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RACIAL DISCRIMINATION OF ROMA PEOPLE IN SPAIN

Cristina HERMIDA DEL LLANO[1]

Abstract:

Spain has one of the largest populations of Roma People in the EU, constituting approximately 8% of the total umber on the continent. Despite having lived in Spain for nearly six centuries, Roma People continue to suffer from grave injustices. Indeed, they are the most socially marginalized collective in the country and are among those who suffer most seriously from social exclusion, both in social and economic term.

Key words: *Roma People; Racial Discrimination; Anti-Gypsyism; Spain.*

INTRODUCTION

The Roma People/Gypsies[1] are the most numerous ethnic minority group in the current European Union (EU), with between 6 and

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This contribution is the result of the following research projects that are currently active: (1) as principal investigator of the European Project "The prohibition of racial discrimination in the European Union" (587051-EPP-1-2017-1-ES-EPPJMO-CHAIR), by the European Commission's Education, Audiovisual and Culture Executive Agency and co-financed by the University Rey Juan Carlos of Madrid, Spain; (2) through the research Bridge Project of the URJC "Immigration and Management of Cultural Diversity" (INGESDICUL) of 2020, which I direct; (3) as part of the UNESCO Chair on the Culture of Peace and Human Rights (ED/PLS/HED/17/111), directed by Antonio Rovira Viñas of the Universidad Autónoma of Madrid, Spain, of which I am a member.

8 million Gypsies living throughout its 28 member States. The greatest concentration can be found in the countries of Central and Eastern Europe: in Romania (with over 2 million), Bulgaria (around 700,000), Hungary (over 500,000), the Czech Republic (around 300,000), and Slovakia (nearly 450,000)[2]. Likewise, Spain has one of the largest populations of Gypsies in the EU, constituting approximately 8% of the total number of Gypsies on the continent[3]. This number has continued to increase as Romani people coming mainly from Romania and Bulgaria have arrived in the country, especially since 2002 when the visa requirement was waived for all citizens of these two countries, and then in 2007, when their countries of origin joined the EU[4].

It is noteworthy that, despite having lived in Spain for nearly six centuries, the Gypsies continue to suffer from grave injustices. Indeed, they are the most socially marginalized collective in the country and are

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[1] Following the recommendations of the European Council, there is a consensus among the international community that the term "Roma" covers the distinct groups and subgroups of existing Gypsies in Europe (Romani, travelers, Sinti, Calé, Gypsies, Romanichal, Boyash, Ashkali, Egyptians, Yenishes, Dom, Lom, Abdal …). In accordance with the terminology of the European institutions and international organizations, the terms "Gypsies" and "Romani" are used here indistinguishably to refer to these groups—which include nomads—without denying the specificities of each group.

[2] That said, the figure is even higher if we examine the European context, where we can say there are between 10 and 12 million. This figure includes the EU, the Balkan and other countries in the East such as, for example, Moldavia.

[3] "The Gypsy population has been present in Spain since the 15th century and, as in the rest of Europe, its history has been marked by persecutions, attempts at forced assimilation, and social marginalization. Currently, the Spanish Gypsy population is calculated to be between 725,000-750,000 people, figures for Spain that European institutions have used to calculate the Romani population within the whole of Europe." Vid. National Roma Integration Strategy in Spain 2012-2020 Reports, Studies and Research 2012. Ministry of Health, Social Services and Equality, 11.

[4] The number of Roma people of Romanian and Bulgarian nationality who, as citizens of the EU, exercise their right to freedom of movement and residence in Spain is difficult to quantify, given that they are integrated within large contingents of Romanian and Bulgarian citizens who have taken temporary or permanent residency in Spain, and due to the inexistence of registries that record the ethnicity of foreigners in Spain. Vid. Ibidem, 12.

among those who suffer most seriously from social exclusion, both in social and economic terms[1]. The situation is hardly unique to Spain; in fact, transgressions against the people known as the Roma likewise occur at alarming rates in the other member states of the European Union, where they suffer systematic discrimination.

This has led the European Council to begin using the term "anti-Gypsyism"[2] defined as "a specific form of racism, an ideology based on racial superiority, a form of dehumanization and institutional racism manifesting itself in, among other things, violence, a discourse exploiting fear, and discrimination in its most flagrant form."[3]

Valeriu Nicolae, the Secretary General of the European Council on Gypsy Affairs and himself a Gypsy activist, has insisted that anti-Gypsyism represents a specific type of racist ideology that is similar to but differs from other such ideologies, in spite of the overlaps it has with many other kinds of racism. In his words: "Anti-Gypsyism itself is a complex social phenomenon which manifests itself through violence, hate speech, exploitation, and discrimination in its most visible form. Discourses and representations from the political, academic and civil society communities, segregation, dehumanization, stigmata as well as social aggression and socio-economic exclusion are other ways through

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[1] Gypsies live throughout all regions of Spain, with highest prevalence in Andalusia (nearly 45%). The great majority is concentrated in the cities and, within these, there are often large numbers of families in socially disadvantaged zones. As a group, Roma members recognize each other, but it is worth noting the heterogeneity and diversity that exists in the heart of the community itself. Vid. Andrés, María Teresa, *The Gypsy Community and Education.* Gypsy Secretariat Foundation. https://docplayer.es/97815889-La-comunidad-gitana-y-la-educacion-ma-teresa-andres.html.

[2] Anti-Gypsyism or hostility toward Gypsies is expressed by means of different terms in various member states, such as, for example, "Antiziganismus" in German. Vid. Resolution of the European Parliament, on February 12, 2019, on the need to strengthen the Combating Anti-Gypsyism in the Post-2020 EU Roma Framework and to intensify the struggle against anti-Gypsyism (2019/2509(RSP)).

[3] Vid. Recommendation for General Policy No. 13 of the ECRI "On the Struggle against Anti-Gypsyism and discrimination against the Romani/Gypsies" adopted on June 24, 2011.

which anti-Gypsyism is spread."[1] Clear evidence of this can be found in statements made in June of 2018 by the Italian Minister of the Interior, Matteo Salvini, when he proposed taking a census of Gypsies so as to facilitate the expulsion of all those whose residence status in Italy was irregular. And, as if this was not enough, he further openly lamented having to "keep the rest."[2] To this should be added further statements made a year later, in July of 2019, when Salvini asked delegates from the nation's government for a report on Gypsy camps in order to single out those living there who were in the country illegally so as "to prepare a plan for evicting them."[3]

The institutions of the European Union have not remained indifferent to the discriminatory situation faced by the Gypsies. On the contrary, they have reacted as might be expected: by attempting to combat grave injustices committed against this ethnic minority through a strong campaign to raise social awareness among member states and by encouraging them to implement remedial policies for this collective. Worth pointing out is the Commission Communication of April 5, 2011 entitled "An EU Framework for National Roma Integration Strategies up to 2020," (COM(2011)0173), as well as subsequent reports on enforcement and evaluation. One should not overlook the European Union's 2016 Report on Fundamental Rights (FRA), the EU-MIDIS I and II surveys from the FRA as well as other surveys and reports on the Gypsies; the European citizen initiative "Minority SafePack," registered on April 3, 2017; together with reports and recommendations from the Romani community, NGOs[4] and think tanks.

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[1] https://www.gitanos.org/centro_documentacion/herramientas/cajas/antigitanismo.html.es.

[2] https://www.gitanos.org/actualidad/archivo/124869.html.es.

[3] In a letter, the Ministry requested that the census be carried out within the space of two weeks, underscoring the need to focus on "situations of illegality and degradation that are frequently recorded in the settlements" and "that often constitute a danger to public order and safety." https://www.publico.es/internacional/gitanos-salvini-ordena-censar-campos-gitanos-crear-plan-desalojos.html.

[4] Vid. Hermida del Llano, Cristina, "The importance of non-governmental organizations of achieving the sustainable development goals: The fight against the racial

The European Parliament has also encouraged member states to take measures to combat discrimination against the Gypsies in the European Union. Among these figure: the Resolution issued on the International Day of the Gypsy People—anti-Gypsyism in Europe and recognition by the EU of the genocide against the Gypsy people during the Second World War on April 15, 2015[1]; the Resolution of October 25, 2017 entitled Fighting Anti-Gypsyism, which addresses certain aspects of Gypsy integration in the Union in terms of fundamental rights[2]; the Resolution of February 12, 2019, entitled Combating Anti-Gypsyism in the Post-2020 EU Roma Framework (2019/2509(RSP)) supported by the European Union Treaty (Article 2), the Treaty on the Functioning of the European Union and the Charter on Fundamental Rights of the European Union (Articles 1 and 21)[3].

Likewise, the Council has acted diligently since the approval of Directive 2000/43/CE, of June 29, 2000, on the application of the principle of the equal treatment of persons, regardless of their racial or ethnic origin[4]. Worthy of note are: the Recommendation by the Council of December 9, 1013, on the adoption of effective measures for

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discrimination of Roma in Europe," in *Public-Private Partnerships and sustainable development goals: proposals for the implementation of the 2030 Agenda*, Volume edited by Paloma Durán and Lalaguna, Sagrario Morán Blanco, Castor M. Díaz Barrado and Carlos Fernández Liesa. Verdiales López, D. M. (ed.), (Madrid: Instituto de Estudios Internacionales y Europeos "Francisco de Vitoria," Universidad Carlos III of Madrid, 2018), 17-32.

[1] DO C 328 of 6.9.2016, 4.

[2] DO C 346 of 27.9.2018, 171.

[3] European Union Charter on Fundamental Rights (2000/C 364/01) of 18.12.2000. Article 1: "Human dignity is inviolable. It must be respected and protected." Article 21: "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."

[4] DO L 180 of 19.7.2000, 22.

integrating Gypsies in member states[1]; the conclusions of the Council of December, 2016, on accelerating the process of integrating Gypsies, together with the conclusions of October 13, 2016 on special Report No. 14/2016 of the Audit Court; the Marco Decision 2008/913/JAI of the Council of November 28, 2008, on the struggle against specific forms and manifestations of racism and xenophobia under the Penal Code[2].

Similarly, among the relevant texts and measures on the international stage with regard to this topic, the following should be highlighted: the Universal Declaration of Human Rights and, within the purview of the European Council, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), as well as Council of Europe Parliamentary Assembly Resolution # 2153 (2017) on promoting the social integration of Gypsies and *travelers* and the jurisprudence of the European Court of Human Rights, urging recognition of the Romani community as a group needing special protection against discrimination.

With the respect to this last item, I would like to emphasize that the jurisprudence of the European Court of Human Rights has played a decisive role in combating racial discrimination against the Gypsies. Its actions on this issue can be grouped into two clearly discernable stages: the first, which was only minimally protective and relied on weaker legal arguments, led to two court decisions of note: *Nachova* (2005)[3] and *D.H. and others* (2007)[4]; and a second stage, which built upon these

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[1] DO C 378 of 24.12.2013, 1.

[2] DO L 328 of 6.12.2008, 55.

[3] ECtHR Grand Chamber Sentence, "Caso Nachova and Others v. Bulgaria", of July 6, 2005, Applications Nº 43577/98 and 43579/98. Regarding this sentence, I recommend reading Patricia Zuloaga's article "Hito y Retroceso en la Violencia Racial bajo el Sistema Europeo de Derechos Humanos: El Caso Nachova y Otros v. Bulgaria". Vid. https://anuariocdh.uchile.cl › index.php › ADH › article › download.

[4] ECtHR Grand Chamber Sentence, "D. H. and others vs. The Czech Republic," of November 13, 2007. With respect to this sentence, I recommend reading Fernando Rey Martinez's article "La Sentencia del Tribunal Europeo de Derechos Humanos, de la Gran Sala, "D. H. y otros contra la República de Chequia", de 13 de noviembre de 2007".

conditions, when the Court began to take the protection of ethnic equality more seriously and incorporated into its framework categories of Antidiscrimination Law taken from the Anglo-Saxon legal tradition. This Copernican turn in the Court's jurisprudence was not made without some ambivalence and backpedaling, which, on occasion, improperly cites the concepts involved in the prohibition of discrimination[1]. Indeed, a weakness in this jurisprudence has continued to be its adulterated use of the categories of Antidiscrimination Law. Unfortunately, this has taken place not only on the international European stage but also at the national level of the member states. Spanish Constitutional Court Sentence 69/2007, of April 16, on the well-known *Muñoz vs Díaz* case, is a good example of this.

1. SPAIN'S SENSITIVITY TO ANTI-GYPSYISM

It is only fair to point out that, over the course of the last thirty years in Spain, public authorities at all levels of the government have placed the social integration of the marginalized Gypsy community on their agenda, which has led to significant advances in this area, even if it is nevertheless true that serious challenges still remain.

At the state level, one must highlight the Congress of Deputies' 1985 approval of a non-binding resolution dealing with the creation of a National Plan for Gypsy Development, which led to the implementation of the Program of Gypsy Development (PDG) in 1989. One should further highlight the fact that this resolution's specific measures include financial and technical cooperation with non-governmental organizations

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Vid. https://www.gitanos.org/upload/74/54/Sentencia_Caso_Ostrava_Fernando-Rey-Martinez.pdf.

[1] We may recall the two dubious sentences of the Chamber involving the segregation of Gypsy children in schools, *Orsus* and *D.H. and others*. Or how Court decisions dealing with racial violence (even involving death) have not led to an appreciation of racially motivated violence, despite the fact that the suspects gave clear indications of their motivations. Or, even worse, how in the sentence for the Carabulea case the standard set in the Nachova affair was not even used. In the end, jurisprudence has permitted, despite undeniable progress, setbacks to occur.

(NGOs) pertaining to the associated Gypsy movement and/or those that worked on development issues involving the Gypsy population[1]. As for migrant people, such as Roma (Gypsies) from Eastern countries, the Spanish state establishes a clear distinction between Spanish citizens and foreigners, as is made patently clear in Articles 11 and 13 or the Spanish Constitution as well as in Law 2/2009, which reformed Foreign Nationals Law 8/2000[2]. Two further distinctions are made with regard to citizenship and immigrants by means of EU treaties and Directives dealing with the immigration issue[3]: one distinguishing immigrants who are citizens of the EU from those who are from countries that are not part of the EU, and one distinguishing those whose residency status is regular from those whose residency status is irregular.

With regard to the struggle against discrimination as far as legislation is concerned, the advances achieved by Directives 2000/43/CE[4] and 2000/78/CE[1] must also be mentioned, although it is

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[1] The cooperation is carried out in parallel: on the one hand, technical support to these organizations and, on the other, economic support to the programs of social interest that they carry out. The economic support is implemented by means of regulated subsidies during the annual convocations of the Ministry: specifically, the call for subsidies with a charge of 0.7% tax on the Income of Physical Persons (IRPF) for carrying out cooperative and social volunteer programs, which have been included since 1989, as programs of eligible general interest, the "Program for the Gypsy People," as well as calls for the strengthening of the associative networks within the framework of general subsidies.

[2] Government of Spain (200), Organic Law 8/2000, of December 22, of the Organic Law reform 4/2000 of January 11, on rights and freedoms of foreigners in Spain and their social integration. Government of Spain (2009) Organic Law 2/2009, of December 11, of Organic Law reform 4/2000, of January 11, on the rights and freedoms of foreigners living in Spain and their social integration.

[3] For example, see Directive 2008/115/CE.

[4] Directive 2000/43/CE of the Council, of June 29, 2000, on the application of the principle of equal treatment of people regardless of their racial or ethnic origin. Official Diary no. L180/22 of 19/7/2000. However, it must be recognized that Directive 2000/43/CE and the rest of the state legislation protecting non-discrimination (the Penal Code, the Workers' Statute, civil legislation, etc.) is barely known by professionals in the legal field who should be applying it and thus its practical application is practically nil.

also true that these were not adequately transposed to the specific context of Spain country, and only minimally so in terms of Law 62/2003 of December 30, which stipulates measures regulating fiscal, administrative and social order issues. A more adequate transposition would have been achieved via the Comprehensive Bill on Equal Treatment and Non-Discrimination (which, in the end, did not make it through Parliament before it was dissolved upon elections being called).

Let us keep in mind that, given the absence of an explicit legal concept on race within the framework of Spanish legislation and Directives 2000/43/CE and 2000/78/CE of the Council[2], the Spanish Courts instead turn to the jurisprudence and definitions codified by the European Court of Human Rights[3]. It is important to note that, together with all the politico-legislative measures in Spain, the jurisprudence of the European Court of Human Rights[4] remains essential, given that, as

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[1] Directive 2000/78/CE of the Council, of November 27, 2000, regarding the establishment of a general framework for the equal treatment in employment and occupation. Official Diary no. L 303 of 2/12/2000, 0016-0022.

[2] The definition of race given by Directive 2000/43/CE is negative in the sense that it is based on the opposition of separatist definitions and does not offer a positive and explicit description. In paragraph 6, one can read that the "European Union rejects theories that attempt to establish the existence of human races. The use, in the present Directive, of the term "racial origin" does not imply recognition of such theories." The Directive centers around equal rights and opportunities, including gender equality, and on the struggle against multiple forms of discrimination. EU (2000a) op. cit. (2000b) Directive 2000/78/CE of the Council, of November 27, 2000 regarding the establishment of a general framework general for the equal treatment in employment and occupation.

[3] According to the Committee for the Elimination of Racial Discrimination, for a particular collective to be considered a racial collective, it is enough that they are so perceived and "subjectively" considered as such. Vid. OHRC (2004) The Relevance of International Instruments on Racial Discrimination to Racial Discrimination Policy in Ontario. December of 2004.

[4] One of the conflicts presented to the Strasbourg Court in regard to racial discrimination involves the sterilization of Gypsy women without prior consent. The *V.C. vs. Slovakia* sentence of November 8, 2012 serves as an example. The plaintiff was a Gypsy woman in a public hospital who, after the birth of her second child by C-section and faced with the risks posed by a potential third pregnancy, was sterilized without previously having been asked for her consent. The Court found that this surgical

we know, it remains an indispensable tool for interpreting the Spanish system of rights[1]. Because the Rome Convention is the minimum "standard"[2] for all state signatories within the political tradition of democratic states, the Strasbourg Court has constructed interpretive

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intervention had violated her right to informed consent (art. 3), and further found a certain discriminatory bias due to racial reasons. Indeed, the probability of suffering this sort of surgical intervention is greater for Gypsy women, given existing racial prejudices in the country and particularly the idea that Gypsy women have too many children. Once again, as in the case of *Orsus vs. Croatia*, turning for support to the report from the European Commission against Racism and Intolerance as well as other European organisms that identify such racist stereotypes, the Court concluded that the Slovak state did not offer effective guarantees to ensure the reproductive health of Gypsy women and had thereby violated the right to a private family life under Art. 8 of the Convention. Although the case has racial connotations insofar as sterilization without prior consent affects the special way of life of vulnerable people from ethnic groups, the Court did not go on to examine, however, the eventual violation of Art. 14 of the Convention because the medical personnel did not act in bad faith, nor was there proof of the existence of any systematic public plan to forcibly sterilize women from the ethnic minority. The dissenting vote from Judge Mijovic calls attention, however, to the fact that the racial connotation of this case is crucial for understanding and settling it.

[1] The reasons supporting this claim are various. Teresa Freixes Sanjuán refers to them in her article "Las principales construcciones jurisprudenciales del Tribunal Europeo de Derechos Humanos. El standard mínimo exigible a los sistemas internos de derechos en Europa", *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, Nº 11-12, 1995, 97-115: "a) The integration of the European Convention on Human Rights at the internal level from its official publication imposed by Art. 96.1 of the Spanish Constitution (hereafter SP). B) The constitutional mandate for Art. 10.2 CE on the need to interpret rights and freedoms according to international treaties on these issues ratified by Spain. C) The configuration of the European Court of Human Rights (hereafter the European Court or ECtHR) as an organ for applying and interpreting the Convention in accordance with Art. 46 of the European Convention on Human Rights (hereafter the European Convention or just ECHR). D) The explicit recognition of the European Court as an organ for applying and interpreting the European Convention, formulated by Spain."

[2] "The role of the Convention as a minimum standard imposes, on the one hand, certain obligations on states to guarantee the effectiveness of rights and, on the other, obligations on individuals not to violate rights recognized by the Convention." Vid. Freixes Sanjuán, Teresa, "Las principales construcciones jurisprudenciales del Tribunal Europeo de Derechos Humanos. El standard mínimo exigible a los sistemas internos de derechos en Europa", ibídem.

parameters that, under Article 10.2 of the Spanish Constitution, must be taken into account in all exegeses made involving the issue of equality and non-discrimination, with respect to any right recognized by the Constitution[1].

Further important milestones in this process have been the steps taken toward greater institutional recognition of the Gypsy population. In 1999, the Congress of Deputies agreed to the creation of a *Subcommission for the study of the problems faced by the Gypsy population*; in 2005, it approved a parliamentary motion urging the government to promote the culture, history, identity and language of the Gypsy population. In 2007, this latter led to the creation of the Institute of Gypsy Culture, which was attached to the then Ministry of Culture. Likewise, the legislative assemblies of various autonomous communities have included, in reforms of their Statutes of Autonomy, explicit references to Gypsy communities that have historically been present in their territories[2]. Also, during the last few years consultative and representative organs of the associated Gypsy movement attached both to the General State administration and to various Autonomous Communities[3] have been established.

Governmental plans in the areas of employment, social integration, etc. have also made, especially over the last decade, explicit

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[1] As Freixes Sanjuán has pointed out in her article "Las principales construcciones jurisprudenciales del Tribunal Europeo de Derechos Humanos. El standard mínimo exigible a los sistemas internos de derechos en Europa", ibídem: "…under Art. 10.2 CE, the European Court's interpretation of limits, there is a construction of general reach that holds a special meaning. The "test" developed by the ECtHR constitutes a guarantee of supreme importance, acting as the limit of limits, and which much be respected by both the legislator and the enforcer of regulatory norms in the exercise of fundamental rights, as well as by individuals who, upon exercising their rights, may infringe upon the rights of other people. Hence the great importance of the European Court's jurisprudential construction to our system of rights."

[2] These Autonomous Communities have been Andalusia, Aragon, Catalonia and Castile and León.

[3] Examples of this are the creation of the State Council of the Gypsy People in 2005 as well as the formation of organs with similar characteristics in Catalonia, Basque Country, Catalonia and Castile and León.

references to the Gypsy population[1], which has allowed for an alignment of different measures, the identification of good practices and for greater levels of cooperation among those involved. The inclusive focus of social policies that possess a universal character has been complemented by measures specifically directed at those Gypsy persons who experience greater difficulty in accessing common services because of their disadvantages and social marginalization, in accord with the Common Basic Principles of Integration of Rome no. 2: "Focus explicitly but not exclusively on the Gypsy population" and no. 4: "Aim for the total integration of the Gypsy population into society." [2]

These measures are, in part, a reaction to serious complaints made by, among other entities, the non-governmental organization SOS Racism, who in their "2008 Annual Report on Racism in the Spanish State" called attention to the fact that "over the course of the last year, the Gypsy population has been the most flagrant as well as the most deeply assimilated target of discrimination within the Spanish state," or by the Gypsy Secretariat Foundation, which since 2005 has compiled and published an annual report entitled "Discrimination and the Gypsy Community."[3]

As far as the struggle against discrimination is concerned, not only have the instruments and mechanisms of protection against potential victims been strengthened with the transposition of Directive 43/2000 into Spanish law, but in recent years specialized prosecutors have been appointed to handle hate crimes and crimes of discrimination in the provinces of Barcelona, Madrid and Málaga. Recently, the Attorney General appointed a deputy prosecutor from the Supreme Court tasked

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[1] For example, the Kingdom of Spain's National Plan for Social Inclusion of 2008-2010 included specific measures for the Gypsy population, such adopting a specific state action plan as well as autonomic plans, in addition to the outlining the duties of the State Council of the Gypsy People.

[2] Vid. National Strategy for the Social Inclusion of the Gypsy Population in Spain, op. cit., 18.

[3] The central mission of these reports is to make known verifiable facts, selected from practical experience from the over seventy work centers of the FSG throughout Spain, related to the daily reality of ethnic discrimination against the Gypsy community.

with the legal oversight of equality and non-discrimination issues. Also notable is the creation of the Council for the Promotion of the Equal Treatment and Non-Discrimination of People of Racial or Ethnic Origin, comprised of two entities from the Associated Gypsy Movement together with the Network of Assistance to Crime Victims, which is sponsored by said entity. All these initiatives have been developed with the active involvement of civil society organizations according to the Common Basic Principles for the Integration of Roma People no. 9: "Participation of civil society" and no. 10: "Active participation of Gypsy persons."[1]

In light of all the advances to date, it is even more surprising that such judgements as Supreme Court Sentence 58/2018, of January 25, 2018, continue to take place. In this case, one can clearly discern a *race blind* approach[2] to the subject at issue, in comparison to the *Muñoz Díaz vs. Spain* sentence.

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[1] Vid. National Strategy for the Social Inclusion of the Gypsy Population in Spain, op. cit., 20-21.

[2] In accordance with the previous facts of the Sentence, Doña Luz, a Gypsy woman from Jaén, got married by Gypsy ritual with Nicanor in 1974. In 2014, Nicanor died and Luz requested a corresponding widow's pension from the INSS. The INSS rejected it because the marriage had not been registered in the Civil Registry. Since it was not considered a valid marriage, Luz appealed to the TSJ in Andalusia, alleging discrimination because of ethnic reasons and offering as her main argument the ECtHR sentence in the case of *María Luisa Diaz Muñoz vs. Spain*. The TSJ granted the appeal and forced the INSS to pay said pension. Faced with the resolution, the INSS dissented and appealed to the Supreme Court. The Supreme Court granted the appeal of the INSS and found that the arguments given by the INSS for denying the widow's pension were valid. It was thought that, although there were similarities between this case and the María Luisa Muñoz Díaz case, the fundamental difference was that, in the case of Luz, the good faith of the bride could not be attested to.

According to the Supreme Court, Doña Luz and her husband had no official documentary evidence stating that they were a married couple," unlike what occurred in the case of María Luisa, who had provided official documents. Due to this lack of documentary evidence, the SC decided to follow the previous Constitutional Jurisprudence, given that it did not consider it in conflict with the ECtHR sentence.

In fact, if we place value on the lack of documentary evidence, we discover that, after the ECtHR sentence, we find ourselves before another case of presumed racial discrimination against a Gypsy woman, finding that the judgement is far from controversial. This sentence is legally based on Spanish constitution jurisprudence,

2. THE SPANISH STRATEGY FOR THE SOCIAL INTEGRATION OF THE GYPSY POPULATION IN SPAIN

In 2012, the Spanish Cabinet took an important step forward when it passed the Spanish Strategy for the Social Integration of the Gypsy Population in Spain. This new strategy was derived from the April 5 Commission Communication to the European Parliament, the Council, the Economic and Social Committee, and the Committee of Regions, entitled An EU Framework for National Roma Integration Strategies up to 2020 (COM (2011) 173 end). Said Communication, countersigned by member states during the May 19 meeting of EPSCO and by the European Council in its meeting on June 24, urged member states to approve national strategies for the social integration of the Roma/Gypsy population (or a set of measures), to be presented by the end of 2011. The strategies were to be conceived in coordination with the *European Strategy 2020* and the *National Reform Plans* of each country.

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instead of ECtHR jurisprudence, precisely because the case is regarded differently than that of María Luisa Díaz Muñoz. The main argument given by the SC to establish the radical difference between both cases is that, in various official documents, unlike the María Luisa case, their condition as unmarried individuals is explicitly mentioned and in none of them do they appear as a married couple. It is for this reason that it was found that there was no good faith to the claim that the marriage was valid, in contrast to the María Luisa case.

In my view, what is being forgotten is the social role played by a widow's pension, which is to compensate for a possible economic imbalance caused by the rupture of a matrimonial union in the event of death. In the case of Gypsy women, this imbalance is even more pronounced, precisely because it is the man who generally provides for the family, while the woman generally devotes the greater part of her life to taking care of the latter. We need to keep in mind that the Gypsy community has its own traditions and rites and, due to the social exclusion they suffer, they are excluded from many formalities by simple ignorance, which is, in the last instance, the result of such marginalization.

As in the case of María Luisa, there are interpretive divergences among the diverse juridical organs. The disparity of judicial decisions in similar situations, in my view, does nothing but erode legal security, above all if we keep in mind that the ECtHR has already found in favor of the plaintiff in a similar case.

The Strategy touched on four key areas integral to social integration: Education, Employment, Housing and Health. Certain quantitative goals were set for each of these, which took the form of target population percentages to be achieved by the year 2020, along with intermediate goals for 2015. Beyond these four areas, the Strategy included complementary guidelines dealing with social activity, participation, a better general awareness of this collective, gender equality, non-discrimination, the promotion of culture, and special attention to Romani populations from other countries.

It is interesting to confirm that, as the National Roma Integration Strategy in Spain 2012-2020 notes, one of the greatest evils of Spanish society is the existence of prejudice against the Gypsies. Indeed, the "persistence of negative prejudice against Gypsy people by the Spanish public" means that the Gypsy population continues to be one of the most socially marginalized groups in the country. In recent years, various awareness campaigns have had positive effects, but discriminatory behavior and practices persist in society and constitute a key obstacle to the real and full social integration of the Roma people. Indeed, the Gypsy population's subjective perception of discrimination against them is pronounced[1], especially when it comes to the search for employment, access to locales and services, and housing. The increased presence and interaction of Gypsy people in public space, their improved understanding of their rights, the development of mechanisms and services to detect discrimination and pursue complaints by civil society organizations, and the effects of economic crises[2] may all be working in

[1] In this last study, which examined the subjective perception of discrimination experienced by potential victims, people of sub-Saharan origin were the collective with the greatest proportion of individuals who claimed to have been discriminated against, followed by Gypsies. *Panel on discrimination because of racial or ethnic origin (2010): the perception of potential victims*. Madrid, 2011. Ministry of Health, Social Policy and Equality.

[2] The current economic crisis may be exacerbating the prevalence of racist attitudes and discrimination based on racial or ethnic origin, according to the conclusions of the *Panel on discrimination due to racial or ethnic origin (2010): the perception of potential victims*. Madrid, 2011. Ministry of Health, Social Policy and Equality.

concert to make the discrimination suffered by Gypsy persons on account of their ethnic origin[1] more frequent and visible."

The National Roma Integration Strategy in Spain 2012-2020, in my view, gets it right when it supports the social integration of this group via goals and measures directed at the Spanish population as a whole. Indeed, the Strategy must make an impact upon Spain's general public and not only upon the Gypsy population itself. Such plans and policies are meant to take root within the Gypsy population in order to ameliorate the social disadvantages that they suffer. Thus, such plans and policies must both be inclusive, flexible and accessible[2].

In terms of non-discrimination and the promotion of equal treatment, the National Roma Integration Strategy in Spain 2012-2020 established the following goals:

" • The promotion of the effective application of European and Spanish legislation on non-discrimination, addressing racism and hate crimes and the implementation of the recommendations made by international

[1] Vid. National Roma Integration Strategy in Spain 2012-2020: 16-17.

[2] In the framework of the Human Rights Plan, approved by the Council of Ministers on December 12, 2008, certain measures were established that have a potential impact on the Gypsy population. In addition to the measure involving the specific plan to improve the living conditions of the Gypsy population (which has been referred to in another section), the Human Rights Plan incorporated a Strategic Plan for Citizenship and Integration, as well as the approval of a national strategy for the struggle against racism and xenophobia.

The Strategic Plan for Citizenship and Integration II 2011-2014, which is aimed at integrating non-nationals, includes provisions and measures of interest for the Gypsy population, such as those dealing with the transversal areas of Coexistence, Equal Treatment and Non-Discrimination, and Participation. This beneficiary population of this plan expressly includes European citizens from Romania and Bulgaria.

The National and Integral Strategy against Racism, Racial discrimination, Xenophobia and other Related Forms of Intolerance, approved in November of 2011, in its analysis devoted a section to the racism suffered by the Gypsy population. The measures stipulated under the framework of the Penal Code include monitoring cases of discrimination as well as specific actions in the areas of education, employment, health, housing, communications media, the internet, sports and awareness. Vid. National Roma Integration Strategy in Spain 2012-2020 : 36.

organizations, such as the European Council, to Spain in dealing with discrimination or anti-Gypsyism.
• Strengthening cooperation with the State Council for the Promotion of Equal Treatment and promoting the active participation of Gypsy organizations.
• Developing informational and awareness-raising materials aimed at reducing and eradicating the discrimination suffered by the Gypsy population.
• Developing training activities for civil servants and other key agents, especially professionals working in the field of law, police services, at professionals working in services and public resources and professionals in the field of communications media.
• Fostering informational programs and activities for the Gypsy population, so that they know their rights and duties.
• Establishing measures that pay special attention to Gypsy women who have been the victims of multiple cases of discrimination.
• Carrying out studies and reports that detail how the discrimination faced by the Gypsy community is evolving (Panel on Discrimination of the State Council for the Promotion of Equal Treatment).
• Supporting programs and services that orient, accompany and legally assist victims of discrimination (Network of assistance to victims).
• Special attention to discrimination against Gypsy persons from other countries and a guarantee of their rights."[1]

With respect to the Romani population from other countries: "The Strategy shall pay special attention to Romani community citizens residing in Spain, or to other persons of Romani origin from third countries. The working focus shall be inclusive and shall aim to facilitate participation in the set of measures and activities directed at the Spanish Gypsy population. At the same time, when circumstances recommend it, it shall enact specific measures and activities in order to promote and facilitate their social integration. These activities shall focus specifically on:

[1] National Roma Integration Strategy in Spain 2012-2020: 43.

• Protecting fundamental rights by means of the effective application of European instruments, particularly directives involving free movement and residence[1] as well as antidiscrimination[2].
• Basic attention and mediation for social services.
• Support and school monitoring.
• Favoring Gypsies' incorporation into existing programs and activities dealing with training and access to employment.
• Language instruction.
• Access to housing in inclusive environments.
• Promoting transnational assistance programs, especially with Romania, with the support of the instruments provided by the European Social Fund.

To develop these measures, special attention shall be given to the involvement of local administrations, especially those of municipalities in which there is a greater number of European Romani citizens or which have special difficulties accommodating and integrating the latter."[3]

I would like to highlight that shortly after the passage of the National Roma Integration Strategy in Spain 2012-2020 Resolution CM/ResCMN (2013), of July 10, 2013, adopted by the Spanish cabinet[4], other notable advances in the struggle against discrimination took place as well, such as the creation of a State Council for the Promotion of Equal Treatment and Non-Discrimination for Persons of Racial or Ethnic Origin, the creation of the State Council of the Gypsy People and improvements in the schooling of Gypsy students. That said, as could

[1] European Directive 2004/38/CE on the right of Union citizens and members of their families to move and reside freely in the territory of member states.
[2] European Directive 2004/43/CE on the application of the principle of the equal treatment of people regardless of their racial or ethnic origin.
[3] National Roma Integration Strategy in Spain 2012-2020: 44-45.
[4] Resolution CM/ResCMN(2013)4 on the implementation of the Framework Convention for the Protection of National Minorities by Spain. *(Adopted by the Committee of Ministers on 10 July 2013 at the 1176th meeting of the Ministers' Deputies).*

have been predicted, the Resolution also pointed out important shortfalls in policies aimed at the social integration of persons of Gypsy ethnicity[1].

Still, the National Roma Integration Strategy in Spain 2012-2020 does not fail to note the importance of political activity at the European

[1] The recommendations made by the Spanish government are as follows:
Equal treatment and non-discrimination: underscored by the urgent need to approve the Integral Law for Equal Treatment and Non-Discrimination project not approved by the last legislature. It proposes developing a system for compiling data about discrimination and crimes motivated by racism for the justice system in order to promote a more effective application of legislation against discrimination, and to provide adequate support to the duties of the State Council for the Protection of Equal Treatment and Non-Discrimination for People because of their Racial or Ethnic Origin.
The need to fund diverse plans and strategies of social inclusion aimed at the Gypsy population and to ensure that budget cuts do not affect this funding.
Improving the measures aimed at combatting acts of anti-Gypsy violence and hate crimes against members of the Gypsy community.
Addressing the problem of school absenteeism by Gypsy students and cases of school segregation in certain schools.
Strengthening the social and political participation of the Gypsy community and the decision power of the State Council of the Gypsy People.
Taking much more energetic steps to promote the access of male and female Gypsies to communications media, including support for the training of Gypsy journalists; combatting the dissemination of prejudicial view and stereotypes against Gypsies in communications media.
Guaranteeing the promotion of Gypsy students beyond primary education, successfully financing their secondary education, and revising school texts in order to ensure that they contain adequate and sufficient information about Gypsies—their culture, history and language—that will reach students at all levels of education.
Actively promoting the participation of the Gypsy community in elected organs at all levels, supporting the work of the State Council of the Gypsy People in order to guarantee regular and effective consultation on all matters that concern the Gypsy population.
The Resolution calls attention to the serious impact that the crisis is having on the employment of persons of Gypsy ethnicity.
It proposes taking steps to prevent Gypsy street vendors from losing their source of income as the result of the application of new legislation on street markets and street vending.
Supporting projects to eradicate slum-dwelling and poor housing by means of good existing practices in order to promote the integration of Gypsy families in adequate housing.

level[1], and points out that the following are essential tasks: continued active participation in European institutions and forums, including the European Council, and the promotion and implementation of initiatives in cooperation with other countries; active participation in the Platform for Roma Inclusion and in the Decade of Roma Inclusion 2005-2015; the continuation and strengthening of the European Network for Roma Inclusion within the framework of the Structural Funds (EURome)[2].

Hence, given this context it is of enormous interest to refer to the intermediate Revision of the EU Framework of National Roma Integration Strategies (2017)[3], drafted by the European Commission, which attests to the value added by the Framework, the pertinence of the EU goal of Roma integration and the need to continue combining specific and general approaches.

As highlighted in the intermediate Revision of 2017, education is the area where the situation of Gypsies has witnessed the most significant improvements. It is also the most noteworthy area when it comes to the number of Roma integration policies from member states acting in concert. The improvement is most discernible concerning "premature school dropout," with a decrease in such rates among Gypsies in all the member states that were surveyed.

Spain stands out for its significant improvements, together with such countries as Slovakia, Bulgaria, the Czech Republic and Romania, which is a clear testimony that Spain is successfully applying strategies

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[1] Vid. : 45-46.

[2] This network was created with the support of the Administrative Unit of the European Social Fund in Spain and the Gypsy Secretariat Foundation with the goal of promoting the effective use of Structural Funds for the social integration of the Romani population. The network unites managing authorities of the Structural Funds (mainly the FSE) with organs responsible for policies involving the Gypsy population in the twelve countries that currently form it. Available information on the internet: http://www.euromanet.eu/IN.

[3] Communication from the Commission to the European Parliament and the Council. Intermediate revision of the European Framework for National Strategies for the Social Inclusion of the Gypsies {SWD(2017) 286 end} Brussels, 30.8.2017 COM(2017) 458 end.

to prevent school dropout and so is on track to achieve the European 2020 goal in this area.

The other related improvement concerns "early childhood education and care": the participation of Gypsy children has increased in most of the member states, with significant progress being made in Spain together with such countries as Bulgaria, Greece, Slovakia and Hungary, although it has also worsened in other member states, such as Portugal and Romania. Greater awareness of the importance of child education is reflected in more measures and increased investment in this area, backed by legislative changes, such as the introduction of compulsory preschool years (Bulgaria, The Czech Republic, Finland, Hungary and Lithuania), which, however, did not occur in Spain.

The report points out that specific financial support is required to help particularly needy families face the indirect costs of childhood education (fees, food, clothes, transportation, etc.). Noteworthy too have been minor improvements in "compulsory education:" more than 9 out of 10 Gypsy children subject to compulsory education attend class in a majority of member states (except for Greece and Romania).

Although the greatest degree of progress has been made in the area of education, this does not mean that there are no remaining systematic challenges. In fact, among the greatest challenges is the struggle against "segregation in education" and the inadequate education of Gypsies in schools for special needs students, challenges that were underscored in the European framework, the Council Recommendation of 2013, the Directive on Racial Equality, and the European Semester.

In Spain, segregation is still a problem, given that Gypsy children attend schools where between 29 and 48% of fellow students are also Gypsies, a situation that is repeated in other countries, such as Greece, Croatia, the Czech Republic and Romania. Even worse is the situation in Slovakia, Hungary and Bulgaria, where Gypsies account for 60% of the children at such schools. This can only partially be explained by residential segregation. "Despite the growing numbers of member states that invest in measures aimed at promoting *integrative methods of*

teaching and learning[1], there are few active measures against segregation in several of the most seriously affected countries. In certain cases, EU funds have even been used to exacerbate segregation. Despite the fact that it has been amply demonstrated, there is still no widespread acknowledgement that integrated school environments and mixed classes are beneficial to both the Gypsy and non-Gypsy populations."

Thus, outstanding challenges in this area include the following: the costs of premature school dropout[2]; the difficulty in promoting the effective transition of Gypsies to secondary and higher education; linguistic deficiencies; and discrimination.

The improvements in education do not yet translate effectively into real employment. The numbers of so-called "ninis" (those who neither work nor attend university) among young Gypsies remain alarmingly high and, in fact, have increased in various member states (oscillating between 51 and 77% in Spain, Croatia, Bulgaria, Slovakia, Romania, the Czech Republic, and Hungary; only Portugal shows a clear decrease). This is explicable if we take into account the fact that the measures focus on the supply side, that is, on employability (through professional training, permanent learning, etc.) but do not pay proportional attention to eliminating barriers on the demand side, for example, through eliminating discrimination. It is for this reason that we

[1] The highlighting is in the original text of the document.

[2] The Gypsy Secretariat Foundation put into motion an initiative in September 2019, *The Gypsy School Desk*, with which it aims to ameliorate the situation suffered by Gypsy boys and girls at school in Spain: "Six out of every ten Gypsy students, both male and female, drop out of school without having completed their Compulsory Secondary Education. Take a seat but do not get too comfortable. This is what the Gypsy School Desk means: experiencing the discomfort of sitting at it and experiencing the obstacles it presents for Gypsy students. The education system does not guarantee equal opportunities, it does not compensate for initial disadvantages, nor does it address the segregation that disproportionately affects Gypsy boys and girls. With this measure, from the Gypsy Secretariat Foundation we request that their right to a quality education be guaranteed in Spain. We call upon public powers for a reform of the current Education Law that will promote a truly inclusive education, with special attention to the specific situation of Gypsy students, an emergency plan against school failure, and measures to prevent and reverse school segregation."

need to increase ways of mobilizing the private sector and incentivize employers who hire Gypsies, who in various member states constitute significant and growing proportion of the working-age population, by means of, for example, an explicit search for Gypsies in accordance with the framework of the Youth Guarantee and by considering social factors with regard to public hiring[1].

When we turn to the area of health, it can be seen that access to the basic coverage provided by the national health services continues to be a challenge and indeed shows no significant improvement in the most seriously affected countries, where nearly half the Gypsy population remains without "basic medical coverage" (in Bulgaria and Romania, but an improvement of 30 points was recorded in Greece). This remains the case despite measures aimed at eliminating obstacles preventing Gypsies from accessing the health system, for example, the lack of civil documentation. In general, the way Gypsies perceive their own health status has improved (with the most marked improvements occurring in Romania, Bulgaria, Hungary, Portugal and Greece), which indicates a certain level of success in other measures dealing with health, such as those that promote awareness about health issues, access to vaccines, medical checkups, pre- and post-natal attention and family planning. This improved opinion of their own health status may also be related to a decrease in the rates of Gypsies who suffer hunger regularly in the majority of countries at issue. The civil provision of services to Gypsy women takes on special urgency when it comes to their health, but health reforms do not often explicitly mention the needs of Gypsies[2].

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[1] According to the National Contact Points for the Gypsy population, the single most important factors for success is reaching Gypsies via services for general employment, for example, though individual support, or by reaching them by means of social workers or those in charge of Gypsy employment. The National Contact Points for the Gypsy population highlight the following, among others, as key challenges: a lack of skills and expertise; discrimination; the need to convince employers of the importance of managing diversity and the struggle against discrimination; the need for greater attention to be paid to Gypsy women.

[2] These conclusions are confirmed by the National Contact Points for the Gypsy population, which mentions among the successes: awareness of health matters; the

As far as housing is concerned, small improvements can be seen with respect to Gypsies' access to basic services. The percentage of Gypsies who live in houses without running water, toilets, showers or baths in various member states has decreased (especially in Bulgaria, Romania, Slovakia and the Czech Republic). Their access to the electricity supply has also improved slightly, with percentages exceeding 90% in most member states (except for Portugal and Greece). Nevertheless, in various member states (the Czech Republic, Spain, Italy and Portugal), Gypsies suffer increasing discrimination when it comes to housing. In the national strategies for Roma integration, member states focused mainly on fomenting non-discriminatory access to social housing and some even adopted explicit measures against segregation. Still, several of the most affected countries boast no such measures against segregation, while others do not even address the issue of non-discriminatory access to social housing at all. It is vital that vigorous measures be adopted in both areas, potentially financed by funds from the EU in accordance with the Commission's guidelines on desegregation. This is especially important in the current context of frequent evictions in various member states of the European Union[1].

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promotion of a healthy lifestyle; the emphasis on prevention; health literacy; Gypsy health mediators; civil participation and inter-sector cooperation among the various interested parties. Among the proposed challenges: the lack of health coverage and general practitioners in Gypsy population zones; the underuse of health services; problems of physical and mental health; adolescent pregnancy; and the need for Gypsy health professionals.

[1] Among the successes mentioned in the National Contact Points for the Gypsy population (which tend to be prerequisites for future change) are: the allocation of housing to marginalized communities under the operative programs of the EIE Funds 2014-2020; surveys about the housing situation and new action plans or strategic documents on housing. On the other hand, among the challenges, it points out: the limited availability and low quality of social housing; discrimination in the housing market; and segregation and the creation of ghettoes.

CONCLUSIONS

In conclusion, we can say that with the turn of the century certain advances began to materialize in the struggle against racial discrimination against Gypsies in the European context, thanks to the work carried out by its institutions, courts, NGOs and civil society, but that serious challenges still must be overcome before we reach a truly inclusive society.

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PANDEMIA AND CONSTITUTIONAL LAW: SOME REFLECTIONS ON THE GERMAN EXPERIENCE

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Abstract:

The fight against the Covid 19 pandemia in Germany can be regarded, until now, as rather successful. Serious, large-scale restrictions of fundamental rights have been temporarily imposed on the population. A quick and efficient response to the infection risk was indispensable; the institutional and organizational measures taken for this purpose have stimulated the discussion how far the rule of law exigencies have been observed.

Key words: *pandemia; challenges for constitutional law; legal measures for protection against infection.*

1. PANDEMIA AND THE CHALLENGES FOR CONSTITUTIONAL LAW

a) The challenges: restriction of fundamental rights, questions about rule of law and complexity through federalism

The fight against the Covid 19 pandemia in Germany can be regarded, until now, as rather successful. Serious, large-scale restrictions of fundamental rights have been temporarily imposed on the population.

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A quick and efficient response to the infection risk was indispensable; the institutional and organizational measures taken for this purpose have stimulated the discussion how far the rule of law exigencies have been observed.

The complex constitutional impacts of the anti-corona fight have been multiplied by the structures of the German federal system which makes, as a principle, the governments of each of the 16 member states responsible for the taking of measures while the federal government has been limited to coordinate the member states' activities. This coordination has had a persuasive but not a legally binding character, due to the functional autonomy of the member states considered to have the state quality[1] and therefore to hold all the public functions in their hands except those transferred to the Federation by the BL[2]. This complex issue will be more closely considered later in the following analysis.

b) Constitutional and ordinary emergency law

The Covid 10 emergency is not a constitutional but a legislative emergency situation. This is important for the legal evaluation of the measures taken in this context. Constitutional emergency provisions (which have been introduced into the BL only in 1968[3]) are rather limited; they refer to *external emergency* (in particular defense, art. 115a – l BL, and tension, art. 80 a (1)[4]) and to *internal emergency* (legislation

[1] FCC (Federal Constitutional Court), vol. 34, 1,14 (decision of Oct. 23, 1951).
[2] See Art. 30 BL.
[3] See German Federal Parliament https://www.bundestag.de/dokumente/textarchiv/2018/kw21-kalenderblatt-notstandsgesetze-556672
[4] See also the further cases referred to by art. 80a BL: (a) consent of the Federal Parliament to the application of art. 80 a BL in serious cases in which neither the defense state is given nor the state of tension has been formally declared as well as (b) in cases in which a defense alliance has taken a relevant decision, and this with the consent of the Federal Government (the type (b) of cases according to art. 80a (3) BL). It shall be mentioned that art. 80 a BL is an "auxiliary" provision which does not authorize itself for determined measures but allows, on the conditions established by

emergency in case of institutional malfunction, art. 81 BL; protection by mutual assistance of the executives of the Federation and the member states in case of catastrophes and other particularly serious threats for public security and order, art. 35 BL, as well as in case of a threat against the existence of the State or against the free democratic order of the Federation or of a member state, art. 91 BL)[1].

We can see that most of the relevant provisions of the BL on emergency matters aim at guaranteeing efficiency and deal to a great extent with competence matters. The differentiation of functions foreseen in the federal system gets, in multiple respects, temporarily suspended and modified in such situations.

Emergency law in Germany is to a great extent expressed by ordinary legislation, either by laws of the Federation or of the member states according to the rules on legislative competence distribution as laid down in particular in article 74 BL. An example which is particularly relevant in the context of the pandemia is the concurring legislative competence of the Federation for measures against human and animal diseases which endanger the public or are contagious (art.74 (1) nr. 19), the legal basis for the federal law on the protection against infection diseases. Measures for fighting against emergency situations are to a large extent authorized by ordinary laws which are embedded in the constitutional framework and its safeguards. Ordinary emergency legislation can exist as an implementation of or a complement to the above-mentioned constitutional emergency provisions, as it is the case e.g. for defense and protection of the civilian population (art. 73 (1) nr. 1 BL)[2] or as an autonomous ordinary emergency legislation, as it is the case of the above-mentioned protection against contagious diseases. As

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this article, the application of emergency measures foreseen either by constitutional provisions or by ordinary legislation with express reference to this article.

[1] R. Zippelius and Th. Würtenberger, *Deutsches Staatsrecht*, 33rd ed. (C.H.Beck: 2018), 600 – 605.

[2] See also art. 73 (1) nrs. 9a and 10 BL.

an example for ordinary emergency laws of the member states we can refer to the legislation for the protection against catastrophes.[1]

c) The increase of complexity by the federal system

As it will be shown in the following explanations the type of concurrent competencies, the main type in legislative matters in the German federal system, can increase the complexity of ordinary emergency legislation. This results from the already mentioned idea that the member states are entitled, as a consequence of their statehood, to all State functions as far as they have not attributed them to the Federation by the BL. A concurrent competence allows the Federation, for some cases only under certain conditions[2], to adopt federal legislation in the relevant matter. As far as the Federation uses this competence by adopting a law, the member states have lost their original competence. This means that the member states remain competent in substance and in time as far as and as long as the Federation has not regulated the matter.

This can lead to some uncertainties with the interpretation of the legislative competences. A significant example is the issue of protection against infections. The legal basis for the main measures in the fight against the virus is the federal Law on prevention of and combat against human infection diseases ("Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen", short title: "Infektionsschutzgesetz" (IfSG)) of July 20, 2000 (BGBl. I S.1045), in force since January 1, 2001 with modifications adapting the contents to the virus crisis [3]). Also the member state Bavaria has adopted, on March 25, 2020[4], under the impression of the virus crisis, a Bavarian law on the protection against infections (with temporary force until October 31, 2020 and prolongation possibility) which complements the federal law by

[1] https://www.bbk.bund.de/DE/Service/Fachinformationsstelle/RechtundVorschriften/Rechtsgrundlagen/Bundeslaender/bundeslaender_node.html
[2] art. 72 BL
[3] last modification through article 2 of the Law of May 19, 2020 (BGBl. I S. 1018, 1024).
[4] GVBl. 2020, 174.

the possibility to declare, by the Bavarian government with successive control by the Bavarian Parliament, the "health emergency" if the functioning of the public health system is endangered, authorizing the seizure of medical material and the possibility to oblige organizations or persons to help.[1] However, it is not clear whether the member state Bavaria could adopt such a law which is only possible if the federal law on protection against infections leaves room for a member states regulation. This has been contested by the scientific service of the Federal Parliament[2] but the question is not clearly resolved. The interpretation of the federal law does not totally clarify whether the federal legislator wanted to cover the total field of infection protection or not. Finally this could only be decided by the FCC, which was, however, not addressed.

It has also to be mentioned in this context that independently of the character of legislation, might it be federal or member state legislation, the *execution* of the legal provisions is, as a principle, in the hands of the member states. It is characteristic for the German federal system that even federal legislation is executed by the member states executive. Federal administration is exceptional and has to be expressly authorized by the BL. Therefore the concrete measures against the pandemia have been and are in the hands of the member states' executives which have to act according to the relevant legislation but have an autonomous discretionary power when and in which way to act.

However, if life and health of individuals are concerned being values protected by the Constitution in article 2 (2) BL, the time for taking measures and the kind of these measures must be chosen in a way that the efficiency of the protection is ensured. The discretionary power of the executive, that is in general the government of the member state, ends up, under this perspective, in the *obligation* to act, immediately or as soon as possible as regards the time, and substantively to the extent

[1] https://de.wikipedia.org/wiki/Bayerisches_Infektionsschutzgesetz
[2] https://www.bundestag.de/resource/blob/691276/d7b39e76d5cd2649a5ffe3e6596df907/WD-3-081-20-pdf-data.pdf

which is considered to be indispensable for an efficient protection, and adequate as to the modality of action. The principle that discretionary power to act can be automatically reduced to the obligation to act is a well-known phenomenon in German administrative law[1], particularly in the field of security and police law, but is also applicable to the legislator if the Constitution requires action, either by an explicit constitutional order or implicitly as the obligation to protect a value embodied in a fundamental right. This latter obligation of the legislator to act[2] is much more general and leaves the legislative discretion intact to a large extent; it is not that specific and concrete as the obligation of the executive to act in the above-mentioned situation.

The governments act through legislation (insofar if the member states have the legislative competence), but mainly by regulation (which have normative character and must be based on formal legislation) or by administrative actions, normally with general reference to the addressees. Several problems arise in this context: which constitutional requirements must be fulfilled for adopting a normative regulation by the executive? Furthermore, can fundamental rights be restricted by regulations? And there is a parallel question: can the member states governments adopt regulations and measures which diverged from those adopted by other member states?

We see, regarding these questions that in the German federal system there is a vertical and horizontal complexity concerning competencies. The vertical one results from the distribution of legislative powers between Federation and member states, and from the diverging holders of legislative and executed powers. The horizontal complexity results from the autonomy of every member state grounded in its statehood. The horizontal divergence of executive reactions is due to the federal system and could only be modified by constitutional reform, which is not possible in a short time neither requested from the member states themselves.

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[1] O. Kopp and U. Ramsauer, *Verwaltunsgsverfahrensgesetz. Kommentar*, 19th ed. (2018): § 40 paras. 49- 51.
[2] F. Hufen, *Staatsrecht II.Grundrechte*, 3rd. Ed. (2011) :.53 – 55.

In the following reflections some of the relevant constitutional issues which arise in the *institutional* context, in the context of legislation and executive measures shall be addressed.

2. THE LEGAL BASIS FOR THE PROTECTION MEASURES IN THE FEDERAL LAW ON THE PROTECTION AGAINST INFECTION

a) Rule of law and its requirements for the legal basis

In many respects rule of law as the fundamental principle of modern constitutionalism is relevant in the fight against corona. Legality of executive intervention into freedom is one of the basic elements of rule of law and historically the first step from executive arbitrariness to a law-based relation between public power and individual. It is the step, in the 19th century, from monarchical discretion to the primacy of Parliament, the dependence of administrative action from legislation. It is therefore also an advance, the transition towards democracy, people's sovereignty.

The basic requirement of legality is that invasive executive action interfering with the individual's freedom and property has to be founded on legislation. The inner reason is that freedom of the individual is the principle and restriction of freedom is the exception which must be legitimized.[1] The individuals, the people, have to consent to the freedom restriction through their representatives in Parliament (or, in particular systems, by themselves in a referendum decision). This concept is given by the adoption of a piece of legislation authorizing the executive to intervene into their freedom. Therefore legality is the functional link between people sovereignty and the exercise of public power of the executive.

[1] R. Arnold. « L'État de droit comme fondement du constitutionnalisme européen ». *Revue française de droit constitutionnel*, numéro spécial, 25 ans de droit constitutionnel, no 100 (Décembre 2014) : 769 – 776.

It results from this relation that the law permitting the intervention into freedom must be sufficiently determined and clear[1] to be duly understood by the acting power and the concerned individual. However,modern rule of law is more than legality, it is above all constitutionality. This means that legislation has to conform to the Constitution as the basic legal order of the society, the legal foundation of the State, as the expression of the general consent of the people. Constitutionality implies primacy of this basic legal order over politics which transforms the majority will in Parliament (or in referendum) into law, into legislation, creating by this the specific legal order of the State.

Constitutionality also entails the *value orientation* of public power which results from the values of the Constitution which have an *irradiation effect* [2]on all branches of law. This is reflected also from the anthropocentric character of the Constitution which is a consequence of its supreme value, human dignity. This value is the very basis of every true Constitution which necessarily guarantees freedom, as the twin principle of dignity, for the individual life as well as for the free codetermination of politics, that is democracy.

Rule of law is therefore exercise of public power in conformity with dignity and freedom which includes necessarily equality and nondiscrimination. Rule of law requires consequently that the constitutional requisites and values are part of the power exercise. This also means that legislation has to adequately correspond to the fundamental rights system of the Constitution. This includes the necessity to take account of the differentiation which results from the fundamental rights and has already been expressed by the FCC by the concept of "spheres"[3]: the more intensively the freedom of the person is restricted, the more seriously the individual-related guarantees must be applied. The principle of proportionality has to be used in a stricter sense in the "private sphere "than in the society-related "social sphere" which refers to professional activity and property. The "innermost area of

[1] FCC vol.102, 254, 337; vol. 128, 282, 317-318.
[2] Expression used by the FCC in the famous Lüth case, vol.7, 198, 207.
[3] Vol.27, 344, 351; vol. 34, 205, 209.

private life conduct", as it is formulated by the FCC[1], is under the protection of human dignity and totally exempt from public power intervention; proportionality even in its strictest form, is not applicable in this area.

Not only proportionality but also other elements of rule of law have to correspond with the concept of spheres. Legality and the different aspects connected with it such as legal certainty and precise and comprehensive formulation of the legal provision which allows the interference with the individual's freedom have to be applied in conformity with this concept. This means that restrictions of the personal freedom and other individual-related rights must be founded in precisely formulated laws. General clauses for intervention can be not enough determined for legitimizing the restriction of that kind.[2]

b) Legal basis in the Federal Law on the Protection against Infections

It was strongly disputed[3] whether the federal law on the protection against infections contains the legal basis which is sufficiently determined for authorizing the member states governments to adopt regulations or other measures restricting fundamental rights seriously. In particular section 16 of the law was regarded critically for its broad and general formulation that the competent authority takes the "necessary measures" for protecting the individual or the public against threatening dangers in case of infection diseases. Also the circumstances which can result in such measures are rather broadly formulated: facts which can lead to the emergence of a contagious disease, and even that these facts do presumably exist give legitimation to the authorities to act. It is

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[1] Vol.6, 32,41; vol. 27, 1,6.

[2] See FCC vol.102, 254, 337; vol.118, 168,188; vol. 120, 378, 408.

[3] See Thielbörger, Pierre; Behlert, Benedikt: *COVID-19 und das Grundgesetz: Zur (Un)tauglichkeit des verfassungsrechtlichen „Immunsystems", VerfBlog,* 2020/3/19, https://verfassungsblog.de/covid-19-und-das-grundgesetz/, DOI: https://doi.org/10.17176/20200319-123218-0., with ciritcs also on other constitutional issues in context of pandemia prot4ction measures as well as other comments on Verfassungsblog

comprehensible that a discussion had arisen about the rule of law adequacy of this formulation as a legal basis for serious fundamental rights restrictions.

The federal legislator has specified the law adapting it to the current situation[1]. The core provision, s. 16 (1) 1 has remained unmodified. However, it should be taken into consideration that the interpretation of an ordinary law, that means also of this federal law, has to be conform to the Constitution. In other words, the provisions on the legal basis for the anti-corona measures should be interpreted in the light of the constitutional obligation to protect the fundamental rights values.

This theory developed by the FCC is important for the efficiency - oriented interpretation of s. 16 of the mentioned law and of the provisions which are functionally connected with this section. In this perspective, the term "necessary measures" has to be filled up by the constitutional obligation to realize the protection against the virus efficiently. It seems adequate to regard the general term "necessary measures" as conform to the Constitution. The legislator cannot preview how an infection process develops and therefore cannot in advance indicate in detail the specific measures to be taken. Therefore the use of a general term gives the possibility to the authorities to adapt the actions to the needs which can change rapidly and are not sufficiently foreseeable. Specific terms would limit the possibilities to act what would be contrary to an efficient protection strategy as it is requested by the Constitution.

As the mentioned constitutional obligation to protect the fundamental rights values is important for the argumentation concerning the legal basis for the measures and for further issues in this context it shall be briefly presented in the following.

One important consequence of this efficiency-oriented comprehension of freedom is the concept of the State obligation to protect actively, in particular by legislation, the fundamental rights

[1] See in particular the very detailed new s. 5 which establishes the possibility to declare the "epidemic situation of national dimension " by the Federal Parliament enabling the Federal Ministry of health to take far-reaching measures.

values. Legislation shall prevent infringements of them by adopting laws which protect through substantive prescriptions and provisions on procedure or organization. These laws can be directed towards private persons for preventing them to interfere, through their private activities, for example by causing environmental pollution, with the values protected by fundamental rights. The vertical function of defense against State intervention is complemented by the horizontal function to safeguard these values against private actors, a functional enlargement of the traditional concept in order to make efficient the protection of freedom as the central finality of constitutional law. Furthermore, these laws can refer to the State itself if matters specifying the reach or use of the fundamental rights values are regulated by law. Implementing and protecting these values by legislation must be adequate, efficient. If not, the concerned individual can invoke, even by means of an individual complaint to the FCC, the relevant fundamental right to be not sufficiently protected by the State. Efficient protection is requested, a *deficient protection* is constitutionally prohibited ("*Untermaßverbot*").[1]

S. 16 of the law of protection against infections can be regarded, in the light of the constitutional obligation to protect health, as conform to the rule of law exigencies. The use of the general term " necessary measures" is specified as to its concrete finality for the protection of the individual and the public against contagious diseases and can be seen as an implementation of the constitutional obligation to efficiently safeguard life and health as values protected by article 2 (2) BL. As the situations can be unforeseeable authorizations to act must be large so that the competent authorities can choose the adequate measures regarding the efficient. The complexity of the situations needs flexibility in acting. The legal authorization cannot be completely specified and is efficient and effective only if it is formulated in a relatively undetermined, however not unlimited way. It is, of course, important that judicial review is effectively given.

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[1] See FCC vol. 49, 89, 142; vol. 92, 26, 46. As to the "Untermaßverbot" see FCC vol. 88, 203, 254.

It shall also be taken into consideration that section 28 (1) of the protection law specifies measures restricting the freedom and the free movement of persons if the danger of a spread of the contagious disease is given. This section and also other specific provisions concretize in part the general clause of section 16, which remains the basis for additional measures not expressly specified.

c) Section 32 and the reformulated s. 5 of the federal Law on the protection against infections and their constitutional dimensions

aa) Section 32 of this law authorizes the member states governments to adopt regulations for combating contagious diseases under the detailed conditions established by the sections 28 – 32 of this law, including the restrictions of fundamental rights (freedom of the person, article 2 (2) 2 BL; free movement, article 11 (1) BL; freedom of assembly (article 8 BL); inviolability of domicile (article 13 (1) BL) and privacy of correspondence, posts and telecommunications (article 10 BL).

Various constitutional questions arise in this context:

(1) In the German system, the adoption of regulations which have normative character by the executive is only possible if formal legislation delegates the competence for this to the administrative bodies in a way which is well determined by the legislator as to the finality, contents and scope of the future regulations. This is prescribed by article 80 BL if a federal law, as s. 32 of the mentioned law does, delegates regulation power to the executive[1], or, by specific provisions or by the general rule of law clause in the member states constitutions, if the delegation of regulation power is foreseen by member states legislation.

Beyond this separation of powers related requirement of a precise delegation of regulation power to the executive, the theory of the "essential matters" ("Wesentlichkeitstheorie") has been developed by

[1] FCC vol. 1, 14, 60, vol. 2, 307, 334; vol. 58, 257, 278: in case of fundamental rights restrictions: vol.85, 386, 403-404; on the use of general clauses in delegation laws; vol. 106, 1, 19; as to the question how precise the legal authorization must be, see also vol. 8, 274, 312; vol. 123, 39, 80;.

the constitutional jurisprudence. Essential matters cannot at all be transferred from Parliament to the executive. This would be contrary to the principles of democracy, separation of powers and in general of rule of law. Interventions into fundamental rights are regarded as "essential" if they are "serious" interventions [1].

S.32 of the protection law enumerates the fundamental rights which can be restricted by regulations and determines the conditions by the reference to the sections 28 - 31 of this law. As the period of validity of these regulations is limited, it can be concluded that the concept of essential matters is not contrary to this delegation of regulation power enabling fundamental rights restrictions.

The question which is referred to s. 32 is also relevant for s. 5 of the protection law. Under the aspects of article 80 BL and of the essential matters concept also the delegation of regulation power by this section is unobjectionable.

(2) Section 5 of the protection law, however, raises serious questions[2]. The regulation power is not delegated to the member states governments but to the Federal Minister of health. This is very exceptional because the competence to execute federal laws is in the hands of the member states, according to article 83 BL. Exceptions can only be made if allowed expressly by the Constitution. Article 87 (3) BL is of basic importance for this. However, the execution of federal laws by the Federal Ministry is not foreseen. This could be made probably by the establishment of an autonomous federal higher authority or a federal public law corporation as indicated by this article.[3]

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[1] See FCC vol. 58, 257, 274; also vol. 49, 89, 127; See Sachs/Mann, 8th ed. 2028,GG, Art. 80 Rn. (para.) 22.

[2] These problematic issues have been examined by the scientific service of the Federal Parliament, WD 3 – 3000 – 080/20, 2020, Staatsorganisations und § 5 Infektionsschutzgesetz , with references to critical comments of various authors made for the Verfassungsblog, https://www.bundestag.de/resource/blob/690262/cb718005e6d37ecce82c99191efbec49/WD-3-080-20-pdf-data.pdf

[3] See also Sachs/Sachs, GG 8th 3d. 2018, Rn. (paras) 67 – 70.

bb) Quite uncommon but finally not unconstitutional is that section 5 foresees that regulations can admit *exceptions* from this law or from other regulations adopted on the basis of this law with reference to the prevention or combat of contagious diseases in order to maintain the processes in the health system and the subsistence of the population. This is the problem of regulations (inferior to ordinary legislation and adopted by the executive) which are able to make rules divergent from (superior, Parliament-adopted) legislation. The regulation has got, in this respect, the same power as the ordinary law. This is acceptable from the standpoint of the constitutional law under the aspect that the formal law itself gives room for an exception from its content to be realized by the executive through a regulation; by this the legislator relativizes its own law.[1] The particular reason for legitimizing this mechanism can be seen in the necessity to rapidly adapt to changing situations during the infection crisis. The FCC accepts this mechanism as constitutional but excludes it in cases in which the exception to be made by regulation would "significantly shift" the power importance between legislator and executive which is foreseen in the constitutional order.[2] With reference to s.5 it can be said that the relevant regulations are limited in their period of validity and are the reaction on an extraordinary situation so that such a power shift does not occur.[3]

(3) A further problem results from the fact that s. 5 of the protection law expressly denies that the above-mentioned regulations require the consent of the Federal Council. This, however, is prescribed by article 80 (2) BL. The reason is that the federal law on the protection against infections has to be executed, in general, by the member states "as their own matter " ("als eigene Anglegenheit"). This makes it necessary, according to Art. 80 (2) BL, that regulations based on this law get the

[1] F. Ossenbühl, Rechtsverordnung, in: Isensee/ Kirchhof, Handbuch des Staatsrechts, 3rd ed., Vol. V, 2007,§ 103 Rn. (para.) 27.
[2] FCC vol.8, 155, 171.
[3] Very critical the scientific service of the Federal Parliament (note 26),p. 4 – 8.

consent of the Federal Council. Therefore s. 5 as a provision of ordinary legislation cannot dispense this requirement.[1]

3. THE ISSUE OF FUNDAMENTAL RIGHTS

The restriction of freedom in multiple respects is the core problem in the fight against the pandemia. The prohibition to leave the house or the apartment except for indispensable reasons (consulting the doctor, if not possible by telephone; buying food; walking outside with family members) is a serious restriction of the personal freedom as guaranteed by article 2 (2) BL. Restrictions in meeting people inside the apartment or outside, the prohibition to organize or join assemblies and manifestations, the closing of shops, sport facilities, theatres, etc. have a great impact on social life. Furthermore, it was not allowed to organize and to attend religious services and to move within or to go outside the country. These are some examples of the great complexity of freedom restrictions.

The restrictions were temporary, they have been gradually reduced and now to a great extent suspended. In Germany, as it was mentioned, each of the member states has the right to autonomously regulate the antivirus protection measures, based on the federal law on the protection against infections and, in part, on member states legislation of complementary character. This has led to a certain differentiation as to the intensity and modality of the measures, a consequence of the German federalism, which of course does not dispense the constitutional obligations to protect efficiently individuals and society. The coordination by conferences of the member states' Prime Ministers with the federal Chancellor was useful, however voluntary. The (relative) divergence of the restrictions has resulted from the federal structure but has made it possible to react in a differentiated way on the different regional degrees of infections.

The system of fundamental rights restriction within the virus crisis is not different from the normal one. The fundamental rights

[1] Scientific service of the Federal Parliament (not 26): 24

guaranteed by the BL can be restricted by legislation if this is foreseen by the Constitution. This is the case with most of the fundamental rights concerned. If the BL protects a fundamental right without admitting to the legislator to restrict it (as for example for freedom of religion, article 4 BL), the possible restrictions result from the Constitution itself. In this context the constitutional obligation to protect life and health of the individual resulting from article 2 (2) BL presents a value on the same level as the freedom of religion, on the level of the Constitution. As the Constitution has to be regarded as a unit, protection of life and health limit freedom of religion.

In both cases, the restriction by the legislator or the limitation by the Constitution itself, it is the principle of proportionality which has the most important function in balancing fundamental right and public interest or two or more fundamental rights.

Restrictions of fundamental rights by the legislator and limitations by the Constitution itself have to regard this principle which is composed of three elements: (a) the restricting measure must be apt, appropriate for realizing or at least for contributing to realizing a legitimate aim of public interest (principle of aptitude), (b) the measure must be necessary, indispensable for this purpose; a less restrictive measure which has the same effect would have to be preferred (principal of intervention minimum), and (c) the necessary measure must be evaluated in a process of weighing out on the one hand the public interest and on the other hand the individual interest which is expressed by the value of the fundamental right protecting the individual (principle of proportionality in a narrow sense). This last mentioned element aims at the balance of the seriousness of the intervention into freedom and the importance of the public interest. This relation must be equilibrated.

The battle against a high danger to the public health such as it results from the pandemia legitimizes strong restrictions, of course limited in time and intensity until the high degree danger has been decreased significantly.

A specific problem arises in this context: as neither vaccination nor medicament against corona 19 exists nor it is totally clear which groups of persons are particularly endangered and how the infection

occurs, and furthermore the opinions of the medical experts are in part diverging, it must be constitutionally accepted that both the legislator and the executive carry out a *prognosis*, based on a careful research in the circumstances and respecting the latest scientific knowledge. The question of the constitutionality of a prognosis has already been the subject of constitutional jurisprudence, particularly with regard to the legislator. The aspects developed in this context are able to be transferred to the prognosis made by the executive when adopting a regulation or an administrative measure. If the prognosis of the legislator, as it was said by the FCC[1], has been based on a serious research and comprehensible evaluation of all the available facts and turns out to be wrong, the legislation cannot be regarded as unconstitutional; respectively the executive's action cannot be regarded as illegal under such a condition. However, as soon as the prognosis is recognized as being wrong the relevant actor, legislator or executive, have to correct the measures. This obligation to correct results from the principle of rule of law, specifically from legality, as far as the executive is concerned, and from constitutionality, if the legislator is in question.

In the process of balancing conflicting values and interests in the context of proportionality the already mentioned constitutional obligation to protect the fundamental rights values actively is of particular importance. Fundamental rights, traditionally rights of defense against public power intervention, conceived as subjective rights, have to be regarded also as objective values, with impact on the whole legal system, and are therefore the ideological pillars of the constitutional order.

It is evident that the threat for life and health by the virus has triggered the State's obligation to protect. This obligation had to be duly considered within the balancing process in the context of proportionality. It can be said that this obligation has justified considerable freedom restrictions.

Human dignity (art. 1 (1) BL) is concerned in various aspects. The main problems which concern human dignity directly are the triage

[1] Vol. 50, 290: 333-334.

and the protection of the personal, in particular medical data in the context of the new corona app. Both issues have not obtained importance in Germany until now. The hospital situation never has been serious due to large preventive measures so that the selection (the triage) of people to be treated in intensive care departments in the hospital or not never has been in question. Notwithstanding it shall be stressed that the constitutionally recognized value of human dignity never allows to distinguish between young and old people for admitting to hospital treatment.

Data protection is a personality right closely connected with human dignity. The jurisprudence of the FCC has developed the right of informational self-determination[1] which can be challenged in particular by the application of the digital device to localize persons who are affected by the virus. Such a device has been developed in Germany and offered to the public. Collecting, storing and transferring of personal data are interventions into the individual's freedom and must be based on legislation. However, the use of this device is not obliging so that the voluntary character implies the consent of those who use it. Nevertheless there are political tendencies to adopt legislation for specifying the details.

CONCLUSIONS

The fight against pandemia in Germany has been carried out in conformity with the Constitution. Emergency measures have been based on ordinary legislation, in particular on the federal law on protection against infections, which has been executed by the member states of the Federation. The principal legal instrument has been member states regulations restricting fundamental rights in a multiple way. The restrictions have been made in conformity to the regular system: by formal legislation or, preponderantly, on this basis by regulations of the

[1] Vol. 65, 1: 43

executive, under observance of the principle of proportionality and leaving the very essence of the fundamental rights unaffected.

As a whole it can be said that the crisis has been combatted without prejudice to Rule of Law.

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DIGITAL CONTENT LEFT ON-LINE AFTER DEATH OF A USER. ON THE RESEARCH THAT NEEDS TO BE CONDUCTED

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Abstract:

The problems of content left on the Internet after a user's death are very important. The traditional civil law contructions to date are not prepared to face their challenges. Social needs, modern reality, advanced technology - all this affects inheritance law. These issues need to be looked at more closely, and this text is intended to signal the issues of the so-called "first need" for analysis. One of its tasks is to undertake further discussion on possible needs for change. The succession law of the 21st century requires such changes.

Keywords: *digital world; digital content; Internet; Big Data; succession law; inheritance law.*

INTRODUCTION

Traditionally, photos, films, music or correspondence have been gathered on material carriers, in analogous form, namely in family

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albums, on disks or in binders[1]. Today, along with the development of digital technologies and common access to the Internet, communication and gathering of such content has changed significantly[2]. In practically every household there is a device enabling remote communication through the Internet, so most part of our life in that area has moved to the digital, virtual environment[3]. Through the Internet we use various on-line services, make shopping, download music, share photos and communicate with others on social networking sites, or subscribe various paid contents. Technology in that regard gives us many opportunities, which are more and more boldly used by the society. On many occasions, the virtual world is the only carrier of the contents we create, which refers particularly to e-mail correspondence, photos, or extremely popular posts on social networking sites or blogs[4].

After the death of the user of such services there arise doubts with regard to the destiny of the content such collected[5]. It is not known, indeed, and surely the law does not have a clear structure in that regard, whether in such case the *mortis causa* legal succession may be discussed, and who or possibly on what basis may have access to such content, such as not only to possess the virtual assets but also to be the beneficiary of the services such provided[6]. It is not clear, either, what influence, if any, the deceased has on the destination of such content, i.e. particularly whether the content may be disposed of in case of death, and if such

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[1] Mateusz Mądel, *Następstwo prawne treści cyfrowych na wypadek śmierci* (Kraków, 2017).

[2] Cf. David Koppel, "From the File Cabinet to Cloudacre: Resolving the Post-Mortem Crisis of Digital Asset Disposition for the Fiduciary," in *Kansas City Estate Planning Symposium* (2012): 1–34.

[3] Alp Toygar, C E Tapie Rohm Jr, and Jake Zhu, "A New Asset Type: Digital Assets," *Journal of International Technology and Information Management* 22, no. 4 (2013): 113–19.

[4] Cf. Giorgio Resta, "La 'morte'' Digitale,'" *Diritto Dell'Informazione e Dell'Informatica* 6, no. 6 (2014): 891.

[5] Rachel Pinch, "Protecting Digital Assets After Death: Issues to Consider in Planning for Your Digital Estate," *Wayne Law Review* 60 (2014): 545–65.

[6] Cf. Marta Otero Crespo, "La Sucesión En Los «Bienes Digitales». La Respuesta Plurilegislativa Española," *Revista de Derecho Civil* 6, no. 4 (2019): 89–133.

disposition is made, what legal effect it is going to have. It is not known whether and to what extent there are any limitations, and it may be discussed whether there should be any. The Internet offers various solutions in that regard, even ones which do not allow the Internet services providers to learn whether the user is still alive[1]. The succession law principles applicable in that regard, originating from the solutions assumed many years ago, do not refer to such problems in any way[2]. Therefore, in that light, it should be analysed what is the legal nature of the content left by the user in the Internet in the context of *mortis causa* legal succession. The task undertaken in that area should firstly be the determination whether the content left by the deceased Internet user is hereditary, and if so, then, on what principles. This kind of research should be undertaken urgently. Modern private law legislation requires this. Therefore, in this statement, I will try to outline the possible shape of the research that is needed, being at the same time convinced that this type of proposal is uniform and may concern many European legislators.

CONTENT IN THE INTERNET

The times we live in are very different from when contemporary private law regulations were designed[3]. Technological progress forces changes, which rarely can be introduced as binding norms. Society and its needs always ahead of the legislator. The same is true for digital content created on the Internet. Today there is no longer a household that does not use the Internet. This has extremely important legal consequences[4]. We set up different types of accounts, buy different

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[1] Joseph Mentrek, "Estate Planning in a Digital World," *Ohio Probate Law Journal*, no. 19 (2009): 195.

[2] Cf. Catherine Rendell, *Law of Succession* (London: Macmillan, 1997); Henri Mazeaud, Leon Mazeaud, and Jean Mazeaud, *Leçons de Droit Civil* (Paris, 1999); Bernhard Eccher, *Erbrecht. Bürgerliches Recht Band VI* (Wien, 2016).

[3] Cf. Julius Binder, *Bürgerliches Recht. Erbrecht* (Berlin: Springer, 1923).

[4] Matthew David and Jamieson Kirkhope, "New Digital Technologies: Privacy/Property, Globalization, and Law," *Perspectives on Global Development and Technology* 3, no. 4 (2004): 437–49.

goods, create different content whose value and meaning also varies[1]. This may become more important not only during our lifetime, but also in the face of death. This is because, among other things, there is the problem of who the resulting goods belong to, whether they can be freely disposed of under *inter vivos* and *mortis causa* legal acts[2]. In the latter regard, the issue is very complicated[3]. There is much to suggest that the content left on the Internet should be treated as property rights and on this basis, on general principles, be part of the inheritance. However, there are also several obstacles in this respect, including, among others, the privacy of the Internet user and the secrecy of correspondence, which are so important that they may lead to a different view[4]. Then digital content would not remain part of the inheritance and would not be inherited. The issue seems to be extremely important, especially as the world is moving towards more rather than less digitisation.

Everyday practice of each of us is to coexist with the Internet[5]. We browse the sites, buy access to the Internet press, play games, buy various goods in these games, send emails, contact the world. The message of these achievements stays on the Internet. It can be used to accelerate our next use of the Internet, because our interests are remembered. It can also serve to take away from us or our loved ones all kinds of services and goods. The Big Data technology allows us to direct offers "tailor-made", based on our previous activity on the Internet[6]. All this can become a "greedy bite" for advertisers, but also for other people

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[1] Mariusz Janik, "Oświeceni i Druidzi Dzierżą Władzę Nad Światem," *Gazeta Prawna*, no. 243 (2012): 1–5.
[2] Ulrich Spellenberg, "Recent Developments in Succession Law," in *Law in Motion*, ed. Roger Blanpain (The Hague: Kluwer Law International, 1997).
[3] Cf. Ben Mceniery, "Succession Law Keeping Pace with Changes in Technology and Community Expectations – Informal Wills," *Journal of New Business Ideas & Trends* 12, no. 1 (2014): 1–10.
[4] Mateusz Mądel, "Następstwo prawne treści cyfrowych z perspektywy prawa Stanów Zjednoczonych Ameryki," *Prawo Mediów Elektronicznych*, no. 1 (2016): 1–11.
[5] Angelo Magnani, "Il Patrimonio Digitale e La Sua Devoluzione Ereditaria," *Vita Notarile*, no. 3 (2019): 1281–1308.
[6] Shelly Kreiczer-Levy, "Big Data and the Modern Family," *Wisconsin Law Review*, no. 2 (2019): 349–72.

who want to get to know us better[1]. Should the law allow for this? Not only during our lifetime, but also after our death, should data about our activity be collected and processed without our control, or should we have an influence on it. This needs to be examined.

THE PRACTICE OF THE INTERNET PROVIDERS AFTER THE DEATH OF A USER

The activeness of the Internet users nowadays and the legal consequences of the digital contents published by them are autonomously regulated in the internal rules of the Internet platforms and agreements concluded by and between the users and the digital services providers[2]. The rules and agreements frequently determine the legal status of the created contents, which comprises various limitations regarding thereto, including *mortis causa* ones[3]. The status is not, however, uniform, identically as the practices of the respective virtual platforms. Various assets are treated differently. This often prevents the transfer of an account to other persons (also by way of inheritance), whereas the contents present in the account expire at the death of the user. Sometimes the access is limited solely to the issue of copies of the digital contents gathered by the deceased users, whereas the account succession is rarely allowed. There are also cases enabling the appointment of the so called "account carer", who may decide about the account removal after the death of the user, yet the possibility of access to the contents is limited[4]. Such policies of the particular platforms, variously treating the legal succession of the contents gathered in the accounts, seems unjustified

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[1] Damien McCallig, "Facebook After Death: An Evolving Policy in a Social Network," *International Journal of Law and Information Technology* 22, no. 2 (2013): 1–34.
[2] Karin Sein, "Digital Inheritance : Heirs ' Right to Claim Access to Online Accounts under Estonian Law," *Juridica International*, no. 27 (2018): 117–28.
[3] Paweł Szulewski, "Śmierć 2.0 – Problematyka Dóbr Cyfrowych," in *Non Omnis Moriar. Osobiste i Majątkowe Aspekty Prawne Śmierci Człowieka. Zagadnienia Wybrane*, ed. J. Gołaczyński et al. (Wrocław, 2015), 731–49.
[4] Davide Sisto, "Morte e Immortalità Digitale : La Vita Dei Dati Online e l ' Interazione Postuma," *Funes. Journal of Narratives and Social Sciences* 2 (2018): 111–22.

prima facie, even if we consider the possible nature of the particular assets (starting from digital versions of photos, through accounts in social networking media, the scores in reputation systems, customer bases collected on Internet platforms, ending with heroes gained or purchased in Internet games or crypto currencies)[1]. Should these rules be changed? Should legislation be rigidly regulating such problems? These are just some of the questions that can be asked in this regard.

The legal succession status of the content may show further way of searching for the consequences expected by the society and making a possible attempt to design such regulatory solutions, which, on the one hand, would ensure the protection of the deceased and, on the other hand, serve that person's legal successors, particularly if the presence of the deceased in the Internet had property consequences, which could contribute to hereditary nature of at least some of the virtual assets[2]. The problem of access to the specific digital content after the death of a user of Internet services is a more and more common phenomenon and, thus, growingly sensitive from the social point of view[3]. The heirs of the deceased have tried in this way to reach not only the potential financial benefits, which may be contributed to them by the content left in the Internet, but also to heritage and legacy of the deceased. Such access is usually hindered or prevented by the providers of the Internet services, which may be seen specifically on the background of the published reports on court case held in some countries[4]. Referring to the secret of correspondence, protection of privacy or the private nature of the

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[1] Anetta Breczko and Marta Andruszkiewicz, "Prawo Spadkowe w Obliczu Postępu Technologicznego (Nowe Wyzwania w XXI Wieku)," *Białostockie Studia Prawnicze* 22, no. 4 (2017): 27–46.

[2] Ricardo Berti and Simone Zanetti, "La Trasmissione Mortis Causa Del Patrimonio e Dell'identità Digitale: Strumenti Giuridici, Operativi e Prospettive de Iure Condendo," *Law and Media Working Paper Series*, no. 18 (2016): 1–25.

[3] Lilian Edwards and Edina Harbinja, "'What Happens to My Facebook Profile When I Die?' : Legal Issues Around Transmission of Digital Assets on Death," *CREATe Working Paper* 5, no. 5 (2013).

[4] Cf. A. Janssen, "Das Digitale Erbe Eines Menschen," *European Review of Private Law*, no. 4 (2017): 697–99.

accounts opened by the Internet users for availing of various services, access is denied to the content related to a deceased person[1]. There are also different approaches, which allow making a copy of the specific content of the digital space, or provide unlimited access to the account of the deceased and the content present therein. The very Internet services providers introduce varied instruments in that regard, the legal status of which is not quite clear[2]. The above must result in serious doubts as regards the expected direction of solving the conflicts which may arise. On the one hand, the protection of the deceased and the personal assets related to that person's presence in the Internet is understandable (as this may also refer to people other than the deceased person), but, on the other hand, the possible property nature of some content may speak for the transfer of the assets to the heirs of the deceased without any additional reservations. The solution of that conflict of values is the task of the succession law[3]. Paradoxically, the problems – despite their basically global nature – are subject to domestic legislation. This is because the succession law has a domestic nature and it is not expected that this could change in the nearest future, even within the EU[4]. Therefore, a problem arises, how the particular domestic legislators should solve the originating dilemmas, and mainly whether to leave the solution of the issue of legal succession of digital content to the doctrine and judicature, or to introduce appropriate legal regulations in that regard.

So far, the problem has been perceived in the state legislation of the USA[5], some other Anglo-Saxon countries and in some European

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[1] Edina Harbinja, "Legal Nature of E-Mails: A Comparative Perspective," *Duke Law & Technology Review* 14, no. 1 (2016): 227–55.

[2] Jamie Patrick Hopkins and Ilya Alexander Lipin, "Viable Solutions to the Digital Estate Planning Dilemma," *Iowa Law Review Bulletin* 99 (2014): 61–71.

[3] Thomas Zerres, *Bürgerliches Recht* (Berlin: Springer, 2019).

[4] Cf. Kristin Meth and Jorge Morais Carvalho, "Digital Inheritance in the European Union," *Journal of European Consumer and Market Law*, no. 6 (2017): 253.

[5] United States of America was the first country to apply the first, pioneer solutions regarding the legal consequences of digital contents (in the state law-systems), and further works were carried on unification of the particular regulations, in which a major

countries. It was, however, solved in various ways, and with the lapse of only a few years some regulators have withdrawn from their previous concepts. Meanwhile, in most of the EU countries the issue of legal succession of the content left in the Internet by a deceased user of the services has not been comprehensively elaborated, or even more – it has not been clearly diagnosed or analysed. The only voices of the doctrine in that area, although scarce, have only contributory importance, as to the principle, and provide more questions than answers[1]. Should it remain so?

WISHES OF THE TESTATOR

One of the things that should be examined is the area of a freedom of testation in connection with the content on the Internet[2]. Being fully convinced that one of the main tasks of the modern succession law is connection of the available legal structures with the actual property relationships in the society and supporting solutions which ensure the possibly best use of the testator's assets after his death[3], I am convinced there is a need to verify what consequences in that legal area could have the leaving to the testator of a decision as to the passage of the specific content left in the Internet to other people. It is important to examine relationship between the virtual world and the possibility of implementing the last will of the testator, analysis of whether some new

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role was played by the *Uniform Law Commission*, which prepared on an inter-state level the model *Fiduciary Access do Digital Assets Act (2015)*. The effect of that work is now at the final stage of implementation in the state law-systems.

[1] Cf., e.g., Anna Berlee, "Digital Inheritance in the Netherlands," *Journal of European Consumer and Market Law* 182, no. 6 (2017): 256–60; Mark-oliver Mackenrodt, "Digital Inheritance in Germany," *Journal of European Consumer and Market Law*, no. 1 (2018): 41–47; Natalie M. Banta, "Death and Privacy in the Digital Age," *North Carolina Law Review* 94 (2016): 927.

[2] Iris J. Goodwin, "Access to Justice: What to Do about the Law of Wills," *Wisconsin Law Review*, no. 5 (2016): 947–80.

[3] Kyle B Gee, "Electronic Wills and the Future: When Today's Techie Youth Become Tomorrow's Testators," in *The Marvin R. Pliskin Advanced Probate and Estate Planning Institute, Ohio State Bar Association* (Columbus, 2015).

instruments found in the Internet (e.g. the procedure of account transfer) may be useful for the implementation of the principle of the freedom of bequeathing currently present in the succession law, as well as explanation whether the use by the testator of the possibility provided by the specific Internet *mortis causa* services facilitates or hinders the performance of the will of the testator[1]. The fulfilment of such determined research tasks will enable critical assessment of the legal instruments serving the succession of the content left by the Internet service user after their death[2]. This will also provide basis for theoretical explanation of the challenges posed by the changing reality to the succession law, as well as to create new theses and hypotheses in the context of the possibility of using new technologies for legal succession purposes. That is why it is needed.

THE FUTURE RESEARCH

In the light of the above, it seems necessary to undertake research aimed at broadening knowledge on the subject[3]. This research should contain a detailed analysis of the problems occurring in that area, as well as presenting recommendations for the direction to be followed by the modern legislation in that regard. The issues, as it may be expected, should not be left without a thorough analysis in the literature, because undoubtedly the problem will grow in the coming years, and the theory as well as the practice of law will have to face it[4]. In the times of advanced engineering and the Internet, when practically every household

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[1] Cf. Mariusz Załucki, "About the Need to Adjust the Regulations Regarding the Form of Will to the Modern Requirements," *The European Journal of Economics, Law and Politics* 6, no. 2 (2019): 1–13.

[2] Irma Sasso, "Will Formalities in the Digital Age: Some Comparative Remarks," *Italian Law Journal* 4, no. 1 (2018): 169–93.

[3] Elizabeth Sy, "The Revised Uniform Fiduciary Access To Digital Assets Act: Has the Law Caught Up With Technology?," *Touro Law Review* 32, no. 3 (2016): 647–77.

[4] Michael D Walker, "The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age," *Real Property, Trust and Estate Law Journal* 52 (2017): 51–78.

has access to equipment registering image and voice in digital form (computer sets, mobile phones, photo cameras), it is absolutely needed to show a direction for the legal system to follow[1]. It will enable verification whether the opportunities provided by the new technologies may be used by the available legal instruments applicable to legal succession in case of death, or whether it should be necessary to put forward new generalisations and stands, as well as to propose new theories in that area[2]. Carrying out of research in the proposed scope will contribute to enriching the knowledge of the legal succession law and support development of that scientific discipline, as well as will enable explanation of the relationship between the development of engineering and the legal tools that serve shaping of the *mortis causa* social relations. That is why it is important to start such research project. One of the expected project results should be designing of the future succession law regulation regarding the legal consequence of leaving content in the Internet after the user's death. The currently binding regulations seem to be insufficient for solving the legal problems in that regard, as they do not answer the question: who and on what basis may have access to the content left by the deceased.

SOME CONCLUSIONS

As you can see, the problems of content left on the Internet after a user's death are very important. The traditional civil law contenders are not prepared to face their challenges. Social needs, modern reality, advanced technology - all this affects inheritance law. These issues need to be looked at more closely, and this text has signalled the issues of the so-called "first need" for analysis. One of its tasks is to discuss possible needs for change. Is it time to start such a discussion?

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[1] Hao Wang, Michael W. Galligan, and Jeffrey B. Kolodny, "Modern Inheritance Develops in China," *New York Law Journal*, 2007.

[2] Cf., e.g., Salvatore Patti, "Il Testamento Olografo Nell'era Digitale," *Rivistra Di Dirittio Civile*, no. 5 (2014): 992–1012.

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THE TRANSPORTS IN CONTEXT OF EMERGENCY STATE INSTITUTED IN ROMANIA AS A MEASURE ADOPTED TO COMBAT THE COVID-19 PANDEMIC

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Alexandru BOROIU[2]

Abstract:

The state of emergency established throughout Romania as a necessary measure adopted to limit the infection of the population with SARS-CoV-2 coronavirus - following the spread of the new coronavirus worldwide and the declaration of "Pandemic" by the World Health Organization on 11.03.2020 - it called for urgent, exceptional measures to be taken, which have left a strong mark on all aspects of daily life.

Transports - considered to be the "blood" of the economy - is severely affected, the measures taken by the Military Ordinances amending important provisions of the normative acts in the field of transport, being applicable throughout the state of emergency.

Key words: *transports in emergency state; special measures.*

The state of emergency established throughout Romania[3] as a necessary measure adopted to limit the infection of the population with

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[3] By the Decree signed by the President of Romania on March 16, 2020 https://www.presidency.ro/ro/media/comunicate-de-presa/decret-semnat-de-

SARS-CoV-2 coronavirus - following the spread of the new coronavirus worldwide and the declaration of "Pandemic" by the World Health Organization on 11.03.2020 - it called for urgent, exceptional measures to be taken, which have left a strong mark on all aspects of daily life.

Transports[1] - considered to be the “blood” of the economy - is severely affected, the measures taken by the Military Ordinances amending important provisions of the normative acts in the field of transport, being applicable throughout the state of emergency.

Carrying out the transport activity during this period is carried out only in accordance with the imposed restrictions, and this implies the acceptance of compromises regarding the technical performances and the economic efficiency.

Thus, in the field of road transports, the international road transport[2] of persons is suspended by regular services, special regular services and occasional services[3] in international traffic[4], for all journeys made by transport operators to Italy, Spain, France, Germany, Austria, Belgium, The Swiss Confederation, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of the Netherlands and Turkey and from these countries to Romania, throughout the state of emergency[5]. Due to these traffic restrictions, UNTRR requests the Government to take measures to allow road transport of persons by Romanian bus operators

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presedintele-romaniei-domnul-klaus-iohannis-privind-instituirea-starii-de-urgenta-pe-teritoriul-romaniei

[1] OG no. 19/1997 regarding transports - https://lege5.ro/Gratuit/geztanjz/ordonanta-nr-19-1997-privind-transporturile

[2] To be carried out in accordance with the provisions of the European Agreement concerning the activity of crews of road vehicles engaged in international road transport - https://lege5.ro/Gratuit/gu4tcmbu/acordul-european-privind-activitatea-echipajelor-vehiculelor-care-efectueaza-transporturi-rutiere-internationale-aetr-din-01071970

[3] OUG no. 27/2011 - http://legislatie.just.ro/Public/DetaliiDocument/131203

[4] Agreement on International Carriage by Bus and Coach (INTERBUS) - https://lege5.ro/Gratuit/hezdmnjr/acordul-privind-transportul-international-ocazional-de-calatori-cu-autocarul-si-autobuzul-acordul-interbus-din-02102000-

[5] Military Ordinance no. 7/04 April 2020 - Published in the Official Gazette of Romania no. 284/4 April 2020 http://www.afer.ro/documents/Ordonanta%20militara%20nr%207%20din%202020.pdf

by irregular races (charter), for the transport of professional drivers and seasonal workers from Romania to other states[1].

At the same time, the transports in and from Suceava, respectively in and from Țăndărei locality were restricted, as a result of the quarantine[2], being allowed only: freight transport, regardless of its nature, of raw materials and resources necessary for economic activities in the quarantined locality. , as well as the supply of the population; transport of persons not living in the quarantined area, but carrying out economic or defense activities, public order, national security, health, emergencies, local public administration, social assistance and protection, judiciary, public services, energy, agriculture , public catering, water supply, communications and transport.

Thus, the transports in public interest - forecasted, have undergone changes, their frequency decreasing as a result of the decrease of the citizens' demand as a result of the imposition of the social distance[3] by the norms of the military ordinances, they resorting more to the transport with own means.

Regarding the road transport of goods[4], it is desired to keep it as close as possible to the normal parameters, trying to avoid blockages in the economic circuit, in order not to further aggravate the socio-sanitary-economic context in Romania. In this respect, in order to ensure the national supply of goods, there are derogations from the rules[5] on driving and rest times (replacement of the maximum daily driving limit of 9 hours with one of 11 hours, replacement of the minimum daily break

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[1] This measure is requested by eliminating art. 11 of the Military Ordinance no. 7/2020.
[2] By the provisions of Military Ordinances no. 6 and 7/2020
[3] Government of Jersey – "Distanțarea socială" - https://www.gov.je/SiteCollectionDocuments/Health%20and%20wellbeing/ID%20Social%20Distancing%20Factsheet%20Romanian.pdf
[4] OG no. 27/2011, EC Regulation no. 1071/2009 and no. 1072/2009. A.Singh,*Dreptul transporturilor, Note de curs* (Craiova: Sitech, 2013).
[5] Derogations from the rules established by REGULATION (EC) NO. 561/2006 in some EU and Non-EU Member States - https://www.untrr.ro/meniu-vertical/coronavirus/derogari-de-la-regulament-561-2006/derogari-de-la-regulamentul-ce-nr-561-2006-in-unele-state-membre-ue-si-non-ue-ultima-actualizare-30-03-2020-ora-17-00.html#.Xo3nIJlS_IU

requirements by imposing a break 45 minutes after 5 and a half hours, reduction of daily rest requirements from 11 to 9 hours, postponement of a weekly rest period between 6 and 24 hours). These measures have been brought to the attention of all EU Member States. However, the transport for export of certain agri-food products[1], certain medical devices and sanitary materials is prohibited[2].

In relation to air transport[3], the measure was taken to suspend the flights[4] performed by air economic operators to: Spain and from Spain to Romania, by the norms of military ordinances[5] extending this measure. The same measures were taken regarding the flights performed by economic operators to Italy and from Italy to Romania; to Austria, Belgium, the Swiss Confederation, the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of the Netherlands, Turkey and Iran and from these countries to Romania, for all airports in Romania. At the same time, the measure of suspension of flights performed by air economic operators to France and Germany and from these countries to Romania is extended.

The above measures do not apply to flights performed by state aircraft, to cargo and correspondence flights, humanitarian or emergency medical services, as well as non - commercial technical landings. Also, flights performed by all air operators by irregular flights (charter) are allowed, for the transport of seasonal workers from Romania to other states, with the approval of the competent authorities of the destination country. The category of seasonal workers does not include those who work in the field of health and social care.

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[1] Military Ordinance no. 8/09 April 2020, published in the Official Gazette of Romania no. 301/10 April 2020

[2] Order no. 428/2020 of the Minister of Health

[3] Romanian Air Code of 1997, which will be replaced with that of 2020 (starting with June)

[4] By Military Ordinances 4/2020 (Published in the Official Gazette of Romania no. 257/29 March 2020), no. 5/2020 (Published in the Official Gazette of Romania no. 262/31 March 2020), 6/2020 (Published in the Official Gazette of Romania no. 262/2020) and 7/2020

[5] Military Ordinance no. 8/2020

Regarding maritime transport and inland waterways[1], access ships in Romanian ports, as well as the inspection and operation of ships without restrictions, in compliance with all measures to prevent infection with COVID19, imposed by the Health Ministry[2]. The access of pilots on board sea and river-sea vessels, arriving from red or yellow risk areas, is prohibited if they do not have the protective equipment established by the Health Ministry.

The field of railway transport[3] is severely affected, the confederations requesting the emergency intervention of the Romanian Government in order to avoid blocking the railway system in our country. The aim is to do the same in the other EU Member States, whose governments have intervened to allocate the financial resources needed to keep this mode of transport running, the only one that can transport citizens safely during this difficult time by ensuring a minimum social distance. Currently, the Ministry of Transport, Infrastructure and Communications, as well as economic operators in the field of rail passenger transport do not sell tickets / season tickets or other travel documents for passenger transport in quarantined localities, except for persons who do not live in quarantined area but who carry out activities economic or in the field of defense, public order, national security, health, emergencies, local public administration, social assistance and protection, the judiciary, public utilities, energy, agriculture, public catering, water supply, communications and transport. Rail freight transport is also severely affected, with beneficiaries using warehouse stocks during this period.

In order for the complex transport system to respond to a continuously variable transport demand - as is the case during this period - it is necessary to ensure the continuity of transport flows, which requires the following three conditions to be met[4]:

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[1] OG no. 42/1997, http://www.cdep.ro/pls/legis/legis_pck.frame

[2] According to the provisions of Military Ordinance 4/2020

[3] Ordinance no. 7 of January 20, 2005 for the approval of the Regulation on railway transport in Romania

[4] A. Boroiu, *Geography of transports* (Pitesti: University of Pitesti Publishing House, 2010).

• Ubiquity: the ability to reach any destination;

• Instantaneity: the possibility for the transport to be performed at the desired time;

• Fractionally: the possibility for a single passenger or for an isolated cargo convoy to be transported independently of the group.

However, if we take into account the objective of economic efficiency of transport, it is found that only over short distances and for small transport demands a single-mode transport system is suitable (in most cases only road transport can meet this condition).

For other cases, it is necessary for the transport system to have several modes of transport: as a rule, the initiation and completion of naval, rail or air transport is ensured by road transport.

But, in the current situation, when social distancing is an essential condition, public transport is restricted and organized transport is requested on demand (charter type), which requires the organization of each transport considering the transport demand, but also the possibilities to correlate the components transport to ensure the realization of the transport in the contractual terms established regarding space and time.

As a result, the transport activity during this period is carried out only in accordance with the imposed restrictions, and this presupposes the acceptance of compromises regarding the technical performances and the economic efficiency.

With regard to road traffic - this "side effect" of single-mode road transport and multimodal transport, which also includes road mode - it is clear that the reduction in transport activity during this period has led to a reduction in road traffic and, consequently, a reduction of undesirable effects on the environment: chemical pollution and noise pollution.

CONCLUSION

We can thus conclude that the entire field of transport is affected, the consequences of the restriction of transport activity affecting not only directly - on transport companies, but also indirectly - on the entire economy.

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CITIZEN – PUBLIC ADMINISTRATION RELATIONS: EVOLUTIONS, LIMITS AND CONSTRAINTS

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Abstract:

The relationship between citizens and public administration is the most important in diagnosing society, because it is in fact the expression of the leading political vision and the consequences that individuals must bear.

The successes of the systems of government are measured not in the number of closed political opponents, but in the well-being of each individual. Even if a perfect society cannot be created, in which each person has satisfied all the desires - and not only the needs - the existence of several possibilities for the development of human skills and personality reveals that the state is well governed.

The year 2020 has shown – once again – that good governance has its limits, and the constraints that bring it objective obstacles will have to be analyzed, well understood and then eliminated, in a continuous process of modernization. In this text we want to turn our attention to some aspects of this relationship.

Key words: *Public administration; Citizens; Evolutions; Constraints; Limits; Public Sphere.*

INTRODUCTION

There are varying philosophical and theoretical traditions of citizenship and diverse state policies related to the status and rights associated with citizenship, which have considerable implications for the

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nature and scope of relationship between citizens and government bureaucracy[1].

Both the philosophical aspects and the nature of a theoretical tradition are rather the product of an intellectual reflection, in which the current situation of a community is not always followed concretely. In fact, the old Latin expression: Primum vivere, deinde philosophare (First to live, then to philosophize) expresses a reality that the ancients perceived from the beginning: man's education as a system has a view of an idealised socio-political system, in which there are no big problems to solve. At the same time, the reverse aspect is wrong, because you can't ask an 18-20 year old to fully understand the situation of the country where he lives.

The difference between philosophy, theories, education systems and practice is often very large, because a state's budget reveals more development perspectives than the most interesting writing on the issue of government can do.

1. In countless literary works we are urged to think every day not only about the problems of our (individual) life, but also about the general context in which we spend our days. The urge predisposes to bitter philosophy and conclusions, but reality often proves that thinking about something several times can not necessarily bring the best decision, but not the worst possible.

The year 2020 brought with it a situation that only a few government experts expected – mostly those in the medical systems. The result of the appearance of a very dangerous virus has been – and it is – economically detailed in articles that appear daily in the press, but this dimension is not the subject of this text.

But the most important effect of the current medical crisis we are in is the cessation of the `amounts` of travel that people have made for several weeks. This reduction in physical activity has offered the

[1] M. Shamsul Haque, *Relationship between citizenship and public administration: a reconfiguration*, in *International Review of Administrative Sciences*, Vol. 65 (1999), 310.

possibility of adopting a rather philosophical attitude towards life, which means that people who are self-isolated in their own homes have had more time to think.

Obviously, it is not important for this text that X or Y thought about the problems of emotional life, the repairs he wants to bring to the house, the purchase of a new car, etc. What is really important in the philosophical processes of these months has been inspired – or rather increased – by the technological development of recent decades. Specifically, it has become a habit of many of the world's more than 4.6 billion people with internet access[1] to consult those sites that count the emergence of new cases of Covid-19 infections.

These universal electronic sources indirectly measure an issue that academics and stakeholders frequently comment on: good governance and good administration. Practically every case of an infected person can be analyzed from the perspective of public law in a way closer to fullness, which other sciences cannot achieve.

A medical crisis is not an economic one, in which there are reproaches regarding the ideological orientations of the governments, or acid comments on the performances of the education systems. The objectivity of the crisis – because, unlike major economic errors, a virus or a microbe does not depend on the ideological orientation of a prime minister – reveals more accurately the preparation of the entire medical system of a country, the amounts available in the state budget for specific interventions (procurement of sanitary materials, medical equipment, etc.), the degree of functionality of the vertical administrative relationship (state administration), as well as the collaborative relationship (being involved in addition to local public administrations) and the level of respect for administrative mechanisms by citizens.

2. Very often the segmental analysis is preferred to demonstrate the quality of a good, proud, mechanism, object, legal norms, etc. However, it is not complete if we forget to analyze how the human mind relates to

[1] https://www.internetworldstats.com/stats.htm , consulted on 6 of June 2019.

all objects, people, legal constructs that surround it, so that its perception of life and the world is not segmental, but general.

This aspect is very important when analyzing the relationship between citizens and public administration, because the first one is aware of the strength of the other, without the reciprocal being valid, in view of the discrepancies of means used and objectives. The public administration will always bring to fulfill the will of the political leadership of a state or a community, and the continuation of its purpose allows it to adopt a conduct that does not always take into account the desire of the citizen (regarding the individual). As an expression of this reality is the fact that the same administration will transform a state from a democracy into a dictatorship, and vice versa.

The years of life teach the citizen about a certain predictability of administrative behaviour, and this fairly linear functioning of public institutions is imprinted in the socio-political substratum, so that the perception of administrative activities is largely overlapping with the perception of the political sphere.

The complexity of the relationship is given by the fact that the public administration uses in its activity to continue legal norms, which are the product of a political will. The entire dimension of the autonomy of public institutions is contextualized by a general normative framework, and they cannot go beyond legal limits through their actions, although more than once the same institutions are the first to detect errors contained in normative acts, also having a first image on the implementation of such legal provisions with imperfections.

The public administration being the first to understand the results of the normative acts – in their entire complexity – is at the same time the one that must give the first alarm on the consequences of the imperfections contained in the legislation. The reports that the administration draws up at regular intervals must always capture not only the strictly technical dimension of the normative act – respectively its implementation – but also the way in which the ordinary citizen, lacking specialized knowledge in the legal sphere, perceives the new normative framework. These reports, if well prepared, can play several roles, based on which institutions and civil servants can defend themselves both

against the reproaches of citizens and the pressure exerted by the political environment.

3. The relationship between the citizen and the public administration is understood as a factor of progress of a society only for a short time, less than 15 decades. For hundreds and thousands of years the public administration was only an instrument of power, which performed mainly tasks of collecting resources in a country (by taxing goods and money), ensuring public works necessary for state defence and – within the limits available financial resources – the creation of goods that could not be realized through the enterprise of individuals. This situation began to change in Europe under the influence of two main factors: the increasing level of education of the populations of the states, which demanded for themselves the right to participate in the decision-making that concerned them; the substantial technological development of the 19th century, which widened the spheres of human activities, implicitly growing the amounts of money collected through taxation – which meant that the administration had the capacity to intervene in several areas.

The growth in the number of people with "book science" was based on a period of peace, which led mainly to the expansion of the right to vote, which became the prerogative of an increasingly large group of people who paid taxes. Based on this relationship between education and the right to vote, we will note mainly the increase of internal political tensions, which led to the appearance of the Constitutions in almost all European states (France had eight Constitutions in the 19th century, Spain had six and Portugal three in the same period; Netherlands has today the Constitution established on 1815, with substantial modifications; Belgium has today the Constitution adopted in 1831, with substantial changes; Switzerland in 1848; Denmark in 1849, etc.), as well as the substantiation of new codes and laws in different spheres of social life, which established not only the possibilities of action of the citizens,

but also the role of the public administration in the general coordination of the socio-economic environment[1].

Technological development has brought huge benefits, being the product of increasing the education of the population. In the same type, however, the same technological progress has increased the possibility of killing people, which has made it easier to start wars. These took place mainly in the next century (20th), and their final result manifested itself in the sphere of public administration by increasing its role to an unprecedented level in history, because millions of dead and wounded needed social, medical, financial support coordinated, and the only entity capable of performing these tasks was the state, through the public administration.

4. As a result of the immense human sacrifices of the two world wars, the notion of public service was extended to a very large level, and the concept – now called – classical crystallized at a maximum level just after 1945.

As result, the concept of public service was characterized by the meeting of three conditions: a mission of general interest, the intervention of a legal person of public law, an administrative law and a judge. Its objective was therefore not profitability, but the accomplishment of various missions resulting from the idea that political power was in the general interest[2].

The first decades after the World War II were known by several characteristics, but in any evaluation it will be emphasized the increase of the quality of the medical act. The huge advances made during that period allowed for a marked increase in life expectancy, a decrease in infant mortality, as well as an improvement in the reputation of governments, which proved capable of bringing real improvements to the lives of citizens. This development was replicated in other spheres of

[1] See also Richard C. Box, *Essential History for Public Administration* (Melvin & Leigh: Knoxville, Tennessee, 2018), 14 – 27.

[2] Le Pors Anicet, *Le Service Public dans l'histoire : une notion simple devenue complexe*, in *Raison présente*, n°173, 1er trimestre 2010, 11.

activity, of which the most important was education, which was able to increase in large proportions the degree of literacy of the populations, as well as the number of people with higher education. In all these spheres the contribution of the state, the state budget and a large number of people who worked in public institutions financed by the state and local communities.

This was the most successful period of the relationship between the public administration and the citizen, because the political environment acted on the basis of a high responsibility towards those who had endured two terrible conflagrations in 30 years and in which the number of deaths exceeded 100 million people. The growth in support provided by the state and administrative institutions was augmented by an increase in welfare, based on a series of older or newer inventions that expanded in the same post-war period: telephone, television, automobile, civil aviation, electronic and household appliances, etc. Suddenly, a good life had become something real, accessible to an ever-widening category of people, and this change was proving to be able to last for years.

5. However, the period 1945-1991 was marked by a total ideological confrontation, based on which two systems were opposed. Communism was the system that increased the size of the state to a level that almost completely annihilated free initiative, and public services became not only an agent of performance in favour of citizens, but the concomitant expression of political power and administrative power. On the other hand, the free world allowed the entry into various forms in meeting the public needs of the representatives of the private economy, which allowed the cost efficiency and the installation of a major disproportion between the living standards of the people in the two systems.

An important aspect of the 45-year period of confrontation was the political stability of the leaders, the flag states of the two blocs accepting certain compromises of their own allies, although they exerted constant pressure to achieve greater conformity of political and administrative systems allied with what exists in Washington and Moscow.

The confrontation between communism and the free world was won by the system that put the citizen first. This was the system in which free initiative dominated public and private life, and the major effects of this freedom were instinctively known in communist countries as well. Therefore, when the communist political power collapsed in Europe, there was no doubt about the direction that the liberated states should take.

But there is a major problem of this new path that had to be adopted, namely the lack of a manual to use in terms of moving from a totalitarian system, in which the political environment and public administration represented everything, to a democratic system in which legality and morality to represent the basis of all public and private actions.

In the absence of this manual for establishing legality and economic efficiency, new legal institutions are (re) taken over in the legislation of former communist states (public procurement, concession), and new fundamental laws and codes are adopted to adapt the legal framework to political technological and economic realities of the transition period in the new millennium.

6. The new realities had as an effect a conceptual quasi-globalization of the public sphere, which had strong effects on the entire dimension of public administration. Suddenly, with the help of the Internet and the English language (the global language), the construction of normative acts became universal, and solutions that were used only in one country can be known in any other point of legislation in another country. This aspect has begun to be better understood by citizens, who today can better inform themselves about the political and administrative realities of other countries, and by virtue of this access they can compare the situations in their countries, relative to best practices of other states.

Among the changes that have taken place in administrative doctrine in recent decades is the redefinition – including in UNDP documents – of the great legal institution called the public service. Today the new public service starts with the premise that the focus of public administration should be citizens, community and civil society. In this conception the

primary role of public servants is to help citizens articulate and meet their shared interests rather than to control or steer society[1].

Citizens look beyond narrow self-interest to the wider public interest and the role of public officials is to facilitate opportunities for strengthening citizen engagement in finding solutions to societal problems. Public servants need to acquire skills that go beyond capacity for controlling or steering society in pursuit of policy solutions to focus more on brokering, negotiating and resolving complex problems in partnership with citizens. In seeking to address wider societal needs and develop solutions that are consistent with the public interest, governments will need to be open and accessible, accountable and responsive, and operate to serve citizens. Prevailing forms of accountability need to extend beyond the formal accountability of public servants to elected officials in the management and delivery of budgets and programmes to accommodate a wider set of accountability relationships with citizens and communities[2].

7. The need for a new framework of the relationship between the political environment, public administration and citizens is given by the fact that the year 1989 showed that in front of crowds of hundreds of thousands of people on the streets, a regime that is not dictatorial and does not shoot the people will be forced to leave power. However, the non-violent attitude of the population is joined by an increasing degree of knowledge of relevant information about good governance, as an effect of many documentary materials that present good practices in advanced countries.

Obviously, there is not only an evolution of public administration in the recent decades. There are many limits that the process of

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[1] Mark Robinson, *From Old Public Administration to the New Public Service. Implications for Public Sector Reform in Developing Countries* (UNDP Global Centre for Public Service Excellence: Singapore, 2015), 10.

[2] Robinson, *From Old Public Administration to the New Public Service. Implications for Public Sector Reform in Developing Countries*, 10.

technological modernization and conceptual transformation of the public sphere faces every day.

Although the most important problem appears to be the financial one, the reality shows that you cannot create a perfect society if the main way of acquiring wealth is that of contracts having as object the exploitation, concession, renting, sale of public property or those goods in the use of public institutions. The appearance of wealth in the ex-communist space had as main source precisely this way of capitalizing the goods that are owned by the holders of power to administer, which presupposed a complicit conduct both from the political environment and from the heads of public institutions. As an effect of this patrimonial transformation, the relationship between the citizens and the whole idea of public environment collapsed, being affected not only the political class, but also the prestige of the idea of public administration.

The effect of these modes of action in the sphere of goods and wealth – namely that in which the direct patronage of the political and administrative environment was the main arbiter and grabber of goods – has led to the weakening of societies, so that two thirds of the world are not considered capable of resists various turbulences, because citizens have lost confidence in their own political and administrative leaders[1].

The Index of Fragile States use The State Legitimacy Indicator to consider the representativeness and openness of government and its relationship with its citizenry. The Indicator looks at the population's level of confidence in state institutions and processes, and assesses the effects where that confidence is absent, manifested through mass public demonstrations, sustained civil disobedience, or the rise of armed insurgencies. Though the state legitimacy indicator does not necessarily make a judgment on democratic governance, it does consider the integrity of elections where they take place (such as flawed or boycotted elections), the nature of political transitions and, where there is an absence of democratic elections, the degree to which the government is representative of the population which it governs. The indicator takes

[1] The Fund for Peace, *Fragile States Index* (New York, 2019), 5 – 6.

into account openness of government, specifically the openness of ruling elites to transparency, accountability and political representation, or conversely the levels of corruption, profiteering, and marginalizing, persecuting, or otherwise excluding opposition groups. The indicator also considers the ability of a state to exercise basic functions that infer a population's confidence in its government and institutions, such as through the ability to collect taxes[1].

For this reason, the index of democratic states – a product of The Economist Intelligence Unit – reveals that only a small proportion (1/7) of the world's states can be considered truly democratic, in the sense of the deep rule of legality in society[2].

These data are not very encouraging, and the economic crisis that appeared near the great medical crisis of 2020 raises another series of constraints on the extension of legality as the queen of the public sphere. The little money that will exist in the coming years will make political-administrative support a decisive element of the economy, and this role growth will be observed by citizens, who – economically weakened – can take a firm stand against these practices, trying to change political relations-current legal requirements in something new, as an effect of designing a new type of human society.

CONCLUSIONS

In the analysis of the general situation of states and citizens, a variety of tools are used by people who usually have a single university specialization (no matter how large), which makes the approach to everyday problems to deepen the dimension of science that they master it.

The science of law has preferred in recent years in some countries to be reduced to a rather technical dimension, in relation to the major dimension of the changes they have to go through. However, it is

[1] The Fund for Peace, *Fragile States Index*, 38.

[2] The Economist Intelligence Unit, *Democracy Index 2019. A year of democratic setbacks and popular protest* (London, 2019), 3.

necessary for legal analysis to extend further to other aspects specific to the social sciences, because from those directions new trends emerge, which end up influencing not only the adoption of new laws, but also the execution of those in force.

The relationship between the citizen and the public administration is becoming more and more important, because the latter has the continuity that allows it to implement - in different proportions - governance strategies, legal norms, national or local development plans, etc. The current of protest that has begun to dominate the planet in recent years is primarily an expression of the dissatisfaction that man / individual has with the political-administrative environment. In the face of this challenge that people would like to formulate, the only one able to prevent the great dangers brought by the mistakes of politicians is the public administration. It is therefore she who must arbitrate between the citizen and the political environment, seeking to be neutral, although from a legal point of view it is subordinated to the political decision. The future will belong to those who will know how to solve this three-way equation.

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THE NOTION OF "CHILD" IN THE NATIONAL AND INTERNATIONAL LEGISLATION BRIEF ANALYSIS

Andreea DRĂGHICI [1]

Abstract:

The current article aims to prove the practical importance of defining the notion of "child".

Thus, the clarification of the term child is important in view of the fact that certain legal provisions governing legal institutions with application in the field of child protection, establish protection measures whose application is determined over time, depending on age or certain elements of marital status (such as: health status, marital status - marriage/divorce, liability in criminal law). The qualification of the individual as adult or minor also refers to the analysis of the civil capacity and of the legal personality, as we will show up next.

Key words: *child; Civil Cod; international legislation; child's rights; civil capacity.*

INTRODUCTION

Both the domestic and the international legislation start from the recognition of the child as a person, recognizing all his civil, political, economic, cultural and social rights in this quality, as it results from the

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typology of the rights stated by the International Convention on the Rights of the Child.

THE ANALYSIS OF THE NOTION OF CHILD IN THE NATIONAL AND INTERNATIONAL LEGISLATION

Etymologically, the notion of "child" comes from the Latin *infans* which means "he who does not talk". The Latin *infans* was what we now call a small child. Today, the notion of child has a broader meaning, being defined by the UN Convention[1]. Thus, Art 1 of the Convention[2] defines the child as being "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"[3].

In the same meaning is the text of Art 4 Let a) of the Law No 272/2004 on the protection and promotion of the rights of the child[4], which defines the child as being a "human being below the age of 18, who has not acquired full capacity of exercise, according to the law". Therefore, it results that two conditions needs to be cumulatively met, namely: the person has not reached the age of 18 and the person has not acquired the ability to exercise. According to Art 38 Para 2 of the Civil Code[5], the person reaches majority at the age of 18.

We are therefore, depending on the two existing conditions in the domestic legislation, able to assess the child's civil capacity and determine the beginning and especially the end of the application of the legal provisions directly concerning the status of the *child*.

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[1] Françoise Dekeuwer-Défossez, *Les droits de l'enfant* (Paris: Éditions Presses Universitaires de France, 1991), 3

[2] Ratified by Romania through the Law No 18/1990, published in the Official Gazette No 314/13 June 2001

[3] Andreea Drăghici, *Protecția juridică a drepturilor copilului* (Bucharest: Universul Juridic, 2013), 10

[4] Published in the Official Gazette No 557/23 June 2004, entered into force on 1st January 2005

[5] Law No 287/2009, published in the Official Gazette No 511/July 2004, republished in the Official Gazette No 505/15 July 2011, modified by the Law No 60/2012.

In this meaning, we need to relate to Art 28 of the Civil Code which in Para 1 states the civil capacity of all persons, establishing that every person shall have the capacity of use and, except the cases stated by the law, the capacity of exercise. As it has been mentioned already[1] by the current legislation, every person has legal personality, through the simple fact of his/her existence, without this to be conferred as effect of the discernment's existence. Therefore, though without discernment, as effect of a legal presumption, the child is recognized as legal subject, being able to attend, to the extent to which the law allows it, in the social-legal life.

The existence of discernment is essential for the precise definition of the notion of child. The legislator presumes that, at the age of 18, the persons shall acquire discernment, following their complete psychical maturity, thus acquiring full capacity of exercise. It is in fact the moment when we stop discussing the minor and we witness the appearance of the adulthood with all the manifestations that this status legally implies. However, it is no less true that certain special laws may still maintain beyond this age limit certain effects that began during the minority period, for example the obligation to maintain the minor who is continuing his higher education. This does not mean, however, that during this period we can talk about the child in the sense conferred by the Convention and the Law No 272/2004 on the protection and promotion of the rights of the child.

There are certain exceptions from the rule inserted by Art 38 Para 2 of the Civil Code, in the meaning that we are interested in the loss of the status as minor before the acquirement of the majority. These exceptions are expressly stated by the law. Thus, the Civil Code refers, on the one hand, to the acquirement of the full capacity of exercise as effect of the conclusion by the minor of a marriage (Art 39) and, on the other hand, following the approval of the guardianship by the court (Art 40)[2]. Thus,

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[1] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici and Ion Macovei, *Noul Cod civil, comentariu pe articole* (Bucharest: C.H. Beck, 2012), 31

[2] Ramona Duminică and Andra Puran, Brief considerations on the acquirement in advance by the minor of the full capacity of exercise, *The perspectives of the European*

we can note that these exceptions may emerge from the law (specifically from the marriage certificate) or from a court decision. First of all, we talk about the emancipation of the minor through marriage, and second of all about his judicial emancipation[1].

Art 272 Para 1 of the Civil Code states the matrimonial age at 18, both for men and women, stating as exception the possibility for the minor who has turned 16 to conclude a valid marriage with the cumulative fulfilment of the conditions required by the law. The main effect of this act is the acquirement of the full capacity of exercise. This refers to the fact that the married minor may independently exercise from that moment on his rights and obligations through the valid conclusion of civil legal acts. Regarding the end of the capacity of the married minor, the Civil Code refers only to the case where the marriage was annulled, establishing for the spouse who was in good faith at its conclusion the possibility of maintaining full capacity of exercise with all the effects it assumes. *Per a contrario*, the spouse with bad faith shall not enjoy this regime.

Regarding the interpretation of Art 39 Para 2 of the Civil Code, two mentions are to be made. First aims the causes which may cause the nullity of the marriage concluded by the minor, the law referring only to "annulled marriage", from which it would be concluded that the text does not apply in case of marriage annulment for reasons of absolute nullity. However, the suspicion could be resolved by the existence of the condition of good faith of one of the spouses, which leads to the shaping of the institution of putative marriage.

The second mention is related to the fact that the legislator does not refer (in the context of losing the full capacity of exercise) to the dissolution or termination of the minor's marriage before the threshold stated by Art 38 Para 2 of the Civil Code. This implies that, in case of

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Union. A review of Romania a decade after accession (Bucharest: Hamangiu, 2017), 106-113

[1] Cristina Mihaela Crăciunescu and Dan Lupaşcu, "Emanciparea minorului în reglementarea noului Cod civil", *Pandectele Române* 9 (2011): 29

divorce and termination of marriage, the minor retains his full capacity of to exercise, as stated in the legal literature[1].

The anticipated capacity to exercise is a novelty of the new Civil Code, being stated as an exception from the acquirement of majority at the age of 18. Art 40 of the Civil Code states the possibility that, for grounded reasons, the guardianship court shall recognize for the minor aged 16 the full capacity to exercise. The guardianship and family court is entrusted with the competence of acknowledging this capacity (Art 107 of the Civil Code). The author of the request shall be the minor who in this way uses his right and shall be assisted in the virtue of the limited capacity of exercise that he possesses at the age of 16, by his/her parents or guardian. The guardianship court shall hear the parents or the guardian, for this latter case being necessary also the consent of the family council (Art 130 Para 1 of the Civil Code). As the admission by the guardianship court of such a request has particularly important legal effects, it is necessary for it to weigh the merits of these reasons in the best interests of the child, which is why the statement of the legal guardian becomes very relevant. The ruling of the court's decision determines the minor, from that moment on, to perform independently his rights and obligations by the valid conclusion of civil legal acts. In the doctrine, the question was asked whether in this case it is still necessary the approval from the parents, the guardian and the opinion of the guardianship court for the valid conclusion of a marriage[2]. As the acquirement of the full capacity of exercise implies a full maturity, the conditions of Art 272 Para 2 on the conclusion of a marriage become unnecessary. In the same meaning, the conditions for validity necessary for the conclusion of an adoption are related to the full capacity of exercise.

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[1] Andreea Drăghici, *Protecția juridică a drepturilor copilului* (Bucharest: Universul Juridic, 2013), 12; Florinița Ciorăscu, Andreea Drăghici, Lavinia Olah, *Dreptul familiei și acte de stare civilă* (Pitești: Paralela 45, 2005), 140.

[2] Crăciunescu and Lupașcu, "Emanciparea minorului în reglementarea noului Cod civil", 29-30

Following the analysis of the provisions of the current Civil Code and of the Law No 272/2004, one can state that the child is the natural person who has not yet turned the age of majority and who did not acquired, according to the law, the full capacity of exercise. Depending on the latter aspect, he is granted the right to conclude legal acts alone or through a legal guardian.

By returning to the definitions given by the Convention and the Law No 272/2004, we can note the fact that both documents relate only to a maximum threshold of age in recognizing the statute as child for a person, without pointing out to the moment in which the person acquires this statute. In other words, the question can be asked what the beginning of childhood is, as long as the Civil Code itself recognizes certain rights of the conceived child, enshrining in Art 36 an exception to the acquisition of the capacity to use at birth[1]. This has been and remains an extremely controversial issue with a deep substratum generated by a complicated social issue, that of legalizing or outlawing abortions, one of the misunderstandings between UN Member States that have delayed the adoption of the Convention. The imprecision of identifying this moment by the Convention leaves a margin of appreciation for the signatory states, who in their own legislation may recognize rights for the child from the moment of conception or from the moment of birth[2].

Even if nothing prevents a state party from extending the definition of the term child to the period before birth, prenatal protection cannot be included in the right to life so as to confer on the embryo rights equal to those recognized at birth[3].

It should be noted, however, that most of the rights recognized to the child are granted to him after the moment of birth, their effective

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[1] Ramona Duminică, "Legal status of human embryo", *Annales Universitatis Apulensis, Series Jurisprudentia* 13 (2010): 132-139

[2] The first mention of the onset of childhood appears in the preamble to the 1959 Declaration of the Rights of the Child, which states that "the child, due to lack of physical and intellectual maturity, needs special protection and special care, especially adequate legal protection, both before and after and after birth".

[3] Geraldine van Bueren, "Les droits des l'enfants en Europe", Edition du Conseil d'Europe, Belgique, 2008, 61

exercise being differentiated by age segments according to presumptions of the legislator who sees in the child a being with constantly evolving abilities (for example: the right to conclude an individual employment contract at the age of 16, the right to be heard in court from the age of 10, the right to choose one's own type of education from the age of 14, etc.). The establishment of a minimum age in order to exercise a certain right recognized by the law to the child shall mandatory take into consideration the superior interest of the child, as well as the other principles governing the child's protection.

CONCLUSIONS

The conclusion that must be drawn from the analysis of the legal provisions analysed regarding the beginning and end of childhood is that the Convention is flexible both in terms of the minimum age and in terms of the maximum age. Thus, for the first case, as mentioned before, it allows the states to establish the minimum age in their national legislation, while for the second case it establishes the maximum age at 18, leaving also the option to establish a higher threshold. Internally, the course of childhood is marked by the moment of conception and the one set, as a rule, by law for adulthood, at 18.

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THE ROLE OF THE NATURAL ENVIRONMENT IN THE LEGISLATION ACTIVITY. SOME REFLECTIONS

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Daniela IANCU[2]

Abstract:

The current article analyses the role of the natural environment in the emergence and evolution of the legal norms. The environment represents a complex factor which influences the human socio-economic and political activities and behaviours, who in their turn, find their regulation in legal norms. The role of this factor should not be exaggerated, but neither should it be ridiculed because it exerts influence on the legislative activity, just as legal norms exert an influence on its existence and evolution, as we will show in the study.

Key words: *natural environment; activity of drafting legal norms; environmental law.*

INTRODUCTION

The various legal, philosophical or sociological systems have highlighted over time the importance of one or another of the elements that make up the natural environment: the geographical environment,

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biological, physiological and demographic factors, etc. in the activity of elaborating the legal norms. For instance, Hegel showed that there are "two types of laws: the laws of nature and the law". The laws of nature "are absolute and valid as they are". We need to learn to know them "because the measure of these laws is outside us"[1]. In his turn, Montesquieu gave a preponderant role to the geographical factor in the political and legal organization of society and in the elaboration of the rules of law. From his perspective, the activity of legislation should be in accordance with certain particularities of the area: "the laws shall be in accordance with the nature, namely with the state's physics, cold, warm or temperate climate, air quality, the size of the territory, people's way of life, ploughmen, hunters or shepherds (…)"[2].

To what concerns us, we shall not exaggerate with the role of this factor upon the creation of the law. History proved that an exaggeration of the demographic and biological factors has generated the emergence of aberrant, racist, retrograde or antihuman rules. Though, the law is inevitably influenced by the action of the natural environment because in this framework people live their lives, exercise their rights and assume their obligations[3].

1. WHAT IS THE ENVIRONMENT?

The term of environment (Romanian "mediu înconjurător") finds its etymology in the English word "environment", subsequently borrowed in French "l'environnement", as well as by other languages (medio ambiental in Spanish, ambiente in Italian) and refers to the area surrounding the human being.

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[1] Georg Wilhelm Friedrich Hegel, *Principiile filosofiei dreptului* (Bucharest: Romanian Acadmy Press, 1969), 9.

[2] Charles Montesquieu, *Despre spiritul legilor*, trans. Andreea Năstase (Ploiesti: Antet XX Press, 2011), 17.

[3] Ramona Duminică, "Lege și legiferare în societatea românească actuală" (PhD diss., University of Craiova, 2012): 32-34.

The meanings attributed to this notion are different depending on the science to which is related to[1]. Therefore, for geography the environment represents "the ensemble of all-natural factors and of those created by human actions which, in tight interdependence, influence the ecologic balance and determine the living conditions for the individuals, for the development of society"[2]. Individuals cannot be taken out of the environment, they are an integral part of it, making up a whole.

For other sciences, such as philosophy or sociology, the environment is "the ensemble of factors, relations, conditions, institutions, groups and social ideologies within and under whose influence is placed an individual or a determined micro-group"[3].

From a legal perspective, in the national legislation, the environment is defined from a globalizing perspective, comprising all abiotic, biotic elements, spiritual and material values, quality of life and any other element influencing the health and welfare of individuals. G.E.O No 195/2005 on environmental protection states in Art 1 Para 2 that the environment represents "the ensemble of Earth's natural conditions and elements: air, water, soil, subsoil, the characteristic aspects of the landscape, all atmospheric layers, all organic and inorganic materials, as well as all beings, natural system in interaction including the elements listed above, including some material and spiritual values, quality of life and conditions that may influence human well-being and health".

2. THE INFLUENCE OF THE NATURAL ENVIRONMENT ON THE DEVELOPMENT OF LEGISLATION

The natural environment has and still influences the legislation, by determining the development of laws against pollution and natural decay,

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[1] Ramona Duminică, *Introducere în dreptul mediului* (Bucharest: University Press, 2015), 12-13.

[2] Alexandru Rosu and Irina Ungureanu, *Geografia mediului înconjurător* (Bucharest: Didactic and Pedagogical Press, 1977), 10.

[3] Pavel Apostol, Ion Banu and Adela Becleanu Iancu, *Dicţionar filosofic* (Bucharest: Politic Press, 1978), 451.

by establishing norms for the protection of the land fund, territorial waters, air space or against nuclear radiation etc.

The emergence of legal norms aimed at environmental protection was a necessity and was based on a general consensus inspired by the categorical imperative of the survival of areas and species.

Although, "just out of adolescence"[1], the environmental law, as a branch of law, still managed to be a right to solidarity and reconciliation.

It is the environment that has thus made possible the solidarity not only between the different branches of law, but also between them and the various scientific disciplines. The studies conducted on the area of environment by sciences such as biology, physics, chemistry, geography, sociology, ethnology or economy are in tight connection with the law by their common purpose, namely the identification of the most effective means of environmental protection, preservation and development.

Gone are the days when the environment was protected only incidentally and relatively or when the idea of the existence of an environmental right as an independent branch of law was considered unfounded. In the literature[2] it is unanimously admitted that the importance of protected social values and the need to increase the efficiency of socio-human actions to solve current ecological problems have required the development of rules that have gradually taken the form of a branch of law in full development.

Also, outer space, with its peculiarities, has in turn acquired the value of a configuration factor of law since science and technology have made it accessible to humanity, being developed rules and legal principles for its use.

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[1] Jacqueline Morand-Deviller, *Le droit de l'environnement*, 10th Edition (Paris: Presses Universitaires de France, 2010), 3.

[2] Mircea Duțu, "Despre necesitatea, conceptul și trăsăturile definitorii ale dreptului ecologic", *Romanian Law Magazine*, no 5 (May: 1989): 23; Daniela Marinescu, *Tratat de dreptul mediului*, 4th Edition (Bucharest: Universul Juridic, 2010), 48; Mircea Duţu and Andrei Duţu, *Dreptul mediului*, 4th Edition (Bucharest: C.H. Beck, 2014), 77.

The literature[1] shows that in the process of creating law, a special relevance is acquired by biological and physiological factors in terms of the repercussions that natural features (biological and physiological) of individuals have on their states of consciousness and concrete attitudes in the social environment. The well-known distinction established in law between the capacity to use (that of having rights and obligations) and that of exercise (that of exercising subjective rights and assuming obligations through one's own legal acts), is based precisely on the link between the development physics of the human being and the development of his mental faculties.

Another basic legal institution of the law, namely the legal liability, is configured by the relevance received by the biological and physiological features of individuals. The idea of legal liability is based on the discernment with whom people are acting. The biological and physiological characteristics of people are imposed on the legislator on other levels, for example, children, the sick and the disabled persons demand special legal treatment, elaborating special legal norms through which their protection is achieved. At the same time, legislative norms have been elaborated regarding the stimulation of the demographic growth, the protection of conjugal couples, regulations have been adopted meant to limit the population growth, hence the influence of the demographic factor exerted on the elaboration of normative dispositions.

Moreover, deep changes generated by the progress of biology and medicine have placed the legislator in front of new challenges, such as human cloning, eugenic practices, medical interventions aiming the alteration of descendance, thus the international and national legislative organs have promptly reacted by condemning such experiments. An example in this meaning is represented by the Romanian Civil Code which in Art 62 states the prohibition of genetic manipulations of any kind, which could result in harm to the human species or Art 63 prohibiting any intervention that would result in the cloning of human beings or the creation of human embryos for research purposes.

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[1] Costică Voicu, *Teoria generală a dreptului* (Bucharest: Universul Juridic, 2006), 48-49.

All these environmental components, whose influence upon the law has been revealed, are completed with the situations generated by natural events, whose existence does not depend on the will of man, and which, by the power of law, are causes that lead to the birth, modification or extinction of legal relationships, such as: birth, death, relentless and irreversible flow of time, natural disasters, etc. The flow of time may consolidate or extinguish a right (the acquisitive or extinctive prescription), a natural disaster may generate a legal relation for insuring assets or persons and the examples could go on.

The properties of material assets, such as their consumable or non-consumable character, divisible or indivisible, movable or immovable, determine the legislator to enshrine a distinct legal regime for them. Therefore, the natural features of the assets classify them into fungible and non-fungible, movable and immovable, divisible and indivisible, consumable and non-consumable, material and immaterial (this division generating different legal effects upon the possession, use or other possessory actions etc.)[1].

Last but not least, another topical example that can be brought in support of our claims is the pandemic currently facing almost every state in the world generated by the SARS-CoV-2 virus. It has determined the legislators to adopt urgent measures, with exceptional features with the purpose of limiting the spread of infection and for the purpose of protecting the humans' right to life and health.

CONCLUSIONS

In conclusion, the manifestation of the force of this set of factors does not appear as a fatality, not automatically their presence ends with legal consequences. This is why we consider that the action of these factors must always be corelated with a social interest. Their influence is present only to the extent to which their consideration is requested by a social need.

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[1] Gabriel Boroi and Carla Alexandra Anghelescu, *Curs de drept civil. Partea generală* (Bucharest: Hamangiu, 2011), 75-86.

In this meaning, the doctrine has stated that "by recognizing the double role, of determining the object of regulation and influencing the solutions adopted within this regulation, the regulatory force, sometimes coercive, of the factors forming the natural environment in which the social relations are being conducted can be understood only to the extent to which the concerned factors are considered in relation with the social interests"[1].

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FAIR TRIAL – GUARANTEE OF THE APPLICATION OF THE CONSTITUTIONAL PRINCIPLE OF EQUALITY

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Abstract:

The analysis of the right to a fair trial as guarantee of the constitutional principle of equality starts from the identification of the legal norms and continues with the establishment of the recipients and beneficiaries of this principle, by emphasizing the reflection and application of this principle in the constitutional jurisprudence.

Key words: *equality; principle; fair trial; law; right; jurisprudence.*

INTRODUCTION

In Romania, the principle of equality finds its constitutional statement in Art 16 Para 1 of the fundamental law: "Citizens are equal before the law and public authorities, without any privilege or discrimination".

Also, Art 124 Para 2 of the Romanian Constitution states that "Justice shall be one, impartial, and equal for all", requirements reflecting the principle mentioned by the Universal Declaration of Human Rights, which states that "Everyone has the right to the protection of the law against any interference or attacks".

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The idea is also reflected by Art 2 Para 1 of the Law No 304/2004, according to which: "Justice shall be administered in the name of law, is unique, impartial and equal for all" and by Art 7 of the same law, stating that "(1) all persons are equal in the face of the law, without discrimination and without privileges; (2) the justice shall be done equally to all, without distinction of race, nationality, ethnic origin, language, religion, sex, sexual orientation, views, political affiliation, wealth, social condition or origin of any discriminatory criteria.

The fact that the fundamental law states provisions directly or indirectly referring to equality, it is equivalent with the proclamation as general principle of law.

Also, Art 4 Para 1 of the Law No 303/2004 states for judges and prosecutors the obligation to insure a non-discriminative legal treatment for all participants in judiciary proceedings.

In the previous mentioned meaning are the provisions of Art 1 Para 2 Let a) of the Law No 137/2000 on the prevention and sanctioning of all forms of discrimination, stating that the principle of equality between citizens, of the exclusion of privileges and discrimination are guaranteed also by an equal treatment in courts and in front of any jurisdictional organ.

The provisions of Art 8 of the Code of Civil Procedure apply the principle of equality by guaranteeing the exercise of procedural rights equally and without discrimination.

THE REFLECTION OF THE RIGHT TO A FAIR TRIAL AS GUARANTEE OF THE PRINCIPLE OF EQUALITY IN THE DOCTRINE AND IN THE CONSTITUTIONAL JURISPRUDENCE

It is stated in the doctrine that in order to be fair, the trial shall be conducted following a contradictory procedure, in compliance with the right to defence and equal weapons[1].

[1] Viorel Mihai Ciobanu, "Accesul liber la justiție – principiu constitutional" in *Liber Amicorum* ed. Ioan Muraru. *Despre Constituție și constituționalism* (Bucharest: Hamangiu, 2006), 62-63

The fundamental element of the right to a fair trial is the requirement that each party have sufficient, equivalent and adequate opportunities to support their position on issues of law and facts and that neither party be disadvantaged in relation to the other[1].

The principle of equality signifies that all persons have the equal vocation of being trialled by the same category of courts and rules, either that are matters of first court or procedural[2].

The existence of specialized courts or the establishment of different procedural rules in certain areas does not violate this principle, because those courts solve all litigations under their specialized competence without any discrimination concerning the parties, and the special procedural rules shall apply to every person party in a litigation subjected to those particular derogatory provisions. The difference in treatment would become discriminatory only when distinctions between analogous or comparable situations were introduced, without them being based on a reasonable and objective justification[3].

The equality of parties in front of justice does not exclude, but it includes the reflection of some procedural exigences, whose compliance could achieve the equality of chances in front of justice, principle stated also by the jurisprudence of the European Court of Human Rights, as the principle of equal weapons, which refers to equal treatment for the parties throughout the performance of a procedure in front of a court, without any of the parties being advantaged in relation to the other.

The role of justice as guarantor of the performance of the civil rights and freedoms is justified by its attributions and by the place of the judiciary in the system of public powers.

The reporting of judicial activity to the law ensures the unconditional application of the legal acts of the parliament.

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[1] Ioan Muraru and Viorel Mihai Ciobanu in *Constituția României – comentariu pe articole*, ed.: Ioan Muraru, Elena-Simina Tănăsescu (Bucharest: C.H. Beck, 2008), 181

[2] Viorel Mihai Ciobanu in *Noul Cod de procedură civilă comentat și adnotat*, 1st Volume, Art 1-526, ed. Viorel Mihai Ciobanu and Marian Nicolae (Bucharest: Universul Juridic, 2013), 22

[3] Gabriel Boroi and Mirela Stancu, *Drept procesual civil*, 4th Edition revised and amended (Bucharest: Hamangiu, 2017), 28

The concrete realization of the functions of justice is ensured by rules of conduct of judicial activity, including the equality of citizens in front of the law, but also the obligation of the judge to ensure non-discriminatory legal treatment of all participants in judicial proceedings, regardless of their quality.

The parties shall enjoy the same rights, the same categories of evidence, the same defences and the same remedies, as any provision which would place one party inferior to the other is incompatible with the principle of equality and even with the idea of justice.

In order to comply with this principle, there must be no privileges of jurisdiction. The existence of special procedural rules or of specialized jurisdictional organs does not mean the disobedience of this principle[1].

For the judge, the meaning of the constitutional principle of equality shall be expressed by "the prohibition of arbitrary", but this limitation shall not be efficient concerning the opportunity and arbitrary, which the legislator preserved untouched. It is forbidden for the legislator to adopt arbitrary measures, but within this framework it is entitled to preserve a wide range of opportunity[2].

The constitutional principle of equality may represent a frontier for the parliament's arbitrary, which makes possible the limitation, but not the complete elimination of the margin of discretion of the primary norms, stating in the same time the opportunity of the parliament's choices[3].

The takeover in the constitutional text of Art 21 of the European Convention on Human Rights of the essential coordinate for the protection of subjective rights, namely that of the fair trial, "constitutes a correct reception of modern developments at European level and an

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[1] Florea Măgureanu and George Măgureanu-Poptean, *Organizarea sistemului judiciar*, 6th Edition revised and amended (Bucharest: Universul Juridic, 2009), 43

[2] Elena-Simina Tănăsescu, *Principiul egalității în dreptul românesc* (Bucharest: All Beck, 1999), 78

[3] Tănăsescu, *Principiul egalității în dreptul românesc*, 78-79

agreement on the legal protection guaranteed to subjective rights by domestic and international regulations"[1].

Justice shall be equal for all, in the meaning that the principle of equality in front of the law and authorities shall be applied also for the parties of a litigation, enjoying the same legal regime. In front of the judge both the individuals, as well as the public, private, confessional authorities are on an equal position. In front of the judge all are parties, justice seekers. This addition was imposed as a result of judicial practice for which sometimes found it difficult to find an explicit legal basis for equal treatment of the parties[2].

The issue of respect for the right to a fair trial is examined in relation to all the means of proof, taking into account the own principles of organization of each procedure, but only certain essential aspects of the procedure can be assessed in isolation before the conclusion of the trial.

The decisions of the Constitutional Court shall confirm, or where appropriate, refute provisions from laws or ordinances of the Government, in respect of which it was notified with the settlement of the exceptions of unconstitutionality, without being able to bring amendments to the respective normative acts.

It must be mentioned that in the constitutional jurisprudence it was constantly decided that "(…) the compliance with the principle of equality in front of the law does not refer to the establishment of an equal treatment for situations in which, depending on the aimed purpose, are not equal and this is why it does not exclude, but on the contrary it implies different solutions for different situations"[3].

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[1] Ioan Muraru and Elena-Simina Tănăsescu, *Drept constituțional și instituții politice*, 13th Edition, 1st Volume (Bucharest: C. H. Beck, 2008), 163-164

[2] Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru and Elena-Simina Tănăsescu, *Constituția României revizuită – comentarii și explicații* (Bucharest: All Beck, 2004), 266

[3] Decision of the Constitutional Court No 105 of 9 March 2004, published in the Official Gazette, Part 1, No 301/6 April 2005; Decision of the Constitutional Court No 644 of 29 November 2005, published in the Official Gazette, Part 1, No 324/4 December 1996

Equality does not mean uniformity, thus the existence of some special procedural rules or of some jurisdictional organs, even specialized courts, does not mean a disobedience of this principle.

The Decision No 140/19 November 1996[1] of the Constitutional Court has stated that the principle of equal rights does not mean eo ipso the application of the same legal regime for situations which, due to their specificities are different.

The special protection for certain persons, through different legal regime they enjoy is not mainly incompatible with the imperative nature if the protection norms (for instance, the protection of minors, of children and of youth, protection of health)[2].

The principle of equality in front of the law and the public authorities shall apply, by its nature, for all rights and freedoms stated by the Constitution or the laws. This principle is also stated by Art 14 of the European Convention on Human Rights and has been also stated by the jurisdictional practice of the European Court of Human Rights. Thus, in the application *Marek v Belgium*, the European Court has adopted a solution based on the above-mentioned article, stating that any difference in treatment, made by the state between individuals in analogous situations, shall have an objective and reasonable justification[3].

The Decision No 49/10 March 1998[4] states that "the principle of equality does not mean uniformity, so that, if to equal situations must be replied by equal treatment, in different situations the legal treatment can only be different".

The Constitutional Court has constantly decided that it is not contrary to the constitutional principle of equality of citizens in front of the law and public authorities "the establishment of special rules, for as

[1] Published in the Official Gazette, Part 1, No 324/4 December 1996

[2] Victor Duculescu, Constanța Călinoiu and Georgeta Duculescu, *Constituția României – comentată și adnotată* (Bucharest: Lumina Lex, 1997), 78

[3] Decision of the Constitutional Court No 81 of 19 May 1998, published in the Official Gazette, Part 1, No 220/16 June 1998

[4] Published in the Official Gazette, Part 1, No 161/23 April 1998

long as they insure the judicial equality of citizens in their usage"[1]. In this meaning have stated the Decisions No 70/1993, 74/1994 and 85/1994 published in the Official Gazette of Romania, Part 1, No 307/27 December 1993, No 189/22 July 1994 and 209/11 August 1994.

The equal treatment imposes itself as principle only for the individuals found themselves in the same legal situation[2].

The jurisprudence of the Constitutional Court has constantly stated in the meaning that Art 16 of the fundamental law shall be applicable only for citizens, and not for legal persons. The invoked constitutional text would be applicable for collective persons, towards which was promoted a different legal regime, only if by this the legal regime would reflect upon the citizens, thus involving their inequality in front of the law and the public authorities, which is not the case[3].

CONCLUSIONS

From the analysis of the doctrine and constitutional jurisprudence, it results the idea that in identical situation, the parties cannot receive a differentiated treatment, in other words, to have no privileges of jurisprudence. The non-unitary feature of the judicial practice in the same matter would bring into debate the equality of citizens in front of the law and the judicial authorities.

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MEDICAL SERVICES – INTEGRANT PART OF THE RIGHT TO PROTECTION OF HEALTH

Viorica POPESCU[1]

Abstract:

The right to protection of health is part of the category of fundamental rights, being stated both internationally in the Declaration of Human Rights – Art 25, but also nationally starting with Art 34 of the Romanian Constitution. This right is in tight connection, in modern society, among others, with the means in which medical service is given, from the primary ones insures especially by family doctors to complex medical services that involve conducting investigations with state-of-the-art equipment or prescribing innovative treatments.

Achieving the highest possible standards in ensuring the physical and mental health of all categories of citizens, however, unfortunately remains only at the desired stage, even in the 21st century. An example in this meaning is represented by the situation generated by the SARS-CoV2 pandemic which has put health systems around the world under strong pressure, sometimes making it impossible to provide medical services to other categories of patients.

This medical crisis becomes a starting point determining the health systems to be resilient in future evolutions, to insure accessibility and efficiency. There will be a need to move to a model that places greater emphasis on disease prevention and health promotion, that is more personalized and leverages digital technologies, and improves primary health care and develops integrated health care towards the patient.

The current article aims to briefly analyse the medical services seen as an integrant part of the right to protection of health and of the right to life of the citizen.

Key words: *right to protection of health, right to life, medical services, regulations, responsibility*

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INTRODUCTION

Health has been and is a problem of the human being, on which depends not only man's ability to adapt and act in his living and working environment, but his very existence on this earth.

The social development and evolution have had remarkable effects on human health because they have increased life expectancy, reduced mortality by eradicating diseases due to the appearance of vaccines, improved living conditions.

From the perspective of the European Commission, beside its intrinsic value, health represents a prior condition for economic prosperity[1].

Maintaining and improving the health of the population is the fundamental task of any health system.

THE RIGHT TO PROTECTION OF HEALTH IN INTERNATIONAL REGULATIONS

In the definition of contemporary medicine, health represents "the condition of the human body in all its physiological, mental and emotional features are normal". According to the World Health Organization, health is defined as "a state of physical and mental well-being, of social well-being, and not one characterized only by the absence of diseases or infirmities"[2].

The Jakarta Declaration[3] on Leading Health Promotion into the 21st Century, signed at the Fourth International Conference on Health Promotion, stated that the essential factors for health are peace, shelter, education, social security, social relations, food, income, the

[1] Communication from the Commission on effective, accessible and resilient health systems published in Brussels, 4.4.2014 COM (2014) 215 final

[2] Irina Moroiau Zlătescu and Octavia Popescu, *Mediul şi Sănătatea* (Bucharest: Romanian Institute for Human Rights, 2008), 10

[3] Available at https://www.who.int/healthpromotion/milestones_ch4_20090916_en.pdf

empowerment of women, a stable eco-system, sustainable resource use, social justice, respect for human rights, and equity.

Starting from the above definition and especially from the importance of health for every society, international organisms have tried to mark this right as fundamental for the individual, by mentioning it in international documents. In this meaning, we list the following:

- Universal Declaration of Human Rights[1]
- Charter of Fundamental Rights of the European Union[2]
- Treaty on the Functioning of the European Union[3]
- European Social Charter[4]

Ensuring a healthy life and promoting the well-being of all at all ages is also one of the fundamental goals of sustainable development of the United Nations.

The right to health is a component of Art 8 of the European Convention on Human Rights[1]. According to the jurisprudence of the

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[1] Art 25 of the Universal Declaration on Human Rights states that "Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services".

[2] Art 35 of the Charter of Fundamental Rights of the European Union states that "Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities".

[3] Art 19 and Art 168 of the Treaty on the Functioning of the European Union states among the objectives for all Union's policies the insurance "of a high level of protection of human health".

[4] Art 11 on the right to protection of health stated by the European Social Charter revised on 3rd May 1996 adopted in Strasbourg and published in the Official Gazette No 193/4 May 1999 states that "With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: 1) to remove as far as possible the causes of ill-health; 2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents".

Court, the member states shall have to establish a regulation framework which shall impose to public and private hospitals the adoption of adequate protection measures for the physical integrity of the patients and to insure for the victims of a medical malpractice access to procedures allowing them to receive compensations for the caused damages[2]. Also, the access to medical services has been analysed by the Court as part of the right to life – Art 2[3].

The European Court of Justice has established as principle the fact that "every person has the right to outpatient medical care (without hospitalization) and to the reimbursement of the costs of such care, according to the tariffs of the state of origin, without the need for the authorization of the health centres"[4].

Nationally, the right to protection of health is stated both by the Romanian Constitution[5] in Art 34, but also by the Law No 95/2006 on

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[1] Art 8 of the European Convention on Human Rights signed in Rome on 1950 states that "1) Everyone has the right to respect for his private and family life, his home and his correspondence; 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[2] Application case Vasileva v Bulgaria, pct 63, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-161413%22]} (accessed on 02.06.2020)

[3] Application case *Panaitescu v România*, available at https://lege5.ro/Gratuit/ge2tqojrhaya/hotararea-privind-cauza-panaitescu-impotriva-romaniei (accessed on 02.06.2020)

[4] Press Release No 26/98, 28 April 1998, Judgments of the Court of Justice in Cases C-120/95 and C-158/96, Nicolas Decker v Caisse de Maladie des Employés Privés and Raymond Kohll v Union des Caisses de Maladie, available at https://curia.europa.eu/en/actu/communiques/cp98/cp9826en.htm (accessed on 02.06.2020).

[5] The revised Romanian Constitution published in the Official Gazette of Romania, Part 1, No 767/31 October 2003

the healthcare reform[1], Law No 46/2003 on the patient's rights[2], Law No 263/2004 on ensuring the continuity of primary care through permanence centres[3].

MEDICAL SERVICES

In relation to the above-mentioned regulations it results that medical services are an essential component of the right to protection of health and part of the social services; health also being considered a social right.

In any modern society, the public health system is of vital importance. It results from its indispensable feature, from large investments in human capital, from the high number of people served and from the capital implications of the functioning of medical services in all areas of social life[4].

Decision makers must firmly comply with social responsibility. Both the governmental and the private sector must promote health through the adoption of coherent and effective policies and practices. A better health shall be reflected not only in the improvement of life quality, of individuals' well-being, but also shall contribute as consequence in the creation of a durable economy.

Given these aspects, within the European Union the health systems function based on the following principles:

- Universality;
- Access to good-quality medical assistance;

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[1] Law No 95/2006 on the healthcare reform published in the Official Gazette No 652/28 August 2005, republished in the Official Gazette of Romania, Part 1, No 490/3 July 2015 and amended.

[2] Law No 46/2003 regarding the patient rights published in the Official Gazette No 51/29 January 2003

[3] Law No 263/2004 on ensuring the continuity of primary care through permanence centres published in the Official Gazette No 568/28 June 2004

[4] Mariana Stanciu, "Sistemul public de servicii medicale din România în context European", *Revista Calitatea Vieții*, XXIV, *no. 1* (2013): 3

- Equity and solidarity[1].

Medical services are part of the area of public services of general economic interest, which according to the Administrative Code[2] - Art 584 refer to economic activities conducted with the purpose of satisfying a need (or needs) of public interest, which the market could not provide or would provide under different conditions, regarding the quality, safety, accessibility, equal treatment or general access, without public intervention, for which the authorities of public administration establish obligations specific to public services.

According to Art 1 Let c) of the law on the patient's right, medical services are part of the health care together with community services and services related to the medical act.

The role of medical services is to ensure the health of the population through specialized preventive and therapeutic methods.

According to the law on the health reform, medical services are characterized by the following:

- Quality
- Efficacity
- Efficiency
- Accessibility.

In Romania, medical services are provided both by the public health care system, as well as by the private one, both being regulated and controlled by the state. The difference between the quality of the services provided by the two systems is notable and depends on the financing source. Currently, the Romanian state grants small percentages of the gross domestic product (GDP) for health care system which determines a quality of medical services still diminished in relation to the private system, which allocates large sums of money in increasing the

[1] Council Conclusions on Common values and principles in European Union Health Systems, OJ C 146, 22.06.2006

[2] Administrative Code was adopted by the G.E.O No 57 published in the Official Gazette, No 555/5 July 2019

treatment possibilities offered by the pharmaceutical industry and new medical technologies.

The financial resources allocated to the healthcare sector come from taxes, social insurance and private health insurance or from the direct (co)payment of the cost of services by patients. Regarding the obligation of citizens to contribute through taxes and fees to public expenditures, including those on the social health insurance system, the Constitutional Court of Romania has ruled that such an obligation ensures the fulfilment of the constitutional obligation of the state to ensure health care[1].

According to the provisions of the law on health reform, Art 80-82, Art 92 medical services are classified into:

- Essential services – those services, defining for the area of competence of primary medical care, which are provided by all family doctors during the medical consultation which comprises:

a) essential interventions in medical-surgical emergencies;

b) current assistance for acute demands;

c) monitoring chronic diseases, comprising active medical supervision for most frequent chronic diseases, prescriptions for medical and/or hygienic-dietary treatment, coordination of periodic evaluations performed by doctors other than family medicine;

d) preventive medical services, such as: immunisations, monitoring the progress of pregnancy and lactation, active detection of the risk of disease for conditions selected according to scientific evidence, active medical surveillance, in asymptomatic adults and children at normal or high risk, by age groups and sex.

- Expanded medical services – those services which may be provided at the level of primary medical care optionally and/or in certain conditions of organization, such as:

a) Special counselling services;

b) Family planning;

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[1] Decision No 335/10 March 2011 of the Romanian Constitutional Court, published in the Official Gazette, No 355/23 May 2011

c) Some small chirurgical procedures;
d) Socio-medical services: home care, terminal care.

- Additional medical services representing manoeuvres and techniques mastered by medical practitioners, certified by certificates of complementary studies and / or requiring special equipment.

- Emergency medical services and qualified first aid – ensemble of structures, forces, mechanisms and relations organised according to same principles and rules, using integrated specialized and/or qualified management procedures.

Specifically, the demand for medical services derives from the demand for health which, in turn, is conditioned by factors such as demographic and social changes, the level of education, the degree of information of the population and, last but not least, the income available to achieve this goal. In this context, as function of the health state of the population, the demand for services may put a higher or lower pressure on the performances of a medical system.

In Romania, the performance of the medical care is not high, the state making considerable financial efforts to ensure medical services for all categories of population, including for vulnerable groups.

CONCLUSIONS

The responsibility for health promotion in health services must be shared between individuals, community groups, health professionals, social workers, bureaucrats and the government. All must work together to organize a health system that contributes to improving the health of the population as a whole. The role of the medical sector must overcome the curative responsibilities and to point towards health promotion. But for this to happen, it is necessary to recognize that most causes of illness are outside the influence of the health sector and it is necessary to cooperate with those sectors that can positively influence these causes.

The declaration of the SARS-CoV2 pandemic proved, like in many countries, that the investment in health is inappropriate and inefficient. Increasing investment to improve health requires a truly multisectoral approach, including through the additional allocation of resources to education, housing and the health sector. Greater investment in health and the reorientation of existing services will have the potential to foster the positive evolution of human development, health and quality of life.

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THE ISSUE OF DOMESTIC VIOLENCE IN THE CONTEXT 0F COVID-19 PANDEMIC

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Abstract:

Domestic violence, a problem that the societies faced during all times, presents at present a significant increase of such cases. Urgent measures are imposed at the level of each state, on behalf of governments, and also a constant and intensive effort is imposed on behalf of the bodies involved in fighting family violence. The United Nations Organisation holds an extremely important part, at the same time emphasizing the gravity of this type of crime, following the increase in the incidence of cases of family violence within the first quarter of the year 2020, by referring to the same period of the previous year.

Key words: *COVID-19 pandemic, domestic violence, EU Directive on rights victims, Istanbul Convention, protection, European Union legislation,*

INTRODUCTION

At world level, we face an extremely difficult situation generated by the impact of the COVID-19 pandemic, affecting all fields of life. The efforts undertaken at European Union level, mark out the whole legal system, thus imposing a series of measures at national level to fight criminality.

Domestic violence registered a significant increase during the pandemic and especially during the isolation, when the final solution for

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each of us consisted in everybody's effort to stay at home. Within such a context, the pandemic became a re al danger for those women living with an aggressive partner, including those children exposed to domestic violence both directly and indirectly. Thus, home isolation becomes an absolute trap for those categories of persons considered vulnerable. Each country should decide concrete measures to stop the phenomenon and a consolidated effort on behalf of all Member States is needed to eradicate the violence against women and children on the whole European territory. Each Member State should provide within its national emergency plan to fight COVID-19 pandemic, special support and protection measures for the victims of domestic violence. The World Health Organisation also offers a set of recommendations regarding the way in which the victims of domestic violence can be supported and protected during a crisis generated by a pandemic.

RAISING AWARENESS ON THE PHENOMENON OF FAMILY VIOLENCE AS A SERIOUS PROBLEM OF THE NOWADAYS SOCIETY

For the purpose of unitarization of the policies of preventing family violence cases in all Member States, the Committee of Ministers of the Council of Europe adopted many Recommendations[1]. This initiative is based on the fact that domestic violence represents a serious assault against the persons who fall victims, but also against the society, violating an essential value of great importance for the Council of Europe, i.e. the promotion of safety and security within the community. When the welfare and the physical integrity of some persons are jeopardized, on a regular basis, in their own home and within their own family, the very place where they should feel safe, this represents a

[1] Among the recommendations of the Committee of Ministers addressed to the Member States of the Council of Europe, we mention Rec(2002)5 on the protection of women against women violence, Recommendation CM/Rec(2007)17 on gender equality standards and mechanisms, Recommendation R (79) 17 on the protection of children against ill treatments.

serious problem of the society. Violence, when is manifested within the family relationships, is extremely destabilizing, both on material and on a moral level. So, it is essential that the measures taken should be to prevent family violence and also to treat the consequences produced when they could not be avoided.

MEASURES ESTABLISHED BY THE EUROPEAN COMMISSION IN ORDER TO FIGHT FAMILY VIOLENCE

In the more and more acerbic fight with domestic violence, the Member States of the Council of Europe considered that, in the social and political context, it is urgent for them to define a policy against violence. This rising awareness offered the impulse necessary to the fight for prevention and fight against family violence[1]. Moreover, during such pandemic period we are facing, domestic violence increased significantly, arriving at an alarming ampleness[2]. Thus, the European Commission felt the need to adopt some particular, concrete and urgent measures in the response strategy to the COVID-19 pandemic. They have to take into account several aspects. Thus, the measures to restrain the right of movement can lead to the increase of situations of physical and mental violence or of negligence. The victims found in isolation have fewer possibilities to ask for help, the aggressor being around them all the time. In this regard, they have to make sure and facilitate the actual access to online and offline assistance services, and also to different social services. The Member States has to offer simple ways to call for help, through flexible instruments by which victims could report the abuses.

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[1] European Union Agency for fundamental rights, Violența împotriva femeilor: o anchetă la nivelul UE (*Violence against women, an enquiry at EU level)*, 9-10, https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_ro.pdf

[2]https://anes.gov.ro/cresterea-numarului-de-situatii-de-violenta-domestica-de-la-inceputul-anului-2020-reprezinta-un-semnal-de-alarma-asupra-recrudescentei-fenomenului-violentei-intra-familiale-din-tara-noastra-si-asupra/.

As response to the requests received in order to stop domestic violence, the Commission invited the European Union Member States to assure victims with prevention measures and with support and protection services. The Commission further requires that the Member States apply the obligations provided by the European Union legislation, especially the provisions of the EU Directive on the rights of victims[1]. In accordance with this directive, the victims of criminality have the right to protection, support and access to justice[2]. All the more so, during the crisis period, the victims have to be assured with solid rights, and each Member State has the duty to make sure that the fundamental rights are complied with.

In most Member States, they identified deficiencies regarding the enforcement of some essential rights, such as access to information, services of support and protection in accordance with the victims' individual needs. The Commission is to adopt during 2020 a strategy regarding the rights of victims (2020-2025), which will approach the specific needs of the victims of gender violence, including of domestic violence, based on the Directive on rights of victims[3].

The gender violence, in all its forms, is further reported insufficiently and treated shallowly, not only inside the European Union, but also outside it. The European Union makes efforts to prevent and

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[1] Directive 2012/29/UE of the European Parliament and of the Council of 25 October 2012. See also the Resolution of the European Parliament of 26 November 2009 on the elimination of violence against women, the Member States being invited to improve the national legislations and policies to fight against all forms of violence against women and to take measures to approach the causes of violence against women.

[2] European Commission, Brussels, 11.5.2020 COM(2020) 188 final, Report from the Commission to the European Parliament and the Council on the implementation of 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:188:FIN.

[3] Directive 2012/29/UE establishes minimum rules regarding the rights, support and protection of the victims of criminality. On 11 May 2020, the European Commission adopted the Report on the implementation of the directive on victims' rights. https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-ro.do.

fight gender violence, by supporting and protecting the victims of this type of criminality, and by severely sanctioning the abusive behaviour of aggressors.

Also, the Commission is considering the launch of a network at the European Union level to prevent gender violence and domestic violence, in order to facilitate the exchange of good practices at the level of all Member States.

THE ISTANBUL CONVENTION – A FIRST STEP IN FIGHTING DOMESTIC VIOLENCE

The Convention of the Council of Europe on the prevention and combating violence against women and domestic violence[1], also called the ”Istanbul Convention”, represents the main document approaching this form of violence and it is a reference point for all states of the world in fighting this phenomenon.

The Convention acknowledges and emphasizes the traumatic effect of the violence against women and of domestic violence (physical, mental, economic), as they are not treated as private problems. Therefore, in the light of such facts accomplished within the family, the offender will receive a more severe punishment when the victim is the wife, life partner or a family member. The provisions of the Convention apply to women, but also to other victims of domestic violence, such as men, children and elders.

Among the objectives of the Convention, there are: to protect the women against all forms of violence, and to prevent, sue at law and eradicate violence against women and domestic violence; to design a comprehensive framework of measures and policies for the protection and assistance of all victims of violence against women and of domestic

[1] Council of Europe Treaty Series No. 210, Istanbul, 11.V.2011, The Council of Europe *Convention* on preventing and combating violence against women and domestic violence (Istanbul Convention). www.coe.int/conventionviolence.

violence; to promote international cooperation in order to eradicate violence against women and domestic violence

By condemning all forms of violence against women and domestic violence, the Istanbul Convention sets up for the Member States a plan of measures of prevention, protection and punishment.

In matters of prevention, it requests:

- to change the attitudes, roles and stereotypes which makes the violence against women be accepted;
- to train professionals to work with the victims;
- to increase the degree of awareness regarding different forms of violence and their traumatic nature;
- to include didactic material regarding the themes of gender equality in school curricula at all levels of education;
- to cooperate with NGOs, media and the private sector in order to inform the public on these problems

In matters of protection, it requests:

- to make sure that the victims' needs and safety be the most important in the measures taken;
- to set up help specialized services, which should offer medical assistance, and psychological and legal counselling to the victims and their children;
- to set up enough shelters and to introduce permanent help lines for free calls.

In matters of punishment:

- to take measures so that violence against women be investigated and punished correspondingly;
- not to accept reasons of culture, tradition, religion or so-called "honour" as justification of any act of violence;
- to make sure that victims have access to special measures of protection during investigations and legal proceedings;
- to take measures that the law enforcement agencies answer immediately to help calls and to treat dangerous situations adequately.

The European Union signed this Convention in 2017, thus opening the accession process to it, which has not had finality until today. The Convention acknowledges the phenomenon of violence

against women as a serious violation of human rights and as a form of discrimination, also appointing this liability to Member States in case of failure to take adequate measures against this form of violence. The initiative launched by this Convention is beneficent, although its provisions appear as being non-compliant with the ones in the law of the Member States, starting from conceptual issues until the aspects related to the monitoring mechanism which could violate national sovereignty. Still, the Commission supports the initiative launched by the Convention and assumes totally the signature of the Convention, including the failure to finalize the accession process, intending in this regard that until 2021 to propose measures within the limits of competence of the European Union, in order to reach the same objectives as the Istanbul Convention ones.

CONCLUSIONS

The problem of domestic violence during COVID-19 pandemic was constantly signalled, such cases recording an alarming increase within this social context. So, this problem is still open on the European Commission agenda, appointing in the charge of Member States the obligation of further enforcement of the European Union legislation. Therefore, the Member States have to assure the victims of domestic violence with enough prevention measures, and also support and protection services, especially for women and children, by establishing warning systems, direct phone lines and emergency services. It is absolutely necessary to assure women with safe ways to ask for help and to be guaranteed the existence of some protection centres and shelters in case of violence. Romania needs urgent measures due to this crisis causes by the pandemic, but they have to be related to the deficient infrastructure we are facing. At government level, they drew up a complex package of rules by which they transposed the provisions of the Istanbul Convention, but there is the need that women should be well informed, to know their rights and to request support and help from authorities and NGOs, at all levels of intervention (government, local, community, civil society).

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THE ROMANIAN CASE LAW BETWEEN MAINTAINING RESPECTIVELY RESTRICTING THE RIGHT OF HAVING PERSONAL CONTACT WITH THE MINOR IN THE CONTEXT OF THE STATE OF EMERGENCY GENERATED BY THE SARS-CoV-2 PANDEMIC

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Carmen-Beatrice ENACHE[2]

Abstract:

In this paper we would like to bring under debate an issue from the Romanian law courts practice that relates to the necessity of restricting or not the right of the non-resident parent of having personal contact with the minor, in the context of the state emergency generated by the SARS-CoV-2 pandemic. The study begins with brief clarifications regarding the analysed right, indicating the conditions where we consider that a limitation of this right is supported, by applying the proportionality standard. The essence of the paper will consists in an exemplificative analysis of the decisions of Romanian law courts ruled in the mentioned period - regarding the issue under discussion, on which we will finally make short critical notes according to the manner in which it was ruled.

Key words: *SARS-CoV-2, personal contact with the minor, proportionality, best interest of the child*

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INTRODUCTORY ASPECTS REFERRING TO THE RIGHT OF THE NON-RESIDENT PARENT OF HAVING PERSONAL CONTACT WITH THE MINOR

The right of the non-resident parent to have personal contact with the minor child is regulated by art. 496 para (5) Civil Code[1] as well as by the art. 17 in Law no. 272/2004 regarding the protection and promotion of the child's rights[2]. Basically, reporting strictly to the topic of this paper, we indicate that the parent not living with his/her child, as the case may be, and also in the situation in which the child does not live with any of his parents, he or, as the case may be, they have the right to personal contact with the child.

The lawmaker does not make any distinction if the parents were or not married, respectively if we are in the situation of a child resulted from a marriage or out of it, this is as the situation of the child out of a marriage is assimilated by the one of a marriage. Moreover, we have the opinion that these personal contacts refer to the parentage relationship, putting on a secondary position the relationships between the parents. We stopped upon this issue in order to indicate that not only in the situation of a court decision which expressly foresees this right, but also in the situation of its lacking, the non-resident parent has the right to have personal contact with the minor child. As a consequence, the aspects regarding the necessity of restricting or not the right to have personal contacts with the minor child shall be applicable for both cases.

In the new pandemic context that generated the state emergency, we raised some questions regarding the topic under analysis, such as if the movement restrictions, that were set forth by the regulatory documents enacted, did not have, somehow, as a consequence the

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[1] Romanian Civil Code enacted by Law no. 287/2009 republished in the Romanian Official Gazette, Part I, no. 505/15th of July 2011, with subsequent amendments and additions

[2] Law no. 272/2004 regarding the protection and promotion of child's right, republished in the Official Gazette, Part I, no. 159 from 05/03/2014, with subsequent amendments and additions

restriction of the indicated right, by putting the non-resident parent in the impossibility of going to his/her child residence? Analysing the affidavit based on which the citizens were allowed to travel/move during that period, we noticed that one of the reasons for their movement was that of ”attending/accompanying a minor child, respectively assisting the elderly, ill or disabled persons or the death of a family member”. Therefore, we appreciate that in this way it was created the necessary framework to exercise the right of having personal contact with the minor.

On the other hand, by reporting to art. 53 in the Romanian Constitution revised, the measures ordered by Decree no. 195 from 16 March 2020, published in the Official Gazette no. 212 from 16 March 2020, regarding the institution of the state of emergency in Romania, allowed the limitation of some fundamental rights, among them being indicated the right to a private and family life. We reach the conclusion that, although there was not expressly provided the suspension or the restriction of the right to have personal contacts with the minor child, the new regulations acknowledged the possibility of instituting such measures, this task being on the law courts account referred to in such cases, which shall relate to the particularities of each case.

APPLYING THE PROPORTIONALITY PRINCIPLE FOR ASSURING THE FAIR EQUILIBRIUM BETWEEN THE CONCURRENT INTERESTS

In such circumstances, the law courts were requested to assess, in relation to every state of fact, the measure that had to be ordered, analysing whether the best interests of the child "require" the maintenance or restriction of personal contacts with the non-resident parent. We have to mention that the best interest of the child in the matter of decisions concerning minors is very difficult to determine, "the

subjective factor in establishing these criteria is omnipresent and governs even the whole decision-making process"[1] .

However, we are of the opinion that the magistrate cannot, *ab initio*, restrict the right to personal contact with the minor, but in order to give a legal decision will have to appeal to the application of the standard of proportionality.

This principle is regulated at European Union level by art. 5 of the Treaty on European Union, and in the system of the European Convention of Human Rights, it resides in the values proclaimed by the Convention, respectively democracy and the pre-eminence of the rule of law[2].

In the same sense, at a national level, art. 53 of our fundamental law provides for the possibility of restricting the exercise of certain rights, establishing, in essence, that this measure must be proportionate to the situation that caused it, an aspect reiterated also in Decree No. 195 that regulated implicitly the restriction of the right to private and family life only if that measure was necessary and proportionate to the intended purpose.

It was noted in the literature that "the proportionality test is a more detailed exercise and preferable to a categorical denial of the protection of a right at the interpretative stage"[3] The author of the quote[4] shows that the proportionality test is to be preceded by a test of the legality assessing the fulfilment of the four conditions, namely the existence of a legal basis within the national system for the imposition of the intrusive measure, the accessibility of the legal provision, the sufficiently precise feature of the legal provision which allows a person to reasonably foresee the consequences of what would be implied by his action, and the existence of adequate guarantees against the arbitrary interference in the substantial rights in question.

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[1] O. Mihăilă, *Adopția. Drept român și drept comparat* (Bucharest: Universul Juridic, 2010), 49

[2] T. Papuc, *Principiul proporționalității. Teorie și jurisprudența Curții de la Strasbourg* (Bucharest: Solomon, 2019), 275

[3]Papuc, *Principiul proporționalității,* 279

[4] Papuc, *Principiul proporționalității,* 280

Also, for the possibility of restricting certain rights, including the right to private and family life, we must take into account the reasons justifying the need for such a measure, such as the intensity of the intra-community transmission of this virus, namely the occurrence of outbreaks in a particular geographical area.

After promoting the legality test it is necessary to establish the legitimate aim pursued and by virtue of which this interference of a right guaranteed by law is accepted[1]. This goal consists, we believe, in protecting the best interests of the child, but the reasons related to public health are not to be neglected, and the next step in the analysis concerns the appropriateness of the measure underlying the interference. Is this measure necessary, is it the least intrusive and likely to achieve the legitimate goal, is the proportionality standard observed between the interference of the and the achievement of the intended goal?

The necessity is considered as the main stage in the analysis of the aforementioned because the intromission must be justified by a series of "pressing social needs" and the reasons invoked must be "relevant and sufficient"[2].

In view of the above, it is necessary to examine each factual context on an individual basis and the decision of the court relating to the suspension of the right in question can be obtained in the situation when the non-resident parent, for example, is infected with the new virus, or is exposed, due to his /her profession to this risk, but the simple fact that a minor should be taken from his home by the non-resident parent, so as to come into contact with him/her, is not sufficient to justify the restriction or suspension of the right in question[3]. Also, in the event that the place where the minor resides is seriously affected by the new virus, being

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[1] Papuc, *Principiul proporționalității,* 281

[2] Papuc, *Principiul proporționalității,*282

[3] F. Barbur, *Exercitarea dreptului părintelui nerezident de a avea legături personale cu copilul minor pe durata stării de urgență și a pandemiei de Coronavirus*, retrieved at: https://www.juridice.ro/679082/exercitarea-dreptului-parintelui-nerezident-de-a-avea-legaturi-personale-cu-copilul-minor-pe-durata-starii-de-urgenta-si-a-pandemiei-de-coronavirus.html

completely quarantined, it is obvious that the right in question should be suspended.

BRIEF CASE-LAW EXAMINATION OF THE SUBJECT-MATTER

Based on the same principle, namely the best interests of the child, the Romanian courts have decided either to restrict the right to have personal contact with the minor or to maintain this right in full, as we will exemplify below.

Thus, in a case, by a presiding judge's order, the applicant requested the court to establish the residence of the minor at his mother and, as it is apparent from the content of her petition, to suspend the visiting hours benefited from by the defendant until such time as the state of emergency established for SARS CoV-2 would cease. By civil decision no. 496/2020 of the Court of Bistrița-Năsăud[1] the magistrate of the case, considering that the minor's life had undergone, however, significant changes in the new context, being forced to stay only at home, thus deprived of school courses and the presence of friends, concluded that, additionally, the suspension of the father's visiting hours is not appropriate. Moreover, the court states that although the minor should be taken from the mother's home to the father's home in order to benefit from the visiting hours, this could be done "with minimal risk through the use of personal vehicle and with minimal exposure of the minor to risk factors."

Also, by civil decision no. 1867/2020[2] ruled on March 26, 2020 by the Cluj-Napoca Court was ordered to maintain the visit schedule, based on the agreement of the parties.

In another perspective, the Gherla Court established by civil decision no. 221/2020 delivered on March 27, 2020[3], that it is not in the interest of the minor to be moved from the mother's home to that of the

[1] Available [Online] at: www.rolii.ro
[2] www.rolii.ro
[3] www.rolii.ro

father in order to maintain personal contact, given that there was a risk for the minor to get infected. Next, the court establishes alternatives for maintaining contact between the minor and the father by making daily telephone and video calls until the end of the state of emergency when switching to the established visiting hours.

In the same way, we also refer to civil decision no. 220/2020 of the Moreni Court[1] by which it was noted the fact that the minor travelling at the time of the state emergency was not in her best interest, the solution being imposed, in this case, more since she was travelling abroad.

Such an approach was found in the doctrine, as well[2], considering that, in the framework of the state of emergency and medical difficulties, the restriction of the non-resident parent's right to have personal contact with the minor is justified.

CONCLUSIONS

Referring critically to those contained in the aforementioned decisions, we draw attention to the fact that the first sentence, that of the Bistrița Court, was delivered on the March 19, 2020, and the second, of the Gherla Court, on March 27. We emphasize this aspect, given that from 19th to 27th March the risks of infection have increased, the situation created by SARS CoV - 2 virus being in a permanent dynamic, aspects that should be essential in the delivery of a judgment, the ratio of proportionality between the measure ordered and the intended purpose being clearly influenced.

On the other hand, we point out that in the decision of the Court of Bistrita, the judge, ordering the maintenance of the visiting hours, nevertheless acknowledged the existence of a minimum risk to which the minor could be exposed in order to maintain contact with the father, thus

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[1] Available [Online] at: www.rolii.ro

[2] A. C. Stoica and P.A. Lupu, *Poblematica restrângerii dreptului de păstrare a legăturilor personale cu minorul în contextul Covid-19*, retrieved at: https://www.juridice.ro/677249/problematica-restrangerii-dreptului-de-pastrare-a-legaturilor-personale-cu-minorul-in-contextul-covid-19.html

the possibility of endangering the minor's health following the court's decision. In such circumstances, we consider that it would be appropriate for minors not to be subjected to even minimal risks.

Taking into consideration the aspects related to the best interests of the child, and the ones that give efficiency to the rights of the non-resident parent, we believe that it is appropriate for courts to apply a standard of proportionality, by analysing the concurrent interests, and whether the extent of restriction of rights is necessary and appropriate.

Also, in the issue of restricting or not the right to have contact with the minor, the parent with whom the minor lives must observe the principle of good faith. Thus, "the parent with whom the child lives has a responsibility to support the maintenance of personal contacts of the child with the other parent"[1], through the alternative means of communication.

The establishment of the state of emergency cannot be a stand-alone argument in the sense of refusing the child's personal contact with the parent who does not live with him, but he/she has visiting hours established by a court or even agreed by the two parents.

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AGRICULTURAL LAND – THE PEARL OF ROMANIA. A HISTORY OF LEGISLATIVE CHANGES WITH MAJOR IMPACT ON THE AGRICULTURAL SECTOR

Raluca CHELARU[1]

Abstract:

The legal regime of agricultural lands has changed frequently over time, with important consequences in the agricultural sector. Most of the amendments simplified the transactions in the real estate sector – the free circulation of lands, opening the land market to foreigners, however others slowed down, but in the same time offered a more powerful protection to the civil circuit – the authentic form of all deeds in real estate, the pre-emption right upon the sale of extra muros agricultural lands. The legislative amendments adopted throughout time also referred to the categories of agricultural land on which it may be built or the condition related to the surface of the acquired arable land per family. Urban planning and permitting construction works in respect of withdrawing from the agricultural circuit of agricultural lands also suffered amendments. As regards the cumulative conditions to be met in order for a court decision operating in lieu of a sale-purchase agreement to be given in the field of sales of extra muros agricultural land, the notary practice and the courts' judicial practice is extremely rich and varied. The latest proposed amendments in the real estate sector, mainly with respect to agricultural bring a real reform in the industry, by establishing seven ranks of pre-emptors, very restrictive conditions for natural persons and legal entities to purchase extra muros agricultural lands, restraints on the sale of the extra muros agricultural lands for a period of 8 years following purchase thereof, the obligation of extra muros land owners to use them solely for agricultural activities. However, it is to be noted that these newly proposed amendments are currently under constitutionality review, for criticisms composed of both extrinsic and intrinsic grounds.

Keywords*: real estate; agribusiness; agricultural lands; pre-emption; agriculture.*

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INTRODUCTION

Agricultural land has always been Romania's protected wealth. Gradual awareness of the local land market value along with accession to the European Union led to value fluctuations, with changes in the architecture of real estate transactions which became more visible especially in the post-accession period, with consolidations of large areas and, most important, to various and totally unexpected legislative changes[1].

From changes in the pre-emption rights, to changes in the foreigners' rights to purchase land in Romania, from significant changes in the regime of building on *extra muros* agricultural land and the withdrawal from the agricultural circuit, up to the restraint on re-sale of *extra muros* agricultural land unless extremely restrictive conditions are met, all such fluctuations were for some time protected by a certain safety "net", and manifested thereafter a powerful legislative trend of turning the sale of agricultural land into a lengthy procedure[2].

LEGISLATIVE CHANGES WITH MAJOR IMPACT ON THE AGRICULTURAL SECTOR

Without going into detail on the legal circulation of land, we shall hereinbelow review the most significant legislative changes with major impact on the agricultural sector[3].

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[1] See also Boar Flavius Alexandru, „Legea nr. 17/2014: de la raţiunea reglementărilor la complexitatea juridică a dificultăţilor practice" (Law No. 17/2014: from grounds of regulations to the legal complexity of practical difficulties), *Revista Română de Drept Privat No. 6* (2014).

[2] G.C. Frenţiu, *Legea nr. 17/2014 privind unele măsuri de reglementare a vânzării-cumpărării terenurilor agricole situate în extravilan (Law No. 17/2014 on certain measures regulating the sale and purchase of agricultural land located extra muros)*, (Bucharest: Solomon, 2014).

[3] For a detailed analysis of the legal regime of the circulation of land, see C. Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod* (Bucharest:Hamangiu, 2013), 117.

I. LAND LAW NO. 18/1991

I.1. The legal regime of land, as instituted by Land law No. 18/1991.

Key-principles: free circulation of land, authentic form of deeds, restraint on foreigners to acquire land, the pre-emption right of co-owners and neighbours upon the sale of *extra muros* agricultural land, immunity of *extra muros* agricultural land[1]

In essence, the initial form of Land law No. 18/1991, as enacted on 20 February 1991, liberalized, under specific conditions, the legal circulation of land, by implementing important principles, such as the *free circulation of land* and its admission to trading (Article 45 of the initial legal version). Alienation of land by means of legal deeds executed among living persons will be possible subject to observance of *the authentic form of the deed* (Article 46 of the initial legal version)[2].

It provided for the *restraint on acquiring ownership of areas larger than 100 ha of agricultural land* as equivalent arable area per family, failing which the deed of alienation would be null and void (Article 46, of the initial version of the law).

Also, it provided *that foreigners, i.e. natural persons who do not have Romanian citizenship and domicile in Romania, and legal entities which do not have Romanian nationality and headquarters in Romania, are prohibited from acquiring any kind of land by means of a deed executed among living persons* (Article 47 of the initial legal version)[3].

The latter could however acquire land by means of succession, but they were bound to alienate it within 1 year from acquirement, failing which the land would be transferred free of charge in the ownership of the state and under the management of the Agency for Rural Development. Also foreigners who acquired ownership of land prior to

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[1] See also E. Chelaru, *Drept civil. Drepturile reale principale* 5th edition (Bucharest: C.H. Beck, 2019), 190.

[2] See also E. Chelaru, *Circulația juridică a terenurilor* (Bucharest: All, 1999).

[3] See also V. Stoica, *Drept civil. Drepturile reale principale* 3rd Edition (Bucharest: C.H. Beck, 2017), 152.

the coming into force of Law No. 18/1991, in respect of which the 1-year period started running from the coming into force of the law, had the same obligation failing which such land would have been transferred free of charge in the ownership of the state and under the management of the Agency for Rural Development. Such restraint on foreign and stateless citizens to acquire a right of ownership over land in Romania was instituted under the constitutional regime set out by the original Constitution of 1991 and suffered major changes in time, currently such restrictions being no longer valid[1].

Law No. 18/1991 provided a *right of pre-emption on alienation of agricultural land located extra muros*, however only for such land alienated by *sale*, under the penalty of relative nullity (Articles 48 and 49 of the initial legal version).

The pre-emption right was established in favour of the co-owners, neighbouring owners and was exercised by the Agency for Rural Development. The pre-emption right suffered major changes in time[2].

EXCLUSIONS

The pre-emption right does not concern the agricultural land located *intra muros*. Also, such pre-emption right is not applicable to land located *extra muros* which has another destination (for instance, land – construction yards located *extra muros*). Hence, the destination considered by Law No. 17/2014 is the *agricultural* one, as described in Article 2 (a) of Law No. 18/1991, according to which: (i) productive agricultural land - arable land, vineyards, orchards, grapevine nurseries, fruit nurseries, hop and mulberry plantations, permanent pastures, hay fields, greenhouses, solaria, hotbeds and the like, (ii) land with forest vegetation if it does not belong to forest planning, afforested pastures,

[1] For a detailed analysis of the manner in which foreign and stateless citizens, and foreign legal entities may acquire a right of ownership over land in Romania, see Chelaru, *Drept civil. Drepturile reale principale*, 225.

[2] For a detailed analysis of the right of pre-emption upon purchase of agricultural land, see also Chelaru, *Drept civil. Drepturile reale principale*, 221

(iii) land occupied by agricultural and farming buildings and installations, aquaculture facilities and land improvements, technological and agricultural operation roads, depositing grounds and platforms serving the needs of agricultural production, and (iv) unproductive land which can be fitted out within improvement perimeters and used for the agricultural production[1], shall be land with agricultural destination. In addition, the provisions of Law No. 17/2014 do not apply to the enforcement procedures and the sale agreements executed after fulfilment of the public tender formalities, such as those performed during the insolvency prevention and insolvency proceedings or because of the immovable asset belonging to the private property of local or county interest of the administrative and territorial units.

It also instituted the *immunity of extra muros agricultural land*, as the same could not be subject to enforcement or voluntary proceedings, except as provided by law (Article 50 of the initial legal version), immunity which was thereafter eliminated from Law No. 18/1991.

I.2. The use of land for agricultural production and the organization and management of agricultural land, as set out by Land Law No. 18/1991

1. *Propter rem* obligations

Law No. 18/1991 instituted specific obligations for all holders of agricultural land, to ensure a rational use thereof, to improve and restore degraded land, to reincorporate the degraded land into the production cycle, to usefully manage the agricultural land.

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[1] See also *Culegerea de practică notarială în domeniul cadastrului și al publicității imobiliare. Spețe comentate în cadrul ședințelor de lucru ale reprezentanților Uniunii Naționale a Notarilor Publici din România și ai Agenției Naționale de Cadastru și Publicitate Imobiliară (Notarial Practice Collection in matters related to cadastre and land registration. Cases commented during the working meetings of the representatives of the Romanian National Union of Notaries Public and of the National Agency for Cadastre and Land Registration)*, published by the Romanian National Union of Notaries Public, Vol. II (Bucharest, 2017), 85-86, 93-94.

All these were characterized, in the specialized literature, as being the so-called *propter rem* obligations, which concern the asset held under any title and which are incumbent on any holder of the land[1].

Subject to penalties for misdemeanours, Law No. 18/1991 provides for the obligation of all holders of agricultural land to secure the cultivation thereof and the protection of the soil (Article 53 of the initial legal version).

Also, Law No. 18/1991 laid down the rules applicable to holders of agricultural land regarding the performance of the necessary works for the protection and amelioration of the soil (Article 58 of the initial legal version).

Currently, such *propter rem* obligations continue to be regulated by Law No. 18/1991.

2. The change of agricultural destination and withdrawal from the agricultural circuit

Law No. 18/1991 permitted natural persons to freely change the category of use of agricultural land to another category, however the legal entity had the obligation to obtain specific endorsements (Article 56-57 of the initial legal version)[2].

Definitive or temporary withdrawal of land from agricultural or forest circulation was possible subject to observance of certain rules, payment of charges (in case of definitive withdrawal) or deposit of money as guarantee (in case of temporary withdrawal) and obtaining certain endorsements (Article 71 and the following of the initial legal version)[3]. The change of the agricultural destination and withdrawal from the agricultural circuit was amended in time, currently the withdrawal proceedings being performed only for *extra muros* land.

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[1] C. Bîrsan, *Drept civil. Drepturile reale principale* 3rd edition, revised and supplemented (Bucharest: Hamangiu, 2008), 142.

[2] See also Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod civil* , 115.

[3] For additional details on the temporary or definitive use of land for purposes other than agricultural production and forestry, see Bîrsan, *Drept civil. Drepturile reale principale*, 143.

3. Organization and management of the agricultural land. Key-principles: correlation of agriculture with the other social and economic activities, consolidation of land, farm management, organization of agricultural road network[1]

According to Law No. 18/1991, the organization and management of agricultural land means creating the conditions for a better use of land for agricultural production and is performed on basis of surveys and projects at the owners' request, solving the following issues:
a) *correlation of agriculture development in the area with the other economic and social activities*, laying down measures which lead to the increase of agricultural production and of the general farming of the land;
b) *consolidation of land according to owners and destinations* in accordance with the ownership structures and the forms of land cultivation, as resulting further to association, establishing the perimeters of each property, by consolidating dispersed plots and rectifying the boundaries that were positioned irrationally;
c) *preparing surveys and projects for the organization and management of farms*;
d) *establishing the agricultural road network*, in addition to the general road network, integrated in the general organization and management of land, for transporting the production and having access to the agricultural machines, as required for the production process.

Currently, such principles continue to be regulated by Law No. 18/1991.

Government Emergency Ordinance No. 108/2001 on farms, which is no longer currently in force, provided a series of rules on dimensioning farms according to sectors (plant, livestock, aquaculture and for mixt farms) and the support granted to agricultural producers who held or managed farms.

[1] See also Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod civil*, 115.

4. Restraints on building on *extra muros* agricultural land[1]

4.1. Initial regulations comprised by Law No. 18/1991

a) General rule

Law No. 18/1991 provided the general rule of locating any new constructions whatsoever inside the *intra muros* area of the territorial units (Article 70 of the initial legal version).

b) Exceptions

Exceptionally, the following could be built on the *extra muros* area:

- Some constructions which, by their nature, could cause pollution effects on the environmental factors;
- Constructions which, by their nature, cannot be located inside the *intra muros* area, and
- Animal housing.

c) Agricultural land with special regime

There were particular plots of agricultural land on which not even the aforementioned construction could be built, namely: (i) *extra muros* agricultural land of 1st and 2nd quality class, (ii) land on which land improvement works were performed, and (iii)land cultivated with vineyards and orchards, national parks, reserves, monuments, archaeological and historical sites.

d) Exceptions from the special regime of agricultural land

Law No. 18/1991 permitted building on land with special regime some *special works*: constructions that service the agricultural activities, constructions with military destination, railways, roads of major importance, high-voltage power lines, drilling and well equipment, oil and gas exploration works, oil and gas pipelines, water management works and development of water supplies.

[1] For a detailed analysis of the temporary or definitive use of land for other purposes than agricultural production and forestry, see Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod civil*, 116.

4.2. The current regulations comprised by Law No. 18/1991, currently in force

a) General rule

Law No. 18/1991 suffered a series of changes in time, and the form which is currently in force kept the original rule according to which any new constructions whatsoever shall be located inside the *intra muros* area of the administrative and territorial units (Article 91 of the current legislative version).

"Any constructions whatsoever" shall mean constructions that can only be made based on and in accordance with the building permit, which was issued according to the law in force.

b) Exceptions

Exceptionally, it is possible to build in the *extra muros* area, based on the building permit and the approval of the definitive or temporary withdrawal from the agricultural circuit, in accordance with two sets of exceptions:

Exceptions regarding the category of agricultural land on which it may be built:

- on agricultural land of 3rd, 4th and 5th class of quality, which are under the category of use of arable land, vineyards and orchards (*First category of land)*, and
- on *extra muros* land on which land improvement works were made (*Second category of land)*
- on *extra muros* agricultural land 1st and 2nd class of quality, and on land occupied by national parks, reserves, monuments, archaeological and historical sites (*Third category of land)*

Exceptions regarding the investment objectives that can be built:

i) As to the first and second category of land, it is possible to build investment objectives that:

- are subject of public and private projects and may generate *pollution effects* on the environmental factors;
- *by their nature cannot be located intra muros*, namely: excavations, gravel pits, borrow pits, landfills, mountain refuges, emergency refuge with the necessary infrastructure;

- *service agricultural activities and/or related services*, such as: mineral or natural fertilizer storehouses, composting plants, fodder silos, storerooms, sheds, silos for deposit and conservation of seeds for consumption, including any related administrative premises, platforms and storage spaces for primary agricultural products, greenhouses, solaria, hotbeds and mushroom farms, animal housing;
- of national, county or local interest, declared as *public utility*, under the law in force;
- *appurtenant structures of agricultural holdings* as defined in point 4 of appendix No. 2 to Law No. 50/1991;
- specific to *aquaculture*, with the necessary infrastructure and utilities, including aquaculture facilities/extraction of mineral aggregates on *extra muros* agricultural land;
- with *military destination, railways, roads of special importance, high-voltage power lines*, drilling and well equipment, oil and gas exploration works, oil and gas pipelines, water management works, sewerage and development of water supplies, wells, water pipes for agricultural holdings, and weather stations;
-for *land improvements* and regulation of water courses, such as: irrigation, drainage, terracing, riverbank protection works and the like;
-radio-TV or telephone *communication infrastructure, public and private roads*, technological roads.

ii) As to the third category of land:

According to the building permit and the approval of definitive or temporary withdrawal from the agricultural circuit, it is possible to build only *constructions that service agricultural activities, with military destination, railways, roads of special importance, high-voltage power lines, drilling and well equipment, oil and gas exploration works, oil and gas pipelines, water management works, sewerage and development of water supplies, as well as works for land improvement and regulation of water courses, respectively: irrigation, drainage, terracing, riverbank protection works and the like*.

II. LAW NO. 54/1998 ON THE LEGAL CIRCULATION OF LAND

Law No. 54/1998, which came into force on 4 June 1998 (and is currently no longer in force), re-instituted certain key-principles of Law No. 18/1991[1]: (i) keeping the rule of the free circulation of land, (ii) the authentic form of the deeds of alienation of land among living persons, (iii) the restraint on acquiring ownership over certain areas of agricultural land, the limit being extended to 200 ha as equivalent arable area per family, (iv) the right of pre-emption on sale of *extra muros* agricultural land, under the penalty of relative nullity, which was also extended in favour of the tenants (being provided in favour of the following, in this order: co-owners, neighbours or tenants). The reason of instituting the right of pre-emption on sale of *extra muros* agricultural land is to avoid excessive severance of the land properties and to favour, as much as possible, their consolidation, to maximize the potential of agricultural land[2].

As to the *interdiction on foreigners to acquire land (including agricultural land)*:

- natural persons with Romanian citizenship and domiciled abroad were excepted from this category, being allowed to acquire any kind of land in Romania, pursuant to legal deeds executed among living persons and by inheritance;
- the restraint on foreign legal entities to acquire land in Romania pursuant to legal deeds by reason of death was extended;
- foreign investors were excepted from this restraint, according to the law on the legal regime of foreign investments.

Also, Law No. 54/1998 instituted, under the penalty of absolute nullity, the restraint on alienations in any form of land whose title is involved in disputes before the courts, throughout the settlement of such disputes.

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[1] See also Chelaru, *Drept civil. Drepturile reale principale* , 191

[2] See E. Chelaru, „Dreptul de preempțiune reglementat de Legea nr. 54/1998“, in *Dreptul No. 8* (1998): 19

III. LAW NO. 247/2005 ON REFORM OF PROPERTY AND JUSTICE, AND ACCESSORY MEASURES

Law No. 247/2005, that came into effect on 22 July 2005, implemented a genuine legislative reform and abrogated Law No. 54/1998.

As to the land, its circulation regime was unified, without making any distinction according to destination (*i.e.* agricultural land, buildable land or others) or location (*intra muros* or *extra muros*).

The land was traded, which meant that it could be subject to transfer by means of deeds executed among living persons without any special conditions (except the authentic form of the deed of alienation).

Therefore, upon enactment of Law No. 247/2005:

- the *pre-emption* right was eliminated from the sale of agricultural land located *extra muros*;
- the condition related to the extent of the acquired area up to *maximum 200 ha* as equivalent arable land per family was eliminated;
- the rules applicable to *foreign and stateless citizens and foreign legal entities* that acquire a right of ownership over land in Romania[1] were completely changed. Regarding such category of persons, Law No. 247/2005 referred to the conditions provided by the special law, that was subsequently adopted, i.e. Law No. 312/2005 on the acquisition of private property right over land by foreign and stateless citizens, and by foreign legal entities, that came into force on 14 November 2005. Such category of persons was assimilated to Romanian citizens, however the assimilation did not occur automatically, but within a differentiated term (5 and 7 years, respectively, from Romania's accession to the European Union, except for third state farmers and persons, in respect of which Law No. 312/2005 provided certain exception rules). Therefore, it currently came to a liberalized legal circulation of land, in consideration

[1] For more details on the issue of acquiring a right of ownership over land by foreign and stateless citizens and foreign legal entities, see also Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod civil*, 126

of the principle of the free circulation of all assets and services within the European Union and the European Economic Area[1].

IV. CHANGES OF THE LAW ON URBAN PLANNING AND PERMITTING CONSTRUCTION WORKS IN RESPECT OF WITHDRAWAL FROM AGRICULTURAL CIRCUIT

Although, the withdrawal from the agricultural circuit was initially a separate and mandatory stage in permitting construction works, gradually, such rule faded away, being finally eliminated, however, only in certain cases and under specific conditions.

Along with the enactment of Law No. 247/2005, certain rules on withdrawal from the agricultural circuit, as regulated by Law No. 18/1991[2], were eliminated. Thus, Article 92 (5) of Law No. 18/1991 was abrogated by Law No. 247/2005 (Title IV), which provided that: "*The provisions of par. (4) also apply to agricultural land that became, according to law, part of the intra muros area of the territorial unit, for the execution of any kind of constructions whatsoever*". Therefore, par. (5) referred to par. (4), which provided that: "*Land located in the extra muros area of the territorial units shall be definitively withdrawn from the agricultural circuit form forestry and agricultural circulation against the payment of the charges provided in appendices Nos. 1 and 2 hereto by the natural person or legal entity applicants, (...)*". Accordingly, regarding the agricultural land that became, according to law, part of the *intra muros* area of a territorial unit, payment of the legal charges for the execution of any kind of construction works whatsoever was eliminated. Subsequently, in 2008, a new rule was implemented in this respect, namely that for the land which became part of the *intra muros* area under the General Urban Plan, withdrawal from the agricultural circuit was no

[1] See also Chelaru, *Drept civil. Drepturile reale principale*, 157; V. Stoica, *Drept civil. Drepturile reale principale* 3rd Edition (Bucharest: C.H. Beck, 2017), 152
[2] See also Chelaru, *Drept civil. Drepturile reale principale*, 192

longer necessary[1]. To this effect, Law No. 350/2001 on land management and urban planning was amended, by Government Ordinance No. 27/2008 for amending and supplementing Law No. 350/2001 on land management and urban planning[2].

After this legislative amendment, certain difficulties existed in practice as regards the actual formalities for withdrawing from the agricultural circuit of a land that became part of the *intra muros* area based on the provisions of the General Urban Plan. In this respect, in accordance with Article 3 of the Regulation on the content of documentations related to withdrawal from the agricultural circuit, approved by Order No. 897/2005 issued by the Ministry of Agriculture, Forests and Rural Development, *in order to withdraw from the agricultural circuit the land that became part of the intra muros area under the General Urban Plan, a series of formalities was required, as in the case of withdrawing from the agricultural circuit of extra muros land* (such as the endorsement of the National Administration of Land Improvements, the cadastral documentation), which is contrary to the very spirit and purpose sought by the legislator when repealing paragraph (5) of Article 92 in Law No. 18/1991.

Further, due to the amendment of 27 July 2012 to Law No. 50/1991 on permitting construction works, *land is withdrawn from the agricultural circuit by the building permit*[3]. The wording in paragraph (3) of Article 23 in Law No. 50/1991, which was prior to 27 July 2012, was the following: "*Land intended for constructions is withdrawn from the agricultural circuit, temporarily or definitively, in accordance with the law*".

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[1] The effect of insertion of par. (5) in Article 31[1] of Law No. 350/2001 is to eliminate the obligation of withdrawing from the agricultural circuitof land that became part of the *intra muros* area pursuant to the provisions of the General Urban Plan.

[2] As approved by Law No. 242/2009 on approving Government Ordinance No. 27/2008 for amending and supplementing Law No. 350/2001 on land management and urban planning.

[3] Paragraph (3) of Article 23 of Law No. 50/1991 was amended by Law 133/2012 approving Government Emergency Ordinance No. 64/2010 amending and supplementing Law No. 7/1996 on cadastre and land registration.

As a result of the legislative change (which is still in force today), *the land intended for constructions, registered as intra muros, is withdrawn from the agricultural circuit definitively by the building permit*. If the owner of the land wishes to only withdraw from the agricultural circuit part of the land it owns, in order to fulfil this procedure, the building permit shall be submitted together with the cadastral technical documentation[1]. The rule that the immovable assets in the *intra muros* area approved under the law are withdrawn from the agricultural circuit, definitively and temporarily, by the building permit is also regulated by Article 23(A)(b) of Law No. 7/1996 on cadastre and land registration.

Intra muros areas are established under the general urban plans (*planuri generale de urbanism* – PUG), which are approved under the law, or by zonal urban plans (*planuri urbanistice zonale* – PUZ), approved under the law, based on duly justified conditions, in accordance with Article 23 (1) and (2) of Law No. 50/1991.

Agricultural extra muros land is included in the intra muros areas of territorial administrative units provided that the due fee is paid to the Land Improvement Fund, as set forth in Article 92^1 of Law No. 18/1991 currently in force. There are certain *exceptions* from this rule as well, such as: (i) certain public benefit objectives, (ii) constructions that service the activities and/or related services, investments made with EU funding, in the agriculture and/or food industry sectors, appurtenant structures of agricultural holdings, works for land improvement and regulation of water courses, sewerage, development of water supplies, wells, water pipes for agricultural holdings, weather stations, investments of national, county or local interest, declared as public utility, under the laws in force, (iii) agricultural perimeters in demolished villages or hamlets, undergoing reconstruction[2].

Naturally, *the agricultural land located extra muros shall continue to be withdrawn from the agricultural circuit* in accordance with the rules in the Procedure for definitively or temporarily

[1] According to Article 23(3) of Law No. 50/1991.
[2] According to Article 92^1(2) of Law No. 18/1991.

withdrawing *extra muros* land, as well as approving the Procedure for reimbursing the fee paid to the Land Improvement Fund, approved by Order No. 83/2018 issued by the Ministry of Agriculture and Rural Development and which came into force on 28 February 2018. Order No. 897/2005 issued by the Ministry of Agriculture, Forests and Rural Development approving the Regulation concerning the content of the documentations related to the withdrawal from the agricultural circuit of the land was repealed on 26 February 2018[1].

In accordance with the Procedure for definitively or temporarily withdrawing from the agricultural circuit of an *extra muros* land, the approval for definitively or temporarily withdrawing *extra muros* agricultural land is a distinctive procedure and is not part of the construction permitting procedure.

This Procedure includes rules related to:

- the documentation and how the definitively or temporarily withdraw from the agricultural circuit *extra muros* lands is approved;
- payment of the fee to the Land Improvement Fund;
- the Government decision approving the definitive or temporary withdrawing from the agricultural circuit of *extra muros* land;
- registration with the cadastre and land registration books of the category of use "buildings and adjoining areas" (in Romanian, "*curți-construcții*");
- the up-to-date status of the approvals for definitively or temporarily withdrawals from the agricultural circuit of an *extra muros* land.

The definitive or temporary withdrawal from agricultural circuit of *extra muros* agricultural land is currently approved as follows:

a) under a decision of the manager of the county agriculture directorate, for agricultural land of up to 1 ha (inclusive);

[1] Order No. 377/2017 repealing Order No. 897/798/2005 of the Ministry of Agriculture, Forests and Rural Development and of the Minister of Administration and Interior approving the Regulation on the content of the documentations related to withdrawal from agricultural circuit.

b) under a decision of the manager of the county agriculture directorate, for agricultural land of up to 100 ha (inclusive), subject to the endorsement of the relevant structure in the Ministry of Agriculture and Rural Development;
c) under a Government decision, for agricultural land exceeding 100 ha, initiated by the Ministry of Agriculture and Rural Development [1].

As to changing the category of use of a land from *extra muros arable* to *intra muros buildings and adjoining areas*, two operations shall be conducted: (i) for changing the intended use of the immovable asset from *extra muros* to *intra muros*, the decision of the Local Council issued based on the zonal urban plan approved in accordance with the legal plans will be used (sufficing to present the certificate issued by the local public authority, the decision of the Local Council approving the urban plan or the certificate attesting to payment of tax liabilities) and (ii) for changing the intended use of the land from *arable* to *buildings and adjoining areas,* the decision of the Ministry of Agriculture and Rural Development approving the withdrawal from the agricultural circuit of the land will be used (considering that an *extra muros* land is involved)[2].

In this respect, the provisions of Order No. 700/2014 approving the Regulation for endorsement, acceptance and registration with the cadastre and land book records are applicable, which, under Article 111 (3), set forth that "*(...) the category of use/intended use for the entire immovable asset registered in the integrated cadastre and land book system may be updated without a cadastral documentation, by the inspector, in the integrated cadastre and land book system, based on the specific administrative act issued under the law*".

[1] In accordance with Article 94 of Law No. 18/1991.
[2] Please also see Notarial Practice Collection in matters related to cadastre and land registration, 86-89.

V. REGULATION CURRENTLY IN FORCE: LAW NO. 17/2014

Key principles: reintroducing pre-emption upon the sale of *extra muros* agricultural land

V.1. Introduction

Before reviewing Law No. 17/2014 on a number of measures to regulate the sale and purchase of *extra muros* agricultural land, and amending Law No. 268/2001 on the privatisation of companies administering land that is public and private property of the State and has agricultural destination, and on the establishment of the State Property Agency, please note that pre-emption upon sale of *extra muros* agricultural land was provided in Law No. 18/1991 and, afterwards, in Law No. 54/1998[1].

The new Law No. 17/2014 brought again into question certain legal concepts that had been repealed in 2005, once Law No. 247/2005 came into force (*i.e.* 22 July 2005). This repeal concerned the provisions related to pre-emption upon sale of *extra muros* agricultural land included in Law No. 54/1998.

Law No. 17/2014 establishes a series of important rules, the inobservance of which has various consequences: administrative, civil or misdemeanour liability, with fines of up to RON 50,000 – 100,000. Moreover, it is expressly set forth that alienating *extra muros* agricultural land by sale and purchase without observing the pre-emption right, in accordance with Article 4, or without obtaining the endorsements indicated in Articles 3 and 9 is prohibited and penalized with relative nullity. This penalty of relative nullity is welcome considering that it replaced the former penalty of absolute nullity starting 16 May 2014,

[1] The new law was also thoroughly analysed in Frenţiu, *Legea nr. 17/2014 privind unele măsuri de reglementare a vânzării-cumpărării terenurilor agricole situate în extravilan*, 2014.

when Law No. 17/2014 was amended by Law No. 68/2014[1]. In this respect, considering Law No. 54/1998, it was pointed out that "*the penalty of relative nullity only concerns sale-purchase agreements (...), not promissory sale-purchase agreements, regardless of the date when they were concluded*". In this case, "*the mechanism of exercising the right of pre-emption may also be triggered by the promissory purchaser, and instead of the selling offer the very promissory agreement will be registered (...)*"[2].

For the implementation of Law No. 17/2014, on 30 May 2014 (i.e. 14 days after the coming into force of Law No. 17/2014), the Methodological Rules approved by Order No. 719/740/57/2333/2014 of the Ministry of Culture were issued. The provisions of the Methodological Rules apply to the transfer of property rights performed both under a sale-purchase agreement authenticated by a notary public, and to a court decision operating in lieu of a sale-purchase agreement if the promissory agreement is concluded in accordance with the provisions of the Civil Code and under the relevant laws. Moreover, in accordance with this order, the transfer of property rights may concern the entire land, or a share of the right to said land[3].

In practice, the issue that arose was that of registering with the land book an *extra muros* agricultural land based on a sale-purchase agreement authenticated after the coming into force of Law No. 17/2014, precisely on the day when the Methodological Rules for implementing

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[1] Law 68/2014 amending paragraph (1) of Article 29 of Law No. 7/1996 on cadastre and land registration and Law No. 17/2014 on a number of measures to regulate the sale and purchase of *extra muros* agricultural land, and amending Law No. 268/2001 on the privatisation of companies administering land that is public and private property of the State and has agricultural destination, and on the establishment of the State Property Agency

[2] Please see Stoica, *Drept civil. Drepturile reale principale*, 321.

[3] In accordance with Article 2(2) of Order No. 2333/2014 approving the methodological rules for applying Title I of Law No. 17/2014 on a number of measures to regulate the sale and purchase of extra muros agricultural land, and amending Law No. 268/2001 on the privatisation of companies administering land that is public and private property of the State and has agricultural destination, and on the establishment of the State Property Agency, issued by the Ministry of Culture.

this law were published. In accordance with Article 21(4) of Law No. 17/2014, "*Until the methodological rules are published in the Official Journal of Romania, Part I, the rules of general law are applicable*". Therefore, in such cases, the sale-purchase agreements for *extra muros* agricultural land, concluded starting with the publishing of the Methodological Rules (*i.e.* 30 May 2014), are subject to Law No. 17/2014, and, therefore, the pre-emption procedures are mandatory[1].

V.2. General principles of Law No. 17/2014

The substantial principles governing the alienation of *extra muros* agricultural land and which may be inferred from Law No. 17/2014 are the following:

- *Exclusion of intra muros land*. Law No. 17/2014 excludes the *intra muros* agricultural land from its scope. *Intra muros* agricultural land may be sold freely, without any pre-emption right;
- *Foreigners*. Assimilates Romanian citizens to the citizens of a Member State of the European Union, of the States that are party to the Agreement on the European Economic Area (AEEA), or of the Swiss Confederation, as well as to stateless persons domiciled in Romania, in a Member State of the European Union, in a State that is party to the AEEA or in the Swiss Confederation, as well as to legal entities of Romanian nationality, or of the nationality of a Member State of the European Union, of the States that are party to the AEEA or of the Swiss Confederation. Those in third countries shall apply the conditions regulated by international treaties, on a reciprocal basis, under the law[2];
- *Specific endorsement of the Ministry of National Defence* – this must be issued in case of sale for *extra muros* agricultural land on a depth of 30 km from the national border and the Black Sea coast, inwards, as well as for *extra muros* land up to 2,400 m from the special objectives

[1] Please also see the Notarial Practice Collection in matters related to cadastre and land registration, 78.

[2] For a detailed review of how foreign citizens and stateless persons, as well as foreign legal entities are able to acquire ownership of land in Romania, please see Chelaru, *Drept civil. Drepturile reale principale* , 225 .

that may be alienated, after a series of preliminary consultations. These provisions do not apply to pre-emptors. As regards this endorsement of the Ministry of National Defence, in practice the question that arose was whether the notary public has an obligation to request it when authenticating a sale-purchase agreement. The notarial practice decided that: (i) on the one hand, it is mandatory to request such an endorsement only when this situation (i.e. the land is located *extra muros* on a depth of 30 km from the national border and from the Black Sea coast, inwards, as well as up to 2,400 m from the special objectives) appears in the land book when the land book excerpt for authentication purposes is requested and (ii) on the other hand, the National Agency for Cadastre and Land Registration must proceed, ex officio, with making references in the land books of the immovable assets registered in the integrated electronic cadastre and land book system as regards the existence of such locations[1];

- *Specific endorsement of the Ministry of Culture and of its public deconcentrated services* – must be obtained upon sale, for the *extra muros* agricultural land where archaeological sites are located, where areas with identified archaeological patrimony or areas with identified archaeological potential accidentally discovered were established;
- *Final endorsement* required for entering into the sale agreement authenticated by a notary public or for the court to issue a decision operating in lieu of the sale agreement is issued by the territorial structures for land of up to 30 hectares (inclusive), while for land of over 30 hectares, by the central structure;
- *Expansion of the pre-emptor categories*. The pre-emption right belongs to the following: co-owners, tenants, neighbouring owners, as well as the Romanian State, acting through the State Property Agency, in this particular order, for an equal price and under equal conditions;
- *Extra muros agricultural land on which classified archaeological sites are located:* the sale takes place in accordance with Law No. 422/2001 on protecting historical monuments;

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[1] Please also see the Notarial Practice Collection in matters related to cadastre and land registration, 87-88.

- *Supplementation with the Civil Code.* Law No. 17/2014 is supplemented by the provisions of the Civil Code (Article 1730 et seq.)[1], but also derogates from them in certain cases (such as by the fact that the seller registers, with the mayor's office in the administrative-territorial unit where the land is located, an application seeking the display of the offer for sale of the *extra muros* agricultural land in order for the pre-emptors to take note thereof[2]).

V.3. Cumulative conditions to be met in order for a court decision operating in lieu of a sale-purchase agreement to be given[3]

The promissory sale-purchase agreement is not a sale-purchase agreement per se, but a preliminary convention, which does not transfer property rights, that refers not to an obligation to give something (*obligatio dare*), but to an obligation to perform a specific action (*obligatio facere*), namely the obligation to enter into the agreement transferring property rights in the future[4]. The legal regime of promissory sale-purchase agreements for immovable assets has repeatedly changed

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[1] In accordance with Article 8 din Law No. 17/2014: "*The provisions of this chapter as regards the exercise of the pre-emption right are supplemented by the provisions of general law*".

[2] In accordance with Article 6(1) of Law No. 17/2014: "*As an exemption from Article 1.730 et seq. of Law No. 287/2009, republished, as further amended, the seller shall register, with the mayor's office in the administrative-territorial unit where the land is located, an application seeking for the offer for sale of the extra muros agricultural land to be displayed, in order for the pre-emptors to take note thereof. The application shall enclose the selling offer for the agricultural land and the substantiating documents set forth in the methodological rules for implementing this law*".

[3] For a detailed review of the general conditions that must be met in order for a court decision operating in lieu of an agreement to be issued, please see Chelaru, *Drept civil, Drepturile reale principale,* 208

[4] For the characteristics, elements and effects of promissory sale-purchase agreements prior to the coming into force of the current Civil Code, please see Chelaru, *Circulația juridică a terenurilor*, 221-239; D. Chirică, *Tratat de drept civil. Contracte speciale* Volume I (Bucharest: C.H. Beck, 2008), 168-214; I. Adam, *Drept civil. Drepturile reale principale* (Bucharest: C.H. Beck, 2005), 230-234.

over time[1]. For the first time, promissory sale-purchase agreements for immovable assets and the express entitlement of courts of law to give decisions operating in lieu of an authenticated sale-purchase agreement were regulated by Decree No. 144/1958[2].

Currently, the Civil Code regulates the general legal regime applicable to promissory agreements, and the special laws are supplemented by it or derogate from it, where expressly provided[3].

In all cases when the issuance of a court decision operating in lieu of a sale-purchase agreement as regards *extra muros* agricultural land is sought, the claim may be granted only provided that a series of cumulative conditions set forth in Article 5 of Law No. 17/2014 are met, namely:

1) the promissory agreement is concluded in accordance with the *Civil Code* and with the applicable laws;

2) if the requirements set forth in Articles 3, 4 and 9 of Law No. 17/2014 are complied with, namely if:

a. the *specific endorsement of the Ministry of National Defence* was obtained for the agricultural land located *extra muros* on a depth of 30 km from the national borders and the Black Sea coast, inwards, as well as the land located *extra muros* up to 2,400 m from the special objectives (Article 3);

b. the *specific endorsement of the Ministry of Culture* and of its deconcentrated public services was obtained for the *extra muros* agricultural land where archaeological sites are located, where areas of

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[1] For a detailed review of the legislative changes that characterized promissory sale agreements for immovable assets over time, please see Chelaru, *Drept civil, Drepturile reale principale,* 196

[2] The issuance of such court decisions was regarded as an enforcement in kind of the obligation to perform a specific action (*obligatio facere*). Please see D.M. Fruth-Oprișan, „Executarea în natură a obligației de a face“ in *RRD* No. 8 (1986).

[3] For a review of the applicable law in case a court ruling that operates in lieu of an agreement is sought pursuant to a promissory agreement concluded prior to the coming into force of the current Civil Code, please see Chelaru, *Drept civil, Drepturile reale principale,* 231-232.

identified archaeological patrimony or areas with archaeological potential accidentally discovered were established (Article 3);

c. all conditions for the pre-emption right to be exercised in accordance with Law No. 17/2014 (Article 4) were observed;

d. the *final endorsement* of the territorial structures for land of up to 30 hectares (inclusive) was obtained, while for land of over 30 hectares, the endorsement was obtained from the central structure (Article 9).

3) the immovable asset that the promissory agreement refers to is registered with the *tax roll* and

4) the immovable asset that the promissory agreement refers to is registered with the *land book*.

In the notary practice, the issue of authenticating promissory agreements referring to *extra muros* agricultural land arose when the immovable assets were not registered with the land book or the endorsements indicated in Law No. 17/2014 were not requested. In such a case, it was reasonably concluded that notaries public have an obligation to warn the parties of the risks that they are exposed to, namely a risk for the transaction to not be completed (*e.g.* if one of the pre-emptors subsequently exercises its right to purchase the land in question). These provisions must be included in the promissory agreement, and the situations shall be described depending on each specific case (for instance, the promissory agreement concluded with a tenant or with a neighbouring landlord, who are also holders of the pre-emption right, or with a purchaser selected from the free market)[1].

The courts' judicial practice is extremely rich and varied as concerns rendering a decision to operate in lieu of a sale-purchase agreement, in the field of sales of *extra muros* agricultural land. The exercise of sale-purchase promissory agreements based on a decision that was rendered by a court to operate in lieu of an authentic instrument was

[1] In this respect, please see the Notarial Practice Collection in matters related to cadastre and land registration, 89-90.

acknowledged in particular after the year 1947[1]. We shall present hereinbelow some decisions relating to some cases, rendered by the courts of jurisdiction in the relevant field recently (*i.e.* in the years 2019-2020).

In a case decision, the Craiova Court of Appeal decided that the fulfilment of the legal conditions required to conclude the sale agreement, and to render a court decision operating as an agreement, respectively, cannot be related to an earlier moment - namely when the promissory sale agreement is concluded – because such promissory agreement does not transfer ownership; instead it should be related to the moment the ownership transfer occurs, which moment is subject to the law in force[2]. Moreover, it was pointed out that the court may order fulfilment of the formalities for obtaining the relevant authorities' endorsements stipulated in Article 3 and Article 9 of Law No. 17/2014, and fulfilment of the procedure regarding the observance of the pre-emption right stipulated in Article 4 of the aforesaid regulatory act, during the trial. The review court noted that the decision of the court of appeal to maintain the first court's ruling is legal, because the plaintiff failed to prove that the requirements under Law No. 17/2014 were met, the plaintiff did not request the court to order fulfilment of formalities and besides the respondent defendant's capacity of owner of the disputed land was not proved, either. This solution dismissing an application for a decision to operate in lieu of an agreement appears justified, in light of the requirements of Law No. 17/2014 and, at the same time, it is in compliance with Decision No. 24/2016 that the High Court of Cassation and Justice rendered in examining the Giurgiu Tribunal's referral, for the rendering of a preliminary decision[3], according to which: "*The court may order fulfilment of the formalities for obtaining the relevant authorities' endorsements stipulated in Article 3 and Article 9 of Law No.*

[1] See in this respect, orientation decision No. V/1954 rendered by the Plenary of the Supreme Tribunal, C.D. 1952-1954, vol. I, p. 20-21, quoted in footnote no. 2 from Chelaru, *Drept civil, Drepturile reale principale*, 197.
[2] See decision No. 141/2020 of 19 May 2020, rendered by the Craiova Court of Appeal.
[3] Published in the Official Journal of Romania, Part I, No. 936 of 22 November 2016.

17/2014, as amended and supplemented, and fulfilment of the procedure regarding the observance of the pre-emption right stipulated in Article 4 of the aforesaid regulatory act, during the trial". This caselaw is extremely useful, because it expressly provides the possibility to request the court to order fulfilment of the formalities for obtaining the endorsements set out by Law No. 17/2014.

As to the relative nullity sanction provided for by Law No. 17/2014 in case the pre-emption right is disregarded, another court declared, in the review phase, that it is applicable regardless of the third party purchaser's good or bad faith[1]. This interpretation given by the Suceava Court of Appeal in solving the review is in line with the legal provisions, which do not make such a distinction based on the good or bad faith and *ubi lex non distinguit, nec nos distinguere debemus*.

Also, some interesting arguments were provided in another case decision rendered by the Constanța Court of Appeal, in which the plaintiff (as promising purchaser applying for a decision to operate in lieu of an authentic document) claimed that the application of Law No. 17/2014 has effects contrary to the European Convention on Human Rights, and contrary to Article 1 of the ECHR Protocol, respectively. In its motivations, the court indicated that, even if Article 1 of the ECHR Protocol should concern a current ownership right, as long as ECHR does not guarantee the right to obtain ownership of a good, by exception the ECHR guarantees the legitimate hope to obtain a good or an uncontested claim of financial value[2]. However, according to the ECHR caselaw, it follows that the legitimate hope to obtain a good is an expansion of the application of Article 1 in Protocol 1 to some goods that are not yet part of the plaintiff's assets, but the latter has, nevertheless, the right to obtain ownership thereof, such right being acknowledged by the state legislation. Thus, it follows that not any hope to obtain a good is deemed legitimate, and in the case at issue the state does not guarantee fulfilment of the promising seller's obligation to sell. Therefore, as correctly

[1] Decision No. 74/2020 of 10 March 2020, rendered by the Suceava Court of Appeal.
[2] Decision No. 315/2019 of 16 October 2019, rendered by the Constanța Court of Appeal.

indicated by the appeal court, its hope is not to acquire the good, but firstly to conclude the sale-purchase act. Therefore, the court considered that the legitimate hope the plaintiff considered was the hope to conclude the sale-purchase agreement, which cannot be a good or a legitimate hope for the purpose of the Convention, and which can be conditional upon certain legal requirements, intended to ensure the security of the legal circulation of *extra muros* land. The grounds provided in the decision that the court rendered when the review was tried are in agreement with the guarantees offered by the ECHR and, at the same time, with the conditions under which the limitation of rights is allowed, namely justified legal conditionalities.

V.4. The form of law no. 17/2014 was subjected to important amendments over time

From the date it was adopted (*i.e.* 12 March 2014), Law No. 17/2014 brought fresh air to the legislation on *extra muros* agricultural land, and it has so far been subjected to three amendments which can be deemed substantial and can be summarised as follows:

1) *the first important amendment*, in force since 16 May 2014, when Law No. 17/2014 was amended by Law No. 68/2014[1], when:

a. some specific clarifications concerning *foreigners' regime* are made;

b. the *conditions for the rendering of a court decision to operate in lieu of a sale-purchase agreement* are referred to, in that as an element of novelty, it is clarified that the promissory agreement must be concluded in compliance with the Civil Code and the relevant legislation, and that the immovable asset that is the subject of the promissory agreement must be registered on the tax roll and with the land book. Also, over time, the requirements concerning the form of concluding promissory agreements

[1] Law 68/2014 amending paragraph (1) of Article 29 of Law No. 7/1996 on Cadastre and Land Registration, and Law No. 17/2014 on certain measures regulating the sale and purchase of extra muros agricultural land and amending Law No. 268/2001 on the privatisation of companies administering land that is public and private property of the State and has agricultural purpose, and the establishment of the State Property Agency.

were various[1]. A concrete case of analysis is the temporary amendment to Law No. 7/1996 as brought by Government Emergency Ordinance No. 121/2011 amending and supplementing a number of legislative acts[2].

This act as temporarily in force[3] lays down the express obligation of an authentic form in case of promissory agreements concerning real rights over certain immovable assets, subject to absolute nullity. These provisions were repealed on 17 July 2013, by Law No. 221/2013 approving Government Emergency Ordinance No. 12/2013 regulating a number of financial and fiscal measures and the prorogation of certain deadlines, and amending and supplementing some legislative acts[4].

The specialised literature includes opinions that the authentic form of promissory agreements would have been necessary also outside such legislative period, for the rendering of a decision to operate in lieu of an authentic instrument, because the Civil Code requires that the promissory agreement should meet all the validity conditions of the promised agreement[5]. Despite such interpretations, the High Court of Cassation and Justice decided that "in the interpretation and application of Article 1279(3) point I and Article 1669(1) of the Civil Code, the authentic form is not mandatory for concluding a promissory agreement on the sale of an immovable asset, in order to render a decision to operate as an authentic instrument"[6];

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[1] See also Chelaru, *Drept civil. Drepturile reale principale*. 5th edition, 208.

[2] Approved by Law No. 221/2013 approving Government Emergency Ordinance No. 121/2011, amending and supplementing a number of legislative acts.

[3] Article 24 (5) of Law No. 7/1996.

[4] For an analysis of promises, see I.-Fl. Popa, « Promisiunile unilaterale şi bilaterale de contract. Promisiunile unilaterale şi sinalagmatice de înstrăinare imobiliară », in Revista Română de Drept Privat No. 5 (2013).

[5] In this connection, see D. Chirică, *Tratat de drept civil. Contracte speciale, vol. I. Vânzarea şi schimbul, ed. A 2-a, revizuită* (Bucharest: Hamangiu, 2017), 205; Chelaru, *Drept civil. Drepturile reale principale*. 5th edition, 209.

[6] Decision No. 23/2013 rendered by the High Court of Cassation and Justice. For criticism against such solution, see Chirică, *Tratat de drept civil. Contracte speciale*, 205-206. For the opinion that the authentic form is not a requirement for the enforcement in kind of an obligation arising from a promissory agreement, see V.

c. an additional duty was given to the *Ministry of Agriculture and Rural Development*, concerning the examination if the promising purchaser meets the sale-purchase legal conditions;
d. the *relative nullity sanction* was established in case of sales-purchases of *extra muros* agricultural land which do not observe the pre-emption right, according to Article 4, or in the absence of the endorsements provided by Articles 3 and 9[1]. This amendment is welcome, because the previous sanction, *i.e.* the absolute nullity sanction, appeared to be excessive;
2) *the second important amendment*, in force since 19 October 2014, when Law No. 17/2014 was amended by Law No. 138/2014[2], when:
a. an *additional clarification* was inserted - according to which the provisions of the law no longer apply to alienations between co-owners, spouses, relatives, relatives by marriage to the third degree including – under Article 20 (2) of Law No. 17/2014, and
b. a second additional clarification was brought, according to which the provisions of the law no longer apply to enforcement procedures and sale agreements concluded as a result of some public tender formalities - as is the case with those conducted in case of insolvency prevention and insolvency proceedings - or as a result of the immovable asset being part of the administrative-territorial units' private property of local or county interest.
3) *the third important amendment* - an implicit one – in force since 9 February 2015, as a result of Constitutional Court Decision No. 755/2014 on the plea of unconstitutionality of Article 20 (1), the thesis regarding promissory agreements of Law No. 17/2014[3], according to which "*The provisions of this law do not apply to promissory agreements and option*

Diaconiță, *Executarea silită în natură a obligațiilor contractuale în sistemul Codului civil roman* (Bucharest: Universul Juridic, 2017), 254-258.
[1] This amendment concerned Article 16 of Law No. 17/2014.
[2] Amending and supplementing Law No. 134/2010 on the Civil Procedure Code, and amending and supplementing also a number of related legislative acts.
[3] Published in Official Journal No. 101 of 9 February 2015.

agreements authenticated by the notary public before the entry into force hereof"[1].

The Constitutional Court admitted the plea of unconstitutionality and found that this exemption from the application of Law No. 17/2014 in case of promissory agreements authenticated by the notary public before the entry into force thereof is unconstitutional.

A case-related decision provided that, as pointed out by the Constitutional Court in the Decision No. 755/2014, the beneficiaries of an unexecuted promise to sell *extra muros* agricultural land, who requested the court a decision to operate in lieu of an authentic sale instrument, are the legal holders of a claim, related to the promissory seller's obligation to sell under the promissory agreement, and they are not the holder of a right of ownership. The right was not transferred at the time the promissory agreement was concluded – regardless in what form, authentic or inauthentic – but it will be transferred in the future, when the sale agreement is concluded, or when the decision operating in lieu of the not-concretized concurrence of wills is rendered, respectively. In this connection, the seized court must check if all the validity conditions are met on the date the decision operating in lieu of a sale agreement is rendered, such conditions being in the case at issue the legal provisions on the exercise of the pre-emption right, as in force on the date the decision is rendered. Thus, it was noted that the fulfilment of the legal conditions for the conclusion of the sale agreement or for the rendering of a decision to operate as an agreement, respectively, cannot be related to an earlier moment, namely the moment when the promissory sale agreement was concluded – because the promissory agreement does not transfer ownership – but must be related to the moment when ownership is transferred, which is subject to the legislation in force[2]. This interpretation by the court was given in the spirit of the law and in

[1] See also Mitroi Cosmin Radu, *Neconstituţionalitatea şi neconvenţionalitatea dispoziţiilor Legii nr. 17/2014 referitoare la condiţiile de pronunţare a unei hotărâri care să ţină loc de contract de vânzare-cumpărare*.

[2] Decision No. 609/2019 of 12 December 2019, rendered by the Galați Court of Appeal.

observance of Constitutional Court's Decision No. 755/2014, and it applies, in this matter, the *tempus regit actum* principle.

VI. THE LATEST AMENDMENTS PROPOSED IN RESPECT OF SALES OF *EXTRA MUROS* AGRICULTURAL LAND

VI.1. Reasoning for proposing the new regulations

Draft Law No. 336/2018 amending and supplementing Law No. 17/2014, in the form submitted for promulgation to Romania's President on 9 June 2020[1], was accompanied by a statement of reasons which succinctly included the arguments for initiating the project[2]. Thus, according to the statement of reasons, it was considered that in the reference period 2014-2017, after the relevant procedures were conducted according to Law No. 17/2014, the land that was the subject of the *sale offers* had a surface area of 469,984 ha, of which: in the year 2014 – a surface area of roughly 59,000 ha; in the year 2015 – a surface area of roughly 173.000 ha; in the year 2016 – a surface area of roughly 145,000 ha; in the first semester of 2017 – a surface area of roughly 93,000 ha. Nevertheless, the records of the *actual sales* are kept by the notaries public.

The statement of reasons provides details on the proposed classification of pre-emptors and the conditions applicable to purchasers that are legal entities.

The statement of reasons indicates that it is a necessary obligation for the agricultural land to be used strictly for agricultural activities, either by direct exploitation, or by conclusion of agricultural lease agreements.

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[1] Draft Law No. 336/2018 amending and supplementing Law No. 17/2014, in the form submitted to the Romanian President for promulgation, is available at: http://www.cdep.ro/pls/proiecte/docs/2018/pr336_18.pdf.

[2] The statement of reasons is available at: http://www.cdep.ro/proiecte/2018/300/30/6/em430.pdf.

Also, the statement of reasons provides that the proposed regulations are intended to generate a positive impact on: (i) the stimulation of young agriculturists, through the exercise of the pre-emption right in purchases of agricultural land; (ii) the expansion of agricultural areas worked and the consolidation of agricultural farms; (iii) the sustainable development of agriculture in general.

VI.2. Legislative news of impact

1. The seven ranks of pre-emptors

The main legislative piece of news is the creation of a whole "cascade" system of pre-emptors, organised by seven ranks. Rank I is the first and most important one, and rank VII is applicable when no pre-emptor of higher rank expresses its option to purchase.

There is, however, an *exception* to this rule, i.e. the alienation by sale of *extra muros* agricultural land accommodating classified archaeological sites, which are alienated according to the provisions of Law No. 422/2001 on the protection of historical monuments.

1) 1st rank pre-emptors are:

a) co-owners,

b) relatives of first degree, spouses, relatives, and relatives by marriage up to the third degree including.

Mention is made that this category enjoyed a privileged status even previously. On 19 October 2014, Law No. 17/2014 was amended by Law No. 138/2014, and at that time express mention was made that the provisions of the law do not apply to alienations between co-owners, spouses, relatives, and relatives by marriage up to the third degree including, which means that: (i) *on the one hand*, in case of such alienations, the pre-emption procedure was no longer needed to be conducted, and (ii) *on the other hand*, there was no obligation to alienate to them. Mention is made that the previous version of the law only referred to alienations between relatives up to the third degree including.

This led in practice to different interpretations, in cases of acquisition of the *extra muros* agricultural land by relatives by marriage or spouses, so an opportune amendment was made, by Law No.

138/2014[1]. It was correctly considered that this capacity (of co-owner, spouse, relative or relative by marriage) must exist at the time of the alienation[2].

The current law amending Law No. 17/2014 considers them pre-emptors, so the sale to other persons can only occur after the pre-emption procedure is conducted with the pre-emptors in the rank I category.

2) 2nd rank pre-emptors are:

a) the owners of agricultural investments for plantations of trees, vines, hops, irrigations, exclusively private

b) and/or agricultural tenants.

In case the land for sale accommodates agricultural investments for plantations of trees, vines, hops and irrigations, the owners of such investments enjoy priority in the sale of such land.

Conditions for the *agricultural tenant*'s purchase of the leased *extra muros* agricultural land:

a) the agricultural tenant must have validly concluded and registered the agricultural lease agreement at least one year before the sale offer was displayed at the municipality office;

b) the agricultural tenant proves that its domicile/residence/headquarters was/were in Romania for at least *5 years* before the sale offer was registered.

3) 3rd rank pre-emptors are:

a) owners of neighbouring agricultural plots

b) and/or tenants of neighbouring agricultural plots.

The priority on purchase of land by neighbouring owners is established according to the largest side on the common boundary between the properties, the neighbour who is a young farmer, the neighbour who is from the same administrative and territorial unit[3].

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[1] See also Culegerea de practică notarială în domeniul cadastrului și al publicității imobiliare, 79-80.

[2] See also Frenţiu, *Legea nr. 17/2014 privind unele măsuri de reglementare a vânzării-cumpărării terenurilor agricole situate în extravilan,* 140.

[3]Article 4 (5) of Law No. 17/2014, as amended, provides the following priority on purchase for owners of neighbouring agricultural plots: a) the owner of a neighbouring agricultural plot who has common boundary with the large side of the plot offered for

4) 4th rank pre-emptors: young farmers.

A "*young farmer*" means a person who is no more than 40 years of age, as defined by Article 2(1) (n) of the Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005, as further amended, *who intends to carry out or carries out agricultural activities*.

If the pre-emption right is exercised by young farmers, the young farmer carrying out livestock farming shall have priority on the purchase of the plot on sale, with the observance of the condition regarding the domicile/residence established on the national territory for a period of no less than *one year* prior to the registration of the sale offer.

5) 5th rank pre-emptors: the Academy of Agriculture and Forestry Sciences "Gheorghe Ionescu-Sisesti" and the units for research and development in agriculture, forestry and food sectors, organized and regulated by Law No. 45/2009 on the organization and operation of the Academy of Agriculture and Forestry Sciences "Gheorghe Ionescu-Sisesti", as further amended and supplemented, and the system of agriculture, forestry and food sectors, and the education institutions 3 with agricultural profile, for the purpose of purchasing *extra muros* agricultural land with the destination as strictly required for agricultural research, and which is neighbouring the plots owned by them;

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sale; b) if the plot offered for sale has two large sides or all sides are equal, the owner of the neighbouring agricultural plot who is a young farmer and has been domiciled /residing on the national territory for no less than 1 year prior to the registration of the sale offer of the extra muros agricultural land, shall have priority on purchase of such land; c) the owners of a neighbouring agricultural plot who have a common boundary with the plot that is offered for sale, in decreasing order of the length of the common boundary with the plot in question; d) if the large side or one of the equal sides of the land offered for sale has a common boundary with a plot located within the area of another administrative and territorial unit, the owner of the neighbouring agricultural plot who is domiciled/residing within the area of the administrative and territorial unit where the plot is located shall have priority on purchase thereof.

6) 6th rank pre-emptors are: natural persons domiciled/residing in the administrative and territorial units where the plot is located or in the neighbouring administrative and territorial units;

7) 7th rank pre-emptors: the Romanian state, by the State Property Agency.

2. The second category of natural person or legal entity "pre-emptors"

Although the law does not qualify them as pre-emptors, there is another category of persons who are entitled to purchase *extra muros* agricultural land *when none of the pre-emptors of the seven pre-emption ranks show intention to purchase*. The law provides to this effect some *very restrictive conditions* for natural persons and legal entities, respectively, when same want to purchase *extra muros* agricultural land. Such restrictive conditions consist of the evidence attesting to the domicile/residence/headquarters in Romania for minimum 5 years, the performance of agricultural activities in Romania for a period of minimum 5 years (and, for legal entities, out of the total income for the past 5 tax years, minimum 75% should represent income from agricultural activities)[1].

[1] According to Article 4^1(1) – (4) of Law No. 17/2014, as amended: *(1) Should the holders of the pre-emption right fail to express their intention to purchase the land, the extra muros agricultural land can be alienated by sale to natural persons in observance of the following cumulative conditions:*
a) to have had their domicile/residence on the national territory for a period of at least 5 years, prior to the registration of the sale offer; b) to have performed agricultural activities on the national territory for a period of at least 5 years prior to the registration of such offer; c) to have been registered with the Romanian tax authorities for minimum 5 ani prior to the registration of the sale offer for the extra muros agricultural land."
(2) Should the holders of the pre-emption right fail to express their intention to purchase the land, the extra muros agricultural land can be alienated by sale to legal entities in observance of the following cumulative conditions:
a) to have had the registered headquarters and/or the secondary offices on the national territory for a period of at least 5 years, prior to the registration of the sale offer; b) to have perform agricultural activities on the national territory for a period of at least 5 years prior to the registration of sale offer for the extra muros agricultural lands; c) to submit the instruments revealing that, out of the total income obtained during the past 5

3. If the *extra muros* land is not purchased by the second category of pre-emptors either, the sale is free

In case of failure to exercise the pre-emption right, if none of the potential purchasers fulfil, within the legal term, the conditions allowing them to purchase the *extra muros* land, such land can be alienated by sale to any natural person or legal entity, as provided hereunder[1].

It may be noted that all the conditions mentioned above converge towards the idea of restricting the sale of *extra muros* land to "foreigners" - *lato sensu,* contrary to all liberalization trends registered in the legislation so far and to the guidelines set forth by the European Union.

4. The presumption of good faith with regard to the sellers' capacity as owner of the immovable asset put out to sale according to the description in the land book

Another legislative novelty proposed in matters related to *extra muros* land sale is the insertion of an *absolute legal presumption* of good faith. The wording of Article 4 (7) of Law No. 17/2014, as proposed for amendment is as follows:

"Requesting and using the land book excerpt or, as provided by law, the encumbrance certificate and the cadastral documentation valid upon the conclusion of agreements transferring property rights regarding the immovable assets and other real rights, fully prove the good faith both of the parties to the agreement, and before the notary

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tax years, minimum 75% represents income from obtained from agricultural activities, as provided under Law No. 227/2015 on the Tax Code, as further amended and supplemented, classified according to NACE Code by order of the minister of agriculture and rural development; d) the controlling shareholder of the company has had its domicile on the national territory for a period of at least 5 years, prior to the registration of the sale offer for the extra muros agricultural land;

e) if, within the shareholding structure of the legal entities, the controlling shareholders of the company are other legal entities, the controlling shareholders of the company shall evidence that their domicile has been located on the national territory for a period of at least 5 years, prior to the registration of the sale offer for the extra muros agricultural land".

[1] According to Article 4^1 (5) of Law No. 17/2014, as amended.

public, with regard to the seller's capacity as owner of the immovable asset put out to sale according to the description in the land book".

BENEFICIARIES. Such presumption, as it is drafted, may be divided into two categories, according to the legal implications:

1) The presumption operates *in favour of* the contracting parties (the seller, respectively the purchaser), which, in theory, means that it may also operate *to the detriment* thereof.

Thus, when the on-site reality is to the purchaser's detriment, the seller's good faith is presumed with regard to the recordings in the land book, such presumption operating in favour of the seller (which cannot be compelled to return a small percentage of the price, for instance), therefore to the detriment of the purchaser.

In the reversed situation, when the on-site reality is more favourable to the purchaser than the situation described in the land book, the presumption operates to the detriment of the seller (which cannot compel the purchaser to pay more, for instance), therefore in favour of the purchaser.

2) Does the presumption also operate *in favour* of the notary public?

As concerns the notary public's liability, we find regulations both in the Civil Code, and in Law No. 36/1995 on public notaries and on the notarial activity, thus:

- According to Article 1258 of the Civil Code, "*In case of annulment or establishment of the nullity of the agreement concluded in authentic form for a cause of nullity the existence of which results from the very text of the agreement, the aggrieved party may request that the notary public be compelled to remedy the harm caused, under the conditions of the civil liability in tort for one's own act*" and
- according Article 9 of Law No. 36/1995, "*If the requested instrument is in conflict with the law and the accepted principles of morality, the notary public shall refuse to draft it*".

In the context of such new legal wording ("*fully prove the good faith both of the parties to the agreement, and before the notary public"*), it arises the question of whether such good faith presumption could be likely to limit the notary public's liability with regard to the content of

the instruments which it authenticates, having at their object the sales of *extra muros* land.

SCOPE. Such good faith presumption only concerns the seller's capacity as owner of the immovable asset put out to sale, according to the description in the land book.

THE CREATING FACTOR OF THE PRESUMPTION. Requesting and using the land book excerpt or, as provided by law, the encumbrance certificate and the cadastral documentation valid upon the conclusion of agreements transferring property rights regarding the immovable assets and other real rights, fully prove the good faith both according to the amending legislative proposal.

MEANING. Firstly, presumptions are the consequences which the law or the judge draws from a known fact in order to determine an unknown fact. According to the Civil Procedure Code, there are two types of presumptions: legal presumptions and judicial presumptions[1].

The legal presumption exempts the person for the benefit of whom it is established from making the proof about everything concerning the acts deemed by the law as being be proved. Nevertheless, the party benefiting from the presumption must prove the close and related known fact on which such presumption relies.

The rule is that the legal presumption may be overruled by an evidence to the contrary, *unless the law provides otherwise*. In the case of the legal presumption of good faith regulated under Law No. 17/2014, as amended, it is expressly stated that "*fully prove the good faith*", which wording would lead to the conclusion that such presumption could not be overruled by an evidence to the contrary.

In case of the presumptions left to the reasoning and wisdom of the judge (judicial presumptions), the judge can only rely on them only if they have the weight and the strength to trigger the probability of the alleged fact; however, they can only be accepted in the cases in which the law allows for the evidence by witnesses. The presumption of good faith established under Law No. 17/2014, as amended, could not be deemed as a judicial presumption, since it is provided under a legal regulation.

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[1] According to Articles 328 and 329 of the Civil Procedure Code.

5. The restraint on the sale of the *extra muros* agricultural land or of the controlling interest of the companies owning *extra muros* agricultural land which represents more than 25% of their assets, for a period of 8 years following purchase thereof

Although not meeting all the elements of a legal restraint on alienation, such legislative novelty represents a way of conditioning sales, as follows:

OBJECT. The *extra muros* agricultural land (owned by natural persons or legal entities, since the law makes no distinction) *or* the controlling interest of the companies owning *extra muros* agricultural land which represents more than 25% of their assets.

RESTRAINT. Such restraint, as well as the rules contemplated by Law No. 17/2014, concern *the sales* of *extra muros* land, but they do not concern other legal operations as well (such as the exchange, *datio in solutum*, donation, maintenance agreement[1], etc.). As concerns the arguments for which Law No. 17/2014 only refers to sale agreements, Craiova Court of Appeal held, in a judgment ruled in a case file, that the entire procedure regulated by Law No. 17/2014 regarding the pre-emption right is closely related to the price (the sale offer for a certain price, the publicity thereof, with the indication of the price, the equalization of the price by accepting the pre-emptors), an element which is essential in a sale and purchase agreement[2]. From this perspective, the court of law also mentioned that an exchange agreement was not always concluded in consideration of the price, which is an extremely important aspect in the case of the sale and purchase, since most of the times the exchange is achieved in consideration of the characteristics of the asset to be received in exchange, therefore, from this standpoint, the promising parties to an exchange pre-agreement could not be required to observe the pre-emption right by accepting a certain price offer.

PERIOD. 8 years following purchase.

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[1] As concerns the unnecessity to apply for the endorsements provided under Law No. 17/2014 in case of maintenance agreements regarding *extra muros* agricultural land, see the Notarial Practice Collection in matters related to cadastre and land registration, 96.
[2] Decision No. 916/2019 of 8 October 2019, ruled by Craiova Court of Appeal.

CONDITION FOR EXEMPTION. In the case of the sale of *extra muros agricultural land*: the obligation to pay the tax of 80% of the amount representing the difference between the sale price and the purchase price, based on the notaries' estimated values of immovable assets. In case of sale of the *controlling interest of the companies* owning *extra muros* agricultural land which represents more than 25% of their assets: the obligation to pay a tax of 80% of the difference in value of such land calculated based on the notaries' estimated values of immovable assets between the time of acquirement of the land and the time of alienation of the controlling interest. In such case, the corporate income tax regarding the difference in value of the sold shares shall apply to a base reduced *pro rata* with such agricultural land percentage of the fixed assets, any double taxation being forbidden.

EXCEPTIONS. Such conditioning regarding the sale of *extra muros* agricultural land, namely of the companies' controlling interest shall not apply to reorganization or to the reallocation of assets within the same group of companies.

6. Obligation of *extra muros* land owners to use them solely for agricultural activities

The insertion of a new restrictive regulation for *extra muros* agricultural land owners is proposed. They are under obligation to use such land solely for agricultural activities as of the purchase date, and if agricultural investments for fruit tree, vine, hops crops and exclusively private irrigations have been made on such agricultural land, the agricultural use of such investment shall be maintained – Article 4^2 (5) of Law No. 17/2014, as amended.

7. Pre-emption procedure

Law No. 17/2014, as amended, comprises detailed provisions regarding the pre-emption procedure: (i) posting of the offer and further submission of the file by the city hall – Article 6 (2) and (3), (ii) pre-emptors' notification procedure – Article 6 (6) – (8), (iii) pre-emptors' communicating acceptance of the offer, the auction between the pre-

emptors and the sale for a lower price – Article 7, (iv) the seller's withdrawing its offer – Article 8, (v) the final endorsement – Article 9.

Also, there are detailed provisions regarding the powers of the Ministry of Agriculture and Rural Development in matters related to the publication of offers, the verification of the exercise of the pre-emption right, the compliance with the legal conditions for sale by the pre-emptor or potential purchaser, the issuance of endorsements, the finding of misdemeanours and the application of the sanctions – Article 12 (1).

8. The National Sole Register regarding the Circulation and Use of *Extra muros* Agricultural Land is established – Article 12 (2) *et seqq.*

The proposal to amend Law No. 17/2014 establishes the National Sole Register regarding the Circulation and Use of *Extra muros* Agricultural Land, an electronic system established based on the data and information provided by the local public administration authorities, the National Agency for Cadastre and Land Registration. The Sole Register shall be established, updated, and managed by the Ministry of Agriculture and Rural Development.

9. Failure to observe Law No. 17/2014

Also, amendments are made to the regime of the sanctioning and finding of misdemeanours, *i.e. the fines are increased* (from RON 100,000 to RON 200,000) – Article 14 *et seqq.*

Particularly important, the extremely harsh sanction of the *absolute nullity* for the alienation by sale of the *extra muros* land in breach of the pre-emption right, according to the provisions of Article 4 – 4^2 or without obtaining the endorsements provided under Article 3 and Article 9, is restored.

10. Transitory provisions

Article II of the law amending Law No. 17/2014 sets forth that the provisions regarding the procedures related to the sale offers, the exercise of the pre-emption right, the control of the application of the pre-emption right procedure, and the procedure for the issuance of the endorsements necessary for the alienation of the land are *applicable to*

the applications submitted subsequent to the coming into force of this law, and to the applications which are currently pending.

Also, the law amending Law No. 17/2014 shall come into force within 60 days following the date of publication in the Official Journal of Romania, Part I, and the Methodological Rules for the application of Title 1 of Law No. 17/2014, approved by Order No. 719/740/57/2333, shall be amended within 15 days following the date of the coming into force of this law.

11. Constitutionality review

As concerns such law amending Law No. 17/2014, a plea of unconstitutionality was filed with the Constitutional Court on 9 June 2020, forming the object of File No. 687AI/2020, by the Parliamentary Group of the National Liberal Party and by the Parliamentary Group of the Save Romania Union Party. The criticisms included in the unconstitutionality notification are various and concern both:

(1) extrinsic grounds and grounds pertaining to the legislative technique, among which aspects concerning the unclarity of the law, since, for instance, the wording "agricultural investments" is not deemed as appropriate to make the difference between pre-emptors; "*the direct or indirect alienation, prior to the expiry of the period of 8 years following purchase, of the company's controlling interest (...)*" is deemed as an unclear operation from the legal perspective, and the controlling interest is not defined; the use of inconsistent terms, the law referring sometimes to the restraint on *alienation* of the controlling interest for a period of 8 years, and sometimes to the *sold* shares, when discussing the payment of the corporate income tax in the case in which the controlling interest is, however, alienated, it speaks about some unclarity and unpredictability of the law, and

(2) intrinsic grounds of unconstitutionality, such as the lack of proportionality (by imposing excessive tax burdens on *extra muros* land owners) and the restriction of the attributes of the ownership right (particularly, of the right to dispose of goods), the unlawful restriction of the right of the citizens of the European Union Member States and of the Member States of the European Economic Area, claiming issues of

compatibility with the law of the European Union and with the caselaw of the Court of Justice of the European Union, the rightful settlement of tax burdens[1] .

The final form of the legislative proposal to amend Law No. 17/2014 underwent a rather complex process, from its adoption by the Senate, on 22 May 2018, to its adoption by the Chamber of Deputies, on 3 June 2020. Please note that there is a final form thereof, which was actually submitted to the President of Romania for promulgation, which brings considerable amendments by reference to the statement of reasons related to the initial version of the bill, and the form adopted by the Chamber of Deputies differs from that adopted by the Senate, such facts being also criticised in said unconstitutionality notification.

CONCLUSIONS

The civil circuit is a never ending source of legislative measures. The agricultural sector represents one of the most important sectors in Romania, and all legislatives changes that took place over time reflect this importance. The main aim should be to avoid excessive severance of the land properties and to favour, as much as possible, their consolidation, to maximize the potential of agricultural land, and to secure the chains of transfers. Although it is not uncommon in Romania to adopt pieces of legislation at short intervals of time, it should be taken into consideration, on the one hand, the best economic interest of the country, and, on the other hand, the European agricultural trends and legislation.

Unlike other sectors, agriculture is not a field expected to change from day to day, but rather a static one. From this point of view, an environment characterized by certainty, predictability, rigor and a degree of suppleness is expected.

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[1] The contents of the unconstitutionality notification can be found here: http://www.cdep.ro/proiecte/2018/300/30/6/sesiz336.pdf.

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THE OBJECT OF THE REAL RIGHT OF REAL ESTATE MORTGAGE

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ABSTRACT:

Real estate mortgage is the name of a real right that has as object one or more real estate used to guarantee the execution of certain obligations.

Regardless of its legal or conventional type, the real right of real estate mortgage will be established over the real estate allowed by law.

The real estate mortgage can be extended or relocated to other assets than those initially agreed in the mortgage agreement or by law.

Keywords: *real estate mortgage; conventional; collateral right; extension; relocation; immovable property.*

INTRODUCTION

In the previous doctrine, the object of the legal act was understood as the conduct of the parties established by that legal act, i.e. the actions or inactions to which they are entitled or to which the parties are bound, and for the case where the good concerned a good, it was said that the good formed a derivate object of the civil legal act. It is therefore considered that the object of the civil legal act coincides with the object

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of the civil legal relationship that was born (amended or extinguished) from that legal act[1].

The Civil Code distinguishes between the object of the contract and the object of the obligation.

As per art.1225 Civil Code, the object of the contract represents *the legal transaction, such as the sale, lease, loan and the like, agreed by the parties, as it appears from all the contractual rights and obligations. The object of the contract must be determined and lawful, under penalty of absolute nullity. The object is illicit when it is prohibited by law or contravenes public order or morals.*

Pursuant to art.1226 Civil Code, *the object of the obligation is the benefit to which the debtor is committed which, under the sanction of absolute nullity, must be determined or at least determinable and lawful.*

In the case of the real estate mortgage contract, its object is represented by the establishment of the real right of real estate mortgage.

The object of the mortgage contract, respectively, the establishment of the real mortgage right is different from the object of the debtor's benefit, respectively the obligation to guarantee with the real estate.

In addition to the object of the contract and the object of the obligation, the Civil Code refers to goods as a derived object of the contract or obligation born of the legal relationship[2].

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[1] Gabriel Boroi and Liviu Stănciulescu, *Instituții de drept civil* (Bucharest: Hamangiu, 2012), 115

[2] Thus, art.1228 Civil Code - called *Future assets,* provides that *Unless otherwise provided, contracts may also apply to future assets*. Art.1229 Civil Code called *Assets that are not in the civil circuit* specifies that *Only assets that are in the civil circuit can be the subject of a contractual benefit.* And art.1230 Civil Code called *Assets that belong to another* provides that *Unless otherwise provided by law, the assets of a third party may be the subject of a benefit, the debtor being obliged to procure and transmit them to the creditor or, as the case may be, to obtain the consent of the third party. In case of non-fulfilment of the obligation, the debtor is liable for the damages caused.*

1. GENERAL RULES

The general norms applicable to both real estate mortgages and chattel mortgages are regulated by art.2350 Civil Code which provides for the derived object of the debtor's obligation.

Thus, the mortgage can have as object movable or immovable goods, tangible or intangible. They can encumber determined or determinable goods or universalities of assets[1].

According to art.2367 Civil Code, the mortgage of an annullable right or affected by a condition on the asset will be able to be consented only as a mortgage subject to the same nullity or condition.

As per art.2368 of the Civil Code, the conventional mortgage on a universality of movable or immovable property, present or future, tangible or intangible, can be consented only with respect to the assets affected by the activity of an enterprise.

Therefore, the universality of goods[2] which may be the subject of the real estate mortgage will include only real estate affected by the activity of an enterprise.

Given the characteristics of real estate[3] we can appreciate that only tangible property can be subject to the real estate mortgage, since corporeality[1] it is the characteristic of real estate.

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[1] Art.159 of Law no.71/2011 provides that *If several assets that are joined by accession are the subject of several mortgages, the holder of any of the mortgages may claim the separation of the assets under the conditions of art.600 of the Civil Code.* And art.160 provides that *In the case of a mortgage on a universality of assets, when an asset leaves the universality, it is no longer encumbered by the mortgage.*

[2]Art.541 Civil Code provides that *It is in fact a universality the whole assets that belong to the same person and have a common destination established by his/her will or by law. The assets that make up the de facto universality may, together or separately, be the subject of separate legal acts or relations.*

[3] Art.537 Civil Code provides that *Are immovable property the lands, springs and watercourses, rooted plantations, constructions and any other works permanently fixed in the ground, platforms and other installations for the exploitation of underwater resources located on the continental shelf, as well as everything that, naturally or artificially, it is incorporated into them on a permanent basis.* And art.538 Civil Code states that *Remain immovable property the materials temporarily separated from a*

Real estate that can be the subject of a real estate mortgage must be determined and not just determinable.

The requirement for the exact determination of the real estate is given by the provisions of art.29 of Law no.7/1996 [2] according to which, in order to tabulate or provisionally register it is necessary to individualize the building by a land register number and a cadastral or topographic number, as appropriate.

According to art.2377 Civil Code, *the mortgage on an immovable property is constituted by registration in the land book.*

Therefore, in order to have a real estate mortgage, it is necessary to fulfil the real estate advertising formalities, formalities strictly related to the individualization of the real estate by land book number and cadastral number. Thus, the possibility that the object of the mortgage is determinable immovable property is excluded, contrary to the general rule on contracts[3].

2. EXCEPTIONS

From the general rules but also from the special ones, exceptions in art.2351 Civil Code according to which *inalienable or intangible*

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building, to be used again, as long as they are kept in the same form, as well as the integral parts of a building that are temporarily detached from it, if they are intended to be reintegrated. The materials brought to be used instead of the old ones become immovable property from the moment they acquired this destination.

[1] *It is tangible that good which has a material, physical existence, being easily perceptible to the human senses*, see Marian Nicolae, *Drept civil Teoria generală, vol. II. Teoria drepturilor subiective civile* (Bucharest: Solomon, 2018), 141.

Law no. 7/1996 on cadastre and real estate advertising was published in the Official Gazette of Romania no.61 of 26 March 1996 and republished in the Official Gazette of Romania, Part I, no.720 of 24 September 2015

[3] Art.1226 and 1232 Civil Code generally regulates that *the object of the obligation must be at least determinable and lawful and when the price or any other element of the contract is to be determined by a third party, it must act correctly, diligently and equidistantly. If the third party is unable or unwilling to act or its assessment is manifestly unreasonable, the court shall, at the request of the interested party, determine, as appropriate, the price or item not determined by the parties.*

assets cannot be mortgaged. As an exception, the mortgage of inalienable or non seizable assets will be valid as a mortgage on a future asset, in situations where the asset in question is affected by a conventional inalienability or immunity fro seizure.

The reason for such interdictions is given by the non-existence of the right of disposition over inalienable assets in the patrimony of the real estate mortgagee, without which a valid mortgage cannot be constituted. Equally, assets that cannot be pursued by force[1] they cannot be the object of the mortgage since a real mortgage right constituted would have lacked from the very beginning one of its specific effects - the right of pursuit, which would be contrary to the cause of its constitution.

The above interdictions apply to both conventional real estate mortgages and legal real estate mortgages.

As we have already shown, an exception to the general rules is the exact determination of the object of the mortgage contract, respectively of the real estate on which the real right of real estate mortgage is constituted, determination without which the mortgage cannot be constituted by registration in the land book.

Given that the inalienable and non seizable assets cannot be mortgaged, it follows that the real estate mortgage rights corresponding to public property (right of administration, right of concession, right of free use), right of use will not be subject to the right of real estate mortgage, the right of habitation as well as the right of servitude constituted as a burden on the building on which the right of habitation or use is exercised[2].

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[1] The right of use and the right of habitation cannot be enforced, so they cannot be the subject of a real estate mortgage. Pursuant to art.752 Civil Code, *the right of use and habitation cannot be assigned and the property subject to these rights cannot be rented or, as the case may be, leased*. Pursuant to art.973 Civil Code, *the right to habitation is free, inalienable and unassessible.*

[2] Gabriel Boroi and Alexandru Ilie, *Comentariile Codului Civil* (Bucharest: Hamangiu, 2012), 170.

3. SPECIAL RULES

Peculiarities applicable to the establishment of the real right of real estate mortgage are provided by art.2379 Civil Code according to which on can mortgage*: a) buildings with their accessories; b) the usufruct of these buildings and accessories; c) shares in the right over buildings; d) the right of surface.*

From art.2379 and art.2380 Civil Code it results that the real estate mortgage may bear on some *future constructions as well as on rents or leases*[1] *present and future income from real estate, as well as on indemnities paid under insurance contracts in respect of the payment of such rents or leases*.

From the wording of the text it results that the Civil Code includes in the object of the real estate mortgage also the present and future civil fruits produced by the real estate or the amounts representing insurance indemnity for the payment of these fruits.

However, we are of the opinion that the legislator thus regulated the real estate fruits in order to ensure the publicity of the mortgage constituted on the real estate fruits and not to extend the object of the real estate mortgage to movable property.

The Civil Code regulates the possibility for it to be established on future buildings, by temporary registration in the land register. It is also provided the possibility of registering the mortgage on a building in its entirety or only on a share of the property right over it.

4. EXTENSION OF REAL ESTATE MORTGAGE

In certain situations, the law extends the effects of the real estate mortgage to other assets than those for which the real right to a real estate mortgage was initially established.

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[1] Art.548 par.3 The Civil Code includes in the category of civil fruits the income resulting from the use of the property by another person by virtue of a legal act such as rents and leases.

And in this situation we have the general cases of extension of the real estate mortgage and the special cases of extension of the real estate mortgage.

The general cases are those applicable to both real estate mortgages and chattel mortgages:

a) The mortgage of the bare ownership regulated by art.2352 Civil Code according to which *the bare ownership mortgage extends to full ownership upon extinguishing of the dismemberments.*

b) The extent of the mortgage claim regulated by art.2354 Civil Code states that *the mortgage guarantees with the same rank the capital, the interests, the commissions, the penalties and the reasonable expenses made with the recovery or conservation of the asset.*

c) The extension of the mortgage by accession regulated by art.2355 Civil Code provides that *the mortgage extends to the assets that are united by accession with the encumbered good.*

There are also situations in which the extension of the mortgage by accession will not take place. Thus, in the situation where a movable mortgage would encumber an asset that was acquired by accession by another person, par.2 of art.2355 Civil Code provides that *the one who acquires by accession the good thus created is held by the mortgage.*

Article.2356 Civil Code shows that *movable assets accessories of a building* and which do not lose their individuality, *they can be mortgaged either with the property or separately*, but the mortgage will not extend to them by right. And *the chattel mortgage continues to encumber the asset even after it becomes the accessory of a building*.

d) the extension of the real estate mortgage on the assets incorporated in a construction or other improvement of a land even if they were the object of the movable mortgage prior to the incorporation.

As per art.235 par. 2 final Civil Code *however, the chattel mortgage is extinguished with respect to construction materials or other such assets incorporated in a construction or other improvement of a land.*

e) The extension of the mortgage constituted on the universality, regulated by art.2357 Civil Code according to which *the mortgage on a universality of assets extends to all the assets included in it.*

The special cases of extension of the real estate mortgage are the situations applicable exclusively to real estate mortgages:

a) The extension of the mortgage on the improvements regulated by art.2382 Civil Code according to which *the mortgage extends, without any other formality, over the constructions, improvements and accessories of the building, even if they are subsequent to the constitution of the mortgage.*

b) The extension of the mortgage on the fruits of the building established by art.2383 Civil Code which provides that *the mortgage extends to the natural and industrial fruits of the mortgaged property produced after the notation of the beginning of the forced pursuit or, as the case may be, after the notation of the opening of the insolvency procedure. The mortgage right extends from the same date on the rents and leases of the leased property. This right is opposable to the tenants only from the moment of the communication of the notation of the beginning of the forced pursuit, respectively of the communication of the notation of the opening of the insolvency procedure, unless they were known in another way. The deeds concluded by the owner regarding the unpaid income or their pursuit by other creditors are not opposable to the mortgagee after noting the beginning of the foreclosure, unless these deeds were noted in the land book before the notation of the commencement of foreclosure.*

5. RELOCATION OF THE REAL ESTATE MORTGAGE

There are situations in which the law replaces the object of the real estate mortgage with another property through the legal procedure called relocation.

The replacement is necessary to protect the real right of real estate mortgage from its loss as a result of the cessation of the existence of the property, in the situations provided by law.

Basically, the real right of real estate mortgage relocated from the property on which the real estate mortgage was first established on the property or value indicated by law.

a) the general rule regarding the relocation of guarantees is contained in the provisions of art.2330 Civil Code according to which *if the encumbered asset has perished or been damaged, the insurance indemnity or, as the case may be, the amount due as compensation is affected by the payment of privileged or mortgage claims, according to their rank. The amounts due under the expropriation due to public utility or as compensation for encumbrances of the property right established by law are affected by the payment of the same receivables.*

Therefore the relocation of the guarantee is an application of the real subrogation in particular with all its effects, which works only in the cases provided by law[1].

b) another case of mortgage relocation and private subrogation is the one provided by art.2353 Civil Code mortgage of an individual party who states that *if, following the division or other constitutive or translational act of rights, the constitutor retains any right over a material part of the asset, the mortgage that had been constituted over an individual share of the right over the asset is relocated by right over that part of the asset, but only within the value of the individual share. Otherwise, the mortgage is automatically relocated to the amounts due to the constitutor* [2].

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[1] *The real subrogation in particular is not related to the functioning of the patrimony and therefore does not operate automatically, but only in the cases provided by law; see in this regard* Eugen Chelaru, *Drept civil. Drepturile reale principale* (Bucharest: CH Beck, 2013), 24.

[2] *Provision of art.2331 Civil Code applies accordingly*. Art.2331 Civil Code regulates *the procedure for relocating the guarantee stipulating that the amounts due as insurance indemnity or compensation shall be recorded in a separate bank account bearing interest in the name of the insured, the injured party or, as the case may be, the expropriated and available to the creditors who entered the guarantee in advertising registers. The debtor may not dispose of these amounts until all secured claims have been settled except with the consent of all mortgage or preferred creditors. However, he has the right to collect interest. In the absence of the agreement of the parties, the creditors can satisfy their claims only according to the legal provisions regarding the execution of mortgages.* Art.2332 Civil Code regulates *the option of the insurer* providing that *through the insurance contract, the insurer may reserve the right to repair, restore or replace the insured property. The insurer will notify the intention to*

c) the provisions of art.2357 final Civil Code according to which *the mortgage is maintained on the universality of assets, even when the goods contained therein have perished, if the debtor replaces them within a reasonable time, taking into account the quantity and nature of the assets*, also regulates another case of relocation of the mortgage from the initial assets included in the universality to the assets that replaced them.

CONCLUSIONS

By way of regulation, the real right of real estate mortgage is presented as a real guarantee for ensuring the realization of the right of claim that it guarantees.

Its attributes of pursuit and preference are doubled by other legal mechanisms such as the extension and relocation of the real estate mortgage right.

The tangible and legal limits established by the legislator for the object of the real mortgage right aim at ensuring the observance of the legal norms that regulate and harmonize the private interest with the public interest.

In our opinion, the real right of real estate mortgage is a legal instrument placed at the disposal of the holder of the property right over a claim in order to ensure the guarantee of the realization of his claim, therefore implicitly of the property right.

Through its specific object, the buildings, and, through their characteristic, stability, the real right of real estate mortgage creates psychic comfort to its owner.

This comfort is based on predictability in the realization of the claim, predictability based on the physical characteristic of its object, namely that the buildings do not disappear.

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exercise this right to the creditors who have registered their guarantee in the advertising registers, within 30 days from the date on which it knew the occurrence of the insured event. Holders of secured claims may request payment of the insurance indemnity within 30 days from the date of receipt of the notification.

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THE ENVIRONMENT OF MARITIME TRANSPORT

Sânziana Andreea IOAN[1]

***Abstract**:*

Human development has led to increased demand for the world commodity market. There should be a balance between the percentage of imports and exports at a country level that will help to grow and sustain the economy. If a certain state only imports goods without a nationally stable branch of production, it could lead to long-term crises. Compared to the last two centuries, transports have increased in terms of quality and quantity, the need to meet the needs of the population is increasing. The technique used to transport both people and objects has changed over time and we have moved from the cart or boat used by our ancestors to cars, trains, aircraft and ships[2].

Maritime transport has developed rapidly since antiquity due to the evolution of international trade and its advantages: "high transport capacity, low costs compared to other types of transport, high efficiency over long distances"[3].

The environment of maritime transport includes the following areas: the continental shelf, the territorial waters, the contiguous zone, the exclusive economic zone and the international waters (outside territorial waters).

***Keywords**: economy; shipping; maritime transport; environment.*

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[2] Gheorghe Stancu, *Curs de dreptul transporturilor* (Bucharest: Lumina Lex, 20070, 6

[3] Cristina Stanciu, *Dreptul transporturilor. Contracte de transport de bunuri* (Bucharest: Universul juridic, 2015), 238.

INTRODUCTION

Over time, shipping has undergone three changes that have led to the features they have today. The first important change is marked by the sixteenth and seventeenth centuries, when shipowners dissociated, only making their ships available to exporters or importers for transport, through charterparty (or chartering contract)[1]. The shipowners' class has been declining since the 20th century as companies have emerged that want to have a monopoly on the world's commercial fleet[2]. The second important change is highlighted by the emergence of technical innovations, namely by the use of steel instead of wood in shipbuilding, by the use of the explosion engine instead of the steam engine[3]. These have led to an increase in transport capacity, but also to a shortening of travel time. An example that has remained in the history of the world not only for the mode of transport used, but also for the discovery of the New World, is the voyage made by Christopher Columbus from the Canary Islands to Cuba in 1492 using three caravels (sailing ship)[4]. The third change in the evolution of maritime transport is a negative one due to the Two World Wars (1914-1918; 1938-1945) which led to huge shipwrecks (over 13,000 ships)[5].

Over the years, the law of transport and maritime transport have had various definitions, depending on the vision of the doctrinaires. Starting from the definition given by the Romanian Explanatory Dictionary to the notion of transport: "the branch of the national economy comprising the totality of road, air and naval means that ensure the movement of goods and people" and the notion of transporting: or people from one place to another; to carry", we can consider that maritime transport can be defined in a broad sense or in a narrow sense.

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[1] Stancu, *Curs de dreptul transporturilor*, 347.
[2] Gheorghe Piperea, *Dreptul transporturilor*, Editia a 2-a (Bucharest: C.H.Beck, 2005), 145.
[3] Stancu, *Curs de dreptul transporturilor*, 347.
[4] Stancu, *Curs de dreptul transporturilor*, 347.
[5] Stancu, *Curs de dreptul transporturilor*, 348.

Lato sensu, by maritime transport we mean “both the activities carried out by private law subjects and by states, also in their capacity as private law subjects, so that the relations that states establish between them, as holders of sovereignty in any field, enter into the sphere of public international law, which exceeds the sphere of transport law ”[1]. It follows from this definition that the law of carriage contains legal rules relating to navigation at sea.

Stricto sensu, maritime transport refers only to "their commercial significance, the use of seagoing vessels in private activities"[2] with reference to Article 3 point 13 of the Commercial Code which provides that the law considers as acts of trade, inter alia, transport companies of persons or things on water or on land, thus referring only to the field of civil navigation activity[3].

The notion of "naval transport" includes both maritime transport itself and transport on rivers and navigable lakes[4]. As far as we are concerned, we will focus on the notion of maritime transport.

The Montego Bay Convention offers the definition of the continental shelf, a notion that we could not have gone beyond to create a clearer picture of the maritime area of each state. Therefore, Article 76 considers that it enters the structure of the continental shelf "the bottom of the sea and the subsoil of submarine regions located beyond its territorial sea, throughout the natural extension of the land of this state, to the outer limit of the continental margin or to a distance 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, when the outer limit of the continental margin is at a lower distance ", but shall not exceed 350 nautical miles from the territorial sea line, depending on the other states facing each other or whose shores are adjacent. The rights of the riparian state and its obligations presented for the other areas are also applicable in the case of the continental shelf.

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[1]Stanciu, *Dreptul transporturilor. Contracte de transport de bunuri*, 238-239.
[2] Stanciu, *Dreptul transporturilor. Contracte de transport de bunuri*, 239.
[3] Stancu, *Curs de dreptul transporturilor*, 346.
[4] Andreea-Teodora Stănescu, *Dreptul Transporturilor. Contracte specifice activității de transport*, Editia a 3-a revizuita si adăugita (Bucharest: Hamangiu, 2018), 2.

The United Nations Convention on the Law of the Sea of 10.12.1982 in Article 5 states that the normal baseline from which the width of the territorial sea is measured is the ebb line along the shore, as shown on large, recognized sea charts. officially by the riparian state, and Article 2 (1) of Law no. 17/1990 (amended and supplemented) on the legal regime of inland maritime waters, the territorial sea, the exclusive economic zone and the contiguous zone of Romania considers that the territorial sea of Romania includes the strip of sea adjacent to the shore or, as the case may be, of 12 nautical miles (22,224 m), measured from the baselines.

The territorial waters/sea of Romania is delimited from the territorial sea/waters of the neighboring states by agreements concluded with each of these states, respecting the principles and norms of international law. Romania exercises its sovereignty according to domestic law, the provisions of international conventions to which it is a party, while respecting the principles and rules of international law on inland waters, the territorial sea/waters, their soil and subsoil, and the airspace above them. Thus, the territorial sea/waters is a component of the state territory[1]

The contiguous zone of Romania is the strip of sea adjacent to the territorial waters/sea that stretches out to sea to a distance of 24 nautical miles[2], measured from the same line from which the territorial waters started. In the contiguous zone, the Romanian state exercises its sovereignty by applying internal regulations on the fields: customs, fiscal, sanitary and state border crossing.

Historians appreciate that at the origin of the contiguous zone "are the areas where certain maritime powers have reserved since the eighteenth century some rights of control exclusively in customs, then in

[1] Dumitru Virgil Diaconu, *Drept internațional public* (Pitesti: Editura Universității din Pitești, 2017), 9.

[2] Art 7 from the Law no. 17/1990 regarding the legal regime of inland maritime waters, the territorial sea, the contiguous zone and the exclusive economic zone of Romania (updated and subsequently modified)

other areas, to better protect their interests, in the conditions under which the territorial sea did not exceed 3 km in width."[1]

The special legal regime of the exclusive economic zone is provided by art. 55 of the Montego Bay Convention and refers to an area located beyond and adjacent to the territorial waters/sea whose length may be 200 nautical miles from the same measurements as the territorial waters, subject to the special legal regime established by this part, in under which the rights and jurisdiction of the riparian state and the rights and freedoms of other states shall be governed by the provisions of this Convention.

The riparian state has both rights and obligations over this area, these being expressly provided by the Convention, among them we find the exploration, exploitation, conservation, protection and management of marine biological / nonbiological resources is done according to domestic law, the area can be exploited in economic interest (production of electricity through wind, currents or water) or scientific (protection of wildlife and the marine environment). The exercise of these rights can also be achieved with the help of other states bordering the Black Sea such as: Ukraine, Bulgaria, Turkey, Georgia or Russia. The main obligation of the state is to exercise its rights only by respecting the rights and obligations of other states. Other rules of international law may apply to this area only in so far as they are not incompatible with this Convention.

The principle of the open sea/international waters is enshrined in the laws of all modern states and refers to the right of ships to cross without restrictions the free space of the oceans, which is outside the sovereignty of a particular state, not interested in the nationality of these ships, but also has an aspect negative by the fact that abuses can be created, by the lack of operational control, which can lead to large losses in maritime trade[2], for example, by means of the vessel flying the flag[1] of

[1] Diaconu, *Drept internațional public*, 11.
[2] Stancu, *Drept internațional public*, 348.

complacency (the ownership and control of the vessel is in a country other than the country of the ship's flag) because taxes are minimal, authorizations can be obtained much more easily without being affected by the bureaucracy of a ratified International Conventions in this field.

The United Nations Convention on the Law of the Sea of 10.12.1982 contains provisions on the high seas in Part VII providing a kind of definition of the high seas by exclusion as follows: "the high seas comprises those parts of the sea which are not included in the economic zone exclusive, in the territorial sea or in the internal waters of a state, nor in the archipelagic waters of an archipelago state ". Since Romania, by Law no. 110/1996, ratified the United Nations Convention on the Law of the Sea, concluded in Montego Bay (Jamaica) on December 10, 1982, but also the accession to the Agreement on the Application of Part XI of the United Nations Convention on the Law of the Sea, concluded in New York on July 28, 1994, the following regulations set forth in this paper will focus exclusively on the structure provided by this International Convention, even if the normative act is part of public international law, it also has an impact on maritime transport[2].

The high seas are open to all states regardless of whether they are riparian or landlocked. Freedom of the open sea shall be exercised only in accordance with the provisions of the Convention and other rules of international law. It includes in particular for states, riparian or without coast: a) freedom of navigation; b) freedom of flight; c) the freedom to lay submarine cables and pipelines, subject to Part VIa; d) the freedom to build artificial islands and other installations authorized by international law, subject to Part VI; e) freedom of fishing, subject to the conditions set out in Section 2; f) the freedom of scientific research, subject to parts VI and XIII. Each State shall exercise these freedoms, with due regard for the interest which the exercise of the freedom of the high seas has in

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[1] Flag of different shapes and colors, hoisted at the stern or on the mast of a ship to indicate its membership in a certain country or which is used for certain signals at sea (according to the 2009 Romanian Explanatory Dictionary).
[2] Piperea, *Dreptul transporturilor*, 145.

the other States, as well as the rights recognized by the Convention in respect of activities in the area[1].

Plechkov's case against Romania of September 16, 2014 (application no. 1660/03) is based on a situation that happened in the exclusive economic zone of Romania.

The applicant in question is Iordan Georgiev Plechkov, a Bulgarian national, commander and owner of a fishing vessel - flying the Bulgarian flag - was intercepted by a vessel belonging to the Romanian Navy in the exclusive economic zone of Romania, and 300 kg of shark were found on board. - shark fishing being banned in Romania during that period, but not in Bulgaria - and tools for industrial fishing.

The factual reasons presented by the plaintiff are: his pre-trial detention on the day he was found by the ship of the Romanian Navy, subsequently the insurance seizure was ordered on the ship and the goods on board, the trial in the first instance took place at the Court Constanta, during the criminal investigation, the Constanța County Directorate for Agriculture and Food Industry became a civil party, a bail of 25,000,000 lei was established and the applicant was released from pre-trial detention, during the trial Plechkov paid damages to the civil party, he claims that did not know that the area belonged to the exclusive economic zone of Romania, the Bulgarian Embassy in Bucharest intervenes with a diplomatic note in favor of the plaintiff emphasizing that between Romania and Bulgaria there is no agreement on the exact boundary between the economic zones of the two states, the court concludes that the ship is not in Romanian waters, judged in the first instance court ended with the acquittal of the plaintiff. Subsequently, the Prosecutor's Office filed an appeal against this decision and the Constanta Court annulled it based on art. 57 of the United Nations Convention on the Law of the Sea, an act ratified by both States, ordering the applicant to pay the costs and to state that the applicant had accepted the allegations by compensating the civil party. The applicant then appealed, claiming that he had been convicted illegally but had been rejected.

[1] Articolul 87 din Convenția Națiunilor Unite asupra dreptului mării din 10.12.1982.

In the case, they were invoked and admitted by the Court as being violated: Article 7 of the ECHR which considers that "1. No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor may a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed. 2. This Article shall be without prejudice to the prosecution and punishment of a person guilty of an act or omission which, at the time of the commission, was considered an offense under the general principles recognized by civilized nations, Article 1 of Protocol no. 1 of the Convention which states that "any natural or legal person has the right to respect for his property. No one shall be deprived of his possessions except in the public interest and under the conditions laid down by law and by the general principles of international law. The foregoing provisions shall be without prejudice to the right of States to adopt such laws as they deem necessary to regulate the use of property in the general interest or to ensure the payment of taxes or other contributions or fines".

CONCLUSIONS

Therefore, the environment of maritime transport is delimited according to the exercise of the sovereignty of the states, with or without coastline, each area being limited by clear lines established by neighboring states that have access to the sea, by final written agreements or in progress. achievement. Their delimitation is of particular interest for knowledge of the law applicable in the area. Thus, we can summarize that the environment consists of these areas in the following order: the continental shelf, the territorial sea, the contiguous area, the exclusive economic zone and the open sea.

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THEATER SHOW OR MUSICAL PERFORMANCE CONTRACT

Alina-Mihaela TIRICĂ [1]

Abstract:

This study analyzes one of the royalty contracts, namely the theater show or musical performance contract, through which, for example, written stories can come to life, not just in our imagination. Thus, the study is divided into two parts: the first part aims to present some general concepts concerning: the subject matter and content of copyright; capitalizing the artwork by bringing it to the public attention; the general theory of royalty contracts as well as some limits established in the field of intellectual property; while the second part focuses on the theater show or musical performance contract, where the following areas of interest are broadly considered: the legal framework, definition, legal characters, validity conditions, content, legal effects and termination of this contract, as well as a practical application of these concepts, as highlighted in the national case-law. Therefore, through this study, readers will be able to observe how the mechanism of the capitalization of copyrights works in the Romanian legislation.

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Key words: *copyright; royalty contracts; assignment contract; theater show or musical performance contract; case-law.*

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INTRODUCTION

Intellectual property, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Countries have laws to protect intellectual property for two main reasons. One is to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to those creations. The second is to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.[1]

Creativity and innovation are the heart and soul of the copyright industries. The power of the products and services they produce is undeniable. Almost every person has had his or her life changed by a book. Almost every person has laughed or cried because of a movie. Graphic artists and sculptors move us to see the beauty in life. Computers and computer software make our work easier, give us the ability to communicate globally, and allow us to have access to unlimited amounts of information and knowledge.[2]

On the other hand, the most important institution of civil law – the contract – appears as an indispensable legal instrument in economic activity, as well as in the relationships that arise between individuals. Thus, in the context of intellectual property, specifically in the area of the copyright branch, the royalty contracts make their appearance, which have as a subject matter the legal instruments through which the authors' work is made public.

Contracts are the simplest way in which intellectual property resources can be "traded" in an age of globalization, and the economic

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[1] World Intellectual Property Organization, translated by R. Pârvu, L. Oprea, M. Dinescu, M. Mănăstireanu and M. Florescu, *Introducere în proprietatea intelectuală* (Bucharest: Rosetti, 2001), 16.

[2] K. Idris, *Proprietatea intelectuală, un instrument puternic pentru dezvoltarea economică* (Bucharest: Osim, 2006), 160.

element of intellectual property rights becomes much more important than legal or legislative ones.

In the book "Intellectual property", Gordon V. Smith and Russell L. Parr deal with intellectual property in terms of economic evaluation and exploitation, stating, as few jurists have been able to do, the economic foundation of intellectual property: "Enterprises, and even whole industries, are built on an intellectual property foundation", the interdependence between intellectual property and the economy: "We depend on intellectual property in our businesses and careers; a significant portion of us earn our living creating and maintaining intellectual property; we are entertained by it, educated by it, communicate with it, and are made and kept healthy by intellectual property.", the present and future of interdependence and of intellectual property: "Today, the Intellectual Property Age is on us. Although the new paradigm is yet to be played out fully, clearly the trend again continues away from independence and toward a vital need for the talents of others. Interdependence is at the root of the paradigm shift that is taking place."[1]

In the following, the theater show or musical performance contract will be presented in the light of its particularities, but also in correlation with other institutions of civil law and intellectual property law. This contract has aroused the special interest of the theorists and, especially, the practitioners, together with the publishing contract and the artwork rental contract as royalty contracts.

1. THE SUBJECT MATTER AND CONTENT OF THE COPYRIGHT

"Copyright" guarantees authors and other creators of intellectual works (literary, musical, artistic) the right to authorize or prohibit, strictly

[1] A.-M. Marinescu, „Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II). Contractelor de valorificare a drepturilor patrimoniale de autor: contractul de comandă a unei opere viitoare și contractul de editare", in *Revista Română de Dreptul Proprietății Intelectuale* No. 4 (2015): 135-136.

for specified periods of time, the exploitation of their works in specific ways. In a broad sense, the copyright includes the protection of copyright, in the narrow sense of the term, and also the protection of what is commonly referred to as "related rights".[1]

Copyright is the area of the law that provides protection to "original works of authorship" including paintings, sculpture, music, novels, poems, plays, architecture, dance, instruction manuals, technical documentation, and software, among other items. Legal protection flows from the fact that an author independently creates the work and that his or her "expression" of an idea is original, rather than copied from another person.[2]

According to Law No 8/1996 on copyright and related rights, the object of the copyright are the original works of intellectual creation in the literary, artistic or scientific field, no matter of the method of creation, the way or concrete form of expression and independently of their value or destination.

As regards the content of the copyright, it consists of both moral and economic rights. The economic rights are subjective rights related to the birth and exploitation of a work, which can be expressed in money. Law No 8/1996 expressly and restrictively specifies the subjective economic rights that are included in the copyright.

2. CAPITALIZING THE ARTWORK BY BRINGING IT TO THE PUBLIC ATTENTION

The subjective economic right to consent to the use of the work by others is linked, in its content, to the notion of "public communication". It is considered a public communication any communication of a work, made directly or by any technical means, made in a place open to the public or in any place where a number of persons are gathered beyond the normal circle of the members of a family and its acquaintances, including stage representation, recitation or any other public means of

[1] World Intellectual Property Organization, *Introducere în proprietatea intelectuală*, 16.
[2] Idris, *Proprietatea intelectuală,* ... 158.

performance or direct presentation of the work, the public exhibition of works of fine arts, applied arts, photography and architecture, the public projection of cinematographic works and other audiovisual works, including works of digital art, presentation in a public place, through sound or audiovisual recordings, as well as the presentation in a public place, by any means, of a broadcast work. It is also considered public any communication of a work, by wire or wireless means, made available to the public, including the internet or other computer networks, so that any member of the public have access to it from any place or at any time.[1]

3. THE GENERAL THEORY OF ROYALTY CONTRACTS

The general theory of royalty contracts is represented by the provisions on the assignment contract. Thus, the assignment contract of the copyrights represents the agreement whereby a person, the author or the holder of the copyright, known as assignor, undertakes to transfer, for a specified period of time, the use of one or more economic rights to another person, known as assignee, in exchange for remuneration.

The assignment contract applies both general and special rules contained in Law No 8/1996, as well as the provisions relating to the lease contract or the contract in general, provisions which are included in the Civil Code and are applicable only to the extent that certain aspects are not covered. In addition, according to the Law on Copyright and Related Rights, the assignment contract can take the form of the publishing contract, the theater show or musical performance contract, or the artwork rental contract.

According to the nature of the transmitted rights, the assignment contract of the copyrights is made of two types: the exclusive assignment contract and the non-exclusive assignment contract. The first of them has an exclusive nature of the assignment, which must be expressly mentioned by the parties, and which consists in the fact that the copyright holder is not able to use the assigned work in the manner, term and

[1] L. Dănilă, *Dreptul de autor și dreptul de proprietate industrială* (Bucharest: C. H. Beck, 2008), 93.

territory, that were agreed, nor he can transfer the assigned rights to another person. The second one implies that the copyright holder may use his own work and pass on the non-exclusive right to other persons. In addition, the non-exclusive character does not need to be expressly mentioned in the contract.

The legal characters of the assignment contract[1] are as follows:

– it is a named contract, being nominated in the Law No. 8/1996, in the sense that if the parties fail to provide some certain clauses in the content of the assignment contract or there are some uncertainties about specific contractual provisions, then the special rules of the assignment contract apply, as governed by the law.

– it has a consensual character, meaning that it is validly concluded by the mere consent of the parties, the written form provided by law being an "ad probationem" requirement.

– the synallagmatic (bilateral) nature of the assignment contract stems from the fact that both parties have mutual and interdependent obligations. Thus, the assignor is obliged to hand over the work to the assignee, and the latter has the obligation to publish and distribute the work, as well as to pay the remuneration to the assignor.

– it is a contract for pecuniary interest, whereas by the assignment contract each party seeks to obtain a material benefit. Thus, the assignor seeks to obtain remuneration and the assignee to obtain a gain from the use of the assigned rights.

– it is an intuitu personae contract, at least taking into account the personal qualities of the assignor, whose creative personality is found in the work for which the use of certain rights is assigned.

– it is a commutative contract, as the existence and extent of mutual obligations are known to the parties since the conclusion of the contract, not depending on a future and uncertain event.

The object of the assignment contract consists of the transfer of the use of copyright by the holder to another person, respecting the limits of the exercise of copyright and the exceptions expressly provided by the

[1] B. Florea, „Contractul de cesiune a drepturilor patrimoniale de autor", in *Revista Română de Dreptul Proprietății Intelectuale* No. 4 (2013): 29-31.

law. As for the validity conditions, these are those regulated by the Civil Code, namely: to exist; to be in the civil circuit; to be determined or determinable; to be possible; to be lawful and moral.

For the assignment of copyrights, only those works which have been made public by the author or for which he has expressed his will to make them public, for example, through publication, public communication, etc., are in the civil circuit. Even if the works have been made public, the author, not his heirs, may at any time use the moral right to withdraw the work. In the case of undisclosed works, the moral right to decide whether, in what way and when the work will be made public, is transmitted by inheritance, under civil law, for an unlimited period of time.[1]

With regard to remuneration, the law states that it must be fixed in money, determined or determinable, honest and serious, and established by the agreement of the parties. The manner in which the amount of remuneration is fixed must be proportionate to the receipts from the use of the work, whether in a fixed amount or in any other way. When the remuneration set out in the contract is clearly disproportionate to the benefits of the person who has obtained the assignment of economic rights, the author shall request the competent court to revise the contract or to increase the remuneration accordingly.

The effects of the assignment contract of the copyrights differ in scope, as regards an exclusive or non-exclusive assignment of rights:[2]

– in the case of exclusive assignment, the copyright holder can no longer use the work in the term and within the territory agreed with the assignee. He can no longer transfer the assigned right to another person under the sanction of liability in court. In addition, it is the assignor who receives the full benefit from the exploitation of copyright from an economic point of view. He may assign his right to other persons, provided that he has the consent of the right holder.

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[1] Marinescu, „Cesiunea și licențierea în materia drepturilor de proprietate intelectuală...”: 98.

[2] Dănilă, *Dreptul de autor și dreptul de proprietate industrială*, 151.

– in the case of non-exclusive assignment, the use of the work belongs to both the assignee and the author or to third parties based on other assignment contracts. This legal situation is only possible if we are faced with a non-exclusive assignment. The assignee may also use the work himself and, not having exclusivity, the right assigned to him may be transferred by the copyright holder to other persons.

The action for termination of the assignment contract may be exercised by the assignor, who must prove that he has suffered damage, as well as the bad-faith of the assignee regarding the non-use or insufficient use of the assigned rights. The damage suffered by the assignor can have both an economic and a moral nature. Furthermore, for the admissibility of the action for termination of the contract it is necessary that the reasons for non-use or insufficient use relate solely to the fault of the assignee and not the fault of other persons, such as the assignor or a third party; or other circumstances such as the case of unforeseeable circumstances or major force.[1]

The relative nullity of the assignment contract can only be invoked by the interested party and can only be established by a specific action that is exercised only if from the assignment contract are absent: the assigned economic rights, the conditions of use, the duration and the extent of the assignment, as well as the remuneration of the copyright holder.

On the other hand, the absolute nullity of the assignment contract can be promoted by the parties of the assignment contract, their creditors and by any interested person, intervening when the contract has as its subject matter the economic rights regarding all the future works of the author, nominated or non-nominated.

[1] Florea, *Contractul de cesiune a drepturilor patrimoniale de autor*, 35.

4. THE THEATER SHOW OR MUSICAL PERFORMANCE CONTRACT

4.1. The legal framework and definition of the theater show or musical performance contract

The theater show or musical performance contract is regulated as a species of the assignment contract of the copyrights, having a well defined place in the Law No 8/1996 on copyright and related rights, and being located in Title I, Part I, Chapter VII, Section III, Articles 58-62 of this Law. The legal provisions exclusively concerning this contract are supplemented by the general provisions relating to the assignment contract of the copyrights and the provisions of the Civil Code relating to the lease contract and the general provisions of the civil contracts.

In accordance with the provisions of Article 58 (1) of the Law, by the theater show or musical performance contract, the copyright holder assigns to a natural or a legal person the right to represent or to perform in public a current or future work, a literary, dramatic, musical, dramatic-musical, choreographic or a pantomime work, in return for remuneration, and the assignee undertakes to represent or execute it under the agreed conditions.

According to the doctrine[1], the theater show or musical performance contract was defined as "the modality of the assignment contract whereby the holder of the rights to use a current or future work, a literary, dramatic, musical, dramatic-musical, choreographic or a pantomime work, called the beneficiary-assignor, undertakes to transmit, for a specified period of time or for a specified number of public communications, to another natural or legal person, called the assignee, the use of the right to represent or perform publicly the respective work, in return for remuneration, under the obligation of the beneficiary-assignee to exercise the use of the right provided to him".

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[1] B. Florea, „Incidența normelor noului cod civil asupra contractului de reprezentare teatrală ori de execuție muzicală", in *Revista Română de Dreptul Proprietății Intelectuale* No. 1 (2012) : 49.

"Theater show", which is synonymous with "interpretation", means the form of bringing to the public attention a current or future work, by performing on stage a literary, dramatic, dramatic-musical, choreographic or a pantomime work. "Musical performance" means the form of bringing to public attention a current or future work, consisting in the interpretation of a musical or dramatic-musical creation, through a performer or performers.

The theater show or musical performance contract may be concluded directly, in its own name, by the copyright holder, but may also be concluded through collective management organizations. This method of concluding the contract is not mandatory, but optional, the author being the only one who can decide on whether or not to participate in the actual signing of the contract.[1]

4.2. The legal characters of the theater show or musical performance contract

Like other royalty contracts, the theater show or musical performance contract has its own features, which are printed by the specific nature of the rights arising from the making of a work protected by the Copyright Law. The specific nature of these rights lies in the existence of the simultaneous exercise of the economic rights transferred under the contract for the purpose of exploitation and the conservation, in the sense of the unaltered observance of the moral rights of the author of the capitalized work. Therefore, the legal characters of the contract under consideration are:[2]

– it is a consensual contract, which is validly concluded by the mere agreement of the parties (solo consensus) without any other formalities. As it is not a solemn contract, the written form is not required by law for the validity of the contract, but only ad probationem.

– it is a bilateral (synallagmatic) contract for the fact that it gives rise to mutual obligations between the contracting parties, the copyright

[1] Dănilă, *Dreptul de autor și dreptul de proprietate industrială*, 142.

[2] Florea, „Incidența normelor noului cod civil asupra contractului de reprezentare teatrală ori de execuție muzicală" : 55-60.

holder having, mainly, the obligation to assign the use of the right to represent or perform his work publicly, and the beneficiary-assignee to pay the remuneration and to use the transmitted right. It also implies the interdependence of the obligations, in the sense that the performance of one party is the cause of the obligation assumed by the other party.

– it is a contract for pecuniary interest, since each party seeks to attain an economic interest, respectively to receive an equivalent in return for the benefit to which he/ she is obliged. Thus, the copyright holder undertakes to assign the use of the performance right in return for payment, and the beneficiary-assignee aims to obtain a gain from the public performance of the work. In certain circumstances, the contract may also be free of charge if the parties agree so.

– it is a commutative contract, because the existence and extent of the mutual obligations of the parties are known from the moment of concluding the theater show or musical performance contract and do not depend on a future and uncertain event.

– it is a translational contract for the temporary use of the exercise of the right of theater show or musical performance of a work. The legal effects operate, for the future, from the moment of its conclusion. The risk of accidental loss of the work will be borne by the copyright holder, and not by the beneficiary-assignee.

– it is a contract with successive execution, because the obligations of the beneficiary-assignee are executed over time, for a fixed period of time or for a specified number of theater shows or musical performances to the public.

– it is a named contract, since it is specifically nominated and regulated as such in Law No 8/1996 on Copyright and Related Rights. In such circumstances, if the parties do not provide in the content of the contract all the legal clauses, or derogate from the legal regulation, the provisions of the law will be automatically and fully applied.

– it is a negotiated contract, because the parties express their legal will after discussing all the clauses, without imposing any particular pressure on them, outside their will. Of course the rights and obligations provided by the law for each contractual party will be respected, but, by

negotiation, those clauses will be delimited in order to express the essential characteristics of the legal operations they are considering.

– it is a limited contract. The limits of the theater show or musical performance contract concern: a strictly determined number of rights whose exercise can be transmitted; the fact that this contract is concluded for a specified period of time or for a specified number of shows or performances; in a limited territory within which the theater shows or musical performances of the work may take place.

– it is mainly a non-exclusive contract and, by way of exception, it can be an exclusive contract, in relation to the will of the parties. The rule is that the theater show or musical performance contract is non-exclusive. However, the exclusive nature of the assignment must be expressly stated in the contract, which means that the presumption of the exclusive nature of the assignment does not apply in the case of this type of contract.

– it is an intuitu personae contract, since it is made in the consideration of the beneficiary-assignee. Furthermore, the legislator stipulates that the assignee of this contract cannot transfer it to a third party, a show organizer, without prior consent of the author or his/ her representative, except in the case of simultaneous assignment of this activity, total or partial.

4.3. Validity conditions for the theater show or musical performance contract

The parties to the examined contract are the copyright holder, as assignor, and a natural or legal person, as assignee. Of course, in order to be parties to the contract, these persons must meet the conditions for the civil capacity.

The copyright holder can be both the author of the work, meaning the natural person who created the work, and other natural or legal persons, who acquire the quality of copyright holder. From the latter category, we specify by way of example: the legal or testamentary heirs of the author; a natural or legal person through whom, with the consent of the author, an anonymous or pseudonymous work has been made public, which does not allow the author to be identified, as long as the author does not reveal his identity and assumes his or her work; the

natural or legal person on whose initiative a collective work was created, in the absence of a contrary agreement, etc.

As regards the assignee, he/ she may be a natural or legal person. When the theater show or musical performance covered by the contract is of a commercial nature, the natural assignee must be authorized, under the terms of the Government Emergency Ordinance No 44/2008 on the development of economic activities by authorized natural persons, individual enterprises and family enterprises. On the other hand, in order for the legal person to have the quality of an assignee in the contract, the act of establishment must provide as an object of activity "theater show or musical performance" of a work of the nature which is likely to be the subject of the contract.[1]

The analyzed contract has a double subject matter: the use of the rights of theater show or musical performance of a work and the remuneration due to the holder of the assigned copyright, with the general rules on the assignment of copyright applying to this essential element.

At the same time, we highlight that the remuneration, as an essential element of the theater show or musical performance contract, must meet the following conditions:[2]

– to be set in money. The remuneration established in the theater show or musical performance contract must be only made in monetary form and must be paid in RON.

– to be determined or determinable. When remuneration has not been determined by the parties at the conclusion of the contract, the rules of sale contract on determinable price shall apply. Remuneration is thus considered to be determinable if the parties have agreed on a way in which it can be determined later, but not later than the date of payment, without the need for a new agreement of the parties.

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[1] Florea, „Incidența normelor noului cod civil asupra contractului de reprezentare teatrală ori de execuție muzicală" : 65.

[2] Florea, „Incidența normelor noului cod civil asupra contractului de reprezentare teatrală ori de execuție muzicală" : 73-74.

– to be honest and serious. In order for the remuneration to be qualified as sincere, it must not be established in a fictitious way, but in order to be paid in reality. Remuneration must also be serious, meaning not derisory, insignificant, and disproportionate to the practice in this area.

According to the Civil Code, "the cause is the reason for each party to conclude the contract". Thus, the copyright holder of a work undertakes to assign the use of the right to theater show or musical performance in order to obtain remuneration, and the assignee undertakes to pay the remuneration and to perform the work for the purpose of making a profit for him/ her. The cause must also meet the requirements of the law, namely: to exist, to be lawful and to be moral.

The performance contract can take various forms, depending on how the communication is made, from the public recitation, the lyrical performance, the dramatic performance, to the dissemination of words, sounds and images by any means.[1]

4.4. The content of the theater show or musical performance contract

As it results from Articles 59 and 61 of the Law, the submitted contract must contain binding provisions regarding:

– the duration of the contract or the number of public communications for which the right of theater show or musical performance has been assigned;

– the term in which the premiere or the only performance of the work will take place;

– the exclusive or non-exclusive nature of the assignment;

– the territory for which the right of theater show or musical performance has been assigned;

– the remuneration due by the assignee to the copyright holder;

– the communication periods (not less than once a year) by the assignee to the holder of the assigned copyright, of the number of theater shows or musical performances, and the statement of revenue;

[1] Dănilă, *Dreptul de autor și dreptul de proprietate industrială*, 143.

– the terms when the assignee must pay to the assignor of the assigned copyright the remuneration in the provided amount.

Besides these provisions, which cannot be absent from the contract, the law refers to other clauses, optional, which the theater show or musical performance contract may contain:

– the period of interruption of the shows or performances;

– the periods when the assignee must send the program, posters and other printed materials, as well as the public reviews of the show or performance to the right holder.

4.5. The legal effects of the theater show or musical performance contract

Although the special law only provides the obligation of the assignor to authorize the assignee to exercise the right of theater show or musical performance, we consider that the assignor has other obligations, such as:[1]

– the obligation to make the work available to the assignee. This obligation arises from the main duty of the assignor, to transmit the right of performing the work. The performance requires that the assignee to be provided with the work; a "to do" obligation for the assignor.

– the guarantee obligation. In the case of the guarantee obligation, as the special law does not regulate it, the rules of common law remain applicable. Therefore, the assignor has the obligation to guarantee the exercise of the economic rights to the assignee, both against eviction and against vices.

The obligations of the assignee are governed by Article 59-61 of the Law:

– the obligation to use the work under the established conditions and within the established term;

– the obligation not to assign the theater show or musical performance contract to a third party, without the written consent of the assignor;

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[1] Florea, „Incidența normelor noului cod civil asupra contractului de reprezentare teatrală ori de execuție muzicală":80-82.

– the obligation to allow the author to control the performance of the work;

– the obligation to provide adequate support for the achievement of technical conditions for the interpretation of the work;

– the obligation to send the program, posters and other printed materials, and public reviews of the show or the performance to the author;

– the obligation to ensure that the work is performed in appropriate technical conditions;

– the obligation to ensure that the author's rights are respected;

– the obligation to communicate periodically to the assignor the number of shows or performances;

– the obligation to pay to the assignor the remuneration provided in the contract.

4.6. Termination of the theater show or musical performance contract

The specific cases of termination of the theater show or musical performance contract are:[1]

– termination of the contract and payment of damages for non-performance under the common law, where the performance has been interrupted for two consecutive years, if no other term is provided in the contract;

– termination of the theater show or musical performance contract because the beneficiary of the contract transmitted the assigned right to a third party, show organizer, without the written consent of the assignor, except for the simultaneous transfer, total or partial;

– termination of the contract if the assignee does not represent or execute the work within the established term and the obligation for the assignee to pay damages for non-execution. At the same time, the author keeps the remuneration received or, where appropriate, may require the payment of the full remuneration provided in the contract.

[1] Florea, „Incidența normelor noului cod civil asupra contractului de reprezentare teatrală ori de execuție muzicală": 87.

5. LIMITS ESTABLISHED IN THE FIELD OF INTELLECTUAL PROPERTY

Analyzing the content of copyright, it has been observed that the author of a literary, artistic or scientific work is sovereign in decisions taken in connection with the release of the work, the author being, primarily, the only one who can decide if, how and when his work will be used or exploited.

There are certain situations where the author's freedom to decide on his work is limited, and they concern certain categories of activities in which the reproduction or use of certain works is required for judicial, administrative, literary, information, research, etc. purposes. In such situations, the use of the work is expressly permitted by law without prior authorization of the author being required.

According to Romanian law, the principle of sovereignty of the exploitation of the work is expressly limited in terms of the use of the work, the transformation of the work and the reproduction or the public communication of the work.

The law allows a work previously brought to public attention to be used without the author's consent only if the following three conditions are cumulatively fulfilled: the use of the work must be in accordance with good practice; the use of the work must not contradict the normal exploitation of the work; the use of the work must not prejudice the author or the right holders. The cumulative meeting of the three conditions must be carried out at the same time, under the sanction of paying compensations.[1]

Does not constitute a copyright infringement the reproduction of a work without the author's consent, for personal use or for the normal circle of a family, provided that the work has been previously made public and that the reproduction is not contrary to the normal use of the work and does not prejudice the author or the copyright holder.[2]

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[1] Dănilă, *Dreptul de autor și dreptul de proprietate industrială*, 120.
[2] Dănilă, *Dreptul de autor și dreptul de proprietate industrială*, 125.

6. THEATER SHOW OR MUSICAL PERFORMANCE CONTRACT CASE-LAW

In the following, a specific case of national case-law will be summarized, which has as legal basis the theater show or musical performance contract, a special contract provided in the Law No 8/1996 on Copyright and Related Rights, and which was tried in the territorial area of the Iași Court of Appeal.

Thus, by the summon addressed to the Iaşi Court, the plaintiff X sued the defendant Iaşi Y Theater and requested that he be required to pay the sum of 15.000 RON of copyright as a result of the performance of his play "Money has no smell" in the premiere of December 6, 2004 and the royalties (percentages due to receipts after representations), as well as the payment of court costs. The Iaşi Court declined the competence of the case to Iaşi Tribunal.[1]

By Civil Decision, the Iaşi Tribunal dismissed the action on the grounds that the theater show contract was not concluded in written form, according to Articles 58 and 59 of Law No 8/1996 and in the absence of such conditions, the legal act cannot be validly born, even in the case of an existing verbal agreement between the parties.

The Iaşi Court of Appeal considers that the conclusion in written form of the assignment contract, implicitly of the theater show contract, is an "ad prodationem" condition and not an "ad validitetem" condition, as the Tribunal has held. In the present case, although both parties have recognized the existence of a verbal agreement for putting in the scene the play "Money has no smell", the author of which is the plaintiff-appellant, by the Y Theater Iași, the content of this agreement could not be proven, without a written document.[2]

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[1] https://legeaz.net/spete-civil-iccj-2015/decizia-2150-2015-c3h. Accessed on: 13 January 2020.

[2] http://www.rolii.ro/hotarari/589643dce49009a4090026e3. Accessed on: 13 January 2020.

The Iași Court of Appeal therefore admitted the appeal submitted by the complainant X against the Civil Decision of the Iasi Tribunal, which it abated. The court also refers the case to the Iasi Tribunal for retrial, in order to settle the substance of the dispute, based on the provisions of the Code of Civil Procedure.

In the retrial, at the first instance court, an accounting expertise was performed for the evaluation of the economic rights related to the plaintiff, representing copyrights. By civil sentence, the Iaşi Tribunal admitted the plaintiff's request, and: ordered the defendant to pay to the plaintiff the amount of 15.000 RON as copyright and the amount of 596 RON as royalties for the receipts declared for the performed play; ordered the defendant to pay to the plaintiff the amount of 1.000 RON as court costs and ordered the plaintiff to transfer the amount of 500 RON in the account of the Local Bureau for Judicial Expertise for the benefit of the expert Z, as the expert fee difference.[1]

CONCLUSIONS

Royalty contracts are not limited by law; they are outlined as a legal institution that depends strictly on the subject matter of the contract, that is to say: the type, nature, form of expression, the transmission support of the work and the field in which they are created.

Thus, observing the current trend towards the multitude forms of manifestation of the creative act, respectively towards the intellectual inventiveness, it can be deduced that the number of contracts with specific and personalized tint, as form of expressing the creative activity, will increase and diversify.

The analysis of the theater show or musical performance contract represents only a general outline of the wide field in which the rights and obligations are born, unfolded and terminated on the basis of an existing

[1] https://legeaz.net/spete-civil-iccj-2015/decizia-2150-2015-c3h. Accessed on: 13 January 2020.

agreement between the author and third parties; it can take various forms, depending on how the communication is made public.

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Codul penal. Comentariu pe articole. Ediţia 3

Autori: Georgina Bodoroncea, Valerian Cioclei, Irina Kuglay, Lavinia Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca-Maria Vasile, George Zlati

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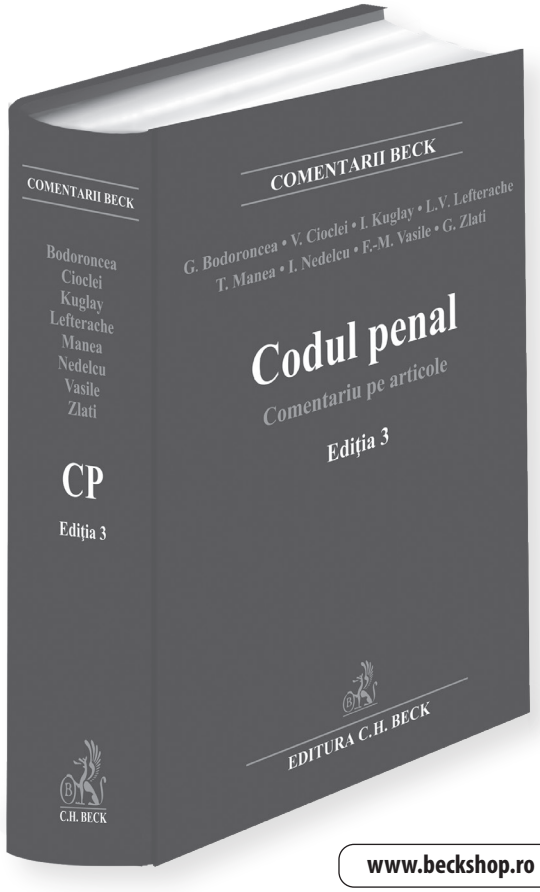

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Despre Ediţia 3

Această nouă ediție, cum era și firesc, subliniază și explică modificările legislative apărute după ultima publicare a lucrării. De asemenea, au fost revizuite, completate sau explicate mai amplu, unele abordări teoretice, ținând cont de evoluția legală, doctrinară sau jurisprudențială. În acord cu rațiunea și obiectivele generale ale lucrării, această nouă ediție se concentrează în primul rând pe actualizarea și interpretarea jurisprudenței create după ediția anterioară. Astfel, au fost avute în vedere recursurile în interesul legii, hotărârile prealabile pentru dezlegarea unor chestiuni de drept, deciziile instanței supreme, precum și orice alte hotărâri ale instanțelor, cu relevanță în aplicarea corectă a legii penale. În această manieră de abordare, prin această ediție, precum și prin edițiile ce sperăm să vadă lumina tiparului în viitor, înțelegem să asigurăm obiectivul pe termen lung al lucrării: acela de a pune la dispoziția practicienilor un instrument de lucru eficient, mereu util și actual.

Puncte forte

- depășește stadiul descriptiv la care s-au limitat unele lucrări publicate înainte sau imediat după intrarea în vigoare a noului Cod penal, având avantajul de a putea evalua un prim impact concret al aplicării noilor reglementări
- aduce explicațiile teoretice necesare și propune soluții practice pentru rezolvarea problemelor deja semnalate, dar, în același timp, identifică alte potențiale controverse, încercând să anticipeze răspunsurile potrivite
- colectivul de autori este format integral din juriști practicieni strict specializați pentru fiecare domeniu abordat, cu vastă experiență recunoscută