treaty against cruel, inhuman or humiliating treatment.

The Law Decree 24 in 1988 of the proclaiming of ICCPR optional minutes.

Treaty about the child's rights, 20 November 1989 – New York, proclaimed by the Act LXIV in 1991.

European Human Legal Convention about the „defense of human rights and basic liberties", European Convention on Human Rights in popular title, created on 4th December in 1950, Rome. That Convention and its eight minutes proclaimed in Hungary by the XXXI Act in 1993. The LXXVI Act in 1994 about the proclaiming of the ninth minutes and the II Act in 1999 are connected to it. European Convention about the persons of European Court of Human Rights' procedure, proclaimed in Strasbourg on 5th March 1996 and the XLII Act in 1998 about the proclaim of the fourteenth minutes about the „Defense of human rights and basic liberties", connected to the European Court of Human Rights.

European Convention on Extradition, proclaimed by the XVIII. Act in 1994.

The European convention on the prevention of torture and inhuman or humiliating treatment, created on 26 November 1987, in Strasbourg, which established the European Control Commission, proclaimed by the III. Act in 1995.

The XXXVIII. Act in 1996 on the international criminal legal aid.

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The UN convention against the transnational organized crime, accepted in 2000.

Convention by the Council about the mutual criminal legal aid among the states of European Union, according to the Article 34 of the Treaty of EU (1 July 2000).

The Europe Council framework decision 2000/383/IB of 29 May 2000 on the enforcement of criminal and other sanctions against the counterfeiting of euro's initiate.

The Europe Council framework decision 2001/220/IB of 15 March 2001 on the legal stand for the injured party in the criminal procedure.

The Europe Council framework decision 2001/500/IB of 26 June 2001 on the money laundering and the identification, search, freeze, distrainment and the seize of the used appliances and the income of it.

The Europe Council framework decision 2002/187/IB of 28 February 2002 on the establishment of EuroJust for the increased fight against the serious forms of crime.

The Europe Council framework decision of 13 June 2002 on the European warrant for arrest and the passing procedure among the member-states.

The Europe Council framework decision 2002/475/IB of 13 June 2002 on the fight against the terrorism.

The Europe Council framework decision 2002/629/IB of 19 July 2002 on the fight against the human trafficking.

The Europe Council framework decision 2003/80/IB of 27 January 2003 on the criminal law defense of environment.

The Europe Council framework decision 2003/80/IB of 22 July 2003 on the execute of decisions about insure arrangements connected to property and evidence in the European Union.

The Europe Council framework decision of 22 July 2003 on the fight against child pornography and sexual exploitation of children.

The Europe Council directive 2004/68/EC on damage reduce of crime victims.

The Europe Council decision 2004/757/IB of 25 October 2004 on the minimum rules of penalties and elements of crime on the field of prohibited narcotic drug trade-

The Europe Council framework decision 205/222/IB of 24 February 2005 on the attack against information systems.

II. European Union recommendations

Europe Council Ministerial Committee recommendation No. R(80) 11. on the imprisonment before judgment.

Europe Council recommendation No. R(81) 7. on the devices of easier ways of using jurisdiction.

Europe Council Ministerial Committee recommendation No. R(82) 17. on the imprisonment and treatment of dangerous convicts.

Europe Council recommendation No. R(83) 2. on the legal defense of the insane and involuntary treatment in mental institution.

Europe Council recommendation No. R(86) 12. on the other arrangements about reducing and prevention of overtaxing the courts.

Europe Council Ministerial Committee recommendation No. R(87) 18. on the simplification of criminal procedures.

Europe Council recommendation No. R(95) 12. on the control of criminal jurisdiction.

European Union Council recommendation No. R(95/C 327/04) of 23 November 1995 on the protection of witness in the frame of fight against organized international crime.

Europe Council Ministerial Committee recommendation No. R(96) 8. on the policy of criminal law in the changing Europe.

Europe Council Ministerial Committee recommendation No. R(97) 13. on the right for defense and the intimidation of witnesses.

European Union Council recommendation No. R(97/C 10/01) of 20 December 1996 on the people cooperating in jurisdiction on the field of fight against organized crime.

European Union Council recommendation No. R(97/C 251/01) of 28 April 1997 on the action plan for the fight against organized crime.

Europe Council Parliament General Assembly recommendation No. 1245/1994. on the custody before judgment.

Europe Council Parliament General Assembly No. 690 decision on „statement about the police."

European Convention on the mutual aid in criminal cases (2 April 1959, Strasbourg).

Additional minutes on the mutual aid in criminal cases (17 March 1978).

European Convention on the valid of international sentences (28 May 1970, Hague).

European Convention on the offer of criminal procedure (15 May 1972, Strasbourg).

European Convention on the liquidation of terrorism (27 January 1977, Strasbourg).

Hague Program on the advance success of the liberty, safety and law in the European Union (4-5 November 2004, Presidential Conclusions, Brussels).

III. International documents connected to the confrontation

Neither of the documents consist any particular formulations about confrontation, only we can conclude from connection and bond. First of all I stress the importance of the *European Convention on Human Rights* (EJEE in further) cause if anybody feels that the European state, included Hungary, has infringed his rights in the EJEE or its additional minutes he is allowed to use the legal defense of European Court of Human Rights (ECHR) in Strasbourg within 6 months by using his own name, tax free and without the compulsion of a lawyer after the domestic legal aids.

The Convention protects, among others, the important rights in the view of confrontation, so:

the right for fair procedure both in civil and criminal cases (Article 6.),

the right for efficient legal aid (Article 13.),

On the other hand, among others, it is prohibiting the important and possible act in the view of confrontation, so:

the torture, the inhuman of humiliating treatment and penalty harmonized with international agreements.

Within the fair procedure the Article 6 of EJEE there lies the importance of the right for fair hearing.

1. Everybody has a right for his case have heard by an independent and impartial court in a fair and public way, being heard within reasonable time and give decision in his civil rights and obligations and in the substantiate of his criminal charge. The judgment has to declare in public way but entering the courtroom can be prohibited for the press

and audience in under the whole period of hearing or partly if it is necessary in a democratic society cause the morality, public order or the national security, if the limits are important in the welfare of minors or the defense of the privacy of parties from procedure or if the court feels it necessary cause where the public can be dangerous for the welfare of jurisdiction.

2. Every suspect is innocent until his guilty have been stated by the law.

3. Every suspect has a right at least for

a) information, within the shortest time and on an audible language, about the nature and grounds of his charge;

b) to have the necessary time and devices for the preparations of defense;

c) to have a chance for defiance by personally or his chosen lawyer, and if he unable to pay for lawyer, so far as the jurisdiction's welfare need it, he can get a free appointed counsel;

d) to ask or address questions for the witnesses of charge and obtain the summon and hearing witnesses of defense among similar conditions as the witnesses of charge.

e) to have free interpreter if not understand or not speak the language of the trial.

Especially Article 3.d deserves regard in the circle of confrontation cause from the view of accused the witnesses, within on the interrogation of injured party-witness able to have contradiction, opposite statements and incriminating evidence against him. The convention does not call the confrontation as an available device for the accused and jurisdiction. It states to give only the right of query to the accused, but there is no rule of the form, the time or the mode of action.

On the other side the fix of mode cannot be lucky cause the confrontation is an unknown and non-used device among some European states, as I presented it in chapter 3.1, on the other hand in each countries have to decide about the modes of searching for just by domestic features and unwanted in the future to give communal directions as my opinion.

From Article 6 of the convention the following requirements can be draft on confrontation:

nor this proceedings can cause the unjustified draw of procedure and the unreasonable length of time,

the confrontation must be conduct in impartial way by the authority,

the presumption of innocence have to be prevalent on the confrontation,

because the confrontation is a special form of interrogation in consequence of fair procedure, the accused has a right to take part in it, further silencing, to be passive on confrontation,

the accused cannot be forced by any agreement or domestic rules to confess and taking active part in it by an opposite mode,

prohibition of self-accusation is current on confrontation because the fair procedure

also on confrontation the unlawful (illegal) evidences are unacceptable,

also the accused able to initiate the confrontation but non-obligatory for authority to hold it, it can use other modes (like cross-examination on hearing or giving written points),

on confrontation „the equal of weapons", worked out by jurisprudence, must be kept into the period of judiciary emphasizing that only in the period of judiciary,

confrontation also the part of public hearing, except the restriction justified by reasons in the convention,

the right of using the mother tongue and free, suitable interpreter are also necessary on confrontation,

the accused can use defending counsel creating efficient defense,

the necessary time and devices for the preparation of defense also need time in confrontation like in their period of confess,

Result from EJEE Article 13, the accused has a right for efficient legal aid also in confrontation, if he feels that the authority and its members infringed his right for life, fair procedure or legal aid during the confrontation. Moreover for torturing, inhuman or humiliating treatment or discriminated among the rights of the convention. (The latest one also can be found in the international European convention on „against the torture and other cruel, inhuman or humiliating penalties or treatments" and in Strasbourg European convention on „prevention of torture and the inhuman or humiliating penalties or treatments."

Also important, besides the EJEE, Europe Council Ministerial Committee recommendation No. R(97) 13. on the intimidation of witnesses and right for defense.

Prima facie, namely „clear at first sight", that there are cases when „the witness is in need of defense" with the words of Imre Kertész.[1] Also recognized in European relation showed by the recommendation. Special criminal procedure advices been drafted, which are able to action against intimidation, on the other hand they are able to make safe the fragile balance between the defense of public order and the defense of accused rights in a fair procedure.

The recommendation accounted the directions of EJEE and the connected practice of ECHR. Basically making forward the contradictorily procedure, where the national court collects and examine the evidences on a public hearing, consider them in the presence of accused. But it does not mean that the witness must do his testify always in the courtroom, cause it is possible that he will be frightened or become under psychological influences. Thus on the efficient of witness-protection behalf advisable the use of video cameras or other technical tools what give the chance of following the events by the attendants, their persons of procedure (authorities and people, within the accused and his defending counsel).

The recommendation also gives the importance of testifies on preliminary or interrogation period (police interrogation), what the court has to accept as evidence, maybe the confrontation if meanwhile the witness dies, disappears or unexpected events come and make impossible the repeat of testify.

The chance, the legal possibility of confrontation totally fall out it so-called „anonymous" witness actions in procedure. It means that the details of witness will stay fully unknown before the accused (defense) allowed by the court usually the fact of threat.

The anonymous witness always means a risk-hiding witness since the defense is not able to check the accuracy, authenticity and the truth of testify. Among the risk:

the anonymous witness cannot be authentic cause subjective reasons connected to the past for example because of such circumstances (*e.g.* insane), what cannot be reveal if the identify of witness is unknown,

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[1] See: „The witness in need of defense" by Imre Kertész: Magyar Jog (Hungarian Law), 1993/4. pp. 193-199.

the anonymous witness can be a tool in a conspiracy or complicity against the accused.

It is needed an impartial mechanism practiced by jurisdiction to remove these doubts, this mechanism used for replace and enforce the accused's welfare by an effective and well-meant way. Be guard continuously:

must over the balance between the right of getting information for defense and the hide of witness's identify details,

hiding of witness must be grant by the court and initiated by the prosecutor,

investigation of the witness's past and controlling his validity must be done by an impartial judge or prosecutor,

give the chance for the defense to ask questions about the witness's past, prejudice and essentials of the case at least in writing.

It is in sight from the last recommendation that it does not order or advice any compulsion of confrontation or right for direct question by accused exactly in the protection of witnesses mostly the most important witnesses.

If the hide of witness not allowed but he needed it the recommendation will not advice the confrontation with witness in that case, too. Instead, it supports to make more difficult the identification of witness by the defense in a way of hiding the face of witness, distort the voice of him or use audiovisual record or broadcast. (A similar idea can be found in the European Union Council recommendation 95/C No. 327/04 what lay in the circle of organized crime that the identification of witnesses and it recommended the relatives can be charged cause high threaten).

The Convention on the Rights of the Child, created in New York 20 November in 1989 and proclaimed in Hungary by the Act LXIV in 1991, touch with many articles the minor's criminal procedure. From Articles 37-40, which consist the prohibition of torture, cruel, humiliating treatments and unlawful and high-handed deprivation of liberty and other many important rights.

, I want to emphasize Article 40, which says:

„1. The states share in the Convention admit the child's, charged, suspected or guilty of crime, right for treatment what advances the personality's impeachment of sense for its dignity and value, strengthen the respect for others human rights and basic liberty and which account his age and the necessary of fit in society and take useful part in it.

2. From that aim and account the international documents' orders, the member states of this convention particularly take care of:

a) do not suspect, charge of find guilty of crime the child who act or default which was not mean crime nor by domestic and international law.

b) the child who been charged by crime at least has a right for the following guarantees:

(i) find him innocent until his guilty benne found by law

(ii) to be informed by direct of his parents, representative in care about the charges and share in legal aid for prevention in his defense, preparations of it and for other suitable help.

(iii) judge his case without late by free, independent and impartial authority of court on a way of just procedure in the presence of his lawyer, other counselors or his parents except that last if it is opposite with the welfare of child, which stands over everything, particularly cause his age or social standing.

(iv) do not force him to be witness or confess his guilty, ask or arrange questions or witnesses standing against him and witnesses standing with him and heard them by similar conditions.

(v) if he been found guilty in crime or have chance for legal aid by free, independent and impartial authority or court against this decision or other arrangement.

(vi) to have free interpreter if he do no speak or understand the spoken language on the hearing.

(vii) his private life has been respected in every period of procedure.

3. Member states of the convention will on with their all power to accept special acts and procedures, establishment of authorities and institutes for the minor suspected, charged or be found guilty with crime, especially:

a) accept a limit of age where the child cannot be charged;

b) possible and wanted cases make arrangements to handle the child's care without judiciary procedure and reservation of keeping totally the human rights and lawful guarantees.

4. Many arrangements needed to make it safe, especially with taking care, control and supervision, consultation, release on parole, family placing, general and professional educational programs and non-institutional solutions connected to these needed or make arrangements to have suitable welfare, social standing and treatment measured to the committed crime.

In Point 2/B/iv the following known requirement drafted at adult (general) accused: the right for interrogate the witnesses but it does not include the compulsion, need or creation of confrontation. (The terminus is not in the convention). The official translated and published, proclaimed „to do manage" causative verb shows much rather that the interrogation through much rather the official defending counsel or maybe legal representative, executed by then under the needed special (act-form and spirit) procedure.

I studied the prove and procedure rules regulating the operational estate of international courts (standing and ad hoc tribunals) by international documents. The Hague standing International Criminal Court (ICC), the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY – to punish acts seriously violate the international humanitarian law in the territory of former Yugoslavia), and the International Criminal Tribunal for the Rwanda (ICTR – to punish people in charge of violating the humanitarian law, genocide and other serious infringements in Rwanda and to punish people of Rwanda in charge of genocide and other serious infringements in the neighbor states) organization and operation rules' sources are the statutes (fundamental rules),[2] but the procedure rules consisted in other codex, named Rules of Procedure and Evidence (RPE).

Neither investigation procedure consist the right for confrontation or the possibility of it for the court in procedure. The accused has the same classical „legal package", detailed in the EJEE's fair procedure. This includes their interrogation and motion competences, the witnesses and their said reliability and authenticity and investigation of them. On the other hand these are allowed by considering the defense of injured party and witnesses.

I want to remark here that the confrontation also was not known on the Tribunal of Nuremberg, established after World War II, which was the historical preliminary of

[2] Fundamental rule of standing International Criminal Court, called as Treaty of Rome of 18 July 1998, came into force on 1 July 2002, confirmed Hungary's signer status by Parliament Decision 72/2001 (XI. 7).

international criminal courts. The interrogation of witnesses and accused executed by cross-questions as a hard American and English influences, which gave serious problems for the German defending counsels, who used to the continental comprehension.[3]

I states with the international documents, notified in the previous list, about the international criminal cooperation that all of them supports the omission of confrontation (the direct confrontation between witnesses and accused or injured party) in the maximum defense of witnesses.

After all of these we can say that in spite of that the confrontation is a living and used mode in the searching of justice in the most of European continental countries, but cannot find in international within European conventions and statutes, procedure recommendations and directives.

As soon as the Anglo-Saxon influence prevails, included the Anglo-Saxon samples followed countries, first of all the USA and Great Britain's law, jurisprudence, jurist requirement system and mentality the confrontation is not exist moves in its place the cross-question, oath etc., so other mode of searching justice moved into international (European) level and at last the omission of confrontation as a mode of collecting evidences. Besides the Anglo-Saxon influences the omission procedure of confrontation helped by in our days too, an international level of the defense of witnesses and injured parties in serious crimes and sometimes the accusing partners and penitent pentinos, too. I think we can account on this influence for a long time.

IV. Confrontation in the mirror of European Court of Human Rights decisions

The confrontation exists in the praxis of ECHR in spite of that the EJEE does not consist terms with it, but it can issue in each European states' legal practice and sometimes it can exist and give grounds for infringements in domestic and other European countries' legal practices.

Usually the requirements of fair procedure connects to the confrontation, the infringements usually exist in it.[4] Within the rules of interrogation the witnesses are really important. The EJEE, it does not name it, but draft the equal of arms in the terms of interrogation witnesses and the interrogation of experts. In the explanation of Article 6 Point 3/d makes safe the following suitable and real chances for the accused:

the interrogation of accusing-witnesses,

summon of accusing-witnesses,

Interrogation of saving-witnesses among as similar conditions as accusing-witnesses.

But the rights of accused about the interrogation of witnesses are non-absolute rights, in justified cases the restriction of it is acceptable. For example the witnesses and

[3] See: International and European Criminal Law by Péter M. Nyitrai: Osiris, Budapest, 2006. Page 58-62. and referred by him to The Nurenberg Suit and the International Criminal Law by I. Szabó. Officina Publisher's, Budapest, 1946. p. 12.

[4] The 90 per cent of Hungarian complaints arrives to the ECHR cause the draw of procedure, offending the „fair" Article 6, See: Judicial ethics and the fair procedure by Ferenc Kondorosi – György Uttó – Antal Visegrády. Magyar Közlönykiadó (Hungarian Official Journal Publisher's) Budapest, 2007. pp 77-109.

accused life and safe are protected by the Articles 2 and 8 of EJEE, so the fair procedure desires the balance of welfares.

In the legal practice of ECHR in contradictory proceeding the evidences needed to collect and examine on hearing. It does not mean that the witness always has to do his confess in the courtroom, cause he can suffer psychological influences or unjustified pressure by the accused on the confrontation. In the name of efficient defense of witnesses participants can follow the procedure by video or other technical equipment. The general requirement is that the accused need chance, in one of procedure parts, to argue the witnesses' testifies, in that case the balance among the defense, the rights of witness and the state's jurisdiction task are safe.

The ECHR says it is acceptable that criminal court will not interrogate all witnesses suggested by the defense, but it is indispensable to do it with people who know relevant facts in the name of justice. (For example: Gergely *versus* Hungary, admissible decision of 15 May 1996). It is acceptable to read the testifies from investigation period on the hearing period if the defense had a chance in one period of procedure to interrogate the witnesses, maybe on confrontation, and to check the witnesses' answers' authenticity and reliability. (For example: P.S. *versus* Germany, decision of 20 December 2001; Destrehem *versus* France, decision of 18 May 2004; Tánczos *versus* Hungary, admissible decision of 26 April 2005).

The Court said in P.S. versus Germany case that the German authorities infringed the Convention's Article 6 Point 1 (the right for fair procedure) with the fact that the accused, charged by rape, by only the injured party's mother's and policeman's testifies, who interrogated the injured party, in spite of the injured child was not interrogated cause to protect her moral progress so the accused could not ask questions for her to defend himself. (As appropriate confrontation was not held, too).

The anonymous witness's exist is a special case which have to be limited in a few cases, says ECHR and in this few cases the defense must has interrogate the witnesses in a way and to check the witness's authenticity, sot test it. But it is prohibited to sentence someone by only this type of witnesses. (See for example: Kotovski *versus* The Netherlands, decision of 20 November 1989; Windisch *versus* Austria, decision of 23 April 1997; Lüdi *versus* Switzerland, decision of 15 June 1992; Saidi *versus* France, decision of 20 September 1993; Doorsen *versus* The Netherlands, decision of 26 March 1996).

In *Lüdi vs Switzerland* infringement case the accused, charged by drug trade, has not got any chances to contest the mole's investigation testify. For the court did not interrupt the witness, whose name was unknown for the accused, and did not try to absolve the opposition between the defense and prosecution. In his request argued that his right for fair procedure had been denied by do not confront with the agent-witness who was known for him in physical way (not the real identify) because he met him five times. In similar special cases cannot leave out of consideration that the police authority wants to protect the real identify of its agent in drug cases and to cooperate further.

Similar arguments were said in *Saidi vs France* case where the accused, charged by drug crime, did not have any chances either under investigation or hearing periods to ask questions for witnesses whose testifies absolutely used for charge him.

We can similar arguments in *Delta vs France* case, too. The accused had been charged by only the injured party and his girlfriend's testifies from investigation period. These witnesses had been summoned by the court but they did not come and the court

did not use any force actions against them and gave sentence without their presence. Moreover their interrogation was not done in the legal aid period, too.

It does not infringe the right for fair procedure if no so relevant witnesses be interrogated only under the investigation and give the minutes as a material of suit in the case of it, if the defense also do not ask the summon of them. (See about it in: Brandstetter *vs* Austria, decision of 28 August 1991).

In the marked Doorson case the court also did not stated the infringement of Article 6 Point 3/d cause, it said, the problems what suffered by the defense included the accused were suitable solved.

The court of first instance took in consideration in the case the two testifies of anonymous witnesses by the examining judge and in the presence of defending counsel and another named witness testify form the police interrogation period which was repealed on the public hearing. At last an also named witness testify had been took in consideration, who also did it in the previous investigation and so cannot been interrogated by the defense.

The applicant contested the first decision. Under the appeal the defense could interrogate the two witnesses, but confrontation did not been held cause the witnesses further asked to keep in secret their identifies which was strengthen by the examining judge.

The Court of Appeal found guilty the applicant. After it the Court of Cassation refused his request of states void invalidate and after that the ECHR did not state the infringement of the convention, too.

The court explained itself that the defending counsel had chance to interrogate the witnesses. Besides it the witnesses identified the accused with pictures which used were used for identify the accused himself and accepted by him and the witnesses also gave descriptions about his clothing and physique. The court also gave importance for that the Court of Appeal of Amsterdam based or no based the guilty on only and conclusively the anonymous witnesses' testifies.

By the interrogations of witnesses the ECHR also said that the fair and equal in arms procedure requires the ability of following the procedure either by the accused and defending counsel (also the court and the sworms, in physical way, too) and to answer the questions and give motions without suffer exaggerated exhaustion. Cause in this, infringement, case the jury hearing took 2 days which finished at 4:00 am and all of the motions of adjournment by the defense had been refused by the court. (See: Makhfi vs France, decision of 19 October 2004).

It is a requirement of defending counsel, also rated in confrontation, that the provision of defense for needy is a duty of the state. Moreover not only the provision of official defending counsel needed but it has to be efficient (really skilled) under the whole period of procedure. (See about it in: Artico *vs* Italy, decision of 13 May 1980; Pakelli *vs* Germany, decision of 25 April 1983; Gaddi *vs* Italy, decision of 9 April 1984; Daud *vs* Portugal, decision of 21 April 1998; T. and V. *vs* United Kingdom, decision of 16 December 1999; R.D. *vs* Poland, decision of 18 December 2001)

The Court separately emphasized in Daud case that the requirement of efficient defense (which includes the presence, case knowledge, practice of licenses forwarding cases, right to complain etc.) stands not only in the hearing period but in the preparatory (investigation) period, too.

Under the confrontation the accused also has the right for using his mother tongue and have a free interpreter it he in charge or been charged. (See: Luedicke, Balkacen and

Koc vs Germany, decision of 28 November 1978). On the other hand the guarantee of interpreting by the state is not enough, it has to be „suitable" standard which does not mean that it is a minutes details. A general guarantee of interpreting by the state which also includes the absences for a well defense more enough. (See: Kaminski *vs* Austria, decision of 19 December 1989).

The Article 13 of EJEE on legal aid also connects to the confrontation. Exactly a Hungarian case connects to it, named Balogh *vs* Hungary, decision of 20 July 2004, which said, besides many insulting and non-insulting, that Article 13 did not happen in the applicant's case.

The applicant found injurious among others that he did not have suitable legal aid in this dishonest criminal procedure full with abuses and discrimination, too. The court examined that the needed solid and efficient national inquiry had happened or not because the complaint of applicant. (Article 13 also requires the complainant to take efficient part in the investigation by his complaint). In the relevant case the authorities were ready to investigate seriously the statements of complainant and did not refuse them immediately, by the statement of court. Inquiry did by three attorney level and the prosecutor's office started again (twice times) the procedure by the request of the National and Ethnic Minority Bureau. Under the investigation the applicant had been interrogated about what happened in the police department. The suspected policemen also had been interrogated by confrontation in the presence of the applicant, too. The policemen on duty and the partners of applicant also had been interrogated as witnesses. Medical expert also had been appointed to determine the nature and possible reasons of the injuries of applicant and the medical examination of National and Ethnic Minority Bureau also had been considered. The criminal procedure had been closed cause there were not enough evidence that the ear wounds had been caused by the suspected policemen. But the efficient of legal aid does not depend on the certainty of the favor result for applicant, in the view of Article 13.

The court said that the investigation by the request of applicant was substantiated and eligible to punish and identify the representatives of the state who are responsible by the gathered evidences. After all of this the court weighed that the applicant had efficient legal aid.

I want remark here that the fair of procedure must be guaranteed under all judicial level by the court's general norm system, on their other side infringements on lower level can be remedy in the later periods of procedure so the honesty can be examined under the entire procedure. The weight of evidences is the exclusive competence of the national courts, but the ECHR can overrule by the honesty in flagrant high-handed weighs.

Examining the ECHR within the past ten years cases of confrontation we can say that the court acted in this decade by the spirit of what written above.

I have found 27 cases, where the „confrontatio" (as expression especially not examined by state) can be found but I only chosen the following five which were worthy for examination and were relevant.

Hülki Günes vs Turkey (decision of 19 September 2003) case the court found the infringement of fair procedure cause the accused, charged for treason, could not meet the three witnesses under the entire procedure who identified him by 5 photos. His

request for personal identify procedure had been rejected, he could not able to ask questions for witnesses, or confront them cause road-safety grounds the court did not summon the policemen witnesses in spite of the numbered request of defense. So he could not ask questions by his defending counsel, could not able to check the identity, trustworthy of witnesses or notice their behavior in neither of periods of the procedure. His counsel also was not on the photograph present for identification or their signatures were not in the minutes of it.

The court did not find infringement in the part of *Belevitskiy vs Russia* decision of 1 March 2007, which been established on the applicant's objections that he had not got fair procedure under the investigations of witnesses. The rejection argument said that the accused, suspect later been charged for abuse of drugs, was already confronted to the witness, who testified against him, also on the trial in the first instance. There he and his counsel were able to ask the witnesses and examine the authenticity. (Here the court looked back on its Isgró *vs* Russia, decision of 19 February 1991). On the repeated procedure the witness was not on it personally but the previous investigation and trial minutes stated by the new adjudication court, made them material proof and those were in harmony with other witnesses' testifies and other physical evidences, which referred to the guilty of the accused.

The court condemned in *Bak vs Poland* decision of 16 January 2007 cause the unreasonable length of procedure (but not for the previous long one). The applicant has been charged for two counts of armed robbery, which were organized, said the Polish government, so inspite of it solid trial and investigation were needed. For example they examined 300 evidences, interrogated 130 witnesses and confronted the accused in many times. But all of this did not give fund of this 7-year-long procedure. (Applicant had been arrested on 28 September 1999 and the case was still on regional court level on 28 March 2006).

The court in it's 130 long argument found the serious infringement of Articles 3, 5 and 8 of the convention and found a significant compensation for the injured parties in *Elei and others vs Turkey*, decision of 24 March 2004. Here the applicants were Turkish lawyers, had been arrested in December 1993 for violation of Criminal Code. Actually they were arrested for representing clients before the State Security Court and take part in human rights work. They said, as their complaint, they were tortured and had cruel treated under their detention.

The most of the lawyers confronted to a witness who gave a false but testify against them. He said about all of them that they were in contact with the Kurd Labour Party which is a terrorist organization. Some of their partners were not confronted but everybody charged by the confronted witness's false testify. After the confrontations and accuses applicants were forced to sign the minutes by detention. These contents could not be known by the applicants cause their eyes were covered under the whole detention.

It is sad in Irfan Bilgin *vs* Turkey decision of 17 October 2001 that in a complicated, ramifying and full with contradictions case like it was not been done a deep investigation and judicial inquiry by national authorities, moreover though nothing of their duties, said the Court of Strasbourg. By that they violated Article 2. (guarantees the

right for life), Article 5. (right for liberty) and Article 13. (the right for suitable, efficient legal aid) of the convention. The substance of the case is that Ankara Security Directorate apprehended the applicant's brother. Later the applicant enquired for his brother but came to a dead end with either of authorities. All of the authorities said that his brother is not among the arrested ones. After it hi hired a lawyer who made contact with the Human Right Council of Turkish National Assembly and reported what happened.

The applicant enquired further for his brother, turned to the chief prosecutor of Ankara, too. After it he collected 10 prisoners' written testifies what said that his brother was within the prisoners. But the testifies of prisoners were inconsistent with the statements of policemen and prison guards cause they denied that Kenan Bilgin, brother of the applicant, was in arrestment. At that time Selahattin Kemaloğlu was a prosecutor in Ankara did not start the investigation in Kenan Bilgin's case but Özden Tömük did it. When he got the case from the Ankara Security Directorate he asked for information about Kenan Bilgin's arrest. The Directorate said that they never arrested him. After it he listened to the witnesses and made sure that there is something wrong and as a prosecutor he must search for Kenan Bilgin or other similar disappearances. He applied for the chief prosecutor to join the cases but his application had been returned. He filed for action against the Security Directorate's leader because he denied to cooperate with the authorities, but it was also unsuccessful. Many times he motioned to confront the affected policemen with the witnesses, but it was no happened cause nobody answered to his pleadings.

Anyway the confrontation or interrogation of the affected policemen must have to be done what could be by the prosecutor, the competent authorities never gave him the list of policemen.

At last I remark that because of the unjustified draw of pre-trial detentions there were many cases where under the term of investigation, except Sulaoja case, was confrontation but neither of the cases said the confrontation was responsible for the unjustified draw of detention. (See: Contrada *vs* Italy, decision of 24 August 1998; Díkme *vs* Turkey, decision of 11 July 2000; Cesky *vs* Czeh Republic, decision of 4 October 2000; G.K. *vs* Poland, decision of 20 January 2004; Belcher *vs* Bulgaria, decision of 8 July 2004; Vachev *vs* Bulgaria, decision of 8 October 2004; Sulaoja *vs* Estonia, decision of 15 May 2005; Mitev *vs* Bulgaria, decision of 22 March 2005; Iovchev *vs* Bulgaria, decision of 2 May 2006; Celejenski *vs* Poland, decision of 4 May 2006).

5. Further discountable conclusions by the ECHR's decisions connected to confrontation

As is referred as stated above the confrontation in the convention is not be named in spite of that it can be found in the practice of ECHR, sometimes it needed and possible to deal with it cause the most of continental countries includes and us it in their domestic legal system.

It is well perceptible that the confrontation can be connected to the interrogations by the meaning of Strasbourg, cause in reality it is a special form of interrogation as might as in the cases of witnesses or accused. The court says the confrontation is a form of interrogation, a procedure act which able to help and fulfill the right within the accused (human right) legal package ordered in the Convention. Especially the right of accused that he can secure the authenticity of testifies or personality (behavior) of

witnesses against him or maybe other accused as personally with questions, deservations or simply surveillance.

The court says that the confrontation is a form which able, also in the period of investigation and trial, to exhaust the requirement that the defense (counsel, accused) to control the person who makes testimony against them, or we can use the mean of confront, at least in one period of the procedure.

Just the default of confrontation, if besides it was possible to ask questions from incriminating persons by the defense, does not give fund for violate the fair procedure within the Convention.

We also say that the absence of confrontation for itself cannot be illegal, cause it is possible that it was not legal to sit two persons in front of each other cause rational reasons, within witness protection reason (*e.g.* case of anonymous).

Just only the great number of confrontations does not give enough arguments in the practice for funding the unreasonable term of procedure, as regards it could be a justify circumstance for the delaying tactic behavior of domestic authorities.

Some cases show that under confrontation sometimes possible not only the violation of fair procedure, legal aid, principles of the defense, but also the use of inhuman, humiliating treatment where the court must be so strict against them and emphasize the following noble idea, that not only the remedy of violation is the duty of the state, but also the prevention of it. Nor the act and the legal practice can contain „integrated" infringements what always scream for legal aid in all European states.

V. Summon of the study

We can see that the confrontation is a very important part of criminal procedure. International and European Union decisions, conventions makes rules for it. It is said, that in the 21st Century we can find too much negative cases, where the law, the fair procedure, the equal of arms, right for innocence suffer violation. Of course some of this special cases are from countries, where we cannot find a real legal state (*e.g.* Turkey, where the real power is in the hands of the army), but we also can find similar cases in European countries. As I remarked, in Nuremberg the German defending counsels could not be efficient, because the Anglo-Saxon type of cross-examination. The most of the accused did terrible, inhuman and cruel crimes against the human race, but everybody has a right for innocence until an impartial, independent court find him guilty. So I can remark the Hülki Günes *vs* Turkey (decision of 19 September 2003); Belevitsky *vs* Russia (decision of 1 March 2007); Elci and others *vs* Turkey (decision of 24 March 2004); and Irfan Bilgin *vs* Turkey (decision of 17 October 2001) etc.

It is a good fact, that there are many international conventions, like International Covenant on Civil and Political Rights and the European Convention on Human Rights, they are not only empty platitude, not just symbols of the legal state and independent judgment, but a living creatures what make the balance between the prosecution and defense. That balance is not a modern idea, but it can be found in the ancient Egyptian myology, when the spirit of the dead stands before the court of gods in the Hall of Justice, where the gods (Anubis, Toth and Osiris) give the fair procedure for him. So the fair procedure, equal of arms and other elements of a modern legal system are immortal.

Evolution of the Regulation of Corruption Offenses

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Abstract:

Criminal conduct in the sphere of civil service has experienced serious mutations post-1990, particularly through the particularization of criminal liability in the area of combating corruption as a social phenomenon, the fight against corruption and, especially, the fight against the corruption of the public power's agents becoming a priority for Romania, being, at the same time, considered as a priority at European Union level as well.

In this regard, under the aegis of the Council of Europe, on January 27th 1999, in Strasbourg, was adopted the Criminal Law Convention on Corruption, which entered into force on July 1st 2002, ratified by Romania through Law no. 27/2002,[1] *according to which "corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society".*

Furthermore, the Member States of the Council of Europe and the European Community have adopted in Strasbourg, on November 4th 1999, the Civil Law Convention on Corruption,[2] *which defines in Article 2 "corruption" as "requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof".*

Keywords: *corruption offenses; active bribery; passive bribery; Penal Code of 1968; new Penal Code.*

In an attempt to draft a definition of corruption, it has been stated that corruption offenses are those acts "committed in connection with the exercise of functions, official duties and consist in violations of attributions, pursuing, in all cases, a profit".[3]

Regulation of corruption offenses in the 1968 Penal Code. The Penal Code adopted in 1968[4] regulated, in Title VI of its Special Part, the offenses affecting activities of public

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[1] Published in the "Official Journal of Romania", Part I, no. 65 of January 30th 2002.

[2] In the Explanatory Report of the Civil Law Convention on Corruption, it was stated that: "The Council of Europe became strongly interested in the international fight against corruption because of the obvious threat corruption poses to the basic principles this Organisation stands for: the rule of law, the stability of democratic institutions, human rights and social and economic progress".

[3] A. Boroi, N. Neagu, *Armonizarea legislației române cu legislația comunitară în materie de corupție*, in Dreptul no. 4/2003, p. 117.

[4] The Penal Code was adopted by Law no. 15/1968, published in the "Official Journal of the Socialist Republic of Romania", Part I, no. 79-79bis from June 21st 1968, and entered into force, according to the provisions of Article 363, on January 1st 1969. It was republished in the "Official Journal of Romania", Part I, no. 65 from April 16th 1997.

interest or other activities provided by law,[5] the most numerous texts of the Penal Code being comprised under this title, which presented a wide range of incriminations, unified by the same generic legal matter: "the body of social relations whose existence is ensured through the protection of social values such as: proper functioning of state, as well as public, organisations, legal interests of individuals, course of justice, railroad traffic safety".[6] Thus, in this title was included the first chapter, entitled "Misfeasance in office or in connection with the office" (Articles 246-258), which incriminated as corruption offenses, without explicitly using this term: passive bribery (Article 254), active bribery (Article 255), receiving undue advantages (Article 256) and influence peddling (Article 257).

Subsequent to the extensive amendments brought by Law no. 140/1996,[7] followed by the decision to republish the Penal Code, *passive bribery* was defined by Article 254 para. (1) of the 1968 Penal Code as "the act of that public official who, directly or indirectly, requests or receives money or any other undue advantages or accepts the promise of such advantages or does not reject it, in order to act, to refrain from acting or to delay to act in the exercise of his or her official duties or in order to act contrary to these official duties", an act punishable with imprisonment from 3 to 12 years and the prohibition of certain rights. Para. (2) regulated the aggravated form of this offense, providing that "the act stipulated in para. (1), if committed by a public official with control functions, shall be punished with imprisonment from 3 to 15 years and the prohibition of certain rights" and, according to para. (3) "the money, valuables or any other goods which were the subject of passive bribery shall be confiscated, and if they are not to be found, the convict is compelled to pay their equivalent in money".

Article 255 incriminated *active bribery* as "the promising, offering or giving of money or other advantages, in the forms and for the purposes set out in Article 254", the penalty provided being imprisonment from 6 months to 5 years.

Para. (2) of Article 255 regulated a cause which removed the criminal nature of the act, providing that the act does not constitute an offense when the briber was constrained in any way by the person who took the bribe, and para.(3) regulated a special cause of non-punishment, which applied when the briber denounced to the authorities the act before the prosecution body had already been notified of the respective offense and, in such cases, the money, valuables or any other goods were returned to the person who had offered them.

Para. (4) of Article 255 provided that "the provisions of Article 254 para. (3) shall apply accordingly, even if the offer was not followed by acceptance", establishing the obligation of applying the safety measure of the special confiscation (forfeiture).

Receiving undue advantages, incriminated in Article 256 para. (1) represented "the receipt by a public official, directly or indirectly, of money or other advantages, after

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[5] Initially, the name of Title VI of the Special Part was "Offenses affecting the activity of state organisations, public organisations or other activities provided by law".

[6] See S. Kahane, *Explicații introductive (Infracțiuni care aduc atingere activității organizațiilor de stat, organizațiilor obștești sau altor activități reglementate de lege)* in „Explicații teoretice ale Codului penal român. Partea specială" by V. Dongoroz et al., vol. IV, Academiei Publishing House – All Beck Publishing House, Bucharest, 2003, p. 63.

[7] Published in the "Official Journal of Romania", Part I, no. 289 from November 14th 1996.

having performed an act by virtue of his/her office, an act which he/she was compelled to perform on the grounds of his/her office", the penalty provided by law being imprisonment from 6 months to 5 years. The money, valuables or any other goods received were confiscated, and if they were not to be found, the convict was compelled to pay their equivalent in money.

Influence peddling was incriminated by Article 257 of the 1968 Penal Code, the legislator defining the offense as "the receipt or request of money or other advantages or the acceptance of promises or gifts, directly or indirectly, for oneself or for another, committed by a person who asserts influence or leaves the impression that he/she can exert an influence over a public official in order to persuade him/her to do or refrain from doing an act falling within the scope of his/her official duties", the penalty provided being imprisonment from 2 to 10 years. According to para. (2) of this article, the provisions of Article 256 para. (2) were applied correspondingly, which meant that the money, valuables or any other received goods were confiscated, and if they were not to be found, the convict was compelled to pay their equivalent in money.

Law no. 78/2000 on preventing, discovering and sanctioning of corruption acts[8] was the first regulatory act which used, *expressis verbis,* the notion of "corruption", being the result of the transposing into Romanian legislation of the Programme of Action against Corruption adopted by the Committee of Ministers of the Council of Europe in November 1996, following the recommendations of the 19th Conference of European Ministers of Justice in Valletta, from 1994, and of Resolution no. 1 adopted by the European Ministers of Justice at the 21st Conference in Prague, from 1997, which called upon the Member States to rapidly implement the Programme of Action against Corruption.

Law no. 78/2000, in its Article 5 para. (1)-(3), classified the corruption offenses into three categories: "corruption offenses" – the offenses provided in Articles 254-257 of the 1968 Penal Code, as well as the offenses provided under special laws, the specific forms of the offenses provided in Articles 254-257 of the Penal Code; "offenses assimilated to corruption offenses" – the offenses provided in Articles 10-13 of the law and "offenses directly related to corruption offenses" – the offenses covered by Article 17 of the law.

Subsequently, after the amendments brought to Law no. 78/2000 by means of Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignitary functions, public offices and in the business environment, and to prevent and sanction corruption,[9] a fourth category of offenses was added, category which includes offenses against the financial interests of the European Communities, governed by Articles 18^1-18^5 of the law, which, however, were not qualified by the legislator as corruption offenses.

Originally, Law no. 78/2000 provided that in corruption cases, the provisions governing the procedure applicable for the prosecution and trial of corruption offenses are those to be found in the Criminal Procedure Code and in special laws and, in

[8] Published in the "Official Journal of Romania", Part I, no. 219 from May 18th 2000.
[9] Published in the "Official Journal of Romania", Part I, no. 279 from April 21st 2003.

accordance with Article 27, when there are solid indicators regarding the perpetration of one of the offenses provided for by this law, "for the purpose of gathering evidence or of identifying the offender, the public prosecutor may order, for a maximum period of 30 days:

a) the placing under surveillance of bank accounts and their related accounts;
b) the placing under surveillance or wiretapping of telephone lines;
c) the access to informational systems;
d) the communication of authentic documents or under private signature, of banking, financial or accounting documents".

For solid reasons, during the prosecution stage, the measures could be extended by the prosecutor by means of a motivated ordinance, each extension not exceeding 30 days, and, during the trial stage, by the court by means of a motivated ruling.

Also, in accordance with Article 22 of the law, the prosecution is necessarily conducted by the prosecutor, Article 28 instituting the Section for combating corruption and organized crime, which operated within the Prosecutor's Office attached to the Supreme Court of Justice, as specialized structure in this area at national level, the services for the combat of corruption and organized crime within the prosecutors' offices attached to the Courts of Appeal, as well as the offices to combat corruption and organized crime within the prosecutors' offices attached to tribunals, as local structures specialized in this field. The activity of these services and offices was coordinated and controlled by the Section for combating corruption and organized crime, which operated within the Prosecutor's Office attached to the Supreme Court of Justice.

Subsequent to the ratification by Romania through Law no. 27/2002 of the Criminal Law Convention on Corruption, adopted in Strasbourg on January 27th 1999, by means of Law no. 161/2003 the legislator introduced in Law no. 78/2000 Article 6^1, incriminating the offense of *buying influence*, consisting in "promising, offering or giving money, gifts or other advantages, directly or indirectly, to a person who asserts influence or leaves the impression that he/she can exert an influence over a public official in order to persuade him/her to do or refrain from doing an act falling within the scope of his/her official duties", the penalty provided by law being imprisonment from 2 to 10 years.

According to para. (2) of the same article, the legislator also established a special cause of non-punishment, similar to the one regulated in the case of active bribery, the offender being exempted from punishment "if he/she denounces to the authorities the act before the prosecution body had already been notified of the respective act", in this case, the money, value or any other goods being returned to the person who had offered them.

Para. (3) also regulated the obligation of the application of the safety measure of the confiscation, providing that "the money, valuables or any other goods which represented the object of the offense provided in para. (1) shall be confiscated and, if they are not to be found, the convict shall be compelled to pay their equivalent in money".

Thus, Romania complied with the obligation under Article 12 of the Criminal Law Convention on Corruption, incriminating, albeit in a separate text, the active variation of

the offense referred to in the Convention as "influence peddling". Therefore, the passive form of the offense was still to be found in Article 257 of the 1968 Penal Code, and in its active form, in Article 6[1] of Law no. 78/2000, republished.

The Government Emergency Ordinance no. 124/2005[10] introduced Article 26[1] which regulated the institution of the undercover investigators. Thus, if there were solid and concrete indicators that an offense has been committed or is about to be committed by a public officer, an offense of passive bribery, provided in Article 254 of the Penal Code, an offense of receiving undue advantages, provided by Article 256 of the Penal Code, or of influence peddling, provided by Article 257 of the Penal Code, the prosecutor was entitled to authorise, by means of a motivated ordinance, the use of undercover investigators or of investigators with real identity, for the purpose of discovering the facts, identifying the perpetrators and gathering evidence.[11]

While undercover investigators are operative workers within the judicial police, especially appointed for this purpose, under the law, the investigators with real identity are operative workers within the judicial police. Both undercover investigators and those with real identity could be authorized to promise, offer or, where appropriate, give money or other advantages to a public official, under the conditions provided in Articles 254, 256 or 257 of the Penal Code, drawing up minutes regarding the performed activities, which could constitute evidence and could only be used in the criminal case for which the authorization had been given. Also, undercover investigators or those with real identity could be heard as witnesses with protected identity, under the conditions of Article 86[2] of the 1968 Criminal Procedure Code.

Regulation of corruption offenses in the new Penal Code. The new Penal Code, adopted by means of Law no. 286/2009[12], which entered into force, in accordance with the provisions of Article 246 of Law no. 187/2012,[13] on February 1st 2014, regulates in Title V of its Special Part "Corruption offenses and misfeasance in office", structured into two chapters: Chapter I – "Corruption offenses" (Articles 289-294) and Chapter II – "Misfeasance in office" (Articles 295-309).

Unlike the 1968 Penal Code which regulated, as shown above, in Chapter I of Title VI of its Special Part, misfeasance in office and corruption offenses together, under the name "misfeasance in office or in connection with the office",[14] this regulatory approach being criticized ever since the publication of the Code, the 2009 Penal Code, re-establishing the order of the social values protected by criminal law and,

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[10] Published in the "Official Journal of Romania", Part I, no. 842 from September 19th 2005.

[11] The authorization of the use of undercover investigators or of investigators with real identity was given by means of a motivated ordinance by the prosecutor in charge of the criminal proceedings for a period of maximum 30 days, which could be extended, on the basis of a motivation, only if the grounds which determined the authorization maintained themselves. Each extension could not exceed 30 days and the total period of the authorization, concerning the same case and the same person, could not exceed 4 months.

[12] Published in the "Official Journal of Romania", Part I, no. 510 from July 24th 2009.

[13] Published in the "Official Journal of Romania", Part I, no. 757 from November 12th 2012.

[14] It has been stated that misfeasance in office "can have as direct active subjects only public officers or other employees", whilst in the case of misfeasance in connection to the office, "the direct active subjects can be represented by any persons". In this respect, see S. Kahane, *op. cit.*, p. 68.

consequently, the order of incriminations, has achieved this goal by the regulation, under Title V of the Special Part, of the two chapters, the ordering of offenses by placing the corruption offenses in a pre-eminent regulatory position being generated by the importance given to the process of combating corruption, both in Romania and in the European socio-political context.

With the implementation of the new Penal Code, Article 79 of Law no. 187/2012 also modified Law no. 78/2000, with its subsequent modifications and completions, which provides in Article 5 that "for the purpose of the present law, corruption offenses are those offenses provided in Articles 289-292 of the Penal Code, including when they are committed by the persons provided in Article 308 of the Penal Code", being offenses assimilated to corruption offenses those offenses provided in Articles 10-13. Moreover, in para. (3) of the same regulatory text, it is stated that "the provisions of the present law are also applicable to the offenses against the financial interests of the European Union, provided in Articles 18^1-18^5, their sanctioning aiming to ensure the protection of the European Union's funds and resources".

It follows that the legislator has abandoned the category of offenses related to corruption offenses, covered by Article 17 of Law no. 78/2000, this text being repealed *expressis verbis* through the provisions of Article 79 point 10 of Law no. 187/2012.

At present, the Penal Code incriminates as corruption offenses four offenses: passive bribery (Article 289); active bribery (Article 290); influence peddling (Article 291); buying of influence (Article 292), maintaining the dissociated incrimination of influence trafficking and buying of influence and abandoning the distinct incrimination of the offense of receiving undue advantages, the latter being found in the constitutive content of the offense of passive bribery, provided by Article 289.

Passive bribery is governed by Article 289 of the Penal Code and Article 7 of Law no. 78/2000, republished, the previously mentioned texts incriminating a standard form, an assimilated form, a mitigating form, as well as an aggravated one.[15]

The standard form is provided in Article 289 para. (1) of the Penal Code, consisting in "the act of the public official who, directly or indirectly, for himself/herself or for another, claims or receives money or other advantages which are not due to him/her or accepts the promise of such advantages in connection with the performance, failure to perform, acceleration or delay of an act falling within the duties of his/her office or in relation to the performance of an act contrary to these duties", the penalty provided being imprisonment from 3 to 10 years and the prohibition of the right to hold a public office or to exercise the profession or activity in the execution of which he/she committed the act.

The new Penal Code, unlike the 1968 Penal Code, no longer provided as variation of the material element *(actus reus)* of the objective aspect in the passive bribery offense the failure to reject the promise of money or other undue advantages, which presupposed the lack of a firm reaction of rejection of the public official when faced with the promise of money or other advantages.

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[15] V. Dobrinoiu, *Infracțiuni de corupție și de serviciu* in „Noul Cod penal comentat. Partea specială" by V. Dobrinoiu et al. vol. II, Universul Juridic Publishing House, Bucharest, 2012, p. 527.

The assimilated form is provided in para. (2) of the same incrimination text, which stipulates that "the act provided in para. (1), committed by one of the persons stipulated in Article 175 para. (2), constitutes an offense only when committed in connection with the failure or delay in performing an act falling under his/her legal duties or in connection with the performance of an act contrary to these duties".

The mitigating form is provided in Article 308 of the Penal Code and consists in the act provided in Article 289 committed by or in connection with the persons who exercise, permanently or temporarily, with or without remuneration, a duty of any kind in the service of one of the natural persons stipulated in Article 175 para. (2) or within any legal person, in this case the special limits of penalty being reduced by one third, in accordance with the provisions of Article 308 para. (2) of the Penal Code.

The aggravated form is provided in Article 7 of Law no. 78/2000, republished, which stipulates that, when the active subject is one of the subjects provided in letters (a)-(d) of the regulatory text quoted hereabove, the penalty limits provided in Article 289 of the Penal Code shall be increased by one third. As follows, the categories of subjects provided in Article 7 are:

a) persons exercising a public dignitary function;
b) judges or prosecutors;
c) persons who are criminal investigation bodies or which are responsible for the establishment or sanctioning of contraventions;
d) persons provided in Article 293 of the Penal Code, respectively, the persons who, based on an arbitration agreement, are called upon to decide on a dispute which is entrusted to them for settlement by the parties to this agreement, regardless of whether the arbitration proceedings shall be conducted under Romanian or any other law.

Although the safety measure of special confiscation is regulated in Article 112 of the Penal Code, the legislator chose to expressly provide it also in Article 289 para. (3), which stipulates that "the money, valuables or any other goods received are subject to confiscation, and when they can no longer be found, confiscation by equivalent shall be applied". As shown in the regulatory text mentioned hereabove, in order to be confiscated, the money or any other goods must have actually been received, since those only promised to the bribed person cannot be confiscated.

Active bribery is governed by Article 290 of the new Penal Code, the legislator incriminating a standard form (in Article 290 of the Penal Code) and a mitigating form (in Article 308 of the Penal Code).

Article 290 para. (1) of the Penal Code defines active bribery as "promising, offering or giving money or other advantages, under the conditions shown in Article 289", punishable by imprisonment of 2 to 7 years.

Article 308 of the Penal Code, just like in the case of passive bribery, provides that if the act is committed by a person or in connection with a person "who exercises, permanently or temporarily, with or without remuneration, a duty of any kind in the service of one of the natural persons stipulated in Article 175 para. (2) or within any legal person", the special limits of penalty are reduced by one third.

The new incriminating regulation, unlike the old Penal Code, which required that the promising, offering or giving money or other advantages be achieved before the performance or non-performance of the act or, at the latest, during the performance of the official duties, claims that the act be committed "in connection with the performance, failure to perform, acceleration or delay of an act falling within the duties of his/her office or in relation to the performance of an act contrary to these duties".

Article 290 of the Penal Code regulates in para. (2) a cause of non-imputability, and in para. (3) a cause of non-punishment.

Thus, according to Article 290 para. (2), "the act does not constitute an offense when the briber was constrained in any way by the person who took the bribe" and, according to para. (3) of the same article, "the briber is not punished if he/she denounces the act to the authorities before the prosecution body has been notified of the respective offense". In these situations, according to para. (4), the money, valuables or any other goods are returned to the person who gave them, if they were given in the case referred to in para.(2) or given after the denunciation provided in para. (3). Therefore, the money or goods given prior to the denunciation shall not be returned, but they shall be made subject to confiscation.

Para. (5) provides *expressis verbis* that "the money, valuables or any other goods offered or given shall be confiscated, and if they are not to be found, the confiscation by equivalent shall be applied".

Influence trafficking is incriminated by Article 291 of the Penal Code and consists in "claiming, receiving or accepting a promise of money or other advantages, directly or indirectly, for himself/herself or for another, committed by a person who asserts influence or leaves the impression that he/she can exert an influence over a public official and who promises to persuade him/her to perform, to refrain from performing, to accelerate or to delay an act falling within the scope of his/her official duties or to perform an act contrary to these duties", the penalty provided by law being imprisonment from 2 to 7 years.

Article 291 para. (1) regulates the standard form of the offense of influence trafficking, with Article 7 of Law no. 78/2000, republished, regulating the aggravated form, under the same conditions, which relate to the quality of the active subject, just like in the case of passive bribery and, therefore, we will no longer comment upon them. Also, Article 308 para. (1) of the Penal Code, just like in the case of the other corruption offenses, provides a mitigating form.

Buying of influence is incriminated by Article 292 of the Penal Code in its standard form and by Article 308 of the Penal Code in its mitigating form. The standard form of this offense represents "promising, offering or giving money or other advantages, for himself/herself or for another, directly or indirectly, to a person who asserts influence or leaves the impression that he/she can exert an influence over a public official, in order to persuade him/her to perform, to refrain from performing, to accelerate or to delay an act falling within the scope of his/her official duties or to perform an act contrary to these duties", the penalty provided by law being imprisonment from 2 to 7 years and the prohibition of exercising certain rights.

As in the case of the other offenses, according to Article 308 of the Penal Code, the special limits of the penalty are reduced by one third when the act is committed by or in connection with the persons who exercise, permanently or temporarily, with or without remuneration, a duty of any kind in the service of one of the natural persons stipulated in Article 175 para. (2) or within any legal person.

Para. (2) of Article 292 of the Penal Code regulates a cause of non-punishment in the situation in which the offender denounces the act to the authorities before the prosecution body has been notified of the respective offense. Also, in accordance with the provisions of para. (4), the money, valuables or any other goods offered or given shall be confiscated, and if they are not to be found, the confiscation by equivalent shall be applied"; furthermore, the provisions of Article 112^1 of the Penal Code regulating extended confiscation also apply.

Article 293 of the Penal Code provides that, as regards to offenses of passive and active bribery incriminated in Articles 289 and 290, the provisions of these articles shall apply, accordingly, also to those persons who, based on an arbitration agreement, are called upon to decide on a dispute which is entrusted to them for settlement by the parties to this agreement, regardless of whether the arbitration proceedings shall be conducted under Romanian or any other law.

In addition, Article 294 of the Penal Code provides that the provisions of Chapter I of Title V of its Special Part also applies to the corruption acts committed by foreign officials or related to them, if not otherwise provided in the international treaties to which Romania is a party, and letters (a)-(g) enumerate the categories of foreign officials concerned.

Procedural issues regarding corruption offenses. Both in the case of corruption offenses and in that of the offenses assimilated to the former, the prosecution is carried out by the prosecutor, and the initiation of the criminal proceedings is done in all the manners provided in the Criminal Procedure Code.

In 2002, the Government Emergency Ordinance no. 43/2002 established the National Anti-Corruption Prosecutor's Office as a prosecutor's office specialized in combating corruption offenses, which exercises its attribution throughout Romania by prosecutors specialized in combating corruption.

The National Anti-Corruption Prosecutor's Office was organized as an autonomous body, with legal personality, within the Public Ministry, being headed by a general prosecutor and coordinated by the general prosecutor of the Prosecutor's Office attached to the Supreme Court of Justice.

Subsequently, after the Constitutional Court, through its Decision no. 235 of May 5th 2005[16], has found that the provisions of art. I point 2 of the Law approving Government Emergency Ordinance no. 103/2004 amending Government Emergency Ordinance no. 43/2002 on the National Anti-Corruption Prosecutor's Office, with reference to Article 13 para. (1) letter (b) from the Government Emergency Ordinance no. 43 of April

[16] Published in the "Official Journal of Romania", Part I, no. 462 from May 31st 2005.

4th 2002 on the National Anti-Corruption Prosecutor's Office, which establishes that the National Anti-Corruption Prosecutor's Office has jurisdiction over the offenses provided in Law no. 78/2000, with the subsequent modifications and completions, committed by deputies and senators, are unconstitutional, by way of the Government Emergency Ordinance no. 134/2005[17] was amended the Government Emergency Ordinance no. 43/2002, stating that "the National Anti-corruption Department is established as an autonomous body, with legal personality, within the Prosecutor's Office attached to the High Court of Cassation and Justice, through the reorganisation of the National Anti-Corruption Prosecutor's Office".

At present, due to the changes introduced by Law no. 54/2006 approving Government Emergency Ordinance no. 134/2005, within the Prosecutor's Office attached to the High Court of Cassation and Justice functions, as a body with legal personality, the National Anti-corruption Directorate, headed by a chief-prosecutor.

Conclusions. The entry into force of the new Penal Code has brought added rigour and concision to the regulation of corruption offenses. Furthermore, the changes introduced by Law no. 187/2012 eliminated the previous regulatory parallelism by splitting the incrimination between the old Penal Code and Law no. 78/2000, which, at present, regulates in Article 7 only an aggravated form of passive bribery and influence trafficking and, in Articles 10-13[2], the offenses assimilated to corruption offenses.

Also, we deem as inspired the adoption of the French model as regards the passive bribery with respect to abandoning the condition of the precedence of the perpetration of the act in relation to the performance of the official duty, which resulted in the elimination of a separate incrimination for receiving undue advantages; however, this system has not been transposed in the case of influence trafficking.

Currently, even if not completely immune to critics, Romania has an incriminating system in the matter of corruption offenses which has transposed into national law the provisions of the Criminal Law Convention on Corruption, which entered into force on July 1st 2002 and was ratified by Romania through Law no. 27/2002.

[17] Published in the "Official Journal of Romania", Part I, no. 899 from October 7th 2005.

A Few Remarks about Criminal Corruption in Hungary

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Abstract:

Whenever we type the word „corruption" in any of the internet-based search programs, it gives nearly 20 million results, and the fact is, that hundreds of international conferences focus on the so-called "today's plague" phenomenon every year.

Nowadays it is hard to say anything new about one of our greatest common enemy to date, that spreads across the globe, corruption.

The roots of abuse and misuse carried out to reach individual goals, backed by rights delegated by the community,[1] date back to thousands of years.

Keywords: *corruption; economic deficit; passive and active corruption; recent Hungarian Criminal Code.*

To enumerate forms of corruption really takes a man, yet let's recall the classic example, how Paris designated to choose the most beautiful of all goddess in Greek mythology was approached by different offers: it was probably Zeus's wife who committed the presently most typical version of corruption, offering richness. The career opportunity promised by Pallas Athena on the other hand, also holds a good value even today.[2]

In addition, as far as we know, the enemy could pass the impenetrable Great Wall of China for centuries only by corrupting the guards.

Over the years, the situation did not improve too much.

Some International Instruments

In the last 20 years a considerable number of international instruments was adopted to oblige states to criminalize certain forms of corruptive behavior.

The most important of these are the following:

- Protocol to the Convention on the Protection of the European Communities' financial interests (27 September 1996);
- Convention drawn up on the basis of Article K 3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities of officials of Member States of the European Union (26 May 1997);
- Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector;

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[1] See in details: Endre BÓCZ: The Corruption in Hungarian Criminal Law. (In: Papers on the Corruption. Helikon/Korridor, Budapest, 1998)

[2] See János BÁNÁTI: Address of the President of the Budapest Bar Association (In: Young Penalist Conference on Corruption and Related Offences in International Business Relations. HAS Working Papers, No 18. Budapest, 2003, p. 10.)

- Criminal Law Convention on Corruption (adopted on 27 November 1999 in the framework of Council of Europe);
- United Nations Convention against Transnational Organized Crime;
- Resolution (99) 5 of the Committee of Ministers of the Council of Europe: Agreement

Establishing the Group of States against Corruption;

- Resolution (97) 24 of the Committee of Members of the Council of Europe: Twenty

Guiding Principles for the Fight against Corruption;

- OECD Convention on Combating Bribery of Foreign Public Officials in International

Business Transactions;

- The Reports on Group of States against Corruption (GRECO - 1999);

- Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 6 June 2011 – Fighting corruption in the EU [COM (2011) 308]

Global Corruption Barometer of Transparency International - 2013

The recently published Global Report of Transparency International gives special actuality to the abovementioned statement. According to the Report of 2013, which released some echoes in Hungary, our country had fallen back by one place on the ranking list.

"It seems as though Hungarian society is becoming insensitive to corruption. 70% of the population would not report corruption either because they do not trust authorities or they are afraid of repercussions. Mistrust penetrates public life more than ever, which is the hotbed for sidestepping rules, corruption and apathy. According to Transparency International, the government does not encourage citizens to stand up against corruption, as it does not provide adequate protection for whistleblowers, nor does it enforce the fast and effective investigation of announcements of corruption."[3]

With a view to those present, here I have to emphasize that the above generalization did not concern the judicial system, and Hungarian public opinion considers the judicial system as the least corrupt.

Let's take a more pragmatic look at the phenomenon: the corruption index in every country shows close relation to its GDP per capita.

If the corruption index improves by 1 point a(n) 0.3 percent increase in the GDP is likely to occur. (Hungary presently having 54), this is one good reason why it is worth fighting corruption.

[3] In 2013 Hungary scored 54 points in the CPI survey, thus ranking 47th out of the 177 surveyed countries. Among the European Union's 28 member states, Hungary ranked 20th (last year 19th out of 27 member states); therefore, its ranking remains unchanged in the bottom third. In regional comparison, Hungary is in the mid-range, following Estonia, Poland, Lithuania and Slovenia. (http://www.transparency.hu/HUNGARY_IS_CORRUPT___AND_IT_IS_NOT_THE_ONLY_ONE?bind_info=page&bind_id=322 – 10.04.2014.).

A few words about the past and present in Hungary

Those earlier expectations, that did seek more effective actions against corruption from the use of more strict and rigorous tools of criminal law, or from fighting back the latent and undetectable crimes, or simply from the improvement of detection, were not met.

Corruption was related to the economic deficit in the last decades of the previous century, and it was made an ordinary, routine act, by the fact that some material goods were available only through offering and accepting illegitimate benefits. Before the transition of the market economy, a different type of corruption existed, which was harder to detect but was more widespread, the so-called exchange of symbolic goods (such as relations, connections, and positions) were exchanged for mutual benefits. Some people hoped that this form of protectionism could be de-emphasized by the re-establishment and transformation of the economy and economic conditions. Unfortunately, the forms of corruption, even with the re-establishment and transformation of the political and economic conditions, could not be eliminated, and could only adjust to these new conditions. The process of privatization in Hungary – especially its earlier stage – was infected by different forms of corruption. The politically determined legislation, and its weaknesses empowered the possibilities of abuse and misuse, and by the time the correct legal frames for the privatization were created, major part of the transition had already taken place.

Therefore we can see that corruption cannot be eliminated in the foreseeable future. Even with the lack of economic constraints and pressure, the need for bribery still regenerates. Nowadays the interrelationship between power and corruption, the approach and the trade of the political influence appear as dominant as ever. The corrupt relations are intensifying on international level as well. Therefore we must pay attention to the new forms of corruption, that sometimes hide the usual basis of the act more, and therefore we must identify and handle these acts according to their severity, in order to develop effective countermeasures. And the dedication and determination of this strife shall be clear despite temporary setbacks.

The regulatory system of the Hungarian Criminal Law

Now let's look at how the Hungarian Criminal Law aims at fighting against corruption.

In the last 150 years four penal codes were enacted in Hungary. During the time of the Austro-Hungarian Monarchy the Penal Code of 1878 was enacted (which, naturally, was in force only in the territory of the historical Hungary and it was not valid for the territory of the Austrian Empire; the second one was enacted in 1961, the third in 1978 and the present in 2012.

Chapter XXVII of the recent Hungarian Criminal Code enumerates 9 corruption offences.

- Active Corruption in Economy
- Passive Corruption in Economy
- Active Corruption in Public Officials
- Passive Corruption in Public Officials

- Active Corruption in Court or Regulatory Proceedings
- Passive Corruption in Court or Regulatory Proceedings
- Misprision of Bribery
- Indirect Corruption
- Abuse of a Function

The regulation – that equally administers the domestic and international levels – is in accordance with the European standards. All forms of the passive corruption in economy and in public officials should it be either(request or acceptance of benefits) are punishable, in most severe cases – if there is a concrete misconduct or breach of obligation related to the act – the punishment can add up to 10 years of imprisonment.

The active corruption in public officials (such as providing or promising benefits) is also punishable, but in the economic sphere it is only punishable if it leads to misconduct or breach of obligation. Therefore according to the Hungarian criminal law, in the economic sphere the benefits given or promised for fulfilling obligations without leading to misconduct or breach of obligation, is not criminal corruption (but requesting or accepting is a type of passive corruption.).

Here is the regulation of the most important forms of passive and active corruption:[4]

Active Corruption *Section 290*	*Passive Corruption* *Section 291*
(1) Any person who gives or promises unlawful advantage to a person working for or on behalf of an economic operator, or to another person on account of such employee, to induce him to breach his duties is guilty of a felony punishable by imprisonment not exceeding three years. *(2) The penalty shall be imprisonment between one to five years if the criminal offense described in Subsection (1) is committed in connection with a person working for or on behalf of an economic operator who is authorized to act in its name and on its behalf independently.* *(3) The penalty shall be:* *a) imprisonment between one to five years in the case under Subsection (1);* *b) imprisonment between two to eight years in the case under Subsection (2);*	*(1) Any person who requests or receives an unlawful advantage in connection with his activities performed for or on behalf of an economic operator, for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest, is guilty of a felony punishable by imprisonment not exceeding three years.* *(2) If the perpetrator:* *a) breaches his official duty in exchange for unlawful advantage he is punishable by imprisonment between one to five years,* *b) commits the criminal offense defined in Subsection (1) in criminal association with accomplices or on a commercial scale he is punishable by imprisonment between two to eight years.*

[4] Act. C. of 2012. on the Hungarian Criminal Code

if the crime of corruption is committed in criminal association with accomplices or on a commercial scale. *(4) Any person who commits the act of corruption in connection with a person working for or on behalf of a foreign economic operator shall be punishable in accordance with Subsections (1)-(3).* *(5) The penalty may be reduced without limitation - or dismissed in cases deserving special consideration - against the perpetrator of a criminal offense defined in Subsection (1) if he confesses the act to the authorities first hand and unveils the circumstances of the criminal*	*(3) If the perpetrator is working for or on behalf of an economic operator who is authorized to act in its name and on its behalf independently, the penalty shall be imprisonment:* *a) between one to five years in the case under Subsection (1);* *b) between two to eight years in the case under Paragraph a) of Subsection (2);* *c) between five to ten years in the case under Paragraph b) of Subsection (2).* *(4) Any person working for or on behalf of a foreign economic operator shall be punishable in accordance with Subsections (1)-(3) for the commission of the criminal offense defined therein.* *(5) The penalty may be reduced without limitation - or dismissed in cases deserving special consideration - against the perpetrator of a criminal offense defined in Subsection (1) if he confesses the act to the authorities first hand, surrenders the obtained unlawful financial advantage in any form to the authorities, and unveils the circumstances of the criminal act.*

Passive Corruption in public Officials Section 294	*Active Corruption in Public Officials Section 293*
(1) Any public official who requests or receives an unlawful advantage in connection with his actions in an official capacity, for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest, is guilty of a felony punishable by imprisonment between one to five years. *(2) The penalty shall be imprisonment between two to eight years if the criminal offense is committed by a high-ranking public official.*	*(1) Any person who attempts to bribe a public official by giving or promising unlawful advantage to such person or to another person for influencing such official's actions in an official capacity is guilty of a felony punishable by imprisonment not exceeding three years.* *(2) Any person committing bribery is punishable by imprisonment between one to five years if he gives or promises the advantage to a public official to induce him to breach his official duty, exceed his competence or otherwise abuse his position of authority.*

The new regulation that has been in effect for almost a year, is stricter than its predecessor which gave bigger freedom to passive economic parties unauthorized to take independent measures.

Opportunities and hopes for improvement

In the following, I would like to list those legislative tasks that are said to weaken the basis of corruption. I would like to start with what is always on the agenda, however, in my opinion it is not an appropriate, adequate tool.

In today's world, that urges for severity, the penalties related to corruption are often considered for further severity. Of course this is merely a question of willingness. Although the experience is that the idea of introducing more severe penalties only serves the prevention indirectly and to an uncertain extent.

Therefore – the increase of penalties could express and reflect the dedicated strife against criminal corruption. I think that the real solution nowadays should not be the supervision of sanctions. The lack of severity has never been the reason, not even indirectly, for these criminal acts.

Similarly it seems that the possibility to evade the punishment in case of repentance did not live up to the expectations as well.

I do not consider the continuous establishment of new "independent anti-corruption syndicates", boards, or committees to be an effective method, as these will always remain to be mere formal actions. Finally, I consider that the idea of paying part of the bribery sum to the denunciator as a reward as a false attempt. Corruption is an intimate criminal act, in most cases only the involved parties know about it, and the suspiciousness, accusation, or denunciation without the needed information is a double edges sword, that could lead to false accusations, which can seriously and ultimately damage the righteous human relations.

The supervision of measures providing the opportunity for corruption

What is it that gives us hope for success? Well, I think, that first and foremost the continuous and thorough supervision of legal norms related situations those have a potential to corrupt relationships. – could be such a method. It shall not discourage us that Hungary has numerous such measures situations to supervise. In this matter, criminalists, criminologists, or even law enforcers and executors shall establish a continuous, consultative co-operation primarily with the professionals from the fields of business law and administrative law.

It might be surprising, but I also consider that if these goals can only be realized by establishing a more complex and complicated bureaucracy, then we shall accept this price.

It seems, that we cannot use a more effective and direct weapon against criminal corruption than bureaucracy and the multistage proceedings supported by several steps of supervision and filtering. Of course the emphasis is not on the complexity and the time-consuming characteristics of it, but rather on implementing the mutual and continuous control[5].

[5] The European Commission has acknowledged "ambitious" policies in Hungary to fight corruption, but added that financing of political parties, control mechanisms for public procurement procedures and conflicts of interest among public officials remain issues of concern.

To conclude, I would add one more comment.

We shall not deny the attitude-forming effects of ethical norms, and righteousness.

I am well aware of the fact, that this requirement is so obvious, on the other hand it is slightly naïve, that it is also naive, and lacks from reality. Nowadays it is not easy to expect that today's harsh and violent money-seeking attitude, the publicity of ultimate self-interest, or the unscrupulous fight for better market positions could be restrained and subdued or even be formed by ethical remonstrance. On the long run however, we should not forget these Ideas.

We must believe that sooner or later the exemplary and educative role of morals will inevitably provide aid in the fight against corruption.

Even if we do not make it to see it happen, the future still depends on what we leave to our successors.

The EU anti-corruption report [...] said Hungary should do more to strengthen accountability standards for elected and appointed officials, deal with risks concerning favouritism in public administration and to progressively eliminate the practice of gratuity payments in health care. (EC concerned over political financing, corruption in Hungary - http://www.politics.hu/20140204/ec-concerned-over-political-financing-corruption-in-hungary/ - 10.04.2014.)

Evolution of the Criminal Legal Frameworks for Preventing and Combating Cybercrime

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Abstract:

The dynamism of cyberspace brings along, incessantly, new challenges for many professions, especially for legal practitioners. "The law cannot follow in real time the technological progress". It is essential, that it always keeps up and not stay too far behind.

For a long time, cybercrimes have not found themselves incriminated in express legal provisions, except for Law no. 8/1996 on copyright and related rights, which criminalizes software privacy, covering only a small part of this hazardous phenomenon, and Law no. 16/1995 on the protection of topographies of semiconductor products. Law no. 21/1999 on preventing and sanctioning money laundering has introduced for the first time in the Romanian legislation the concept of "offenses committed via computers".

Until the entry into force of the new Penal Code, the main regulatory act regarding cybercrimes was represented by Law no. 161/2003, with its subsequent amendments and completions, which dedicates its Title III to issues related to cybercrime. In Chapter 3 of this Title, the offenses are structured and categorized into 3 sections: Section I, Offences against the confidentiality and integrity of computer data and systems, including: illegal access to a computer system, illegal interception of computer data transmission, alteration of the integrity of computer data, hindering the functioning of information systems, illegal operations with computer devices or software; Section II, Computer crimes: computer forgery and computer fraud; Section III, Child pornography through computer systems.

In order to create the necessary legal framework for the prevention and control of cybercrime, as well as with a view to the ratification of the European Convention relating to this field, the Romanian legislator thought it was absolutely necessary to draft Title III, on the prevention and combat of cybercrime.

Keywords: *cybercrime; information technology; telecommunications technology; computer system; computer data; service provider; European Convention on Cybercrime.*

Nowadays, to try and present the Internet is almost useless since it has already become deeply enrooted in our daily lives and habits. This international communications network has given rise to new possibilities and forms of expression and creation, education and training, cultural and information exchanges, trade, and, last but not least, entertainment, fun, games and relaxation. Internet brings added value in the lives of all of us. Undoubtedly, the Internet has upon our social lives consequences as important as the appearance of the telephone or the industrial revolution of the nineteenth century, radically transforming human behaviour. This mutation in society is so deep that the term that future historians will use to describe this period will be, most likely,

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"revolution": the Internet revolution. And this revolution is far from being over. The Internet wins every day new areas, ever more numerous, of everyday life. The Internet is not a mere fleeting "fashion" and, although we can not know for sure whether it will remain forever part of our lives, we can be certain that it will represent the starting point of telecommunications systems henceforth.

The Internet is often referred to as the new "Wild West" since it brings with it real dangers. A web surfer is exposed to dangers which are new, difficult to police, and difficult to prevent. The only significant difference may be that the Internet is a virtual society rather than a tactile one; a virtual society existing only in networks and information packets. However, the harms committed against both individual citizens and businesses are very real. These citizens are extremely vulnerable as criminal activity on the Internet continues to run rampant.[1]

A conspicuous feature of information technology is the impact it has had and will have on the evolution of telecommunications technology. Classical telephony, involving the transmission of human voice, has been overtaken by the exchange of vast amounts of data, comprising voice, text, music and static and moving pictures. The pervasive use of electronic mail and the accessing through the Internet of numerous web sites are examples of these developments. They have changed our society profoundly. The ease of accessibility and searchability of information contained in computer systems, combined with the practically unlimited possibilities for its exchange and dissemination, regardless of geographical distances, has lead to an explosive growth in the amount of information available and the knowledge that can be drawn there from.[2]

In addition to these benefits, Internet expansion has fostered new kinds of crimes, additional means to commit existing crimes and increased complexities of prosecuting crimes. It seems that today, computer crimes affect everyone. A common example is credit card theft whereby a perpetrator illegally obtains the victim's personal information by "hacking" into a website where the victim maintains an account or makes purchases. The perpetrator may steal or charge thousands of dollars to the victim's credit card before he is apprehended, if ever. The problem persists because a perpetrator can easily remain anonymous by instantaneously manipulating or deleting data.[3]

Internet investigations are inherently difficult to conduct because a maze of interconnected computer networks can transmit information instantaneously. Criminals can delete or alter data as quickly as they create it. The ability to destroy or alter data quickly makes it difficult to obtain evidence and perform investigative procedures.

The first international initiative on computer crime in Europe was the Council of Europe Conference on Criminological Aspects of Economic Crime in Strasbourg in 1976. Several categories of computer crime were introduced.[4]

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[1] Keyser, M., "The Council of Europe Convention on Cybercrime", in *Journal of Transnational Law and Policy*, 12, 2003, p. 287.

[2] Council of Europe, Committee of Experts on Crime in Cyber-Space, Explanatory Memorandum to the Convention on Cybercrime, EST No. 185 1 (May 25, 2001), available at http://conventions.coe.int/Treaty/en/Reports/Html/185.htm (26.05.2014).

[3] Hopkins, S.L., Cybercrime Convention: A Positive Beginning to a Long Road Ahead, in *Journal of High Technology Law*, 2, 2003, pp. 101-121.

[4] A Paper for the 12th Conference of Directors of Criminological Research Institutes: Criminological Aspects of Economic Crime, Strasbourg, 15-18 November 1976, pp. 225-229.

Then, in 1985, the Council of Europe appointed another expert committee in order to discuss the legal issues of computer-related crime. A summary of the guidelines for national legislatures with liability for intentional acts only, was presented in the Recommendation of 1989.[5] It included a minimum list of computer fraud, computer forgery, damage to computer data or computer programs, computer sabotage, unauthorized access, unauthorized interception, unauthorized reproduction of a protected computer program and unauthorized reproduction of a topography.

The Council of Europe adopted this Recommendation on September 13, 1989. It contains a minimum list of offences necessary for a uniform criminal policy on legislation concerning computer-related crime, and an optional list.

In this respect, the Council of Europe has initiated a series of regulations regarding cybercrime. Thus, in 1995, was adopted Recommendation no. R (95) 13 concerning problems of criminal procedural law connected with Information Technology. This Recommendation introduces 18 principles categorized in 7 chapters: search and seizure; technical surveillance; obligation to co-operate with the investigating authorities; electronic evidence; use of encryption; research; statistics and training; international co-operation.[6]

On November 23rd 2001, the member states of the Council of Europe (with the help of Canada, U.S.A., Japan and South Africa, as observers) have drafted and signed the "Convention on cybercrime".[7] Subsequently, on January 28th 2003, was submitted for signature by the member states the "Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of racial and xenophobic nature committed through computer systems".[8] Romania has signed this Additional Protocol on October 9th 2003.

The Convention and the Additional Protocol establish the basic framework for the investigation and sanctioning of criminal offenses committed with the help of the computer, as well as for the interstate cooperation required to stop this phenomenon.

The Convention brings to the fore the need for criminalization of criminal acts such as: illegal access to computer systems, illegal interception of computer transmissions, computer forgery, computer fraud, child pornography on the Internet, violations of property rights and other related rights etc.

The Convention was ratified by Romania through Law no. 64/2004 for the ratification of the Council of Europe's Convention on Cybercrime.

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[5] Recommendation no. R. (89) 9 of the Committee of Ministers to Member States on Computer-Related Crime, adopted by the Committee of Ministers on 13 September 1989 at the 428th meeting of the Ministers' Deputies

[6] Recommendation no. R (95) 13 of the Committee of Ministers to Member States concerning Problems of Criminal Procedural Law connected with Information Technology, adopted by the Committee of Ministers on 11 September 1995 at the 543rd meeting of the Ministers' Deputies.

[7] Council of Europe, *Convention on Cybercrime*, Budapest, November 23rd 2001.

[8] Published in the Official Journal of Romania, Part I, no. 279 from 21.04.2003.

The Convention on Cybercrime of the Council of Europe[9] is the most elaborate regulation of the existing international instruments addressing cybercrime because it includes provisions on substantive criminal law, criminal procedure and international cooperation. This historic milestone in the combat against cybercrime entered into force on July 1st, 2004. The number of signatures not followed by ratifications are 23 States and the number of ratifications/accessions are 23 States (December 2008). An Additional Protocol on the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems of January 2003 has also been adopted.

In the field of substantive criminal law (Chapter II Section I), Articles 4 and 5 deal with "the damaging, deletion, deterioration, alteration or suppression of computer data without right" and "the serious hindering without right of the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data". They cover all types of interference in data and computer systems which – as shown – are a prerequisite for terrorist attacks on the electronic systems made via the Internet. As Article 4 is not limited to the deletion of data, but also includes the alteration and suppression of data (and is extended to the hindering of a computer system in Article 5), such interference is not limited to IT attacks on information systems, but occur also in the context of the IT attacks mentioned hereabove on other infrastructures, physical property or the lives and well-being of the people.[10] This consequence of the concept underlying the Convention on cybercrime concerning the comprehensive protection of the integrity and availability of the information systems is confirmed in the Explanatory Report of the Convention, which explains the fact that Article 5 is formulated "in a neutral way so that all kinds of functions can be protected by it".[11] Consequently, all the types of terrorist attacks on computer systems are covered by Articles 4 and 5.

In addition, Articles 2 and 3 of the Convention on Cybercrime incriminate "the access to the whole or any part of a computer system without right", as well as "the interception without right, made by technical means, of non-public transmissions of computer data to, from or within a computer system, including electromagnetic emissions from a computer system carrying such computer data" and, thus, cover the hacking intrusion techniques of the information systems and those of interception of computer data (*e.g.* through technical manipulations or the misuse of the intercepted information), which, in many cases, must be used to defeat the existing security measures in the victim's computer system so that the intruder might intervene and alter the data.

These provisions are expanded in terms of scope by means of rules regarding attempt and aiding or abetting (Article 11) and corporate liability (Article 12), and are

[9] Council of Europe's Convention on Cybercrime from November 23rd 2001 (ETS nr. 185).

[10] Council of Europe's Convention on Cybercrime from November 23rd 2001 (ETS nr. 185), Explanatory Report no. 65 of interpretation of Article 5 specifies that "the protected legal interest is the interest of operators and users of computer or telecommunication systems being able to have them function properly".

[11] Council of Europe's Convention on Cybercrime from November 23rd 2001 (ETS nr. 185), Explanatory Report no. 65 of interpretation of Article 5. See also no. 60 and 61 describing the concept of Article 4.

supported by regulations which impose effective, proportionate and dissuasive sanctions, including imprisonment (Article 13). Furthermore, Article 6 on the "misuse of devices" wants the establishment as criminal offences of the actions preparing the intrusion, such as the illegal production, sale, procurement for use, import, distribution or otherwise making available of "a device, including a computer program, designed or adapted primarily for the purpose of committing any of the offences established in accordance with Articles 2 through 5", with intent that it be used for the purpose of committing any of the offences established in Articles 2 through 5. Article 6 also has in view the possession of such item with the intent that it be used for the purpose of committing any of the offences established in the articles mentioned above.[12] Thus, with respect to the terrorist attacks via the Internet, Articles 2, 3 and 6 provide an additional protection, allowing the indictment of the authors from an early stage.

As a result, the requirements for implementing the Convention on Cybercrime in the field of substantive criminal law provide a broad spectrum of incrimination of IT terrorist attacks on computers and on all other legal rights pertaining to the operation of computer systems. As noted above, the physical injury to property or life and well-being leads to the application of further offenses, in addition to the "traditional" ones from the national criminal law. Thus, the Convention on Cybercrime manages to criminalize the attacks on information systems through an "approach regarding data" which do not need, consider or evaluate the physical damage or (political) intent of the author.

The Convention on Cybercrime calls for the criminalization of nine offenses in four categories. The first category targets "offenses against the confidentiality, integrity and availability of computer data and systems". These include: illegal access, illegal interception, data interference, system interference, and misuse of devices. The second category, "computer-related offenses", includes provisions calling for the criminalization of computer-related forgery and computer-related fraud. "Content-related offenses" requires criminalizing offenses related to child pornography. This third category is ostensibly supplemented by a new protocol adopted November 7th 2002, making any dissemination of racist or xenophobic material through computer systems a criminal offense. However, the new protocol is a separate legal instrument from the treaty, and parties agreeing to the treaty are not obliged to adopt it. The fourth category, "offenses related to the infringements of copyright and related rights", criminalizes copyright violations. This section of the Convention also includes ancillary provisions that require the establishment of laws against attempt and aiding or abetting in the aforementioned crimes, as well as the establishment of a standard for corporate liability.[13]

Article 1 initially defines four terms vital to the treaty. These terms are vital because they are heavily relied upon throughout the treaty. The treaty first defines "Computer system" as a device consisting of hardware and software developed for automatic processing of digital data. For purposes of this Convention, the second term, "computer data," holds a meaning different than that of normal computer lingo. The data must be "in such a form that it can be directly processed by the computer system." In

[12] Furthermore, there is a provision against computer-related forgery (Article 7), which can be applied in case of preparatory electronic forgeries which might also facilitate the interference.

[13] Weber, A.M. "The Council of Europe's Convention on Cybercrime", in *Berkely Techology Law Journal*, Vol. 18, issue 1, 2003, p.431.

other words, the data must be electronic or in some other directly processable form. The third term, "service provider" includes a broad category of entities that play particular roles "with regard to communication or processing of data on computer systems." This definition not only includes public or private entities, but it also extends to include "those entities that store or otherwise process data on behalf of" public or private entities.

The fourth defined term is "traffic data," which has created some controversy in this Convention. "Traffic data" is generated by computers in a "chain of communication in order to route" that communication from an origin to its destination.

Thus, it is auxiliary to the actual communication. When a Convention party investigates a criminal offense within this treaty, "traffic data" is used to trace the source of the communication. "Traffic data" lasts for only a short period of time and the Convention makes Internet Service Providers ("ISPs") responsible for preservation of this data. The increased costs placed upon ISPs as a result of the Convention's stricter rules regarding preservation of "traffic data" is one issue of concern for many ISPs. Another concern is the requirement of rapid disclosure of "traffic data" by ISPs. While rapid disclosure may be necessary to discern the communication's route, in order to collect further evidence or identify the suspect, some civil libertarians express concern over its infringement upon individual rights - namely the right to privacy.[14]

The drafters intended that "Convention parties would not be obliged to copy [the definitions] verbatim into their domestic laws…." It is only required that the respective domestic laws contain concepts that are "consistent with the principles of the Convention and offer an equivalent framework for its implementation."

After defining the vital terms, Article 1 lays out the Convention's substantive criminal laws. The purpose of these criminal laws is to establish a common minimum standard of offenses for all countries. Uniformity in domestic laws prevents abuses from being shifted to a Convention party with a lower standard. The list of offenses is based upon the work of public and private international organizations, such as the United Nations and the Organization for Economic Cooperation and Development. "All of the offenses contained in the Convention must be committed 'intentionally' for criminal liability to apply." In certain cases, additional specific intentional elements form part of the offense. The drafters have agreed that the exact meaning of "intentional" will be left to the Convention parties to interpret individually. A *mens rea* requirement is important to filter the number of offenders and to distinguish between serious and minor misconduct.

The criminal offenses in Articles 2 thru 6 were intended by the drafters "to protect the confidentiality, integrity and availability of computer systems or data."

At the same time, however, the drafters did not criminalize "legitimate and common activities inherent in the design of networks, or legitimate . . . practices."

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[14] Keyser, M., "The Council of Europe Convention on Cybercrime", in *Journal of Transnational Law and Policy*, 12, 2003, p. 298.

There is no doubt that cyber crimes are potentially damaging offenses, with potentially serious ramifications. Since computer-related crimes affect practically all nations,[15] there is no question of a need for updated, harmonized laws that involve international cooperation to fight crime in cyberspace.[16] The international community cannot choose to ignore cyber crimes, as that would only encourage the attackers' greed and more serious criminal behaviors will result.[17] The Convention is an important step in the right direction and is the most significant treaty to address computer crimes. Although an international perspective in fighting cyber crimes is vital, it is, at the same time, difficult.[18]

The Convention convened representatives from many nations, both from their members and outside nations, to discuss and debate the definition of certain acts committed on the internet and then define what the most appropriate actions would be to institute a fair, yet effective, fight against cyber crimes. They recognized the need for a consistent international approach to fighting cyber crimes that included cooperation between law enforcement agencies to investigate offenses.

However, because the Convention is largely symbolic, its long-term effectiveness must be brought into question. There are problems relating to the definitions of terms in the treaty, privacy issues, and the investigatory powers created in the document. Further, international laws requiring cooperation between nations are difficult to enforce. Overall, the treaty leaves too many holes in terms of the lack of definitions and inconsistencies, and has many gaps that will allow criminals to continue to commit criminal offenses. There are many ways for criminals to continue to exist and operate even after the treaty is in force.

In order for the treaty to be effective, more countries will need to sign it and ratify it and turn it into national law. Until then, cyber crimes will not be impacted by the treaty in any significant way.

The Council of the European Union also had concerns in this direction. Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems[19] is based on the Convention on Cybercrime of the Council of Europe, and, just like the Convention, requires that the Member States ensure that the illegal access to information systems (Article 2), the illegal interference in the systems (Article 3) and the illegal interference on the data (Article 4) shall be punished as criminal offenses. In addition, it includes requirements regarding the criminalization of incitement, complicity and attempt. The European Commission is far from remaining indifferent to the phenomenon of computer crimes. Following a feasibility study

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[15] Backhouse, J., & Dhillon G. "Manager Computer Crime: A Research Outlook" in *Computers and Security*, 14, 1995, pp. 645-651.

[16] Walden, I. "Harmonising Computer Crime Laws in Europe" in *European Journal of Crime, Criminal Law and Criminal Justice*, 12(4), 2004, pp. 321-336.

[17] Wang, S. "Measures of Retaining Digital Evidence to Prosecute Computer-based Cyber-crimes", in *Computer Standards and Interfaces*, 29, 2007, pp. 216-223.

[18] Marion, N.E., "The Council of Europe's Cyber Crime Treaty: An exercise in Symbolic Legislation", in International Journal of Cyber Criminology, Vol. 4, Issue 1&2, 2010, pp. 699-712.

[19] Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ L 69/67 from 16.03.2005).

conducted by Rand Corporation Europe, the European Commission decided to establish a European Cybercrime Centre (EC3) at Europol in order to help protect the European citizens and businesses against IT threats. The Centre will be the focal point in the EU's fight against cybercrime, contributing to faster reactions in the event of online crimes. It will support Member States and the European Union's institutions in building operational and analytical capacity for investigations and cooperation with international partners.

The centre is established within the European Police Office, Europol, in The Hague (Netherlands) and started its activity January 11th 2013, with a mandate to tackle the following areas of cybercrime: that committed by organised groups to generate large criminal profits such as online fraud, that which causes serious harm to the victim such as online child sexual exploitation, that which affects critical infrastructure and information systems in the European Union.

One of the objectives of the European Cybercrime Centre will be protecting the profiles on social networks against infiltrations by online criminals, thus supporting the fight against online identity theft. Moreover, the centre will also focus on those offenses causing serious injury to the victims, such as online sexual exploitation of children and attacks affecting the critical infrastructure and information systems in the European Union.

EU experts will also carry out activities aimed at preventing cybercrime affecting Internet banking and online reservation systems, thus increasing the level of consumer confidence online.

The European Centre will warn the EU Member States on major information threats and will draw attention to the biggest weaknesses in their defence systems online. The centre will identify the organized networks of cybercrime, as well as the leading offenders in cyberspace. It will provide operational support in concrete investigations, either providing legal assistance specialized in IT, or supporting the establishment of joint investigative teams in the field of cybercrime. The new centre will also serve as an information database for the national police services from the Member States and will bring together the European expertise and training initiatives in the field of cybercrime.

Given this international context, Romania could not have remained indifferent to computer crimes and its propagation speed.

A first reaction of the Romanian legislator, prior to the Convention from Budapest in 2001, was in the field of copyright law, by the incrimination through the provisions of Law no. 8/1996, of the offense of bringing, without right, to a work (intellectual creation protected by copyright) to the attention of the public[20] and the offense of reproduction, without right, of a work.[21]

There followed legal provisions with regard to cybercrime, which were introduced in the first regulations concerning money laundering. Thus, it was introduced for the

[20] Regulated by Article 140, letter (a) of Law no. 8/1996 on copyright and related rights.
[21] Regulated by Article 142, letter (a) of Law no. 8/1996 on copyright and related rights.

first time in the Romanian legislation the concept of "offenses committed via computers".[22]

Other legal provisions with applicability in the field of computer crimes were introduced by Law no. 365/2002 on electronic commerce.[23]

In applying the Budapest Convention (2001), were introduced in Law no. 161/2003 more specific regulations regarding cybercrime.

The latest regulations have been made on the drafting of the new Penal Code, which introduced more specific provisions.

The dynamism of cyberspace brings along, incessantly, new challenges for many professions, especially for legal practitioners. "The law cannot follow in real time the technological progress". It is essential, that it always keeps up and not stay too far behind.

For a long time, cybercrimes have not found themselves incriminated in express legal provisions, except for Law no. 8/1996 on copyright and related rights, which criminalizes software privacy, covering only a small part of this hazardous phenomenon, and Law no. 16/1995 on the protection of topographies of semiconductor products. Law no. 21/1999 on preventing and sanctioning money laundering has introduced for the first time in the Romanian legislation the concept of "offenses committed via computers".

Until the entry into force of the new Penal Code, the main regulatory act regarding cybercrimes was represented by Law no. 161/2003, with its subsequent amendments and completions, which dedicates its Title III to issues related to cybercrime. In Chapter 3 of this Title, the offenses are structured and categorized into 3 sections: Section I, Offences against the confidentiality and integrity of computer data and systems, including: illegal access to a computer system, illegal interception of computer data transmission, alteration of the integrity of computer data, hindering the functioning of information systems, illegal operations with computer devices or software; Section II, Computer crimes: computer forgery and computer fraud; Section III, Child pornography through computer systems.

As specified in the Explanatory motives of the law, in order to create the necessary legal framework for the prevention and control of cybercrime, as well as with a view to the ratification of the European Convention relating to this field, the Romanian legislator thought it was absolutely necessary to draft Title III, on the prevention and combat of cybercrime.

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[22] According to the text of Article 23 of Law no. 21/1999, money laundering is represented by "changing or transferring goods, knowing that they come form committing of offenses, (…), offenses committed with the help of computers, (...) in the purpose of hiding or the dissimulation of the illicit origin of these or in the purpose to help the person that committed the contravention form which the goods came, withdraw himself from the pursuit, trial or execution of the punishment".

[23] The offenses provided by Articles 24-28 of Law no.365/2002 – forgery and placing in circulation of electronic payment instruments; possession of hardware or software for the purpose of forgery of electronic payment instruments; fraudulent financial operations etc.

The proposed Title, harmonized with the European Convention on Cybercrime, is structured in five chapters, which include general provisions, provisions on the prevention of cybercrime offenses, offenses and misdemeanours, procedural provisions and provisions regarding international cooperation.

The general provisions are devoted, mainly, to the establishment of the meaning of the terms and expressions used in Title III, which present a technical character, specific to the field of computer science. Thus, the legislator establishes the notions of "computer system", "automatic data processing", "computer software", "computer data", "service provider", "data referring to the information traffic", "data regarding users", "security measures".

In Chapter II are listed the rules regarding the prevention of cybercrime. These provisions relate to the cooperation between authorities and public institutions with competences in the area and service providers, NGOs and other representatives of the civil society in the development of policies, practices, procedures and standards for computer security, as well as to the organisation of the information campaigns regarding cybercrime and the risks to which are exposed the users of computer systems. Also, the provisions on cybercrime prevention provide the obligation of the Ministry Justice, Ministry of Interior and Ministry of Communications and Technology Information to create and update databases on cybercrime.

Chapter III has as main regulatory object the regulation of the offenses committed in the computer environment, grouped according to the same criteria as the ones set out in the European Convention on Cybercrime. Thus, the Romanian legislator provides offenses against confidentiality and integrity of computer data and systems, such as illegal access to an information system; illegal interception of the transmission of data information which are not public; modification, deletion or deterioration of the data information or restriction of access to such data, without right. This law also provides, as computer crimes, the acts of forgery committed in relation to data information and the facts which cause patrimonial damage as a result of operations upon computer data or systems, committed with the purpose of obtaining material benefits.

Moreover, the law provides severe punishment – such as the imprisonment for 3 to 12 years and the prohibition of certain rights – for child pornography through computer systems, also criminalizing the mere possession of materials containing child pornography in a computer or data storage system. In this way, the regulation responds not only to the provisions of the European Convention on Cybercrime, but also to the Recommendation of the Committee of Ministers of the Council of Europe, Rec(2001)16 on the protection of children against sexual exploitation.

The procedural provisions, enshrined in Chapter IV, regulate the measures and means of investigation specific to the computer field, while also achieving an adaptation of certain provisions from the Criminal Procedure Code to the specificity of this area. The legislator chooses to regulate, in principle, the immediate preservation of computer data or data referring to the information traffic, the procedure of forfeiture of those items which contain information data, the scrutiny of computer systems or data storage systems.

Chapter V contains provisions referring to international cooperation concerning international legal assistance in criminal matters, such as extradition, identification, freezing, seizure and confiscation of the results and instruments of the crime, the conduct of joint investigations, information sharing, technical or any other type of assistance for the gathering and analysis of the information, as well as for the training of specialised personnel.

Also, in order to ensure the immediate and permanent international cooperation Sin the field of combating cybercrime, the law provides the establishment, within the Prosecutor's Office attached to the Supreme Court of Justice, the Service for the combating of cybercrime, as point of contact available 24-7, and which does not involve additional costs from the state budget.

Another special law containing provisions regarding the electronic environment is Law no. 365/2002, republished in 2006, on e-commerce, meant to transpose in Romanian law Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"). The main objectives set out by the directive were provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States. The entire directive is structured around four focal points, which the Romanian law adopts and develops: the free movement of information society services, commercial communications, contracts concluded by electronic means and liability of intermediary service providers. As regards the liability of service providers, the law regulates intermediary services as mere conduit of the information (Article 9), the intermediate and temporary storage of the information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, also known as *caching* (Article 10), the permanent storage of information provided by a recipient of the service, also known as *hosting* (Article 11).

The Romanian law on e-commerce contains an article which defines the key words of the law (Article 1), which has the merit of introducing into national legislation new basic concepts of a technical and legal language consecrated by the European Union (electronic means, "information society services", "service provider", "established service provider", "commercial communication", "opt-out register"). This language is indispensable to the law's harmonization with the rhythm of technological evolutions and, at the same time, that of the Romanian legislation with the European one.

Article 2 establishes the objective of the regulation and the scope of the law, in keeping with the provisions of Directive 2000/31/EC. Article 4 entrenches the principles of the provision of IT services in Romania: the principle excluding prior authorisation, under the limits provided by para. (2) and the principle of non-discrimination between Romanian providers and EU providers established on Romanian territory.

Article 8 contains a provision which helps eliminating an important uncertainty which put a strain on the contractual circuit in the electronic environment. The text clearly stipulates which is the moment when an electronic commercial contract is considered to have been concluded.

The sanctioning regime was elaborated having in mind the practical impossibility of exercising an efficient, and especially, thorough control over the activities developed in the electronic environment. This is the reason why the legislator opted for the sanction considered to have a real applicability in the case of electronic commercial contracts, namely the relative nullity in the situation in which the provider has breached the obligations provided by law regarding the information and protection of the potential co-contracting party. The legislator creates, thus, the presumption that such a provider has determined the emergence of the contractual relation by vitiating the will of the other party.

The law also stipulates sanctions having the nature of a civil fine for those situations in which an effective control of the activities developed by a service provider is, indeed, possible. Moreover, in the spirit of the protection of the weaker party in the contractual relation, it is expressly provided that, in the litigations regarding the provision of a service of the information society, the burden of proof of the fulfillment of the obligations to inform, to protect the co-contracting party or those related to the performance of commercial communication belongs to the provider of the services, if the other party has the quality of consumer.

At present, the main provisions of Laws no. 161/2003 and 365/2002 have been included in the new Penal Code. The decision to proceed to the drafting of a new Penal Code was not a mere manifestation of the political will, but equally represented a corollary of the economic and social evolution – and also of the doctrine and case-law – and was based on a series of shortcomings in the regulation of the 1968 Penal Code.

A very important role in the harmonization of the legislation with the constitutional provisions has been played by the Constitutional Court, both through its *a priori* and *a posteriori* judicial review, the latter taking the form of the settlement of the constitutional challenges raised before the courts.

Following a failed Penal Code, repealed before even coming into force,[24] the current Penal Code was adopted through Law no.286/2009.

Published in the Official Journal, Part I no. 510 of 24/07/2009, the new Penal Code, immediately after birth, has been submitted to modifications by means of two laws, passed within an interval of less than one month, an utter example of lack of consistency and perspective in a criminal policy which sees itself as reformatory, although the distinguished members of the Cabinet had forgotten the fact that they had committed, within 12 months from the date of the Penal Code's publication in Romania's Official Journal, to submit to the Parliament a draft law for the implementation of the Penal Code, a good opportunity to make the desired amendments.

[24] 2004 Penal Code (Law no. 301/2004, Official Journal no. 575/29.06.2004)

It took almost five years since the publication of the current Penal Code for it to enter into force on February 1st, 2014 as a result of Law no. 187/2012[25] which, in turn, has brought some changes to the original shape of the Penal Code.

The offenses in the IT field provided in the new Criminal Code, contained in Chapter VI of Title VII, were developed taking into account, mainly, the provisions of this special law, matters concerning judicial practice, the features of cyberspace and of the means of electronic communications, and also the need to provide an appropriate legal response in the context of this phenomenon which is continuously on the rise, namely the antisocial acts committed in the electronic environment.

Since it facilitates communication and the dissemination of information on a planetary scale, the Internet favours offenses and appears as the vector of a new form of crime, regarding which the application of criminal law tries to identify the perpetrators, given its international dimension. The difficulty is also related to the fact that the Internet faces the heterogeneity of legal systems on a global scale. What is criminalized in one country is not necessarily incriminated in another. In addition, a major difficulty lies also with the proving of the offenses. The proof of the connection to a particular website is extremely difficult to establish.[26]

The new Penal Code criminalizes the following acts in connection with the information field or which could be considered as relevant to the extent that the deeds are carried out in connection with a computer system or software: Article 208– Harassment, Article 230 – Theft for the purpose of use, Article 249 – Computer fraud, Article 250 – Fraudulent financial operations, Article 251 – Acceptance of fraudulent financial operations, Article 302 – Violation of the secrecy of correspondence, Article 311 – Forgery of debt securities or payment instruments, Article 313 – The circulation of counterfeited values, Article 314 – Possession of instruments for counterfeiting values, Article 324 - Falsification of technical records, Article 325 – Computer forgery, Article 374 – Child pornography, Article 388 – Electronic vote fraud, Article 391 – Falsification of electoral documents and records.

[25] Published in Official Journal of Romania, Part I, no. 757 from November 12th 2012.

[26] Boroi, A., Gorunescu, M., Barbu, A., *Dreptul penal al afacerilor*, 5th edition, C.H. Beck Publishing House, 2011, p. 488.

New Technologies - New Challenges to Copyright Law

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Abstract:

The issue of copyright licence has endured a hit below the belt. Nowadays, the more and more up-to-date technical means that can be used in the real sphere are suitable to create an inestimable infringement of copyright licence. The Internet also is available. Owing to its massive nature, so-called file sharing creates the greatest challenge.

For companies producing and distributing different voice carriers, the main problem is lost income, while for the judiciary it lies, on the one hand, in the uncertain legal regulatory system, and, on the other hand, in the lack of personal and material conditions to catch up with events.

The dilemma is even more serious concerning legislation. There is no social support – so it is supposed – for announcing that file sharing should be prosecuted (contrary to traditional crimes); moreover, it is a crime adjudged differently throughout the world, and finally, if prosecutions commenced, the number of Hungarian criminals would be doubled (or even tripled) by a simple stroke of a pen.

In order to see the situation in reality, and to draw the correct conclusions, it is necessary to introduce the process and the technical environment of file sharing in a more detailed form.

Keywords: *copyright law; Cyber environment; file sharing prosecution; Hungarian criminal law.*

1. Introduction

Since new technical means and technological procedures have appeared that allow licensed products to be multiplied, forwarded or stored, approaches to copyright cannot remain unaffected.

For the last ten to fifteen years, computer technologies and related technical means have been developed, while simultaneously usage of the Internet has increased; therefore, copyright license law must bear stronger enforceability aspects than ever.

At first, media activity like founding presses, distributing books, creating radio and television programs, recording works of art on LP disks, CDs (Compact Disk), DVDs (Digital Versatile Disk) or VCDs (Video-CD), or even providing programs – through whatever platform – was accomplished through terrestrial means. Later many of these were carried out through cable and/or satellite technology although this is still not a major part of the market.

The spread of computer technologies, the wide range and general use of the Internet, techniques for compilation, and easy methodologies for multiplication have made the infringement of copyright licenses possible on a huge scale.

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The monopoly on producing, copying and distributing copyright licenced works of arts has been demolished.

It is not rare now that authors – due to various reasons or ideas – represent their works and provide access on the Internet.

Users create their own selections of music, film or pictures etc. for themselves and for their friends, choosing from products in circulation or accessible through the Internet. In order to listen to your favorite records on CD, you do not need to buy disks from the performers. The user no longer depends on supply (or even on price).

You also do not have to buy expensive albums of performers if you are fond of an artist or of an age. Their works can be digitalized, downloaded from the Net, copied to CDs, printed on color printers in excellent quality or even watched through DVD players. Furthermore, music or other audio effects can be attached to them, making the influence of users complete.

It is possible to produce mp3 format media from old LPs (ripping), which can be recorded on a CD later; in this way, old records can be saved for decades (with only minimal diminution in quality).

Films published on CDs and DVDs in Hungary do not usually have synchronized soundtracks (due to the small size of the Hungarian market), so the pleasure offered by them is less. However, this inconvenience can be averted by adding the soundtrack to films using a little ingenuity. Videofiles have so-called container formats, so they contain more data streams. The MPEG-2 videofile in the VOB files of a DVD can be detached from the AC-3, MPEG-2 and PCM files, thus making both the video and the audio bands applicable separately. This method allows Hungarian synchronized language taken from a video cassette to be given to films on DVD or VCD (whether original or recorded from television) of an excellent quality.

Of course, it is quite possible to infringe copyright laws without using modern techniques and technologies.

2. Products of authors in digital environments

The data collected, stored, processed and forwarded (such as handled) in electronic data processing and data carrying systems are all electronic impulses, invisible to the eye.

Hardware and software producers are pouring out more and more up-to-date technical means and programs for the computer technology market. The work of users has been supported by computers with better and better performance and more and more memory, and with other peripherals, data carriers, and faster and more stable data forwarding technologies.

2.1. Development of the software side

Effective use of these technical means and technologies is possible due to new computer programs.

Today, a film with a size of 3-5 gigabytes recorded on a DVD can be compacted with the help of the appropriate program (with a slight damage to quality) into a 700 megabyte extension.

Musical records of 60-70 minutes will fit on a CD sold in commercial circulation, while CDs in the mp3 format, with a content of six to ten times more, are also sold in shops.

However, the codes of DVD films are easily cracked with the help of computer programs, and then compactable into .avi format, and can even be provided with (*e.g.,* Hungarian) subtitles or synchronized language.

Later the .avi format can be converted into .mpg (.mpeg) format of a better quality, and again recordable as VCD through a program.

You can obtain DVD codes through the Internet from illegal sites, as well as so-called cracks, patches, and key generators, all suitable for cracking software codes.

2.2. Development of the hardware side

Wideband data transmission (called ADSL technology) is able to forward data at a speed of 66-67kb/sec. This way, a one and a half or two hour film can be downloaded within 3-4 hours, and a 3-4 minute musical record within approximately one and a half minutes. A novel of 500-700 pages can be copied within seconds.

LAN (Local Area Network) nets, through, *e.g.*, an optical cable with the speed of 1,5-2,5 megabyte/sec, reduce the time for downloading a film to 3-7 minutes, while in the case of a single musical record it requires only seconds.

Computer technology is more and more suitable to fill the functions of electronic entertainment accessories (television, radio, video recorder, CD player etc.), and can be connected to them.

Almost all new video cards are appropriate for playing films from the computer onto the screen of the television. The available DVD players nowadays use double layer technology, so they are ready to play not only original DVD disks, but also home-made copies of CDs (recorded in (S)VCD format).

Nevertheless, you can even make your own DVD record at home, and VCD disks have appeared in commercial circulation as well, being more popular in Western Europe while still little known in Hungary.

DVD players with Divx technology are also available, which can play films in .avi format, as are musical equipment (in DVD players, hi-fi towers, portable CD players), which can be used to listen to disks with records in mp3 format. When used to record .avi format films from television, DivX players reduce the amount of time required, but require a relatively long time (2-10 hours, depending on the performance of the computer) to convert, while good quality is not guaranteed.

The problem is obvious:

.Avi and .mp3 format works of artists are not currently in circulation. The producers have not agreed to the legal circulation of these formats.

The present CD standards are stated in the agreement of two giant companies, Philips and Sony, signed in 1982 (the so-called Red Book).

Products of artists available in .avi and .mp3 format can generally be obtained from the Internet and those creating and distributing through these means are well aware of this.

The customer, having obtained the necessary technology, looks for the new file formats on the Internet, or inquires about them among his acquaintances, and soon can find (mostly illegal) sources.

The situation is paradoxical, or nearly so. There is a great demand for this technology, and the fulfillment of this demand brings in money. The creators and distributors of these technologies emphasize their own profit interests.

The complex problems of defending licensed products of authors are transferred over to the copyright license lobby and into the jurisdiction of the legislature. Although this assumes that the situation 'supported' by them is to be considered as reality.

We have to accept that these technological means do not create infringement of copyright, but they (can) increase the number of criminals.

3. Cases of licence infringement in the cyber environment and their criminal features

There is a new legal infringement activity creating a heightened possibility of copyright crime.

This is *file sharing*, where users copy files from each other's' computers with the help of dozens of such programs, but without the permission of the author or the publisher.

Let me refer to some statistical data, while mentioning in advance that statistical differences – to the extent of several million – cited in other sources do not affect the essence of the phenomenon. Based on a source from the US, there are 63 million (!) users using file sharing regularly or at least occasionally, such as when users far from each other in space download music, movies, pictures and text documents (*e.g.,* novels).[1] Another statistical source states that 69% of US inhabitants older than 15 years used the Internet in 2003. The entire population of the US is 290 million people.[2] Of these, 30% of the whole, or approximately 200 million Internet users, are engaged in file sharing.

[1] http://www.szamitastechnika.hu/hirek_hir.php?id=32414.
[2] http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.ht.

There are no statistical data from other countries on the American Continent, or from Europe, the Middle East, the Far East, or Australia, yet still we surely are not mistaken if we talk about hundreds of million more users.

This giant number – taking into account the increase in use of the Internet and the continuing development of technical means and solutions – causes a considerable loss of (due to a reduction in revenues) profit from producing CDs, DVDs, VCDs, movies, books etc. This is the main reason for the strong representation of the license lobby, which seeks to defend the personal and financial rights of the authors.

4. 'Places' of committing copyright licence infringements

4.1 Copyright licence infringement in real space

In the cyber environment, the place the crime was committed is a possible special objective element of the statement of facts when analyzing copyright crimes.

Infringement may be realized in the *real sphere*:

Copying and distribution of licensed products of art derived from legal sources (software, music, movies, novels etc.) in order to create or increase financial income.

Copying and distribution of licensed products of art derived from illegal sources, even without the aim of creating or increasing financial income [Sec (1) Art 35 Act on Copyright License (Szjt)].

Through behavior, such as exceeding the limitations of a so-called free application.

Apart from these, in case of software, infringement of license rights includes:

Copying or distributing the License Contract, or the software or its documentation (codes, manuals) without the permission of the author. (Art 59 Szjt).

Applying the license to create a greater number of applications than was permitted.

Distributing software as an addition to hardware, without a License Contract.

In the case of other licensed products.

Copying a whole book, newspaper, or daily newspaper which legally can be copied only in handwritten form or on a typewriter. [Sec (2) Art 35 Szjt].

Causing somebody to prepare copies on computer, using an electronic data carrier [Sec (3) Art 35 Szjt].

Who can estimate the number of CDs, DVDs, VCDs, computer programs (operational programs or simple games) that have been copied, given away or distributed with the sole aim of making copies? How many users employ copied rather than legal software, even if the user is not the one who installed it?

4.2 Copyright licence infringement in virtual space

I have to state in advance that *virtual space* is a space that exists through physical means. It is a space through which computers communicate with the help of cable networks, by sending electronic impulses to each other.

We can include most of the types of license infringement mentioned above, but owing to its technological specifications some further infringing behaviors can also be observed:

Representing a work of art on a web site without the permission of the author.

Allowing products to be downloaded from web sites, FTP or other servers free, or for financial return.

Uploading crack, patch or keygenerator programs on web sites, FTP or other servers in order to crack software safety programs.

'Sharing' and forwarding licensed works of arts.

Entering networks – legally or illegally – through the Internet, and copying or employing distribution software.

Computers connected to the Internet are divided into two groups:

Domain or serving computers (servers): computers that store and systematize electronic impulses, and which usually ensure connection to the Internet

Client computers: on which single users work, play, entertain, use e-mail or arrange financial or administrative business etc., which use the services of the servers.

A server is figuratively a seller, serving the clients turning to it and demanding services.

Servers communicate with each other through the Internet, such as when we approach other clients (*e.g.*, mail) or data bases through servers.

However, there is another technical option for communication, different from this basic state. These new solutions are generating new forms of licence infringement cases, since most file sharing programs operate between users by direct communication, excluding the server that could support the infringement. This is called the peer to peer (P2P) solution and is now being investigated as legal infringements.

Most of the file sharing programs employ the computers of the users as servers and client (= servant) computers at the same time, such that the data on the user's computer (text, picture, audio or video file) are as available as the ones on the domain server. There are some file sharing programs based on the traditional server-client connection.

4.3 Types of file sharing

Those using file sharing programs represent a network among themselves while they are applying the program.

Such nets can be divided in two groups:

Centralized model: the users are connected to a server (as clients). The server records the list of the files that the participating clients want to share. The available list is presented after the user chooses one of the indicators of the file (name, title, extension, quantity, name of user etc.) These programs include Kazaa, Kazaa Lite, its clone program, Grokster and DC, and other clone programs like DC++, BCDC etc.

Decentralised program: the user is connected to a server, representing a part of the network. This server generates a chain of requests, finding a server connected to the net, which finds another server etc. Files (by the name of the author, title etc.) and their downloads also can be found this way, server by server. E-mule, Gnutella, and E-donkey, Bit Torrent programs and Shareaza, which employs the common platform of the three last working as a multi-network, are the decentralized programs.

A attempted connection between the centralized and the decentralized models: This program is, *e.g.*, WinMX, which operates in a basically centralized way, while also ensuring a connection to other servers.

All models have their advantages and disadvantages (*e.g.,* concerning the quantity of the available files, choosing the band width, technical stabilization of file sharing etc.)

5. Dynamics of file sharing

File sharing is like a flea market. The comparison is appropriate for several reasons: all the users take the files to be shared among themselves that have been offered, and because the sharing is also somewhere on the border between legality and illegality. Its legal status based on the relevant decisions is uncertain.

The process of file sharing is described below.

5.1 Uploading

When a user starts a file sharing program, the user becomes a part of a network. Whether it is a centralized or decentralized model, when the user enters the server of the network he carries with him uploads of the files to be shared, with the name, title, extension, e-mail address etc.

Programs are available that allow the user to enter with only a limited quantity of files to be shared, while other programs prefer a larger quantity, because the quantity affects the speed of the upload.

Questions on the legal aspects of uploads:

1. Only digitalized products can be uploaded. The question is whether a user who is a private person may digitalize a work of art? Art 35 Act LXXVI on Licence, 1999 (Szjt) allows copying for private purposes. The issue is whether digitalization is to be considered 'copying'? The work of the author became intangible and changed its material form, and it was placed in a new data carrier. Therefore it cannot be included

under the referred article. The legislature obviously did not think about digitalization as a new way of representing works of arts.

However, as the Act did not specify the quantity and techniques of copying, and did not tighten the definition, in my opinion digitalization can be included in the concept of copying.

From the marketing point of view, copying a work of art onto a new data carrier and distributing it can lead to a significant profit. Let's mention here the current distribution of old records, which earlier existed only on LPs, on CD or DVD. Such a perspective can result in a different legal understanding concerning digitalization. ('Existence determines sense.')

Naturally, after multiple exchanges of a file it is impossible to determine who digitalized the work of art first. Sometimes a cracker group makes its name or access obvious in the name of a file when working with films.

2. Is the concept of 'distribution', prohibited in the Act on Defense of License (Szjt), equal to the concept of upload?

The Szjt considers making original or copies of a work of art available to the public as distribution, through putting into or offering for circulation (Sec (23) Art 23, Szjt.) Art 23 of Act on License includes putting into circulation and offering for circulation in the concept of being available.

It is a special aspect of criminal penal law that both a completed behavior and preparation for it – although considered as separate behaviors – are sanctioned. (*e.g.*, Art 250 Penal Code, factual statement of passive official corruption.)

In a Ministry Opinion on the Act on License (Szjt) regarding the distributional rights of authors, it is stated that distribution means making the original or a copy of a work available to the public, through selling or transferring possession – and thus basically applies to material, copied products. [Ministry Opinion on Art 17/b AL (Szjt)]. This legal concept concentrates on the transfer of possession.

An upload can unambiguously be considered as distribution; it can be identified with offering for circulation.

During file sharing, we cannot talk about transfer of possession as the digitalized form of the work of the author stays with the uploader, and when downloaded the work is doubled or even multiplied.

3. Although a mistake of the uploader (Art. 27 PC) concerning the free availability of works cannot be excluded. These products (*e.g.*, freeware, shareware with conditions, promotional music records, own products etc.) can be shared through the Internet freely by anyone.

It is a basic question whether the work was freely available or not, and as such it is relevant regarding criminal liability. We should not have illusions, of course, in

connection with the fact that this is true only with respect to a portion of downloads. Sharing files mostly happens without the permission of the authors or the publishers.

5.2. Phases of downloading

After the user has entered an identifying feature of the file to be obtained in a file sharing program – which is done in a different way in each network – the program presents a list, notifying whether the file is available, and, if so, whether it is downloadable.

If so, then the process is started by entering the download command.

The effect of downloading as actually realized is not obvious:

If the uploading was illegal because the uploader accomplished the uploading without the permission of the author, the downloading – although I would dispute this – in compliance with the principle of *ius ex iniuria* has to be judged as illegal.

Due to a possible mistake of the uploader, the fault of the downloader cannot be excluded either. Here I repeat that the fact whether a work of an author is freely available or not is also a constitutive fact, relevant from the point of view of criminal liability.

Should the downloader know if the downloaded files originate from illegal sources? Many hundred thousands of files are 'circulating' in the file sharing networks.

Sec (1) Art 35 AL (Szjt) allows the usage of copies for private purposes except if the aim is gaining financial profit. When somebody else is made to prepare a copy of the original issue on a computer or onto another electronic datacarrier, it is excluded from this main rule. [Sec (3) Art 35 AL (Szjt)].

In connection with the permission to copy for private purposes, it can be stated that when establishing the law in this field the legislators did not consider the fact – as indeed they could not – that owing to the development of technology many tens (hundreds?) of thousands of works would be copied for private aims on the file sharing networks every second.

5.2.1. Possible technical, commercial and legal means to fight against copyright licence infringement

The possibility of file sharing – as we have seen before – was established by the free communication ensured by the Internet. Because through these communication channels not only written texts but files can be forwarded, it is not easy to limit file sharing through technical means.

1. Within the *technical means* of limiting file sharing used against the operators of FTP servers, the appearance of warez pages (used to distribute illegal pirated software) was significant. (*E.g.,* continuous observation of the concept of such web sites and servers, prohibiting them, excluding the user from the circle of Hungarian users, or indictment in case of permanent infringing of the law.)

I think that a server supplier cannot escape from responsibility however difficult finding a solution to the problem may be.

It would be possible to exclude file sharing programs from the servers of our suppliers. The question is, are there suppliers that try to increase the number of clients by decreasing services?

The other question is: who should finance the observation and prohibition of the continuously renewing file sharing programs? Who can develop such a program and who will finance it? The suppliers would obviously transfer the extra charges to the users.

However, taking the liability of conceptual suppliers *stricto jure* (by strict law) we can state that conceptual suppliers are physical coactors in crimes when they provide web sites, storage places, servers etc. (Art 21 PC). A physical coactor is someone who ensures the means necessary or assists someone to commit a crime (material behavior during preparation Art 18 PC).

Although, as with all technical prevention, it would be possible to defeat file sharing limitations.

In case of centralized models, following the elimination of the central server another server can start to operate automatically within seconds. (Most programs inform you in advance about the availability of a reserve server.)

If it is a decentralized model, the elimination of one or two servers would not cause problems; at most the quality of supply on the server will be reduced for a while.

As in other fields of computer piracy, probably in the case of file sharing it would not be hard for suppliers to defeat newer and newer safety- defense solutions.

With the technology of .avi files, files can be forwarded in a much smaller size (e.g., works of arts of authors could be included in an e-mail).

In case of prohibition, the decentralized models will quickly become dominant, or would be organized in a new form.

Nowadays there are file sharing programs (Blubster, Piolet etc.) that mix the IP addresses of the users. We are talking about tens of thousands of addresses, so it would be extremely difficult to identify them.

Internet radio and television applications may easily turn into file sharing. The users do not choose from each other's offers, but from the 'program service' that provides the files in a hidden form, like a 'request program'.

We should not forget about postal letters and parcels in the real sphere, for which Internet serves as communication base between partners (and offers). There are winamp generated lists on WEB sites and FTP servers, which report in a codified form on the musical records available from other suppliers (or through the post).

It is also obvious that Internet users will not be satisfied with limitations on apparently free communication. Should we talk about free communication at all if the IP number of the visited web site, the length of the visit, the files downloaded, e-mail addresses from which the communication arrived and where letters have been sent etc., are available to the server supplier?

It is only the content of the communication which is unknown to them (yet) as server supplier are not obliged to report on it.

2. We also have to consider prices. Can the prices of frighteningly expensive musical CDs and DVDs be 'highly burdened' with the need for extra profit? This is the definite reason evoked for illegal copying and alteration of software, audio- and videofiles, and it has created massive demand. Today the non-discounted price of a CD is 2-6 thousand HUF, a DVD 6-9 thousand HUF, and the prices of books are as high as the stars, while the price of a WIN98 operational system, which has sold many hundreds of million copies all over the world, was still about 30 thousand HUF in 2004.

We all should trust that there are users who insist on obtaining the products of authors in the best quality and in the original form. By decreasing prices, providing discounts, and applying further market advantages the contrasting interests could be brought closer. That marketing behavior should be followed; there have already been some good examples ('Bomb-price' sales, permanent discounts, club sales etc.)

3. The *legal means* to fight against file sharing should be imbued with reality.

The legislature is compelled to defend the personal and material rights of the author in each phase of using the products of art.

There are lobbying activities taking place in all countries in the interest of authors and distributors. To prevent lost profits, a harsher approach should required, even through increasing the range of criminal law remedies.

However, there are arguments that file sharing does not reduce CD distribution.[3]

Actually, the authors' license lobby will inspire the legislature to establish prohibitions. The Ministry of Justice will refer to international decisions and organizations in connection with the provisions lobbyists support.

5.2.2. Concerns

What is the effect of a legal regulation that would turn tens or hundreds of thousand people into persons whose activities should be condemned, and, if file sharing is criminalized, that even turns them into criminals? Is it right to establish a regulation that may double the number of criminals in our age?

What could a legislative proposal be like, that allows the government to observe and record the data transmissions, including the content, of hundreds of thousands of Internet users? Data downloads about the private interest of users – political, religious, health and sexual etc. – would be recorded and observed. Such regulations could be – unfortunately – dedicated to the memory of George Orwell.

Prohibiting file sharing will be unenforceable in the future. Besides the necessary hundreds of legal procedures, is it possible to call to account tens of thousands of users?

[3] http://pcforum.hu/hirek/A-fájlcsere-nem-csökkenti-a CD-eladásokat.htm?qnid=8118.

I do not consider it as probable that a legal provision aiming at observation of our use of computers would gain social support.

The opinion of suppliers as to an increase in their legal responsibility is also questionable.

6. What can be the solution?

The development of new technical means, their availability to the public, the nature of the Internet, and lately file sharing have made it clear that the principles of copyright licence – first established by LÁSZLÓ ARANY, the son of the poet JÁNOS ARANY, in the 19th century – have been shaken.

The principal values and interests (protecting the author's copyright licence, prohibiting changing the product without permission, royalties etc.) are clear. New solutions for collecting fees are also well known, and some new ideas have also emerged. The legal royalties of products of authors found in student books should not be included here.

The free availability of works of authors (in many cases), and their recording, multiplication by different technical means, application in compliance with our convenience, and copying, as well as the elimination of the monopoly of publishers and other arguments, should to persuade the legislature to consider whether it is worth retaining the strict, but no longer feasible, provisions of Art 329 of Penal Code without any social support.

The statement of facts on copyright license and the attached rights established in Art 329 is a definitive statement of facts; making the license law stricter means criminal liability is aggravated.

Considering the material aspect of the statement of facts, the objects of the act committed and the behavior committed are to be judged by the Szjt (Act on Licence) at present.

I think that the Penal Code should approach the matter realistically and criminalize businesses aimed copying and putting into circulation licenced products of authors. So the behavior committed would be determined *expressis verbis* in the Penal Code.

The Szjt should continue to govern the objects of commission and other regulations.

The *de lege ferenda* regulation – in my opinion – is in compliance with Art. 10 of the Convention on Cyber-Crime signed on 22 November, 2001 in Budapest.

Instead of making the Penal Code stricter, payment of the copyright licence fee to authors – in accordance with the amount of downloaded data – could be considered as a real solution. However, such a royalty could be introduced only if the regulations of the Penal Code are softened. The maintenance of this strict approach and the introduction of licence fee at the same time would be incorrect.

Criminal Liability of Legal Persons. History, Evolution and Trends in Romanian Criminal Law

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Abstract:

The issue of criminal liability of legal persons is a new challenge on the "ramparts " of Romanian doctrinal debates, but brings to the fore long forgotten theories and conflicts settled long time ago. Amid the express consecration by Romanian legislator of the criminal liability of legal persons institution, debates on the fundament of this form of liability and on possible explanations concerning the criminal liability of a collective subject of law restarted. Tributary to the principle of subjective criminal liability and to the adagio "societas delinquere non potest", Romanian doctrine is put in the position of trying to abandon the monolithic theoretical schemes and to shyly explain the institution of criminal liability of legal persons. The saving doctrine comes from the West, the common-law system offering flexible and attractive solutions concerning the criminal liability of corporate law subjects through the mechanism of judicial precedent. Rejecting the heavy and rigid schemes, the Common-law system remarks itself by flexibility and dynamism and by an extremely practical spirit. Amid pressure from EU legislation, the Romanian legislator managed to properly regulate the institution of criminal liability of legal persons.

Keywords: *legal persons; subjective criminal liability; crime; punishment; complementary punishment; dissolvence; suspension of the activity; publication of the conviction.*

I. Introduction

Criminal liability of legal persons has become one of the most debated issues of the twentieth and early twenty-first century. This debate really became significant after the '90s, when both the United States and Europe have experienced an alarming number of crimes committed by legal persons – environmental crimes, antitrust crimes, fraud, pharmaceutical crimes and offences, labor law offences, criminal corruption, economic and fiscal policies crimes and offences.[1] Consequences of this phenomenon proliferation consist in both huge economic and human lives losses. Besides those noted, their long-term effects, should not be underestimated. Some of the most important, not visible at this moment, long-term effects are affecting the environment and the human health.

Unlawful conduct of legal persons can be approached from the point of view of civil law and administrative law, and especially criminal law

At present, most states admit civil and administrative liability of legal persons in case of violation by these actors of legal regulations. But criminal liability of legal persons was a controversial topic since the beginning, very difficult to address and

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[1] *R. Mokhiber*, *R. Mokhiber*, Top 100 Corporate Criminals of the Decade available online at: http://www.corporatepredators.org/top100.html.

resolve. Common law jurisdictions, more pragmatic than those of continental Europe, recognized this institution from the beginning, even if under different models. Vehement criticism against the criminal liability of legal entities comes from continental law system and questions the compatibility of criminal liability of legal entities with the general principles of criminal law. Lately, we notice a new orientation of doctrine to acknowledge the criminal liability of legal persons institution.

Different states – those which initially have refused or still refuse to recognize criminal liability of legal persons – have this attitude because of historical, economic, social, political specificity of each. Under these conditions, they tried to solve in their own and effective way the legal persons sanctioning issue for their illegal conducts. It has been shown in the doctrine that none of these systems is perfect.[2] It is undeniable however, that the most effective method in order to discourage different forms of economic and financial crime is the criminal liability of legal persons.[3] It has been shown that stigmatizing effect of criminal sanctions applied to legal persons can be very effective and dissuasive. For proper functioning of an enterprise, for its economic progress, "good fame" is a decisive factor. When a punishment hits the good reputation, its effect is certainly discouraging.[4]

Although initially the criminal liability of legal persons imitated criminal liability of individuals scheme (so-called *anthropomorphic model*), new models of criminal liability have emerged – *aggregation doctrine*, *separate identity doctrine* – culminating with *constructivist models* that focus on the concept of *corporate culture* and *corporate ethos* concepts. Between all penal systems, the U.S. criminal liability system seems the most opened and evolved on the institution of criminal liability of legal persons, being the first to embrace the *aggregation doctrine*. English and French systems have rejected this theory from the beginning, although it represented in its time an ingenious way of reconciling traditional and modernist visions.

Other states, such as Germany, obstinately refuse to consecrate criminal liability of legal persons, despite all the efforts of the European community to support the project implementation. German legislator chose instead an administrative liability for legal persons which has the advantage of being less expensive and less demanding in terms of theory and has proven a great effectiveness, administrative fines applicable to entities reaching the limit of 1 million euro! Some countries, such as Spain, still "lie" in uncertainty due to unfortunate errors of expression of the legislator. Although the Spanish doctrine believes that the Spanish criminal law indirectly enshrined criminal liability of the legal person, any legal reference does not lead to this conclusion.[5]

In general, in continental Europe, principle *Societas delinquere non potest* and dogma of criminal liability based on fault constituted serious obstacles to the consecration of the institution of criminal liability of legal persons. With all the tribute paid to these true Philosopher`s stones of criminal law, social realities have demonstrated the urgent need to recognize the criminal liability of legal persons, an obstinate rejection of the institution not being beneficial to a proper conduct of legal persons in the field of social relations increasingly troubled by corporate crime phenomenon.

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[2] *A.I. Pop*, Criminal Liability of Corporation – Comparative Jurisprudence, p. 3, available online at: http://www.law.msu.edu/king/2006/2006_Pop.pdf.

[3] *A. Jurma*, Răspunderea penală a persoanei juridice, in R.D.P. nr. 1/2003, p. 100.

[4] *Idem*, p. 101.

[5] The Spanish legislator has provided in Spanish Criminal Code specific sanctions called "accessory consequences" (*consequencias accesorias*) that apply only to legal persons in case of committing an offense, their juridical nature being hotly disputed by Spanish Criminal doctrine.

II. Evolution of the institution of criminal liability of legal persons

Theories of criminal liability of legal entities and their associated doctrinal research are relatively recent, dating back almost two centuries. But the issue of ascribing criminal liability to a collective entity emerged long time before these theories had been conceived. Since ancient times, local collective entities were held criminal responsible for their conduct. The first ancient collective entities – such as clans, tribes, religious groups, old business enterprises and other groups as such – and the forms of punishment applicable for them constitute the germs of which arose the institution of criminal liability of legal persons. Criminal liability of different groups coexisted for a long period of time with the liability of individuals. Since the occurrence of liberal ideas, the legal field in general and the criminal law field in special, were dominated by individualistic values. This process of humanization of penal institutions was crucial in the direction adopted by different systems of law regarding criminal liability of collective entities. On the other hand, theories of criminal liability of legal entities were designed and modeled in the common law system in the context created by the individualistic trend[6]. As noted in the literature, although these theories were an important step in the field of criminal liability of legal persons, their main weakness is their inherent individualistic component.[7]

In Ancient society, the group liability constituted the rule because ancient society was not conceived as a sum of individuals, but rather as a union of families.[8] This feature gave the main differential element and sketched legal regulations at the time. The law was adapted to a small independent groups system, called clans or families, and liability (no matter which) was incurred in relation to these issues. Conduct of a group member was regarded as emanating from the group itself, viewed as a whole or as an entity. The Book of Genesis says that God punished Sodom and Gomorrah because of corruption.[9] Later Emperor Theodosius punished Antioch city taking its theater, public baths and the title of metropolis. Emperor Severus destroyed Byzantium city, taking the theater, baths, honors and ornaments, reducing it to the status of a village.

Contrary to Ancient law, Roman law reflects the value individualism over collectivism. In those days were born early forms of corporations and the law could not remain indifferent to this new reality, so that the existence and activity of these new entities was governed without seeing them as unique individuals. The earliest forms of legal entities were joint civil enterprises or associations – *civitas*, *municipium*, *republica*, *communitas, scribae*, *decuriae, aurifodinarum*, *argentifodinarum*, *salinarum societas*, *vectigalium publicorum societas*, *sodalidates*, *sodalitia*, *collegia tenuiorum.*

The civil enterprise included a sum of individuals pursuing a common goal, which could be political, professional, religious etc., permanently or for a limited period of

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[6] *D. Holler Branco*, Towards a New Paradigm for Corporate Criminal Liability in Brazil: Lessons from Common Law Developments, thesis, available online at http://library2.usask.ca/theses/available/etd-04192006-112943/unrestricted/d_branco.pdf, p. 10.

[7] *C.D. Stone*, Where the Law Ends: The Social Control of Corporate Bahviour, Harper & Row Publishers, New York, 1975, p. 1.

[8] *Sir H. Sumner Maine*, Ancient Law, in *D. Holler Branco*, *op. cit.*, p. 11.

[9] Bible, Book of Genesis, verse 19:24: „Then the LORD rained on Sodom and Gomorrah brimstone and fire from the LORD out of heaven" and 19:25: „He overthrew those cities, and all the valley, and all the inhabitants of the cities, and what grew on the ground".

time. Depending on their interest, associations could be public or private.[10] In order to regulate the legal position of these actors in Roman society, Roman jurists created the concept of *legal person*, even if they have not named it like this. Consequently, these entities could hold collective ownership, but because they were legal fictions or ideal entities, were unable to sign legal acts. Individualistic vision of Roman law was not an obstacle for the glossers to assign criminal liability to collective entities. The Romans did not develop a theory of collective entities or of an ability of a group to commit crimes, although they admitted the possibility to engage criminal liability of collective entities such the *city*. Consequently, the principle of *societas delinquere non potest*, which reflects precisely collective entities inability to act and have conscience, has not prevailed in the Roman law.

In the Middle Ages the concept of legal personality was first used in the Church and not the state institutions field. In the year 1245 Pope Innocent the IVth introduced a new principle according to which collective entities were fictions. He was the father of the dogma of fictional and intellectual character of legal persons. According to his theory, the collective entity is not really a person, but is regarded as a person due to a fiction of law or, in certain ecclesiastical entities due to Divine power. By the assumption that legal persons are nothing but fictional entities, ecclesiastical entities acquired a privileged and protected status[11].

Eventually, canonists had to accept criminal liability of legal persons. After the seventeenth century, the School of Bologna began to stipulate sanctions that were intended to be imposed only to communities. Thus, a city that granted asylum to criminals and not helped to their arrest, was captured. As shown, canonists accepted criminal liability of collective entities, but under certain conditions. The most important of these is the fact that the community could not be held responsible for the act of a single individual only if the individual act committed would have been a consequence of collective will or could have been the result of most community members will.[12]

As a consequence of the recognition of liability of a collective entity, there were adopted a series of specific sanctions: fines, restriction of rights and dissolution. In addition, spiritual penalties were applied to the individual members of the group, such as the prohibition of the sacraments and, if they were members of the clergy, religious exercise suspension and excommunication.

In France, criminal liability of legal persons was recognized, according to some scholars, until the French Revolution, as a legacy of canonic law. It was accepted that a collective entity had a factual existence, and that the groups could commit crimes and should be punished irrespective of their nature.[13] In 1331, the city of Toulouse was condemned by the Parliament, by taking inherent rights and privileges of its status as a collective entity and confiscating its assets. Having been removed these privileges, Toulouse could not represent itself as specific and autonomous entity. Parallel to this, by

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[10] *T. Sâmbrian*, De la statutul persoanelor juridice *„piae causae"* în dreptul roman, la propuneri de legiferare privind regimul juridic al asociațiilor și fundațiilor filantropice din România, in Revista de Științe Juridice nr. 34/2005, p. 29, available online at http://drept.ucv.ro/RSJ/Articole/2005/RSJ34/0103Sambrian.pdf.

[11] *M. Lizée*, De la capacité organique et des responsabilités délictuelle et pénale des personnes morales, in McGill Law Journal, vol. 41, 1995, p. 134-136.

[12] *D. Holler Branco*, *cited*, p. 15.

[13] *Idem*, p. 16. Opinions that deny the recognition by the French of criminal liability of legal persons in those times were also expressed.

denying the right to be a collective entity, the right to be an independent community was also denied. By confiscation of its assets, the Parliament ensured that city of Toulouse obtained no advantage due to its economic position. The same thing happened in 1558 with the city of Bordeaux and later followed Montpellier in 1739.[14]

In 1670 the foundations of modern French law were settled, French Criminal Justice Ordinance adopted that year recognizing, among other things, the institution of criminal liability of groups. The first provision in this regard provided that criminal proceedings could be used against towns, villages, collective entities and various forms of association which committed various crimes such as rebellion or violence. In the category of collective entities were included schools, religious councils, monasteries, professional groups of lawyers, court officials and prosecutors. In order to engage their criminal liability, the criminal deed should have been the result of the collective will, due to the importance given to subjective *mens rea* element. The act *per se* was not sufficient. The will of the group was an essential element of the offense. In addition, the doctrine of those times emphasized that criminal liability of the group did not remove or diminish criminal liability of the individual who committed the wrongful act. In this way, the offender and the other participants to the offence were not exempt from personal criminal liability.[15]

On the other side, English modern law initially rejected the concept of collective guilt so widespread in the medieval period, while the principle of non – liability of legal persons prevailed. According to the general opinion, only individuals who willfully committed an injurious act could be found responsible for committing a crime. Chief Justice of England confirmed this theory in 1701, when he stated that collective entities as corporations cannot be accused of a crime, but only individuals as their members. In the mid nineteenth century a breech occurs in common law legislation and conception, criminal liability of legal entities becoming a reality. Initially, the criminal liability of legal persons was restricted only to breaches of legal obligations – *nuisance*; was later extended to other categories of offenses: *nonfeasance* (such as failure to repair roads and bridges), *defamatory libel* (publishing a defamatory obscene or revolting text against a living person), *blasphemous libel* (publication of any document slandering the Christian faith, the Bible, the Church of England, God, Jesus or any sacred person) and *criminal contempt of court* (any interference in the process of justice).[16]

By the nineteenth century, industrial corporations were held criminal responsible for committing so-called *statutory Crimes*, the fine as a specific sanction being mainly imposed.

In 1889, the British Parliament introduced an interpretive rule according to which the term *person* used in legal incrimination texts refers to both individuals and legal entities. This is the moment that triggered admission of criminal liability of legal persons in case of committing intentional crimes.[17] Common law was the cradle of creation of two models imposing criminal liability of legal entities: vicarious liability (vicarious liability model) and identification model. These doctrines have dominated the field of

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[14] *L.F. Gomes (coord.)*, Responsabilidade penal da pessoa jurídica e medidas provisórias e direito penal, in Revista dos Tribunais, vol. 72, São Paulo, 1999, p. 80.

[15] *A. Mestre*, Les personnes morales et le problème de leur responsabilité pénale, cited by *Fl. Streteanu, R. Chiriță*, Răspunderea penală a persoanei juridice, Second ed., C.H. Beck, București, 2007, p. 20.

[16] *Fl. Streteanu, R. Chiriță*, *cited*., p. 36.

[17] *D. Holler Branco cited*., p. 20.

criminal liability of legal persons and, although they represented true challenges for scholars of those times, they actually weren't meant to be a breach of the individualistic principles, as erroneously believed by some doctrine.[18]

III. Historical evolution of the legal entities within Romanian criminal law

Ever since the Getae – Dacian period, there have been collective organization forms[19] and in the Middle Age collective responsibility forms in the fiscal, criminal and international commerce area, are being signaled.[20] Under the Turkish-phanariot regime the first companies are being formed. A chapter on juridical entities can be found in the *Pravilniceasca condica*,[21] as well as within the *Legiuirea Caragea* [22] which talk about so called *"tovărăşii"* – comraderies. The *Calimah Code* calls the legal entities *moral persons*.

The Criminal Code of the Romanian United Principalities, known as well under the name of Cuza's Criminal Code from 1864, establishes the personal criminal responsibility in principal excluding the criminal responsibility for collective persons. Until the adoption of the Criminal code from 1936, a series of special criminal laws have been adopted, indirect engaging a criminal responsibility for juridical entities.[23] As such, on February 6th 1924 the law for legal entities has been adopted, which, despite its denomination was referring only at associations and foundation with gainful purpose. This regulatory document contains a very interesting provision on the possibility of dissolution of those legal entities, based on a decision of the executive power (Council of Ministers), in case the public order or state's safety was infringed.

The mine law, adopted on July 3rd 1924 was establishing in art 141 a real criminal responsibility for legal entities: "in case of deviations which would result in deviation within the functioning of the public services and in the general functioning of the state, the following sanctions will be applied by the mine authorities to the enterprise/company as well as to its administrator (…)".

In 1932 a law was passed for unfair competition. This law was sanctioning with penal fines the use in commerce of firms or trademarks which would infringe certain rights previously obtained by others on them. On 7th of April 1934 a law for public defense was passed, directly regarding the right to association. Using an extremely vague terminology, the law was establishing that those political groups which throughout their activity are endangering the states' safety or the social order or they preach for social or state order changes, could have been dissolved by a decision issued by the Council of Ministers. Hence, as it was mentioned by some authors, "a measure

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[18] *E. Lederman*, Models for Imposing Corporate Criminal Liability: from Adaptation and Imitation toward Aggregation and the Search for Self-Identity, in Buffalo Criminal Law Review, vol. 4:641, p. 642.

[19] *E. Cernea, E. Molcuț*, Istoria statului și dreptului românesc, Casa de editură și presă „Șansa" SRL, București, 1996, p. 12-16.

[20] *E. Cernea, E. Molcuț*, op. cit., p. 117.

[21] Enacted in the Romanian Country (Țara Românească) by the command of Alexandru Ipsilanti in 1775 into force only in 1780, because of the turkish occupation.

[22] Compiled in 1818 by order of the Romanian Country Lord Ioan Gheorghe Caragea and entered into force one year later.

[23] Professor Ion Tanoviceanu names it „quasi-criminal responsability". See, *I. Tanoviceanu*, Tratat de drept și procedură penală, vol. I, Tipografie „Curierul Judiciar", București, 1927, p. 384.

mentioned only exceptionally within the Legal entity Law is trying to get generalized[24]. Secret society activities which concealed their activities in order to preclude the law, was as well prohibited.

The Doctrine and intra-war legislation were acknowledging next to criminal responsibility of the natural person a criminal responsibility of the legal entity.[25]. In 1928 in Bucharest takes place the Congress of the International Association of Criminal Law where the papers concentrate around the idea that legal entities represent very important social forces in today's life[26].

This stream was consolidated by the adoption of the Criminal Code of Carol the II-nd in 1936, in which the Romanian legislator of 1936 envisaged safety measures applicable to legal entities, in Title IV – "Safety Measures" Chapter II – "Different species of safety measures". Because the juridical nature of the safety measures was of penal sanctions, which were applicable only in case a crime was committed, hereby the institution of criminal responsibility of the legal entity was indirectly established. Hence, art. 84 regulated the safety measure of closing the place down, stating that "closing down the industrial or commercial place can be ordered by a court, in the cases specified by the law, when it is being considered that this measure is necessary in order to prevent future crimes. The closing down duration is between 1 month and one year. As an offence, closing down the place can be ordered only in case of a subsequent offence for an identical offence and for a period between, one day to one month." Art. 85 of the 1936 criminal code, regulated de safety measure of dissolution or activity suspension of a legal entity: " when a crime or an offence is being punished by the law with one year of correctional prison was being committed by the directors or administrators of a company, associations or corporations, working in the name of the legal entity and with means procured by it, the criminal court can next to the punishment applicable to the natural person, can pronounce a safety measure of activity suspension or dissolution of the legal entity, in conformity with the danger that it could create for the public moral or order that this company continues to have activity." More, 3rd line of the same article, penal capacity is being recognized to legal entity as a collective entity, being of a separate body then its constituting members, because it's stating that: "activity suspension is based on ceasing any activity of the legal entity, even under another name or with other directors or administrators." These provisions of the 1936 criminal Code made professor Vintila Dongoroz to make the following remark "the affirmative as well as the negative thesis of the criminal responsibility of the legal entity have been reduced to the same common denominator".[27]

The Penal Code of 1968[28] of communist inspiration has disjointed the problem of legal entity criminal responsibility by not recognizing it. This view has been kept for 40 years, the capacity to be held criminal responsible has been recognized only to natural persons.

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[24] *E. Cernea, E. Molcuț*, op. cit., p. 269.

[25] *A. Fanu-Moca*, Răspunderea penală a persoanei juridice – o problemă de actualitate a dreptului românesc, în Buletinul ştiinţific al conferinţei naţionale „România şi dreptul internaţional", 24-26 aprilie 1998, Ed. Universităţii „Lucian Blaga", Sibiu, 1999, p. 119.

[26] *V. Pașca, R. Mancaș*, Drept penal. Partea generală, Ed. Universitas Timisiensis, Timişoara, 2002, p. 421.

[27] *V. Dongoroz*, *op. cit.*, p. 368.

[28] Published in B. Of. nr. 79-79bis from 21 June 1968, republished in B. Of. nr. 55-56 din 23 April 1973 and M. Of. nr. 65 din 16 aprilie 1997.

In 2004, while failing in the attempt to pass a New Penal Code[29] the Romanian legislator passed the Law regarding the criminal responsibility of legal entities for the crimes of falsifying coins and other values no. 299/2004[30], currently repealed, a special criminal law which was expressly establishing the criminal responsibility of the legal entity in case the offences of falsifying coins or other values, as it is being envisaged by art 282 and art. 284 of the Criminal Codes well as for the crimes of detaining of the necessary means in order to falsify values, envisaged in art 285 Criminal Code, committed in the name of or in the interest of the legal entities, by the organs or their representatives. According to art 2 of 299/2004 Law, the applicable punishments of the legal entities envisaged were: fines, as capital punishment and suspension of activities or one of its activities as complementary punishment, restraining as such the number of complementary punishments which could have been applied to legal entities in case they were committing such crimes. Very interesting though, is the fact that this law came into force on July 1st 2004, while criminal responsibility of a legal entity being expressly established before the entering into force of the 301/2004 Law, but only for an expressly and limited, by law envisaged, number of offences.

Law no. 301/2004 has been abolished by Law no. 286/2009, after it's come into effect has been repeatedly postponed.[31]

In order to ensure its credibility and because the amendments previewed by Law no. 301/2004 have been imposed by the European and International juridical context, the Romanian legislator has been bound to introduce a series of new institutions, among which the legal entities criminal responsibility, within the, still in force, Penal Code of 1936. Therefore, by 278/2006 Law the very famous art. 19 has been introduced, stating that "legal entities, except the State, public authorities and institutions, which are caring an activity which does not comply with the object of the private domain, are being held criminal responsible for the crimes committed while exercising the object of activity or in the interest or name of the legal entity (...)". Within the same article the criminal responsibility of the legal entity is being combined with the criminal responsibility of the natural person which committed the unlawful act. With the introduction of art. 53 by 278/2006 Law the punitive framework has been established, stating that main types and complementary penalties are applicable to a legal entity offender. Main types of punishment are fines comprising between 2.500 lei (RON) and 2.000.000 lei (RON) and the complementary penalties are:

a) dissolution of a legal entity

b) suspension of the legal entities activities for a period of 3 months until one year or suspension of one of the legal entities activity in relation with which the crime has been committed, for a period of 3 months to 3 years.

c) closing down a legal entities working point for a duration between 3 months and 3 years.

d) Prohibition to take part at public auction procedures for a period between one and 3 years.

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[29] Legea nr. 301/2004, currenty recalled

[30] M. Of. nr. 593 from 1 Jully 2004.

[31] The 301/2004 Law, should have, initially, entered into force on 28 iunie 2005. Later, this date has been shifted by O.U.G. nr. 58/2005 to 1st Septembre 2006, and by O.U.G. no. 73/2008 the entering into force term has been prororogued to September 1st, 2009. Finally this project died at birth, because, even though it was modified multiple times, throughout the period it was not yet into force, the former future Penal Code has been recalled by Law no. 286/2009.

e) Publishing or broadcasting the final judgment/ the conviction judgment.

The applicability conditions of these punishments are being detailed by the provisions entailed in Chapter IV[1] (art. 71[1]-71[7]) brought in the 1968 Criminal Code by art I point 23 278/2006 Law. At the same time, the institution of legal rehabilitation of the legal entity,[32] as shown above, not envisaged by 301/2004 Law, as well as the legal entities relaps, within art. 40[2].

IV. Criminal Responsibility of Legal Persons pursuant to the provisions of the new Criminal Code of Romania

A significant moment in the field of criminal law was the adoption of the new Criminal Code of Romania - Law no. 286/2009 regarding the Criminal Code of Romania, which includes an entire section dedicated to the criminal responsibility of the legal persons - Title VI "The criminal responsibility of legal persons".

Article 135 defines the conditions in which a legal person can be held liable, indicating that the legal person, with the exception of the state and of the public authorities, is criminally liable for the offences committed while pursuing its business purposes or committed in the name of, on behalf of, or for the benefit of a legal person. The public institutions are not held criminally liable for the offences committed during an activity that is not related to the private sector. The new Criminal Code also defines the aggregation of the criminal liability of the legal person with the criminal liability of the natural person who took part in committing that offence. Therefore, the new Criminal Code grants full criminal immunity to the state and to the public authorities, as well as a limited criminal immunity to the public institutions for offences committed during activities that pertain to the public sector. The criminal liability of the legal person does not exclude the criminal liability of the natural person who was involved in perpetrating the same offence.

As far as the criminal sanctions applied to a legal person, a single main penalty was provided for - the fine - which is established according to the day-fine system, to which six additional sanctions are being added (art. 136):

a. the winding-up of the legal person;

b. the suspension of the entire business activity or of one of the business activities pursued by the legal person, for a period of time from 3 month and up to 3 years;

c. closure of business units belonging to the legal person, for a period of time from 3 month and up to 3 years;

d. prohibition from taking part in public procurement tenders, for a period of time from 1 to 3 years

e. placing under judicial supervision;

f. formal publication or communication of the sentence.

The total amount of the fine is established according to the day-fine system. The amount corresponding to a day-fine, between 100 and 5,000 RON, is multiplied with the number of day-fine, which may be between 30 and 600 days. The new Criminal Code of Romania provides the courts with legal criteria regarding the calculation of the day-fine amount: the turnover, in the case of a legal person operating for profit, and the value of the assets, in the case of other type of legal persons, as well as taking into consideration the other obligations undertaken by the legal person.

[32] Art. 134 alin. (2) Penal Code from 1968.

When the main aim of offence perpetrated by the legal person was to obtain financial benefits, the special limits of the day-fine provided for by the law for the offence may be increased by one third, without exceeding the general maximum amount of the fine. Upon establishing the fine to be applied, the value of the financial benefit obtain or pursued shall be considered.

As far as the additional sanctions are concerned, these are established in a general manner, which can yet be improved. The application of the additional sanctions is basically not mandatory, and they are implemented when the court of law acknowledges that, in consideration to the nature and severity of the offence, as well as the circumstances of the said offence, such sanctions are deemed necessary. The application of additional sanctions is mandatory when the law specifically indicates the said sanction.

Except for the winding-up of the legal person – which, in our opinion, should have been set as main sanction, not as additional sanction – all the other five additional sanctions may be applied cumulatively.

The additional sanction of winding-up the company shall be compulsory and added to the main sanction of fine payment when the legal person was established for the purpose of infringing the law, when its business purpose was diverted for the purpose of perpetrating offences, and when the sanction provided for by the law for the committed crime is imprisonment for a period which exceeds 3 years. Another case in which the winding-up of the legal person is mandatory is when one of the additional sanctions is the failure to implement, in bad faith, one of the additional sanctions provided for in article 136, paragraph (3), sections b)-e); in this case, the so-called *cumulative effect* applies. With regard to this additional sanction, the new Criminal Code also provides a list of "immune" legal persons, indicating in article 141 that winding-up cannot be applied to public entities, political parties, trade unions, management organizations, religious institutions or entities belonging to national minorities, established pursuant to the law, as well as the legal persons pursuing their activities in the mass-media. If the interdiction of winding-up public entities is set forth for obvious reasons, we have serious doubts regarding the impossibility for the political parties, religious institutions, trade unions, management organizations and especially entities in the mass-media from being wound-up. These legal persons were included on the list of legal persons immune to winding-up, due to the recognition of the right to association and freedom of expression, established in the European Convention on Human Rights and Fundamental Freedoms; however, even the Strasbourg case law accepted that these rights may be reasonably limited for state protection reasons, applicable in a democratic society. Moreover, the special legislation regarding the above legal persons allows the winding-up as a civil and administrative sanction in the case of political parties, for example, after they are deemed unconstitutional following the application of a special protocol.

The additional sanction of suspending the activity of the legal person consists in prohibiting the legal person, for a period ranging from 3 months to 3 years, from pursuing all or one of its business purposes which are related to the committed offence, while the other business purposes which are not related to the offence and which are pursued according to the law cannot be suspended. Also, if the legal person fails, in bad faith, to comply with the additional sanction of formal publication or communication of the sentence [pursuant to article 136, paragraph (3), section f)], the court of law shall order the suspension of all or one of the business purposes pursued by the legal person, until the additional sanction is implemented, yet this suspension shall apply for no

longer than 3 months. If the sentence passed regarding the legal person was not formally published or communicated within this period, the court of law shall order the winding-up of the legal person.

This additional sanction cannot be applied to the legal persons for which winding-up is not allowed.

The additional sanction of closing certain business units belonging to the legal person shall involve the closing, for a period from 3 months up to 3 years, of one or several of the business units belonging to a legal person operating for profit, where the activity representing the offence was pursued; this time, the Romanian legislator indicated that the business units belonging to legal persons operating in the mass-media cannot be closed, for reasons based on the entitlement to the freedom of expression, which was directly and wrongly interpreted by the Romanian legislator.

The additional sanction related to the prohibition from taking part in public procurement tenders, for a period of time from 1 to 3 years represents the inability to take part, directly or indirectly, in the proceedings regarding the award of public works contracts (public tenders, direct sales and other administrative proceedings for the procurement of goods and services), as provided for by the law.

The placing under judicial supervision is another additional sanction, which requires the legal person to carry out, under the supervision of a legally authorized agent, of the activity which was related to the offence committed, for a period ranging from 1 to 3 years. The legally authorized agent shall refer the case to a competent court when the said agent finds that the legal person has not taken all the steps necessary in order to prevent new offences from being committed. Should the court of law deem that the matter referred is duly substantiated, the said court shall order that the additional sanction be replaced with the suspension of the business activity pursued by the legal person. This additional sanction - the placing under judicial supervision - cannot be applied in case of the public entities, political parties, trade unions, management organizations, religious institutions or entities belonging to national minorities, established pursuant to the law, as well as the legal persons operating in the mass-media.

The easiest of the additional sanctions is the formal communication of the final sentence or its publication. The discrediting and stigmatizing character of this last additional sanction may not be minimized, however, as this is joined by the social sanction of the public disrepute. The formal communication of the final sentence or its publication shall always be at the expense of the sentenced legal person, within the limits regarding the privacy and the protection of the personal information belonging to the other persons involved in the legal affair. Thus, the legislator set forth, in article 145, paragraph 2 that the formal communication or publication of the sentence passed shall not disclose the identity of other persons. The final sentence shall be formally communicated as an extract, in the form and at the place ordered by the court of law, and for a period between 1 and 3 months. The final sentence shall be formally communicated as an extract, in the form ordered by the court of law, in the printed or the audiovisual media, or in other audiovisual communication means, as established by the court of law. Should the sentence be communicated in the printed or audiovisual media, the court of law shall establish the number of issues (no more than 10) and, in the case of other audiovisual means, the duration cannot be longer than 3 months.

The liability of the legal person in case of repeated offence has been very much simplified, as compared to the provisions of article 40^2 from the 1968 Criminal Code, as

the legislation does not define two cases of repeated offence which were strictly distinguished according to the first condition, regarding the execution or not of the sanction with fine. Article 146 defines a single case of repeated offence for the legal person, setting forth that "the repeated offence is considered when the legal person, after a final and definitely imposed sentence and until the recovery of their rights, commits a new offence, with direct or oblique intent". If the legal person commits repeated offence, the special limits of the sanction, as provided for by the law in case of a new offence shall be increased by one half, without exceeding the general maximum amount of the fine. If the previous fine sanction was not executed, in whole or in part, the fine established for the new offence, pursuant to paragraph (2) shall be added to the previous sanction or to the remaining non-executed sanction.

With regard to the attenuation or the aggravation of the criminal liability of the legal person, article 147 sets forth that, in case of aggregated offences, plurality of intermediary devices or causes of attenuation or aggravation of the criminal liability, the legal person is applied the fine in the amount provided for by the law for natural persons. In case of aggregated offences, the additional different sanctions, except the winding-up, or the sanctions that are similar, but have different content, shall be cumulated; also, among the same type and same content additional sanctions, the harder shall be applied. In case of aggregated offences, the safety measures applied shall be cumulated.

A very interesting provision is the one regarding the effect of a merger or winding-up on the liability of the legal person; this provision is of utmost importance, considering the "hazy" corporate environment in Romania. This text of law introduces elements of novelty, inspired from the Criminal Code of Belgium[33]. Thus, in case of merger or total absorption or division, the initial legal person ceases to exist and loses its legal personality, therefore cannot be held criminally liable. Nevertheless, in these cases, the assets of the reorganized legal person are transferred in whole or in part, and this also leads to a transfer, in whole or in part, of its obligations. The previous Criminal Code of Romania defined the principle of the personal criminal liability, which implied that the reorganized legal person could not also transfer its criminal liability. However, the new Criminal Code solves this issue in the provisions of article 151, paragraph 1, which sets forth that, "should a legal person lose its personality following a merger, absorption or division performed after the offence was committed, the criminal liability and its consequences shall be directed:

a) to the legal person created after the merger;

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[33] Article 86 of the Criminal Code of Belgium indicates that "the loss of the legal personality in case of a condemned person shall not cancel the sanction", while article 20 (repealed by article 21 of the Law 1996-07-10/42 regarding the abolition of the death penalty and the change of criminal sanctions http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn =1996071042) sets forth that "the criminal proceedings shall be cancelled at the end of liquidation, judicial winding-up or winding-up without liquidation. The criminal pursuit may continue if the legal person initiated the proceedings of liquidation, judicial winding-up or the winding-up without liquidation with the view of evading criminal investigation, or if the legal person was indicted by the investigating magistrate before it lost its legal personality." The updated version of the Criminal Code of Belgium may be found at: http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?DETAIL=1867060801%2FF&caller=list&row_id=1&numero=2&rech=4&cn=1867060801&table_name=LOI&nm=1867060850&la=F&dt=CODE+PENAL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&trier=promulgation&chercher=t&sql=dt+contains++%27CODE%27%26+%27PENAL%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&imgcn.x=41&imgcn.y=12#LNK0026

b) to the absorbing legal person;

c) the legal persons created following a division or who have acquired parts of the assets belonging to the divided legal person.

In the case referred to in paragraph (1), the sanction shall be established according to the turnover or the value of the assets belonging to the legal person having committed the crime, as well as according to the part of its assets which were transferred to each of the legal persons taking part in the proceedings".

By these legal provisions, the Romanian legislator defines an exception from the principle of the personal criminal liability and establishes the principle of proportion regarding the established sanction with the fine.

V. Conclusions

In Romania, the corporate criminal phenomenon – also known as *corporate crime* in the *common law* system – has expanded especially in fields like tax, customs, constructions, environment, and securities, causing serious losses for the national economy and the population. The fight against economic and financial crimes committed by the natural persons has failed dramatically in the countries which have exempted the legal person from liability. The pragmatic reason must create new entities allowing the justice to operate with legal categories adapted to the present-day social reality. If Romania had not adopted a new approach to the liability of the legal person and a inclusion of this principle in the applicable law, our country would not have been included in the concerted actions implemented by the European member states in order to limit the economic and financial crime. The purpose of the sanction in the criminal law is mainly to prevent any new offences from being committed, by implementing social prevention regarding the offenders, as well as a general prevention, regarding the social aggregate of the persons addressed by the criminal law.

The Romanian legislator has managed to overcome all obstacles and has laid the bases of a modern and bold law, which takes into consideration the criminal liability of the legal person. Notwithstanding certain regulatory requirements which could be improved in our opinion and which could be addressed by a future law, we believe that Romania has adopted the modern trend across Europe by establishing the criminal liability of the legal person in the new Criminal Code.

Probation Services and Their Role in the Execution of Criminal Sanctions

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Abstract:

The study aims to present the trajectory of Probation Services in Romania from the first implementation initiatives to their current configuration in accordance with the new regulations in criminal matters (the New Criminal Code, the New Criminal Procedure Code) correlated to the provisions of Law no. 252/2013 on the organization and functioning of probation system, Law no. 253/2013 on the enforcement of sanctions, educational measures and other non-custodial measures imposed by court during trial, Law no. 254/2013 on the enforcement of sanctions and measures involving deprivation of liberty ordered by the court during the trial.

Keywords: *Probation services; custodial sanctions; non-custodial sanctions; social reintegration of offenders.*

In Romania, the interest for establishment and proper functioning of Probation services is related to the requirement formulated in doctrine: penal policy should "aim at a systematic action of re-socialization of offenders, which can be developed only through a growing humanization of the repressive system and must be based on scientific approach to the crime and the offender's personality".[1]

In 1996-1998 have outlined the first initiatives both in theory and practice[2] within the implementation of program *Partnership for Justice* by Romanian General Directorate of Prisons, Organization Europe to Europe, University of Exeter, Devon Probation Service from UK, in collaboration with professors from West University of Timisoara (the main objective of the program was the professional training of the prison staff and volunteers from the community for the probation activities); also, in 1997 was created the first experimental center probation in Romania as distinct department of Arad Penitentiary (the activity of this center was focused initially on juvenile offenders).

The development of Probation services in Romania highlights the harmonization of Romanian legislation in criminal matters with the European legislation in the probation area, particularly the Council of Europe recommendations (*e.g.*, Recommendation (2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules: this document recommends that governments of the member states be guided in their legislation, policies and practice by the rules concerning the probation activities, ensuring that this recommendation and the accompanying commentary are translated and disseminated as widely as possible and more specifically among judicial authorities, probation services, penitentiary administration, as well as the media and the general public).

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[1] Christine Lazerges, *La politique criminelle*, P.U.F., Paris, 1987, p. 14.

[2] Viorel Pașca, *Curs de drept penal Partea generală*, vol. II, Editura Universul Juridic, București, 2011, p. 194.

In accordance with the definitions formulated in Recommendation (2010)1 on Probation Rules regarding the basic terms used in this field (*e.g. Probation* – the implementation in the community of sanctions and measures, defined by law and imposed on an offender; it includes a range of activities and interventions, which involve supervision, guidance and assistance aiming at the social inclusion of an offender, as well as at contributing to community safety; *Probation agency* – means anybody designated by law to implement the above tasks and responsibilities; depending on the national system, the work of a probation agency may also include providing information and advice to judicial and other deciding authorities to help them reach informed and just decisions; providing guidance and support to offenders while in custody in order to prepare their release and resettlement; monitoring and assistance to persons subject to early release; restorative justice interventions; and offering assistance to victims of crime), the national law (Law no. 252/2013 on the organization and functioning of probation system) contains main provisions related to the organization and functioning of bodies carrying out probation activities (at central level the National Probation Directorate within Ministry of Justice – with legal personality and the subordinated Probation Services at territorial level – without legal personality).

The National Probation Directorate establishes strategic directions for action in the field of probation in order to implement justice as a public service, coordinates the enforcement of non-custodial sanctions and measures, develops minimum standards for institutions working in probation and community norms for the approval and accreditation of work with supervised persons, organizes and coordinates the work of territorial structures. The Law no. 252/2013 provides that personnel working in the probation system has specialised training in accordance with the responsibilities assigned by law and aims to achieve high standards of professionalism. The National Probation Directorate provides training to staff on probation and carries out study and research on the directions of development of the probation practice directly or through subordinated organized structures. The probation activity is accomplished by probation officers within territorial structures (Probation services).

The Probation services are specialized bodies with main tasks and duties on supervising the execution of the measures and obligations ordered by the court concerning the social reintegration of offenders, the assistance of persons convicted and the advice to the offender's request. From 2000 to present, these services have seen different names: services of offenders social reintegration and supervising the execution of non-custodial sanctions (according to Government Ordinance no. 92/2000 on the organization and functioning of these services); services of victim protection and offenders social reintegration (according to Law no. 211/2004 on certain measures to protect victims of crime); Probation services (according to Law no. 123/2006 on the status of probation staff). The new legislation in criminal matters (Law no. 286/2009, Law no. 135/2010, Law no. 252/2013, Law no. 253/2013 and Law no. 254/2013) maintains the name of Probation services.

Through its activity, the probation system as a public service, contributes to the administration of justice. The probation system activity is conducted in the interest of the community, for social reintegration of offenders, reducing the risk of committing new crimes and increasing community safety, evaluating and monitoring the impact of custody and the feasibility of non-custodial sanctions and measures, in general and in particular cases, planning and developing assistance and control interventions. Promoting community sanctions and measures aimed at reducing the social costs of

enforcement of criminal sanctions and measures by reducing the prison population, taking into account the potential socio-economic of offenders and maintaining community safety, the probation system has the inherent responsibility to meet the needs of offenders as members of community.

The new regulations in criminal matters (the New Criminal Code adopted by Law no. 286/2009 and the New Criminal Procedure Code adopted by Law no. 135/2010 – correlated to Law no. 252/2013, Law no. 253/2013, Law no. 254/2013) have the main contribution to clarify the role that Probation services play in four directions:

a) Elaborating the pre-sentence reports on individual offenders in order to assist the judicial authorities in deciding what would be the appropriate sanctions or measures (especially, in case of application of non-custodial sanctions or measures) and also other advisory reports required for decisions to be taken by the competent authorities taking into account: the feasibility of the offender's release in the community, any special conditions that might be included in the decision regarding the offender's release, any intervention required to prepare the offender for release.

b) Evaluation, at the request of the court, of the supervised persons, *i.e.* persons convicted, regarding the compliance of the supervision measures and obligations established by law and also of the juvenile offenders whose the court applies a non-custodial educational measures.

c) Development of the special programs regarding the protection, the assistance and the counseling of offenders upon request; these programs are oriented to the social and group behavior of offenders (particularly, the behavior of the juvenile offenders).

The support and advice of offenders can be considered essential dimensions of supervision. In accordance with the settlements of Rec (2010) 1, supervision refers both to assistance activities conducted by or on behalf of an implementing authority which are intended to maintain the offender in the community and to actions taken to ensure that the offender fulfills any conditions or obligations imposed, including control where necessary. The Romanian doctrine[3] emphasizes that the offender assistance and counseling activities have a decisive role in monitoring and evaluation by the probation services of offenders social reinsertion.

In the prisons, the Probation services provide support to offenders. Assistance and counseling activity are achieved through the development and implementation of programs of civic education, ethics and moral education, hygiene and health education, psychosocial therapy programs. Participation of inmates in these programs is possible voluntary (in most cases), by recommending of prison administration or ex officio. We note that is necessary a transparent evaluation of the participants to the programs of assistance and counseling conducted by Probation services in prisons, taking into account the following criteria: the degree of correction of behavior, the real possibilities of offender reintegration into community, the risk of inmates for community.

Assistance and counseling of offender can be achieved through cooperation and partnership between Probation services and community (especially representatives of non-governmental organizations specialized in social assistance).

d) Initiation of collaborative programs with public institutions and non-governmental organizations for the joint actions aimed to the effective social reintegration of persons

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[3] Pavel Abraham, Victor Nicolăescu, Ștefăniță Bogdan Iașnic, *Introducere în probațiune, supraveghere, asistență și consiliere a infractorilor condamnați la sancțiuni neprivative de libertate*, Editura Național, București, 2001, p. 140.

supervised: finding jobs, development of training courses and qualifications; we can observe that the fourth direction of action highlights the *postdelictum* and *postdecision* involvement of the representatives of civil society into probation activities focused on supervising and re-socialization of offenders as provided by law (Law no. 253/2013 and Law no. 254/2013).

In this situation is accomplished the requirement formulated in Rec (2010)1: the Probation services shall work in cooperation with other agencies of the justice system, with support agencies and with the representatives of civil society in order to implement their tasks and duties effectively.

Regarding the sanctioning regime applicable to minors, the new Penal Code is more nuanced, referring to custodial educational measures (non-custodial sanctions of juveniles offenders as provided the previous Criminal Code and Law no. 275/ 2006 as amended by Law no. 83/2010) and the non-custodial educational measures.

The Law no. 253/2014 emphasizes the role of Probation services in coordination of the process of monitoring compliance the non-custodial educational measures and enforcement of obligations imposed by the court in charge of minors to ordering: civic training stage; supervision; recording the weekend; daily assistance. Coordinating the supervision of the minor in one of the educational measures is carried out by the probation officer-case manager. During the execution of one of the non-custodial educational measure, the probation officer-case manager shall exercise supervisory control over the process, both with respect to execution of the measure by the minor and of the fulfillment of duties by the person exercising supervision.

In coordination of minors supervision, the probation officer-case manager shall proceed as follows: informs the juvenile offender and parent, tutor or person responsible for monitoring within the supervisory process; evaluates initially the minor; planning the supervisory process (elaborates the work plan); coordinates the activities of the community institutions and the persons responsible for supervising of minor offender; cooperates with the judge, the court enforcement and other authorities or public institutions; monitors the surveillance; evaluates finally the supervisory process. For each case, the probation officer-case manager shall establish a record of probation.

During the enforcement of the non-custodial educational measures, the Probation service shall notify the court in the next cases:

a) intervening the reasons for modifying the obligations imposed by the court or the end of enforcement of some of these (the court orders the change of obligations if considers that this ensures better chances for the supervised minor or the extinction of obligations if considers that is not necessary to maintain them - as provides art. 122 of the new Penal Code);

b) minor supervised, with bad faith, does not comply the enforcement conditions of the educational measure or the obligations imposed (court orders: extending educational measure, without exceeding the maximum provided by law for this; replacement the measure with another non-custodial educational measure, more severe; replacement the non-custodial educational measure with one custodial educational measure: internment into educational center, if initially was taken the non-custodial educational most severe during its maximum – as provides art. 123 of the new Penal Code).

In the case of major offenders, as provides the Law no. 253/2013, the Probation Service coordinates the monitoring of compliance of supervision measures and enforcement of obligations set by the court on the persons to whom it was ordered:

delay penalty; suspension of sentence under supervision; conditional release if the remaining unexecuted punishment is 2 years or more at the release date.

The coordination of supervision is carried out for each person supervised by the probation officer assigned case manager as follows: informs the person on the surveillance process; initially evaluates the person supervised; elaborates the supervisory plan; develops the survey and conducts or assists in the supervision process; directly controls the compliance of surveillance measures by the person supervised - in exercising control compliance measures, the probation officer periodically checks the data provided by the person supervised and establishes any other control measures adapted case; collaborates with the execution judge, community institutions, and other public authorities or institutions; monitors the surveillance; finally assesses the supervisory process.

For each case, the probation officer-case manager prepares a record of probation.

At the first meeting, the probation officer-case manager shall inform the person convicted on supervision measures and obligations that have to execute and the consequences of compliance or non-compliance of them. If the supervised person has executed obligations whose fulfillment is verified by other bodies than the probation service, the probation officer informs the person about it.

The organization and conduct of supervision is carried out based on a survey plan prepared by the probation officer-case manager, taking into account the initial assessment and the involvement of the supervised person. Monitoring plan shall be made within 30 days of the first meeting and reviewed whenever necessary, depending on changes in the person's situation and progress of the case.

In order to enforce the obligation of attending a social reintegration program, probation officer-case manager, depending on the situation and individual needs, identifies suitable reintegration program within the Probation service or within the community institution of those recorded in the database established at the national level.

If the reintegration program set is available in the Probation service, probation officer-case manager develops the program if has a specific training or ensures the transmission of case to the probation officer specialized in this respect, within the Probation service.

If the established social reintegration program is not available or cannot be implemented in the Probation service, probation officer-case manager identifies a community institution where the supervised person can follows the program.

Following the establishment of community institutions, probation officer issued a decision referring the case to the community institution established for enforcement of obligation.

The decision and a copy of the sentence concerning the enforcement of attending a social reintegration program shall notify to the community institution set for developing this program. Also, the decision shall be communicated to the person supervised.

During the enforcement of obligation, the probation officer-case manager monitors the implementation of the program of social reintegration.

Upon completion of the program, the document issued by the community institution which confirm the attendance of this program by the offender is attached (copy) to the record of probation.

Offender reintegration into community is an important goal of community sanctions and measures, which can be achieved through one close cooperation between

Probation services and local community members in carrying out surveillance of offenders, and in the development of local programs on crime prevention. Community sanctions and measures are a practical solution[4] based on the premise that, unlike detention regime, in the community are better conditions for the social reintegration of offenders and assumption of their responsibilities; the enforcement of community sanctions must takes into account the resources of the community and the need for supervision of offenders, ensuring a balance between the need for social safety and needs of the social reintegration of offenders.

In accordance with the requirements underlined in Rec (2010)1, we consider necessary that the competent authorities and the Probation services shall inform the media and the general public about the work of probation services in order to encourage a better understanding of their role and value in society.

[4] Pavel Abraham, Daniela Nicolăescu, *Justiția terapeutică. O nouă abordare în tratamentul consumatorului de droguri*, Editura Concordia, Arad, 2006, pp. 20-27, 41-48.

Evolution of the Legislation on Preventing and Combating Organised Crime*

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Abstract:

Organised crime is a dynamic phenomenon, which adapts to the social changes and the complexity of the risks arising from such changes, taking advantage of the slowness of the states' mechanisms of adaptation of the legislation to the new social realities.

The paper analyses the actions and measures to prevent and counteract organized crime in Romania, after the fall of the communist regime, both on a legislative level and on that of judicial structures, as well as the influence of international regulations on the national law.

Keywords: *organized crime; organized criminal group; the Palermo Convention.*

We might be tempted to say that the origin of organized crime in Romania is closely linked to the Romanian democratic society and that this phenomenon is relatively recent for Romania. Although in minimalist forms, Romania, just like the other countries under a totalitarian regime, has experienced the classical forms of organized crime, such as the association with a view to commit crime. Under the empire of the communist regime, organized crime was not a striking manifestation in everyday life, due to the lack of the pre-requisites for the development of such a phenomenon, as well as to the strict control of the economy and the lack of opportunities for recyclability of the crimes' product, the relatively minor flow of cross-border movements of the local population, which resulted in hindering the import of criminal techniques and association with other criminal cultures.

Nevertheless, corruption has attained, paradoxically, rising rates of criminality, superior to other forms of crimes.[1]

The fact that communism, with a centrally planned economy, has generated great shortcomings in supplying the population with basic necessary goods, which created, inexorably, the phenomenon of the "black market", intended to "supply for" the shortage of products on the Romanian market, particularly in the areas of public nourishment and circulation of goods. This situation proved to be a favourable environment for criminals, but also for some "factors" which got organized for this purpose, taking full advantage from the existing situation, accumulating sufficient financial resources which

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[1] V. Bujor, O. Pop, *Aplicații criminologice privind crima organizată,* Mirton Publishing House, Timişoara, 2003, p. 20; I. Pitulescu, *Al treilea război mondial, crima organizată*, Național Publishing House, 1996, p. 147

they have placed, speculatively, as soon as the market was liberalized, the pre-existing underground economy being rather familiar with the development of organized crime.[2]

The post-revolutionary democratic regime is facing, however, an evolution of organized crime unknown until now, as Romania, as well as the other Eastern European countries, has become the target of external "developers", their action receiving, during the initial years, a helping hand from an incomplete and powerless legislative background, which enabled the reactions of the organised crime to take by surprise the newly installed authorities, succeeding in bypassing the repressive system.

The transition to the market economy, the free movement of people and capital, the non-transparent privatizations, the dissolution of the authority of the state authority are just some of the factors which favoured the amplification of the manifestations of organized crime.

The corruption of civil servants was also another factor, the cases of corruption reaching, in 1995, shares 400% higher than in 1989,[3] so as to ascertain, in 2010, that structures of the state bodies, such as customs (the cases of the Siret Customs, Moraviţa Customs etc.) and the border police (and not only) have constituted themselves in criminal groups enabling smuggling and tax evasion.

Organized crime, considered to be a residual phenomenon of globalization, is spreading at a very fast pace and attracts the poor populations, eager to spring up at any price and to explore the realms banned by the communist regime. In this context, new phenomena, favoured by globalization, such as drug trafficking, human trafficking, cybercrime, tax evasion and money laundering, arms trafficking, terrorism, theft and smuggling of expensive cars, all these are activities successfully practised in Romania as well.

According to the specialists' opinion, the criminal groups operating in Romania can be grouped into three typologies:[4] a) local criminal groups, which have developed independently, without external influences, and act only within the country's borders, in local areas; b) local criminal groups, which have joined foreign criminal networks, Italian ones or those from South American drug cartels; c) criminal groups of foreign origin, which have expanded their scope in Romania as well (the Italian Mafia, Chinese and Arab criminal groups, rackets from the ex-Soviet area).[5]

The 1968 Penal Code, just like other European codes, contained the incrimination of the offense of association with a view to commit crimes.

Article 323 of the Code incriminated the deed of associating or initiating the establishment of an association for the purpose of committing one or several offenses, other than those shown in article 167, or joining or supporting in any way such an association, punishing it with imprisonment from 6 months to 5 years, without exceeding the penalty provided by law for the offense falling within the association.

If the deed of association was followed by committing an offense, those who committed the respective offense were punished with the corresponding penalty, as well as with the penalty provided for the offense of association. One category was

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[2] P. Albu, *Crima organizată în perioada de tranziţie – o ameninţare majoră la adresa securităţii internaţionale*, Ed. Ministerului Internelor şi Reformei Administrative - 2007, p. 168

[3] D. Banciu, S.M. Rădulescu, V. Teodorescu, *Tendinţe actuale ale crimei şi criminalităţii în România*, Lumina Lex Publishing House, Bucharest, 2002, p. 277

[4] D. Miclea, *Cunoaşterea crimei organizate,* Pygmalion Publishing House, Ploieşti, 2001, p. 38.

[5] X. Raufer, St. Quéré, *Le crime organisé*, PUF, Paris, 2005, p. 42.

exempted from penalty: those who denounced to the authorities the association before being discovered and before starting committing the offense falling under the purpose of the association.

On November 15th, 2000, in New York, the United Nations General Assembly adopted the United Nations Convention against Transnational Organized Crime, as well as two Additional Protocols, namely the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, and the Protocol against the smuggling of migrants by land, sea and air.

On December 14th, 2000, Romania signed, in Palermo, the United Nations Convention against Transnational Organized Crime, the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, as well as the Protocol against the smuggling of migrants by land, sea and air.

In order to repress the acts of organized crime, in addition to the ratification of the United Nations Convention against Transnational Organized Crime and of the two additional protocols signed by Romania, it was necessary to draft a normative act to ensure, on the one hand, the creation of the appropriate legal framework in the field and, on the other hand, the transposition into national law of the provisions of the above mentioned international legal documents.

This draft law was enrolled in the Program of the priority actions for the preparation of Romania's accession to NATO, having as a deadline for its entry into force the date of September 15th, 2002.

The authorities' response came rather late. It was only through Law no. 39/2003 that the legislator created the legislative framework to prevent and combat organized crime[6] and by Law no. 508/2004 was established the Directorate for Investigating Organized Crime and Terrorism,[7] within the Prosecutor's Office attached to the High Court of Cassation and Justice, as the unique structure from the Public Ministry specializing in combating and investigating terrorist and organised crime offenses.

Law no. 39/2003 incriminated, in Article 7, the offense of establishing an organized criminal group, defined as the activity of initiation or establishment of an organized criminal group or that of joining or supporting in any way such a group. The offense was punishable by imprisonment from 5 to 20 years and the prohibition of certain rights, without the penalty applied being greater than the penalty provided by law for the most serious offense which entered the purpose of the organized criminal group.

The organized criminal group was defined identically to the provisions of Article 2 of the United Nations Convention against Transnational Organized Crime as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

The offenses for the purpose of which was constituted the organized criminal group were serious offenses, such as murder, organ trafficking, trafficking in drugs and precursors, money laundering, corruption crimes, smuggling, tax evasion, fraudulent bankruptcy, crimes committed through computer systems and communication or information networks, as well as any other offense for which the law provides a prison sentence with a special minimum of at least 5 years.

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[6] Published in the Official Journal of Romania, Part I, no. 50 from 29/01/2003.

[7] Published in the Official Journal of Romania, Part I, no. 1089 din 23/11/2004.

If the constitution of the organized criminal group was followed by the perpetration of a serious offense, it was necessary to apply the rules governing concurrent offenses.

Under the law, it was not considered as organized criminal group that group which was formed occasionally, with a view to the immediate perpetration of one or several offenses and which has no continuity, determined structure or pre-established roles for its members within the group.

The law also provided no penalty for the person who denounced to the authorities the association before being discovered and before starting committing the offense falling under the purpose of the association. If the person who committed the offense of constituting the organized criminal group and any of the scheduled offenses, during the prosecution or trial, denounced and facilitated the identification and prosecution of one or more members of an organized criminal group, benefited from the halving of the limits of the penalty as provided by law.

Chapter II of the law contained provisions regarding the prevention of organized crime, establishing, *inter alia*, in the burden of the institutions responsible with the prevention and combat of organized crime, the obligation to develop and implement the National action plan for the prevention and combat of organized crime, to make periodic studies in order to identify the causes which determine and of the conditions which favour organized crime and to initiate an information campaign about this phenomenon within the National Crime Prevention Committee, established by Government Decision no. 763/2001.

Chapter IV contained procedural provisions necessary to conduct in optimum conditions the activities for the combat of organized crime. Thus is extended the range of goods originating from serious offenses committed within organized criminal groups and which are subject to confiscation. The provisions regarding confiscation used to transpose into national law the provisions in the field of the United Nations Convention against Transnational Organized Crime.

Also, there were provided specific activities which can be undertaken by the prosecution to gather evidence or identify the perpetrators when there is probable cause that an offense from the organised crime field is about to be committed. Such activities included surveillance of bank accounts and of their related accounts; surveillance of communications systems; the surveillance and/or access to information systems.

The legislator also regulated the possibility to use undercover police officers, controlled deliveries with the authorization, by reasoned ordinance, of the prosecutor appointed by the general prosecutor attached to the former Supreme Court or, where appropriate, the general prosecutor attached to the Court of Appeal.

The law contained provisions regarding international cooperation, providing that the Ministry of Interior, the Ministry of Justice and the Public Ministry cooperated directly and openly, in compliance with the law and the obligations under the international legal instruments to which Romania is a party, with the institutions having similar responsibilities from other countries, as well as with the international organizations specialized in the field. The cooperation related, as appropriate, to the international judicial assistance in criminal matters, extradition, identification, freezing, seizure and confiscation of the proceeds and instruments of the offense, the conduct of joint investigations, information sharing, technical assistance or other measures to collect and analyze information, training specialized personnel, as well as other activities necessary to fulfill the aimed purpose.

The decision to raft a new Criminal Code was based on a number of existing regulatory failures, shortcomings highlighted both in practice and in the doctrine.

Thus, the criminal sanctioning system regulated by the previous Penal Code, subject to frequent legislative intervention on different institutions, led to inconsistent application and interpretation, lack of coherence of the criminal law, with repercussions on the effectiveness and purpose of the act of justice.

Regarding criminal groups, the new Penal Code abandons the existing parallelism between the texts which incriminate this kind of acts (organized criminal group, association with a view to commit offenses, conspiracy, terrorist group) in favour of the establishment of a framework incrimination - setting up an organised criminal group – with the possibility to keep as separate incrimination the terrorist association, given its specificity.

The new Penal Code takes over, with some changes, the incrimination from Law no. 39/2003 on preventing and combating organized crime[8] regarding the organised criminal group, which turns this special incrimination into the ordinary law in the matter, abandoning the common incrimination of the association with a view to commit offenses, existing so far in all Romanian Penal Codes.

It is true that Article 5 of the United Nations Convention against Transnational Organized Crime, adopted in New York on November 15th 2000, opened for signing in Palermo, on December 12th 2000 and ratified by Romania through Law no. 565/2002,[9] provides the obligation of the signatory states to take measures to incriminate transnational organized crime structures, but there are also other European Penal Codes which have retained this dual incrimination.

The incrimination provided in the new Penal Code corresponds only partially to the content of the offense stipulated in Article 7, in the sense that in the definition of the organized criminal group, Article 2 of Law no. 9/2003 required that it be constituted "with the aim of committing one or several serious offenses in order to obtain, directly or indirectly, a financial or other material benefit", a purpose which no longer appears in the new incrimination, its requirement being only that of its constitution "with the aim of committing one or several offenses", the organized criminal group being thus reduced to virtually any criminal association.

The new regulation no longer contains the provision included in the second paragraph of Article 2 of Law no. 39/2003, according to which "it is not considered as organized criminal group that group which was formed occasionally, with a view to the immediate perpetration of one or several offenses and which has no continuity, determined structure or pre-established roles for its members within the group" and, consequently, the rules of incrimination of the association with a view to committing offenses provided by Article 8 of Law no. 39/2003 and Article 323 of the previous Penal Code have been repealed by Law no. 187/2012 for the application of the current Penal Code.[10]

However, what characterizes organized crime as distinct from criminal associations is its capacity to parasitize economy by obtaining, directly or indirectly, financial benefits or other material benefits as a result of committing offenses.[11]

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[8] Published in the Official Journal of Romania, Part I, no. 50 from January 29th 2003.

[9] Published in the Official Journal of Romania, no. 813 /2002.

[10] Published in the Official Journal of Romania, no. 757/2012.

[11] Maria Luisa Cesoni, *Criminalité organisée: des représentations sociales aux définitions juridiques*, L.D.G.J., Paris, 2004, p. 695.

Law no. 39/2003 required that the association should have as a program the perpetration of offenses of a certain degree of seriousness, some of them being expressly enumerated by Article 2 letter (b) points (1)-(19), others determined by the quantum of the penalty whose special minimum should have been of at least 5 years, provisions which are no longer present in the current Penal Code.

In terms of the sanctioning regime, the new Penal Code could represent the more favourable law because, as opposed to the provisions of Article 7 of Law no. 39/2003 which provides a penalty with imprisonment from 5 and 20 years and the prohibition of certain rights, conditioned however not to exceed the penalty provided by law for the most serious offense which enters into the scope of the organized criminal group, the new Penal Code provides a sanctioning regime partially distinct from that of the offenses program in that the offense is punishable by imprisonment of one to 5 years and the prohibition of certain rights, and if the offense which enters the scope of the organized criminal group is punishable by law with life imprisonment or imprisonment exceeding 10 years, the penalty is imprisonment from 3 to 10 years and the prohibition of exercising certain rights.

If the existence of the criminal group continues also after the entry into force of the new Penal Code, the problem of applying the more favourable law will no longer raise itself because, in the case of continued offenses, the applicable law is that of the time of the end of the criminal activity.

The new Penal Code takes over, in para. (4) and (5) of Article 367 the provisions of Article 9 of the Law no. 39/2003 regarding the cause of impunity and that of the reduction of the penalty for offenders who cooperate with the prosecution.

Denunciation and facilitating the identification and the criminal prosecution of one or more members of a criminal group can no longer have any effects if performed during the trial.

From an institutional perspective, Law no. 508/2004 created the Directorate for Investigating Organized Crime and Terrorism as a structure with legal personality, specialized in combating the offenses of organized crime and terrorism, within the Prosecutor's Office attached to the High Court of Cassation and Justice.

The Directorate for Investigating Organized Crime and Terrorism is headed by a chief-prosecutor, assimilated to the first deputy of the general prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice. The chief-prosecutor of the Directorate for Investigating Organized Crime and Terrorism is assisted by a deputy chief-prosecutor, assimilated to the deputy of the general prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice, as well as by two counsellors, assimilated to the counsellors of the general prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice. The Directorate for Investigating Organized Crime and Terrorism is composed of regional offices in the territorial jurisdictions of the prosecutor's offices attached to tribunals.

The Directorate for Investigating Organized Crime and Terrorism is responsible for the prosecution of the offenses of organised crime: leads, supervises and controls the criminal investigations led, following the order of the prosecutor, by the officers and agents of the judicial police found in the coordination of the Directorate for Investigating Organized Crime and Terrorism; informs the courts to take the measures provided by law and to prosecute cases regarding the offenses within the competence of the Directorate for Investigating Organized Crime and Terrorism; leads, supervises and

controls the technical activities of the criminal investigation, carried out by specialists in the economic, financial, banking, customs, IT fields, as well as in other areas, appointed at the Directorate for Investigating Organized Crime and Terrorism; studies the causes generating the perpetration of organized crime offenses, drug trafficking, cybercrime and terrorism and the conditions which foster them and develops proposals aimed at eliminating them, as well as improving the criminal legislation in the field; develops and updates the database regarding the offenses which are given in the competence of the Directorate for Investigating Organized Crime and Terrorism.

Prevention and Combating of Trafficking in Persons

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Abstract:

Human trafficking is a modern version of slavery, representing one of the most worrying problems of our current society.

Far from being only a national phenomenon, human trafficking has reached a transnational, international level and, in the context of globalization, it continues to develop new dimensions that transform it in a malfeasant phenomenon, impossible to control, prevent or combat efficiently.

Every year, more and more persons become victims of human trafficking, being treated as pieces of merchandise that can be sold and bought. These victims are, usually, forced to work in sex industry, but also in agriculture or enterprises (in harsh working conditions), sometimes on the black market, being paid miserably or not being paid at all.[1]

According to the latest Report of United Nations Office on Drugs and Crime (2012),[2] *victims of human trafficking belonging to, at least, 136 different nationalities were detected in 118 countries worldwide between 2007-2010. Women and girls together account for about 75 percent of all trafficking victims detected globally.*

Trafficking for the purpose of sexual exploitation accounts for 58 per cent of all trafficking cases detected globally, while trafficking for forced labor accounts for 36 per cent (the share of detected cases of trafficking for forced labor has doubled between 2008-2012)[3]*. Victims trafficked for begging account for about 1.5 per cent of the victims detected globally and trafficking for the removal of organs has been detected in 16 countries in all regions of the world.*[4]

Keywords: *human trafficking; Romania as a source/transit/destination country; European and domestic laws on trafficking in persons; new Criminal Procedure Code.*

1. Introduction

According to the *Trafficking in Persons Report 2013 of the State Department of U.S.A.,*[5] Romania continues to be a source, transit and destination country for men, women and children that are trafficked especially for forced labor, as well as for women and children that are trafficked for sexual exploitation.

Men, women and children from Romania are trafficked towards European countries including Austria, Azerbaijan, Cyprus, Czech Republic, Denmark, Switzerland,

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[1] According to the brochure *Council of Europe Action against Human Traffickingwww.bice.md/User Files/File/publicatii/CE_Trafic.pdf.*

[2] UNODC (2012), Global Report on Trafficking in Persons, UN. GIFT: Vienna - http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf

[3] *Idem.*

[4] *Idem.*

[5] http://romania.usembassy.gov/2013_tip_ro.html.

France, Germany, Greece, Italy, Lithuania, Holland, Great Britain, Norway, Poland, Slovakia, Slovenia, Spain and Sweden, for forced labor, in agriculture, households, hotels and industry, as well as for begging and stealing. Men, women and children from Romania are trafficked towards European countries including Belgium, Cyprus, Switzerland, Finland, France, Germany, Greece, Malta, Holland, Portugal, Slovenia, Spain, Sweden and Hungary for sexual exploitation. Children represent at least one third of all trafficking victims of Romania.[6]

Romania was detected as a destination country for a small number of women coming from the Republic of Moldavia and for persons trafficked for forced labor from Serbia and Bangladesh.

At the same time, Romania represents an important route for the transit of victims from the Republic of Moldavia and Ukraine to Yugoslavia, Montenegro, Kosovo and from there to other western countries.[7]

According to the information provided by the Romanian Agency against Trafficking in Persons (A.N.I.T.P.),[8] in 2013, 897 victims were registered in SIMEV records (The Integrated System of Monitoring the Human Trafficking Victims), of which 419 victims were trafficked and detected in 2013. In 2013, the tendency of decrease in the number of trafficked and detected victims was more obvious than in the previous years.

As to the gender distribution, in 2013 women were situated on the first place (77 per cent of all the victims).

Considering the age criterion, it seems that 52 per cent of all the victims were of age at the time they entered trafficking.

Taking into consideration the different types of exploitation, in 2013 the sexual exploitation accounted for about 66 per cent of all cases detected, followed by forced labor that accounted for 24 per cent. Victims forced into begging, pornography or stealing were also detected, but they accounted only for 6 per cent.

According to A.N.I.T.P. data, for about 54 per cent of the victims have been recruited by a friend or an acquaintance. The recruitment has been made directly, without intermediaries, in 94 per cent cases. Most of the victims were deceived by promises of a job abroad.

From *Trafficking in Persons Report 2013 of the State Department of U.S.A.,*[9] it results that in Romania, in 2012, 867 cases of human trafficking were investigated by the authorities, while in 2011, there were 897 investigated. In 2012, 667 persons were sent up for jail and 427 were convicted for human trafficking, compared to the figures of 2011, when 480 persons were sent up for jail and 276 convicted for human trafficking.

Although A.N.I.T.P. sustains *"the strong decrease of the proportions of the phenomenon*",[10] due to the progress made in the field of prevention and combating of human trafficking and to the inter-institutional cooperation, on national and international level, we may doubt that this statistical decrease corresponds to a real decrease of the phenomenon.

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[6] Idem.

[7] Oltei, I. G., *Trafficking in Persons. Juridical Frame*, The Review of Criminal Law, no. 2/2009, p. 123.

[8] Document "*Statistical Situation of Human Trafficking Victims in 2013*" - http://anitp.mai.gov.ro/ro/docs/studii/GRAFICE%202013.pdf.

[9] The report may be consulted at the link: http://romania.usembassy.gov/2013_tip_ro.html.

[10] Document "*Statistical Situation of Human Trafficking Victims in 2013*" - http://anitp.mai.gov.ro/ro/docs/studii/GRAFICE%202013.pdf.

2. The Main International Normative Instruments regarding Trafficking in Persons

On international level, in the XXth century, a series of important normative acts were adopted in order to combat trafficking in persons.[11]

Romania, in the post Communism years, has been one of the states, that has ratified the main international normative instruments that have been adopted in order to prevent and combat trafficking in persons.

Romania signed the *United Nations Convention against Transnational Organized Crime*, in Palermo, on December the 14th2000 and *the two Protocols thereto,*[12] adopted in New York, on November the 15th 2000 and ratified these international instruments through the *Law no. 565/16.10.2002.*[13]

In Article 3^{a}[14] and Article 3^{c}[15] of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ("the Protocol of Palermo")* there are provided the definitions of the notions of "trafficking in persons" and "trafficking of children", that are recognized on international level.

As a consequence of the ratification of the *United Nations Convention against Transnational Organized Crime* and of *the two Protocols thereto, Romania adopted two acts of Parliament,* respectively the Law no. 678/2001 for the prevention and the combating of the trafficking in persons[16] and the Law no. 39/2003 for the prevention

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[11] For example: International Agreement for the Suppression of the "White Slave Traffic", Paris, 18 May 1904; International Convention for the Suppression of the White Slave Traffic, Paris, 4th May 1910; International Convention for the Suppression of the Traffic in Women and Children. Geneva, 30th September 1921; Slavery Convention, signed at Geneva on 25th September 1926 International Convention for the Suppression of the Traffic in Women of Full Age. Geneva, 11th October 1933; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Lake Success, New York, 21st March 1950; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Geneva, 7th September 1956; International Labor Organization Convention concerning the Abolition of Forced Labor no. 105/1957; The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly.

[12] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

[13] The Law no. 565/2002 was published in the Official Journal of Romania, Part I, no. 813 from November the 8th 2002.

[14] According to Article 3a of the Protocol of Palermo: «*"Trafficking in person" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs».*

[15] According to Article 3c of the Protocol of Palermo «*The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article*». At the same time, the Protocol defines the term "child" in Article 3d: *«"Child" shall mean any person under eighteen years of age».*

[16] The Law no. 678/2001 was published in the Official Journal of Romania, Part I, no. 783 from December the 11th 2001.

and the combating of the organized crime.[17] In the latter one, trafficking in persons and the offences connected to it are considered serious crimes, which characterize as program offences the constitution and existence of the organized criminal group.

Moreover, Romania has also signed other important international instruments, such as *The Council of Europe Convention on Action against Trafficking in Human Beings*, adopted on the 3rd of May, 2005, signed by Romania in Warsaw, in May 2005 and ratified through Law no. 300/2006[18] and *The European Union Plan on Best Practices, Standards and Procedures for Combating and Preventing Trafficking in Human Beings* [Official Journal C 311 of 9.12.2005].[19]

In respect of trafficking of children, other normative instruments have been adopted on international level, with express reference to the rights of children, trafficking of children and the action against any form of children exploitation. Romania is one of the states that signed these acts. Such international instruments are: *The Convention on the Rights of the Child*, adopted by the General Assembly of the United Nations Organization on November the 20th, 1989, entered into force in 1990 and ratified by Romania through the Law no. 18/1990;[20] *International Labor Organization no. 182/1999 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor,* adopted at 87th ILC session, in Geneva, (17 June 1999), entered into force in November the 19th, 2000 and ratified by Romania through *Law no.* 203/2000;[21] The *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2001)*, entered into force in January 18, 2002, published in the Official Journal of Romania no. 601/27.09.2001, Part I.

As well as this, Romania signed at Lanzarote, together with other 23 member states of the Council of Europe, in October 25, 2007, the *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (also known as "the Lanzarote Convention"), adopted by the Committee of Ministers in July 12, 2007, entered into forced in July the 1st, 2010 and ratified by Romania through Law no.* 252/2010.[22]

This Convention was adopted as a consequence of the worrying proportions reached by the sexual exploitation and sexual abuse of children on both national and international level. Moreover, the prevention and combating of such sexual exploitation and sexual abuse of children require international cooperation, in order to contribute efficiently to the common goals of providing assistance to victims and of protecting children against sexual exploitation and sexual abuse, whoever the perpetrator may be.[23]

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[17] The Law no. 39/2003 was published in the Official Journal of Romania, Part I, no. 50 from January the 29th 2003.

[18] The Law no. 300/2006 was published in the Official Journal of Romania, Part I, no. 622 from July the 19th 2006.

[19] Dungan, P., *Organized Criminality and trafficking in persons*, vol. *Italian – Romanian Experiences in International Juridical Cooperation in the Field of Criminal Law*, ed. West University, Timisoara, 2010, p. 129.

[20] Republished in the Official Journal of Romania, Part I, no. 314 from June the 13th 2001.

[21] Published in the Official Journal of Romania, Part I, no. 577 from November the 17th 2000.

[22] Published in the Official Journal of Romania, Part I, no. 885 from December the 29th 2010.

[23] Pamfil, M. L., *The Protection of Children against Sexual Exploitation and Sexual Abuse*, The Review of Criminal Law, no. 2/2008, p. 97.

3. The Legislative Frame at the Level of European Union

Romania's Accession to European Union has implied the harmonization of the national legislation with the one of European Union, the adaptation of the structures and mechanism of the national public administration to the European ones, as well as the development of the administrative and juridical capacity of implementation of the European acquis.

In the field of human trafficking, the EU acquis comprises: *The European Convention on the Compensation of Victims of Violent Crimes (Strasbourg, 24 November 1983); Council of Europe Committee of Ministers Recommendation No. R(85) 11 to the Member States on the position of the victim in the framework of criminal law and procedure; Crime victims in the European Union. Reflexions on standards and action. Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee. COM (99) 349 final, 14 July 1999;* ***Council Decision of 29 May 2000 to combat child pornography on the Internet****; 2001/87/EC Council Decision of 8 December 2000 on the signing, on behalf of the European Community, of the United Nations Convention against transnational organized crime and its Protocols on combating trafficking in persons, especially women and children, and the smuggling of migrants by land, air and sea; Commission of the European Communities, Green Paper: Compensation to crime victims, 28 September 2001; Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings;* ***2002/629/JHA: Council Framework Decision of 19 July 2002 on combating trafficking in human beings****;* ***Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography****;* ***Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims****;* ***Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities****;* ***Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA;*** *Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating sexual abuse and sexual exploitation of children, and child pornography, replacing the Council Framework- Decision 2004/68/JHA; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.*

The Community legislation regarding the protection of crime victims has been transposed in our national legislation through the Law no. 211/2004 regarding certain measures for the protection of crime victims.[24]

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA represents the latest normative instrument adopted in the field of human trafficking.

In order to prevent human trafficking, the Directive requests that Member States: discourage demand through education and training; lead information and awareness-

[24] Published in the Official Journal of Romania, Part I, no. 505 from June the 4th 2004.

raising campaigns; train the officials likely to come into contact with victims of trafficking; take the necessary measures to establish as a criminal offence the use of services, sexual or other, of a person who is a victim of trafficking. The position of a European anti-trafficking Coordinator is established in order to ensure a consistent approach to combating this phenomenon in the EU.

The *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The EU strategy towards the Eradication of Trafficking in Human Beings 2012-2016* [COM(2012) 286 final – Not published in the Official Journal] presents a strategy designed to focus on concrete measures that will support the transposition and implementation of Directive 2011/36/EU, bring added value and complement the work done by governments, international organizations and civil society both in EU and non-EU countries. The strategy identifies the following five priorities for the EU to focus on:

- identifying, protecting and assisting victims of trafficking;
- stepping up the prevention of trafficking in human beings;
- increased prosecution of traffickers;
- enhanced coordination and cooperation among key actors and policy coherence;
- increased knowledge of and effective response to emerging concerns related to all forms of trafficking in human beings.

Within the above priorities, the Communication outlines a number of actions which the European Commission proposes to implement over the next five years, alongside EU countries, European External Action Service, EU institutions, EU agencies, international organizations, non-EU countries civil society and the private sector.

4. National Legislative Background

4.1. The Main National Regulations in the Field of Trafficking in Persons

Following the ratification of the United Nations Convention against Transnational Organized Crime, together with the two Additional Protocols, through Law no. 565/2002, Romania has adopted two legislative instruments, namely *Law no. 678/2001 on preventing and combating trafficking in persons*[25] and *Law no. 39/2003 on preventing and combating organized crime,*[26] law in which trafficking in persons and the offences related to trafficking in persons are qualified as serious offences which characterize, as program offence, the creation and existence of the organized criminal group.

Law no. 678/2001 was the main national regulation in the field of preventing and combating trafficking in persons until the entry into force of the new Penal Code.[27]

This law contained provisions relating to the prevention of trafficking in persons, the offences regarding trafficking in persons and related to trafficking in persons, the protection and support of the victims of trafficking in persons, international cooperation, as well as the special provisions concerning judicial procedure (concerning the criminal prosecution and trial of the offences under Law no. 678/2001).

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[25] Law no. 678/2001 was published in the Official Journal of Romania, Part I, no. 783 from December 11th 2001.

[26] Law no. 39/2003 was published in the Official Journal of Romania, Part I, no. 50 from January 29th 2003.

[27] Adopted through *Law no. 286/2009*, published in the Official Journal of Romania, Part I, no. 510 from July 24th 2009.

Therefore, trafficking in persons was regulated for the first time as a distinct form of crime by Law no. 678/2001, a law which has undergone many changes due to the issuing, over the years, of several emergency ordinances and laws, with a view to the transposition on the national level of the European and international legislation regarding trafficking in persons.

From the perspective of the incriminated offences, Law no. 678/2001 distinguished between two categories of offences, namely: offences regarding trafficking in persons and offences related to trafficking in persons.

In the group of the offences regarding trafficking in persons, the legislator provided the following: trafficking in persons (Article 12), trafficking of children (Article 13), using the services of an exploited person (Article 14^1), organizing the offences regarding trafficking in persons or related to trafficking in persons [Article 15 para.(2)], and, in the second category, the offence provided by Article 17 of the law and child pornography (Article 18).

As regards the offence of trafficking in persons, incriminated in Article 12, Law no. 678/2001 observed the definition contained in Article 3a of the Palermo Protocol, in a very faithful reproduction (with small differences in linguistic terms), definition which establishes trafficking in persons as a complex process, for which the doctrine has identified three constitutive elements: action, means and purpose.[28]

According to Article 12 para. (1) of Law no. 678/2001, the offence of trafficking in persons constituted the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of profiting from the impossibility of those persons to defend themselves or to express their will or of the offering, giving, accepting or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation, and was punishable with imprisonment from 3 to 10 years and the prohibition of certain rights.

Along with trafficking in persons, Law no. 678/2001 regulated, in Article 13, the offence of trafficking of children, as a species of the offence of trafficking in persons, distinguished from it through the special quality of the passive subject, namely that of minor, an aspect which has called for the specific regulation of this offence. In its standard form, from the perspective of the definition agreed upon in the foreign literature, the offence supposes only two elements, the action and, respectively, the purpose, lacking the means.

According to the definition contained in Article 13 para. (1) of Law no. 678/2001, by trafficking of children, one understood the recruitment, transportation, transfer, harbouring or receipt of a child, for the purpose of exploitation, and was punished with imprisonment from 5 to 15 years and the prohibition of certain rights.

In Article 14^1 of Law no. 678/2001, the legislator incriminated the use of the services of a person whom is known by the beneficiary to be a victim of trafficking in persons or of children, thus incriminating also the behaviour of the consumer of such services, the act being punishable by imprisonment from 6 months to 3 years or a fine, if it did not constitute a more serious offence.

The law also provided, in Article 2 section 2, what was meant by "exploitation of persons", namely: the execution of a work or performance of services by force or

[28] Turner, J., *Patterns of Human Trafficking*, p. 1, Course of specialization in International Criminal Law, with the theme "Human trafficking for the purpose of their sexual exploitation", International Institute of Higher Studies in Criminal Sciences, Syracuse, 23 May – 2 June 2010.

violation of the legal rules on working conditions, wages, health and safety; the keeping in a state of slavery or other similar methods of deprivation of freedom or servitude; the forcing into prostitution, begging, pornographic representations with a view to the production and dissemination of pornographic materials or other forms of sexual exploitation; the removal of organs, tissues or cells of human origin, in violation of the legal provisions; the carrying out of other such activities which violate the fundamental human rights and freedoms.

The incrimination of the behaviour of the consumer of services provided by exploited persons was introduced in the national legislation through Law no. 230/2010[29] which brought some amendments to Law no. 678/2001, in the context in which Article 19 of the *Council of Europe Convention on action against trafficking in human beings* requires the signatory parties to incriminate, in their national legislations, the use of such services with the knowledge that the person is a victim of trafficking in human beings.

In studying the phenomenon of trafficking in persons, with the aim of preventing and combating it, one has reached the pertinent conclusion that the trafficking in persons would not exist if there were no demand for the services offered as a result of exploitation.[30] Without demand, there is no offer. And without an offer, the chance of exploitation would disappear.

If the provider of services, obtained as a result of the exploitation of human beings, is punished by law, so should the consumer or beneficiary of such services, who acts knowingly.

If a person is guilty of exploiting another human being, so is the person who, having knowledge of the respective exploitation, chooses to enjoy the services of such exploited persons.

By means of Article 15 para. (2) of Law no. 678/2001, the legislator incriminated distinctly also the organizing of the offences regarding trafficking in persons, punishable by the same penalty as the organized crime.

In the category of the offences related to trafficking in persons, Article 17 of Law no. 268/2001 incriminated the act of determining or permitting, with knowledge, either directly or through an intermediary, the entering or remaining on the country's soil of a person who is not a Romanian citizen, subject to trafficking in persons in one of the following ways: using against these persons fraudulent means, violence, threats or any other forms of coercion or abusing the special condition is which those persons found themselves, due to their illegal or precarious situation of entry or stay within the country, or because of pregnancy, disease or infirmity or a deficiency, physical or mental. The act was punished with the penalty provided by law for the offence of trafficking in persons.

Also an offence in connection to the trafficking in persons is that of child pornography, regulated in two normative forms in Article 18 of Law no. 678/2001. According to Article 18 para. (1), the standard form of the offence consisted in the act of exposing, selling or spreading, leasing, distributing, manufacturing or otherwise producing, transmitting, providing or making available or holding with a view to

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[29] Published in the Official Journal of Romania, Part I, no. 812 from December 6th 2010.

[30] Smith, L., *The Problem of Demand*, article prepared for The course of specialization in International Criminal Law, with the theme "Human trafficking for the purpose of their sexual exploitation", International Institute of Higher Studies in Criminal Sciences, Syracuse, 23 May – 2 June 2010.

spreading items, films, pictures, slides, emblems or other visual supports representing sexual positions or acts, having a pornographic nature, showing or involving minors under the age of 18. The variation assimilated to the offence was regulated in para. (2) of Article 18 and consisted in the import or delivery of items, from among those referred to in para. (1), to a carrier or supplier, for the purpose of their sale or distribution. The offence, in both forms, was sanctioned with imprisonment from 3 to 10 years.

The drafting of Law no. 678/2001 represented one of the objectives of the *National Action Plan to Combat Trafficking in Human Beings*, adopted by Government Decision no. 1216/2001,[31] law which aimed to identify the causes of vulnerability of the persons faced with trafficking in persons, its effects and forms, establishing the groups of people at risk of being trafficked and the measures for eliminating the actions of traffic.[32]

Along with Law no. 678/2001, was adopted through Government Decision no. 299/2003[33] also its *Regulation of implementation* in order to ensure consistency of action by the national coordination of the operations to combat trafficking in persons, as a result of the creation of the Inter-ministerial Working Group for the coordination and evaluation of the activities to prevent and combat trafficking in persons.

In addition, for the purpose of harmonization with European standards, were adopted a *National Strategy against Trafficking in Persons 2006-2010*[34] and a *National Action Plan* for its implementation.[35]

At the same time, by joint Order[36] of the Minister of Administration and Interior, the Minister of Education, Research and Youth, the Minister of Public Health, the Minister of Labour, Family and Equal Opportunities, the President of the National Authority for Child Protection, the president of the National Agency for Equal opportunities for women and men, the president of the National Agency for employment, the president of the National Agency for Roma, was ordered the establishment, organization and functioning of the Thematic Working Group for the national coordination of the activities to protect and assist the victims of trafficking in persons, and by a subsequent joint Order[37] of the Minister of Administration and Interior, the Minister of Education, Research and Youth, the Minister of Public Health, the Minister of Labour, Family and Equal Opportunities, the President of the National Authority for Child Protection, the Minister of Foreign Affairs, the General Prosecutor and the Minister of Justice, was approved the National mechanism for the identification

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[31] *Government Decision no. 1216/2001*for the approval of the *National Action Plan to Combat Trafficking in Human Beings,* published in the Official Journal of Romania no. 806 from December 17th2001.

[32] Oltei, I. G., *Trafficking in Persons. Juridical Frame*, The Review of Criminal Law, no. 2/2009, p. 124.

[33] Government Decision no. 299/2003 was published in the Official Journal of Romania no. 206 from March 13th 2003.

[34] Government Decision no. 1654/2006 for the approval of the National Strategy against Trafficking in Persons 2006-2010, published in the Official Journal of Romania, Part I, no. 967 from December 4th 2006.

[35] Government Decision no. 1720/2006 for the approval of the National Action Plan 2006 - 2007 for the implementation of the National Strategy against Trafficking in Persons 2006-2010, published in the Official Journal of Romania, Part I, no. 1009 from December 19th 2006; Government Decision no. 982/2008 for the approval of the National Action Plan 2008 - 2010 for the implementation of the National Strategy against Trafficking in Persons 2006-2010, published in the Official Journal of Romania, Part I, no. 660 from September 19th 2008.

[36] Published in the Official Journal of Romania, Part I, no. 799 from November 23rd 2007.

[37] Published in the Official Journal of Romania, Part I, no. 849 from December 17th 2008.

and referral of victims of trafficking, whose aim is to establish the procedures for identifying the victims of trafficking in persons and entrusting them to the providers of protection and assistance services.

As one may notice, the creation of an effective legislative framework represented a concern not only internationally, but also nationally, and thus a series of national laws and special provisions referring to trafficking of children, children's rights and the fight against all forms of children exploitation were also adopted, such as:

- *Law no. 272/2004 on the protection and promotion of children's rights*[38] stipulating the responsibility of parents and local communities in raising and educating children and laying the foundations of inter-institutional cooperation as regards, in any circumstances, the superior interest of the child;[39]

- *Government Decision no. 1443/2004 regarding the method of repatriation of unaccompanied Romanian children in another state and special protection measures in their favour;*[40]

- *joint Order no. 123-429/2004 of the National Authority for Child Protection and Adoption and the Ministry of Administration and Interior;*[41]

- *Government Decision no. 1295/2004 approving the National Action Plan to prevent and combat trafficking of children;*[42]

- *Government Decision no. 1769/2004 approving the National Action Plan to eliminate the exploitation of children through labour;*[43]

- *Government Decision no. 1504/2004 approving the National Action Plan to prevent and combat child sexual abuse and sexual exploitation of children for commercial purposes;*[44]

- *Government Decision no. 617/2004 on the establishment and organization of the National Steering Committee on preventing and combating the exploitation of children through labour, with its subsequent amendments and completions;*[45]

- *Government Decision no. 76/2008 amending and supplementing Government Decision no. 617/2004 on the establishment and organization of the National Steering Committee on preventing and combating the exploitation of children through labour;*[46]

- *Government Decision no. 860/2008 approving the National Strategy for the protection and promotion of children's rights 2008-2013 and of the Operational Plan for the implementation of the National Strategy for the protection and promotion of children's rights 2008-2013;*[47]

- *Government Decision no. 867/2009 prohibiting hazardous work for children;*[48]

- *Government Decision no. 49/2011 approving the Methodology-framework on prevention and intervention in a multidisciplinary team and network in cases of violence against children and domestic violence and the Methodology of multi-disciplinary and*

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[38] Republished in the Official Journal of Romania, Part I, no. 159 from March the 5th 2014.

[39] Oltei, I. G., *Trafficking in Persons. Juridical Frame*, The Review of Criminal Law, no. 2/2009, p. 128.

[40] Published in the Official Journal of Romania, Part I, no. 873 from September the 24th 2004.

[41] Published in the Official Journal of Romania, Part I, no. 1150 from December 6th 2004.

[42] Published in the Official Journal of Romania, Part I, no. 802 from August the 31st 2004.

[43] Published in the Official Journal of Romania, Part I, no. 1028 from November the 8th 2004.

[44] Published in the Official Journal of Romania, Part I, no. 878 from September the 27th 2004.

[45] Published in the Official Journal of Romania, Part I, no. 391 from May 3rd 2004.

[46] Published in the Official Journal of Romania, Part I, no. 72 from January 30th 2008.

[47] Published in the Official Journal of Romania, Part I, no. 646 from September 10th 2008.

[48] Published in the Official Journal of Romania, Part I, no. 568 from August 14th 2009.

inter-institutional intervention regarding exploited children and children at risk of being exploited through labour, children victims of trafficking in persons, as well as Romanian migrant children, victims of other forms of violence in other states.[49]

At present, *Government Decision no. 1142/2012*[50] *approved the National Strategy against trafficking in persons for 2012-2016 and the National Action Plan 2012-2014 for the implementation of the National Strategy against trafficking in persons for the period 2012-2016*, having as main objectives: boosting prevention activities and civil society participation in their implementation; improving the quality of protection and assistance to the victims of trafficking in persons with a view to their social reintegration; improving the institutional capacity to investigate the offences of trafficking in persons, especially the cases of trafficking of children, as well as the tracking of the criminal profit by criminal prosecution; increasing the capacity to collect and analyse data regarding trafficking in persons; optimization and extension of the process of inter-institutional and international cooperation to support the implementation of the national strategy against trafficking in persons.

4.2. Other national legislative instruments referring to trafficking in persons

Alongside the normative acts which expressly regulate the sphere of human trafficking, at national level there are other legislative instruments applicable to it, such as:

- *Law no. 682/2002 on the protection of witnesses, with its subsequent amendments*, which establishes the measures to protect the witness's identification data, the place of their domicile/residence, as well as the possibility of hearing the witness by appropriate technical means, without their actual presence in the room in which the judicial activity is being carried out;

- *Law no. 39/2003 on preventing and combating organized crime, with its subsequent amendments,* which defined the "organized criminal group" (until the entry into force of the new Penal Code) and qualified the trafficking of persons and the related offences as being part of the serious program offences which may enter the scope of the organized criminal group;

- *Law no. 211/2004 on certain measures which ensure the protection of the victims of offences, with its subsequent amendments and completions,* which transposes into national law the provisions of the European Convention on the Compensation of Victims of Violent Crimes (1983), as well as those of the Recommendation R/85/11 on the standing of victims in criminal proceedings, ensuring the right of victims to be informed, to receive counselling and legal aid, financial compensation;

- *Law no. 302/2004 on international judicial cooperation in criminal matters, republished*, allows the transferring of judicial proceedings in cases of trafficking in persons, preparation of letters rogatory or the presentation before foreign courts of witnesses or experts;

- *Law no. 508/2004 regarding the establishment, organization and functioning within the Public Ministry of the Directorate for Investigating Organized Crime and Terrorism, with its subsequent amendments and completions*, which establishes the material

[49] Published in the Official Journal of Romania, Part I, no. 117 from February 16th 2011.
[50] Published in the Official Journal of Romania, Part I, no. 820 from December 6th 2012.

competence of the this institution in the investigation of the cases of trafficking in persons.

The provisions of *Law no. 39/2003 on preventing and combating organized crime,*[51] adopted following the ratification of the United Nations Convention against Transnational Organized Crime, with its two additional protocols, offered a legal definition of the organized criminal group, incriminating, simultaneously, the initiation, set up of an organized criminal group, adherence or support in any way of such a group, in Article 7 para. (1) of Law no. 39/2003. The offence provided by Article 7 para. (1) of Law no. 39/2003 was punished with imprisonment from 5 to 20 years and the prohibition of certain rights, without the penalty applied being higher than the sanction prescribed by law for the most serious offence which entered the scope of the organized criminal group.

According to Article 2 letter (a) of Law no. 39/2003, by organized criminal group was understood *"a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit; it is not considered as organized criminal group that group which was formed occasionally, with a view to the immediate perpetration of one or several offences and which has no continuity, determined structure or pre-established roles for its members within the group"*, and, according to Article 2 letter (b), section 12 of the law, the trafficking in persons and the offences related to trafficking in persons were classified as serious offences which characterized as program offences the constitution and existence of the organized criminal group.

The entry into force of Law no. 39/2003 repealed the provisions of Article 14 of Law no. 678/2001, regulating an aggravated form of the offences of trafficking in persons and trafficking of children, incident in the case of their perpetration by a person who belonged to an organized group.

The Law no. 187/2012 for the implementation of Law no. 286/2009 on the Penal Code, applicable as from February 1st 2014, repealed the provisions of Articles 7-10 and 13, following the entry into force of the new Penal Code, which incriminates, in Article 367 of the Penal Code, the offence of establishment of an organised criminal group, and the definition of the organized criminal group is also offered by the new Penal Code, in Article 367 para.(6) of the Penal Code, as it expressly results from the provisions of Article 2 letter (a) of Law no. 39/2003, as amended.

Although the offences of trafficking in persons or trafficking of children are no longer expressly provided in the category of serious program offences, according to the amendments brought to Article 2 of Law no. 39/2003, by Law no. 187/2012, they continue to be part of this group of serious offences which fall under Law no. 39/2003, whereas, according to the same Article 2, as amended, serious offences are those for which the law provides the penalty of life imprisonment or imprisonment with a special maximum limit of at least 4 years. According to the provisions of Articles 210 and 211 of the Penal Code, for the offences of trafficking in persons and trafficking of children, in their standard form, the special maximum limit of the prison sentence is 10 years.

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[51] Law no. 39/2003 was published in the Official Journal of Romania, Part I, no. 50 from January 29th 2003.

Until the entry into force of the new Criminal Procedure Code,[52] in terms of procedure, Law no. 39/2003 provided certain rules applicable to the prosecution and sanctioning of the offences provided by Article 7 (including the serious program offences), respectively:

- the possibility of the confiscation in kind or equivalent of the goods acquired by means of the program offences of the organized group, and of the gains or other material benefits obtained from these goods (Article 13 of Law no. 39/2003).

- the impossibility to oppose the banking and professional secrecy (except for the professional secrecy of the lawyer), to the prosecutor and, respectively, the court, which could require in writing the data and information deemed necessary.

- if there were solid indications regarding the perpetration of the offences provided in Article 7, for the purpose of gathering evidence or identifying the perpetrators, the prosecutor was entitled to order the surveillance of bank accounts and their related accounts or of the communication systems (Article 15).

- the authorization to conduct supervised deliveries, under certain conditions (Article 16).

- the authorization to use undercover police officers from the specialized structures of the Ministry of Interior (Article 17).

- the possibility to use informants to gather data regarding the perpetration of offences and the identification of the perpetrators, under certain conditions, informants eligible for financial rewards, under the law (Articles 21-22).

Upon the entry into force of the new Criminal Procedure Code, on February 1st 2014, the procedural rules provided by Articles 13, 15, 16, 17 of Law no. 39/2003 were repealed, being taken over, in a specific way, by the provisions of the new code, which, moreover, extends the applicability of the special techniques of interception to private spaces as well.

As regards the victims of the trafficking in persons, their main rights, regulated in the national normative acts, are the following:

- the right to physical protection, the victims of trafficking in persons benefitting, on demand, by protection from the Ministry of the Interior, under the conditions of Article 113 of the Criminal Procedure Code, if they are parties in the criminal trial, according to Article 24 para.(1) of the Government Decision no. 299/2003 and Article 27 para. (1) of Law no. 678/2001. The victims of trafficking in persons received in the assistance and protection centres are informed regarding the applicable judicial and administrative proceedings, as well as regarding the possibility to benefit, according to law, from the specific measures for the protection of witnesses, in accordance with the provisions of Article 54 of Law no. 678/2001.

- the right to free social and psychological assistance from the part of specialized staff from the Centres for assistance and protection of the victims of trafficking in persons, established by Law no. 678/2001, as well as by the services of protection of the victims and social reintegration of offenders, which function next to the courts, according to Article 7 of Law no. 211/2004. Also, according to Article 27 para. (2) of Law no. 678/2001, the National Agency against Trafficking in Persons, in cooperation with the interested institutions, as well as non-governmental organizations, international

[52] Law no. 255 from July 19th 2013 for the application of Law no. 135/2010 regarding the Criminal Procedure Code and the amendment and completion of certain normative acts which contain criminal procedure provisions repealed Articles 11, 14-19 and 23 from Law no. 39/2003.

organizations and representatives of the civil society engaged in the protection and assistance of the victims of trafficking in persons, provide them with the psychological support and assistance necessary for their social integration.

- the mandatory legal assistance is provided to the victims of trafficking in persons, under Article 44 para. (1) of Law no. 678/2001, in order for them to be able to exercise their rights during criminal proceedings, as prescribed by law, in all phases of the criminal trial, and to be able to support their complaints and civil claims against the persons who have committed the offences of trafficking in persons or related to the trafficking in persons, in which they are involved. In case the provisions of Article 44 of Law no. 678/2001, which stipulate in this respect, are not met, the sanction is the absolute nullity, according to Article 281 of the new Criminal Procedure Code (according to the old Criminal Procedure Code, under Article 197 para. (2), the sanction was relative nullity). According to the provisions of Article 44 para. (2) of Law no. 678/2001, the victims of the trafficking in persons are also entitled to free legal assistance under Law no. 211/2004.

- the healthcare for the victims of trafficking in persons is provided in accordance with the regulations governing the field of health insurance, according to Article 27^1 of Law no. 678/2001.

- the right to reintegrate the students victims of trafficking in persons in the education system, according to the specificity of the trauma suffered, according to Article 16, letter (h) of the Government Decision no. 299/2003.

- the right to professional reintegration, under which the persons with high risk of being trafficked and the victims of trafficking in persons benefit with priority from the services provided by the National Agency for Employment, namely by the county employment agencies.

- the right to be informed, in accordance with Article 4 of Law no. 211/2004, by the first judicial body to which they present themselves, in a language they understand, regarding: the services and organizations which provide counselling or other forms of assistance to the victim, according to their needs; the prosecution body to which they may file a complaint; the right to legal assistance and the institution where they can address themselves in order to exercise this right; the conditions and procedure for free legal aid; the procedural rights of the injured party and of the civil party; the conditions and procedure in order to benefit from the provisions of Article 113 of the Criminal Procedure Code, as well as from the provisions of Law no. 682/2002 on the protection of witnesses, with its subsequent amendments; the conditions and procedure for the granting of financial compensations by the state; the right to be informed, in case the accused is deprived of freedom, respectively, sentenced to imprisonment, of its release in any form, under the Criminal Procedure Code.

- the right to confidentiality regarding the identity and private life of the victims, according to Article 26 of Law no. 678/2001.

4.3. Aspects regarding the regulation of the New Penal Code with respect to trafficking in persons

Upon the entry into force of the new Penal Code of Romania on the 1st of February, 2014, adopted by the Law no. 286/2009, published in the Official Journal of Romania, Part I, no. 510 from July the 24th 2009, the offences that fell under the Law no. 678/2001 were repealed.

Following the change of optics of the legislator of the new Penal Code, some of these offences have been provided in the new Penal Code of Romania, in Title I of the Special Part of the Code, dedicated to offences committed against the person.

With respect to Romania, the high incidence and frequency in time of the offences regarding or related to trafficking in persons, in which our country has been and is involved, either as a source, transit or destination country, and the constant exploitation of certain vulnerable persons, in the form of forcing them to practice prostitution or begging, for example, led the Romanian legislator to consider such criminal behavior a constant, first order problem of our society, which requires to be regulated in the Romanian Penal Code.

Under the name "Trafficking and exploitation of vulnerable persons", the legislator of the new Penal Code of Romania has grouped in Chapter VII of Title I eight offences, namely: slavery (Article 209), trafficking in persons (Article 210), trafficking of children (Article 211), submission to forced or compulsory labor (Article 212), pandering (Article 213), exploitation of begging (Article 214), using a minor for purposes of begging (Article 215), using the services of an exploited person (Article 216).

Child pornography was not included by the legislator of the new Penal Code in Chapter VII of Title I, but in Title VIII, Chapter I, concerning offences against public order, which is regulated by the Article 374 of the Penal Code.

Regarding trafficking in persons, the new Penal Code stipulates a definition of this offence, similar to that contained in Article 12 of the Law no. 678/2001, without providing the aggravated versions of the offence, contained in Article 12 para. (2) and (3) of the Law no. 678/2001, excepting the one referring to the offence committed by a public official in the performance of his duties, which is provided in para. (2) of Article 210 of the Penal Code.[53]

According to Article 210, para. (3) of the Penal Code "*the consent of a victim of trafficking shall not be considered a justification cause",* provision which is similar to the one contained in Article 16 of the Law no. 678/2001, that stipulated *that "the consent of a victim of trafficking does not preclude the criminal liability of the perpetrator."*

Both regulations are inspired by the Article 3, letter b) of the Protocol from Palermo, according to which: *"The consent of a victim of trafficking in persons to the intended exploitation set forth in letter a) of the present article, shall be irrelevant where any of the means set forth in subparagraph. a) was used".*

The above-mentioned provision of the new Penal Code was necessary, in order to prevent the operation of the victim's consent as a justification cause, given the fact that according to Article 22 of the Penal Code, the victim's consent could have had such a legal effect, as long as the law would not have specifically excluded the justifying effect.

Regarding the regime of sanctions, the special maximum of imprisonment duration was modified from 12 years (as it was provided in the Law no. 678/2001) to 10 years for the standard form of the offence, along with the special maximum of the aggravated

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[53] Article 12 of Law no. 678/2001: *"(2) Trafficking in persons committed in one of the following circumstances:*

a) by two or more persons together;

b) causing a serious injury to the health or physical integrity of the victim;

c) by a public official in the performance of his duties,

is punishable by imprisonment from 5 to 15 years and the prohibition of certain rights.

(3) If the deed has had as a consequence the death or the suicidal of the victim, the penalty is imprisonment from 15 to 25 years and the the prohibition of certain rights".

form [when the deed is committed by a public official, according to Article 210 para. (2) of the Penal Code], that was reduced from 15 years (as it was provided in Law no. 678/2001) to 12 years.

The new Penal Code essentially takes over the stipulations of the Law no. 678/2001 in terms of trafficking of children (Article 211 Penal Code), renouncing the aggravated forms of the offence, that have also not been provided in case of trafficking in persons, and changing the maximum limits of the punishment.

The provisions of Article 211 para. (1) of the Penal Code respect the rigors of Article3c of the Palermo Protocol.

Under the provisions of Article 211 para. (1) of the Penal Code, trafficking of children, in its standard form, involves "*the recruitment, transportation, transfer, harbouring or receipt of a child, with the purpose of exploitation"* without being necessary for the perpetrator to use the means provided by Article 210 para.(1) of the Penal Code. The use of the means provided by Article 210 para.(1) Penal Code attract the aggravation of the offence, foreseen under Article 211para.(2) of the Penal Code.

The sanctioning regime has been changed, for both the standard and aggravated forms of the offence. The special maximum of imprisonment punishment was reduced from 12 years to 10 years, for the standard form of the offence. For the aggravated forms, referred to in para. (2) of Article 211, the maximum of the imprisonment punishment was reduced from 15 years to 12 years.

In the case of the offence of trafficking of children, *"the consent of a victim of trafficking shall not represent a justificative cause"* [Article 211 para. (3) Penal Code].

The new Penal Code in Chapter VII, dedicated to the Trafficking and exploitation of vulnerable persons, provides the incrimination of the consumer's behaviour, taking over the similiar regulation of Article 14^1 of the Law no. 678/2001.

The indictment of the consumers' behavior, who are acting with the knowledge that they use the services (as provided in Article 182 of the Penal Code), of a victim of trafficking in persons (according to Article 210 of the Penal Code) or of trafficking of children (according to Article 211 of the Penal Code) defines the contents of the offence provided in Article 216 of the Penal Code.[54]

The sphere of services, as foreseen in Article 182 of the Penal Code includes:

- the execution of a work or performance of services by force;
- the keeping in a state of slavery or other similar methods of deprivation of freedom or servitude;
- the forcing into prostitution, with a view to the production and dissemination of pornographic materials or other forms of sexual exploitation;
- the forcing into begging;
- the illegal removal of organs.

If the above-mentioned services are not performed and are not being used in the context of exploitation of trafficking victims, they will not represent constitutive elements of the studied offences.

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[54] Article 216 New Penal Code: "*The use of the services provided in art. 182, performed by a person whom is known by the beneficiary to be a victim of trafficking in persons or trafficking of children, is punishable by imprisonment from 6 months to 3 years or fine, if the deed does not represent a more serious offence*".

4.4. Brief aspects regarding the criminal prosecution and trial of the analysed offences

For the offences of trafficking in persons, trafficking of children and child pornography, the criminal prosecution is mandatorily carried out by specialized prosecutors from the Directorate for Investigating Organized Crime and Terrorism, according to Article 12 para. (1) letter (b) point (i) of Law no. 508/2004, regardless whether they were or were not committed under the conditions of the organized criminal group provided under Article 367 para. (6) of the Penal Code.

For the offences provided by Article 12 para. (1) of Law no. 508/2004, committed by minors or against minors, the criminal prosecution is carried out by prosecutors specifically appointed for this purpose by the General Prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice [Article 12 para. (2) Law no. 508/2004].

The jurisdiction for the judgment in the first instance of the offences of trafficking in persons and trafficking of children belongs to the tribunal, and in the case of child pornography, the jurisdiction for the judgment in the first instance belongs to the tribunal, only in the conditions of the carrying out of the criminal prosecution by the Directorate for Investigating Organized Crime and Terrorism, according to Article 36 of the Criminal Procedure Code. In case the defendant or the victim is a minor, the judgment must be made by specialized panels of judges. The prosecutor's presence at the trial is mandatory. The prosecutors from the prosecutors' offices attached to the competent courts participate in the trial, drawing conclusions and exercising the means of appeal, except for the cases where the prosecutors from the Directorate for Investigating Organized Crime and Terrorism inform the prosecutors' offices attached to the competent courts and the court that they will participate directly.

In the case of the offences of trafficking of children and child pornography, the legislator derogated from the rule of the publicity of the hearing, providing that these hearings are secret. The failure to observe the provisions of Article 24 of Law no. 678/2001 is sanctioned by relative nullity, given that the provisions of Article 281 of the Criminal Procedure Code protect the publicity which can never be violated in favour of the secret hearing (the same was the sanction according to Article 197 para. (2) of the 1969 Criminal Procedure Code).

In the situation in which in a respective case are being subject to judgment other offences as well, apart from those strictly enumerated by the legislator in the text of Article 24 of Law no. 678/2001, the court must conduct the entire procedure in conditions of publicity, in order to ensure the transparency of the administration of justice.

According to Article 25 of Law no. 678/2001, during the trial of offences of trafficking in persons, upon the request of the injured person, the court may declare a closed-door hearing.

5. Conclusions

Despite all legislative instruments, adopted on international, European and national level, the combating of trafficking in persons continues to represent a serious and constant problem of our society.

The handsome profits make human trafficking a very tempting business in many countries of the world. United Nations Organization has foreseen that human trafficking is likely to become the main sector of interest of organized crime, exceeding drug trafficking. Many organized criminal groups consider human trafficking an easier and less risky business than other business on the market, considering the fact that the legislation in the field has proven to be insufficiently efficient and the legal sanctions grow pale in comparison to those provided for drug or gun trafficking.[55]

The human trafficking phenomenon is much too complex to be combated or prevented without efficient political, social and juridical instruments on national and international level.

Legislative instruments are inefficient, if active, practical measures are not taken in order to identify the victims among the vulnerable categories of population (like illegal immigrants).

The efforts made on international level in order to improve the data-collection and data-analyzing systems regarding human trafficking victims tend to remain useless,[56] if the efforts made on national level in order to protect and support the victims of human trafficking are diminished, as a consequence of the lack of government funds.

Complex tools are necessary, as human trafficking is a complex phenomenon.

The campaigns of informing, rendering sensitize and educating the vulnerable persons on the subject of human trafficking together with the actions meant to discourage the users of such services represent one of the most important tools in preventing human trafficking.

One may consider that there are sufficient legislative instruments on national and international level in order to combat human trafficking. The key consists in using them in an efficient manner.

If the new Romanian Criminal Code will prove to be such an efficient instrument, it remains to be seen.

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[55] Cherif, M. (coordonator), *Addressing International Human Trafficking in Woman and Children for Commercial Sexual Exploitation in the 21st Century*, The International Human Rights Law Institute, DePaul University College of Law, p. 18.

[56] UNESCO Trafficking Statistics Project - http://www.unescobkk.org/index.php?id=1022; International Organization of Migration, Data and Research on Human Trafficking - http://iom.ch/jahia/jsp/index.jsp; Vermeulen G., Paterson N., *The MONTRASEC demo: A Bench-Mark for Member State and EU Automated Data Collection and Reporting on Trafficking in Human Beings and Sexual Exploitation of Children*, IRCP series, vol. 36, Maklu Publishers, 2010.

The Liberty and Custody Judge in the Romanian New Code of Criminal Procedure

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Abstract:

Romania is the last state of the European Union that adopted a modern code of criminal procedure, and this was to a considerable extent, the outcome of the pressure from the European Court of Human Rights who urged our country to amend the former criminal legislation and make it correspond effectively to the standards imposed by the European Convention.

The Romanian New Code of Criminal Procedure, adopted by Act no. 135/2010, came into force on the 1st of February 2014 and reshaped the whole structure of a criminal trial, by importing many essential institutions from the other, more advanced, European codes of criminal procedure. Among the most important legal novelties, the following are worth mentioning: the ne bis in idem principle, the right to a fair trial within a reasonable time, the separation of judicial functions, the liberty and custody judge, the pre-trial chamber judge, the home arrest as pre-trial detention alternative, the two degrees of jurisdiction in criminal affairs (instead of three, as in the former code), the appeal on law as extraordinary relief, and certain special procedures, such as plea bargaining, the challenge against the unreasonable time of a criminal trial, the procedure in case of criminal liability of legal persons, and so on.

One of the positive features of the New Code of Criminal Procedure is undoubtedly the settlement of the liberty and custody judge, long needed as a guarantor of the legality of criminal investigation acts and the respect of individual rights and liberties.

The liberty and custody judge was inspired by the French model of "le juge des libertés et de la détention" and has important control prerogatives during the stage of criminal investigation that precedes the trial. However, the liberty and custody judge is not absolutely new in the Romanian criminal procedure tradition, since in the codes of criminal procedure of 1864 and, respectively, 1936, there used to be the criminal instruction judge, but this institution faded away in the communist era and was revived in the current code under a different form, adapted to present realities.

The following study aims at presenting the new institution in a comparative law approach, enhancing the advantages it brings into the present criminal trial, as well as the drawbacks of the new regulation consisting in that the prosecutor still preserves some powers that seriously diminish the role of the liberty and custody judge. Apparently, no Romanian governance so far could afford to displease the prosecutor. This in fact turns the new institution into a legal compromise.

Keywords: *Romanian New Code of Criminal Procedure; separation of judicial functions; liberty and custody judge; comparative approach; legal compromise.*

In the Explanatory Note preceding the draft law on the Romanian New Code of Criminal Procedure[1] (adopted by Act no. 135/2010[2] and in force starting the 1st of

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[1] Available on the site of the Romanian Ministry of Justice at: http://www.just.ro/Sections/PrimaPagina.

[2] Published in the Official Journal no. 486 of 15th July 2010.

February 2014, already amended by the Government Emergency Ordinance no. 3/2014[3]), the authors make reference to some newly introduced principles of a criminal trial, among which the separation of judicial functions, a kind of checks and balances at the micro- level of criminal proceedings. According to the authors of the Explanatory Note, this principle will considerably improve the quality of the criminal justice acts in Romania; it is provided by art. 3 in the New Code of Criminal Procedure (hereinafter, the Romanian abbreviation "NCPP") and it proclaims and guarantees that four judicial functions are exercised in a criminal trial, namely: a) the criminal investigation (carried out by the judiciary police and the prosecutor), b) the control ruling on the fundamental rights and liberties of an individual during the investigation stage (carried out by the liberty and custody judge), c) the judicial review of the legality of prosecution or charge dropping (performed by the judge of pre-trial chamber) and d) the judgment (carried out by the courts of law).

Some authors of the Romanian doctrine,[4] while analyzing the new conception at trial proposed by the NCPP, have actually drawn attention upon the fact that the notion of "judicial function" is misinterpreted as representing the duties of judicial authorities. As an example, the criminal investigation is a stage of a criminal trial during which the prosecutor or the judiciary police exert their competences, but it is not a function. Similarly, the same author states that when referring to the function of control ruling on the fundamental rights and liberties of an individual during the investigation stage or, similarly, to the judicial review of the legality of prosecution or charge dropping, the code refers to the function of instruction (from the French "instruction criminelle"), in a contemporary understanding of the term.

Therefore the judicial functions should not overlap with the duties of judicial authorities.

Two of the above-mentioned judicial functions are newly introduced in the Romanian NCPP, namely the control ruling on the fundamental rights and liberties of an individual during the criminal investigation and the review of the legality of prosecution or charge dropping. These judicial functions are accordingly performed by the liberty and custody judge and the judge of pre-trial chamber. While the latter represents an absolute novelty for the Romanian criminal procedure, as the pre-trial chamber procedure is itself completely new, the former, namely the liberty and custody judge is a relative novelty, mostly due to the name and extended competences. In fact, the recent history of Romanian criminal procedure shows that for more than a decade, there has been a judge appointed for the control of the criminal investigation stage, especially for the ruling on pre-trial detention.

The past history of Romanian codes of criminal procedure (specifically, that of 1864 and that of 1936) reminds us that there used to be an institution similar to the current liberty and custody judge, namely the instruction judge.

Nonetheless, there are important distinctions between the two institutions, considerably in favor of the latter; thus, as concerns the competence, the liberty and custody judge rules on complaints against the acts carried out during the criminal investigation stage, being a genuine guarantor of possible abuses occurring at that crucial stage, whereas the instruction judge used to effectively perform acts of criminal

[3] Published in the Official Journal no. 98 of 7th February 2014.

[4] Diana Ionescu: *On the Conception at Trial and the new Code of Criminal Procedure. A Few Basic Issues*, Caiete de Drept Penal (Criminal Law Writings), no. 1/2011, p. 88.

investigation amounting to the criminal instruction (or the French inspired "instruction criminelle") which aimed at finding clues and evidence based on which the authorities decided whether to prosecute a defendant or not.[5] Furthermore, as concerns the independence, the liberty and custody judge is an independent magistrate, in the sense conferred by the European Convention, while the instruction judge would perform his activity under the supervision of the Attorney-General attached to the Court of Appeal, which interfered a lot with his independence.

The liberty and custody judge and his extended competences in the NCPP are the result of a long series of amendments of our former codes of criminal procedure.

The first relevant amendment of the initial Romanian Code of Criminal Procedure of 1969 occurred by an act of Government, namely the Government's Emergency Ordinance no. 109/2003,[6] which substantially modified the former art. 136 parag. (5) of the Code of Criminal Procedure of 1969, in the sense that pre-trial detention could no longer be ordered by a prosecutor, but, for the first time, by a judge. This amendment had been announced by a previously enacted law – the revolutionary Act no. 281/2003,[7] which amended itself the old Code of Criminal Procedure, as well as some subsidiary penal legislation. Art. X of said act expressly stated that whenever other laws contain dispositions on the orders, by a prosecutor, on the pre-trial detention or its revocation, on judicial supervision (bail), on the prohibition of a defendant to leave his home town, on detention orders, phone tapping, searches or mail interception and delivery of the defendant's correspondence and objects, there will accordingly apply art. I of the act, pursuant to which all such competences belong to a judge.

Apparently, these acts were nothing but a legal echo of the conviction that Romania suffered before the European Court of Human Rights (hereinafter the ECHR) in the famous affair of *Pantea v. Romania*[8] in which the European Court harshly criticized the lack of separation of judicial functions in a Romanian criminal trial, the lack of impartiality of the prosecutor who ordered the pre-trial detention, as well as the fact that the judicial review of the pre-trial detention by an independent tribunal occurred only at a very late stage of proceedings, which amounted to a violation by the Romanian authorities, of article 5 paragraphs (1) and (3) of the European Convention on Human Rights. More precisely, in paragraphs 238-239 of its judgment, the court stated that "since prosecutors in Romania act as members of the Prosecutor-General's Department subordinate firstly to the Prosecutor-General and then to the Ministry of Justice, they do not satisfy the requirement of independence from the executive". The Court thus found no reason to depart from this conclusion, given that "independence from the executive is one of the guarantees inherent in the concept of «officer» for the purposes of article 5 parag. 3 of the Convention". Having regard to these arguments, the Court concluded that "the prosecutor who ordered the applicant to be placed in pre-trial detention was not an «officer» for the purposes of the third paragraph of article 5". Subsequently, the court determined whether judicial review of the applicant's detention nonetheless took place «promptly» within the meaning of the same Convention provision.

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[5] Ioan Tanoviceanu: *Treaty of Law and Criminal Procedure*, vol. IV – Criminal procedure – Curierul Judiciar Publishers, Bucharest, 1924-1926, p. 504.

[6] Published in the Official Journal no. 748 of 26th October 2003.

[7] Published in the Official Journal no. 468 of 1st July 2003.

[8] ECHR, *Pantea v. Romania*, application no. 33343/1996, judgment of 03.06.2003, final judgment of 03.09.2003, available at http://hudoc.echr.coe.int/sites/fra/pages/search.

The Court reiterated that art. 5 parag. 3 of the Convention requires that judicial review take place rapidly, the promptness in each case having to be assessed according to its special features. A prompt judicial review of pre-trial detention is an important safeguard against ill-treatment of the individual subject to a criminal trial.

In the aforementioned case, the Court noted that the applicant was placed in pre-trial detention by an order of the prosecutor dated 5th July 1994 for a period of thirty days starting from the date of his arrest, and that he was apprehended and imprisoned on 20 July 1994. Yet it was only on 28 November 1994 that the question of the merits of his detention was examined by the Bihor County Court, which finally provided the guarantees required by art. 5 parag. 3 of the Convention. The total length of the applicant's detention, before being brought before a judge or another officer within the meaning of art. 5 parag. 3, was therefore more than four months.

Or, the Court, in its previous case-law,[9] held that a period of detention in police custody amounting to four days and six hours without judicial review fell outside the strict constraints permitted by art. 5 parag. 3, even though it was designed to protect the community as a whole from terrorism. A fortiori, the Court could not therefore accept that it was necessary to detain the applicant for more than four months before bringing him before a judge or another officer who satisfied the requirements of parag. 3 of art. 5.

There was accordingly a violation of art. 5 parag. 3 of the Convention.

The requirement that pre-trial detention must be ordered only by a judge, as an essential guarantee of the separation of judicial functions at trial and of the right of the accused to a fair trial, was immediately adopted by Romanian domestic legislation, as shown above. This exigency is accordingly set out in the Romanian Constitution, in the form amended in the same outstanding year of 2003.[10] Parag. (4) of art. 23 of the Romanian Constitution, relating to individual freedom, reads "Pre-trial detention is ordered by the judge and only within a criminal trial".

It is clear that it was high time that the Romanian New Code of Criminal Procedure followed the standards imposed by the European Convention and the case-law of the European Court of Human Rights that were formerly adopted by all EU member states in their codes of criminal procedure.

Probably the best example at hand is the French Code of Criminal Procedure (hereinafter the FCCP),[11] wherefrom the Romanian lawmaker took his inspiration upon elaborating the new institution, *i.e.* the liberty and custody judge. Inserted in the Code of Criminal Procedure by the French Act of 2002 on the presumption of innocence, art. 137-1 parag. (2) sets out the rules on the appointment of the liberty and custody judge. His replacement was later on provided by the French Perben II Act of 9th March 2004.

According to art. 137-1 in the French Code of Criminal Procedure, pre-trial detention is ordered and extended by the liberty and custody judge. Release applications are also submitted to him.

The liberty and custody judge is a judge with the rank of president, of senior deputy president, or of deputy president. He is appointed by the president of the district first

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[9] ECHR, *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988.

[10] In 2003, the Romanian Constitution was amended by Law no. 429/2003, a law approved by the national referendum of 18-19th October 2003 and came into force on 29th October 2003.

[11] The French Code of Criminal Procedure is available at: http://www.legifrance.gouv.fr/initRechCodeArticle.do.

instance court. When he gives a decision at the end of a debate, he is aided by a clerk. Where the nominated custody judge and the president as well as the senior deputy presidents or deputy presidents are unable to act, the custody judge is replaced by the highest level judge with the most seniority, nominated by the president of the first instance court. He may not, under pain of nullity, participate in the trial of criminal cases of which he has taken cognizance.

He is seized by means of a reasoned judgment from the investigating judge, who transfers the case file and the district prosecutor's initial submissions to him.

According to art. 137-2, judicial supervision is ordered by the investigating judge, who gives his judgment after taking note of the district prosecutor's recommendations.

Where he is in charge of the case, the liberty and custody judge may also make a custody ruling. Pursuant to art. 137-3, the liberty and custody judge gives his ruling by a reasoned judgment. Where he orders or prolongs a remand in custody, or rejects a request for release, the ruling must enunciate the legal and factual matters that render judicial supervision inadequate, as well as the grounds for detention, In every case, the person under judicial examination is notified of the ruling and receives a complete copy of it, for which he has to sign the case file.

Essentially, the liberty and custody judge in France has the following competences within a criminal trial:

- orders or extends pre-trial detention, release of an individual or sanctions the breach of judicial supervision (art. 137-1 parag. 2 FCCP);

- may, at the request of the district prosecutor, authorize the searches, house visits and seizures of exhibits be carried out outside the times provided by article 59 FCCP (*i.e.* between 6 a.m. and 9 p.m.);

- where an investigation has been opened, and in order to guarantee the payment of the fines incurred as well as, where applicable, the compensation of the victims and the execution of any confiscation measures, the liberty and custody judge, at the request of the district prosecutor, may order protective measures to be taken over the assets, movable or immovable, owned jointly or severally, of the person under judicial examination (art. 706-103 FCCP);

- authorizes, at the request of the district prosecutor, the installation of all technical instruments destined to localize a person or vehicle under observation, for a maximum period of one month (art. 230-33 FCCP);

- maintains in complete hospitalization the persons in need of psychiatric care (art. 18 parag. IV of the French Code of Public Health);

- authorizes the maintenance in the waiting zone of foreign citizens in demand of asylum, for a period that cannot exceed 8 days (art. L 221-1 of French Code of Entrance and Stay of Foreign Citizens and the Right to Asylum).

The institution of the liberty and custody judge is equally provided by the Italian Code of Criminal Procedure (hereinafter, the ICCP);[12] art. 328 sets out the so-called "giudice per le indagini preliminari", literally meaning the judge of preliminary investigations. The Italian Code of Criminal Procedure adopted by the Italian Parliament in 1988, replaced the instruction judge with the preliminary investigations judge, thus creating the premises of an adversarial procedure. In fact, the Italian Code of Criminal Procedure is one of the most adversarial in nature from all European codes.

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[12] Codice penale e di procedura penale, Luigi Alibrandi e Piermaria Corso (eds.), Casa Editrice La Tribuna, Piacenza, 2008, p. 656. Also available at http://www.legislationoline.org.

Much like the Romanian system, the Italian criminal law system was traditionally structured on an inquisitorial framework, which means that the investigation was carried out by the instruction judge who would collect the evidence. The new Italian Code of Criminal procedure, subject to a series of legislative initiatives, took its inspiration from the adversarial model of the unitary U.S. Code – Title 18: Crimes and Criminal Procedure.[13] By leaving aside the instruction judge, the new code of criminal procedure settled the preliminary investigations judge who has the prerogative to supervise the preceding stage of a criminal trial, the acts ordered by the prosecutor ("il Pubblico Ministero") and more importantly, to guarantee the rights and liberties of the investigated person. Also, this judge may order himself measures that restrain individual liberty (art. 275bis ICCP, "li arresti domiciliari", the home arrest; art. 281 ICCP, "il divieto di espatrio", the prohibition to leave the country; art. 283 ICCP, "il divieto e obbligo di dimora", the prohibition to leave the home town) or the pre-trial detention (art. 280 ITCP "custodia cautelare in carcere"), the detention orders (art. 321 ICPP, "le misure di sicurezza"), the precautionary orders (art. 316, "il sequestro conservatorio", the distraint upon property; art. 321, "il sequestro preventivo", the seizure), if such measures prove necessary during the criminal investigation stage.

It is extremely important to remark that in the Italian Code of Criminal Procure, the preliminary investigations judge may exert his prerogatives only prior to the initiation of prosecution - "Prima dell'esercizio dell'azione penale provedde il giudice per li indagini preliminari", according to art. 328 and art. 405 ICCP).

When it comes to the Romanian NCPP, the competences of the liberty and custody judge are provided in a general manner under art. 53. They are however completed and developed by a series of other articles that particularize and enhance such competences.

An overview of the opinions expressed by the Romanian doctrine[14] that has so far examined the new institution provided by the NCPP reveals a somewhat unanimous trend of accepting the liberty and custody judge as a positive element of novelty.

This new institution is saluted as extremely useful and fully corresponding to the exigencies of the ECHR, especially since the European court convicted Romania on several occasions precisely because certain measures related to individuals' deprivation of liberty or to intrusions in their private life were either taken by non-independent authorities (in the sense established by the European court), who were directly involved in the criminal investigation, or they were not subject to the control of an impartial tribunal, therefore disregarding the fundamental rights and liberties of persons.

At the same time, taking into account the current practice of Romanian investigation authorities that order abusively certain measures that restrain the individuals' fundamental rights and liberties, and motivate them in a strictly formal manner, it became necessary to set out this new institution that represents an independent magistrate, a specialized judicial organ able to assess whether the restraints of individual freedom are justifiable.

Thus, according to art. 53 NCPP, the liberty and custody judge is that judge who, within a court of law, in accordance with the jurisdiction of that court, during the criminal investigation stage, rules on the requests, proposals, complaints, challenges (contestations) or any other submissions relating to:

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[13] Available at http://www.law.cornell.edu/uscode/text/18.

[14] Ioan Gârbuleț: *The Liberty and Custody Judge, a New Institution in Criminal Procedure Law*, Dreptul (The Law), no. 11/2009, pp. 181-186.

a) preventive orders;

b) precautionary orders;

c) detention orders of temporary character;

d) acts of the prosecutor, in the cases expressly provided by the law;

e) authorization of searches, the use of special methods and techniques of supervision and investigation or other evidentiary proceedings according to the law;

f) anticipated hearings;

g) other situations expressly provided by the law.

The liberty and custody judge was envisaged as an independent guarantor of the respect of fundamental rights and liberties during the criminal investigation stage. As such, he is appointed by law to authorize those acts of criminal investigation that may constitute a serious interference with the private life of an individual, such as the following:

- issuance and extension of the technical supervision mandate (art. 139-144 NCPP); this implies, among others phone tapping, audio-video supervision and technical localization of objects and persons;

- ruling on withhold, delivery and search of mail and objects belonging or addressed to the suspect (art. 147 NCPP);

- authorization of obtaining data generated or processed by the providers of public networks of electronic communications (art. 152 NCPP);

- authorization of obtaining data related to the financial records of a person (art. 153 NCPP);

- authorization of home searches (art. 158 NCPP);

- authorization of searches into computer data (art. 168 NCPP);

- authorization of home arrest, extension of home arrest and their revocation/replacement (art. 218 - 222 NCPP; art. 242 NCPP);

- ruling on pre-trial detention, extension of pre-trial detention, as well as their revocation (art. 223-234 NCPP; art. 242 NCPP);

- ruling on compulsory provisional treatment orders (art. 245 NCPP);

- ruling on provisional hospitalization orders (art. 247 NCPP).

Having regard to these powers of the liberty and custody judge, after a thorough analysis of the New Code of Criminal Procedure, some authors of the doctrine[15] have drawn attention to a sensitive issue, namely that, although the liberty and custody judge has control over many acts carried out during the criminal investigation stage, still he has limited competence over other very important procedural acts that considerably interfere with the suspect's private life and could easily lead to the disregard of his rights and guarantees in a criminal trial. Much surprisingly for a criminal procedure code that aims to be more adversarial in nature than inquisitorial, as before, such powers are entrusted to the prosecutor. Or, under these circumstances, one cannot help wondering what have been the criteria according to which the Romanian lawmaker guided himself when determining that certain investigation acts that could easily qualify as interferences with private life should be authorized by the liberty and custody judge, while others should remain at the prosecutor's discretion.

For instance, the prosecutor can authorize himself the above-mentioned acts of technical supervision for a term that cannot exceed 48 hours, in case of emergency,

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[15] Dorel Lucian Julean: *The Liberty and Custody Judge as Settled by the New Code of Criminal Procedure*, the "In Honorem" Collection, Universul Juridic Publishers, Bucharest, 2012, p. 399.

when the obtainment of a mandate from the judge could lead to a serious delay of the criminal investigation (art. 141 NCPP). Also, he can authorize the use of under-cover investigators and agents, for a maximum period of 60 days (art. 148 NCPP), that can be extended even up to one year for well-grounded reasons (art. 148 parag. 9 NCPP), he can authorize participation to certain activities –art. 150 NCPP (*Nota bene*: according to art. 138 parag. 10 NCPP, this may imply the commission by the investigator of an act similar to the *actus reus* of a corruption offence, the conclusion of transactions, operations or any other agreements related to goods or persons that are suspected to be missing, to be victims of human trafficking or kidnapping, the involvement in drug dealings and performance of services, with the aim to obtain evidence) for a maximum period of 60 days (art. 150 NCPP), that can be extended up to one year for well-grounded reasons (art. 150 parag. 9 NCPP), he can authorize controlled deliveries – art. 151 NCPP (pursuant to art. 138 parag. 12 NCPP, controlled delivery means an investigation and supervision technique that allows the entrance, transit and exit into and out the state territory of certain goods that are suspected to have been illegally detained or obtained, with the aim of investigating an offence or identifying the persons involved in its commission) for an unspecified period, he can further authorize preservation of computer data (art. 154 NCPP) for a maximum period of 60 days that can be extended only once for another 30 days (art. 154 parag. 3 NCPP).

This distinction between the prerogatives of the liberty and custody judge and the powers of the prosecutor is difficult to understand, and obviously fails to meet the European Convention's requirements for accessible, predictable and clear laws, especially given the perspective of the aforementioned principle governing the separation of judicial functions, newly inserted in the Romanian Code of Criminal Procedure and, for these good reasons, they have been harshly criticized by the doctrine and practice. This unusual distinction between these competences raises even an issue of unconstitutionality of such provisions.

When confronted for an answer of this strange choice of prerogatives upon criminal investigation acts, the representatives of the Ministry of Justice, as initiators of the draft law preceding the new code of criminal procedure, came up with a purely formal response,[16] namely that authorization of the use of under-cover investigators or agents and authorization of controlled deliveries are justifiable by the fact that the prosecutor carries out and supervises the criminal investigation and that the supervision and investigation techniques are used in order to obtain evidence. As concerns their gravity, they are not as serious interferences with private life as phone tapping, for instance, therefore they should not fall within the competence of the liberty and custody judge. The prosecutor is, in his turn, a magistrate, acting as the leader of criminal prosecution, therefore he may order the procedural acts and measures necessary for a good administration of evidence, with a view to finding the truth in a criminal case (in my opinion, the discovery of truth, as a purely inquisitorial principle, should have been left out from the new code of criminal procedure!).

The representatives of the Ministry of Justice further explained that the prosecutor takes care of the respect of the legality and loyalty of criminal proceedings, and the breach of legality or loyalty can be later on sanctioned by the judge of pre-trial chamber, according to his competences, who may apply the exclusionary rules on illegally or disloyally obtained evidence.

[16] For this explanation, see http://www.just.ro.

This explanation is far from satisfactory and lacks legal logic.

However, despite this "trial of competences" between the prosecutor and the judge, the liberty and custody judge preserves a special competence, namely that of ruling on the challenge (contestation) against the unreasonable time-period of a criminal trial, during the criminal investigation stage. During the judgment stage, the challenge (contestation) is solved by the court of law. This is also a new procedure inserted in the present code of criminal procedure under the pressure of convictions incurred by Romania before the ECHR as a consequence of the excessive length of criminal trials (currently, there are almost 147 cases in which Romania was convicted for the violation of art. 6 of the European Convention, most notably for the excessive time-period of trial proceedings).[17]

According to art. 488^1 parag. (1) NCPP, if the criminal investigation activity is not carried out within a reasonable period of time, a person may file a challenge (contestation) by which he demands the speeding of the proceedings. During the investigation stage, this challenge may be filed by the suspect, the defendant, the injured party, the civil party as well as the party liable under civil law.

The procedure governing the ruling on this kind of challenges (contestations) is settled by art. 488^4 NCPP. More precisely, the liberty and custody judge, in order to be able to rule upon the challenge, will order the following measures:

a) notification of the prosecutor about the challenge that has been filed, indicating the latter's possibility to present a legal opinion on the challenge;

b) transmission of the case-file or a certified copy of the case-file, in a 5 day-term, by the prosecutor;

c) notification of the other parties to the trial about the challenge that has been filed and their possibility to present a point of view within the term granted to that end by the liberty and custody judge.

In case the suspect or the defendant are remanded in custody, the notification will be made both to these persons and to the lawyer of one's choice or appointed ex officio.

If the prosecutor or the parties do not present their opinion to the liberty and custody judge within the term established by the former, the ruling will take place irrespective of this situation. The liberty and custody judge will rule upon the challenge against the unreasonable term of the criminal investigation in a maximum period of 20 days from the registration of the challenge. The challenge is ruled upon by a reasoned judgment, in closed session, without attendance by the parties or the prosecutor.

At a *prima facie* analysis of the legal novelties brought about by the Romanian New Code of Criminal Procedure, the institution of the liberty and custody judge stands out as a positive feature, since he is primarily meant to represent an efficient promoter and guarantor of the lawfulness of procedural acts carried out during the investigation stage in a criminal trial.

This institution was created following mainly the French model of the "juge des libertés et de la détention" (art. 137-1 in the French Code of Criminal Procedure) but in a manner specific to the Romanian legislator, who has good intentions but lacks consistence. More precisely, although the liberty and custody judge enjoys a broad jurisdiction as to the control of investigation acts performed by the judiciary police and the prosecutor, this jurisdiction is still limited and voided of legal sense by the fact that the prosecutor seems to have his fair share of prerogatives upon many important acts of

[17] For the analysis of the 147 cases against Romania, see http://hudoc.echr.coe.int/fra/Pages.

investigation that allow serious interferences with the individuals' right to private and family life.

Therefore, although the Romanian New Code of Criminal Procedure finally took distance from an old and pernicious conception at trial, much influenced in the past by the communist regime, it is still very close to the inquisitorial system by granting the prosecutor large powers and initiative as regards certain sensitive acts of investigation, such as the authorization of under-cover investigators and agents, the authorization of investigators to participate in certain activities and the authorization of controlled deliveries.

In my opinion, all such procedural activities should have been entrusted to the liberty and custody judge, if he was truly envisaged as a checking filter and guarantor of the acts carried out during the criminal investigation stage. Moreover, the new code of criminal procedure cannot possibly accept some obnoxious overlapping of prerogatives belonging at the same time to the prosecutor and to the liberty and custody judge (the prosecutor may even authorize himself certain acts that theoretically fall under the general jurisdiction of the liberty and custody judge, *i.e.* the acts of technical supervision for a term that cannot exceed 48 hours, in case of emergency).

Certainly, the liberty and custody judge has access to the prosecutor's file, but the judge is not in charge of the overall control of the investigation stage in which authorization is demanded and must commonly decide in a situation of emergency. It means that, in practice, the obtaining of the authorization mostly depends on the ability of the prosecutor to convince the judge, and not merely on the needs of the investigation. In fact, it suggests that the institution of the liberty and custody judge has been exploited by the Romanian legislator to put in front of the public prosecutor a judicial judge – which apparently justifies the requirements of the ECHR – with apparent powers but no proper means to enforce them in practice.

As a general and bitter conclusion, if the Romanian New Code of criminal Procedure is certainly interesting, it can hardly be regarded as a model, because, aside of the achievements above presented, it carries weaknesses that should not be neglected. Piercing the veil of appearances leads to the notice that, despite the ongoing legislative efforts, the Romanian justice system is still affected by the lack of protection of human rights and liberties during the criminal investigation stage.

Legal rumor has it that the Romanian Parliament is currently preparing an act which is meant to amend the very new code of criminal procedure and hopefully, this act in progress will deprive the prosecutor of his present powers to decide on some essential and extremely sensitive acts of criminal investigation, in the absence of a prior authorization by the liberty and custody judge.

Until that forthcoming act destined to amend the code comes into force, the New Code of Criminal Procedure looks very much like a compromise. It is a legal compromise between essence and appearance. Between the European Convention-oriented manner in which the liberty and custody judge has been settled in the codes of criminal procedure of the EU member states (see France and Italy) and the purely Romanian variant in which said institution was provided in our new code.

Evolution of the Law on the Execution of Criminal Penalties and Related Acts post 1989

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Abstract:

The continuous evolution of national legislation in the area of criminal law has triggered the shaping of different concepts as to the perception of the criminal law branches, thus emerging opinions or trends that are sometimes in diametrical opposition.

More precisely, while a part of the doctrine has firmly stated that the area of criminal law cannot be split up into several criminal domains, since it is an autonomous concept that sets out the norms that apply when holding an individual criminally liable, on the other hand, the majority is in favor of setting directions that could establish other branches of law, connected to that of criminal law.

In this sense, it becomes noticeable, more and more clearly, the distinct position of the law on the execution of criminal penalties, having a specific object, different from that of criminal law in general.

Keywords: *Romanian law on the execution of criminal penalties; custodial and non-custodial sentences; penitentiary law; new Penal Code and new Code of Criminal Procedure; Probation Services.*

Effectively speaking, the law on the execution of criminal penalties settles the special social relations governing the execution of criminal penalties, thus being created the legal framework that enables the performance of certain activities by the state authorities that are in charge of the execution of criminal penalties incurred by the persons convicted after a criminal trial.

Through this mechanism there are created the specific relations between the state coercive authorities and the convicted individual, a series of special criminal law norms being thus highlighted in order to establish the rules to be followed in the course of such proceedings.

Therefore, it is to be noticed that the different lawmaking process in case of norms that belong to a special area, that of the execution of criminal penalties, determines the emergence and self-governing existence of legal relations belonging to the law on the execution of criminal penalties. This set of norms highlights a well-structured pillar of criminal law, with specific rules and autonomous settlement.

Undoubtedly, the law on the execution of criminal penalties is extended on several levels, according to the concrete object it approaches and settles from a legal perspective.

Thus, in this area, there appears a wide range of aspects contained within the norms of the law on the execution of criminal penalties, referring mostly to the execution of principal punishments – custodial and non-custodial sanctions, to accessory punishments, but also to detention orders, as well as to guidance and supervision orders provided by penal legislation.

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For a clear understanding of the distinction between the law on the execution of criminal penalties and criminal law, we need to approach the core issue taken into account by the legislator upon settling the set of norms specific to each separate area. More precisely, while criminal law focuses on establishing the essential elements of an offense, the criminal liability and finally, the application of criminal sanctions, the law on the execution of criminal penalties centers on a moment subsequent to the aforementioned stages. It deals with the modalities of execution of penalties applied post-conviction, the established penalty being thus guided towards the realm of execution and assuming a material, concrete shape due to the effective application of norms of the law on the execution of criminal penalties.

In the legislative evolution of the law on the execution of criminal penalties, it is to be noticed a well-shaped system of norms, the foundation of this field being the adoption of Act no. 23 of 1969, as well as other special acts, which completed the general provisions of the former penal code. While the former penal code contained general norms in the area of execution of criminal penalties, governing institutions such as the parole, or the regimes of detention or work, the special legislation concretely provided the modality of applying criminal penalties, as well the stage of their execution.

The sources of the law mentioned above, the set of norms provided by certain special acts in force at that time, that completed the dispositions of Act no. 23 of 1969, created an autonomous, self-governing mechanism, shaping out the area of the law on the execution of criminal penalties.

The norms set out in the above-mentioned acts contained dispositions on the detention regimes, the modes of execution of custodial or non-custodial sanctions, or drew a division line between the execution of principal punishments and that of accessory punishments.

Consequently, from the manner the legislator settled this stage of execution of criminal penalties, it can be identified the autonomous character of the law on the execution of criminal penalties, with a particular object, specific to the coercive relations established between the state, through its specialized institutions, and the convicted individuals, following a definitive criminal sentence.

The set of provisions that govern this matter determine the existence of an autonomous branch of law, as a distinct stage in a criminal trial, namely that of effective application of the dispositions contained in the decisions passed by criminal courts.

Additionally, besides the autonomous nature of this branch of law, it is to be mentioned its public character, the legislation in this matter having an authoritative character. Thus, the convicted individual is subordinated to the state, which, by its specialized authorities, imposes on the convicted person the effective modality of executing the penalties established within the conviction decisions.

At the same time with the evolution of this legal system, the execution of penalties is not oriented only towards the punishment, at all costs, of the individual therefore, alongside with the punitive character of punishments, great attention is paid to the function of social reintegration of the individual. This special goal results inclusively from the special mode of settling the law on the execution of criminal penalties, the sources of this branch of law, which provide the legal framework destined to reach the outcome of rehabilitation and social reintegration, the beginnings of this conception being highlighted inclusively in Act no. 23 of 1969.

The above-mentioned aspects, which point out an essential feature of the law on the execution of criminal penalties, namely that of preventing the commission of new

offenses, are particular to the law on the execution of criminal penalties, and by such feature this legal area differentiates itself from other branches of law in the criminal field.

Nonetheless, the law on the execution of criminal penalties is closer, from the point of view of its legal approach, to penitentiary law, but the latter contains a series of provisions strictly on custodial sentences for the convicted individuals that execute criminal penalties in a prison facility.

Therefore, penitentiary law separates itself from the law on the execution of criminal penalties, being just a part of it, the law on the execution of criminal penalties having a larger legal base, which allows for additional measures of social reintegration or execution of non-custodial sentences as well.

The first signals of the new approach to penitentiary activity and execution of penalties in criminal matters emerged upon the adoption of the Law Decree no. 6 of 7th January 1990, which abolished the death penalty and replaced it with life imprisonment.

Taking into account that the new post-communist vision was closer to a European punitive system, this measure was an essential one, also given the number of persons executed in Romania until the year 1989. Thus, in Romania, between 1965 and 1989, 104 persons had been convicted to death, only the Court Martial of Bucharest having convicted to the capital punishment a number of 47 individuals. The last persons convicted to the death penalty were the Ceausescu spouses on 25th December 1989.

The same year, still as a consequence of the evolution and the alignment of national penitentiary standards to European ones, there was enacted Act no. 21 of 15th November 1990, by which the National Penitentiary Network, as it was called at the time, passed from the jurisdiction of the Ministry of Internal Affairs to that of the Ministry of Justice.

Thus, a well-organized framework was created, which, in the future, was to generate an independent activity performed by the judges in charge of supervision within penitentiaries, appointed by the courts of law in the jurisdiction of which there were situated the detention facilities.

Later on, in the year 2004, another measure of great importance in the process of updating of the penitentiary system was represented by the adoption of Act no. 293/2004 on the Status of Public Officers within the National Administration of Penitentiaries, a law which brought about the demilitarization of the personnel working in penitentiaries. On that occasion the name of the institution was also modified, from the National Network of Penitentiaries into the National Administration of Penitentiaries, doubled by the administrative and logistic consequences entailed by the new structure.

This organizational change created optimal conditions for the adoption of a new act on the execution of criminal penalties and measures ordered by criminal courts of law, in accordance with the conceptions of European institutions in this field.

Alongside with the development of state coercion mechanisms, as well as the European exigencies on lawmaking and settlement of conditions that govern the execution of definitive criminal sentences, the national legislator had to resort to implementing a new conception in this area of law, in 2006 being enacted Act no. 275 on the execution of penalties and measures ordered by judicial authorities in the course of a criminal trial.

By the enactment of this act, subsequently amended several times, inclusively by Act no. 83/2010, the state imposed a new direction in the area of execution of penalties

or measures ordered in the course of a criminal trial, by respecting the fundamental human rights and the principles attached hereto, in accordance with the European law standards.

That is why, starting with the very first articles of Act no. 275/2006, the legislator paid great attention to the fundamental human rights that need to be respected by state authorities upon the effective execution of custodial or non-custodial sentences, a vital issue, especially if filtered through the rich case-law of the European Court of Human Rights containing convictions against Romania in this matter.

Therefore, Act no. 275/2006 contained provisions on the respect of human dignity in a prison facility. According to the dispositions of article 3 of said act, criminal penalties are executed in conditions that ensure the respect of human dignity. In what followed, article 4 settled the prohibition of torture, inhuman or degrading treatment or other ill treatment. Thus, it is to be noticed a focus of the legislator on a fundamental principle of a criminal trial and of the execution of penalties stage especially, namely the respect of human dignity.

As we have mentioned above, this aspect, as a standard imposed by European law, highlights also the social, human side of the end of a criminal trial, the judicial authorities and those who execute the former's orders being compelled to become aware of the aim of the procedure of holding a person criminally liable. More precisely, in order for the social reintegration to be effective, the state should come up with the right solutions, by enacting functional sets of laws, containing norms that take into account first and foremost the respect of the fundamental human rights.

At the same time with the enactment of the above-mentioned act, there was adopted the Government's Order no. 1897/2006, which ratified the rules governing the application of Act no. 275/2006 on the execution of penalties and measures ordered by judicial authorities in the course of a criminal trial. The set of rules comprised in the above-mentioned Order has actually applied the firm directions imposed by the European institutions in this field, the focus being the creation of an optimal framework that could allow for social reintegration.

To this end, it is important to mention the Recommendation No. R (87) 3 of the Council of Europe's Committee of Ministers to Member States on the European Prison Rules, adopted on 12 February 1987, which sets out, as a basic principle, that deprivation of liberty shall be effected in material and moral conditions that ensure respect for human dignity and are in conformity with these rules. The same recommendation states, from the very Preamble, that all persons deprived of liberty shall be treated with the respect of fundamental human rights.

Given the broad range of European recommendations and directives in this field, the Romanian state was obviously confronted with a series of issues related to the assurance of material conditions of detention that should be in accordance with European requirements.

This aspect added to the overcrowding of prison inmates, thus forcing the state to adopt methods of implementation, both legislative and material, from a logistic point of view, by which detention conditions should not lead to a violation of the articles in the European Convention.

In order to complete the general provisions in the field of execution of penalties and other measures ordered in the course of a criminal trial, ever since 1998 there was enacted the Government's Order no. 487/1998 amending and completing the

Government's Order no. 65/1997 on the organization and functioning of the Ministry of Justice, thus being established the Probation Service within this ministry.

Subsequently, by Order of the Minister of Justice no. 2626/C/2000, said service was reorganized under the name of the Department of Supervision and Social Reintegration, still subordinated to the Ministry of Justice, and later on, there were established the services of social reintegration of offenders and of supervision of execution of non-custodial sentences, as special agencies, attached to each court house (tribunal), under the coordination of the Department of Supervision and Social Reintegration.

In 2006, the name of the services was modified, by Act no. 23/2006, thus becoming the Probation Service.

Once enacted the new Penal Code and the new Code of Criminal Procedure, a re-shaping of the probation system was imminent, taking into consideration the significant amendments brought to the regime of non-custodial sentences.

Therefore, alongside with the adoption of the new codes in criminal matters, in force since the 1st of February 2014, new laws became necessary in order to create a legal framework that would lead to increased efficiency of the measures to be ordered by judicial authorities.

Thus, there were enacted Act no. 254/2013 on the execution of penalties and custodial measures ordered by judicial authorities in the course of a criminal trial, Act no. 253/2013 on the execution of penalties, guidance and supervision orders and other non-custodial measures ordered by judicial authorities in the course of a criminal trial, as well as Act no. 252/2013 on the organization and functioning of the Probation Service.

Once this set of laws entered into force, they aimed at setting out a modern way of executing criminal penalties, and as a result, Act no. 275/2006 was repealed, thus two distinct laws remaining valid, depending on the regime of the measures ordered in the course of a criminal trial, namely custodial and non-custodial ones.

As regards Act no. 254/2013, it is destined to complete the serious reform in criminal matters signaled by the adoption of the two new codes, but also to improve the institutions created by the former Act no. 275/2006. If the latter law was meant to open up a new horizon in the matter, by respecting the standards imposed by the European Court, as a result of the multiple convictions of Romania in the field of detention, Act no. 254/2013 shapes out, in a particularly European manner, institutions that complete and harmonize the provisions of the new Penal Code and the new Code of Criminal Procedure.

Said act actually details the elements of some new institutions approached by the legislator, such as home arrest, as well as the way in which different substantial or procedural provisions are applied in practice, aiming at the social reintegration of the convicted individuals, their reeducation or the physical and psychical development of the former in order to dissuade them from committing further offenses.

At the same time there has been settled the judge in charge with the supervision of deprivation of liberty, who carries out his activity within penitentiaries, custody and arrest centers, as well as within educational and detention centers, whose main duty is to supervise and control the lawful character of the execution of penalties and custodial measures.

Therefore, the new act contains a series of guarantees in determining strictly whether the state respects or not the fundamental human rights in the course of imprisonment, taking into account the multiple international and European regulations

in the field, both those preceding Act no. 275/2006 and the more recent ones of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as well as the current case-law of the European Court of Human Rights. (the affair of *Petra vs Romania.*)

In order to shape out more clearly a positive result of the new regulations in the field, it should be mentioned that by the enactment of the new set of laws, the legislator took into consideration the firm position of the European Court of Human Rights which, in the area of political rights, stated that the global prohibition of the right to vote to all convicted individuals who execute a custodial sentence, a measure that was inherently applicable in the former legislation, regardless of the length of the sentence and irrespective of the nature and gravity of the offense, exceeds the acceptable margin of appreciation, being incompatible with article 3 of Protocol I (the affair of *Calmanovici vs Romania*).

As regards the enactment of Act no. 253/2013, it brings about a new vision in the field, setting out a series of non-custodial institutions, such as the suspended sentence with probation, supervised freedom (probation), as well as certain obligations imposed on minor offenders, suspended sentence with probation applicable to minor offenders, temporary release under judicial control. Also, there have been inserted new institutions, destined to represent an efficient alternative to deprivation of liberty, such as the deferred imposition of a sentence or community work.

Such legislative necessity, translated into the enactment of laws which create the general framework of coercion aiming at social reintegration by non-custodial measures, is in relation with the state penal policy, since the legislator understood that the application of measures in criminal matters is to be done effectively, depending on each particular case, and that many times a non-custodial measure proves more efficient than custodial ones.

The new provisions identify the institutions in charge of executing or supervising the fulfillment of obligations imposed on the convicted individual, as well as the cases of breach of preventive measures ordered by judicial authorities.

Concerning Act no. 252/2013 on the organization and functioning of the probation system, it settles the legal framework for the application of the values on which a modern system of probation is based, according to the European Convention on Human Rights and the international and European conventions and recommendations.

These provisions pay special attention to the professional training of the personnel acting within the probation system, as well as to the research and study activities within the Probation Department at the Ministry of Justice.

The problem of a well-shaped probation system that can be inferred from these legal provisions, derives from the manner in which the state settles, through the law, aspects related to the social reintegration of individuals who commit criminal acts and is reflected in the finality of such methods, by a thorough analysis of the efficiency of the laws in the field of probation.

Concretely speaking, the problem raised is that of establishing, at a governmental level, the most efficient supervision instrument aimed at the social reintegration of those who committed offenses acknowledged and sanctioned by criminal courts. This aspect derives from the nature of penalties inflicted by the judge, taking into account that criminal sanctions applied in a criminal trial have not only a punitive side, meant to punish beyond any other reason, but also an educational side, destined to reeducate offenders.

The above-mentioned issue is related, to a considerable extent, to the penal policy adopted by each state, while, at a global level, there have been attempts to find methods more or less different by which specialized institutions may create the framework necessary to reach the objectives of social reintegration.

Following the legislative evolution in the field of probation, having regard to the general penal norms and the special provisions of Act no. 252/2013, it is to be remarked that the state puts greater focus on the last stage of a criminal trial, namely that of execution of criminal sentences.

Therefore, it is deemed as extremely important the fact that both the legislative and the judicial authorities treat with great attention both the rules on finding the truth or establishing the guilt during the stages of pre-trial investigation and the judgment, but also subsequent to the establishment of guilt, with an aim to supervising the conduct of convicted individuals.

This fact derives, as we have mentioned previously, from that the role of a criminal penalty does not consist only of punishing, as we might infer from the very name of the legal institution, but also of succeeding to reeducate the individuals targeted by these sanctions.

It is true though that, by rendering efficient the methods of coherent transposition of probation rules, by enacting special laws and institutions in the field of probation, such as the new provisions that have entered in force at the same time with the new codes in criminal matters, the state has only gains and benefits, both socially and economically.

From a social point of view, the reintegration into the community of those who committed criminal acts, manages to create a social stability of the environment in which they are integrated, leading to a feeling of security of the citizens with whom the convicts come into contact following their penal sanctioning.

On the other hand, from an economic point of view, an efficient reintegration of these individuals into the society means that they have to respect the working rules within different companies or institutions which carry out their activity with the aim to obtaining profit.

By designating probation officers – or "case managers" as they are called in the internal penal legislation, the state succeeds in doing an analysis of each individual taken separately, the probation services appointing well trained persons, with proper education, in order to permanently supervise the process of the individuals' reintegration into the community. This goal can be achieved only through a distinct and detailed analysis of each person, as well as through a very complex knowledge of each individual's psychology. Only this way can we talk about an efficient approach of the state, by its specialized agencies, destined to contribute substantially to the reeducation of offenders.

However, many times there are references to the inefficiency of such a system, based firstly on the idea that the persons who commit offenses and prove to be perseverant in the criminal career, are "built" in such a way that any attempt of the state to improve their deviant behavior leads to no result, thus recidivism being born.

Undoubtedly we agree that in certain situations, the perseverance in committing offenses, caused by different internal or external factors, succeeds in overcoming any proceeding meant to correct criminal behavior, but it is true as well that if the state manages to exactly discover the causes behind the commission of such acts, the fight for achieving the goal of social reintegration is considerably facilitated.

Concretely, it is highly unlikely that the state may aim at socially reintegrating all the persons convicted for having committed offenses, since this phenomenon would be an utopia, instead the state, by implementing institutions in the probation field, by creating a coherent and efficient system, well organized at the level of probation services, aims to create the chance for each individual to be reeducated.

Therefore, no matter how efficient the contribution of state agencies to the achieving of the above-mentioned goals may be, they ultimately create an opportunity for the criminally sanctioned individuals to be socially reintegrated, by implementing a set of rules contained in the special acts in the field of the law on the execution of criminal penalties, while leaving room for their own persuasion and choices in order to reach the positive goal of reeducation.